

ITEM 4
TEST CLAIM
PROPOSED DECISION

Penal Code Sections 3041, 3046, 3051, and 4801

Statutes 2013, Chapter 312 (SB 260); Statutes 2015, Chapter 471 (SB 261);
Statutes 2017, Chapter 675 (AB 1308); Statutes 2017, Chapter 684 (SB 394)

Youth Offender Parole Hearings

17-TC-29

County of San Diego, Claimant

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STATE of CALIFORNIA
COMMISSION ON STATE
MANDATES



TEST CLAIM FORM

Section 1

Proposed Test Claim Title:

Youth Offender Parole Hearings

Section 2

Local Government (Local Agency/School District) Name:

County of San Diego

Name and Title of Claimant's Authorized Official pursuant to [CCR, tit.2, § 1183.1\(a\)\(1-5\)](#):

Tracy Sandoval, Deputy Chief Administrative Officer, Auditor and Controller

Street Address, City, State, and Zip:

1600 Pacific Highway, Room 166, San Diego, CA 92101

Telephone Number

(619) 531-5413

Fax Number

(619) 531-5219

Email Address

tracy.sandoval@sdcounty.ca.gov

Section 3

Claimant Representative: Timothy Barry Title: Chief Deputy

Organization: Office of County Counsel

Street Address, City, State, Zip:

1600 Pacific Highway, Room 355, San Diego, CA 92101

Telephone Number

(619) 531-6259

Fax Number

(619) 531-6005

Email Address

timothy.barry@sdcounty.ca.gov

<i>For CSM Use Only</i>	
Filing Date:	RECEIVED June 29, 2018 <i>Commission on State Mandates</i>
Test Claim #:	17-TC-29

Section 4 – Please identify all code sections (include statutes, chapters, and bill numbers; e.g., Penal Code section 2045, Statutes 2004, Chapter 54 [AB 290]), regulatory sections (include register number and effective date; e.g., California Code of Regulations, title 5, section 60100 (Register 1998, No. 44, effective 10/29/98), and other executive orders (include effective date) that impose the alleged mandate pursuant to Government Code section 17553 and don't forget to check whether the code section has since been amended or a regulation adopted to implement it (refer to your completed WORKSHEET on page 7 of this form):

Penal Code sections 3041, 3046, 3051 and 4801, Statutes 2013, Chapter 312 [SB 260, effective 1/1/14]; Statutes 2015, Chapter 471 [SB 261, effective 1/1/16]; Statutes 2017, Chapters 675 and 684 [AB 1308 and SB 394, effective 1/1/18].

Test Claim is Timely Filed on [Insert Filing Date] [select either A or B]: 06/29/2018

- A: Which is not later than 12 months following [insert the effective date of the test claim statute(s) or executive order(s)] 01/01/2018, the effective date of the statute(s) or executive order(s) pled regarding AB 1308 and SB 394; and
- B: Which is within 12 months of [insert the date costs were *first* incurred to implement the alleged mandate] 07/11/2016, which is the date of first incurring costs as a result of SB 260 and 261. * *This filing includes evidence which would be admissible over an objection in a civil proceeding to support the assertion of fact regarding the date that costs were first incurred.*

(Gov. Code § 17551(c); Cal. Code Regs., tit. 2, §§ 1183.1(c) and 1187.5.)

Section 5 – Written Narrative:

- Includes a statement that actual and/or estimated costs exceed one thousand dollars (\$1,000). (Gov. Code § 17564.)
- Includes all of the following elements for each statute or executive order alleged pursuant to Government Code section 17553(b)(1) (refer to your completed WORKSHEET on page 7 of this form):
- Identifies all sections of statutes or executive orders and the effective date and register number of regulations alleged to contain a mandate, including a detailed description of the *new* activities and costs that arise from the alleged mandate and the existing activities and costs that are *modified* by the alleged mandate;
- Identifies *actual* increased costs incurred by the claimant during the fiscal year for which the claim was filed to implement the alleged mandate;
- Identifies *actual or estimated* annual costs that will be incurred by the claimant to implement the alleged mandate during the fiscal year immediately following the fiscal year for which the claim was filed;

*See Attachment A

- Contains a statewide cost estimate of increased costs that all local agencies or school districts will incur to implement the alleged mandate during the fiscal year immediately following the fiscal year for which the claim was filed;
Following FY: 2017-2018 Total Costs: \$2,750,000 to \$6,375,000
- Identifies all dedicated funding sources for this program; State: None
Federal: None Local agency's general purpose funds: None
Other nonlocal agency funds: None
Fee authority to offset costs: None
- Identifies prior mandate determinations made by the Board of Control or the Commission on State Mandates that may be related to the alleged mandate: None
- Identifies a legislatively determined mandate that is on the same statute or executive order: None

Section 6 – The Written Narrative Shall be Supported with Declarations Under Penalty of Perjury Pursuant to Government Code Section 17553(b)(2) and California Code of Regulations, title 2, section 1187.5, as follows (refer to your completed WORKSHEET on page 7 of this form):

- Declarations of actual or estimated increased costs that will be incurred by the claimant to implement the alleged mandate.
- Declarations identifying all local, state, or federal funds, and fee authority that may be used to offset the increased costs that will be incurred by the claimant to implement the alleged mandate, including direct and indirect costs.
- Declarations describing new activities performed to implement specified provisions of the new statute or executive order alleged to impose a reimbursable state-mandated program (specific references shall be made to chapters, articles, sections, or page numbers alleged to impose a reimbursable state-mandated program).
- If applicable, declarations describing the period of reimbursement and payments received for full reimbursement of costs for a legislatively determined mandate pursuant to Government Code section 17573, and the authority to file a test claim pursuant to paragraph (1) of subdivision (c) of Government Code section 17574.
- The declarations are signed under penalty of perjury, based on the declarant's personal knowledge, information, or belief, by persons who are authorized and competent to do so.

Section 7 – The Written Narrative Shall be Supported with Copies of the Following Documentation Pursuant to Government Code section 17553(b)(3) and California Code of Regulations, title 2, § 1187.5 (refer to your completed WORKSHEET on page 7 of this form):

- The test claim statute that includes the bill number, and/or executive order identified by its effective date and register number (if a regulation), alleged to impose or impact a mandate. Pages 7-1 to 7-51.

- Relevant portions of state constitutional provisions, federal statutes, and executive orders that may impact the alleged mandate. Pages None.
- Administrative decisions and court decisions cited in the narrative. (Published court decisions arising from a state mandate determination by the Board of Control or the Commission are exempt from this requirement.) Pages 7-52 to 7-336.
- Evidence to support any written representation of fact. *Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. (Cal. Code Regs., tit. 2, § 1187.5).* Pages 6-1 to 6-17.

Section 8 –TEST CLAIM CERTIFICATION Pursuant to Government Code section 17553

- The test claim form is signed and dated at the end of the document, under penalty of perjury by the eligible claimant, with the declaration that the test claim is true and complete to the best of the declarant's personal knowledge, information, or belief.

Read, sign, and date this section. Test claims that are not signed by authorized claimant officials pursuant to California Code of Regulations, title 2, section 1183.1(a)(1-5) will be returned as incomplete. In addition, please note that this form also serves to designate a claimant representative for the matter (if desired) and for that reason may only be signed by an authorized local government official as defined in section 1183.1(a)(1-5) of the Commission's regulations, and not by the representative.

This test claim alleges the existence of a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514. I hereby declare, under penalty of perjury under the laws of the State of California, that the information in this test claim is true and complete to the best of my own personal knowledge, information, or belief. All representations of fact are supported by documentary or testimonial evidence and are submitted in accordance with the Commission's regulations. (Cal. Code Regs., tit.2, §§ 1183.1 and 1187.5.)

Tracy Sandoval

Name of Authorized Local Government Official
pursuant to Cal. Code Regs., tit.2, § 1183.1(a)(1-5)



Signature of Authorized Local Government Official
pursuant to Cal. Code Regs., tit.2, § 1183.1(a)(1-5)

Deputy Chief Administrative Officer/
Auditor and Controller

Print or Type Title

10/22/18

Date

Test Claim Form Sections 4-7 WORKSHEET

Complete Worksheets for Each New Activity and Modified Existing Activity Alleged to Be Mandated by the State, and Include the Completed Worksheets With Your Filing.

Statute, Chapter and Code Section/Executive Order Section, Effective Date, and Register Number: Stats. 2013, Ch. 312 amending Penal Code section 3041, 3046, and 4801 and adding Penal Code section 3051, effective 1/1/2014

Activity: Preparation for and appearance at enhanced sentencing hearing for youth offenders who were under the age of 18 when they committed their offense.

Initial FY: 2016-2017 Cost: \$5,945 Following FY: 2017-2018 Cost: \$40.24

Evidence (if required): Declarations of John O'Connell and Laura Arnold

All dedicated funding sources; State: None Federal: None

Local agency's general purpose funds: None

Other nonlocal agency funds: None

Fee authority to offset costs: None

Statute, Chapter and Code Section/Executive Order Section, Effective Date, and Register Number: Stats 2015, Ch. 471 amending Penal Code sections 3051 and 4801, effective 1/1/2016

Activity: Preparation for and appearance at enhanced sentencing hearing for youth offenders who were under the age of 23 when they committed their offense.

Initial FY: 2016-2017 Cost: \$4,817 Following FY: 2017-2018 Cost: \$10,665

Evidence (if required): Declarations of John O'Connell and Laura Arnold

All dedicated funding sources; State: None Federal: None

Local agency's general purpose funds: None

Other nonlocal agency funds: None

Fee authority to offset costs: None

Statute, Chapter and Code Section/Executive Order Section, Effective Date, and Register Number: Stats 2017, Ch. 675 and 684 amending Penal Code sections 3051 and 4801, effective 1/1/2018

Activity: Preparation for and appearance at enhanced sentencing hearing for youth offenders who were under the age of 26 when they committed their offense.

Initial FY: 2016-2017 Cost: \$ 0 Following FY: 2017-2018 Cost: \$6,344

Evidence (if required): Declarations of John O'Connell and Laura Arnold

All dedicated funding sources; State: None Federal: None

Local agency's general purpose funds: None

Other nonlocal agency funds: None

Fee authority to offset costs: None

ATTACHMENT A

ATTACHMENT A TO TEST CLAIM FORM

Following the passage of SB 260 and 261 (adding and amending Penal Code sections 3046, 3051, and/or 4801), a youth offender who commits a specified crime and is sentenced to state prison must receive a youth offender parole hearing, with some limited exceptions. In order for the Parole Board to fully consider the impact of the offender's youth in committing the offense and any subsequent maturation during the youth offender parole hearing, the California Supreme Court found the board must have a baseline against which to compare. *People v. Franklin*, 63 Cal. 4th 261, 283 (2016). The Court therefore concluded youth offenders must have an opportunity to present evidence, evaluations, and testimony regarding the influence of youth-related factors at the sentencing hearing "so that the Board, years later, may properly discharge its obligation to 'give great weight to' youth related factors (§ 4801, subd. (c)) in determining whether the offender is 'fit to rejoin society' despite having committed a serious crime 'while he was a child in the eyes of the law.'" *Id.* at 284 (citation omitted). The Court also found that "[t]he statutory text makes clear that the legislature intended youth offender parole hearings to apply retrospectively, that is to all eligible youth offenders regardless of the date of conviction." *Id.* at 278.

The Supreme Court in *Franklin* issued its opinion on May 26, 2016, remanding the matter to the Court of Appeal with instructions to remand to the trial court to determine whether, at the time of sentencing, "Franklin was afforded an adequate opportunity to make a record of information that will be relevant to the Board as it fulfills its statutory obligations under sections 3051 and 4801." *Id.* at 286-287. The Supreme Court issued its remittitur to the Court of Appeal on June 28, 2016. California Courts, Supreme Court, Case No. S217699, Docket (Jun. 29, 2018), http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=2073771&doc_no=S217699&request_token=NiIwLSIkXkw5W1AtSCJNSEIIEw0UDxTiiMuXzNRICAgCg%3D%3D. The Court of Appeal issued its remittitur to the trial court on July 1, 2016. California Courts, 1st App. District, Case No. A135607, Docket (Jun. 29, 2018), http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=1&doc_id=2016085&doc_no=A135607&request_token=NiIwLSIkXkw5W1AtSCJNSEpJQFg6UVxfICNOXzpSQCAgCg%3D%3D.

Following these changes in the law, as of July 1, 2016, defense counsel and prosecutors are now required to provide newly mandated services and incur newly mandated costs as detailed below. This resulted in Claimant incurring increased costs as early as July 2016, during its 2016-2017 fiscal year.

Govt. Code § 17551(c) provides that a test claim "shall be filed not later than 12 months following the effective date of a statute or executive order, or within 12 months of incurring increased costs as a result of a statute or executive order, whichever is later." At the time of the Court's decision in *Franklin*, 2 California Code of Regulations ("C.C.R."), section 1183.1(c) ("Original § 1183.1(c)") provided in relevant part:

. . . any test claim . . . filed with the Commission must be filed not later than 12 months following the effective date of a statute or executive order, or within 12 months of first incurring increased costs as a result of a statute or executive order, whichever is later. *For purposes of claiming based on the date of first incurring costs, ‘within 12 months’ means by June 30 of the fiscal year following the fiscal year in which increased costs were first incurred by the test claimant.*” (Emphasis added.)

Operative April 1, 2018, the Commission caused § 1183.1 to be amended to remove the second sentence (“Amended § 1183.1(c)”). It currently reads as follows:

. . . any test claim . . . filed with the Commission must be filed not later than 12 months (365 days) following the effective date of a statute or executive order, or within 12 months (365 days) of first incurring costs as a result of a statute or executive order, whichever is later.

Under Original § 1183.1(c), Claimant had until (and including) June 30, 2018 to file its test claim. In contrast, Amended § 1183(c) would have required Claimant to file its test claim as early as July 2017.

A change to the earlier filing deadline under Amended § 1183.1(c) would result in retrospective application of the law. “A retrospective law is one which affects rights, obligations, acts, transactions and conditions which are performed or exist prior to the adoption of the statute.” *Aetna Cas. & Surety Co. v. Indus. Accident Comm’n*, 30 Cal.2d 388, 391 (1947) (citation and internal quotation marks omitted). If Amended § 1183(c) is applied to this test claim, it will be retrospective because it will impact Claimant’s right to submit its claim by June 30, 2018, a right which existed prior to adoption of Amended § 1183(c).

As the California Supreme Court explained, “It is a widely recognized legal principle, specifically embodied in section 3 of the Civil Code, that in the absence of a clear legislative intent to the contrary statutory enactments apply prospectively.” *Evangelatos v. Superior Court*, 44 Cal. 3d 1188, 1193-1194 (1988). In amending § 1183.1(c), the Commission did not indicate its intent for the amended provision to apply retroactively. Given this lack of “clear legislative intent”, Amended § 1183.1 should only apply prospectively and the Original § 1183.1(c) timeframe for submitting a test claim should apply to Claimant’s test claim.

Furthermore, retroactive application of Amended § 1183.1(c) would deny Claimant its right to submit a timely test claim. As noted above, Amended § 1183(c) would have required Claimant to file its test claim as early as July 2017. However, Claimant could not have known of that filing date at that time, because the amendment to § 1183.1(c) was filed on February 27, 2018 and became effective April 1, 2018. If Amended § 1183.1(c) is retroactively applied, Claimant will have no ability to submit its test claim and deny Claimant its Constitutional right to petition the government. Cal.

Const. Art. I, § 3. “The right of petition to governmental agencies, like freedom of speech, of the press, and of religion, has ‘a paramount and preferred place in our democratic system.’” *Matossian v. Fahmie*, 101 Cal. App. 3d 128, 135 (1980) (citation omitted). The rare circumstances which justify denial of the right to petition do not exist here. *Id.* at 135-36 (“[Any] attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger.”).

In light of the above, Original § 1183.1(c) should apply to Claimant’s test claim and Amended § 1183.1(c) should apply only prospectively to test claims for costs incurred after April 1, 2018.

SECTION 5. WRITTEN NARRATIVE
COUNTY OF SAN DIEGO TEST CLAIM
YOUTH OFFENDER PAROLE HEARINGS

Statutes 2013, Chapter 312
Statutes 2015, Chapter 471
Statutes 2017, Chapters 675 and 684

I. STATEMENT OF THE TEST CLAIM

In *Roper v. Simmons*, 543 U.S. 551, 578 (2005), the Supreme Court held that the Eighth Amendment to the federal Constitution’s prohibition on cruel and unusual punishment prohibited the imposition of a death sentence on any individual who committed his or her crime when he or she was a juvenile. In *Graham v. Florida*, 560 U.S. 48, 74 (2010), the Supreme Court used the same rationale to hold that no juvenile who commits a non-homicide offense may be sentenced to life without the possibility of parole (“LWOP”). Finally, in *Miller v. Alabama*, 567 U.S. 460, 464 (2012), the Supreme Court held that the Eighth Amendment prohibits a **mandatory** LWOP sentence for a juvenile offender who commits homicide.

In *People v. Caballero*, 55 Cal.4th 262, 268 (2012), the California Supreme Court held that the principles set forth in *Graham* prohibiting LWOP sentences for juvenile non-homicide offenders applied to sentences that were the “functional equivalent of a life without parole sentence”, but did not elaborate on what constituted a “functional equivalent” of a LWOP sentence or how that standard should be applied to a juvenile homicide offender. *Id.* at 268, fn. 4.

In response to these cases, California’s Legislature passed SB 260 effective January 1, 2014, which added sections 3051, 3046, subdivision (c) and 4801, subdivision (c) to the Penal Code. The stated purpose of SB 260 was “to establish a parole eligibility mechanism that provides a person serving a sentence for crimes that he or she committed as a juvenile the opportunity to obtain release when he or she has shown that he or she has been rehabilitated and gained maturity in accordance with the decision of the California Supreme Court in *People v. Caballero* (2012) 55 Cal.4th 262 and the decisions of the United States Supreme Court in *Graham v. Florida* (2010) 560 U.S. 48 and *Miller v. Alabama* (2012) 183 L.Ed.2d 407.” (Stats. 2013, ch. 312, § 1.)

With limited exceptions,¹ SB 260 required the California Board of Parole Hearings to conduct a youth offender parole hearing to consider release of all offenders who committed specified crimes prior to being 18 years of age and who were sentenced to state prison. (Stats. 2013, ch. 312, § 4, adding Penal Code § 3051(a)(1).) The requirements of SB 260 went well beyond the constitutionally mandated protections established by the cases cited above. Specifically, individuals who were under the age of eighteen at the time of his or her controlling offense and who are sentenced to a determinate sentence are now eligible for release on parole at a youth offender parole hearing no later than the 15th year of incarceration; individuals who receive a sentence that is less than 25 years to life are now entitled to a hearing no later than the 20th year of incarceration; and individuals who receive a sentence that is a minimum of 25 years to life are now entitled to a hearing no later than the 25th year of incarceration. (Stats. 2013, ch. 312, § 4, adding Penal Code § 3051(b).)

SB 260 also provided that the board at the youth offender parole hearing must: 1.) “provide for a meaningful opportunity to obtain release” (Stats. 2013, ch. 312, § 4 adding Penal Code § 3051(e)); 2.) “take into consideration the diminished capacity of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the individual” (Stats. 2013, ch. 312, § 4 adding Penal Code § 3051(f)); and 3.) “in reviewing a prisoner’s suitability for parole pursuant to Section 3041.5, . . . give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law.” (Stats. 2013, ch. 312, § 5, amending Penal Code § 4801 adding Penal Code § 4801(c).)

The Legislature subsequently enacted SB 261, amending Penal Code §§ 3051 and 4801, effective January 1, 2016, to extend the entitlement to a youth offender parole hearing to individuals who committed the controlling offense for which he or she was convicted “before the person attained 23 years of age.” (Stats. 2015, ch. 471.) In 2017, the Legislature enacted SB 394, effective January 1, 2018, again amending Penal Code §§ 3051 and 4801 to further extend the entitlement to a youth offender parole hearing to individuals who committed the controlling offense for which he or she was convicted “when the person was 25 years of age or younger.” (Stats. 2017, ch. 675 and Stats. 2017, ch. 684.)

In *People v. Franklin*, 63 Cal.4th 261 (2016), the California Supreme Court granted review to answer two questions. First, “[d]oes Penal Code section 3051 moot defendant’s constitutional challenge to his sentence by requiring that he receive a parole

¹ SB 260 exempted from its provisions inmates who were sentenced pursuant to the “Three Strikes” law or Jessica’s Law or sentenced to LWOP. The bill also did not apply to an individual to whom the bill would otherwise apply, but who, subsequent to attaining 18 years of age, committed an additional crime for which malice aforethought is a necessary element of the crime or for which the individual is sentenced to life in prison.

hearing during his 25th year of incarceration?” *Id.* at 268. Second, “[i]f not, then does the state’s sentencing scheme, which required the trial court to sentence Franklin to 50 years to life in prison for his crimes, violate *Miller’s* prohibition against mandatory LWOP sentences for juveniles?” *Id.* The Court answered the first question in the affirmative, negating the need to decide the second one.

In *Franklin*, defendant was convicted of first degree murder with a personal firearm enhancement. He committed his crime in 2011 when he was sixteen years old. The trial court was obligated by statute to impose two consecutive 25 years-to-life sentences. As a result, defendant’s total sentence was life in state prison with a possibility of parole after 50 years. After defendant was sentenced, the U.S. Supreme Court issued its decision in *Miller v. Alabama*, referenced above, and the California Supreme Court issued its decision in *People v. Caballero*, also referenced above.

Defendant appealed, arguing, among other things, that his sentence was the “functional equivalent of a life without parole” in violation of his Eighth Amendment right against cruel and unusual punishment as interpreted by *Miller, supra*, 567 U.S. 460, without consideration of his youth and its relevance for sentencing. The Court of Appeal affirmed the conviction and sentence finding that “any potential constitutional infirmity in [defendant’s] sentence has been cured by the subsequently enacted Penal Code section 3051, which affords youth offenders a parole hearing sooner than had they been an adult.” *Franklin*, 63 Cal.4th at 272.

Despite its answers to the questions above, the Court made two additional findings. First the Court concluded that “a juvenile may not be sentenced to the functional equivalent of LWOP for a homicide offense without the protections outlined in *Miller.*” *Id.* at 276.

Second, the Court recognized that Franklin’s appeal raised “colorable concerns as to whether he was given adequate opportunity at sentencing to make a record of mitigating evidence tied to his youth.” *Id.* at 268. Specifically, Franklin argued that the Parole “Board will not be able to give great weight to ... [the salient characteristics of youth outlined in *Miller, Graham, and Caballero*] ... at a youth offender parole hearing because ‘there would be no reliable way to measure his cognitive abilities, maturity, and other youth factors when the offense was committed 25 years prior.’” *Id.* at 282.

The Court agreed, finding that the Parole Board cannot “give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity” unless the Board has a baseline against which to compare. *Id.* at 283, quoting Penal Code § 4801(c). Therefore, the Court concluded that youth offenders must have an opportunity to present evidence, evaluations and testimony regarding the influence of youth-related factors at the sentencing hearing “so that the Board, years later, may properly discharge its obligation to ‘give great weight to’ youth related factors (§ 4801, subd. (c)) in determining whether the offender is ‘fit to rejoin society’ despite having committed a serious crime ‘while he

was a child in the eyes of the law.” *Id.* at 284, citing *Graham, supra*, 560 U.S. at p. 79. The Court also found “[t]he statutory text makes clear that the legislature intended youth offender parole hearings to apply retrospectively, that is to all eligible youth offenders regardless of the date of conviction.” *Id.* at 278.

As a result of SB 260, 261 and 394 and the decisions interpreting and applying that legislation in *Franklin* and *People v. Perez*, 3 Cal.App.5th 612 (2016),² defense counsel and prosecutors are now required to provide newly mandated services and incur newly mandated costs as detailed below. It is the costs incurred in meeting these newly mandated requirements for which Claimant seeks reimbursement.³

II. STATE MANDATE LAW

Article XIII B, § 6 requires the state to provide a subvention of funds to local government agencies any time the Legislature or a state agency requires the local government agency to implement a new program, or provide a higher level of service under an existing program. Section 6 states in relevant part:

² The Court of Appeal in *Perez* held that adult youth offenders who commit their controlling offense before reaching 23 years of age are entitled to a youth parole hearing as provided for by SB 261, and must be given sufficient opportunity in the trial court to put on the record the kinds of information that sections 3051 and 4801 deem relevant at a youth offender parole hearing as required by *Franklin*.

³ In, *In re Cook* (2017) 7 Cal.App.5th 393, Cook committed two murders in 2003 at a time when he was 17 years old and was sentenced to 125 years to life. His convictions were affirmed in 2009. In 2014, he filed a petition for writ of habeas corpus challenging his sentence of 125 years to life contending that his sentence was unconstitutional under *Miller v. Alabama*. The Court of Appeal granted Cook’s petition for writ of habeas corpus “insofar as it challenges Petitioner’s sentence of 125 years to life without affording Petitioner the opportunity to make a record of mitigating evidence tied to his youth at the time the offense was committed” and remanded the matter with directions to the trial court. (*Id.* at 401.) Specifically, the court found that petitioner was not provided sufficient opportunity to put on the record the kinds of information that Penal Code sections 3051 and 4801 deem relevant at a youth offender parole hearing. The Supreme Court granted review on April 12, 2017. *In re Anthony Cook*, Case No. S240153 is currently pending in the California Supreme Court. The issue before the Court is whether “youth offenders” whose convictions are already final and who are currently incarcerated, are entitled to a hearing before the trial court to preserve evidence for use at a future youth offender parole hearing, as ordered in *Franklin*. An affirmative decision would significantly expand the scope of the mandated activities for which reimbursement is sought by this Test Claim. Claimant reserves the right to amend or supplement this Test Claim if the Court reaches a decision during the pendency of this claim, or alternatively, submit an additional Test Claim if a decision is reached after a mandate determination has been made on this claim.

Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse such local governments for the cost of such program or increased level of service

The purpose of § 6 “is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are ‘ill equipped’ to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose.”⁴ The section “was designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues.”⁵ In order to implement § 6, the Legislature enacted a comprehensive administrative scheme to define and pay mandate claims.⁶ Under this scheme, the Legislature established the parameters regarding what constitutes a state mandated cost, defining “costs mandated by the state” to include:

. . . any increased costs which a local agency . . . is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of § 6 of Article XIII B of the California Constitution.⁷

Government Code § 17556 identifies seven exceptions to the rule requiring reimbursement for state mandated costs. The exceptions are as follows:

- (a) The claim is submitted by a local agency . . . that requests . . . legislative authority for that local agency . . . to implement the program specified in the statute, and that statute imposes costs upon that local agency . . . requesting the legislative authority. . . .
- (b) The statute or executive order affirmed for the state a mandate that had been declared existing law or regulation by action of the courts. . . .

⁴ *County of San Diego v. State of California*, 15 Cal.4th 68, 81 (1997); *County of Fresno v. State of California*, 53 Cal.3d 482, 487 (1991).

⁵ *County of Fresno, supra*, 53 Cal.3d at 487; *Redevelopment Agency v. Commission on State Mandates*, 55 Cal.App.4th 976, 984-985 (1997).

⁶ Gov. Code § 17500, et seq.; *Kinlaw v. State of California*, 54 Cal.3d 326, 331, 333 (1991) (statute establishes “procedure by which to implement and enforce § 6”).

⁷ Gov. Code § 17514.

- (c) The statute or executive order imposes a requirement that is mandated by a federal law or regulation and results in costs mandated by the federal government, unless the statute or executive order mandates costs that exceed the mandate in that federal law or regulation. . . .
- (d) The local agency . . . has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service. . . .
- (e) The statute, executive order, or an appropriation in a Budget Act or other bill provides for offsetting savings to local agencies . . . that result in no net costs to the local agencies. . . , or includes additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate. . . .
- (f) The statute or executive order imposes duties that are necessary to implement, or expressly included in, a ballot measure approved by the voters in a statewide or local election. . . .
- (g) The statute created a new crime or infraction, eliminated a crime or infraction, or changed the penalty for a crime or infraction, but only for that portion of the statute relating directly to the enforcement of the crime or infraction.

The SB 260, 261 and 394 as interpreted by the courts impose state mandated activities and costs on Claimant, and none of the exceptions in Government Code § 17556 excuse the state from reimbursing Claimant for the costs associated with implementing the required activities. SB 260, 261 and 394 therefore represent a state mandate for which Claimant is entitled to reimbursement pursuant to § 6.

III. CONTROLLING LEGISLATION

SB 260 (Stats. 2013, ch. 312) amending Penal Code sections 3041, 3046 and 4801 and adding Penal Code section 3051.

SB 261 (Stats. 2015, ch. 471) amending Penal Code sections 3051 and 4801.

AB 1308 (Stats. 2017, ch. 675) amending Penal Code sections 3051 and 4801.⁸

SB 394 (Stats. 2017, ch. 684) amending Penal Code sections 3051 and 4801.

IV. MANDATED ACTIVITIES

As a result of the enactment of SB 260, individuals who committed the controlling offense for which they were sentenced when they were under the age of 18 were entitled to a youth offender parole hearing as follows:

Determinate Sentence	During the 15th year of incarceration (Penal Code § 3051(b)(1))
Sentence less than 25 years to Life	During the 20th year of incarceration (Penal Code § 3051(b)(2))
Sentence 25 years to life	During the 25th year of incarceration (Penal Code § 3051(b)(3))
LWOP	During the 25th year of incarceration (Penal Code § 3051(b)(4))

SB 261 extended these protections to individuals who committed the controlling offense for which they were sentenced when they were under the age of 23.

SB 394 extended these protections to individuals who committed the controlling offense for which they were sentenced when they were under the age of 26.

The board at the youth offender parole hearing must: 1.) “provide for a meaningful opportunity to obtain release” (Penal Code § 3051(e)); 2.) “take into consideration the diminished capacity of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the individual” (Stats. 2013, ch. 312, § 4 adding Penal Code § 3051(f)); and 3.) “in reviewing a prisoner’s suitability for parole pursuant to Section 3041.5, . . . give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law.” (Penal Code § 4801(c).)

⁸ SB 394 incorporated all of the amendments proposed by AB 1308 but added Penal Code § 3051(b)(4) and made other conforming changes. Section 3051(b)(4) provides that individuals who committed the controlling offense for which they were sentenced when they were under the age of 26 and who were sentenced to LWOP are now entitled to a youth offender parole hearing during their 25th year of incarceration. SB 394 was approved by the Governor and filed with the Secretary of State on the same day as AB 1308 but was chaptered after AB 1308 and is therefore the controlling legislation.

Prior to the enactment of Penal Code § 3051, individuals who committed an offense for which they were sentenced to the sentences detailed above and who were under the age 18, and later 23 and 26, at the time they committed the controlling offense, had no right to a parole hearing. Now, as a result of the enactment of SB 260, 261 and 394 as interpreted and applied by the courts in *Franklin* and *Perez*, youth offenders who committed the controlling offense for which they were sentenced when they were under the age of 26 must have an opportunity to present evidence, evaluations and testimony regarding the influence of youth related factors at the sentencing hearing “so that the Board, years later, may properly discharge its obligation to ‘give great weight to’ youth related factors (§4801, subd. (c)) in determining whether the offender is ‘fit to rejoin society’ despite having committed a serious crime ‘while he was a child in the eyes of the law.’” *Franklin*, 63 Cal. 4th at 284 citing *Graham, supra*, 560 U.S. at 79). This requirement applies both prospectively and in retrospect to all eligible youth offenders regardless of the date of conviction.” *Id.* at 278.

A. Challenged Legislative Requirements

SB 260 added Penal Code section 3051 to read.⁹:

§ 3051 (a) (1) A youth offender parole hearing is a hearing by the Board of Parole Hearings for the purpose of reviewing the parole suitability of any prisoner who was under 18 years of age at the time of his or her controlling offense.

(2) For the purposes of this section, the following definitions shall apply:

(A) “Incarceration” means detention in a city or county jail, a local juvenile facility, a mental health facility, a Division of Juvenile Justice facility, or a Department of Corrections and Rehabilitation facility.

(B) “Controlling offense” means the offense or enhancement for which any sentencing court imposed the longest term of imprisonment.

(b) (1) A person who was convicted of a controlling offense that was committed before the person had attained 18 years of age and for which the sentence is a determinate sentence shall be eligible for release on parole at a youth offender parole hearing by the board during his or her 15th year of incarceration, unless previously released pursuant to other statutory provisions.

⁹ The provisions containing the operative legislation at issue in this Test Claim are contained in Penal Code section 3051, subdivisions (a), (b), (e) and (f).

(2) A person who was convicted of a controlling offense that was committed before the person had attained 18 years of age and for which the sentence is a life term of less than 25 years to life shall be eligible for release on parole by the board during his or her 20th year of incarceration at a youth offender parole hearing, unless previously released or entitled to an earlier parole consideration hearing pursuant to other statutory provisions.

(3) A person who was convicted of a controlling offense that was committed before the person had attained 18 years of age and for which the sentence is a life term of 25 years to life shall be eligible for release on parole by the board during his or her 25th year of incarceration at a youth offender parole hearing, unless previously released or entitled to an earlier parole consideration hearing pursuant to other statutory provisions.

(c) An individual subject to this section shall meet with the board pursuant to subdivision (a) of Section 3041.

(d) The board shall conduct a youth offender parole hearing to consider release. At the youth offender parole hearing, the board shall release the individual on parole as provided in Section 3041, except that the board shall act in accordance with subdivision (c) of Section 4801.

(e) The youth offender parole hearing to consider release shall provide for a meaningful opportunity to obtain release. The board shall review and, as necessary, revise existing regulations and adopt new regulations regarding determinations of suitability made pursuant to this section, subdivision (c) of Section 4801, and other related topics, consistent with relevant case law, in order to provide that meaningful opportunity for release.

(f) (1) In assessing growth and maturity, psychological evaluations and risk assessment instruments, if used by the board, shall be administered by licensed psychologists employed by the board and shall take into consideration the diminished culpability of juveniles as compared to that of adults, the hallmark features of youth, and any subsequent growth and increased maturity of the individual.

(2) Family members, friends, school personnel, faith leaders, and representatives from community-based organizations with knowledge about the individual before the crime or his or her growth and maturity since the time of the crime may submit statements for review by the board.

(3) Nothing in this section is intended to alter the rights of victims at parole hearings.

(g) If parole is not granted, the board shall set the time for a subsequent youth offender parole hearing in accordance with paragraph (3) of subdivision (b) of Section 3041.5. In exercising its discretion pursuant to paragraph (4) of subdivision (b) and subdivision (d) of Section 3041.5, the board shall consider the factors in subdivision (c) of Section 4801. No subsequent youth offender parole hearing shall be necessary if the offender is released pursuant to other statutory provisions prior to the date of the subsequent hearing.

(h) This section shall not apply to cases in which sentencing occurs pursuant to Section 1170.12, subdivisions (b) to (i), inclusive, of Section 667, or Section 667.61, or in which an individual was sentenced to life in prison without the possibility of parole. This section shall not apply to an individual to whom this section would otherwise apply, but who, subsequent to attaining 18 years of age, commits an additional crime for which malice aforethought is a necessary element of the crime or for which the individual is sentenced to life in prison.

(i) The board shall complete all youth offender parole hearings for individuals who become entitled to have their parole suitability considered at a youth offender parole hearing on the effective date of this section by July 1, 2015

SB 260 also amended Penal Code section 4801 to read¹⁰:

4801 (a) The Board of Parole Hearings may report to the Governor, from time to time, the names of any and all persons imprisoned in any state prison who, in its judgment, ought to have a commutation of sentence or be pardoned and set at liberty on account of good conduct, or unusual term of sentence, or any other cause, including evidence of intimate partner battering and its effects. For purposes of this section, “intimate partner battering and its effects” may include evidence of the nature and effects of physical, emotional, or mental abuse upon the beliefs, perceptions, or behavior of victims of domestic violence if it appears the criminal behavior was the result of that victimization.

(b) (1) The board, in reviewing a prisoner’s suitability for parole pursuant to Section 3041.5, shall give great weight to any information or evidence that, at the time of the commission of the crime, the prisoner had experienced intimate partner battering, but was convicted of an offense that

¹⁰ SB 260 made amendments to Penal Code section 4801 subdivisions (a) and (b) which are not relevant to this Test Claim but also added subdivision (c), which is the operative legislation at issue in this Test Claim.

occurred prior to August 29, 1996. The board shall state on the record the information or evidence that it considered pursuant to this subdivision, and the reasons for the parole decision. The board shall annually report to the Legislature and the Governor on the cases the board considered pursuant to this subdivision during the previous year, including the board's decisions and the specific and detailed findings of its investigations of these cases.

(2) The report for the Legislature to be submitted pursuant to paragraph (1) shall be submitted pursuant to Section 9795 of the Government Code.

(3) The fact that a prisoner has presented evidence of intimate partner battering cannot be used to support a finding that the prisoner lacks insight into his or her crime and its causes.

(c) When a prisoner committed his or her controlling offense, as defined in subdivision (a) of Section 3051, prior to attaining 18 years of age, the board, in reviewing a prisoner's suitability for parole pursuant to Section 3041.5, shall give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law.

SB 261 amended Penal Code sections 3051 and 4801 to extend the applicability of those provisions to individuals who committed their controlling offense when they were under the age of 23. (See Section 7, pages, 7-7 to 7-11 for the full text of these provisions as amended.)

SB 394 amended Penal Code sections 3051 and 4801 to extend the applicability of those provisions to individuals who committed their controlling offense when they were under the age of 26. (See Section 7, pages, 7-16 to 7-22 for the full text of these provisions as amended.)

B. Newly Mandated Activities

As a result of the enactment of SB 260, 261 and 394, Claimant has incurred and will continue to incur costs to perform the following mandated activities relating to youth offenders who committed their controlling offense when they were under the age of 26¹¹:

(1) Preparation and presentation of evidence by counsel including evaluations and testimony regarding an individual's cognitive culpability, cognitive maturity, or that

¹¹ The mandated activities are the same regardless of the age of the offender at the time he or she committed his or her controlling offense.

bears on the influence of youth related factors at the sentencing hearing¹² (Penal Code §§ 3051(a), (b), (e), and (f); and 4801(c));

(2) Retention and utilization of investigators to: (a) locate and gather relevant evidence, including but not limited to, interviews with anyone that can provide mitigating information about the defendant, including family, friends, teachers, and anyone else that knows the defendant; and (b) gather records of the defendant, including school, hospital, employment, juvenile, and other relevant persona records¹³ (Penal Code §§ 3051(a), (b), (e), and (f); and 4801(c));

(3) Retention and utilization of experts to evaluate the offender and prepare reports for presentation at the sentencing hearing¹⁴ (Penal Code §§ 3051(a), (b), (e), and (f); and 4801(c));

(4) Attendance by the district attorney's office and indigent defense counsel at the sentencing hearing¹⁵ (Penal Code §§ 3051(a), (b), (e), and (f); and 4801(c)); and

(5) Participation of counsel in training to be able to competently represent their clients at the sentencing hearing¹⁶ (Penal Code §§ 3051(a), (b), (e), and (f); and 4801(c)).

C. Newly Mandated Costs

Total increased costs to comply with SB 260 and 261 in Fiscal Year 2016-2017 totaled at least \$10,763¹⁷ Claimant did not incur any costs to comply with SB 394 in Fiscal Year 2016-2017. For Fiscal Year 2017-2018 Claimant incurred at least \$10,705 in increased costs to comply with SB 260 and 261.¹⁸ Claimant also incurred at least \$6,344 in increased costs to comply with SB 394.¹⁹

¹² Declaration of John O'Connell, ¶24a; Declaration of Laura Arnold ¶14a.

¹³ Declaration of John O'Connell, ¶24b; Declaration of Laura Arnold ¶14b.

¹⁴ Declaration of John O'Connell, ¶24c; Declaration of Laura Arnold ¶14c.

¹⁵ Declaration of John O'Connell, ¶24a; Declaration of Laura Arnold ¶14a.

¹⁶ Declaration of Laura Arnold, ¶14d.

¹⁷ Declaration of John O'Connell, ¶¶19-22.

¹⁸ Declaration of John O'Connell, ¶¶19-22.

¹⁹ Declaration of John O'Connell, ¶23.

D. Description of Existing Requirements and Costs

Prior to SB 260, 261, and 394, and the decisions of the courts in *Franklin* and *Perez*, California defense attorneys were not mandated to present evidence, evaluations, or testimony regarding the influence of youth-related factors at sentencing hearings for use at a subsequent Youth Offender Parole Hearing many years in the future.²⁰ Such information was unlikely to have any impact on the sentence imposed, given the existence of mandatory sentences for many of the crimes and judges' limited discretion with regard to certain enhancements.²¹ Because there was no effort to gather and present this information, defense attorneys expended a minimal amount of time to prepare for and to attend the sentencing hearings.

For the same reasons as defense attorneys, California prosecutors presented no information and incurred no costs, other than the cost of attending sentencing hearings.

E. Increased Costs Incurred During Fiscal Year 2016-2017

Claimant did not incur any costs to comply with SB 260 or 261 prior to Fiscal Year 2016-2017.²² Claimant first incurred increased costs to comply with SB 260 and/or 261 on July 11, 2016.²³ Total increased costs to comply with SB 260 and 261 in Fiscal Year 2016-2017 totaled at least \$10,763²⁴ Claimant did not incur any costs to comply with SB 394 in Fiscal Year 2016-2017.

F. Estimated Increased Costs Incurred During Fiscal Year 2017-2018

For Fiscal Year 2017-2018 Claimant incurred at least \$10,705 in increased costs to comply with SB 260 and 261.²⁵ Claimant also incurred at least \$6,344 in increased costs to comply with SB 394.²⁶

²⁰ Declaration of John O'Connell, ¶9; Declaration of Laura Arnold ¶9.

²¹ Declaration of John O'Connell, ¶9; Declaration of Laura Arnold ¶9.

²² Declaration of John O'Connell, ¶22.

²³ Declaration of John O'Connell, ¶22.

²⁴ Declaration of John O'Connell, ¶¶19-22.

²⁵ Declaration of John O'Connell, ¶¶19-22.

²⁶ Declaration of John O'Connell, ¶23.

V. COSTS INCURRED BY CLAIMANT TO COMPLY WITH SB 260, 261 AND 394

In Fiscal Year 2016-2017 Claimant incurred at least \$5,945.46 in increased costs to comply with SB 260.²⁷

In Fiscal Year 2016-2017 Claimant incurred at least \$4,818 in increased costs to comply with SB 261.²⁸

In Fiscal Year 2017-2018 Claimant incurred at least \$40,24 in increased costs to comply with SB 260.²⁹

In Fiscal Year 2017-2018 Claimant incurred at least \$10,665 in increased costs to comply with SB 261.³⁰

In Fiscal Year 2017-2018 Claimant incurred at least \$6,344 in increased costs to comply with SB 394.³¹

VI. MANDATED ACTIVITIES ARE REIMBURSIBLE

In *County of Los Angeles v. State of California*, 43 Cal.3d 46 (1987), the Supreme Court was called upon to interpret the phrase “new program or higher level of service” that was approved by the voters when they passed Proposition 4 in 1979 adding article XIII B to the California Constitution. In reaching its decision the Court held that:

...the term ‘higher level of service’ ... must be read in conjunction with the predecessor phrase ‘new program’ to give it meaning. Thus read, it is apparent that the subvention requirement for increased or higher level of service is directed to state mandated increases in the services provided by local agencies in existing ‘programs.’ But the term ‘program’ itself is not defined in article XIII B. What programs then did the electorate have in mind when section 6 was adopted? We conclude that the drafters and the electorate had in mind the commonly understood meanings of the term --

²⁷ Declaration of John O’Connell, ¶19.

²⁸ Declaration of John O’Connell, ¶20-22

²⁹ Declaration of John O’Connell, ¶19.

³⁰ Declaration of John O’Connell, ¶20-22.

³¹ Declaration of John O’Connell, ¶23

programs that carry out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local government and do not apply generally to all residents and entities in the state.³²

The definition as set forth in *County of Los Angeles* has two alternative prongs, only one of which has to apply in order for the mandate to qualify as a program. *Carmel Valley Fire Protection Dist. v. State of California*, 190 Cal.App.3d 521, 537 (1987). The activities mandated by SB 260, 261 and 394 meet both prongs. The mandated activities “impose unique requirements on local governments” that do not generally apply to all residents and entities in the state and they are intended to “implement a state policy.”

The Mandated Activities are Unique to Local Government

The relevant Penal Code provisions, as interpreted and applied by the courts, impose obligations on local public defender offices and district attorneys to prepare for and attend sentencing hearings and present evidence, evaluations and testimony regarding youth offenders’ cognitive culpability, cognitive maturity, or that bears on the influence of youth related factors at the sentencing hearing so that the Parole Board, years later, may properly discharge its obligation to provide such individuals with a meaningful opportunity for parole. In addition, the provisions require sheriff departments to transport, house and feed youth offenders who have been previously sentenced and incarcerated without having had an opportunity to present such evidence at the time they were sentenced.

The Mandated Activities Carry Out a State Policy

The Legislature’s stated purpose in passing SB 260 was “to establish a parole eligibility mechanism that provides a person serving a sentence for crimes that he or she committed as a juvenile the opportunity to obtain release when he or she has shown that he or she has been rehabilitated and gained maturity in accordance with the decision of the California Supreme Court in *People v. Caballero* (2012) 55 Cal.4th 262 and the decisions of the United States Supreme Court in *Graham v. Florida* (2010) 560 U.S. 48 and *Miller v. Alabama* (2012) 183 L.Ed.2d 407.” (Stats. 2013, ch. 312, §1.)

VII. DETAILED DESCRIPTION OF THE EXISTING ACTIVITIES AND COSTS THAT ARE MODIFIED BY THE MANDATE

Prior to SB 260, 261, and 394, and the decisions of the Courts in *Franklin* and *Perez*, California defense attorneys were not mandated to present evidence, evaluations, or testimony regarding the influence of youth-related factors at sentencing hearings for

³² *County of Los Angeles v. State of California*, 43 Cal.3d 46, 56 (1987).

use at a subsequent Youth Offender Parole Hearing many years in the future.³³ Such information was unlikely to have any impact on the sentence imposed, given the existence of mandatory sentences for many of the crimes and judges' limited discretion with regard to certain enhancements.³⁴ Because there was no effort to gather and present this information, defense attorneys incurred no costs other than the cost of attending sentencing hearings.

For the same reasons as defense attorneys, California prosecutors presented no information and incurred no costs, other than the cost of attending sentencing hearings.

In contrast to defense attorneys and prosecutors, Probation Departments were responsible for investigating and compiling information to be considered by the sentencing judge and, as a result, did incur costs.³⁵ Probation officers gathered and provided information concerning the facts surrounding the offense, victim restitution requests and impact statements, the defendant's education, military, and employment history, the defendant's medical, psychiatric and substance abuse history, and the defendant's criminal and delinquent history.³⁶ (See Pen. Code, § 1203, Cal. Rules of Court, Rules 4.411-4.433.) Such information was typically gathered by interviewing the defendant, without attempting to gather information from other sources. However, this effort to gather information did not include any investigation or reporting on the circumstances of the defendant's youth and is therefore distinguishable from the effort required by the mandate.³⁷

As a result of the statutory changes, youth offenders now must be granted an opportunity to present evidence, evaluations, and testimony regarding the influence of youth-related factors at the sentencing hearing. Defense attorneys must perform the activities described in the "Mandated Activities" section above, which will result in costs not previously incurred. In addition, prosecutors will be required to prepare for the hearings, which will also result in costs not previously incurred.

VIII. ACTUAL COSTS INCURRED DURING FISCAL YEAR 2016-2017 AND ESTIMATED ANNUAL COSTS FOR FISCAL YEAR 2017-2018

Claimant first incurred costs in providing the mandated activities in Fiscal Year 2016-2017, on July 11, 2016.³⁸ As set forth more fully in Section 6 - Declarations in

³³ Declaration of John O'Connell, ¶9; Declaration of Laura Arnold ¶9.

³⁴ Declaration of John O'Connell, ¶9; Declaration of Laura Arnold ¶9.

³⁵ Declaration of Laura Arnold, ¶11.

³⁶ Declaration of Laura Arnold, ¶11.

³⁷ Declaration of Laura Arnold ¶11, fn. 1.

³⁸ Declaration of John O'Connell, ¶22.

support, those costs exceeded \$1,000.³⁹ As is also set forth more fully in Section 6 – Declarations in support, the ongoing annual costs of performing the state mandated activities identified by this Test Claim in San Diego County is estimated to exceed \$550,000.⁴⁰

IX. STATEWIDE COST ESTIMATE

Claimant solicited statistical information from numerous counties regarding the costs they have incurred to prepare for and attend the enhanced *Franklin* sentencing hearings. Based on that survey, it appears that the average costs range between \$5,500 and \$12,750 per case.⁴¹ Given that there are hundreds of defendants who are convicted every year of serious crimes whose sentences will entitle them to a youth offender parole hearing sometime in the future, it is reasonable to estimate that the statewide costs for the mandated activities will exceed \$2,750,000 per year and may be as high as \$6,375,000 per year.⁴²

X. FUNDING SOURCES

Claimant is unaware of any state, federal or other nonlocal agency funding sources and does not have fee authority to recover the costs of the mandated activities.

XI. PRIOR MANDATE DETERMINATIONS

Claimant is not aware of any prior mandate determinations relating to the mandated activities for which reimbursement is sought through this Test Claim.

XII. PRIOR LEGISLATIVELY DETERMINED MANDATES

None.

XIII. CONCLUSION

SB 260, 261 and 394 as interpreted by the courts imposes state mandated activities and costs on Claimant. Those state mandated costs are not exempted from the subvention requirements of § 6 there are no other funding sources, and Claimant lacks authority to develop and impose fees to fund any of these new state mandated activities. Claimants therefore respectfully requests that the Commission find that the mandated activities set forth in this Test Claim are state mandates that require subvention under § 6.

³⁹ Declaration of John O’Connell, ¶¶19-23.

⁴⁰ Declaration of John O’Connell, ¶26.

⁴¹ Declaration of Laura Arnold, ¶17.

⁴² Declaration of Laura Arnold, ¶19.

SECTION 6

DECLARATION OF JOHN O'CONNELL

IN SUPPORT OF COUNTY OF SAN DIEGO TEST CLAIM

YOUTH OFFENDER PAROLE HEARINGS

Statutes 2013, Chapter 312
Statutes 2015, Chapter 471
Statutes 2017, Chapters 675 and 684

I, John O'Connell, declare as follows:

1. I make this declaration based upon my own personal knowledge, except for matters expressly set forth herein on information and belief, and as to those matters I believe them to be true, and if called upon to testify, I could and would competently testify to the matters set forth herein.
2. I am a member of the Bar of the State of California. I have been licensed to practice law in California since 2005, prior to that I was licensed to practice law in the state of Utah since 1994.
3. I am employed by the San Diego County Office of the Public Defender. I have been employed by the Public Defender/Alternate Public Defender's Office since 2005.
4. I am currently the Profile Homicide Coordinator for the Public Defender's Office. I have held my current position for approximately 1 year. My duties include monitoring all the homicide cases, scheduling roundtables, coordinating on which attorneys are appointed to homicide cases, providing advice and assistance to attorneys regarding their homicide and other cases. Prior to my current position I have worked in the Writs and Appeals division, the Juvenile Branch as well as being a felony trial attorney.

5. As the Profile Homicide Coordinator for the Public Defender's office my duties include: monitoring all the homicide cases, scheduling roundtables, help arrange which attorneys are appointed to homicide cases, providing advice and assistance to attorneys regarding their homicide and other cases.

6. I have read and I am familiar with Penal Code sections 3051, and 4801, subdivision (c), which were added to the Penal Code by SB 260 (Stats. 2013, ch. 312), effective January 1, 2014, and which were amended by SB 261 (Stats. 2015, ch. 471), AB 1308 (Stats. 2017, ch. 675), and SB 394 (Stats. 2017, ch. 684).

7. I have also read the courts' opinions in *People v. Caballero* (2012) 55 Cal.4th 262 ("*Caballero*"), *People v. Gutierrez* (2014) 58 Cal. 4th 1354 ("*Gutierrez*"), *People v. Franklin* (2016) 63 Cal. 4th 261 ("*Franklin*"), and *People v. Perez* (2016) 3 Cal.App.5th 612 ("*Perez*"), *In re Cook* (2017) 7 Cal.App.5th 393, review granted April 12, 2017, and *People v. Contreras* (2018) 4 Cal.5th 349.

8. Based on my review and understanding of the relevant Penal Code provisions and the case law interpreting those provisions, Penal Code section 3046, subdivision (c), 3051, and 4801, subdivision (c), as interpreted by the Courts, impose new activities on public defenders, district attorneys, and sheriff departments that are unique to local governmental entities.

9. Prior to the enactment of Penal Code section 3046, subdivision (c), 3051, and 4801, subdivision (c), as interpreted and applied by the courts in *Franklin* and *Perez*, defense attorneys were not mandated to present evidence, evaluations or testimony regarding the influence of youth-related factors at sentencing hearings for use at a subsequent Youth Offender Parole Hearing many years in the future. On the contrary – given the existence of mandatory sentences for many crimes carrying lengthy determinate terms, and for all crimes carrying

indeterminate terms, coupled with the historic inability of sentencing judges to exercise sentencing discretion with regard to certain proved or admitted enhancements (i.e. Pen. Code, §§ 1385, subd. (b), 12022.53), there would be little reason for counsel to present such information to a sentencing judge or include it in a statement of view, as it would be irrelevant to the sentence imposed. (See e.g., *Franklin, supra*, at p. 282-283.)

10. After the courts' decisions in *Franklin* and *Perez*, defense counsel and district attorneys are now required to prepare and present evidence, evaluations, and testimony regarding an individual's cognitive culpability, cognitive maturity, or any other factors bearing on the influence of youth at the sentencing hearing so that that information can be available to the Parole Board at the time of the youth offender's parole hearing. Depending on the unique facts of each case, the attorneys may need to retain and utilize both investigators to locate and gather relevant evidence and experts to evaluate the offender and prepare reports for presentation at the sentencing hearing.

11. I have reviewed and I am familiar with the books and records maintained by the Primary Public Defender's Office in the ordinary course of business.

12. Our office employs approximately 196 attorneys. We handle approximately 53,000 misdemeanor and 22,000 felony cases a year.

13. The system we use to track the status of cases, the time spent handling cases and the costs incurred relating to each case is called Judicial Court Activity Tracking System ("JCATS").

14. In reviewing the records in JCATS for fiscal years 2016-2017 and 2017-2018, we identified 64 cases where the defendants were under the age of 23 when they committed their offenses and who, if convicted of crimes that they were initially charged with, would be entitled to a youth offender parole hearing after

serving 15, 20 or 25 years of their sentence, thereby triggering the requirements for the enhanced sentencing hearing requirements mandated by Penal Code § 3051(a), (b), (e) and (f) and 4801(c).

15. We also identified one case where the defendant was under the age of 26 when he committed his offense and who was convicted of crimes that entitled him to a youth offender parole hearing after serving 25 years of his sentence, thereby triggering the requirements for the enhanced sentencing hearing requirements mandated by Penal Code § 3051(a), (b), (e) and (f) and 4801(c).

16. Of the 64 defendants, who were under the age of 23 when they committed their controlling offenses four defendants were eventually convicted of offenses that would entitle them to a youth offender parole hearing after serving 15, 20 or 25 years of their sentence.

17. The information set forth in this declaration accurately reflects the information contained in our JCATS system.

18. Set forth below is a summary of the actual costs our office has incurred relating to specific cases in fiscal years 2016-2017 and 2017-2018.

19. Defendant One: Defendant committed his controlling offense on July 21, 2015. He was 17 when he committed his controlling offense qualifying him for a youth offender parole hearing pursuant to SB 260. His case was opened July 14, 2016. He was sentenced on July 19, 2017. We first incurred costs in preparation for the Franklin Hearing on October 22, 2016. Our records indicate

that our office incurred the following costs in preparing for and attending the Franklin Hearing for Defendant One:

Fiscal Year 2016-2017

Attorney Time	16.6 hours x \$134.16	\$ 2,227.05
Investigator Time	10.8 hours x \$ 62.21	671.87
Mileage Reimbursement	87 miles x \$.535	46.54
Expert Fee		<u>\$ 3,000.00</u>
Total Costs 2016-2017		\$ 5,945.46

Fiscal Year 2017-2018

Attorney Time	.3 hours x \$134.16	\$ 40.24
Investigator Time	— hours x \$	None
Mileage Reimbursement	— miles x \$	None
Expert Fee		<u>None</u>
Total Costs 2017-2018		\$ 40.24

20. Defendant Two: Defendant committed his controlling offense on May 18, 2017. He was 19 when he committed his controlling offense qualifying him for a youth offender parole hearing pursuant to SB 261. His case was opened May 26, 2017. He was sentenced on October 5, 2017. We first incurred costs in preparation for the Franklin Hearing on June 20, 2017. Our records indicate that our office incurred the following costs in preparing for and attending the Franklin Hearing for Defendant Two:

Fiscal Year 2016-2017

Attorney Time	.5 hours x \$128.26	\$ 64.13
Investigator Time	3.3 hours x \$ 72.51	\$ 239.28
Mileage Reimbursement	10 miles x \$.535	\$ 5.35
Expert Fee		<u>None</u>
Total Costs 2016-2017		\$ 308.76

Fiscal Year 2017-2018

Attorney Time	14 hours x \$128.26	\$ 1,795.64
Investigator Time	7.4 hours x \$ 72.51	\$ 536.57
Mileage Reimbursement	115 miles x \$.535	\$ 61.52
Expert Fee		<u>None</u>
Total Costs 2017-2018		\$ 2,393.73

21. Defendant Three: Defendant committed is controlling offense on April 24, 2016. He was 20 when he committed his controlling offense qualifying him for a youth offender parole hearing pursuant to SB 261. His case was opened May 2, 2016. He was sentenced on January 1, 2018. We first incurred costs in preparation for the Franklin Hearing on February 24, 2017. Our records indicate that our office incurred the following costs in preparing for and attending the Franklin Hearing for Defendant Three:

Fiscal Year 2016-2017

Attorney Time	1.75 hours x \$121.11	\$ 211.94
Investigator Time	18 hours x \$ 61.49	\$ 1,106.82
Mileage Reimbursement	__ miles x \$	None
Expert Fee		<u>None</u>
Total Costs 2016-2017		\$ 1,318.76

Fiscal Year 2017-2018

Attorney Time	37 hours x \$121.11	\$ 4,481.07
Investigator Time	17.2 hours x \$ 61.49	\$ 1,057.62
Mileage Reimbursement	__ miles x \$	None
Expert Fee		\$ <u>2,500.00</u>
Total Costs 2017-2018		\$ 8,038.69

22. Defendant Four: Defendant committed his controlling offense on January 17, 2016. He was 21 when he committed his controlling offense qualifying him for a youth offender parole hearing pursuant to SB 261. His case was opened January 22, 2016. He was sentenced on July 25, 2017. We first incurred costs in preparation for the Franklin Hearing on July 11, 2016. This is the first case after the Supreme Court's decision in *Franklin* became effective that our office incurred costs in preparation for a Franklin hearing. Our records

indicate that our office incurred the following costs in preparing for and attending the Franklin Hearing for Defendant Four:

Fiscal Year 2016-2017

Attorney Time	10.9 hours x \$105.51	\$ 1,150.05
Investigator Time	.7 hours x \$ 57.34	\$ 40.13
Mileage Reimbursement	___ miles x \$	None
Expert Fee		<u>\$ 2,000.00</u>
Total Costs 2016-2017		\$ 3,190.18

Fiscal Year 2017-2018

Attorney Time	2.2 hours x \$105.51	\$ 232.12
Investigator Time	___ hours x \$	None
Mileage Reimbursement	___ miles x \$	None
Expert Fee		<u>None</u>
Total Costs 2017-2018		\$ 232.12

23. Defendant Five: Defendant committed his controlling offense on October 9, 2015. He was 23 when he committed his controlling offense qualifying him for a youth offender parole hearing pursuant to SB 394. His case was opened May 2, 2016. He was sentenced on March 3, 2018. We first incurred costs in preparation for the Franklin Hearing on February 8, 2018. Our records indicate that our office incurred the following costs in preparing for and attending the Franklin Hearing for Defendant Five:

Fiscal Year 2016-2017

Attorney Time	___ hours x \$	\$ None
Investigator Time	___ hours x \$	None
Mileage Reimbursement	___ miles x \$	None
Expert Fee		<u>None</u>
Total Costs 2016-2017		\$ None

Fiscal Year 2017-2018

Attorney Time	40 hours x \$158.60	\$ 6,344.00
Investigator Time	___ hours x \$	None
Mileage Reimbursement	___ miles x \$	None
Expert Fee		<u>None</u>
Total Costs 2017-2018		\$ 6,344.00

24. As detailed above, since July 2016, when we first incurred costs to comply with the court's decision in *Franklin*, the additional costs of preparing for and attending these hearings required by Penal Code §§ 3051(a), (b), (e) and (f) and 4801(c) averaged about \$5,500 per hearing. Costs include the following:

a. Time spent by attorneys communicating with clients, drafting investigation requests, drafting pleading and preparing for and attending the court hearing;

b. Time spent by investigators gathering documents and records regarding the youth offenders life history, social history interviews, drafting witness statements, defense victim outreach and travel;

c. Mileage reimbursement paid to attorneys and investigators;
and

d. Time spent by experts to interview the youth offender and others, review documents relating to the youth offender's past history, preparation of reports for the court and use at the hearing.

25. As detailed above, costs incurred by Claimant to comply with the requirements of SB 260, 261 and 394 in fiscal year 2016-2017 and 2017-2018 exceeded \$1,000.

26. In addition, the Public Defender's office estimates that our offices, including the Alternate Public Defender and Conflicts Counsel will handle up to 100 *Franklin* hearings in Fiscal Year 2018-2019 and we anticipate that the costs of preparing for and attending these hearings in Fiscal Year 2018-2019 could exceed \$550,000.

27. We anticipate that these costs will continue on an ongoing basis in future fiscal years.

28. I am informed and believe that there are approximately 15,000 inmates currently in California prisons that may be eligible for Youth Offender

Parole Hearings depending on the decision of the California Supreme Court in *In re Cook*, Case No. S240153.

29. I am also informed and believe that approximately 1,000 of the inmates sentenced to state prison committed their crimes in San Diego County, meaning any hearing to satisfy the requirements of SB 260, 261, and 394 would be held in San Diego County. As a result, these inmates would need to be transported and housed in San Diego County jail for the duration of the hearing.

30. If it is determined by the Supreme Court in *In re Cook* that the approximately 1,000 inmates already in state prison who committed their crimes in San Diego County are entitled to a hearing, the San Diego Public Defender's Office expects to incur the same costs identified in Paragraphs 19 through 23 with respect to these individuals. It is not known at this time how many of these inmates will request a *Franklin* hearing but the potential costs for providing hearings for these approximately 1,000 inmates could exceed \$10 million.

31. In addition, if it is determined by the Supreme Court in *In re Cook* that the 1,000 inmates already in state prison who committed their crimes in San Diego County are entitled to a hearing, the Sheriff will incur costs, transporting, feeding and housing these inmates while they await and during their *Franklin* hearing.

32. I am not aware of any dedicated state or federal funds that are or will be available to pay for these increased costs.

33. I am not aware of any non-local agency funds that are or will be available to pay for these increased costs.

34. I am not aware of any authority to assess a fee to offset these increased costs.

35. I believe that the only available source to pay these increased costs are and will be the County's general purpose funds.

Executed this 22 day of October at San Diego, California.

I declare under penalty of perjury that the foregoing is true and correct.


JOHN O'CONNELL

SECTION 6

DECLARATION OF LAURA ARNOLD

IN SUPPORT OF COUNTY OF SAN DIEGO TEST CLAIM

YOUTH OFFENDER PAROLE HEARINGS

Statutes 2013, Chapter 312
Statutes 2015, Chapter 471
Statutes 2017, Chapters 675 and 684

I, LAURA ARNOLD, declare as follows:

1. I make this declaration based upon my own personal knowledge, except for matters expressly set forth herein on information and belief, and as to those matters I believe them to be true, and if called upon to testify, I could and would competently testify to the matters set forth herein.

2. I am a member of the Bar of the State of California. I have been licensed to practice law in California since 1995.

3. I have been employed by the Law Offices of the Public Defender, Riverside County since 2013. I am currently the lead attorney in the Writs and Appeals Unit for our office. From 1995 until 2013, I worked as a deputy public defender for the County of San Diego, Department of the Public Defender, except for a period of approximately 18 months in 2000-2001, when I worked in the private sector.

4. Since 2013, I have served as a Director of the California Public Defenders Association (CPDA), the largest organization of criminal defense practitioners and, in particular, public defenders, in the State of California. I also currently chair CPDA's Juvenile/Youthful Offender Committee and CPDA's Mental Health and Civil Commitment Committee. In addition, I am a member of the Criminal Law and Appellate Law Advisory Committees to the California Judicial Council.

5. I have read and I am familiar with Penal Code sections 3051 and 4801, subdivision (c), which were added to the Penal Code by SB 260 (Stats. 2013, ch. 312), effective January 1, 2014, and subsequently amended by SB 261 (Stats. 2015, ch. 471), AB 1308 (Stats. 2017, ch. 675), and SB 394 (Stats. 2017, ch. 684).

6. I have also read the courts' opinions in *People v. Caballero* (2012) 55 Cal.4th 262 ("*Caballero*"), *People v. Gutierrez* (2014) 58 Cal.4th 1354 ("*Gutierrez*"), *People v. Franklin* (2016) 63 Cal.4th 261 ("*Franklin*"), and *People v. Perez* (2016) 3 Cal.App.5th 612 ("*Perez*"), *In re Cook* (2017) 7 Cal.App.5th 393, review granted April 12, 2017, and *People v. Contreras* (2018) 4 Cal.4th 349.

7. Since September, 2016, I have given numerous presentations to California appellate practitioners and trial attorneys regarding the "youth offender parole hearings" now required by Penal Code sections 3051 and 4801, as interpreted and applied by the California Supreme Court in *Franklin* and the District Court of Appeal in *Perez*.

8. The enactment of SB 260, SB 261, SB 394, and AB 1308 and their interpretation and application by California courts has dramatically changed the standards of professional competency for counsel representing youth offenders now eligible for youth offender parole.

9. Prior to the enactment of these statutes and the courts' subsequent decisions in *Franklin* and *Perez*, counsel representing a defendant in a criminal proceeding had no recognized statutory or constitutional obligation to investigate the defendant's youthful circumstances or present a record of such information to the sentencing judge, unless the client was convicted of a crime, committed when he or she was a minor, and was sentenced to life-without-possibility-of-parole, or its functional equivalent. Because most crimes carrying life sentences and lengthy indeterminate terms had "mandatory" sentences, and the court's discretion was restricted with regard to many enhancements (i.e., Pen. Code, §§ 1385, subd. (b), 12022.53), the presentation of such information at sentencing would have had little or no impact.

10. Moreover, while defense counsel had the ability to prepare and file a pre-sentencing “statement in mitigation” (Cal. Rules of Court, Rule 4.437) to support a shorter sentence, and/or a post-judgment “brief statement” (Pen. Code, §1203.1), to be transmitted to the receiving prison facility, these filings were neither statutorily nor constitutionally mandated, and they rarely included information regarding the defendant’s youthful circumstances.

11. Prior to the enactment of the youth offender parole statutes, responsibility for investigating and reporting on a criminal defendant’s background rested solely with the Probation Department. The information provided in the confidential pre-sentence investigation reports, maintained in the court’s file, was extremely limited, focusing on the facts of the offense, including victim restitution requests and victim impact statements, the defendant’s education, military, and employment history, the defendant’s medical, psychiatric and substance abuse history, and the defendant’s criminal and delinquent history.¹ (See Pen. Code, § 1203, Cal. Rules of Court, Rules 4.411-4.433.) It did not encompass an investigation or reporting regarding the circumstances of the defendant’s childhood, within the meaning of the youth offender parole statutes.

12. As a result of Penal Code sections 3051 and 4801 and the subsequent court decisions interpreting the duties of trial counsel, defense counsel must now prepare and present a comprehensive package of information at an eligible defendant’s sentencing hearing, for transmission to the Department of Corrections, inclusion in the defendant’s “C” file, and consideration by the parole commissioners at the defendant’s eventual parole hearing, as a “reliable way to measure [the youth’s] cognitive abilities, maturity, and other youth factors when the offense was committed” (*Franklin* at 282.)

¹ In my experience having reviewed thousands of probation reports during my 22 years as a Deputy Public Defender, information in probation reports regarding a defendant’s personal background is generally gathered from interviewing the defendant, without accessing or considering existing records and without interviewing relatives, teachers, employers, and other individuals with personal knowledge of the defendant’s characteristics and circumstances.

13. The information required to be submitted goes far beyond what was required of defense counsel or Probation Departments prior to the enactment of Penal Code sections 3051 and 4801.

14. The newly-mandated activities include:

a. Preparation for and attendance at the sentencing hearing by indigent defense counsel and staff. In preparing for and appearing at the sentencing hearing, counsel may now be required to review discovery, read transcripts, interview the defendant, retain experts, utilize investigators, review reports prepared by experts and investigators and draft legal briefs for presentation to the court;

b. Retention and utilization of investigators to locate and interview anyone that can provide mitigating information about the defendant, including family, friends, teachers and anyone else that knows the defendant. Investigators are also needed to gather records of the defendant, including school, hospital, employment, juvenile, and other relevant personal records;

c. Retention and utilization of experts, which may include, without limitation:

1.) A forensic social worker to help to establish family trees, and familial relationships;

2.) A psychologist/psychiatrist to examine the defendant, perform tests, and write a report, focusing on growth and maturity, psychological evaluations, risk assessments, diminished culpability, the hall mark features of youth and any subsequent growth and increased maturity of the individual;

3.) A gang expert for those clients that may be entrenched in gang life;

4.) A neuro psychologist/psychiatrist for those clients with head related injuries or other possible organic issues, including the medical costs of conducting studies to determine such injuries and/or traumas;

5.) A pediatrician to discuss childhood development and conditions that could have affected the growth and maturity of a defendant;

6.) A mapping expert to demonstrate poverty rates, crime rates, pollution and super-fund sites present in the areas where the defendant resided; and

d. Attendance and participation of indigent defense counsel in training to be able to competently represent their clients.

15. I have conducted a survey of Public Defender offices throughout the state in an attempt to quantify the costs incurred by those offices in meeting the requirements of Penal Code sections 3051 and 4801 as interpreted and applied by the courts' in *Franklin* and *Perez*. Set forth below is the information I received as of June 28, 2018:

a. The Santa Barbara Public Defender's office has thirteen pending *Franklin* cases. The office completed one *Franklin* case in the last twelve months. The cost for that one case, including attorneys' time, investigators' time and expert costs, but excluding staff time, exceeded \$12,750.

b. The Sacramento Public Defender's office has conducted seven *Franklin* investigations and hearings in the last twelve months. The cost for these cases has averaged approximately \$5,700 per case.

c. The Alameda County Public Defender's office has processed ten *Franklin* investigations and hearings since January 2017. The cost for these cases, including attorney staff time, social workers time and experts has averaged \$5,755 per case.

d. The Solano Public Defender's office has seven pending *Franklin* cases. The cost for these cases, including attorney staff time, investigators, experts and interpreters has averaged approximately \$9,000 per case.

e. As of November 2017, the Santa Clara Public Defender's office had fifty open cases where the defendants qualified for a youth offender parole hearing depending on the outcome of his or her case and the severity of the sentence that was

eventually imposed. For the cases that have gone forward, Santa Clara estimates that the average costs associated with preparing the “time capsule” above and beyond what would otherwise be required, using unloaded hourly rates, is approximately \$10,500 per case.

f. Since November 2016, Orange County Public Defender’s office has handled approximately 225 cases requiring youth offender parole investigation but was not able to provide cost breakdown at this time.

16. I am also informed that the San Diego County Public Defender’s office has estimated that the average cost to prepare for and appear at a *Franklin* hearing is approximately \$5,500.

17. Based on the information available to me, it appears that the costs of preparing for and appearing at *Franklin* hearings varies by county but averages between \$5,500 and \$12,750 per case, and actual costs for individual cases may be higher.

18. In fiscal year 2017-2018 there were thousands of criminal defendants in California who were charged with crimes that, if convicted of, would entitle them to a youth offender parole hearing after serving 15, 20 or 25 years of their sentence.

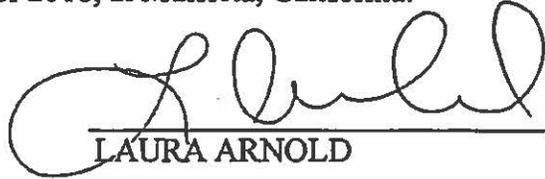
19. Out of that group, there are hundreds of defendants who were or who continue to be represented by Public Defender’s throughout the state that were or who still may be convicted the offenses entitling them to a youth offender parole hearing after serving 15, 20 or 25 years of their sentence, thereby triggering the enhanced sentencing hearing requirements that the court in *Franklin* found to be mandated by Penal Code sections 3051(a), (b), (e) and (f) and 4801(c)..

19. Assuming that only 500 individuals represented by Public Defender’s offices in fiscal year 2017-2018 were entitled to the enhanced requirements of a *Franklin* sentencing hearing, I estimate that the statewide annual costs incurred by County Public

Defenders in fiscal year 2017-2018 as a result of SB 260, 261 and 394 ranged from \$2,750,000 to \$6,375,000.

I declare the foregoing to be true and correct under penalty of perjury.

Executed this 22 of October 2018, at Murrieta, California.



LAURA ARNOLD

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Senate Bill No. 260

CHAPTER 312

An act to amend Sections 3041, 3046, and 4801 of, and to add Section 3051 to, the Penal Code, relating to parole.

[Approved by Governor September 16, 2013. Filed with
Secretary of State September 16, 2013.]

LEGISLATIVE COUNSEL'S DIGEST

SB 260, Hancock. Youth offender parole hearings.

Existing law provides that the Secretary of the Department of Corrections and Rehabilitation or the Board of Parole Hearings, or both, may, for specified reasons, recommend to the court that a prisoner's sentence be recalled, and that a court may recall a prisoner's sentence. When a defendant who was under 18 years of age at the time of the commission of a crime has served at least 15 years of his or her sentence, existing law allows the defendant to submit a petition for recall and resentencing, and authorizes the court, in its discretion, to recall the sentence and to resentence the defendant, provided that the new sentence is not greater than the initial sentence.

This bill would require the Board of Parole Hearings to conduct a youth offender parole hearing to consider release of offenders who committed specified crimes prior to being 18 years of age and who were sentenced to state prison. The bill would make a person eligible for release on parole at a youth offender parole hearing during the 15th year of incarceration if the person meeting these criteria received a determinate sentence, during the 20th year if the person received a sentence that was less than 25 years to life, and during the 25th year of incarceration if the person received a sentence that was 25 years to life. The bill would require the board, in reviewing a prisoner's suitability for parole, to give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law. The bill would require that, in assessing growth and maturity, psychological evaluations and risk assessment instruments, if used by the board, be administered by licensed psychologists employed by the board and take into consideration the diminished culpability of juveniles as compared to that of adults, the hallmark features of youth, and any subsequent growth and increased maturity of the individual. The bill would permit family members, friends, school personnel, faith leaders, and representatives from community-based organizations with knowledge about the young person prior to the crime or his or her growth and maturity since the commission of the crime to submit statements for review by the board.

Existing law requires the board to meet with each inmate sentenced pursuant to certain provisions of law during his or her 3rd year of incarceration for the purpose of reviewing his or her file, making recommendations, and documenting activities and conduct pertinent to granting or withholding postconviction credit.

This bill would instead require the board to meet with those inmates, including those who are eligible to be considered for parole pursuant to a youth offender parole hearing, during the 6th year prior to the inmate's minimum eligible parole release date. The bill would also require the board to provide an inmate additional, specified information during this consultation, including individualized recommendations regarding the inmate's work assignments, rehabilitative programs, and institutional behavior, and to provide those findings and recommendations, in writing, to the inmate within 30 days following the consultation.

Existing law, added by Proposition 8, adopted June 8, 1982, and amended by Proposition 36, adopted November 6, 2012, commonly known as the Three Strikes law, requires increased penalties for certain recidivist offenders in addition to any other enhancement or penalty provisions that may apply, including individuals with current and prior convictions of a serious felony, as specified.

Existing law, as amended by Proposition 83, adopted November 7, 2006, commonly known as Jessica's Law, requires a person convicted of certain felonies under specified circumstances to be committed to prison for a term of years to life.

This bill would exempt from its provisions inmates who were sentenced pursuant to the Three Strikes law or Jessica's Law, or sentenced to life in prison without the possibility of parole. The bill would not apply to an individual to whom the bill would otherwise apply, but who, subsequent to attaining 18 years of age, commits an additional crime for which malice aforethought is a necessary element of the crime or for which the individual is sentenced to life in prison.

The people of the State of California do enact as follows:

SECTION 1. The Legislature finds and declares that, as stated by the United States Supreme Court in *Miller v. Alabama* (2012) 183 L.Ed.2d 407, "only a relatively small proportion of adolescents" who engage in illegal activity "develop entrenched patterns of problem behavior," and that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds," including "parts of the brain involved in behavior control." The Legislature recognizes that youthfulness both lessens a juvenile's moral culpability and enhances the prospect that, as a youth matures into an adult and neurological development occurs, these individuals can become contributing members of society. The purpose of this act is to establish a parole eligibility mechanism that provides a person serving a sentence for crimes that he or she committed as a juvenile

the opportunity to obtain release when he or she has shown that he or she has been rehabilitated and gained maturity, in accordance with the decision of the California Supreme Court in *People v. Caballero* (2012) 55 Cal.4th 262 and the decisions of the United States Supreme Court in *Graham v. Florida* (2010) 560 U.S. 48, and *Miller v. Alabama* (2012) 183 L.Ed.2d 407. Nothing in this act is intended to undermine the California Supreme Court's holdings in *In re Shaputis* (2011) 53 Cal.4th 192, *In re Lawrence* (2008) 44 Cal.4th 1181, and subsequent cases. It is the intent of the Legislature to create a process by which growth and maturity of youthful offenders can be assessed and a meaningful opportunity for release established.

SEC. 2. Section 3041 of the Penal Code is amended to read:

3041. (a) In the case of any inmate sentenced pursuant to any law, other than Chapter 4.5 (commencing with Section 1170) of Title 7 of Part 2, the Board of Parole Hearings shall meet with each inmate during the sixth year prior to the inmate's minimum eligible parole release date for the purposes of reviewing and documenting the inmate's activities and conduct pertinent to both parole eligibility and to the granting or withholding of postconviction credit. During this consultation, the board shall provide the inmate information about the parole hearing process, legal factors relevant to his or her suitability or unsuitability for parole, and individualized recommendations for the inmate regarding his or her work assignments, rehabilitative programs, and institutional behavior. Within 30 days following the consultation, the board shall issue its positive and negative findings and recommendations to the inmate in writing. One year prior to the inmate's minimum eligible parole release date a panel of two or more commissioners or deputy commissioners shall again meet with the inmate and shall normally set a parole release date as provided in Section 3041.5. No more than one member of the panel shall be a deputy commissioner. In the event of a tie vote, the matter shall be referred for an en banc review of the record that was before the panel that rendered the tie vote. Upon en banc review, the board shall vote to either grant or deny parole and render a statement of decision. The en banc review shall be conducted pursuant to subdivision (e). The release date shall be set in a manner that will provide uniform terms for offenses of similar gravity and magnitude with respect to their threat to the public, and that will comply with the sentencing rules that the Judicial Council may issue and any sentencing information relevant to the setting of parole release dates. The board shall establish criteria for the setting of parole release dates and in doing so shall consider the number of victims of the crime for which the inmate was sentenced and other factors in mitigation or aggravation of the crime. At least one commissioner of the panel shall have been present at the last preceding meeting, unless it is not feasible to do so or where the last preceding meeting was the initial meeting. Any person on the hearing panel may request review of any decision regarding parole for an en banc hearing by the board. In case of a review, a majority vote in favor of parole by the board members participating in an en banc review is required to grant parole to any inmate.

(b) The panel or the board, sitting en banc, shall set a release date unless it determines that the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration for this individual, and that a parole date, therefore, cannot be fixed at this meeting. After the effective date of this subdivision, any decision of the parole panel finding an inmate suitable for parole shall become final within 120 days of the date of the hearing. During that period, the board may review the panel's decision. The panel's decision shall become final pursuant to this subdivision unless the board finds that the panel made an error of law, or that the panel's decision was based on an error of fact, or that new information should be presented to the board, any of which when corrected or considered by the board has a substantial likelihood of resulting in a substantially different decision upon a rehearing. In making this determination, the board shall consult with the commissioners who conducted the parole consideration hearing. No decision of the parole panel shall be disapproved and referred for rehearing except by a majority vote of the board, sitting en banc, following a public meeting.

(c) For the purpose of reviewing the suitability for parole of those inmates eligible for parole under prior law at a date earlier than that calculated under Section 1170.2, the board shall appoint panels of at least two persons to meet annually with each inmate until the time the person is released pursuant to proceedings or reaches the expiration of his or her term as calculated under Section 1170.2.

(d) It is the intent of the Legislature that, during times when there is no backlog of inmates awaiting parole hearings, life parole consideration hearings, or life rescission hearings, hearings will be conducted by a panel of three or more members, the majority of whom shall be commissioners. The board shall report monthly on the number of cases where an inmate has not received a completed initial or subsequent parole consideration hearing within 30 days of the hearing date required by subdivision (a) of Section 3041.5 or paragraph (2) of subdivision (b) of Section 3041.5, unless the inmate has waived the right to those timeframes. That report shall be considered the backlog of cases for purposes of this section, and shall include information on the progress toward eliminating the backlog, and on the number of inmates who have waived their right to the above timeframes. The report shall be made public at a regularly scheduled meeting of the board and a written report shall be made available to the public and transmitted to the Legislature quarterly.

(e) For purposes of this section, an en banc review by the board means a review conducted by a majority of commissioners holding office on the date the matter is heard by the board. An en banc review shall be conducted in compliance with the following:

(1) The commissioners conducting the review shall consider the entire record of the hearing that resulted in the tie vote.

(2) The review shall be limited to the record of the hearing. The record shall consist of the transcript or audiotape of the hearing, written or

electronically recorded statements actually considered by the panel that produced the tie vote, and any other material actually considered by the panel. New evidence or comments shall not be considered in the en banc proceeding.

(3) The board shall separately state reasons for its decision to grant or deny parole.

(4) A commissioner who was involved in the tie vote shall be recused from consideration of the matter in the en banc review.

SEC. 3. Section 3046 of the Penal Code is amended to read:

3046. (a) No prisoner imprisoned under a life sentence may be paroled until he or she has served the greater of the following:

(1) A term of at least seven calendar years.

(2) A term as established pursuant to any other provision of law that establishes a minimum term or minimum period of confinement under a life sentence before eligibility for parole.

(b) If two or more life sentences are ordered to run consecutively to each other pursuant to Section 669, no prisoner so imprisoned may be paroled until he or she has served the term specified in subdivision (a) on each of the life sentences that are ordered to run consecutively.

(c) Notwithstanding subdivisions (a) and (b), a prisoner found suitable for parole pursuant to a youth offender parole hearing as described in Section 3051 shall be paroled regardless of the manner in which the board set release dates pursuant to subdivision (a) of Section 3041, subject to subdivision (b) of Section 3041 and Sections 3041.1 and 3041.2, as applicable.

(d) The Board of Prison Terms shall, in considering a parole for a prisoner, consider all statements and recommendations which may have been submitted by the judge, district attorney, and sheriff, pursuant to Section 1203.01, or in response to notices given under Section 3042, and recommendations of other persons interested in the granting or denying of the parole. The board shall enter on its order granting or denying parole to these prisoners, the fact that the statements and recommendations have been considered by it.

SEC. 4. Section 3051 is added to the Penal Code, to read:

3051. (a) (1) A youth offender parole hearing is a hearing by the Board of Parole Hearings for the purpose of reviewing the parole suitability of any prisoner who was under 18 years of age at the time of his or her controlling offense.

(2) For the purposes of this section, the following definitions shall apply:

(A) "Incarceration" means detention in a city or county jail, a local juvenile facility, a mental health facility, a Division of Juvenile Justice facility, or a Department of Corrections and Rehabilitation facility.

(B) "Controlling offense" means the offense or enhancement for which any sentencing court imposed the longest term of imprisonment.

(b) (1) A person who was convicted of a controlling offense that was committed before the person had attained 18 years of age and for which the sentence is a determinate sentence shall be eligible for release on parole at a youth offender parole hearing by the board during his or her 15th year of

incarceration, unless previously released pursuant to other statutory provisions.

(2) A person who was convicted of a controlling offense that was committed before the person had attained 18 years of age and for which the sentence is a life term of less than 25 years to life shall be eligible for release on parole by the board during his or her 20th year of incarceration at a youth offender parole hearing, unless previously released or entitled to an earlier parole consideration hearing pursuant to other statutory provisions.

(3) A person who was convicted of a controlling offense that was committed before the person had attained 18 years of age and for which the sentence is a life term of 25 years to life shall be eligible for release on parole by the board during his or her 25th year of incarceration at a youth offender parole hearing, unless previously released or entitled to an earlier parole consideration hearing pursuant to other statutory provisions.

(c) An individual subject to this section shall meet with the board pursuant to subdivision (a) of Section 3041.

(d) The board shall conduct a youth offender parole hearing to consider release. At the youth offender parole hearing, the board shall release the individual on parole as provided in Section 3041, except that the board shall act in accordance with subdivision (c) of Section 4801.

(e) The youth offender parole hearing to consider release shall provide for a meaningful opportunity to obtain release. The board shall review and, as necessary, revise existing regulations and adopt new regulations regarding determinations of suitability made pursuant to this section, subdivision (c) of Section 4801, and other related topics, consistent with relevant case law, in order to provide that meaningful opportunity for release.

(f) (1) In assessing growth and maturity, psychological evaluations and risk assessment instruments, if used by the board, shall be administered by licensed psychologists employed by the board and shall take into consideration the diminished culpability of juveniles as compared to that of adults, the hallmark features of youth, and any subsequent growth and increased maturity of the individual.

(2) Family members, friends, school personnel, faith leaders, and representatives from community-based organizations with knowledge about the individual before the crime or his or her growth and maturity since the time of the crime may submit statements for review by the board.

(3) Nothing in this section is intended to alter the rights of victims at parole hearings.

(g) If parole is not granted, the board shall set the time for a subsequent youth offender parole hearing in accordance with paragraph (3) of subdivision (b) of Section 3041.5. In exercising its discretion pursuant to paragraph (4) of subdivision (b) and subdivision (d) of Section 3041.5, the board shall consider the factors in subdivision (c) of Section 4801. No subsequent youth offender parole hearing shall be necessary if the offender is released pursuant to other statutory provisions prior to the date of the subsequent hearing.

(h) This section shall not apply to cases in which sentencing occurs pursuant to Section 1170.12, subdivisions (b) to (i), inclusive, of Section 667, or Section 667.61, or in which an individual was sentenced to life in prison without the possibility of parole. This section shall not apply to an individual to whom this section would otherwise apply, but who, subsequent to attaining 18 years of age, commits an additional crime for which malice aforethought is a necessary element of the crime or for which the individual is sentenced to life in prison.

(i) The board shall complete all youth offender parole hearings for individuals who become entitled to have their parole suitability considered at a youth offender parole hearing on the effective date of this section by July 1, 2015.

SEC. 5. Section 4801 of the Penal Code is amended to read:

4801. (a) The Board of Parole Hearings may report to the Governor, from time to time, the names of any and all persons imprisoned in any state prison who, in its judgment, ought to have a commutation of sentence or be pardoned and set at liberty on account of good conduct, or unusual term of sentence, or any other cause, including evidence of intimate partner battering and its effects. For purposes of this section, “intimate partner battering and its effects” may include evidence of the nature and effects of physical, emotional, or mental abuse upon the beliefs, perceptions, or behavior of victims of domestic violence if it appears the criminal behavior was the result of that victimization.

(b) (1) The board, in reviewing a prisoner’s suitability for parole pursuant to Section 3041.5, shall give great weight to any information or evidence that, at the time of the commission of the crime, the prisoner had experienced intimate partner battering, but was convicted of an offense that occurred prior to August 29, 1996. The board shall state on the record the information or evidence that it considered pursuant to this subdivision, and the reasons for the parole decision. The board shall annually report to the Legislature and the Governor on the cases the board considered pursuant to this subdivision during the previous year, including the board’s decisions and the specific and detailed findings of its investigations of these cases.

(2) The report for the Legislature to be submitted pursuant to paragraph (1) shall be submitted pursuant to Section 9795 of the Government Code.

(3) The fact that a prisoner has presented evidence of intimate partner battering cannot be used to support a finding that the prisoner lacks insight into his or her crime and its causes.

(c) When a prisoner committed his or her controlling offense, as defined in subdivision (a) of Section 3051, prior to attaining 18 years of age, the board, in reviewing a prisoner’s suitability for parole pursuant to Section 3041.5, shall give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law.

O

Senate Bill No. 261

CHAPTER 471

An act to amend Sections 3051 and 4801 of the Penal Code, relating to parole.

[Approved by Governor October 3, 2015. Filed with
Secretary of State October 3, 2015.]

legislative counsel's digest

SB 261, Hancock. Youth offender parole hearings.

Existing law generally requires the Board of Parole Hearings to conduct youth offender parole hearings to consider the release of offenders who committed specified crimes when they were under 18 years of age and who were sentenced to state prison.

This bill would instead require the Board of Parole Hearings to conduct a youth offender parole hearing for offenders sentenced to state prison who committed those specified crimes when they were under 23 years of age. The bill would require the board to complete, by July 1, 2017, all youth offender parole hearings for individuals who were sentenced to indeterminate life terms who become entitled to have their parole suitability considered at a youth offender parole hearing on the effective date of the bill. The bill would require the board to complete all youth offender parole hearings for individuals who were sentenced to determinate terms who become entitled to have their parole suitability considered at a youth offender parole hearing on the effective date of the bill by July 1, 2021, and would require the board, for these individuals, to conduct a specified consultation before July 1, 2017.

The people of the State of California do enact as follows:

SECTION 1. Section 3051 of the Penal Code is amended to read:

3051. (a) (1) A youth offender parole hearing is a hearing by the Board of Parole Hearings for the purpose of reviewing the parole suitability of any prisoner who was under 23 years of age at the time of his or her controlling offense.

(2) For the purposes of this section, the following definitions shall apply:

(A) "Incarceration" means detention in a city or county jail, a local juvenile facility, a mental health facility, a Division of Juvenile Justice facility, or a Department of Corrections and Rehabilitation facility.

(B) "Controlling offense" means the offense or enhancement for which any sentencing court imposed the longest term of imprisonment.

(b) (1) A person who was convicted of a controlling offense that was committed before the person had attained 23 years of age and for which the

sentence is a determinate sentence shall be eligible for release on parole at a youth offender parole hearing by the board during his or her 15th year of incarceration, unless previously released pursuant to other statutory provisions.

(2) A person who was convicted of a controlling offense that was committed before the person had attained 23 years of age and for which the sentence is a life term of less than 25 years to life shall be eligible for release on parole by the board during his or her 20th year of incarceration at a youth offender parole hearing, unless previously released or entitled to an earlier parole consideration hearing pursuant to other statutory provisions.

(3) A person who was convicted of a controlling offense that was committed before the person had attained 23 years of age and for which the sentence is a life term of 25 years to life shall be eligible for release on parole by the board during his or her 25th year of incarceration at a youth offender parole hearing, unless previously released or entitled to an earlier parole consideration hearing pursuant to other statutory provisions.

(c) An individual subject to this section shall meet with the board pursuant to subdivision (a) of Section 3041.

(d) The board shall conduct a youth offender parole hearing to consider release. At the youth offender parole hearing, the board shall release the individual on parole as provided in Section 3041, except that the board shall act in accordance with subdivision (c) of Section 4801.

(e) The youth offender parole hearing to consider release shall provide for a meaningful opportunity to obtain release. The board shall review and, as necessary, revise existing regulations and adopt new regulations regarding determinations of suitability made pursuant to this section, subdivision (c) of Section 4801, and other related topics, consistent with relevant case law, in order to provide that meaningful opportunity for release.

(f) (1) In assessing growth and maturity, psychological evaluations and risk assessment instruments, if used by the board, shall be administered by licensed psychologists employed by the board and shall take into consideration the diminished culpability of juveniles as compared to that of adults, the hallmark features of youth, and any subsequent growth and increased maturity of the individual.

(2) Family members, friends, school personnel, faith leaders, and representatives from community-based organizations with knowledge about the individual before the crime or his or her growth and maturity since the time of the crime may submit statements for review by the board.

(3) Nothing in this section is intended to alter the rights of victims at parole hearings.

(g) If parole is not granted, the board shall set the time for a subsequent youth offender parole hearing in accordance with paragraph (3) of subdivision (b) of Section 3041.5. In exercising its discretion pursuant to paragraph (4) of subdivision (b) and subdivision (d) of Section 3041.5, the board shall consider the factors in subdivision (c) of Section 4801. No subsequent youth offender parole hearing shall be necessary if the offender

is released pursuant to other statutory provisions prior to the date of the subsequent hearing.

(h) This section shall not apply to cases in which sentencing occurs pursuant to Section 1170.12, subdivisions (b) to (i), inclusive, of Section 667, or Section 667.61, or in which an individual was sentenced to life in prison without the possibility of parole. This section shall not apply to an individual to whom this section would otherwise apply, but who, subsequent to attaining 23 years of age, commits an additional crime for which malice aforethought is a necessary element of the crime or for which the individual is sentenced to life in prison.

(i) (1) The board shall complete all youth offender parole hearings for individuals who became entitled to have their parole suitability considered at a youth offender parole hearing prior to the effective date of the act that added paragraph (2) by July 1, 2015.

(2) (A) The board shall complete all youth offender parole hearings for individuals who were sentenced to indeterminate life terms and who become entitled to have their parole suitability considered at a youth offender parole hearing on the effective date of the act that added this paragraph by July 1, 2017.

(B) The board shall complete all youth offender parole hearings for individuals who were sentenced to determinate terms and who become entitled to have their parole suitability considered at a youth offender parole hearing on the effective date of the act that added this paragraph by July 1, 2021. The board shall, for all individuals described in this subparagraph, conduct the consultation described in subdivision (a) of Section 3041 before July 1, 2017.

SEC. 2. Section 4801 of the Penal Code is amended to read:

4801. (a) The Board of Parole Hearings may report to the Governor, from time to time, the names of any and all persons imprisoned in any state prison who, in its judgment, ought to have a commutation of sentence or be pardoned and set at liberty on account of good conduct, or unusual term of sentence, or any other cause, including evidence of intimate partner battering and its effects. For purposes of this section, “intimate partner battering and its effects” may include evidence of the nature and effects of physical, emotional, or mental abuse upon the beliefs, perceptions, or behavior of victims of domestic violence if it appears the criminal behavior was the result of that victimization.

(b) (1) The board, in reviewing a prisoner’s suitability for parole pursuant to Section 3041.5, shall give great weight to any information or evidence that, at the time of the commission of the crime, the prisoner had experienced intimate partner battering, but was convicted of an offense that occurred prior to August 29, 1996. The board shall state on the record the information or evidence that it considered pursuant to this subdivision, and the reasons for the parole decision. The board shall annually report to the Legislature and the Governor on the cases the board considered pursuant to this subdivision during the previous year, including the board’s decisions and the specific and detailed findings of its investigations of these cases.

(2) The report for the Legislature to be submitted pursuant to paragraph (1) shall be submitted pursuant to Section 9795 of the Government Code.

(3) The fact that a prisoner has presented evidence of intimate partner battering cannot be used to support a finding that the prisoner lacks insight into his or her crime and its causes.

(c) When a prisoner committed his or her controlling offense, as defined in subdivision (a) of Section 3051, prior to attaining 23 years of age, the board, in reviewing a prisoner's suitability for parole pursuant to Section 3041.5, shall give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law.

O

Assembly Bill No. 1308

CHAPTER 675

An act to amend Sections 3051 and 4801 of the Penal Code, relating to parole.

[Approved by Governor October 11, 2017. Filed with
Secretary of State October 11, 2017.]

legislative counsel's digest

AB 1308, Mark Stone. Youth offender parole hearings.

Existing law generally requires the Board of Parole Hearings to conduct youth offender parole hearings to consider the release of offenders who committed specified crimes when they were under 23 years of age and who were sentenced to state prison.

This bill would instead require the Board of Parole Hearings to conduct youth offender parole hearings for offenders sentenced to state prison who committed those specified crimes when they were 25 years of age or younger. The bill would require the board to complete, by January 1, 2020, all youth offender parole hearings for individuals who were sentenced to indeterminate life terms who become entitled to have their parole suitability considered at a youth offender parole hearing on the effective date of the bill. The bill would require the board to complete all youth offender parole hearings for individuals who were sentenced to determinate terms who become entitled to have their parole suitability considered at a youth offender parole hearing on the effective date of the bill by January 1, 2022, and would require the board, for these individuals, to conduct a specified consultation before January 1, 2019.

The people of the State of California do enact as follows:

SECTION 1. Section 3051 of the Penal Code is amended to read:

3051. (a) (1) A youth offender parole hearing is a hearing by the Board of Parole Hearings for the purpose of reviewing the parole suitability of any prisoner who was 25 years of age or younger at the time of his or her controlling offense.

(2) For the purposes of this section, the following definitions shall apply:

(A) "Incarceration" means detention in a city or county jail, a local juvenile facility, a mental health facility, a Division of Juvenile Justice facility, or a Department of Corrections and Rehabilitation facility.

(B) "Controlling offense" means the offense or enhancement for which any sentencing court imposed the longest term of imprisonment.

(b) (1) A person who was convicted of a controlling offense that was committed when the person was 25 years of age or younger and for which the sentence is a determinate sentence shall be eligible for release on parole at a youth offender parole hearing by the board during his or her 15th year of incarceration, unless previously released pursuant to other statutory provisions.

(2) A person who was convicted of a controlling offense that was committed when the person was 25 years of age or younger and for which the sentence is a life term of less than 25 years to life shall be eligible for release on parole by the board during his or her 20th year of incarceration at a youth offender parole hearing, unless previously released or entitled to an earlier parole consideration hearing pursuant to other statutory provisions.

(3) A person who was convicted of a controlling offense that was committed when the person was 25 years of age or younger and for which the sentence is a life term of 25 years to life shall be eligible for release on parole by the board during his or her 25th year of incarceration at a youth offender parole hearing, unless previously released or entitled to an earlier parole consideration hearing pursuant to other statutory provisions.

(c) An individual subject to this section shall meet with the board pursuant to subdivision (a) of Section 3041.

(d) The board shall conduct a youth offender parole hearing to consider release. At the youth offender parole hearing, the board shall release the individual on parole as provided in Section 3041, except that the board shall act in accordance with subdivision (c) of Section 4801.

(e) The youth offender parole hearing to consider release shall provide for a meaningful opportunity to obtain release. The board shall review and, as necessary, revise existing regulations and adopt new regulations regarding determinations of suitability made pursuant to this section, subdivision (c) of Section 4801, and other related topics, consistent with relevant case law, in order to provide that meaningful opportunity for release.

(f) (1) In assessing growth and maturity, psychological evaluations and risk assessment instruments, if used by the board, shall be administered by licensed psychologists employed by the board and shall take into consideration the diminished culpability of juveniles as compared to that of adults, the hallmark features of youth, and any subsequent growth and increased maturity of the individual.

(2) Family members, friends, school personnel, faith leaders, and representatives from community-based organizations with knowledge about the individual before the crime or his or her growth and maturity since the time of the crime may submit statements for review by the board.

(3) This section is not intended to alter the rights of victims at parole hearings.

(g) If parole is not granted, the board shall set the time for a subsequent youth offender parole hearing in accordance with paragraph (3) of subdivision (b) of Section 3041.5. In exercising its discretion pursuant to paragraph (4) of subdivision (b) and subdivision (d) of Section 3041.5, the board shall consider the factors in subdivision (c) of Section 4801. No

subsequent youth offender parole hearing shall be necessary if the offender is released pursuant to other statutory provisions prior to the date of the subsequent hearing.

(h) This section shall not apply to cases in which sentencing occurs pursuant to Section 1170.12, subdivisions (b) to (i), inclusive, of Section 667, or Section 667.61, or in which an individual was sentenced to life in prison without the possibility of parole. This section shall not apply to an individual to whom this section would otherwise apply, but who, subsequent to attaining 26 years of age, commits an additional crime for which malice aforethought is a necessary element of the crime or for which the individual is sentenced to life in prison.

(i) (1) The board shall complete all youth offender parole hearings for individuals who became entitled to have their parole suitability considered at a youth offender parole hearing prior to the effective date of the act that added paragraph (2) by July 1, 2015.

(2) (A) The board shall complete all youth offender parole hearings for individuals who were sentenced to indeterminate life terms and who become entitled to have their parole suitability considered at a youth offender parole hearing on the effective date of the act that added this paragraph by July 1, 2017.

(B) The board shall complete all youth offender parole hearings for individuals who were sentenced to determinate terms and who become entitled to have their parole suitability considered at a youth offender parole hearing on the effective date of the act that added this paragraph by July 1, 2021. The board shall, for all individuals described in this subparagraph, conduct the consultation described in subdivision (a) of Section 3041 before July 1, 2017.

(3) (A) The board shall complete all youth offender parole hearings for individuals who were sentenced to indeterminate life terms and who become entitled to have their parole suitability considered at a youth offender parole hearing on the effective date of the act that added this paragraph by January 1, 2020.

(B) The board shall complete all youth offender parole hearings for individuals who were sentenced to determinate terms and who become entitled to have their parole suitability considered at a youth offender parole hearing on the effective date of the act that added this paragraph by January 1, 2022. The board shall, for all individuals described in this subparagraph, conduct the consultation described in subdivision (a) of Section 3041 before January 1, 2019.

SEC. 2. Section 4801 of the Penal Code is amended to read:

4801. (a) The Board of Parole Hearings may report to the Governor, from time to time, the names of any and all persons imprisoned in any state prison who, in its judgment, ought to have a commutation of sentence or be pardoned and set at liberty on account of good conduct, or unusual term of sentence, or any other cause, including evidence of intimate partner battering and its effects. For purposes of this section, “intimate partner battering and its effects” may include evidence of the nature and effects of

physical, emotional, or mental abuse upon the beliefs, perceptions, or behavior of victims of domestic violence if it appears the criminal behavior was the result of that victimization.

(b) (1) The board, in reviewing a prisoner's suitability for parole pursuant to Section 3041.5, shall give great weight to any information or evidence that, at the time of the commission of the crime, the prisoner had experienced intimate partner battering, but was convicted of an offense that occurred prior to August 29, 1996. The board shall state on the record the information or evidence that it considered pursuant to this subdivision, and the reasons for the parole decision. The board shall annually report to the Legislature and the Governor on the cases the board considered pursuant to this subdivision during the previous year, including the board's decisions and the specific and detailed findings of its investigations of these cases.

(2) The report for the Legislature to be submitted pursuant to paragraph (1) shall be submitted pursuant to Section 9795 of the Government Code.

(3) The fact that a prisoner has presented evidence of intimate partner battering cannot be used to support a finding that the prisoner lacks insight into his or her crime and its causes.

(c) When a prisoner committed his or her controlling offense, as defined in subdivision (a) of Section 3051, when he or she was 25 years of age or younger, the board, in reviewing a prisoner's suitability for parole pursuant to Section 3041.5, shall give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law.

Senate Bill No. 394

CHAPTER 684

An act to amend Sections 3051 and 4801 of the Penal Code, relating to parole.

[Approved by Governor October 11, 2017. Filed with
Secretary of State October 11, 2017.]

legislative counsel's digest

SB 394, Lara. Parole: youth offender parole hearings.

Existing law requires the Board of Parole Hearings to conduct a youth offender parole hearing for offenders sentenced to state prison who committed specified crimes when they were under 23 years of age. Existing law, as added by initiative statute, imposes a term of confinement in the state prison for life without the possibility of parole or, at the discretion of the court, 25 years to life, on a defendant who was 16 years of age or older and under 18 years of age at the time of the commission of the crime for which he or she was found guilty of murder in the first degree, if specified special circumstances have been found true. Existing case law prohibits a juvenile convicted of a homicide offense from being sentenced to life in prison without parole absent consideration of the juvenile's special circumstances in light of the principles and purposes of juvenile sentencing.

This bill would make a person who was convicted of a controlling offense that was committed before the person had attained 18 years of age and for which a life sentence without the possibility of parole has been imposed eligible for release on parole by the board during his or her 25th year of incarceration at a youth offender parole hearing. The bill would require the board to complete, by July 1, 2020, all hearings for individuals who are or will be entitled to have their parole suitability considered at a youth offender parole hearing by these provisions before July 1, 2020. The bill would make other technical, nonsubstantive changes.

This bill would incorporate additional changes to Sections 3051 and 4801 of the Penal Code proposed by AB 1308 to be operative only if this bill and AB 1308 are enacted and this bill is enacted last.

The people of the State of California do enact as follows:

SECTION 1. Section 3051 of the Penal Code is amended to read:

3051. (a) (1) A youth offender parole hearing is a hearing by the Board of Parole Hearings for the purpose of reviewing the parole suitability of any prisoner who was under 23 years of age, or was under 18 years of age as

specified in paragraph (4) of subdivision (b), at the time of his or her controlling offense.

(2) For the purposes of this section, the following definitions shall apply:

(A) "Incarceration" means detention in a city or county jail, a local juvenile facility, a mental health facility, a Division of Juvenile Justice facility, or a Department of Corrections and Rehabilitation facility.

(B) "Controlling offense" means the offense or enhancement for which any sentencing court imposed the longest term of imprisonment.

(b) (1) A person who was convicted of a controlling offense that was committed before the person had attained 23 years of age and for which the sentence is a determinate sentence shall be eligible for release on parole at a youth offender parole hearing by the board during his or her 15th year of incarceration, unless previously released pursuant to other statutory provisions.

(2) A person who was convicted of a controlling offense that was committed before the person had attained 23 years of age and for which the sentence is a life term of less than 25 years to life shall be eligible for release on parole by the board during his or her 20th year of incarceration at a youth offender parole hearing, unless previously released or entitled to an earlier parole consideration hearing pursuant to other statutory provisions.

(3) A person who was convicted of a controlling offense that was committed before the person had attained 23 years of age and for which the sentence is a life term of 25 years to life shall be eligible for release on parole by the board during his or her 25th year of incarceration at a youth offender parole hearing, unless previously released or entitled to an earlier parole consideration hearing pursuant to other statutory provisions.

(4) A person who was convicted of a controlling offense that was committed before the person had attained 18 years of age and for which the sentence is life without the possibility of parole shall be eligible for release on parole by the board during his or her 25th year of incarceration at a youth offender parole hearing, unless previously released or entitled to an earlier parole consideration hearing pursuant to other statutory provisions.

(c) An individual subject to this section shall meet with the board pursuant to subdivision (a) of Section 3041.

(d) The board shall conduct a youth offender parole hearing to consider release. At the youth offender parole hearing, the board shall release the individual on parole as provided in Section 3041, except that the board shall act in accordance with subdivision (c) of Section 4801.

(e) The youth offender parole hearing to consider release shall provide for a meaningful opportunity to obtain release. The board shall review and, as necessary, revise existing regulations and adopt new regulations regarding determinations of suitability made pursuant to this section, subdivision (c) of Section 4801, and other related topics, consistent with relevant case law, in order to provide that meaningful opportunity for release.

(f) (1) In assessing growth and maturity, psychological evaluations and risk assessment instruments, if used by the board, shall be administered by licensed psychologists employed by the board and shall take into

consideration the diminished culpability of youth as compared to that of adults, the hallmark features of youth, and any subsequent growth and increased maturity of the individual.

(2) Family members, friends, school personnel, faith leaders, and representatives from community-based organizations with knowledge about the individual before the crime or his or her growth and maturity since the time of the crime may submit statements for review by the board.

(3) This section is not intended to alter the rights of victims at parole hearings.

(g) If parole is not granted, the board shall set the time for a subsequent youth offender parole hearing in accordance with paragraph (3) of subdivision (b) of Section 3041.5. In exercising its discretion pursuant to paragraph (4) of subdivision (b) and subdivision (d) of Section 3041.5, the board shall consider the factors in subdivision (c) of Section 4801. A subsequent youth offender parole hearing shall not be necessary if the offender is released pursuant to other statutory provisions prior to the date of the subsequent hearing.

(h) This section shall not apply to cases in which sentencing occurs pursuant to Section 1170.12, subdivisions (b) to (i), inclusive, of Section 667, or Section 667.61, or to cases in which an individual is sentenced to life in prison without the possibility of parole for a controlling offense that was committed after the person had attained 18 years of age. This section shall not apply to an individual to whom this section would otherwise apply, but who, subsequent to attaining 23 years of age, commits an additional crime for which malice aforethought is a necessary element of the crime or for which the individual is sentenced to life in prison.

(i) (1) The board shall complete all youth offender parole hearings for individuals who became entitled to have their parole suitability considered at a youth offender parole hearing prior to the effective date of the act that added paragraph (2) by July 1, 2015.

(2) (A) The board shall complete all youth offender parole hearings for individuals who were sentenced to indeterminate life terms and who become entitled to have their parole suitability considered at a youth offender parole hearing on the effective date of the act that added this paragraph by July 1, 2017.

(B) The board shall complete all youth offender parole hearings for individuals who were sentenced to determinate terms and who become entitled to have their parole suitability considered at a youth offender parole hearing on the effective date of the act that added this paragraph by July 1, 2021. The board shall, for all individuals described in this subparagraph, conduct the consultation described in subdivision (a) of Section 3041 before July 1, 2017.

(3) The board shall complete, by July 1, 2020, all youth offender parole hearings for individuals who were sentenced to terms of life without the possibility of parole and who are or will be entitled to have their parole suitability considered at a youth offender parole hearing before July 1, 2020.

SEC. 1.5. Section 3051 of the Penal Code is amended to read:

3051. (a) (1) A youth offender parole hearing is a hearing by the Board of Parole Hearings for the purpose of reviewing the parole suitability of any prisoner who was 25 years of age or younger, or was under 18 years of age as specified in paragraph (4) of subdivision (b), at the time of his or her controlling offense.

(2) For the purposes of this section, the following definitions shall apply:

(A) "Incarceration" means detention in a city or county jail, a local juvenile facility, a mental health facility, a Division of Juvenile Justice facility, or a Department of Corrections and Rehabilitation facility.

(B) "Controlling offense" means the offense or enhancement for which any sentencing court imposed the longest term of imprisonment.

(b) (1) A person who was convicted of a controlling offense that was committed when the person was 25 years of age or younger and for which the sentence is a determinate sentence shall be eligible for release on parole at a youth offender parole hearing by the board during his or her 15th year of incarceration, unless previously released pursuant to other statutory provisions.

(2) A person who was convicted of a controlling offense that was committed when the person was 25 years of age or younger and for which the sentence is a life term of less than 25 years to life shall be eligible for release on parole by the board during his or her 20th year of incarceration at a youth offender parole hearing, unless previously released or entitled to an earlier parole consideration hearing pursuant to other statutory provisions.

(3) A person who was convicted of a controlling offense that was committed when the person was 25 years of age or younger and for which the sentence is a life term of 25 years to life shall be eligible for release on parole by the board during his or her 25th year of incarceration at a youth offender parole hearing, unless previously released or entitled to an earlier parole consideration hearing pursuant to other statutory provisions.

(4) A person who was convicted of a controlling offense that was committed before the person had attained 18 years of age and for which the sentence is life without the possibility of parole shall be eligible for release on parole by the board during his or her 25th year of incarceration at a youth offender parole hearing, unless previously released or entitled to an earlier parole consideration hearing pursuant to other statutory provisions.

(c) An individual subject to this section shall meet with the board pursuant to subdivision (a) of Section 3041.

(d) The board shall conduct a youth offender parole hearing to consider release. At the youth offender parole hearing, the board shall release the individual on parole as provided in Section 3041, except that the board shall act in accordance with subdivision (c) of Section 4801.

(e) The youth offender parole hearing to consider release shall provide for a meaningful opportunity to obtain release. The board shall review and, as necessary, revise existing regulations and adopt new regulations regarding determinations of suitability made pursuant to this section, subdivision (c) of Section 4801, and other related topics, consistent with relevant case law, in order to provide that meaningful opportunity for release.

(f) (1) In assessing growth and maturity, psychological evaluations and risk assessment instruments, if used by the board, shall be administered by licensed psychologists employed by the board and shall take into consideration the diminished culpability of youth as compared to that of adults, the hallmark features of youth, and any subsequent growth and increased maturity of the individual.

(2) Family members, friends, school personnel, faith leaders, and representatives from community-based organizations with knowledge about the individual before the crime or his or her growth and maturity since the time of the crime may submit statements for review by the board.

(3) This section is not intended to alter the rights of victims at parole hearings.

(g) If parole is not granted, the board shall set the time for a subsequent youth offender parole hearing in accordance with paragraph (3) of subdivision (b) of Section 3041.5. In exercising its discretion pursuant to paragraph (4) of subdivision (b) and subdivision (d) of Section 3041.5, the board shall consider the factors in subdivision (c) of Section 4801. A subsequent youth offender parole hearing shall not be necessary if the offender is released pursuant to other statutory provisions prior to the date of the subsequent hearing.

(h) This section shall not apply to cases in which sentencing occurs pursuant to Section 1170.12, subdivisions (b) to (i), inclusive, of Section 667, or Section 667.61, or to cases in which an individual is sentenced to life in prison without the possibility of parole for a controlling offense that was committed after the person had attained 18 years of age. This section shall not apply to an individual to whom this section would otherwise apply, but who, subsequent to attaining 26 years of age, commits an additional crime for which malice aforethought is a necessary element of the crime or for which the individual is sentenced to life in prison.

(i) (1) The board shall complete all youth offender parole hearings for individuals who became entitled to have their parole suitability considered at a youth offender parole hearing prior to the effective date of the act that added paragraph (2) by July 1, 2015.

(2) (A) The board shall complete all youth offender parole hearings for individuals who were sentenced to indeterminate life terms and who become entitled to have their parole suitability considered at a youth offender parole hearing on the effective date of the act that added this paragraph by July 1, 2017.

(B) The board shall complete all youth offender parole hearings for individuals who were sentenced to determinate terms and who become entitled to have their parole suitability considered at a youth offender parole hearing on the effective date of the act that added this paragraph by July 1, 2021. The board shall, for all individuals described in this subparagraph, conduct the consultation described in subdivision (a) of Section 3041 before July 1, 2017.

(3) (A) The board shall complete all youth offender parole hearings for individuals who were sentenced to indeterminate life terms and who become

entitled to have their parole suitability considered at a youth offender parole hearing on the effective date of the act that added this paragraph by January 1, 2020.

(B) The board shall complete all youth offender parole hearings for individuals who were sentenced to determinate terms and who become entitled to have their parole suitability considered at a youth offender parole hearing on the effective date of the act that added this paragraph by January 1, 2022. The board shall, for all individuals described in this subparagraph, conduct the consultation described in subdivision (a) of Section 3041 before January 1, 2019.

(4) The board shall complete, by July 1, 2020, all youth offender parole hearings for individuals who were sentenced to terms of life without the possibility of parole and who are or will be entitled to have their parole suitability considered at a youth offender parole hearing before July 1, 2020.

SEC. 2. Section 4801 of the Penal Code is amended to read:

4801. (a) The Board of Parole Hearings may report to the Governor, from time to time, the names of any and all persons imprisoned in any state prison who, in its judgment, ought to have a commutation of sentence or be pardoned and set at liberty on account of good conduct, or unusual term of sentence, or any other cause, including evidence of intimate partner battering and its effects. For purposes of this section, "intimate partner battering and its effects" may include evidence of the nature and effects of physical, emotional, or mental abuse upon the beliefs, perceptions, or behavior of victims of domestic violence if it appears the criminal behavior was the result of that victimization.

(b) (1) The board, in reviewing a prisoner's suitability for parole pursuant to Section 3041.5, shall give great weight to any information or evidence that, at the time of the commission of the crime, the prisoner had experienced intimate partner battering, but was convicted of an offense that occurred prior to August 29, 1996. The board shall state on the record the information or evidence that it considered pursuant to this subdivision, and the reasons for the parole decision. The board shall annually report to the Legislature and the Governor on the cases the board considered pursuant to this subdivision during the previous year, including the board's decisions and the specific and detailed findings of its investigations of these cases.

(2) The report for the Legislature to be submitted pursuant to paragraph (1) shall be submitted pursuant to Section 9795 of the Government Code.

(3) The fact that a prisoner has presented evidence of intimate partner battering cannot be used to support a finding that the prisoner lacks insight into his or her crime and its causes.

(c) When a prisoner committed his or her controlling offense, as defined in subdivision (a) of Section 3051, prior to attaining 23 years of age, the board, in reviewing a prisoner's suitability for parole pursuant to Section 3041.5, shall give great weight to the diminished culpability of youth as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law.

SEC. 2.5. Section 4801 of the Penal Code is amended to read:

4801. (a) The Board of Parole Hearings may report to the Governor, from time to time, the names of any and all persons imprisoned in any state prison who, in its judgment, ought to have a commutation of sentence or be pardoned and set at liberty on account of good conduct, or unusual term of sentence, or any other cause, including evidence of intimate partner battering and its effects. For purposes of this section, "intimate partner battering and its effects" may include evidence of the nature and effects of physical, emotional, or mental abuse upon the beliefs, perceptions, or behavior of victims of domestic violence if it appears the criminal behavior was the result of that victimization.

(b) (1) The board, in reviewing a prisoner's suitability for parole pursuant to Section 3041.5, shall give great weight to any information or evidence that, at the time of the commission of the crime, the prisoner had experienced intimate partner battering, but was convicted of an offense that occurred prior to August 29, 1996. The board shall state on the record the information or evidence that it considered pursuant to this subdivision, and the reasons for the parole decision. The board shall annually report to the Legislature and the Governor on the cases the board considered pursuant to this subdivision during the previous year, including the board's decisions and the specific and detailed findings of its investigations of these cases.

(2) The report for the Legislature to be submitted pursuant to paragraph (1) shall be submitted pursuant to Section 9795 of the Government Code.

(3) The fact that a prisoner has presented evidence of intimate partner battering cannot be used to support a finding that the prisoner lacks insight into his or her crime and its causes.

(c) When a prisoner committed his or her controlling offense, as defined in subdivision (a) of Section 3051, when he or she was 25 years of age or younger, the board, in reviewing a prisoner's suitability for parole pursuant to Section 3041.5, shall give great weight to the diminished culpability of youth as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law.

SEC. 3. Section 1.5 of this bill incorporates amendments to Section 3051 of the Penal Code proposed by both this bill and Assembly Bill 1308. That section shall only become operative if (1) both bills are enacted and become effective on or before January 1, 2018, (2) each bill amends Section 3051 of the Penal Code, and (3) this bill is enacted after Assembly Bill 1308, in which case Section 1 of this bill shall not become operative.

SEC. 4. Section 2.5 of this bill incorporates amendments to Section 4801 of the Penal Code proposed by both this bill and Assembly Bill 1308. That section shall only become operative if (1) both bills are enacted and become effective on or before January 1, 2018, (2) each bill amends Section 4801 of the Penal Code, and (3) this bill is enacted after Assembly Bill 1308, in which case Section 2 of this bill shall not become operative.

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Deering's California Codes are current through Chapter 12 of the 2018 Regular Session.

Deering's California Codes Annotated > PENAL CODE > Part 2 Of Criminal Procedure > Title 8 Of Judgment and Execution > Chapter 1 The Judgment

§ 1203. Probation

(a) As used in this code, "probation" means the suspension of the imposition or execution of a sentence and the order of conditional and revocable release in the community under the supervision of a probation officer. As used in this code, "conditional sentence" means the suspension of the imposition or execution of a sentence and the order of revocable release in the community subject to conditions established by the court without the supervision of a probation officer. It is the intent of the Legislature that both conditional sentence and probation are authorized whenever probation is authorized in any code as a sentencing option for infractions or misdemeanors.

(b)

(1) Except as provided in subdivision (j), if a person is convicted of a felony and is eligible for probation, before judgment is pronounced, the court shall immediately refer the matter to a probation officer to investigate and report to the court, at a specified time, upon the circumstances surrounding the crime and the prior history and record of the person, which may be considered either in aggravation or mitigation of the punishment.

(2)

(A) The probation officer shall immediately investigate and make a written report to the court of his or her findings and recommendations, including his or her recommendations as to the granting or denying of probation and the conditions of probation, if granted.

(B) Pursuant to [Section 828 of the Welfare and Institutions Code](#), the probation officer shall include in his or her report any information gathered by a law enforcement agency relating to the taking of the defendant into custody as a minor, which shall be considered for purposes of determining whether adjudications of commissions of crimes as a juvenile warrant a finding that there are circumstances in aggravation pursuant to [Section 1170](#) or to deny probation.

(C) If the person was convicted of an offense that requires him or her to register as a sex offender pursuant to [Sections 290 to 290.023](#), inclusive, or if the probation report recommends that registration be ordered at sentencing pursuant to [Section 290.006](#), the probation officer's report shall include the results of the State-Authorized Risk Assessment Tool for Sex Offenders (SARATSO) administered pursuant to [Sections 290.04 to 290.06](#), inclusive, if applicable.

(D) The probation officer may also include in the report his or her recommendation of both of the following:

(i) The amount the defendant should be required to pay as a restitution fine pursuant to subdivision (b) of [Section 1202.4](#).

(ii) Whether the court shall require, as a condition of probation, restitution to the victim or to the Restitution Fund and the amount thereof.

(E) The report shall be made available to the court and the prosecuting and defense attorneys at least five days, or upon request of the defendant or prosecuting attorney nine days, prior to the time fixed by the court for the hearing and determination of the report, and shall be filed with the clerk of

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the court as a record in the case at the time of the hearing. The time within which the report shall be made available and filed may be waived by written stipulation of the prosecuting and defense attorneys that is filed with the court or an oral stipulation in open court that is made and entered upon the minutes of the court.

(3)At a time fixed by the court, the court shall hear and determine the application, if one has been made, or, in any case, the suitability of probation in the particular case. At the hearing, the court shall consider any report of the probation officer, including the results of the SARATSO, if applicable, and shall make a statement that it has considered the report, which shall be filed with the clerk of the court as a record in the case. If the court determines that there are circumstances in mitigation of the punishment prescribed by law or that the ends of justice would be served by granting probation to the person, it may place the person on probation. If probation is denied, the clerk of the court shall immediately send a copy of the report to the Department of Corrections and Rehabilitation at the prison or other institution to which the person is delivered.

(4)The preparation of the report or the consideration of the report by the court may be waived only by a written stipulation of the prosecuting and defense attorneys that is filed with the court or an oral stipulation in open court that is made and entered upon the minutes of the court, except that a waiver shall not be allowed unless the court consents thereto. However, if the defendant is ultimately sentenced and committed to the state prison, a probation report shall be completed pursuant to [Section 1203c](#).

(c)If a defendant is not represented by an attorney, the court shall order the probation officer who makes the probation report to discuss its contents with the defendant.

(d)If a person is convicted of a misdemeanor, the court may either refer the matter to the probation officer for an investigation and a report or summarily pronounce a conditional sentence. If the person was convicted of an offense that requires him or her to register as a sex offender pursuant to *Sections 290 to 290.023*, inclusive, or if the probation officer recommends that the court, at sentencing, order the offender to register as a sex offender pursuant to *Section 290.006*, the court shall refer the matter to the probation officer for the purpose of obtaining a report on the results of the State-Authorized Risk Assessment Tool for Sex Offenders administered pursuant to [Sections 290.04 to 290.06](#), inclusive, if applicable, which the court shall consider. If the case is not referred to the probation officer, in sentencing the person, the court may consider any information concerning the person that could have been included in a probation report. The court shall inform the person of the information to be considered and permit him or her to answer or controvert the information. For this purpose, upon the request of the person, the court shall grant a continuance before the judgment is pronounced.

(e)Except in unusual cases where the interests of justice would best be served if the person is granted probation, probation shall not be granted to any of the following persons:

(1)Unless the person had a lawful right to carry a deadly weapon, other than a firearm, at the time of the perpetration of the crime or his or her arrest, any person who has been convicted of arson, robbery, carjacking, burglary, burglary with explosives, rape with force or violence, torture, aggravated mayhem, murder, attempt to commit murder, trainwrecking, kidnapping, escape from the state prison, or a conspiracy to commit one or more of those crimes and who was armed with the weapon at either of those times.

(2)Any person who used, or attempted to use, a deadly weapon upon a human being in connection with the perpetration of the crime of which he or she has been convicted.

(3)Any person who willfully inflicted great bodily injury or torture in the perpetration of the crime of which he or she has been convicted.

(4)Any person who has been previously convicted twice in this state of a felony or in any other place of a public offense which, if committed in this state, would have been punishable as a felony.

(5)Unless the person has never been previously convicted once in this state of a felony or in any other place of a public offense which, if committed in this state, would have been punishable as a felony, any

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person who has been convicted of burglary with explosives, rape with force or violence, torture, aggravated mayhem, murder, attempt to commit murder, trainwrecking, extortion, kidnapping, escape from the state prison, a violation of [Section 286](#), 288, 288a, or 288.5, or a conspiracy to commit one or more of those crimes.

(6) Any person who has been previously convicted once in this state of a felony or in any other place of a public offense which, if committed in this state, would have been punishable as a felony, if he or she committed any of the following acts:

(A) Unless the person had a lawful right to carry a deadly weapon at the time of the perpetration of the previous crime or his or her arrest for the previous crime, he or she was armed with a weapon at either of those times.

(B) The person used, or attempted to use, a deadly weapon upon a human being in connection with the perpetration of the previous crime.

(C) The person willfully inflicted great bodily injury or torture in the perpetration of the previous crime.

(7) Any public official or peace officer of this state or any city, county, or other political subdivision who, in the discharge of the duties of his or her public office or employment, accepted or gave or offered to accept or give any bribe, embezzled public money, or was guilty of extortion.

(8) Any person who knowingly furnishes or gives away phencyclidine.

(9) Any person who intentionally inflicted great bodily injury in the commission of arson under subdivision (a) of [Section 451](#) or who intentionally set fire to, burned, or caused the burning of, an inhabited structure or inhabited property in violation of subdivision (b) of [Section 451](#).

(10) Any person who, in the commission of a felony, inflicts great bodily injury or causes the death of a human being by the discharge of a firearm from or at an occupied motor vehicle proceeding on a public street or highway.

(11) Any person who possesses a short-barreled rifle or a short-barreled shotgun under [Section 33215](#), a machinegun under [Section 32625](#), or a silencer under [Section 33410](#).

(12) Any person who is convicted of violating [Section 8101 of the Welfare and Institutions Code](#).

(13) Any person who is described in subdivision (b) or (c) of [Section 27590](#).

(f) When probation is granted in a case which comes within subdivision (e), the court shall specify on the record and shall enter on the minutes the circumstances indicating that the interests of justice would best be served by that disposition.

(g) If a person is not eligible for probation, the judge shall refer the matter to the probation officer for an investigation of the facts relevant to determination of the amount of a restitution fine pursuant to subdivision (b) of [Section 1202.4](#) in all cases where the determination is applicable. The judge, in his or her discretion, may direct the probation officer to investigate all facts relevant to the sentencing of the person. Upon that referral, the probation officer shall immediately investigate the circumstances surrounding the crime and the prior record and history of the person and make a written report to the court of his or her findings. The findings shall include a recommendation of the amount of the restitution fine as provided in subdivision (b) of [Section 1202.4](#).

(h) If a defendant is convicted of a felony and a probation report is prepared pursuant to subdivision (b) or (g), the probation officer may obtain and include in the report a statement of the comments of the victim concerning the offense. The court may direct the probation officer not to obtain a statement if the victim has in fact testified at any of the court proceedings concerning the offense.

(i) A probationer shall not be released to enter another state unless his or her case has been referred to the Administrator of the Interstate Probation and Parole Compacts, pursuant to the Uniform Act for Out-of-State Probationer or Parolee Supervision (Article 3 (commencing with [Section 11175](#)) of Chapter 2 of Title 1 of Part 4) and the probationer has reimbursed the county that has jurisdiction over his or her probation case the

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reasonable costs of processing his or her request for interstate compact supervision. The amount and method of reimbursement shall be in accordance with [Section 1203.1b](#).

(j) In any court where a county financial evaluation officer is available, in addition to referring the matter to the probation officer, the court may order the defendant to appear before the county financial evaluation officer for a financial evaluation of the defendant's ability to pay restitution, in which case the county financial evaluation officer shall report his or her findings regarding restitution and other court-related costs to the probation officer on the question of the defendant's ability to pay those costs.

Any order made pursuant to this subdivision may be enforced as a violation of the terms and conditions of probation upon willful failure to pay and at the discretion of the court, may be enforced in the same manner as a judgment in a civil action, if any balance remains unpaid at the end of the defendant's probationary period.

(k) Probation shall not be granted to, nor shall the execution of, or imposition of sentence be suspended for, any person who is convicted of a violent felony, as defined in subdivision (c) of [Section 667.5](#), or a serious felony, as defined in subdivision (c) of [Section 1192.7](#), and who was on probation for a felony offense at the time of the commission of the new felony offense.

(l) For any person granted probation prior to January 1, 2021, at the time the court imposes probation, the court may take a waiver from the defendant permitting flash incarceration by the probation officer, pursuant to [Section 1203.35](#).

History

Enacted 1872. Amended Stats 1903 ch 34 § 1; Stats 1905 ch 166 § 1; Stats 1909 ch 232 § 1; Stats 1911 ch 381 § 1; Stats 1913 ch 137 § 1; Stats 1917 ch 732 § 1; Stats 1919 ch 604 § 1; Stats 1921 ch 752 § 1; Stats 1923 ch 144 § 1; Stats 1927 ch 770 § 1; Stats 1929 ch 737 § 1; Stats 1931 ch 786 § 1; Stats 1935 ch 604 § 1; Stats 1945 ch 765 § 1; Stats 1947 ch 1178 § 2; Stats 1949 ch 1329 § 1; Stats 1951 ch 1438 § 1; Stats 1955 ch 309 § 2; Stats 1957 ch 385 § 1, ch 2054 § 1; Stats 1965 ch 1720 § 1; Stats 1968 ch 101 § 1; Stats 1969 ch 522 § 2; Stats 1971 ch 706 § 1; Stats 1975 ch 1004 § 1; Stats 1977 ch 162 § 2, effective June 29, 1977, operative July 1, 1977, ch 165 § 20, effective June 29, 1977, operative July 1, 1977, ch 1123 § 5; Stats 1978 ch 1262 § 2; Stats 1979 ch 1174 § 2, ch 1175 § 2; Stats 1981 ch 1076 § 1; Stats 1982 ch 247 § 1, effective June 9, 1982, ch 1282 § 2; Stats 1983 ch 932 § 2, ch 1063 § 1; Stats 1984 ch 1340 § 3; Stats 1985 ch 1485 § 3; [Stats 1987 ch 134 § 11](#), effective July 7, 1987, ch 828 § 71, ch 1155 § 2, effective September 26, 1987, ch 1379 § 2, September 29, 1987; [Stats 1989 ch 936 § 1](#), ch 1402 § 11.5; [Stats 1993 ch 59 § 14 \(SB 443\)](#), effective June 30, 1993; [Stats 1993 ch 273 § 1 \(AB 306\)](#), ch 610 § 18 (AB 6), effective September 30, 1993, operative until January 1, 1994, ch 610 § 18.3 (AB 6), effective September 30, 1993, operative January 1, 1994, ch 611 § 20 (SB 60), effective September 30, 1993, operative until January 1, 1994, ch 611 § 20.3 (SB 60), effective September 30, 1993, operative January 1, 1994; [Stats 1994 ch 23 § 2 \(AB 482\)](#), ch 146 § 167 (AB 3601) (1st Ex Sess ch 33 prevails), ch 451 § 2 (AB 2470); Stats 1st Ex Sess 1993–94 ch 30 § 1 (AB 141X), effective November 30, 1994, ch 33 § 2.5 (SB 36X), effective November 30, 1994; [Stats 1995 ch 313 § 7 \(AB 817\)](#), effective August 3, 1995; [Stats 1996 ch 123 § 1 \(AB 2376\)](#), ch 719 § 1 (AB 893) (ch 719 prevails); [Stats 2006 ch 337 § 38 \(SB 1128\)](#), effective September 20, 2006; [Stats 2009 ch 582 § 5 \(SB 325\)](#), effective January 1, 2010; [Stats 2010 ch 178 § 74 \(SB 1115\)](#), effective January 1, 2011, operative January 1, 2012; [Stats 2013 ch 28 § 45 \(SB 71\)](#), effective June 27, 2013; [Stats 2016 ch 706 § 1 \(SB 266\)](#), effective January 1, 2017.

Cal Rules of Court, Rule 4.411

This document reflects changes received through June 4, 2018.

California Court Rules > CALIFORNIA RULES OF COURT > Title 4. Criminal Rules > Division 5. Felony Sentencing Law

Rule 4.411. Presentence investigations and reports

(a) When requiredAs provided in subdivision (b), the court must refer the case to the probation officer for:

(1)A presentence investigation and report if the defendant:

(A)Is statutorily eligible for probation or a term of imprisonment in county jail under section 1170(h);
or

(B)Is not eligible for probation but a report is needed to assist the court with other sentencing issues, including the determination of the proper amount of restitution fine;

(2)A supplemental report if a significant period of time has passed since the original report was prepared.

(Subd (a) amended effective January 1, 2018; previously amended effective January 1, 2007, and January 15, 2015.)

(b) Waiver of the investigation and reportThe parties may stipulate to the waiver of the probation officer's investigation and report in writing or in open court and entered in the minutes, and with the consent of the court. In deciding whether to consent to the waiver, the court should consider whether the information in the report would assist in the resolution of any current or future sentencing issues, or would assist in the effective supervision of the person. A waiver under this section does not affect the requirement under section 1203c that a probation report be created when the court commits a person to state prison.

(Subd (b) amended effective January 1, 2018; previously amended effective January 1, 2015.)

History

Rule 4.411 amended effective January 1, 2018; adopted as rule 418 effective July 1, 1977; previously amended and renumbered as rule 411 effective January 1, 1991; previously renumbered effective January 1, 2001; previously amended effective January 1, 2006, January 1, 2007, and January 1, 2015.

Deering's California Codes Annotated

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End of Document

Cal Rules of Court, Rule 4.411.5

This document reflects changes received through June 4, 2018.

California Court Rules > CALIFORNIA RULES OF COURT > Title 4. Criminal Rules > Division 5. Felony Sentencing Law

Rule 4.411.5. Probation officer's presentence investigation report

(a) Contents A probation officer's presentence investigation report in a felony case must include at least the following:

(1) A face sheet showing at least:

(A) The defendant's name and other identifying data;

(B) The case number;

(C) The crime of which the defendant was convicted;

(D) The date of commission of the crime, the date of conviction, and any other dates relevant to sentencing;

(E) The defendant's custody status; and

(F) The terms of any agreement on which a plea of guilty was based.

(2) The facts and circumstances of the crime and the defendant's arrest, including information concerning any co-defendants and the status or disposition of their cases. The source of all such information must be stated.

(3) A summary of the defendant's record of prior criminal conduct, including convictions as an adult and sustained petitions in juvenile delinquency proceedings. Records of an arrest or charge not leading to a conviction or the sustaining of a petition may not be included unless supported by facts concerning the arrest or charge.

(4) Any statement made by the defendant to the probation officer, or a summary thereof, including the defendant's account of the circumstances of the crime.

(5) Information concerning the victim of the crime, including:

(A) The victim's statement or a summary thereof, if available;

(B) Any physical or psychological injuries suffered by the victim;

(C) The amount of the victim's monetary loss, and whether or not it is covered by insurance; and

(D) Any information required by law.

(6) Any relevant facts concerning the defendant's social history, including those categories enumerated in section 1203.10, organized under appropriate subheadings, including, whenever applicable, "Family," "Education," "Employment and income," "Military," "Medical/psychological," "Record of substance abuse or lack thereof," and any other relevant subheadings. This includes facts relevant to whether the defendant may be suffering from sexual trauma, traumatic brain injury, posttraumatic stress disorder, substance abuse, or mental health problems as a result of his or her U.S. military service.

(7) Collateral information, including written statements from:

(A) Official sources such as defense and prosecuting attorneys, police (subsequent to any police reports used to summarize the crime), probation and parole officers who have had prior experience with the defendant, and correctional personnel who observed the defendant's behavior during any period of presentence incarceration; and

(B) Interested persons, including family members and others who have written letters concerning the defendant.

(8) The defendant's relevant risk factors and needs as identified by a risk/needs assessment, if such an assessment is performed, and such other information from the assessment as may be requested by the court.

(9) An evaluation of factors relating to disposition. This section must include:

(A) A reasoned discussion of the defendant's suitability and eligibility for probation, and, if probation is recommended, a proposed plan including recommendations for the conditions of probation and any special need for supervision;

(B) If a prison sentence or term of imprisonment in county jail under section 1170(h) is recommended or is likely to be imposed, a reasoned discussion of aggravating and mitigating factors affecting the sentence length;

(C) If denial of a period of mandatory supervision in the interests of justice is recommended, a reasoned discussion of the factors prescribed by rule 4.415(b);

(D) If a term of imprisonment in county jail under section 1170(h) is recommended, a reasoned discussion of the defendant's suitability for specific terms and length of period of mandatory supervision, including the factors prescribed by rule 4.415(c); and

(E) A reasoned discussion of the defendant's ability to make restitution, pay any fine or penalty that may be recommended, or satisfy any special conditions of probation that are proposed.

Discussions of factors (A) through (D) must refer to any sentencing rule directly relevant to the facts of the case, but no rule may be cited without a reasoned discussion of its relevance and relative importance.

(10) The probation officer's recommendation. When requested by the sentencing judge or by standing instructions to the probation department, the report must include recommendations concerning the length of any prison or county jail term under section 1170(h) that may be imposed, including the base term, the imposition of concurrent or consecutive sentences, and the imposition or striking of the additional terms for enhancements charged and found.

(11) Detailed information on presentence time spent by the defendant in custody, including the beginning and ending dates of the period or periods of custody; the existence of any other sentences imposed on the defendant during the period of custody; the amount of good behavior, work, or participation credit to which the defendant is entitled; and whether the sheriff or other officer holding custody, the prosecution, or the defense wishes that a hearing be held for the purposes of denying good behavior, work, or participation credit.

(12) A statement of mandatory and recommended restitution, restitution fines, other fines, and costs to be assessed against the defendant, including chargeable probation services and attorney fees under section 987.8 when appropriate, findings concerning the defendant's ability to pay, and a recommendation whether any restitution order should become a judgment under section 1203(j) if unpaid.

(13) Information pursuant to [Penal Code section 29810\(c\)](#):

(A) Whether the defendant has properly complied with [Penal Code section 29810](#) by relinquishing firearms identified by the probation officer's investigation or declared by the defendant on the Prohibited Persons Relinquishment Form, and

(B) Whether the defendant has timely submitted a completed Prohibited Persons Relinquishment Form.

(Subd (a) amended effective January 1, 2018; previously amended effective January 1, 1991, July 1, 2003, January 1, 2007, January 1, 2015, and January 1, 2017.)

(b) Format The report must be on paper 8-1/2 by 11 inches in size and must follow the sequence set out in (a) to the extent possible.

(Subd (b) amended effective January 1, 2007; previously amended effective January 1, 1991.)

(c) Sources The source of all information must be stated. Any person who has furnished information included in the report must be identified by name or official capacity unless a reason is given for not disclosing the person's identity.

(Subd (c) amended effective January 1, 2007; previously amended effective January 1, 1991.)

History

Rule 4.411.5 amended effective January 1, 2018; adopted as rule 419 effective July 1, 1981; previously amended and renumbered as rule 411.5 effective January 1, 1991; previously renumbered effective January 1, 2001; previously amended effective July 1, 2003, January 1, 2007, January 1, 2015, and January 1, 2017.

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Cal Rules of Court, Rule 4.412

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California Court Rules > *CALIFORNIA RULES OF COURT* > *Title 4. Criminal Rules* > *Division 5. Felony Sentencing Law*

Rule 4.412. Reasons--agreement to punishment as an adequate reason and as abandonment of certain claims

(a) Defendant's agreement as reasonIt is an adequate reason for a sentence or other disposition that the defendant, personally and by counsel, has expressed agreement that it be imposed and the prosecuting attorney has not expressed an objection to it. The agreement and lack of objection must be recited on the record. This section does not authorize a sentence that is not otherwise authorized by law.

(Subd (a) amended effective January 1, 2007; previously amended effective January 1, 2001.)

(b) Agreement to sentence abandons section 654 claimBy agreeing to a specified term in prison or county jail under section 1170(h) personally and by counsel, a defendant who is sentenced to that term or a shorter one abandons any claim that a component of the sentence violates section 654's prohibition of double punishment, unless that claim is asserted at the time the agreement is recited on the record.

History

Rule 4.412 amended effective January 1, 2017; adopted as rule 412 effective January 1, 1991; previously amended and renumbered effective January 1, 2001; previously amended effective January 1, 2007.

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Cal Rules of Court, Rule 4.413

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California Court Rules > **CALIFORNIA RULES OF COURT** > *Title 4. Criminal Rules* > *Division 5. Felony Sentencing Law*

Rule 4.413. Grant of probation when defendant is presumptively ineligible for probation

(a) Consideration of eligibility The court must determine whether the defendant is eligible for probation. In most cases, the defendant is presumptively eligible for probation; in some cases, the defendant is presumptively ineligible; and in some cases, probation is not allowed.

(Subd (a) amended effective January 1, 2018; previously amended effective January 1, 2007.)

(b) Probation in cases when defendant is presumptively ineligible If the defendant comes under a statutory provision prohibiting probation "except in unusual cases where the interests of justice would best be served," or a substantially equivalent provision, the court should apply the criteria in (c) to evaluate whether the statutory limitation on probation is overcome; and if it is, the court should then apply the criteria in rule 4.414 to decide whether to grant probation.

(Subd (b) amended effective January 1, 2018; previously amended effective July 1, 2003, and January 1, 2007.)

(c) Factors overcoming the presumption of ineligibility The following factors may indicate the existence of an unusual case in which probation may be granted if otherwise appropriate:

(1) Factors relating to basis for limitation on probation A factor or circumstance indicating that the basis for the statutory limitation on probation, although technically present, is not fully applicable to the case, including:

(A) The factor or circumstance giving rise to the limitation on probation is, in this case, substantially less serious than the circumstances typically present in other cases involving the same probation limitation, and the defendant has no recent record of committing similar crimes or crimes of violence; and

(B) The current offense is less serious than a prior felony conviction that is the cause of the limitation on probation, and the defendant has been free from incarceration and serious violation of the law for a substantial time before the current offense.

(2) Factors limiting defendant's culpability A factor or circumstance not amounting to a defense, but reducing the defendant's culpability for the offense, including:

(A) The defendant participated in the crime under circumstances of great provocation, coercion, or duress not amounting to a defense, and the defendant has no recent record of committing crimes of violence;

(B) The crime was committed because of a mental condition not amounting to a defense, and there is a high likelihood that the defendant would respond favorably to mental health care and treatment that would be required as a condition of probation; and

(C) The defendant is youthful or aged, and has no significant record of prior criminal offenses.

(3) Results of risk/needs assessment Along with all other relevant information in the case, the court may consider the results of a risk/needs assessment of the defendant, if one was performed. The weight of a risk/needs assessment is for the judge to consider in its sentencing discretion.

(Subd (c) amended effective January 1, 2018; previously amended effective January 1, 2007.)

History

Rule 4.413 amended effective January 1, 2018; adopted as rule 413 effective January 1, 1991; previously renumbered effective January 1, 2001; previously amended effective July 1, 2003, and January 1, 2007.

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Cal Rules of Court, Rule 4.414

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Rule 4.414. Criteria affecting probation

Criteria affecting the decision to grant or deny probation include facts relating to the crime and facts relating to the defendant.

(a) Facts relating to the crimeFacts relating to the crime include:

- (1)The nature, seriousness, and circumstances of the crime as compared to other instances of the same crime;
- (2)Whether the defendant was armed with or used a weapon;
- (3)The vulnerability of the victim;
- (4)Whether the defendant inflicted physical or emotional injury;
- (5)The degree of monetary loss to the victim;
- (6)Whether the defendant was an active or a passive participant;
- (7)Whether the crime was committed because of an unusual circumstance, such as great provocation, which is unlikely to recur;
- (8)Whether the manner in which the crime was carried out demonstrated criminal sophistication or professionalism on the part of the defendant; and
- (9)Whether the defendant took advantage of a position of trust or confidence to commit the crime.
(Subd (a) amended effective January 1, 2007; previously amended effective January 1, 1991.)

(b) Facts relating to the defendantFacts relating to the defendant include:

- (1)Prior record of criminal conduct, whether as an adult or a juvenile, including the recency and frequency of prior crimes; and whether the prior record indicates a pattern of regular or increasingly serious criminal conduct;
- (2)Prior performance and present status on probation, mandatory supervision, postrelease community supervision, or parole ;
- (3)Willingness to comply with the terms of probation;
- (4)Ability to comply with reasonable terms of probation as indicated by the defendant's age, education, health, mental faculties, history of alcohol or other substance abuse, family background and ties, employment and military service history, and other relevant factors;
- (5)The likely effect of imprisonment on the defendant and his or her dependents;
- (6)The adverse collateral consequences on the defendant's life resulting from the felony conviction;
- (7)Whether the defendant is remorseful; and
- (8)The likelihood that if not imprisoned the defendant will be a danger to others.

History

Rule 4.414 amended effective January 1, 2017; adopted as rule 414 effective July 1, 1977; previously renumbered effective January 1, 2001; previously amended effective January 1, 1991, July 1, 2003, and January 1, 2007.

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Cal Rules of Court, Rule 4.415

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Rule 4.415. Criteria affecting the imposition of mandatory supervision

(a) Presumption Except where the defendant is statutorily ineligible for suspension of any part of the sentence, when imposing a term of imprisonment in county jail under section 1170(h), the court must suspend execution of a concluding portion of the term to be served as a period of mandatory supervision unless the court finds, in the interests of justice, that mandatory supervision is not appropriate in a particular case. Because section 1170(h)(5)(A) establishes a statutory presumption in favor of the imposition of a period of mandatory supervision in all applicable cases, denials of a period of mandatory supervision should be limited.

(b) Criteria for denying mandatory supervision in the interests of justice In determining that mandatory supervision is not appropriate in the interests of justice under section 1170(h)(5)(A), the court's determination must be based on factors that are specific to a particular case or defendant. Factors the court may consider include:

- (1) Consideration of the balance of custody exposure available after imposition of presentence custody credits;
- (2) The defendant's present status on probation, mandatory supervision, postrelease community supervision, or parole;
- (3) Specific factors related to the defendant that indicate a lack of need for treatment or supervision upon release from custody; and
- (4) Whether the nature, seriousness, or circumstances of the case or the defendant's past performance on supervision substantially outweigh the benefits of supervision in promoting public safety and the defendant's successful reentry into the community upon release from custody.

(c) Criteria affecting conditions and length of mandatory supervision In exercising discretion to select the appropriate period and conditions of mandatory supervision, factors the court may consider include:

- (1) Availability of appropriate community corrections programs;
- (2) Victim restitution, including any conditions or period of supervision necessary to promote the collection of any court-ordered restitution;
- (3) Consideration of length and conditions of supervision to promote the successful reintegration of the defendant into the community upon release from custody;
- (4) Public safety, including protection of any victims and witnesses;
- (5) Past performance and present status on probation, mandatory supervision, postrelease community supervision, and parole;
- (6) The balance of custody exposure after imposition of presentence custody credits;
- (7) Consideration of the statutory accrual of post-sentence custody credits for mandatory supervision under section 1170(h)(5)(B) and sentences served in county jail under section 4019(a)(6);
- (8) The defendant's specific needs and risk factors identified by a risk/needs assessment, if available; and

(9)The likely effect of extended imprisonment on the defendant and any dependents.

(Subd (c) amended effective January 1, 2018.)

(d) Statement of reasons for denial of mandatory supervisionNotwithstanding rule 4.412(a), when a court denies a period of mandatory supervision in the interests of justice, the court must state the reasons for the denial on the record.

History

Rule 4.415 amended effective January 1, 2018; adopted effective January 1, 2015; previously amended effective January 1, 2017.

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Cal Rules of Court, Rule 4.420

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Rule 4.420. Selection of term of imprisonment

(a) When a sentence of imprisonment is imposed, or the execution of a sentence of imprisonment is ordered suspended, the sentencing judge must select the upper, middle, or lower term on each count for which the defendant has been convicted, as provided in section 1170(b) and these rules.

(Subd (a) amended effective May 23, 2007; previously amended effective July 28, 1977, January 1, 1991, and January 1, 2007.)

(b) In exercising his or her discretion in selecting one of the three authorized terms of imprisonment referred to in section 1170(b), the sentencing judge may consider circumstances in aggravation or mitigation, and any other factor reasonably related to the sentencing decision. The relevant circumstances may be obtained from the case record, the probation officer's report, other reports and statements properly received, statements in aggravation or mitigation, and any evidence introduced at the sentencing hearing.

(c) To comply with section 1170(b), a fact charged and found as an enhancement may be used as a reason for imposing a particular term only if the court has discretion to strike the punishment for the enhancement and does so. The use of a fact of an enhancement to impose the upper term of imprisonment is an adequate reason for striking the additional term of imprisonment, regardless of the effect on the total term.

(Subd (c) amended effective January 1, 2018; adopted effective January 1, 1991.)

(d) A fact that is an element of the crime on which punishment is being imposed may not be used to impose a particular term.

(Subd (d) amended effective January 1, 2018; adopted effective January 1, 1991; previously amended effective January 1, 2007, May 23, 2007, and January 1, 2008.)

(e) The reasons for selecting one of the three authorized terms of imprisonment referred to in section 1170(b) must be stated orally on the record.

(Subd (e) amended effective May 23, 2007; previously amended and relettered effective January 1, 1991; previously amended effective July 28, 1977, and January 1, 2007.)

History

Rule 4.420 amended effective January 1, 2018; adopted as rule 439 effective July 1, 1977; previously amended and renumbered as rule 420 effective January 1, 1991; previously renumbered effective January 1, 2001; previously amended effective July 28, 1977, January 1, 2007, May 23, 2007, January 1, 2008, and January 1, 2017.

Cal Rules of Court, Rule 4.421

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Rule 4.421. Circumstances in aggravation

Circumstances in aggravation include factors relating to the crime and factors relating to the defendant.

(a) Factors relating to the crime Factors relating to the crime, whether or not charged or chargeable as enhancements include that:

- (1) The crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness;
- (2) The defendant was armed with or used a weapon at the time of the commission of the crime;
- (3) The victim was particularly vulnerable;
- (4) The defendant induced others to participate in the commission of the crime or occupied a position of leadership or dominance of other participants in its commission;
- (5) The defendant induced a minor to commit or assist in the commission of the crime;
- (6) The defendant threatened witnesses, unlawfully prevented or dissuaded witnesses from testifying, suborned perjury, or in any other way illegally interfered with the judicial process;
- (7) The defendant was convicted of other crimes for which consecutive sentences could have been imposed but for which concurrent sentences are being imposed;
- (8) The manner in which the crime was carried out indicates planning, sophistication, or professionalism;
- (9) The crime involved an attempted or actual taking or damage of great monetary value;
- (10) The crime involved a large quantity of contraband; and
- (11) The defendant took advantage of a position of trust or confidence to commit the offense.
- (12) The crime constitutes a hate crime under section 422.55 and:
 - (A) No hate crime enhancements under section 422.75 are imposed; and
 - (B) The crime is not subject to sentencing under section 1170.8.(Subd (a) amended effective May 23, 2007; previously amended effective January 1, 1991, and January 1, 2007.)

(b) Factors relating to the defendant Factors relating to the defendant include that:

- (1) The defendant has engaged in violent conduct that indicates a serious danger to society;
- (2) The defendant's prior convictions as an adult or sustained petitions in juvenile delinquency proceedings are numerous or of increasing seriousness;
- (3) The defendant has served a prior term in prison or county jail under section 1170(h);
- (4) The defendant was on probation, mandatory supervision, postrelease community supervision, or parole when the crime was committed; and

(5)The defendant's prior performance on probation, mandatory supervision, postrelease community supervision, or parole was unsatisfactory.

(c) **Other factors**Any other factors statutorily declared to be circumstances in aggravation or which reasonably relate to the defendant or the circumstances under which the crime was committed.

(Subd (c) amended effective January 1, 2018; adopted effective January 1, 1991; previously amended effective January 1, 2007, and May 23, 2007.)

History

Rule 4.421 amended effective January 1, 2018; adopted as rule 421 effective July 1, 1977; previously renumbered effective January 1, 2001; previously amended effective January 1, 1991, January 1, 2007, May 23, 2007, and January 1, 2017.

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Cal Rules of Court, Rule 4.423

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Rule 4.423. Circumstances in mitigation

Circumstances in mitigation include factors relating to the crime and factors relating to the defendant.

(a) Factors relating to the crime Factors relating to the crime include that:

- (1) The defendant was a passive participant or played a minor role in the crime;
- (2) The victim was an initiator of, willing participant in, or aggressor or provoker of the incident;
- (3) The crime was committed because of an unusual circumstance, such as great provocation, that is unlikely to recur;
- (4) The defendant participated in the crime under circumstances of coercion or duress, or the criminal conduct was partially excusable for some other reason not amounting to a defense;
- (5) The defendant, with no apparent predisposition to do so, was induced by others to participate in the crime;
- (6) The defendant exercised caution to avoid harm to persons or damage to property, or the amounts of money or property taken were deliberately small, or no harm was done or threatened against the victim;
- (7) The defendant believed that he or she had a claim or right to the property taken, or for other reasons mistakenly believed that the conduct was legal;
- (8) The defendant was motivated by a desire to provide necessities for his or her family or self; and
- (9) The defendant suffered from repeated or continuous physical, sexual, or psychological abuse inflicted by the victim of the crime, and the victim of the crime, who inflicted the abuse, was the defendant's spouse, intimate cohabitant, or parent of the defendant's child; and the abuse does not amount to a defense.

(Subd (a) amended effective May 23, 2007; previously amended effective January 1, 1991, July 1, 1993, and January 1, 2007.)

(b) Factors relating to the defendant Factors relating to the defendant include that:

- (1) The defendant has no prior record, or has an insignificant record of criminal conduct, considering the recency and frequency of prior crimes;
- (2) The defendant was suffering from a mental or physical condition that significantly reduced culpability for the crime;
- (3) The defendant voluntarily acknowledged wrongdoing before arrest or at an early stage of the criminal process;
- (4) The defendant is ineligible for probation and but for that ineligibility would have been granted probation;
- (5) The defendant made restitution to the victim; and

(6)The defendant's prior performance on probation, mandatory supervision, postrelease community supervision, or parole was satisfactory.

(c) Other factorsAny other factors statutorily declared to be circumstances in mitigation or which reasonably relate to the defendant or the circumstances under which the crime was committed.

(Subd (c) adopted effective January 1, 2018.)

History

Rule 4.423 amended effective January 1, 2018; adopted as rule 423 effective July 1, 1977; previously renumbered effective January 1, 2001; previously amended effective January 1, 1991, July 1, 1993, January 1, 2007, May 23, 2007, and January 1, 2017.

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[Cal Rules of Court, Rule 4.424](#)

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Rule 4.424. Consideration of applicability of section 654.

Before determining whether to impose either concurrent or consecutive sentences on all counts on which the defendant was convicted, the court must determine whether the proscription in section 654 against multiple punishments for the same act or omission requires a stay of execution of the sentence imposed on some of the counts.

History

Rule 4.424 amended effective January 1, 2011; adopted as rule 424 effective January 1, 1991; previously renumbered effective January 1, 2001; previously amended effective January 1, 2007.

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Cal Rules of Court, Rule 4.425

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Rule 4.425. Factors affecting concurrent or consecutive sentences

Factors affecting the decision to impose consecutive rather than concurrent sentences include:

(a) Facts relating to crimesFacts relating to the crimes, including whether or not:

- (1)The crimes and their objectives were predominantly independent of each other;
- (2)The crimes involved separate acts of violence or threats of violence; or
- (3)The crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior.

(Subd (a) amended effective January 1, 2018; previously amended effective January 1, 1991, and January 1, 2007.)

(b) Other facts and limitationsAny circumstances in aggravation or mitigation may be considered in deciding whether to impose consecutive rather than concurrent sentences, except:

- (1)A fact used to impose the upper term;
- (2)A fact used to otherwise enhance the defendant's sentence in prison or county jail under section 1170(h); and
- (3)A fact that is an element of the crime may not be used to impose consecutive sentences.

(Subd (b) amended effective January 1, 2018; previously amended effective January 1, 1991, January 1, 2007, and January 1, 2017.)

History

Rule 4.425 amended effective January 1, 2018; adopted as rule 425 effective July 1, 1977; previously renumbered effective January 1, 2001; previously amended effective January 1, 1991, January 1, 2007, and January 1, 2017.

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Cal Rules of Court, Rule 4.426

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Rule 4.426. Violent sex crimes

(a) Multiple violent sex crimesWhen a defendant has been convicted of multiple violent sex offenses as defined in section 667.6, the sentencing judge must determine whether the crimes involved separate victims or the same victim on separate occasions.

(1) Different victimsIf the crimes were committed against different victims, a full, separate, and consecutive term must be imposed for a violent sex crime as to each victim, under section 667.6(d).

(2) Same victim, separate occasionsIf the crimes were committed against a single victim, the sentencing judge must determine whether the crimes were committed on separate occasions. In determining whether there were separate occasions, the sentencing judge must consider whether, between the commission of one sex crime and another, the defendant had a reasonable opportunity to reflect on his or her actions and nevertheless resumed sexually assaultive behavior. A full, separate, and consecutive term must be imposed for each violent sex offense committed on a separate occasion under section 667.6(d).

(Subd (a) amended effective January 1, 2007.)

(b) Same victim, same occasion; other crimesIf the defendant has been convicted of multiple crimes, including at least one violent sex crime, as defined in section 667.6, or if there have been multiple violent sex crimes against a single victim on the same occasion and the sentencing court has decided to impose consecutive sentences, the sentencing judge must then determine whether to impose a full, separate, and consecutive sentence under section 667.6(c) for the violent sex crime or crimes instead of including the violent sex crimes in the computation of the principal and subordinate terms under section 1170.1(a). A decision to impose a fully consecutive sentence under section 667.6(c) is an additional sentence choice that requires a statement of reasons separate from those given for consecutive sentences, but which may repeat the same reasons. The sentencing judge is to be guided by the criteria listed in rule 4.425, which incorporates rules 4.421 and 4.423, as well as any other reasonably related criteria as provided in rule 4.408.

(Subd (b) amended effective January 1, 2007; previously amended effective July 1, 2003.)

History

Rule 4.426 amended effective January 1, 2007; adopted as rule 426 effective January 1, 1991; previously renumbered effective January 1, 2001; previously amended effective July 1, 2003.

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Cal Rules of Court, Rule 4.427

This document reflects changes received through June 4, 2018.

California Court Rules > **CALIFORNIA RULES OF COURT** > *Title 4. Criminal Rules* > *Division 5. Felony Sentencing Law*

Rule 4.427. Hate crimes

(a) Application This rule is intended to assist judges in sentencing in felony hate crime cases. It applies to:

- (1) Felony sentencing under section 422.7;
- (2) Convictions of felonies with a hate crime enhancement under section 422.75; and
- (3) Convictions of felonies that qualify as hate crimes under section 422.55.

(b) Felony sentencing under section 422.7 If one of the three factors listed in section 422.7 is pled and proved, a misdemeanor conviction that constitutes a hate crime under section 422.55 may be sentenced as a felony. The punishment is imprisonment in state prison or county jail under section 1170(h) as provided by section 422.7.

(c) Hate crime enhancement If a hate crime enhancement is pled and proved, the punishment for a felony conviction must be enhanced under section 422.75 unless the conviction is sentenced as a felony under section 422.7.

(1) The following enhancements apply:

(A) An enhancement of a term in state prison as provided in section 422.75(a). Personal use of a firearm in the commission of the offense is an aggravating factor that must be considered in determining the enhancement term.

(B) An additional enhancement of one year in state prison for each prior felony conviction that constitutes a hate crime as defined in section 422.55.

(2) The court may strike enhancements under (c) if it finds mitigating circumstances under rule 4.423 and states those mitigating circumstances on the record.

(3) The punishment for any enhancement under (c) is in addition to any other punishment provided by law.

(d) Hate crime as aggravating factor If the defendant is convicted of a felony, and the facts of the crime constitute a hate crime under section 422.55, that fact must be considered a circumstance in aggravation in determining the appropriate punishment under rule 4.421 unless:

(1) The court imposed a hate crime enhancement under section 422.75; or

(2) The defendant has been convicted of an offense subject to sentencing under section 1170.8.

(e) Hate crime sentencing goals When sentencing a defendant under this rule, the judge must consider the principal goals for hate crime sentencing.

(1) The principal goals for hate crime sentencing, as stated in section 422.86, are:

(A) Punishment for the hate crime committed;

(B) Crime and violence prevention, including prevention of recidivism and prevention of crimes and violence in prisons and jails; and

(C) Restorative justice for the immediate victims of the hate crimes and for the classes of persons terrorized by the hate crimes.

(2) Crime and violence prevention considerations should include educational or other appropriate programs available in the community, jail, prison, and juvenile detention facilities. The programs should address sensitivity or similar training or counseling intended to reduce violent and antisocial behavior based on one or more of the following actual or perceived characteristics of the victim:

(A) Disability;

(B) Gender;

(C) Nationality;

(D) Race or ethnicity;

(E) Religion;

(F) Sexual orientation; or

(G) Association with a person or group with one or more of these actual or perceived characteristics.

(3) Restorative justice considerations should include community service and other programs focused on hate crime prevention or diversity sensitivity. Additionally, the court should consider ordering payment or other compensation to programs that provide services to violent crime victims and reimbursement to the victim for reasonable costs of counseling and other reasonable expenses that the court finds are a direct result of the defendant's actions.

History

Rule 4.427 amended effective January 1, 2017; adopted effective January 1, 2007.

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Cal Rules of Court, Rule 4.428

This document reflects changes received through June 4, 2018.

California Court Rules > **CALIFORNIA RULES OF COURT** > *Title 4. Criminal Rules* > *Division 5. Felony Sentencing Law*

Rule 4.428. Factors affecting imposition of enhancements

(a) Enhancements punishable by one of three termsIf an enhancement is punishable by one of three terms, the court must, in its discretion, impose the term that best serves the interest of justice and state the reasons for its sentence choice on the record at the time of sentencing. In exercising its discretion in selecting the appropriate term, the court may consider factors in mitigation and aggravation as described in these rules or any other factor authorized by rule 4.408.

(Subd (a) was adopted effective January 1, 2018.)

(b) Striking enhancements under section 1385If the court has discretion under section 1385(a) to strike an enhancement in the interests of justice, the court also has the authority to strike the punishment for the enhancement under section 1385(c). In determining whether to strike the entire enhancement or only the punishment for the enhancement, the court may consider the effect that striking the enhancement would have on the status of the crime as a strike, the accurate reflection of the defendant's criminal conduct on his or her record, the effect it may have on the award of custody credits, and any other relevant consideration.

(Subd (b) was adopted effective January 1, 2018.)

History

Rule 4.428 amended effective January 1, 2018; adopted as rule 428 effective January 1, 1991; previously renumbered effective January 1, 2001; previously amended effective January 1, 1998, July 1, 2003, January 1, 2007, May 23, 2007, January 1, 2008, and January 1, 2011.

Deering's California Codes Annotated

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Cal Rules of Court, Rule 4.431

This document reflects changes received through June 4, 2018.

California Court Rules > CALIFORNIA RULES OF COURT > Title 4. Criminal Rules > Division 5. Felony Sentencing Law

Rule 4.431. Proceedings at sentencing to be reported

All proceedings at the time of sentencing must be reported.

History

Rule 4.431 amended effective January 1, 2007; adopted as rule 431 effective July 1, 1977; previously renumbered effective January 1, 2001.

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Cal Rules of Court, Rule 4.433

This document reflects changes received through June 4, 2018.

California Court Rules > CALIFORNIA RULES OF COURT > Title 4. Criminal Rules > Division 5. Felony Sentencing Law

Rule 4.433. Matters to be considered at time set for sentencing

(a) In every case, at the time set for sentencing under section 1191, the sentencing judge must hold a hearing at which the judge must:

- (1)** Hear and determine any matters raised by the defendant under section 1201;
- (2)** Determine whether a defendant who is eligible for probation should be granted or denied probation, unless consideration of probation is expressly waived by the defendant personally and by counsel; and
- (3)** Determine whether to deny a period of mandatory supervision in the interests of justice under section 1170(h)(5)(A).

(b) If the imposition of a sentence is to be suspended during a period of probation after a conviction by trial, the trial judge must identify and state circumstances that would justify imposition of one of the three authorized terms of imprisonment referred to in section 1170(b), or any enhancement, if probation is later revoked. The circumstances identified and stated by the judge must be based on evidence admitted at the trial or other circumstances properly considered under rule 4.420(b).

(Subd (b) amended effective January 1, 2018; previously amended effective July 28, 1977, January 1, 2007, May 23, 2007, January 1, 2008, and January 1, 2017.)

(c) If a sentence of imprisonment is to be imposed, or if the execution of a sentence of imprisonment is to be suspended during a period of probation, the sentencing judge must:

- (1)** Determine, under section 1170(b), whether to impose one of the three authorized terms of imprisonment referred to in section 1170(b), or any enhancement, and state on the record the reasons for imposing that term.
- (2)** Determine whether any additional term of imprisonment provided for an enhancement charged and found will be stricken;
- (3)** Determine whether the sentences will be consecutive or concurrent if the defendant has been convicted of multiple crimes;
- (4)** Determine any issues raised by statutory prohibitions on the dual use of facts and statutory limitations on enhancements, as required in rules 4.420(c) and 4.447; and
- (5)** Pronounce the court's judgment and sentence, stating the terms thereof and giving reasons for those matters for which reasons are required by law.

(Subd (c) amended effective January 1, 2018; previously amended effective July 28, 1977, July 1, 2003, January 1, 2007, May 23, 2007, and January 1, 2017.)

(d) All these matters must be heard and determined at a single hearing unless the sentencing judge otherwise orders in the interests of justice.

(Subd (d) amended effective January 1, 2007.)

(e) When a sentence of imprisonment is imposed under (c) or under rule 4.435, the sentencing judge must inform the defendant:

(1) Under section 1170(c), of the parole period provided by section 3000 to be served after expiration of the sentence, in addition to any period of incarceration for parole violation;

(2) Of the period of postrelease community supervision provided by section 3456 to be served after expiration of the sentence, in addition to any period of incarceration for a violation of postrelease community supervision; or

(3) Of any period of mandatory supervision imposed under section 1170(h)(5)(A) and (B), in addition to any period of imprisonment for a violation of mandatory supervision.

(Subd (e) amended effective January 1, 2018; previously amended effective July 28, 1977, January 1, 1979, July 1, 2003, January 1, 2007, and January 1, 2017.)

History

Rule 4.433 amended effective January 1, 2018; adopted as rule 433 effective July 1, 1977; previously renumbered effective January 1, 2001; previously amended effective July 28, 1977, January 1, 1979, July 1, 2003, January 1, 2007, May 23, 2007, January 1, 2008, and January 1, 2017.

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[12 Cal. Comp. Cases 123; 1947 Cal. Wrk. Comp. LEXIS 249; 30 Cal. 2d 388; 182 P.2d 159](#)

Supreme Court of California

June 26, 1947

S. F. Nos. 17417, 17418, 17419, 17420, 17421, 17422, 17423, 17424, 17425, 17426, 17427, 17428, 17429

Reporter

12 Cal. Comp. Cases 123 *; 1947 Cal. Wrk. Comp. LEXIS 249 **; 30 Cal. 2d 388 ***; 182 P.2d 159 ****

**AETNA CASUALTY AND SURETY COMPANY (a Corporation) et al.,
Petitioners, v. INDUSTRIAL ACCIDENT COMMISSION and WILLIAM
CHARLESWORTH, Respondents. FIREMAN'S FUND INDEMNITY COMPANY
(a Corporation) et al., Petitioners, v. INDUSTRIAL ACCIDENT COMMISSION
and SIMON O. MacDONALD, Respondents. PACIFIC EMPLOYERS
INSURANCE COMPANY (a Corporation) et al., Petitioners, v. INDUSTRIAL
ACCIDENT COMMISSION and CLARA WYNKOOP, Respondents.
INDUSTRIAL INDEMNITY EXCHANGE (an Inter-insurance Exchange) et al.,
Petitioners, v. INDUSTRIAL ACCIDENT COMMISSION and R. C. KILLEN,
Respondents. CALIFORNIA COMPENSATION INSURANCE COMPANY (a
Corporation) et al., Petitioners, v. INDUSTRIAL ACCIDENT COMMISSION and
FRANK KIDD, Respondents. INDUSTRIAL INDEMNITY EXCHANGE (an Inter-
insurance Exchange) et al., Petitioners, v. INDUSTRIAL ACCIDENT
COMMISSION and HARVEY ALLISON, Respondents. STATE
COMPENSATION INSURANCE FUND et al., Petitioners, v. INDUSTRIAL
ACCIDENT COMMISSION and ROBERT DENTON FLEMING, Respondents.
STATE COMPENSATION INSURANCE FUND et al., Petitioners v.
INDUSTRIAL ACCIDENT COMMISSION and ELWYN ROBERTS,
Respondents. STATE COMPENSATION INSURANCE FUND et al.,
Petitioners, v. INDUSTRIAL ACCIDENT COMMISSION and ROBERT L.
RICHARDSON, Respondents. HARTFORD ACCIDENT AND INDEMNITY
COMPANY (a Corporation) et al., Petitioners, v. INDUSTRIAL ACCIDENT
COMMISSION and BURNS D. LAMB, Respondents. WESTERN NATIONAL
INDEMNITY COMPANY (a Corporation) et al., Petitioners, v. INDUSTRIAL
ACCIDENT COMMISSION and JOHN W. JANSON, Respondents. LIBERTY
MUTUAL INSURANCE COMPANY (a Corporation) et al., Petitioners, v.
INDUSTRIAL ACCIDENT COMMISSION and GERALD REED, Respondents.
INDUSTRIAL INDEMNITY EXCHANGE (an Inter-insurance Exchange) et al.,
Petitioners, v. INDUSTRIAL ACCIDENT COMMISSION and JOE MARTINEZ,
Respondents**

Subsequent History:

[**1] Respondents' Petition for a Rehearing was Denied July 22, 1947. Carter, J., Voted for a Rehearing.

Prior History:

PROCEEDINGS to review orders of the Industrial Accident Commission awarding compensation for personal injuries.

Disposition: Awards annulled.

Core Terms

disability, workmen's compensation law, permanent disability, workman, retroactive, temporary, workmen's compensation, legislative intent, insurance carrier, retrospective, percent, permanent, effective date of the amendment, industrial injury, disability payment, injured employee, effective date, temporary disability payment, permanent disability award, liberal construction, impairment, retrospective operation, existing conditions, date of injury, vested, rule of statutory construction, liberally construed, workman, rehabilitate, self-insured

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Robert W. Kenny, Attorney General, Clarence A. Linn, Assistant Attorney General, Charles A. Son, Charles J. Janigian, Charles P. Scully, George Olshausen, John K. Hagopian and Gladstein, Andersen, Resner & Sawyer as Amici Curiae on behalf of Respondents.

Opinion By: GIBSON

Opinion

[*124] [***391] [****160] This is a proceeding to review an award of compensation made by the Industrial Accident Commission in favor of an injured employee. At the time the employee sustained his admittedly compensable injury, [section 4661 of the Labor Code](#) provided that "Where an injury causes both temporary and permanent disability, [**2] the injured employee is not entitled to both a temporary and permanent disability payment, but only to the greater of the two." By an amendment effective as of September 15, 1945, the following proviso was added to [section 4661](#): "except that where the temporary disability payment exceeds 25 per cent of the permanent disability payment the injured employee shall be paid 75 per cent of such permanent disability payment in addition to the temporary disability payment." Thereafter the commission made its award allowing compensation pursuant to the terms of the amended statute, with the result that the award was greater than it would have been had the commission applied [section 4661](#) as it read at the date of injury. Twelve additional cases arising from similar factual situations have been consolidated with this proceeding.

The two-fold question to be determined in this proceeding is whether the commission gave retrospective operation to the amended statute by applying it in a case where the injury occurred prior to the amendment and, if so, whether such retrospective application was proper.

12 Cal. Comp. Cases 123, *124; 1947 Cal. Wrk. Comp. LEXIS 249, **2; 30 Cal. 2d 388, ***391; 182 P.2d 159, ****160

"A retrospective law is one which affects rights, obligations, acts, transactions and conditions [**3] which are performed or exist prior to the adoption of the statute." (*American States W. S. Co. v. Johnson*, 31 Cal.App.2d 606, 613 [88 P.2d 770]; *Ware v. Heller*, 63 Cal.App.2d 817, 821 [148 P.2d 410]; 23 Cal.Jur. 628.) Respondent commission contends, however, that in making its award in accordance with [section 4661](#) as amended, it gave only prospective operation to the amendment. It is argued that the statute deals with the subject [***392] of disability to which the injury is a mere antecedent fact, that there was no right to or correlative obligation for permanent disability compensation at the time of injury but that such right or obligation arose only after the disability was manifest and its existence determined by the commission, and that consequently no existing rights or obligations were affected by application of the amendment even though the injury occurred before its adoption. With this reasoning we cannot agree.

The prior industrial injury was not a mere antecedent fact relating to the permanent disability ensuing therefrom; on the contrary, it was the basis of the right [**4] to be compensated for such disability. This is recognized by the amendment itself which begins with the recital "Where an injury causes both temporary and permanent disability." Moreover, it is elementary that an industrial injury is the foundation of rights and liabilities under workmen's compensation laws. (See [Lab. Code, § 3600](#).) It may be true that, with respect to certain procedural matters, proceedings for permanent disability compensation are viewed as separate and distinct from proceedings for temporary disability compensation. (See *Gobel v. Industrial Acc. Com.*, 1 Cal.2d 100 [33 P.2d 413]; *Cowell L. & C. Co. v. Industrial Acc. Com.*, 211 Cal. 154 [294 P. 703, 72 A.L.R. 1118].) [*125] It does not follow, however, that the "cause of action" for permanent disability is separate and distinct from the original industrial injury. ([Lab. Code, § 5303](#).) The employee was entitled to compensation not merely because he became permanently disabled, but because that disability resulted from an injury in the course of and arising out of his employment.

Since the industrial injury [**5] is the basis for any compensation award, the law in force at the time of the injury is to be taken as the measure of the injured person's right of recovery. The 1945 amendment of [section 4661](#) increased the amount of compensation above what was payable at the date of the injury, and to that extent it enlarged the employee's existing rights and the employer's corresponding obligations. [****161] The amendment is therefore clearly substantive in character, and the commission, by applying it in the present proceedings, gave it a retrospective operation.

The authorities support the conclusion that a statute changing the measure or method of computing compensation for disability or death is given retrospective effect when applied [***393] to disability or death resulting from an injury sustained before the effective date of the statute. (*Holmberg v. City of Oakland*, 55 Cal.App. 270, 272 [203 P. 167]; *United Iron Works v. Smethers*, 159 Okla. 105 [14 P.2d 380]; *Lynch v. State*, 19 Wn.2d 802 [145 P.2d 265]; *Virden v. Smith*, 46 Nev. 208 [210 P. 129]; [**6] *Polk v. Western Bedding Co.*, 145 Pa.Super. 142 [20 A.2d 845]; *Quilty v. Connecticut Co.*, 96 Conn. 124 [113 A. 149]; *Stanswsky v. Industrial Commission*, 344 Ill. 436 [176 N.E. 898]; see *Hendrickson v. Industrial Acc. Com.*, 215 Cal. 82, 84 [8 P.2d 833]; *Hyman Bros. B. & L. Co. v. Industrial Acc. Com.*, 180 Cal. 423, 424 [181 P. 784]; *Chaney v. Los Angeles County Retirement Bd.*, 59 Cal.App.2d 413 [138 P.2d 735].) The only case cited in support of the contrary view is *Talbot v. Industrial Ins. Com.*, 108 Wash. 231 [183 P. 84, 187 P. 410]. It is sufficient to note that in a subsequent case the same court which decided it stated that the Talbot case "did not say that the allowance of the increased payment was in 'no sense' a retroactive application of the amendatory act, but simply said that so to apply the amendment did not [**7] amount to giving it a retroactive effect *contrary to the intention of the legislature*." (*Lynch v. State*, 19 Wn.2d 802 [145 P.2d 265, 268].)

It is an established canon of interpretation that statutes are not to be given a retrospective operation unless it is clearly made to appear that such was the legislative intent. (*Jones v. Union Oil Co.*, 218 Cal. 775 [25 P.2d 5]; *In re Cate*, 207 Cal. 443 [279 P. 131]; *Pignaz v. Burnett*, 119 Cal. 157 [51 P. 48].) It is contended upon behalf of respondents that this rule of statutory construction has no application to procedural statutes, and that [section 4661](#) relates solely to matters of procedure or remedy. *Feckenscher v. Gamble*, 12 Cal.2d 482 [85 P.2d 885], *City of Los Angeles v. Oliver*, 102 Cal.App. 299 [283 P. 298], *San Bernardino County v. Industrial Acc. Com.*, 217 Cal. 618 [20 P.2d 673], [**8] and *Davis & McMillan v. Industrial Acc. Com.*, 198 Cal. 631 [246 P. 1046, 46 A.L.R. 1095], are relied upon in support of the contention. In those cases, with one exception, it was held that the language of the statutes showed that the Legislature intended them to be applied retroactively, and the court was concerned mainly

12 Cal. Comp. Cases 123, *125; 1947 Cal. Wrk. Comp. LEXIS 249, **8; 30 Cal. 2d 388, ***393; 182 P.2d 159, ****161

with the question of whether the Legislature has power to give those laws such retroactive effect. Since the question of the constitutionality of retroactive legislation [***394] and the question of the applicability of a rule of statutory construction are distinct ([Ware v. Heller, 63 Cal.App.2d 817, 821 \[148 P.2d 410\]](#)), these cases are not in point.

[*126] [Davis & McMillan v. Industrial Acc. Com., supra at page 638](#), contains language, quoted from 36 Cyclopaedia of Law, page 1201, to the effect that the presumption against retrospective construction does not apply to statutes relating merely to remedies and modes of procedure. (See, also, Crawford, The Construction of Statutes, p. 581.) A [**9] different theory is offered to reach the same result in [Morris v. Pacific Electric Ry. Co., 2 Cal.2d 764, 768 \[43 P.2d 276\]](#), wherein this court stated that procedural changes "operate on existing causes of action and defenses, and it is a misnomer to designate them as having retrospective effect." (See, also, [Estate of Patterson, 155 Cal. 626, 638 \[102 P. 941, 132 Am.St.Rep. 116, 18 Ann.Cas. 625, 26 L.R.A.N.S. 654\]](#); [Ware v. Heller, 63 Cal.App.2d 817, 825 \[148 P.2d 410\]](#).) In other words, procedural statutes may become operative only when and if the procedure or remedy is invoked, and if the trial postdates the enactment, the statute operates in the future regardless of the time of occurrence of the events giving rise to the cause of action. ([Blyer v. Hershman, 156 Misc. 349 \[281 N.Y.S. 942, 944\]](#).) In such cases the statutory changes are said to apply not because they constitute an exception to the general rule of statutory construction, but because [**10] they are not in fact retrospective. [****162] There is then no problem as to whether the Legislature intended the changes to operate retroactively.

This reasoning, however, assumes a clear-cut distinction between purely "procedural" and purely "substantive" legislation. In truth, the distinction relates not so much to the form of the statute as to its effects. If substantial changes are made, even in a statute which might ordinarily be classified as procedural, the operation on existing rights would be retroactive because the legal effects of past events would be changed, and the statute will be construed to operate only in futuro unless the legislative intent to the contrary clearly appears. ([Jones v. Union Oil Co., supra, 218 Cal. 775, 777](#) [change in procedure to obtain judgment liens]; [In re Cate, supra, 207 Cal. 443, 448](#) [change in reinstatement procedure by enactment of State Bar Act]; [Pignaz v. Burnett, supra, 119 Cal. 157, 160](#) [change in time to appeal].) The argument that the statute in this case is a procedural law to which [**11] the general rule of statutory construction does not apply is but a different statement of the respondent commission's [***395] original contention that it did not give a retrospective application to the amendment. As we have heretofore concluded, the amendment of [section 4661](#) is substantive in its effect, and its operation would be retroactive, since it imposes a new or additional liability and substantially affects existing rights and obligations.

We turn now to the contention that the Legislature intended to give retrospective operation to the 1945 amendment of [section 4661](#). That intention does not appear on the face of the amendment since no express provision was made for its application to cases involving prior injuries. Respondents urge, however, that such intention appears by necessary implication.

It is argued that since the provisions of the Workmen's Compensation Act are to be liberally construed to extend their benefits to injured persons ([Lab. Code, § 3203](#)), the legislative intention that the amendment should operate retrospectively must be implied. No authority is cited for this novel doctrine which would require the court to ignore the rule against retroactive operation [**12] with respect to statutes increasing benefits to persons favored by remedial legislation. The rule of liberal construction and the rule that statutes should ordinarily be construed to operate prospectively are neither inconsistent nor mutually exclusive. They relate to different aspects of the interpretation of statutes, and are found in most of the codes, including the Labor Code. ([Civ. Code, §§ 3, 4](#); [Code Civ. Proc., §§ 3, 4](#); [*127] [Pen. Code, §§ 3, 4](#); [Lab. Code, §§ 4, 3202](#).) It would be a most peculiar judicial reasoning which would allow one such doctrine to be invoked for the purpose of destroying the other. It seems clear, therefore, that the legislative intent in favor of the retrospective operation of a statute cannot be implied from the mere fact that the statute is remedial and subject to the rule of liberal construction. (See [Virden v. Smith, supra \[Nev.\], 210 P. 129, 130](#).)

It is also argued that the legislative intent to extend the benefits of the amendment to previously injured workmen must be implied from the fact that the Legislature could not have intended to differentiate between [**13] workmen injured before and after the effective date of the amendment. The argument is not persuasive. Every change in the

12 Cal. Comp. Cases 123, *127; 1947 Cal. Wrk. Comp. LEXIS 249, **13; 30 Cal. 2d 388, ***395; 182 P.2d 159, ****162

law brings about some difference in treatment as a result of the prospective operation of the amendment. Moreover, the injustice that [***396] might be suffered by an employer if the amendment were applied retrospectively would afford ample basis for an intentional difference in treatment of workmen injured before and after adoption of the amendment.

Finally, it is argued that the amendment was motivated by the need for an increase in disability benefits due to war conditions and economic crises, that such necessity applies to disabled workmen without regard to the date of their injury, and that therefore a retrospective operation must have been intended. There is nothing on the face of the statute which indicates that the economic effect of the war motivated its enactment, and the amendment was not made a part of a general increase in compensation for all compensable injuries, which might indicate an intent to provide [****163] for such unusual conditions. In [Schmidt v. Wolf Contracting Co., 269 App.Div. 201 \[55 N.Y.S.2d 162\]](#), [**14] affd. 295 N.Y. 748 [65 N.E.2d 568], relied upon by respondents, it was held that a statute increasing both temporary and permanent disability payments for a limited period was intended to operate retrospectively. The court reached its conclusion on the ground that the statute contained an introductory recital "Because of existing conditions due to war" which would have been surplusage had the Legislature intended to restrict the increase to employees injured after the effective date of the amendment. The implication from that decision is clear that if, as in the present case, the statute did not contain the quoted language it would have been construed to apply prospectively only.

Our conclusion is that it does not clearly appear from the language of the amended statute, or by necessary implication, that the Legislature intended it to apply in cases where the injury occurred before the effective date of the enactment. On the contrary, it must be assumed that the Legislature was acquainted with the settled rules of statutory interpretation, and that it would have expressly provided for retrospective operation of the amendment if it had so [**15] intended. Accordingly the commission improperly gave a retrospective effect to the amendment by applying it to claims arising out of injuries occurring prior to the date of its enactment.

The awards are annulled and the causes are remanded for further proceedings in accordance with this opinion.

Dissent By: CARTER

Dissent:

[*128] [***397] CARTER, J. I dissent.

The majority opinion is a product of the reactionary legalistic philosophy of an era preceding the advent of the Workmen's Compensation Laws and is out of harmony with the philosophy underlying the social policy upon which these laws are based. It was because of the prevalence in the courts of this reactionary legalistic philosophy and its devastating effect upon the social and economic welfare of wage earners that Workmen's Compensation Laws were enacted, and their administration was taken away from the courts except for the very limited function of review on legal issues only. This philosophy inheres in the concept that property rights are above personal rights and that laws granting benefits to employees must not be so construed as to affect the status quo adverse to the employer. While this philosophy still has its advocates in our courts and [**16] in other branches of our government, it has lost most of its vigor in recent years due to the effort of leaders in liberal thought to improve the condition of those who are required to work for a livelihood in the great industries of our country. It was this liberal thought which placed in our Constitution and on our statute books the Workmen's Compensation Laws.

Mr. Horovitz in his able and enlightening work on Workmen's Compensation Laws makes the following comment relative to the history, theory and growth of compensation acts: "Before the advent of the factory system, with its gigantic machinery and high speeds, huge mines, mills and other industries, bringing large numbers of workers into close proximity with danger,—back in the days of rural and agricultural life of one hundred or more years ago,—serious injuries were relatively few. Men were closer to their employers.

"If the home servant lost an arm the master, out of human sympathy, often provided doctors, financial help and a readjusted job. If he did not, the servant's only recourse was to sue in the regular common-law courts. Here he

12 Cal. Comp. Cases 123, *128; 1947 Cal. Wrk. Comp. LEXIS 249, **16; 30 Cal. 2d 388, ***397; 182 P.2d 159, ****163

would often wait two or more years for a jury trial. Meantime his limited savings [**17] or public charity bore the burden. Then his lawyer would attempt to show negligence on the part of the employer—only to be defeated in the great majority of cases by the employer's (or his insurer's) defences of contributory negligence, assumption of risk, or the fellow-servant rule. In short, if the worker himself was partly to be blamed, or if a fellow worker and not the employer himself caused the [***398] injury, or if the contract [****164] of employment apparently subjected him to the risk of injury—in any of these three situations the worker lost his case.

"The fellow-servant defense was particularly harmful to workers. In huge factories and work places it was usually the fellow worker, not the boss himself, who caused the accident. By staying out of the factory the employer usually could avoid liability for all injuries to his men.

*"The creation by the courts, therefore, of the fellow-servant defense was hailed by employers with wide acclaim. As stated by one writer: 'Very appropriately, this exception was first announced in South Carolina, then the citadel of human slavery. It was eagerly adopted in Massachusetts, then the center of the factory system, [**18] where some decisions were then made in favor of great corporations, so preposterous that they have been disregarded in every other state without even the compliment of refutation. It was promptly followed in England, which was then governed exclusively by landlords and capitalists.'*

[*129] *"No wonder, then, that 80 per cent of the cases were lost or uncompensated; and in the 20 per cent of successful cases the lawyer's fees, doctor's bills and other expenses often ate up a substantial portion of the award.*

"As workers and their union representatives clamored for amelioration of these outmoded court-made rules, some of the liberal courts invented the doctrine of vice-principal (i.e., a person in superintendence was not a fellow employee, and his negligence was that of the employer); and the legislatures passed Employers' Liability Acts, cutting down the value of some of these three defences. Nevertheless, most of the courts, bound by precedent, continued to grind out proemployer decisions, and the workers were up in arms. Workers and their families had the right to vote. Legislators felt the pressure of their constituents.

*"The workers wanted a system entirely new. It [**19] is but fair to admit that they had become impatient with courts of law. They knew and both economists and jurists were pointing out what is now generally conceded—that two generations ought never to have suffered from the baleful judgments of Abinger and Shaw.' What could be done?*

*"In 1884, Germany, led by Bismarck, had evolved the idea of workmen's compensation legislation. Work injuries for the first time were compensated, not on the basis of negligence [***399] but on their relation to the job. In 1897 England had enlarged the German idea, and had abolished the common law and its amendments and established an entirely new theory—that of workmen's compensation. Liability depended not on who was at fault for the accident, but on whether it arose out of the employment, while the worker was engaged therein. English legal minds evolved the phrase 'personal injury by accident arising out of and in the course of the employment' as the basis of awards. To laymen this simply meant that if the worker was injured at work because of his work he would obtain a certain percentage of his wages during periods of injury-enforced idleness, plus medical care at the employer's (or his [**20] insurer's) expense.*

"From 1902 onward many legislators clamored for a similar change of law in this country. They argued that the mechanization of the country had made injuries inevitable; that industry and not charity or savings should pay for industrial injuries; that simple justice required the abolition of the old common-law defences for industrial injuries.

"Legislate as we may . . . for safety devices the army of the injured will still increase, the price of our manufacturing greatness will still have to be paid in human blood and tears. To speak of the common-law personal injury action as a remedy for this problem is to jest with serious subjects, to give a stone to one who asks for food.'

"A new system was needed, and one that would also help in accident prevention and rehabilitation. Commissions sprang up in many states to study the idea. Massachusetts debated the question for nine years, and when it finally passed its compensation law in 1911, ten other states had already completed the change to compensation.

12 Cal. Comp. Cases 123, *129; 1947 Cal. Wrk. Comp. LEXIS 249, **20; 30 Cal. 2d 388, ***399; 182 P.2d 159, ****164

" [****165] Halted temporarily by three state courts which declared their acts unconstitutional, and then spurred on in 1917 when the Supreme Court of the United [**21] States upheld three different types of acts, the compensation idea spread rapidly. Today 47 out of 48 states (Mississippi standing alone) have compensation acts. In addition, such legislation exists in Alaska, Hawaii and Puerto Rico. Federal workmen's compensation laws now also cover government employees, longshoremen and harbor workers, and private employees in the District of Columbia.

[*130] "*The change was not easily made. Opposition developed from many quarters. Insurance companies or carriers who [***400] made large profits from common-law coverage of employers at first bitterly opposed the adoption of the English system.* For a short while even the labor unions joined the opposition, then turned about and became its most insistent proponents. Employers, fearing large increased costs, added their powerful opposition voices.

"*Unquestionably, compensation laws were enacted as a humanitarian measure, to create a new type of liability,—liability without fault,—to make the industry that was responsible for the injury bear a major part of the burdens resulting therefrom. It was a revolt from the old common law and the creation of a complete substitute therefor, and [**22] not a mere improvement therein. It meant to make liability dependent on a relationship to the job, in a liberal humane fashion, with litigation reduced to a minimum. It meant to cut out narrow common-law methods of denying awards.* It made substitute schemes, or substitute-employer plans, except where expressly permitted in the compensation statute under safeguards, illegal and against public policy; or void because of an element of coercion, or as violating the state's insurance provisions; or as additional to, and not a substitute for workmen's compensation benefits; or construed the policy issued as one under which full workmen's compensation benefits were due." (Injury and Death under Workmen's Compensation Laws by Samuel B. Horovitz, pp. 2–10.) (Emphasis added.)

In the light of the foregoing let us analyze the majority opinion in this case. (1) It is there stated: "The 1945 amendment of [section 4661](#) increased the amount of compensation above what was payable at the date of the injury, and to that extent it enlarged the employee's existing rights and the employer's corresponding obligations." That is not a correct statement as it clearly appears that the amount of compensation [**23] is not increased in all cases. It is *only* where the temporary disability payment exceeds 25 per cent of the permanent disability payment that the latter is increased. (2) It is also stated that the provision in the Workmen's Compensation Act that its provisions be liberally construed cannot indicate a legislative intent to have the amendment applied retroactively for "It would be a most peculiar judicial reasoning which would allow one such doctrine to be invoked for the purpose of destroying the other." There is nothing "peculiar" about the matter. Many situations arise where conflicting legal principles must be rationalized, such as conflicting presumptions [***401] and conflicting rules of statutory construction. To illustrate, we have the rule that statutes in derogation of the common law must be strictly construed yet the four original codes require them to be liberally construed. ([Code Civ. Proc., § 4](#); [Civ. Code, § 4](#); [Pen. Code, § 4](#); [Pol. Code, § 4](#).) In the instant case we have a mere court made rule of statutory construction which conflicts with a provision that, contrary to the statement in the majority opinion that it is similar to provisions in nearly all the statutes, [**24] specifically requires that "this code shall be liberally construed by the courts *with the purpose of extending their benefits for the protection of persons injured in the course of their employment*" ([Lab. Code, § 3202](#)). (Emphasis added.) And all *reasonable doubt* must be resolved in favor of the employees. (*Lumbermen's Mut. Cas. Co. v. Industrial Acc. Com.*, 29 Cal.2d 492 [175 P.2d 823]; *Truck Ins. Exchange v. Industrial Acc. Com.*, 27 Cal.2d 813 [167 P.2d 705].) How can the employee be given protection or doubts resolved in his favor if the amendment is not applied to injuries occurring [****166] prior to the effective date thereof? [**131] While there may be a difference of opinion as to what constitutes a liberal construction, it is nothing short of counterfeit logic to say that the construction contained in the majority opinion falls within that category. The construction there given requires the maintenance of the status quo with respect to all employees who suffered an injury prior to the effective date of the amendment. Such a construction is conservative or reactionary and is the antithesis of a liberal construction. The majority insist upon this construction [**25] because it might injuriously affect employers and insurance carriers. It can hardly be imagined that any provision of the Workmen's Compensation Act could be given a *liberal construction* without adversely affecting an employer who is self-insured or an insurance carrier. The obvious reason for the enactment of [Labor Code section 3202](#) was to benefit injured employees by extending the benefits of the act as far as possible in their favor in order to relieve their financial

distress during the period of disability resulting from an industrial injury. It must be conceded that to so extend such benefits, would injuriously affect the self-insured employer and insurance carriers for employers not self-insured. While this mandate of the Legislature has been disregarded by conservative minded judges in many cases, it is nevertheless a declaration of legislative policy toward the interpretation of the act and should [***402] be given consideration by the courts, and if it had been given consideration in these cases, the awards in favor of the injured employees here involved would be affirmed.

Since the administration of the Workmen's Compensation Act affects the social and economic welfare [**26] of injured employees, it is obvious that changing economic conditions, such as wages and living costs, play an important part in accomplishing the objectives contemplated by the Legislature which enacted the law. It must be assumed that the Legislature had in mind these conditions at the time the law was enacted and at the time each amendment thereto was adopted. The sole problem that the Legislature was considering on each of these occasions was the welfare of the injured workman who had suffered disability arising out of an industrial injury. Certainly when it adopted the amendment here involved it had in mind and intended that its provisions should operate to the benefit of those who had suffered disability and whose welfare required the economic advantage afforded thereby. Any other assumption would impute to the Legislature a motive and desire to discriminate against those who had suffered injuries prior to the effective date of the amendment, but whose permanent disability status had not yet been determined. There is no justification whatsoever for such imputation. Obviously the economic welfare of such injured employees would be as greatly affected as one whose injury [**27] occurred thereafter. To my mind it is more reasonable to assume that the motivating force behind the enactment of the amendment was the necessity for improving the economic welfare of those presently disabled than those who might suffer disability from injuries occurring in the future. It must be conceded that the amendment here involved was adopted in the light of economic conditions as they existed at that time and that its objective was to grant immediate relief to those who were found entitled to the benefits provided for therein.

(3) In endeavoring to distinguish [Schmidt v. Wolf Contracting Co., 269 App.Div. 201 \[55 N.Y.S.2d 162\]](#) (hereafter more fully discussed), the majority opinion states that the legislation there expressly declared that it was necessary to increase the compensation because of the great advance in the cost of living, while here the Legislature made no such declaration. [*132] Justice may be blind but it should not be also dumb. Why should the Legislature declare that which every one knows to exist? Certainly a legislative declaration of the purpose [***403] of legislation is not necessary where the conditions giving rise to it are patent to all. Furthermore, [**28] this court may take judicial notice of the greatly decreased purchasing power of the dollar since 1941.

(4) It is said that "an industrial injury is the foundation of rights and liabilities under workmen's compensation laws." On the contrary the industrial *disability* is the foundation for liability. Merely receiving [****167] an injury does not authorize compensation. There must be a disability.

(5) It is asserted that the employer's substantive rights will be adversely affected by the amendment if it is retroactively applied. However, where the disability occurs *after* the amendment became effective, there is no retroactive application regardless of the date of the injury. There is nothing upon which the amendment can operate until there is a disability. This may occur many months, even years, after the injury. (See *Colonial Ins. Co. v. Industrial Acc. Com.*, 29 Cal.2d 79 [172 P.2d 884]; *Lumbermen's Mut. Cas. Co. v. Industrial Acc. Com.*, 29 Cal.2d 492 [175 P.2d 823]; *Pacific Emp. Ins. Co. v. Industrial Acc. Com.*, 19 Cal.2d 622 [122 P.2d 570, 141 A.L.R. 798].) Furthermore, in the interpretation of the amendment here involved, the majority opinion [**29] overlooks at least one controlling factor. It overlooks, and completely disregards, the proposition that the amendment does not add or create an entirely new liability or obligation but simply changes the method of computing permanent disability awards. In other words, there will be many cases, in fact a great majority of cases in which there is both a temporary and permanent disability award, which will not be affected by the amendment, as the amount of temporary disability must exceed 25 per cent of the permanent disability award before the amendment comes into operation. Suppose that instead of this amendment, the Legislature had provided that where permanent disability awards are payable in installments, future installments should bear interest from the date of the award; or suppose the Legislature should provide that where a compensation claim is contested by an employer or insurance carrier and an award is made in favor of the applicant, he is entitled to an allowance for attorney's fees to be paid by the

employer or insurance carrier. Certainly such an amendment would be held to apply to pending cases in which awards had not yet been made at the time of the effective date [**30] of the [***404] amendment. This proposition is sustained by the case of *Funkhouser v. Preston Co.*, 290 U.S. 163 [54 S.Ct. 134, 78 L.Ed. 243], which holds that a statute passed allowing interest on unliquidated damages for breach of a contract where none had existed before could be validly applied to causes of action which had previously accrued. Let us assume further that some new discovery is made in the field of medical science which although expensive, could restore those afflicted with certain injuries to normalcy, and the Legislature should make provision in the Workmen's Compensation Act that employees so afflicted would be entitled to such treatment at the expense of the employer or insurance carrier. Could it be said that such an amendment would not be applicable to pending cases where the employee was still receiving medical treatment at the expense of the employer or insurance carrier and was still under the jurisdiction of the Industrial Accident Commission? I do not believe that the most reactionary mind could say that such a provision would not be applicable to [*133] pending cases. In other words, such amendments operate upon existing liability, and so long as [**31] such liability exists, amendments increasing or reducing liability should operate in presenti regardless of when the injury occurred which created the liability.

Turning to the cases and looking at the matter affirmatively, I believe only one result is reasonable. The amendment is set forth in the majority decision. In these cases the Industrial Accident Commission made awards after the effective date of the amendment computing and allowing compensation for the permanent disability suffered by said employees in accordance with the amendment rather than the preexisting law although the industrial injuries which ultimately resulted in the permanent disability occurred before the effective date of the amendment. Typical of the cases here involved is the one in which the applicant-employee Charlesworth suffered a compensable injury in 1942. Compensation was paid until January 3, 1945. After hearing in August, 1945, on application for adjustment of compensation, the commission, in March, 1946, found that \$ 3,825 in compensation had been paid; that the employee had 64 per cent permanent disability and was entitled therefore to \$ 6,400; that the compensation insurance carrier was entitled [**32] to a credit of only 25 per cent of the \$ 6,400, [****168] or \$ 1,600, requiring it to pay \$ 4,800 for the permanent disability in addition to that already paid for the temporary disability, or a total of \$ 8,625. Under the law prior to the amendment it would pay a [***405] total of \$ 6,400 inasmuch as the permanent disability award was greater than the temporary disability award of \$ 3,825, or, stated another way, it could deduct the sum of \$ 3,825 from the sum of \$ 6,400, leaving a balance of \$ 2,575.

The major contentions of petitioners (corporate insurance carriers and self-insured employers) are: (1) that the commission has given retroactive effect to the amendment which is contrary to the rule of statutory construction that a statute will not be construed to operate retrospectively unless it is expressly made so to do, and (2) that giving such effect to the amendment it is unconstitutional, or at least, its validity is doubtful and for that reason it should be construed as prospective in operation.

It is no doubt true that there exists the firmly established rule of statutory construction that a statute will not be given a retroactive effect unless the legislation requires [**33] it, and that in cases where, to apply an act retroactively, would impair the obligation of a contract, destroy a vested right or violate the due process clause, such rule may be said to have a constitutional law aspect. The latter aspect really involves a question of whether there has been an impairment of a constitutional right, the same as in any other case, and the retroactive feature as a factor is of small consequence. Considering only, however, for the present, its pertinency as a rule of interpretation of legislation, and assuming that if the amendment here involved is applied to a permanent disability where the injury occurred prior to the effective date of the amendment, it is being given retroactive effect, such rule is nothing more than one element in ascertaining the correct effect and scope of the operation of the legislation. There are several other factors which are of controlling significance.

First, the wording of the amendment, together with the portion which is not amended, may reasonably be said to apply even though the injuries occurred prior to its effective date. The old provision with reference to deducting temporary disability payments from permanent disability [**34] payments remains the same. An exception is established [*134] by the amendment, that is, that where the temporary disability payment is 25 per cent or more of the permanent disability award, then 75 per cent of the latter is payable in addition to the temporary disability payment. In other words, the right of deduction is not wholly abrogated. It is still effective where the required

percentage [***406] is not reached. In the instant cases the awards of the commission were not made until *after* the amendment, and it was not until then that there existed an occasion for applying the computation authorized by the amendment. In [San Bernardino County v. Industrial Acc. Com., 217 Cal. 618, 627 \[20 P.2d 673\]](#), this court considered the effect of an amendment to the workmen's compensation law which authorized the commission to apply against the employer's liability for compensation, the amount of any recovery by the employee from a third party tortfeasor where the recovery was by settlement instead of legal action. Prior thereto the law provided for the assertion of a lien by the employer where there was an action to recover by the employee but no provision was made as to settlement [**35] out of court. In deciding that the amendment did apply to a case *where the injury occurred prior to the effective date of the amendment, the court said:* "In 1931, following the decision in the Jacobsen case, the legislature amended section 26 of the Workmen's Compensation Act to provide expressly for the power denied in that case. The relevant provision now reads: 'The Commission is empowered to and shall allow a credit to the employer to be applied against his liability for compensation the amount of any recovery by the employee for his injury, either by settlement or after judgment, that has not theretofore been applied to reimburse the employer.' While *the injury to Mrs. Allen was sustained prior to the enactment of this amendment, the decision and award of the Commission, [****169] which are here attacked, were made after the amendment went into effect.* How, then, could the Commission disregard it in arriving at its determination? *As a matter of interpretation, the amendment in its language plainly applies to any case before the Commission at the time of its effective operation.* There is nothing in its wording to suggest that it was not intended to apply [**36] to cases where the injury occurred prior thereto. Nor is there any policy opposed to such application. The amendment was designed to permit the Commission to do what the court theretofore alone could do—prevent double recovery by crediting the employer with the employee's recovery against the third party. Its application in the instant case would avoid a multiplicity of actions and the unfair result already discussed." (Emphasis added.) Likewise in the instant case the language of the amendment (being nothing more than a method of computing the disability payments, temporary and permanent, with respect to their relation to each [***407] other) should apply to awards made after the amendment even though the injuries for which the awards were made, were previous thereto. The time to make that computation is the time of the award, not the time of the injury.

Second, the workmen's compensation law being social legislation, especial attention must be given to the purposes and objects sought to be achieved thereby. It is fundamental that the object sought to be achieved and evil to be remedied are compelling considerations in statutory interpretation. ([Rock Creek etc. Dist. \[**37\] v. County of Calaveras, 29 Cal.2d 7, 10 \[172 P.2d 863\]](#), and cases there cited.) The policy underlying the workmen's compensation law is set forth in the Constitution. "The Legislature is hereby . . . vested with *plenary* power, unlimited by any provision of this Constitution, to create, and enforce a complete [*135] system of workmen's compensation, by appropriate legislation, and in that behalf to create and enforce a liability on the part of any or all persons *to compensate* any or all of their workmen for injury *or disability*, . . . A complete system of workmen's compensation includes *adequate* provisions for the *comfort, health and safety and general welfare* of any and all workmen and those dependent upon them for support to the extent of *relieving from the consequences of any injury* . . . sustained by workmen in the course of their employment, irrespective of the fault of any party; . . . full provision for such medical, surgical, hospital and other remedial treatment as is requisite to cure and relieve from the effects of such injury; full provision for adequate insurance coverage against liability to pay or furnish compensation; . . . all of which [**38] matters are expressly declared to be the social public policy of this State, binding upon all departments of the State government." ([Cal. Const., art. XX, § 21.](#)) (Emphasis added.) The essence of workmen's compensation law is to alleviate the effects of the disability. This court said: "The primary purpose of industrial compensation is to insure to the injured employee and those dependent upon him adequate means of subsistence while he is unable to work and *also to bring about his recovery as soon as possible in order that he may be returned to the ranks of productive labor.* By this means society as a whole is relieved of the burden of caring for the injured workman and his family, and the burden is placed upon the industry. That the injured workman and his dependents may be cared for, compensation in the form of disability benefits is provided for by [***408] the act approximating the wages earned by the employee and varying with the degree of disability and dependency." (Emphasis added.) ([Union Iron Wks. v. Industrial Acc. Com., 190 Cal. 33, 39 \[210 P. 410\]](#).) It must be assumed that the Legislature had the foregoing principles in mind when it amended [section 4661](#), [**39] and having that knowledge, it is not to be supposed that it intended to unnecessarily discriminate between groups of workmen suffering permanent disabilities whose injury happened to occur before the effective date of the amendment and those subsequent in time. Such

intention is not to be imputed to the Legislature unless absolutely necessary. The Legislature is not presumed to enact harsh, discriminatory or injurious legislation. (See [Schmidt v. Wolf Contracting \[****170\] Co., 269 App.Div. 201 \[55 N.Y.S.2d 162\]](#), affirmed 295 N.Y. 748 [65 N.E.2d 568].) There is no magic in making the date of the injury the time for the commencement of the operation of the amendment. It would be equally as plausible to argue that the date of employment is the pivotal factor. The essence of the matter is that industry rather than society as a whole must bear the burden of assisting in the economic and vocational restoration or rehabilitation of workmen suffering from industrial disability. It is the disability that is of first importance. Undoubtedly the Legislature recognized the need for a more adequate provision to enable the permanently disabled employee to rehabilitate himself, [**40] reshape his vocational approach to accommodate his disability, and realized that the present high prices of commodities (a fact of which judicial notice may be taken) made it imperative that a greater allowance should be made for permanent disability. While it may have been that in normal times the temporary disability payments would in some measure supply the means necessary to meet the problem of permanent disability, and hence justify the full deduction of the temporary payment from the permanent award, the present decreased purchasing power of the dollar makes pressing and urgent the immediate necessity of increasing the compensation [*136] payable to the permanently disabled workmen. If the amendment is to be confined to injuries occurring after its operative date, little is accomplished toward the end to be achieved. Running through the whole policy of workmen's compensation is the concept of the social advantages of caring for those disabled in industry. Such policy is pregnant with the thought that the Legislature may adjust the benefits conferred to meet changing circumstances [***409] and conditions, a principle with which employers and compensation insurance carriers are or [**41] should be cognizant and which they should contemplate. Indeed, broadly speaking, the Legislature has foreshadowed its intent in respect to the foregoing principle. The law has consistently provided: "The commission has continuing jurisdiction over all its orders, decisions, and awards made and entered under the provisions of this division. At any time, upon notice and after an opportunity to be heard is given to the parties in interest, the commission may rescind, alter, or amend any such order, decision, or award, good cause appearing therefor. . . . Such power includes the right to review, grant or regrant, diminish, increase or terminate, within the limits prescribed by this division, any compensation awarded, upon the grounds that the disability of the person in whose favor such award was made has either recurred, increased, diminished, or terminated." ([Lab. Code, § 5803](#).) While I do not intimate that under that section the commission could change the law for computing compensation, it is evident by the amendment presently discussed that the Legislature was merely expanding the power of the commission under [section 5803](#) to enable it more adequately to meet conditions as they [**42] arise and circumstances as they change, all to attain the fulfillment of the basic social policy implicit in the workmen's compensation law. It must be remembered that we are not confronted here with a radical change in the law. The workmen's compensation law has always provided for compensation for permanent disability. The amendment is not imposing an obligation that did not previously exist. The only change is the method of computing the amount—the effect of and relation between payments for temporary and permanent disability.

Third, it is basic that the workmen's compensation laws should be liberally construed to the end that benefits shall be secured to the workmen. "The provisions of [workmen's compensation laws] . . . shall be liberally construed by the courts with the purpose of *extending their benefits for the protection of persons* injured in the course of their employment." (Emphasis added.) ([Lab. Code, § 3202](#).) (See cases collected 27 Cal.Jur. 260, and Supp.) This is an express mandate by the Legislature that the benefits of the statute shall be extended, that is, construed to secure to all workmen the benefits provided for therein. Certainly when we have an amendment [**43] such as is here involved, which may be interpreted to include [****171] or to exclude, arbitrarily, benefits to workmen [***410] suffering permanent disability, and the Legislature has by [section 3202](#) instructed this court that the rule of inclusion rather than exclusion should apply, the determination by the majority that the method (fixed by the amendment) for computing the payments for permanent disability does not apply to persons who are found so disabled merely because the injury chanced to occur before the operative date of the amendment, gives the amendment a restrictive effect—gives it a strict interpretation rather than extending the benefits thereof and giving it a liberal interpretation. Thus when we consider all the factors heretofore [*137] discussed, together with the principles presently considered, there is no sound basis for the application of the rule that it is presumed the Legislature intends a statute to operate prospectively only. The clear import is to the contrary.

12 Cal. Comp. Cases 123, *137; 1947 Cal. Wrk. Comp. LEXIS 249, **43; 30 Cal. 2d 388, ***410; 182 P.2d 159, ****171

A significant recent case bearing upon the problem is [Schmidt v. Wolf Contracting Co., 269 App.Div. 201 \[55 N.Y.S.2d 162\]](#), supra, affd. 295 N.Y. 748 [65 N.E.2d 568]. There the New York Legislature [**44] on April 1, 1944, amended the law dealing with maximum and minimum compensation payments for permanent and temporary disability to provide that: "Because of existing conditions due to the war compensation for permanent or temporary total disability may be in excess of twenty-five dollars but shall not exceed twenty-eight dollars per week for any period of disability arising out of claims accruing during the year commencing June first, nineteen hundred forty-four." (P. 165 [55 N.Y.S.2d].) It was contended that a claimant who became totally disabled before June 1, 1944, was not entitled to the increase in compensation authorized by the amendment commencing on June 1, 1944. In denying that contention the court said, in line with the foregoing discussion herein: "We have repeatedly said, and so has the Court of Appeals, that the Workmen's Compensation Law is classed as remedial legislation and hence a spirit of liberality should characterize its interpretations in order to effectuate its intent and purpose.

"We are not concerned with the wisdom or the justice of the amendment in question. Our only duty is to ascertain the meaning and intent of the lawmakers. *The intention of the [**45] lawmakers is the law. That intention is to be gathered from the necessity or the reason of the enactment.* In the construction of a statute we are not confined to the literal meaning of the words. When the intention can be disclosed from the statute, words may be modified or altered so as to [***411] obviate all inconsistency with such intention. To give this amendment the construction which appellants urge would produce an absurd and illogical result. 'Every interpretation that leads to an absurdity should be rejected.' [Flynn v. Prudential Insurance Co. of America, 207 N.Y. 315, 318, 100 N.E. 794, 795.](#)

"In [People v. Ryan, 274 N.Y. 149, 152, 8 N.E.2d 313, 315](#), the Court said:

"In the interpretation of statutes, the spirit and purpose of the act and the objects to be accomplished must be considered. The legislative intent is the great and controlling principle. Literal meanings of words are not to be adhered to or suffered to "defeat the general purpose and manifest policy intended to be promoted," all parts of the act must be read and construed together for the purpose of determining the legislative intent, and, if the statute is ambiguous and two constructions [**46] can be given, the one must be adopted which will not cause objectionable results or cause inconvenience, hardship, injustice, or mischief, or lead to absurdity.' . . .

"A reading of the amendment clearly indicates to us that the Legislature intended that *it should apply to injuries sustained prior to June 1, 1944*, if disability is present and payments are due during the year commencing on that date.

"It is unreasonable to assume that the Legislature intended that a workman who suffers injury on May 31, 1944, is any less affected by the phrase 'because of existing conditions due to the war' than one injured on June 1st of the same year. The disability, if any, in both cases would be present during the year commencing [****172] June 1st. Both workmen [*138] would be subject to the same existing conditions due to the war and during the same period of time. We cannot attribute to the Legislature an intent to make such an unfair discrimination.

"It is not the injury which must be sustained during the year commencing June 1st but the disability or incapacitation which must occur in order to bring the workman within the provisions of the amendment.

"In enacting the amendment the Legislature [**47] recognized the existence of an emergency, 'because of existing conditions due to the war' and provided a remedy. If the Legislature had intended to restrict the increase in awards to workmen injured after June 1st, it could have accomplished that result without the use of the words 'because of existing conditions due to the war.' As to those employees the words are superfluous. We should not assume that the lawmakers inserted [***412] those words in the amendment for no useful purpose. . . .

"When the amendment is read in the light of its spirit and purpose and consideration is given to the condition sought to be remedied as well as the history of the times, it is clear that the legislative intention was to make it applicable to claims for disability accruing during the year commencing June 1st.

12 Cal. Comp. Cases 123, *138; 1947 Cal. Wrk. Comp. LEXIS 249, **47; 30 Cal. 2d 388, ***412; 182 P.2d 159, ****172

"It is not the original claim but the disability which is subject to the time limitation. When the injuries are suffered the period of disability is uncertain. A workman may sustain injuries with no resultant disability in which case no compensation is due. A disability does not arise out of a claim. It is the claim which arises out of the disability.

"If the Legislature intended to [**48] limit the force of the amendment, as suggested by appellants, unquestionably it would have used language indicating unequivocally that the increased benefits would be applicable only to those sustaining injuries during the specified year. We think it is unreasonable to assume that the Legislature intended to confer benefits on a small group of workmen sustaining injuries during the year beginning June 1st. . . .

"The Workmen's Compensation Law creates the liability under which compensation is required to be paid by the employer to an injured employee or, in the event of his death, to his dependents. The obligation is purely statutory and does not arise out of an employer-employee relationship. Liability imposed by the Act is neither *ex contractu* ([Matter of Smith v. Heine Boiler Co., 224 N.Y. 9, 119 N.E. 878](#), Ann.Cas. 1918D, 316) nor *ex delicto* ([Matter of Doey v. Clarence P. Howland Co., 224 N.Y. 30, 120 N.E. 53](#)).

"The spirit and purpose of the amendment are of material assistance in its interpretation. . . .

"The history of the times and conditions of the country are helpful in construing the amendment. . . .

"In the consideration of the mischief to be remedied [**49] by the amendment the intention of the Legislature becomes apparent." (Emphasis added.)

In this state several cases have given consideration to the question as to what events are controlling in determining the effective date of changes in the workmen's compensation law. In [Hendrickson v. Industrial Acc. Com., 215 Cal. 82 \[8 P.2d 833\]](#), it was conceded by the commission that an amendment increasing the [*139] compensation by 10 per cent when the employer [***413] was wilfully uninsured did not apply to an injury occurring prior to the effective date of the amendment. The case does not represent a holding, and moreover does not constitute a practice on the part of the commission to interpret amendments as prospective only inasmuch as the amendment provided for what was in the nature of a *penalty* against the employer for failure to insure—a punishment to induce him to obey the law rather than, as in the instant case, a furtherance of the policy of the law to extend and make more adequate payments for disability, thus relieving society as a whole of the burden. While it is true that liability for increased compensation imposed in such cases as the wilful misconduct of the employer [**50] is compensation to the employee in a broad sense [****173] rather than a penalty ([E. Clemens Horst Co. v. Industrial Acc. Com., 184 Cal. 180 \[193 P. 105, 16 A.L.R. 611\]](#)), such liability does not have to do with giving adequate compensation to the employee measured by the cost of attaining rehabilitation, as exists in the case at bar, and thus there is not the same reason for applying it to past injuries. [Pacific Gas & Electric Co. v. Industrial Acc. Com., 180 Cal. 497 \[181 P. 788\]](#), and [Worswick Street Pav. Co. v. Industrial Acc. Com., 181 Cal. 550 \[185 P. 953\]](#), hold merely that an amendment to the Constitution did not purport to ratify or correct an invalid portion of the statute. The general proposition was stated in [Hyman Bros. Co. v. Industrial Acc. Com., 180 Cal. 423 \[181 P. 784\]](#), without any discussion of the controversy involved, that is, it does not appear what contention was made on the subject or what changes if any had been made in the law. In [Great Western Power Co. v. Pillsbury, 170 Cal. 180 \[149 P. 35\]](#), the statute (Stats. 1911, p. 796) in force when the injury occurred was applied but the new act (Stats. 1913, p. 279) specifically [**51] provided that its compensation provision should not apply to any injury sustained prior to its effective date. If anything, this indicates that when the Legislature desires to have the act or amendments limited to future injuries it makes express provision therefor. [Carlsen v. Diehl, 57 Cal.App. 731 \[208 P. 150\]](#), is not in point as it dealt with a procedural matter. In any event it did not involve the extension of the benefits of the act. [Holmberg v. City of Oakland, 55 Cal.App. 270 \[203 P. 167\]](#), involving prior rights, did not consider the rule of liberal construction, dealt with an entirely new liability for benefits for injuries, and spoke as [***414] of the future. There was no dispute concerning the matter in [Bay Shore L. Co. v. Industrial Acc. Com., 36 Cal.App. 547 \[172 P. 1128\]](#). In [Reynolds v. E. Clemens Horst Co., 35 Cal.App. 711 \[170 P. 1082\]](#), the old law was applied on the theory that the new law by a savings clause continued in effect for the prior injuries. In its holding that the employee has a vested right after the injury by reason of the old law which was repealed, the court ignored the well-established rule that there is no vested [**52] right in a right created by statute. (See [Feckenscher v. Gamble, 12 Cal.2d 482 \[85 P.2d 885\]](#).)

12 Cal. Comp. Cases 123, *139; 1947 Cal. Wrk. Comp. LEXIS 249, **52; 30 Cal. 2d 388, ***414; 182 P.2d 159, ****173

There are cases from other jurisdictions holding that amendments to workmen's compensation laws dealing with the amount of or liability for compensation apply only to injuries occurring subsequent to their effective date. (See 71 C.J. 334, 84 A.L.R. 1244, and supplemental decisions; 40 A.L.R. 1473, and supplemental decisions.) I believe, [*140] however, that the social necessity of flexibility in the functioning of workmen's compensation laws, heretofore discussed, was not given sufficient consideration by the courts in deciding those cases.

It is contended that the savings clause in the Labor Code (which contains the workmen's compensation laws) indicates a legislative intent that the amendment is to operate only on injuries occurring subsequent to its effective date. "No action or proceeding commenced before this code takes effect, and no right accrued, is affected by the provisions of this code, but all procedure thereafter taken therein shall conform to the provisions of this code so far as possible." ([Lab. Code, § 4.](#)) Manifestly that provision was designed to cover nothing more than [**53] the original code, inasmuch as many repeals of statutes were effected by it, most of which were restated in the code. It was to prevent the adoption of the code from disturbing existing conditions inasmuch as merely a revision and codification was intended rather than a change in the law. Nor does the provision: "Whenever any reference is made to any portion of this code or of any other law of this State, such reference shall apply to all amendments and additions thereto now or hereafter made," ([Lab. Code, § 9](#)) give a different meaning to [section 4.](#) [Section 9](#) was aimed at situations where reference is made in one law to another as affecting or governing the procedure or rights provided for in the former. Thus it eliminates the uncertainty of whether the law to [****174] which reference was made would be considered as it existed at the time of the reference or as subsequently amended. Moreover, [***415] as heretofore seen, because of the nature and basis of the law here involved the rights do not become static.

It is further asserted that the commission having interpreted the amendment as not applying to previous injuries from September, 1945, to January, 1946, is a pertinent [**54] factor in interpretation. But the time was short and the rule is established that: "But where there is no ambiguity and the interpretation is clearly erroneous, such administrative interpretation does not give legal sanction to a long continued incorrect construction. The administrative interpretation cannot alter the clear meaning of a statute." ([California Drive-In Restaurant Assn. v. Clark](#), [22 Cal.2d 287, 294 \[140 P.2d 657, 147 A.L.R. 1028\]](#).)

It is contended that to apply the amendment to previous injuries is unconstitutional as an impairment of the obligation of contracts, deprivation of vested rights, and a taking of property without due process of law contrary to both the state and federal Constitutions. There is no sound basis for this contention. From the standpoint of the self-insured employer there is no contract. The existing law with relation to the compensation payable to his employees is not a part of the employment contract. If it were, the date of the employment rather than of the date of the injury would be the pivotal time with respect to the law applicable thereto. The obligations and benefits under the workmen's compensation law in California are [**55] purely statutory, regulating the status of employer and employee and have no contractual basis. ([Alaska Packers Assn. v. Industrial Acc. Com.](#), [1 Cal.2d 250 \[34 P.2d 716\]](#); [Alaska Packers Assn. v. Industrial Acc. Com.](#), [294 U.S. 532 \[55 S.Ct. 518, 79 L.Ed. 1044\]](#); [Quong Ham Wah Co. v. Industrial Acc. Com.](#), [184 Cal. 26 \[192 P. 1021, 12 A.L.R. 1190\]](#); [North Alaska Salmon Co. v. Pillsbury](#), [174 Cal. 1 \[162 P. 93, L.R.A. 1917E 642\]](#); [Mark v. Industrial Acc. Com.](#), [29 Cal.App.2d 495 \[84 P.2d 1071\]](#).) [*141] Insofar as the corporation insurance carriers are concerned, their policies, by force of regulation under the Insurance Code, are uniform in providing (or an equivalent thereof): "The Contract. The obligations of Paragraph One (a) of the policy to which this endorsement is attached, include such Workmen's Compensation Laws as are herein cited and described and none others.

"Divisions IV and V, Labor Code of the State of California (except the increase in any award under the provisions of Section 4553 thereof, . . .) and all laws amendatory thereof, [***416] or supplementary thereto which may be or become effective while this policy is in force. All [**56] the foregoing, subject to such exceptions, is, for the purpose of this insurance, called the Workmen's Compensation Law. [Emphasis added.]

"It is further understood and agreed that (subject to the approval of the Insurance Commissioner), the rates of premium are subject to change, if, during the term of this Policy, any amendments affecting the benefits provided by the Workmen's Compensation Laws become effective; such change, if any, to be expressed by an endorsement naming the effective date thereof." Thus the insurance carriers are in no position to complain. Their policies

12 Cal. Comp. Cases 123, *141; 1947 Cal. Wrk. Comp. LEXIS 249, **56; 30 Cal. 2d 388, ***416; 182 P.2d 159, ****174

contemplate changes in the law. True, such policies refer to amendments to the workmen's compensation law which become effective while the policies are in force. It may be that the term of such a policy (the term which the premium payment covered) would have expired before the amendment but the policy would still be in force in the sense that the obligation to pay compensation for any disability would continue to exist as long as it was related to an injury occurring during the term of the policy. It cannot be seriously doubted that liability under the policy continues after its specified term or premium [**57] period as to disabilities having their inception during the term. The only right which could be claimed to be vested is one to have all payments for temporary disability deducted from the permanent disability award in every case, instead of in only some of the cases, and to a partial extent as is permitted [****175] by the amendment. Limiting the extent of the amount of temporary disability payments that may be deducted from permanent disability awards was merely a means to assure that the employee would obtain compensation more nearly consonant with the aims and objects of the workmen's compensation law in the light of changing conditions. It is analogous to enactments increasing or diminishing the damages recoverable in ordinary actions. Retroactive application of such enactments is not unconstitutional. In *Funkhouser v. Preston Co.*, 290 U.S. 163 [54 S.Ct. 134, 78 L.Ed. 243], a statute was passed allowing interest on unliquidated damages for breach of contract where none had existed before. The court held that it could be validly applied to causes of action which had previously occurred, stating: "The statute in question concerns the remedy and does not disturb the [**58] obligations of the contract. . . . The contractual obligation of appellants was to take and pay for the described [***417] articles; and the law, in force when the contract was made, required that in case of breach appellants should make good the loss sustained by the appellee. *The ascertainment of that loss, and of what would constitute full compensation, was a matter of procedure within the range of due process in the enforcement of the contract.* 'To enact laws providing remedies for a violation of contracts' and to alter or enlarge those remedies from time to time,' was within the competency of the legislature. *Waggoner v. Flack, supra.* [188 U.S. 595 (23 S.Ct. 345, 47 L.Ed. 609).] The mere fact that [*142] such legislation is retroactive does not bring it into conflict with the guarantees of the Federal Constitution (*League v. Texas, supra, p. 161* [184 U.S. 156 (22 S.Ct. 475, 46 L.Ed. 478)]), and when the action of the legislature is directed to the enforcement of the obligation assumed by the parties and to the giving of suitable relief for non-performance, it cannot be said that the obligations of the contract have been impaired. The parties make their contract [**59] with reference to the existence of the power of the State to provide remedies for enforcement and to secure adequate redress in case of breach. (*Henley v. Myers, supra*, [215 U.S. 373 (30 S.Ct. 148, 54 L.Ed. 240)].)" (P. 167.) Likewise in the instant cases, the object of the workmen's compensation laws is and always has been to afford full and adequate compensation to injured workmen, and knowledge of such object should be imputed to employers and insurance carriers. The ascertainment of the loss sustained—the measure of compensation—may well be a matter of procedure. (See, also, to the same effect, *United States v. Standard Oil Co. of California*, 21 F.Supp. 645; *Fechenscher v. Gamble*, 12 Cal.2d 482 [85 P.2d 885].)

My conclusion in these cases need not rest alone upon the foregoing discussion. There is a larger and more significant principle involved. Even assuming that there are contract and vested rights involved, yet the amendment is a valid exercise of the police power. The validity of workmen's compensation laws is unquestioned. The social purposes and aims fall within the general welfare scope of the police power. As we have seen above, the [**60] present and urgent need for more adequate and nondiscriminatory compensation for permanent disability to assist in the vocational and economic rehabilitation of the disabled workmen is clear. The nature of workmen's compensation laws is such that a reserved power on the [***418] part of the Legislature to meet current and future exigencies arising from changing conditions should be contemplated. In an overall sense nothing really new has been added by the amendment. Rather the benefits have been extended to more fully accomplish that which has already been done in part. The language in *Home Building & Loan Association v. Blaisdell*, 290 U.S. 398, 434 [54 S.Ct. 231, 78 L.Ed. 413, 88 A.L.R. 1481], is apt: "Not only is the constitutional provision qualified by the measure of control which the State retains over remedial processes, but the State also continues to possess authority to safeguard the vital interests of its people. It does not matter that legislation appropriate to that end 'has the result of modifying or abrogating contracts already in effect.' *Stephenson v. Binford*, 287 U.S. 251, 276 [53 S.Ct. 181, 77 L. [****176] Ed. 288, 87 A.L.R. 721]. Not only are [**61] existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worth while,—a government which retains adequate

12 Cal. Comp. Cases 123, *142; 1947 Cal. Wrk. Comp. LEXIS 249, **61; 30 Cal. 2d 388, ***418; 182 P.2d 159, ****176

authority to secure the peace and good order of society. This principle of harmonizing the constitutional prohibition with the necessary residuum of state power has had progressive recognition in the decisions of this Court. . . . The economic interests of the State may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts. . . . The question is not whether the legislative action affects contracts incidentally, or directly or indirectly, but whether the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end. . . . What has been said on that point is also applicable to the contention presented under the due [*143] process clause." In [Schmidt v. Wolf Contracting Co.](#), [**62] *supra*, 55 [N.Y.S.2d 162](#), heretofore discussed on the question of the interpretation of the amendment, the contention of unconstitutionality was also made. The court answered that contention as follows: (P. 169) "Liability under the Workmen's Compensation Law does not arise out of contract. That liability has its origin not in contract but in legislative fiat decreed in accordance with constitutional mandate and hence does not violate the contract clause of the United States Constitution.

[***419] "Even if it be assumed that liability under the Workmen's Compensation Laws is contractual, the amendment is not thereby violative of the provisions of the Constitution of the United States. The police power of the state may be exercised to affect the due process of law clause as well as the impairment of contract clause of the Federal Constitution.

"The subject matter of workmen's compensation reposes within the control of the Legislature.

"A law enacted pursuant to rightful authority is proper, and private contracts are entered into subject to that governmental authority. [Norman v. Baltimore & Ohio Railroad Co.](#), 294 U.S. 240, 55 S.Ct. 407, 79 L.Ed. 885, 95 [A.L.R. 1352](#); [**63] [Union Dry Goods Co. v. Georgia Public Service Corporation](#), 248 U.S. 372, 39 S.Ct. 117, 63 [L.Ed. 309](#), 9 [A.L.R. 1420](#); [Louisville & N. R. Co. v. Mottley](#), 219 U.S. 467, 31 S.Ct. 265, 55 L.Ed. 297, 34 [L.R.A., N.S., 671](#).

"The constitutional prohibition that no state shall pass any laws which shall deprive a person of life, liberty or property without due process is not absolute. [Matter of People v. Title & Mortgage Guarantee Co. of Buffalo](#), 264 [N.Y. 69](#), 190 [N.E. 153](#), 96 [A.L.R. 297](#); [Home Building & Loan Assn. v. Blaisdell](#), 290 U.S. 398, 54 S.Ct. 231, 78 [L.Ed. 413](#), 88 [A.L.R. 1481](#).

"In the case of [Sliosberg v. New York Life Insurance Company](#), 244 [N.Y. 482](#), at page 497, 155 [N.E. 749](#), at page 755, in discussing the question of impairment of the obligation of contract the court said:

"All contracts are made subject to the exercise by government of a sovereign right to legislate for the protection of "the lives, health, morals, comfort and general welfare of the people." [Manigault v. Springs](#), 199 U.S. 473, 26 S.Ct. 127, 50 L.Ed. 274. That the government may be required, in times of public stress, so to legislate as to nullify private contracts, [**64] is an implied term of the law of every contract, so that such legislation, if enacted, does not impair the obligation of the contract within the meaning of the limitation. [Marcus Brown \[Holding\] Co. v. Feldman](#), 256 U.S. 70, 41 S.Ct. 465, 65 L.Ed. 877.'

"The amendment in question was enacted in the exercise of the police power of the state and hence violates neither its constitution nor the Federal Constitution. The principle of workmen's compensation is the promotion of public good. [Matter of Petrie](#), *supra* [215 [N.Y. 335](#), 109 [N.E. 549](#)]; [Matter of Post v. Burger & Gohlke](#), 216 [N.Y. 544](#), 111 [N.E. 351](#), Ann.Cas. [***420] 1916B, [****177] 158; [New York Central R. Co. v. White](#), 243 U.S. 188, 37 S.Ct. 247, 61 L.Ed. 667, L.R.A. 1917D, 1, Ann.Cas. 1917D, 629.

"In the case of [Guttag v. Shatzkin](#), 230 [N.Y. 647](#), at page 650, 130 [N.E. 929](#), at page 930, the court said:

[*144] "While the states are subject to the contract clause of section 10, article 1 and section 1, article 14, of the United States Constitution, the police power of the states may affect contracts and modify property rights without violation of these provisions. Conceding the health, safety, [**65] and morals of its citizens to be involved, and the circumstances to justify a proper interference by the state, neither the contract nor due process of law clause stand in the way. [Union Dry Goods Co. v. Georgia Public Service Corporation](#), 248 U.S. 372, 39 S.Ct. 117, 63 L.Ed. 309,

12 Cal. Comp. Cases 123, *144; 1947 Cal. Wrk. Comp. LEXIS 249, **65; 30 Cal. 2d 388, ***420; 182 P.2d 159, ****177

[9 A.L.R. 1420](#). These sections of our federal Constitution and the police power of the states harmonize and never conflict. The only question here is one of fact, not one of law: Do the facts call into existence the power reserved to the states to legislate for the safety and health of the people? Within its sphere the police power of the states is not unlike the war power of the nation. Both are rules of necessity, impliedly or expressly existing in every form of government; the one to preserve the health and morals of a community; the other to preserve sovereignty."

In view of the foregoing discussion and the authorities cited, and considering the declared public policy of this state toward the workmen's compensation law, and applying the rule of liberal construction enjoined upon us by statute, it cannot be fairly said that the Legislature intended that the amendment here involved should apply [**66] to future injuries only. On the contrary every consideration of public policy vouchsafed by the constitutional provision which is the postulate of the workmen's compensation statute, and the statute itself, compels a construction which renders said amendment applicable to existing liability regardless of the date of the injuries out of which such liability arose, which construction, I believe, is obviously in harmony with the intention of the Legislature in the enactment of said amendment.

The awards should be affirmed.

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Evangelatos v. Superior Court

Supreme Court of California

April 21, 1988

No. S000194

Reporter

44 Cal. 3d 1188 *; 753 P.2d 585 **; 246 Cal. Rptr. 629 ***; 1988 Cal. LEXIS 104 ****; CCH Prod. Liab. Rep. P11,762

GREGORY EVANGELATOS, Petitioner, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; VAN WATERS & ROGERS, INC., et al., Real Parties in Interest. VAN WATERS & ROGERS, INC., Petitioner, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; GREGORY EVANGELATOS et al., Real Parties in Interest

pending tort litigation, and plaintiff asserted a constitutional challenge to the Act, popularly known as Proposition 51.

Overview

Shortly after the passage of the Fair Responsibility Act of 1986, [Cal. Civ. Code, §1431 et seq.](#), plaintiff's pending personal injury action was assigned for trial. The parties requested the trial court to determine whether the newly revised doctrine applied to the instant case, defendants contesting plaintiff's claims that the legislation was unconstitutional and did not apply retroactively. The intermediate appellate court upheld the statute, concluding that it applied to cases coming to trial after its effective date. The trial court's judgment was affirmed in conflict with a holding of another appellate court. The court granted review, upholding the statute, but refusing to apply the statute retroactively. Retrospective operation would not be given to a statute that interfered with antecedent rights, unless such was the unequivocal and inflexible import of its terms and the manifest intention of the legislature.

Subsequent History: [****1] The Petition of Real Party in Interest Van Waters & Rogers, Inc., for a Rehearing was Denied June 23, 1988.

Disposition: The decision of the Court of Appeal is affirmed insofar as it upholds the constitutionality of Proposition 51, but is reversed insofar as it holds that Proposition 51 applies to causes of action that accrued prior to the effective date of the initiative measure.

Each party shall bear its own costs in these proceedings.

Core Terms

retroactively, tortfeasors, cases, retroactive application, damages, joint and several liability, statutes, cause of action, non economic damages, effective date, decisions, fault, electorate, accrued, preexisting, italics, parties, legislative intent, courts, declaration, crisis, initiative measure, remedial, applies, superior court, comparative, provisions, drafters, modified, retrospectively

Outcome

The judgment below was affirmed as to constitutionality, since the right to recover for noneconomic injuries was not immune from legislative revision. The court reversed the judgment as to retrospective application, because the rule was that statutes operated prospectively unless the legislature's manifest intent was otherwise.

Case Summary

LexisNexis® Headnotes

Procedural Posture

Both parties petitioned for review of a decision of the Court of Appeal (California). Defendants sought a determination that the Fair Responsibility Act of 1986, [Cal. Civ. Code, §1431 et seq.](#), applied retrospectively to

Governments > Legislation > Initiative & Referendum

44 Cal. 3d 1188, *1188; 753 P.2d 585, **585; 246 Cal. Rptr. 629, ***629; 1988 Cal. LEXIS 104, ****1

Governments > Legislation > Effect &
Operation > Prospective Operation

commensurate with that defendant's degree of fault for
the injury.

Governments > Legislation > Interpretation

[HN1](#) Legislation, Initiative & Referendum

It is a widely recognized legal principle, specifically embodied in [Cal. Civ. Code § 3](#), that in the absence of a clear legislative intent to the contrary statutory enactments apply prospectively.

Governments > Legislation > Interpretation

Governments > Legislation > Effect &
Operation > Prospective Operation

Governments > Legislation > Effect &
Operation > Retrospective Operation

[HN2](#) Legislation, Interpretation

The general legal presumption of prospectivity applies with full force to a measure that substantially modifies a legal doctrine on which many persons may have reasonably relied in conducting their legal affairs prior to the new enactment.

Torts > Remedies > Damages > General Overview

Torts > ... > Types of Damages > Compensatory
Damages > General Overview

Torts > ... > Defenses > Comparative
Fault > General Overview

Torts > Procedural Matters > Multiple
Defendants > Distinct & Divisible Harms

Torts > Procedural Matters > Multiple
Defendants > Joint & Several Liability

[HN3](#) Remedies, Damages

The Fair Responsibility Act of 1986, [Cal. Civ. Code § 1431 et seq.](#), popularly known as Proposition 51, retains the traditional joint and several liability doctrine with respect to a plaintiff's economic damages, but adopts a rule of several liability for noneconomic damages, providing that each defendant is liable for only that portion of the plaintiff's noneconomic damages which is

Torts > Wrongful Death & Survival
Actions > Defenses > Comparative Fault &
Contributory Negligence

Torts > ... > Types of Damages > Compensatory
Damages > General Overview

Torts > ... > Defenses > Comparative
Fault > General Overview

Torts > ... > Comparative Fault > Multiple
Parties > General Overview

Torts > Procedural Matters > Multiple
Defendants > Distinct & Divisible Harms

Torts > Procedural Matters > Multiple
Defendants > Joint & Several Liability

Torts > Wrongful Death & Survival Actions > Joinder
Requirements

[HN4](#) Defenses, Comparative Fault & Contributory Negligence

See [Cal. Civ. Code § 1431](#).

Constitutional Law > ... > Fundamental
Freedoms > Judicial & Legislative
Restraints > Overbreadth & Vagueness of
Legislation

Governments > Legislation > Overbreadth

Constitutional Law > Bill of Rights > Fundamental
Freedoms > General Overview

Constitutional Law > ... > Fundamental
Freedoms > Judicial & Legislative
Restraints > General Overview

Governments > Legislation > Interpretation

Governments > Legislation > Vagueness

[HN5](#) Judicial & Legislative Restraints, Overbreadth & Vagueness of Legislation

So long as a statute does not threaten to infringe on the exercise of First Amendment or other constitutional rights, such ambiguities, even if numerous, do not justify the invalidation of a statute on its face. In order to succeed on a facial vagueness challenge to a legislative measure that does not threaten constitutionally protected conduct a party must do more than identify some instances in which the application of the statute may be uncertain or ambiguous; he must demonstrate that the law is impermissibly vague in all of its applications.

Governments > Legislation > Initiative & Referendum

Torts > ... > Comparative Fault > Multiple Parties > Absent Defendants

Governments > Legislation > Interpretation

Torts > ... > Defenses > Comparative Fault > General Overview

Torts > ... > Defenses > Comparative Fault > Intentional & Reckless Conduct

[HN6](#) [↓] **Legislation, Initiative & Referendum**

When situations in which the statutory language is ambiguous arise, a statute's application can be resolved by trial and appellate courts in time-honored, case-by-case fashion, by reference to the language and purposes of the statutory schemes as a whole. The judiciary's traditional role of interpreting ambiguous statutory language or filling in the gaps of statutory schemes is, of course, as applicable to initiative measures as it is to measures adopted by the legislature.

Constitutional Law > Equal Protection > Judicial Review > Standards of Review

Torts > Procedural Matters > Multiple Defendants > Joint & Several Liability

Constitutional Law > Equal Protection > General Overview

Governments > Legislation > Interpretation

Torts > Remedies > Damages > General Overview

Torts > ... > Types of Damages > Compensatory Damages > General Overview

Torts > ... > Types of Losses > Lost Income > General Overview

Torts > ... > Compensatory Damages > Types of Losses > Medical Expenses

Torts > ... > Types of Losses > Pain & Suffering > General Overview

[HN7](#) [↓] **Judicial Review, Standards of Review**

There is clearly a rational basis for distinguishing between economic and noneconomic damages and providing fuller protection for economic losses, as the equal protection clause certainly does not require the legislature to limit a victim's recovery for out-of-pocket medical expenses or lost earnings simply because it has found it appropriate to place some limit on damages for pain and suffering and similar noneconomic losses. In similar fashion, the equal protection clause clearly does not require a state to modify the traditional joint and several liability rule as it applies to economic damages, simply because the state has found it appropriate to limit an individual tortfeasor's potential liability for an injured person's noneconomic damages.

Constitutional Law > Equal Protection > Nature & Scope of Protection

Torts > ... > Types of Losses > Pain & Suffering > General Overview

Torts > ... > Types of Damages > Compensatory Damages > General Overview

[HN8](#) [↓] **Equal Protection, Nature & Scope of Protection**

While the general propriety of noneconomic damages is firmly imbedded in common law jurisprudence, no California case has ever suggested that the right to recover for such noneconomic injuries is constitutionally immune from legislative limitation or revision.

Governments > Courts > Common Law

Torts > ... > Defenses > Comparative
Fault > General Overview

Governments > Legislation > Interpretation

Torts > Procedural Matters > Multiple
Defendants > Joint & Several Liability

[HN9](#) **Courts, Common Law**

Differential treatment flowing from the relative solvency of the tortfeasor who causes an injury has never been thought to render all tort statutes unconstitutional or to require the state to compensate plaintiffs for uncollectible judgments obtained against insolvent defendants. While the common law joint and several liability doctrine has in the past provided plaintiffs a measure of protection from the insolvency of a tortfeasor when there are additional tortfeasors who are financially able to bear the total damages, the allocation of tort damages among multiple tortfeasors is an entirely appropriate subject for legislative resolution.

Governments > Legislation > Effect &
Operation > Operability

Workers' Compensation &
SSDI > Compensability > Injuries > General
Overview

Governments > Legislation > Effect &
Operation > General Overview

Governments > Legislation > Effect &
Operation > Prospective Operation

Governments > Legislation > Effect &
Operation > Retrospective Operation

[HN10](#) **Effect & Operation, Operability**

A retrospective law is one that affects rights, obligations, acts, transactions and conditions that are performed or exist prior to the adoption of the statute. Since the injury is the basis for any compensation award, the law in force at the time of the injury is to be taken as the measure of the injured person's right of recovery. The application of a tort reform statute to a cause of action which arose prior to the effective date of the statute but which is tried after the statute's effective date would constitute a retroactive application of the statute.

Governments > Legislation > Interpretation

Governments > Legislation > General Overview

Governments > Legislation > Effect &
Operation > General Overview

Governments > Legislation > Effect &
Operation > Prospective Operation

Governments > Legislation > Effect &
Operation > Retrospective Operation

[HN11](#) **Legislation, Interpretation**

Because the question whether a statute is to apply retroactively or prospectively is, in the first instance, a policy question for the legislative body which enacts the statute, before reaching any constitutional question the court must determine whether, as a matter of statutory interpretation, a provision should properly be construed as prospective or retroactive. If, as a matter of statutory interpretation, the provision is prospective, no constitutional question is presented.

Governments > Legislation > Interpretation

Governments > Legislation > General Overview

Governments > Legislation > Effect &
Operation > Prospective Operation

Governments > Legislation > Effect &
Operation > Retrospective Operation

[HN12](#) **Legislation, Interpretation**

The principle that statutes operate only prospectively, while judicial decisions operate retrospectively applies to the first rule of construction that legislation must be considered as addressed to the future, not to the past. The rule has been expressed in varying degrees of strength but always of one import, that a retrospective operation will not be given to a statute which interferes with antecedent rights unless such be the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.

Governments > Legislation > Interpretation

Governments > Legislation > Effect &
Operation > Prospective Operation

Governments > Legislation > Effect &
Operation > Retrospective Operation

[HN13](#) Legislation, Interpretation

[Cal. Civ. Code § 3](#), one of the general statutory provisions governing the interpretation of all the provisions of the Civil Code, represents a specific legislative codification of the general legal principle, declaring that no part of the Code is retroactive, unless expressly so declared. Like similar provisions found in many other codes, [Cal. Civ. Code § 3](#) reflects the common understanding that legislative provisions are presumed to operate prospectively, and that they should be so interpreted unless express language or clear and unavoidable implication negatives the presumption.

Governments > Legislation > Interpretation

Governments > Legislation > Effect &
Operation > Prospective Operation

[HN14](#) Legislation, Interpretation

To the extent that dictum in footnote one in the Court of Appeal decision in [Andrus v. Municipal Court, 143 Cal.App.3d 1041 \(1983\)](#), discussing a provision of the Code of Civil Procedure, suggests that such a provision has no application to amendments to such codes and applies only to the original provisions of the codes, that dictum is contrary to numerous Supreme Court decisions and must be disapproved.

Governments > Legislation > Interpretation

Governments > Legislation > Effect &
Operation > Prospective Operation

Governments > Legislation > Effect &
Operation > Retrospective Operation

[HN15](#) Legislation, Interpretation

Broad, general language in statutory provisions has not been considered sufficient to indicate a legislative intent that the statute is to be applied retroactively. A few words of general connotation appearing in the text of

statutes should not be given a wide meaning contrary to a settled policy, excepting as a different purpose is plainly shown.

Governments > Legislation > Interpretation

Governments > Legislation > Effect &
Operation > General Overview

Governments > Legislation > Effect &
Operation > Prospective Operation

Governments > Legislation > Effect &
Operation > Retrospective Operation

[HN16](#) Legislation, Interpretation

Even when a statute does not contain an express provision mandating retroactive application, the legislative history or the context of the enactment may provide a sufficiently clear indication that the legislature intended the statute to operate retroactively that the court may find it appropriate to accord the statute a retroactive application.

Governments > Legislation > Statutory Remedies &
Rights

Torts > ... > Defenses > Comparative
Fault > General Overview

Torts > Procedural Matters > Multiple
Defendants > Joint & Several Liability

[HN17](#) Legislation, Statutory Remedies & Rights

See [Cal. Civ. Code §1431.1](#).

Governments > Legislation > Interpretation

Governments > Legislation > Effect &
Operation > Prospective Operation

Governments > Legislation > Effect &
Operation > Retrospective Operation

[HN18](#) Legislation, Interpretation

It must be assumed that the legislature is acquainted

with the settled rules of statutory interpretation, and that it would have expressly provided for retrospective operation of the amendment if it had so intended.

Governments > Legislation > Interpretation

[HN19](#) [↓] **Legislation, Interpretation**

The intent of the electorate prevails over the intent of the drafters if there is a reliable basis for determining that the two were in conflict.

Governments > Legislation > Initiative & Referendum

Governments > Legislation > Interpretation

[HN20](#) [↓] **Legislation, Initiative & Referendum**

Initiative measures are subject to the ordinary rules and canons of statutory construction.

Governments > Legislation > Interpretation

Torts > Procedural Matters > Multiple Defendants > Joint & Several Liability

Governments > Legislation > Effect & Operation > Retrospective Operation

[HN21](#) [↓] **Legislation, Interpretation**

A remedial purpose does not necessarily indicate an intent to apply a statute retroactively.

Governments > Legislation > Interpretation

Governments > Legislation > Effect & Operation > General Overview

Governments > Legislation > Effect & Operation > Prospective Operation

Governments > Legislation > Effect & Operation > Retrospective Operation

Governments > Legislation > Types of Statutes

[HN22](#) [↓] **Legislation, Interpretation**

The rule of liberal construction and the rule that statutes should ordinarily be construed to operate prospectively are neither inconsistent nor mutually exclusive. It would be a most peculiar judicial reasoning which would allow one such doctrine to be invoked for the purpose of destroying the other. It seems clear, therefore, that the legislative intent in favor of the retrospective operation of a statute cannot be implied from the mere fact that the statute is remedial and subject to the rule of liberal construction.

Governments > Legislation > Interpretation

Governments > Legislation > Effect & Operation > Prospective Operation

Governments > Legislation > Effect & Operation > Retrospective Operation

[HN23](#) [↓] **Legislation, Interpretation**

The fact that the electorate chose to adopt a new remedial rule for the future does not necessarily demonstrate an intent to apply the new rule retroactively to defeat the reasonable expectations of those who have changed their position in reliance on the old law. The presumption of prospectivity assures that reasonable reliance on current legal principles will not be defeated in the absence of a clear indication of a legislative intent to override such reliance.

Governments > Legislation > Effect & Operation > Prospective Operation

Torts > ... > Defenses > Contributory Negligence > General Overview

Governments > Legislation > Interpretation

Torts > ... > Defenses > Comparative Fault > General Overview

[HN24](#) [↓] **Effect & Operation, Prospective Operation**

In the absence of an indication to the contrary, legislative acts should not be construed in a manner which changes legal rights and responsibilities arising out of transactions which occur prior to the passage of

such acts.

Evidence > ... > Presumptions > Exceptions > Common Law Presumptions

Governments > Legislation > Effect & Operation > Prospective Operation

Governments > Legislation > Effect & Operation > General Overview

Governments > Legislation > Effect & Operation > Retrospective Operation

Governments > Legislation > Interpretation

[HN25](#) Exceptions, Common Law Presumptions

The general rule of construction that, unless the intention to make it retrospective clearly appears from the act itself, a statute will not be construed to have that effect is particularly applicable to a statute which diminishes or extinguishes an existing cause of action.

Governments > Legislation > Interpretation

Torts > Procedural Matters > Multiple Defendants > Joint & Several Liability

Governments > Legislation > Effect & Operation > General Overview

Governments > Legislation > Effect & Operation > Prospective Operation

Governments > Legislation > Effect & Operation > Retrospective Operation

[HN26](#) Legislation, Interpretation

The distinction between "procedural" and "substantive" relates not so much to the form of the statute as to its effects. If substantial changes are made, even in a statute which might ordinarily be classified as procedural, the operation on existing rights would be retroactive because the legal effects of past events would be changed, and the statute will be construed to operate only in futuro unless the legislative intent to the contrary clearly appears. The joint and several liability imposed on joint tortfeasors or independent concurrent tortfeasors producing an indivisible injury is a

substantive liability to pay entire damages. This differs from what might be described as a procedural liability to be joined with other tortfeasors as defendants in a single action.

Governments > Legislation > Interpretation

Governments > Legislation > Effect & Operation > Prospective Operation

Governments > Legislation > Effect & Operation > Retrospective Operation

[HN27](#) Legislation, Interpretation

The almost universal rule is that statutes are addressed to the future, not to the past. They usually constitute a new factor in the affairs and relations of men and should not be held to affect what has happened unless, indeed, explicit words be used or by clear implication that construction be required. A statute that introduces a new policy and quite radically changes the existing law is particularly the kind of statute that should not be construed as retrospective.

Headnotes/Syllabus

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

A high school student who was injured while attempting to make fireworks at home with chemicals purchased in a retail store brought an action for personal injuries against the retailer and the wholesale distributor of the chemicals. Before trial began, Proposition 51 (limiting an individual joint tortfeasor's liability for noneconomic damages to a proportion of such damages equal to the tortfeasor's own percentage of fault; [Civ. Code, § 1431 et seq.](#)) was enacted, and the student and both defendants filed motions seeking a determination whether the proposition would be applied to the case. The trial court found that Proposition 51 was constitutional and that it applied to all cases that had not gone to trial prior to its effective date. The student and one of the defendants filed separate mandate petitions challenging the trial court's decision. The Court of Appeal, Second Dist., Div. Two, Nos. B021968, B022000, concluded that the trial court had correctly ruled as to the validity and retroactive application of the proposition.

The Supreme Court affirmed the decision of the Court of Appeal insofar as it upheld the constitutionality of Proposition 51, but reversed as to the retroactivity finding. The court held that Proposition 51 was not unconstitutionally vague and that it did not violate equal protection guarantees. However, the court held, the proposition could not be applied to the student's action. Under [Civ. Code, § 3](#) (no provision of the code is retroactive unless expressly so declared), and the general principle of prospectivity, the absence of any express provision directing retroactive application strongly supported prospective operation of the measure. Further, there was nothing in the statutory "findings and declaration of purpose" or the brochure materials to suggest that retroactively was even considered during the enactment process; and retroactive application could have unexpected and potentially unfair consequences for all parties who acted in reliance on the then existing state of the law. (Opinion by Arguelles, J., with Mosk, Acting C.J., Broussard and Panelli, JJ., concurring. Separate concurring and dissenting opinion by Kauffman, J., with Eagleson, J., and Anderson (Carl W.), J., * concurring.)

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

Classified to California Digest of Official Reports, 3d Series

[CA\(1a\)](#) [↓] (1a) [CA\(1b\)](#) [↓] (1b) [CA\(1c\)](#) [↓] (1c)

Torts § 9—Persons Liable—Joint and Several Tortfeasors—Statutory Limitation of Liability for Noneconomic Damages—Vagueness.

--Proposition 51 ([Civ. Code, § 1431 et seq.](#)), which modified the traditional common law joint and several liability doctrine by limiting an individual tortfeasor's liability for noneconomic damages to a proportion of such damages equal to the tortfeasor's own percentage of fault, is not unconstitutionally vague. Although language of the proposition may not provide a certain answer for every possible situation in which the modified joint and several liability doctrine may come into play, application of the statute in many instances will be quite clear. Application of the statute in ambiguous situations can be resolved by trial and appellate courts in time-

* Presiding Justice, Court of Appeal, First Appellate District, Division Four, assigned by the Acting Chairperson of the Judicial Council.

honored, case-by-case fashion by reference to the language and purposes of the statutory scheme as a whole.

[CA\(2\)](#) [↓] (2)

Constitutional Law § 113—Substantive Due Process—Statutory Vagueness and Overbreadth.

--So long as a statute does not threaten to infringe on exercise of rights under *U.S. Const., 1st Amend.*, or other constitutional rights, ambiguities, even if numerous, do not justify the invalidation of the statute on its face. In order to succeed on a facial vagueness challenge to a legislative measure that does not threaten constitutionally protected conduct, a party must do more than identify some instances in which the application of the statute may be uncertain or ambiguous; he must demonstrate that the law is impermissibly vague in all of its applications.

[CA\(3\)](#) [↓] (3)

Statutes § 19—Construction—Initiatives.

--The judiciary's traditional role of interpreting ambiguous statutory language or filling in the gaps of statutory schemes is as applicable to initiative measures as it is to measures adopted by the Legislature.

[CA\(4\)](#) [↓] (4)

Constitutional Law § 83—Equal Protection—Classification—Judicial Review—Tort Reform Proposition.

--On appeal of a judgment upholding the validity of Proposition 51 (limiting an individual joint tortfeasor's liability for noneconomic damages to a proportion of such damages equal to the tortfeasor's own percentage of fault; [Civ. Code, § 1431 et seq.](#)), the traditional "rational relationship" standard, and not the more stringent "strict scrutiny" standard, was applicable in determining whether the proposition violated equal protection guarantees due to allegedly impermissible distinctions between economic and noneconomic damages and between plaintiffs injured by solvent tortfeasors and those injured by insolvent ones.

[CA\(5\)](#) [↓] (5)

**Torts § 9—Persons Liable—Joint and Several
Tortfeasors—Limitation of Liability for Noneconomic
Damages—Equal Protection.**

--Proposition 51 (limiting an individual joint tortfeasor's liability for noneconomic damages to a proportion of such damages equal to the tortfeasor's own percentage of fault; *Civ. Code, § 1431 et seq.*) does not violate equal protection guarantees. There is no constitutional impediment to differential treatment of economic and noneconomic losses, and the proposition reflects no intent to discriminate between injured victims on the basis of the solvency of the tortfeasors by whom they are injured. The doctrine of joint and several liability modification or revision; rather, the allocation of tort damages among multiple tortfeasors is an entirely appropriate subject for legislative resolution.

[CA\(6a\)](#) [↓] (6a) [CA\(6b\)](#) [↓] (6b) [CA\(6c\)](#) [↓] (6c)
[CA\(6d\)](#) [↓] (6d) [CA\(6e\)](#) [↓] (6e) [CA\(6f\)](#) [↓] (6f)

**Torts § 9—Persons Liable—Joint and Several
Tortfeasors—Limitation of Liability for Noneconomic
Damages—Retroactive Application.**

--In a personal injury action, the trial court erred in holding that Proposition 51 (limiting an individual joint tortfeasor's liability for noneconomic damages to a proportion of such damages equal to the tortfeasor's own percentage of fault; *Civ. Code, § 1431 et seq.*) should constitutionally be applied to cases tried after its effective date, where the cause of action arose before the effective date of the proposition. Under *Civ. Code, § 3* (no provision of the code is retroactive unless expressly so declared), and the general principle of prospectivity, the absence of any express provision directing retroactive application strongly supported prospective operation of the measure. Further, there was nothing in the legislative history to suggest that retroactivity was even considered during the enactment process; and retroactive application could have unfair consequences for all parties who acted in reliance on the then existing state of law.

[CA\(7\)](#) [↓] (7)

**Statutes § 5—Operation and Effect—Retroactivity—Tort
Reform Statute.**

--The application of a tort reform statute to a cause of action that arose prior to the effective date of the statute but that is tried after the effective date constitutes

retroactive application of the statute.

[CA\(8\)](#) [↓] (8)

**Statutes § 5—Operation and Effect—Retroactivity—
Presumption as to Prospectivity.**

--Legislation must be considered as addressed to the future, not to the past. A retroactive operation will not be given to a statute that interferes with antecedent rights unless such be the unequivocal and inflexible import of the terms, and the manifest intention of the Legislature. [*Disapproving Andrus v. Municipal Court (1983) 143 Cal. App. 3d 1041 [192 Cal. Rptr. 341]*, insofar as that case suggests that where one provision of a code states that other provisions of the code are not retroactive unless expressly so declared, that provision has no application to amendments to the code and applies only to the original provisions of the code.]

[CA\(9\)](#) [↓] (9)

**Statutes § 5—Operation and Effect—Effect of No
Express Provision as to Retroactivity.**

--Even when a statute does not contain an express provision mandating retroactive application, the legislative history or the context of enactment may provide a sufficiently clear indication that the Legislature intended the statute to operate retrospectively that it may be found appropriate to accord the statute retroactive application.

[CA\(10\)](#) [↓] (10)

Statutes § 19—Construction—Initiatives.

--Initiative measures are subject to the ordinary rules and canons of statutory construction.

[CA\(11\)](#) [↓] (11)

**Statutes § 5—Operation and Effect—Retroactivity—
Presumption as to Prospectivity.**

--The presumption of prospectivity of a legislative enactment assures that reasonable reliance on current legal principles will not be defeated in the absence of a clear indication of a legislative intent to override such reliance.

[CA\(12\)](#) (12)**Statutes § 5—Operation and Effect—Retroactivity—
Presumption as to Prospectivity—Effect and Cases
Concerning Measures of Damages for Conversion.**

--The line of cases applying statutory amendments that modify the legal measure of damages recoverable in an action for wrongful conversion of personal or real property to all trials conducted after the effective date of the revised statute cannot properly be interpreted as displacing ordinary principles of statutory interpretation with regard to the question of retroactivity.

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Judges: Opinion by Arguelles, J., with Mosk, Acting C. J., Broussard and Panelli, JJ. concurring. Separate concurring and dissenting opinion by Kaufman, J., with

Eagleson, J., and Anderson (Carl W.), J., * concurring.

Opinion by: ARGUELLES

Opinion

[*1192] [586] [***630]** In June 1986, the voters of California approved an initiative measure, the Fair Responsibility Act of 1986 (*Civ. Code, §§ 1431 [****3]* to1431.5) -- popularly known as, and hereafter referred to, as Proposition 51 -- which modified the traditional, common law "joint and several liability" doctrine, limiting an individual tortfeasor's liability for noneconomic damages to a proportion of such damages equal to the tortfeasor's own percentage of fault. ¹ **[****4]** Just a few weeks after the election, the underlying **[*1193]** personal injury action in this case -- which arose out of a July 1980 accident and which had been pending for nearly five years prior to the June 1986 election -- was assigned for trial. Before the trial began, the parties requested the trial court to determine, inter alia, whether the newly revised joint and several liability doctrine would apply to this case. Plaintiff contended that the new legislation should not be applied for a number of reasons, maintaining (1) that Proposition 51 is unconstitutional on its face, and (2) that, in any event, the measure does not apply retroactively to causes of action which accrued prior to its **[**587]** effective date. ² Defendants contested both arguments.

The trial court concluded (1) that Proposition 51 is constitutional on its face and (2) that it should be applied to all cases coming **[***631]** to trial after its effective date, including this case, regardless of when the cause of action accrued. Reviewing the trial court's ruling in these consolidated pretrial writ proceedings, the Court of Appeal upheld the trial court's determination in all respects, declining -- with respect to the retroactivity issue -- to follow another recent Court of Appeal

* Presiding Justice, Court of Appeal, First Appellate District, Division Four, assigned by the Acting Chairperson of the Judicial Council.

¹ The complete text of Proposition 51 and all relevant portions of the election pamphlet, including the Legislative Analyst's analysis and the arguments of the proponents and opponents, are set forth in an appendix to this opinion.

² Under [article II, section 10, subdivision \(a\) of the California Constitution](#), the measure went into effect on June 4, 1986, the day after the election.

decision, *Russell v. Superior Court (1986) 185 Cal. App. 3d 810 [230 Cal. Rptr. 102]*, which had concluded that Proposition 51 does not apply retroactivity to causes of action which arose prior to the initiative's effective date. Because of the importance of the issues and the conflict in Court of Appeal decisions on the retroactivity question, we granted review.

As we shall explain, we have concluded that the Court of Appeal judgment [****5] should be affirmed in part and reversed in part. On the constitutional question, we agree with the Court of Appeal that plaintiff's facial constitutional challenge to Proposition 51 is untenable. Past decisions of this court make it quite clear that the initiative measure -- in modifying the common law rule governing the potential liability of multiple tortfeasors -- violates neither the due process nor equal protection guaranties of the state or federal Constitution. Although the proposition's language leaves a number of issues of interpretation and application to be decided in future cases, those unsettled questions provide no justification for striking down the measure on its face.

On the question of retroactivity, we conclude that the Court of Appeal erred in ruling that Proposition 51 applies to causes of action which accrued before the measure's effective date. [HN1](#) It is a widely recognized legal principle, specifically embodied in [section 3 of the Civil Code](#), that in the absence of a clear legislative intent to the contrary statutory enactments apply [*1194] prospectively. The drafters of the initiative measure in question, although presumably aware [****6] of this familiar legal precept, did not include any language in the initiative indicating that the measure was to apply retroactively to causes of action that had already accrued and there is nothing to suggest that the electorate considered the issue of retroactivity at all. Although defendants argue that we should nonetheless infer a legislative intent on the part of the electorate to apply the measure retroactively from the general purpose and context of the enactment, the overwhelming majority of prior judicial decisions -- both in California and throughout the country -- which have considered whether similar tort reform legislation should apply prospectively or retroactively when the statute is silent on the point have concluded that the statute applies prospectively. Reflecting the common-sense notion that it may be unfair to change "the rules of the game" in the middle of a contest, these authorities persuasively demonstrate that [HN2](#) the general legal presumption of prospectivity applies with full force to a measure, like the initiative at issue here, which substantially modifies a legal doctrine on which many

persons may have reasonably relied in conducting their legal affairs [****7] prior to the new enactment.

Contrary to the extravagant rhetoric of the dissenting opinion, our conclusion that Proposition 51 must properly be interpreted to apply prospectively does not postpone or delay the operative effect of Proposition 51 and is in no way inconsistent with the fact that the measure was adopted in response to a liability crisis. As we explain, the new legal doctrine established by Proposition 51 [**588] went into effect the day following the passage of the initiative and could immediately be relied on by insurance companies to reduce insurance premiums and by potential tort defendants to resume activities they may have curtailed because of the preexisting joint and several liability rule. Indeed, although the dissenting opinion vigorously asserts that Proposition 51's relationship to a liability crisis proves that the electorate must have intended that the measure would be applied retroactively, that assertion is clearly belied by the numerous recent tort reform statutes, adopted in other states in response to the same liability crisis, which, by their terms, are expressly prospective in operation. (See post, pp. 1219-1220.) As these statutes demonstrate, [****8] [***632] a prospective application of Proposition 51 is totally compatible with the history and purpose of the initiative measure.

I.

In July 1980, plaintiff Gregory Evangelatos, an 18-year-old high school student, was seriously injured in his home, apparently while attempting to make fireworks with chemicals purchased from a retail store. In July 1981, plaintiff filed an action for damages against the retailer (Student Science [*1195] Store, Inc.), the wholesale distributor (Van Waters & Rogers, Inc.), and four manufacturers of the chemicals he was using, alleging that defendants were liable for his injuries on both negligence and strict liability theories. The causes of action against three of the manufacturers were dismissed on summary judgment and plaintiff voluntarily dismissed the action against the fourth manufacturer. The case proceeded against the retailer and the wholesale distributor of the chemicals.

On June 23, 1986, almost five years after the action had been filed, the case was assigned for trial. Before the trial began, plaintiff and the two remaining defendants filed motions with the trial court seeking a determination whether Proposition 51, which had [****9] been approved by the voters just three weeks earlier at the June 3, 1986, election, would be applied in this case.

The motions sought a determination of the constitutional validity of the proposition and, if valid, a resolution of various questions relating to the applicability and proper interpretation of the measure.

After briefing, the trial court issued a lengthy written statement, ruling on five separate issues. The court concluded (1) that Proposition 51 was validly enacted and is not unconstitutional on its face; (2) that the measure applies to all cases, including the present proceeding, which had not gone to trial before June 4, 1986, the date on which the initiative measure became effective, regardless of when the cause of action arose; (3) that in determining each defendant's "several" liability for a portion of plaintiff's noneconomic damages under the proposition, the trier of fact may consider the conduct of all persons whose fault contributed to plaintiff's injury, not just the conduct of plaintiff and defendants who are parties to the action; (4) that future medical expenses and loss of future earnings are "economic damages" within the meaning of Proposition 51 for [****10] which defendants remain jointly and severally liable; and (5) that for purposes of apportioning fault in this case, the summary judgment that had been entered in favor of three manufacturers constituted a determination that no causative fault could properly be attributed to them.

Immediately following the ruling, plaintiff and one of the defendants (Van Waters & Rogers, Inc.) filed separate mandate petitions in the Court of Appeal, challenging different aspects of the trial court's decision. The Court of Appeal initially denied both petitions summarily, and the parties then sought review in this court. Shortly before the petitions reached us, another Court of Appeal rendered its decision in [**589] *Russell v. Superior Court, supra*, 185 Cal. App. 3d 810, holding Proposition 51 inapplicable to all causes of action which accrued before the measure's effective date. On October 29, 1986, our court denied a petition for review in *Russell* and transferred the two petitions in this matter to the Court of Appeal with [*1196] directions to issue alternative writs. Our order directed the Court of Appeal's attention to the *Russell* decision.

On remand, the [****11] Court of Appeal issued alternative writs, consolidated the matters for briefing and argument, and ultimately concluded that the trial court had correctly resolved all of the questions at issue, including the facial constitutionality of the measure and its applicability to the instant case. Although the Court of Appeal recognized that the *Russell* court had reached a contrary conclusion on the retroactivity issue, it

disagreed with the *Russell* decision, concluding that, while the initiative measure contained no express or affirmative indication that the measure was intended to apply retroactively, in its view "the legislative intent was for the statute to take effect [***633] immediately and to apply to as many cases as feasible." Finding that it would be unduly disruptive to require retrial of all tort cases that had been tried before the enactment of Proposition 51 but in which judgments had not yet become final, the Court of Appeal concluded that "[the] maximum feasible application of the Act is to all cases yet to be tried, including this one."

Both plaintiff and defendant petitioned for review, and we granted review to resolve the important questions presented by the [****12] case.

II.

Before analyzing either the constitutional or retroactivity issues, we believe it may be useful to place Proposition 51's modification of the common law joint and several liability doctrine in brief historical perspective.

Prior to the adoption of comparative negligence principles in California in the mid-1970's, the jury, in assessing liability or awarding damages in an ordinary tort action, generally did not determine the relative degree or proportion of fault attributable either to the plaintiff, to an individual defendant or defendants, or to any nonparties to the action. Under the then-prevailing tort doctrines, the absence of any inquiry into relative culpability had potentially harsh consequences for both plaintiffs and defendants. On the one hand, if a plaintiff was found to be at all negligent, no matter how slight, under the contributory negligence rule he was generally precluded from obtaining any recovery whatsoever. (See generally 4 Witkin, Summary of Cal. Law (8th ed. 1974) Torts, § 683, p. 2968 and authorities cited.) On the other hand, if a defendant was found to be at all negligent, regardless of how minimally, under the joint and several liability [****13] rule he could be held responsible for the full damages sustained by the plaintiff, even if other concurrent tortfeasors had also been partially, or even primarily, responsible for the injury. (See *id.*, § 35, pp. 2333-2334.) Moreover, the governing [*1197] rules at that time gave the plaintiff unilateral authority to decide which defendant or defendants were to be sued (see *id.*, § 37, p. 2335); a defendant who had been singled out for suit by the plaintiff generally had no right to bring other tortfeasors into the action, even if the other tortfeasors were equally or more responsible for the plaintiff's injury (see *id.*, §

46, p. 2346).³

[****14] In *Li v. Yellow Cab Co. (1975) 13 Cal.3d 804 [119 Cal. Rptr. 858, 532 P.2d 1226, 78 A.L.R.3d 393]*, this court took an initial step in modifying this traditional common law structure, ameliorating the hardship to the plaintiff by abrogating [**590] the all-or-nothing contributory negligence doctrine and adopting in its place a rule of comparative negligence. *Li* held that "the contributory negligence of the person injured . . . shall not bar recovery, but the damages awarded shall be diminished in proportion to the amount of negligence attributable to the person recovering." (*13 Cal.3d at p. 829.*)

In *American Motorcycle Assn. v. Superior Court (1978) 20 Cal.3d 578 [146 Cal. Rptr. 182, 578 P.2d 899]*, our court took the next step in modifying the traditional structure, this time altering the preexisting common law doctrines to diminish the hardship to defendants. Although the *American Motorcycle* court concluded that the traditional common law joint and several liability doctrine should be retained -- relying, in part, on the fact that at that time the "overwhelming majority" of jurisdictions that had adopted comparative negligence [****15] had also retained the joint and several liability rule (*20 Cal.3d at p. 590*) -- at the same time the *American Motorcycle* court held (1) that plaintiffs should no longer have the unilateral right to determine which defendant [***634] or defendants should be included in an action and that defendants who were sued could bring other tortfeasors who were allegedly responsible for the plaintiff's injury into the action through cross-complaints (*20 Cal.3d at pp. 604-607*), and (2) that any defendant could obtain equitable indemnity, on a comparative fault basis, from other defendants, thus permitting a fair apportionment of damages among tortfeasors. (See *20 Cal.3d at pp. 591-598.*)

Subsequent cases established that under the principles articulated in *American Motorcycle, supra, 20 Cal.3d*

³ The Contribution Act of 1957 (*Code Civ. Proc., §§ 875- 880*) ameliorated the situation somewhat by permitting a pro rata division of damages when the plaintiff sued more than one defendant and a joint judgment was entered against the defendants. That act only applied, however, in instances in which a judgment had been entered against multiple defendants, and, if a plaintiff chose not to join a principally culpable tortfeasor in the action, the defendant or defendants who had been singled out for suit had no right to contribution.

578, a defendant may pursue a comparative equitable indemnity claim against other tortfeasors either (1) by filing a cross-complaint in the original tort action or (2) by filing a separate indemnity action after paying more than its proportionate share of [**1198] the damages through the satisfaction of a judgment or through a payment in settlement. [****16] (See, e.g., *Sears, Roebuck & Co. v. International Harvester Co. (1978) 82 Cal. App. 3d 492, 496 [147 Cal. Rptr. 262]*; *American Bankers Ins. Co. v. Avco-Lycoming Division (1979) 97 Cal. App. 3d 732, 736 [159 Cal. Rptr. 70]*.) In addition, more recent decisions also make clear that if one or more tortfeasors prove to be insolvent and are not able to bear their fair share of the loss, the shortfall created by such insolvency should be apportioned equitably among the remaining culpable parties -- both defendants and plaintiffs. (See, e.g., *Paradise Valley Hospital v. Schlossman (1983) 143 Cal. App. 3d 87 [191 Cal. Rptr. 531]*; *Ambriz v. Kress (1983) 148 Cal. App. 3d 963 [196 Cal. Rptr. 417]*.)

Although these various developments served to reduce much of the harshness of the original all-or-nothing common law rules, the retention of the common law joint and several liability doctrine produced some situations in which defendants who bore only a small share of fault for an accident could be left with the obligation to pay all or a large share of the plaintiff's damages if other more culpable tortfeasors were insolvent.

[****17] The initiative measure in question in this case was addressed to this remaining issue. While recognizing the potential inequity in a rule which would require an injured plaintiff who may have sustained considerable medical expenses and other damages as a result of an accident to bear the full brunt of the loss if one of a number of tortfeasors should prove insolvent, the drafters of the initiative at the same time concluded that it was unfair in such a situation to require a tortfeasor who might only be minimally culpable to bear all of the plaintiff's damages. As a result, the drafters crafted a compromise solution: [HN3](#)[↑] Proposition 51 retains the traditional joint and several liability doctrine with respect to a plaintiff's *economic* damages, but adopts a rule of several liability for *noneconomic* damages, providing that each defendant is liable for only that portion of the plaintiff's noneconomic damages which is commensurate with that defendant's degree of fault [**591] for the injury.⁴ It was this compromise

⁴ [HN4](#)[↑] *Civil Code section 1431.2*, which constitutes the heart of Proposition 51, provides in full: "(a) In any action for

measure -- which drew heavily [*1199] upon a number of bills which had been passed by the Senate but not by the Assembly in a number of preceding legislative [****18] sessions (see Sen. Bill No. 75 (1985-1986 Reg. Sess.); Sen. Bill No. 575 (1983-1984 Reg. Sess.); [***635] Sen. Bill No. 500 (1981-1982 Reg. Sess.)) -- that was adopted by the electorate in the June 1986 election.

[****19] Although Proposition 51 is the first legislative modification of the joint and several liability doctrine to be enacted in California, in recent years analogous statutory alterations of the traditional common law joint and several liability rule have been adopted by many states throughout the country, often as part of a comprehensive legislative implementation of comparative fault principles. The revisions of the joint and several liability doctrine in other jurisdictions have taken a variety of forms: several states have abolished joint and several liability entirely and replaced it with a "pure" several liability rule,⁵ other states have formulated various guidelines to distinguish between more culpable and less culpable tortfeasors and have adopted several liability only for the less culpable tortfeasors,⁶ [****21] and still others, like California,

personal injury, property damage, or wrongful death, based upon principles of comparative fault, the liability of each defendant for non-economic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be rendered against that defendant for that amount. [para.] (b)(1) For purposes of this section, the term 'economic damages' means objectively verifiable monetary losses including medical expenses, loss of earnings, burial costs, loss of use of property, costs of repair or replacement, costs of obtaining substitute domestic services, loss of employment and loss of business or employment opportunities. [para.] (2) For the purposes of this section, the term 'non-economic damages' means subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation."

⁵ At least five states apply a "pure" several liability rule. (See, e.g., *Kan. Stat. Ann. § 60-258a(d)* (1983); *Vt. Stat. Ann. tit. 12, § 1036* (Supp. 1987); *Ohio Rev. Code Ann. § 2315.19* (Page 1981); Utah Code Ann. §§ 78-27-38, 78-27-40 (1987); *Colo. Rev. Stat. § 13-21-111.5* (1987). See also *Wash. Rev. Code*

have distinguished between different categories of damages sustained in an injury, retaining some form of joint and several liability for "economic" or "medically related" damages, while adopting some form of several liability for "pain and suffering" and other noneconomic damages.⁷ Thus, while Proposition [**592] 51 unquestionably made [****20] a [*1200] substantial change in this state's traditional tort doctrine, when viewed from a national perspective it becomes apparent that the measure's modification of the common law joint and several liability rule was not an isolated or aberrant phenomenon but rather paralleled similar developments in the evolution and implementation of the comparative-

Ann. § 4.22.070 (West Supp. 1987) [adopting several liability as a general rule, but retaining joint and several liability in several, specified areas]; *Nev. Rev. Stat. Ann. § 41.141* (Supp. 1987) [same].)

⁶ At least four states have adopted such an approach. (See, e.g., *Iowa Code Ann. § 668.4* (West 1987) [joint and several liability does not apply to defendants who bear less than 50 percent of fault]; *Minn. Stat. Ann. § 604.02(1)* (West Supp. 1988) [if state or municipal defendant's fault is less than 35 percent, "it is jointly and severally liable for an amount no greater than twice the amount of fault"]; *Mo. Ann. Stat. § 538.230* (Vernon Supp. 1987) [in medical malpractice cases "any defendant against whom an award of damages is made shall be jointly liable only with those defendants whose apportioned percentage of fault is equal to or less than such defendant"]; *Tex. Civ. Prac. & Rem. Code Ann. § 33.013* (Vernon 1988) [defendant severally liable unless percentage of fault is greater than 20 percent, or, in specified actions, defendant's fault is greater than plaintiff's].)

⁷ At least four states, in addition to California, have embraced such a rule. (See, e.g., *N.Y. Civ. Prac. L. & R. § 1601* (McKinney Supp. 1987) [when defendant's liability is less than 50 percent, defendant's liability for plaintiff's noneconomic loss shall not exceed that of defendant's equitable share; numerous categories of cases excepted]; *Fla. Stat. Ann. § 768.81(3)* (West Supp. 1987) [joint and several liability abolished, except where a defendant's percentage of fault equals or exceeds that of a particular claimant, the defendant is jointly and severally liable for the claimant's economic damage]; *Ore. Rev. Stat. § 18.485* (1983) [defendants severally liable for noneconomic damages, and jointly and severally liable for economic damages unless defendant is less at fault than plaintiff or less than 15 percent at fault in which case defendant only severally liable for economic damages]; Ill. Ann. Stat. ch. 110, paras. 2-1117, 2-1118 (Smith-Hurd Supp. 1987) [all defendants jointly and severally liable for medical expenses, defendants who are less than 25 percent at fault severally liable for all other damages, defendants who are more than 25 percent at fault jointly and severally liable for all other damages].)

fault principle in other states.

[****22] Having briefly reviewed the historical background of Proposition 51, we turn initially to plaintiff's broad claim that the Court of Appeal erred in failing to strike down the initiative measure as unconstitutional on its face.

III.

Plaintiff contends that Proposition 51 is facially unconstitutional on two separate grounds, asserting (1) that the measure is "too vague and ambiguous" to satisfy the due process requirements of either the state or federal Constitutions, and (2) that the enactment violates both the state and federal equal protection clauses by establishing classifications that are not rationally [***636] related to a legitimate state interest. As we shall see, both of these constitutional claims are similar to contentions raised just a few years ago in a series of cases challenging the validity of a variety of provisions of another legislative tort reform measure, the Medical Injury Compensation Reform Act of 1975 (MICRA) (Stats. 1975, 2d Ex. Sess. 1975-1976, chs. 1, 2, pp. 3949-4007), an enactment which modified a number of common law tort doctrines in the medical malpractice area. Our decisions in the earlier MICRA cases clearly establish that plaintiff's current constitutional [****23] challenges lack merit.

A.

[CA\(1a\)](#) (1a) Plaintiff initially contends that Proposition 51 is unconstitutionally vague. Relying on the United States Supreme Court's classic statement of the vagueness doctrine in [Connally v. General Const. Co. \(1926\) 269 U.S. 385, 391 \[70 L. Ed. 322, 328, 46 S. Ct. 126\]](#) -- "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law" -- plaintiff maintains that Proposition 51 is subject to just such a criticism. To support his [*1201] contention, plaintiff catalogues a series of questions relating to the application of Proposition 51 to which he suggests the language of the measure provides no clear answer.⁸ He asserts that the

existence of these numerous unanswered questions renders the measure unconstitutionally vague on its face and warrants the invalidation of the enactment in its entirety.

[****24] Plaintiff's contention is plainly flawed. Many, probably most, statutes are ambiguous in some respects and instances invariably arise under which the application of statutory language may be unclear. [CA\(2\)](#) (2) [HN5](#) So long as a statute does not threaten to infringe on the exercise of First Amendment or other constitutional rights, however, such ambiguities, even if numerous, do not justify the invalidation of a statute on its face. In order to succeed on a facial vagueness challenge to a legislative measure that does not threaten constitutionally protected conduct -- like the initiative measure at issue here -- a party must do more than identify some instances in which the application of the statute may be uncertain or ambiguous; he must demonstrate [**593] that "the law is impermissibly vague *in all of its applications*." (Italics added.) ([Hoffman Estates v. Flipside, Hoffman Estates \(1982\) 455 U.S. 489, 497 \[71 L. Ed. 2d 362, 371, 102 S. Ct. 1186\]](#).) Plaintiff clearly has not satisfied this burden.

Plaintiff's vagueness claim echoes a similar constitutional argument that was raised in [American Bank & Trust Co. v. Community Hospital \(1984\) 36 Cal.3d 359, 377-378 \[204 Cal. Rptr. 671, 683 P.2d 670, 41 A.L.R.4th 233\]](#), [****25] with respect to [section 667.7 of the Code of Civil Procedure](#), a section of MICRA which provided for the periodic payment of judgments in medical malpractice cases under certain circumstances. In [American Bank](#), plaintiff claimed, inter alia, that the statutory provision mandating periodic payment "should . . . be struck down as unconstitutionally 'void for vagueness, ambiguity and unworkability,' because it leaves unanswered many questions as to how a trial court is to actually formulate a comprehensive payment

"3. Does it apply if the jury finds Van Waters & Rodgers liable based on strict products liability?

"4. [Does it] apply if the jury finds Student Science acted *intentionally*

"5. If the jury finds Gregory more than 0% at fault how is his recovery adjusted?

"6. Who bears the burden of naming and serving other parties?

"7. Can the special verdict form contain a catch-all 'other' box or must such parties or non-parties be specified and limited to the evidence adduced at trial?"

⁸ Plaintiff's petition for review lists the following allegedly unanswered questions as to the proposition's application:

"1. Does it retroactively apply to this case?

"2. Does it apply if the jury finds Gregory 0% at fault?

schedule without the benefit of very detailed special jury verdicts." ([36 Cal.3d at p. 377.](#)) After noting that the practical problems [***637] of application [*1202] were by no means insurmountable, we went on to point out that "[in] any event, plaintiff provides no authority to support its claim that the remaining uncertainties which may inhere in the statute provide a proper basis for striking it down on its face. As with other innovative procedures and doctrines -- for example, comparative negligence -- in the first instance trial courts will deal with novel problems that arise in time-honored case-by-case fashion, and [****26] appellate courts will remain available to aid in the familiar common law task of filling in the gaps in the statutory scheme. [Citation.]" (*Id. at p. 378.*)

Precisely the same reasoning applies in this case. [CA\(1b\)\[↑\]](#) (1b) Although the language of Proposition 51 may not provide a certain answer for every possible situation in which the modified joint and several liability doctrine may come into play, the application of the statute in many instances will be quite clear. Thus, for example, while plaintiff cites the statute's lack of clarity on the retroactivity issue, there is no question but that the statute applies to causes of action accruing after its effective date; similarly, although plaintiff complains that the statute is not clear as to whether it applies to causes of action based on intentional tortious conduct or how it should be applied with respect to cases involving absent tortfeasors, the statute's application in an ordinary multiple tortfeasor comparative negligence action in which all tortfeasors are joined is not in doubt. Further, as stated in [HN6\[↑\]](#) *American Bank, supra, 36 Cal.3d 359*, when situations in which the statutory language [****27] is ambiguous arise, the statute's application can be resolved by trial and appellate courts "in time-honored, case-by-case fashion," by reference to the language and purposes of the statutory schemes as a whole. [CA\(3\)\[↑\]](#) (3) The judiciary's traditional role of interpreting ambiguous statutory language or "filling in the gaps" of statutory schemes is, of course, as applicable to initiative measures as it is to measures adopted by the Legislature. (See, e.g., *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) [22 Cal.3d 208, 244-246](#) [[149 Cal. Rptr. 239, 583 P.2d 1281](#)].) [CA\(1c\)\[↑\]](#) (1c) Accordingly, there is no merit to plaintiff's claim that the statute should be struck down as unconstitutionally vague on its face.

B.

[CA\(4\)\[↑\]](#) (4) (see fn. 9.) [CA\(5\)\[↑\]](#) (5) Plaintiff alternatively contends that Proposition 51 violates the

state and federal equal protection guaranties, allegedly because the classifications drawn by the statute are not rationally related to a legitimate state interest.⁹ Plaintiff claims in particular that the statute is [*1203] invalid under [**594] the equal protection clause (1) because it discriminates between [****28] the class of injured persons who suffer economic damage and the class of injured persons who suffer noneconomic damage providing full protection for those who suffer economic damage but a lesser protection for those who suffer noneconomic damage, and (2) because it improperly discriminates within the class of victims who suffer noneconomic damage, permitting full recovery for victims who are injured by solvent tortfeasors, but providing only partial recovery to victims injured by insolvent tortfeasors. Both claims are clearly without merit.

[****29] Plaintiff's challenge to the proposition's disparate treatment of economic and noneconomic damages parallels a similar equal protection attack that was directed at [Civil Code section 3333.2](#), a provision of MICRA which placed a \$ 250,000 limit on the noneconomic damages which may be recovered in a medical malpractice action, but which placed no similar limit on economic damages. In rejecting that equal protection challenge in [Fein v. Permanente \[***638\] Medical Group, supra, 38 Cal.3d 137](#), we explained [HN7\[↑\]](#) that there is clearly a rational basis for distinguishing between economic and noneconomic damages and providing fuller protection for economic losses,¹⁰ and observed that "[the] equal protection

⁹ Although plaintiff also suggests that the proposition's classifications should be evaluated under a more stringent, "strict scrutiny" standard, the controlling decisions make it clear that the traditional "rational relationship" equal protection standard is applicable here. (See, e.g., *American Bank & Trust Co., supra, 36 Cal.3d 359, 373, fn. 12*; *Fein v. Permanente Medical Group* (1985) [38 Cal.3d 137, 161-164](#) [[211 Cal. Rptr. 368, 695 P.2d 665](#)].)

¹⁰ In *Fein*, the court pointed out that legal commentators had long questioned whether sound public policy supported the comparable treatment of economic and noneconomic damages, explaining that "[thoughtful] jurists and legal scholars have for some time raised serious questions as to the wisdom of awarding damages for pain and suffering in any negligence case, noting, inter alia, the inherent difficulties in placing a monetary value on such losses, the fact that money damages are at best only imperfect compensation for such intangible injuries and that such damages are generally passed on to, and borne by, innocent consumers. [HN8\[↑\]](#)

clause certainly does not require the Legislature to limit a victim's recovery for out-of-pocket medical expenses or lost earnings simply because it has found it appropriate to place some limit on damages for pain and suffering and similar noneconomic losses." ([38 Cal.3d at p. 162](#).) In similar fashion, the equal protection clause clearly does not require a state to modify the traditional joint and several liability rule as **[****30]** it applies to economic damages, simply because the state has found it appropriate to limit an individual tortfeasor's potential liability for an injured person's noneconomic damages. Indeed, the distinction which Proposition 51 draws between economic and noneconomic damages is, in general terms, less severe than the statutory distinction upheld in *Fein*; Proposition 51 places no dollar limit on the noneconomic damages a plaintiff may properly recover, but simply provides that each individual tortfeasor will be liable only for that share of the plaintiff's noneconomic damages which is **[*1204]** commensurate with the tortfeasor's comparative fault. There is no constitutional impediment to such differential treatment of economic and noneconomic losses.

[**31]** Nor is Proposition 51 vulnerable to constitutional attack on the basis of plaintiff's claim that it improperly discriminates within the class of plaintiffs who have suffered noneconomic harm. Plaintiff asserts that the statute draws an arbitrary distinction between persons with noneconomic damages who have been injured by solvent tortfeasors and those who have been injured by insolvent defendants, permitting full recovery of noneconomic damages by the former class but only partial recovery by the latter class. The terms of the proposition itself, however, reflect no legislative intent to discriminate between injured victims on the basis of the solvency of the tortfeasors by whom they are injured; instead, the measure quite clearly is simply intended to limit the potential liability of an individual defendant for noneconomic damages to a proportion commensurate with that defendant's personal share of fault.

Although one consequence of the statute's adoption of several liability for noneconomic **[**595]** damages will be that persons who are unfortunate enough to be injured by an insolvent tortfeasor will not be able to obtain full recovery for their noneconomic losses, that

While the general propriety of such damages is, of course, firmly imbedded in our common law jurisprudence [citation], no California case of which we are aware has ever suggested that the right to recover for such noneconomic injuries is constitutionally immune from legislative limitation or revision." (Footnote omitted.) ([38 Cal.3d at pp. 159-160](#).)

consequence does **[****32]** not render the provision unconstitutional. Under any tort liability scheme, a plaintiff who is injured by a single tortfeasor who proves to be insolvent is, of course, worse off than a plaintiff who is injured by a single tortfeasor who can pay an adverse judgment. Such "differential [HN9](#)[↑] treatment" flowing from the relative solvency of the tortfeasor who causes an injury, however, has never been thought to render all tort statutes unconstitutional or to require the state to compensate plaintiffs for uncollectible judgments obtained against insolvent defendants. And while the common law joint and several liability doctrine has in the past provided plaintiffs a measure of protection from the insolvency of a tortfeasor when there are additional tortfeasors who are financially able to bear the total damages, plaintiff has cited no case which suggests that the joint and several liability doctrine is a constitutionally **[***639]** mandated rule of law, immune from legislative modification or revision. As with other common law tort doctrines -- like the doctrines at issue in the recent line of MICRA decisions (see, e.g., [American Bank & Trust Co. v. Community Hospital, supra, 36 Cal.3d 359, 366-374](#) **[****33]** [modification of common law doctrine providing for payment of judgment in lump sum]; [Barme v. Wood \(1984\) 37 Cal.3d 174](#) [[207 Cal. Rptr. 816, 689 P.2d 446](#)] [modification of collateral source rule]; [Fein v. Permanente Medical Group, supra, 38 Cal.3d 137](#) [limitation of noneconomic damages]) -- the allocation of tort damages among multiple tortfeasors is an entirely appropriate subject for legislative resolution. In this regard, it is worth recalling that Proposition **[*1205]** 51 does not require the injured plaintiff to bear the entire risk of a potential tortfeasor's insolvency; solvent defendants continue to share fully in such risk with respect to a plaintiff's economic damages.

In sum, although reasonable persons may disagree as to the wisdom of Proposition 51's modification of the common law joint and several liability doctrine, the measure is not unconstitutional on its face.

IV.

[CA\(6a\)](#)[↑] **(6a)** Plaintiff's second major contention is that even if the lower courts were correct in upholding the constitutionality of the proposition, the trial court and Court of Appeal were nonetheless in error in concluding that the newly enacted **[****34]** statute should apply retroactively to causes of action -- like the present action -- which accrued prior to the effective date of the initiative measure. Plaintiff points out that prior to the enactment of Proposition 51 many individuals -- both plaintiffs and defendants -- relied on the then-existing

joint and several liability doctrine in deciding which parties to join in litigation and whether to accept or reject settlement offers relating to such preexisting claims, and plaintiff contends that because there is nothing in the terms of the proposition which indicates that it is to apply retroactively to defeat such reliance, the lower courts erred in giving it such an application. In response, defendants contend that retroactive application is warranted in light of the nature and purposes of the initiative measure.

A.

Before analyzing the retroactivity principles and precedents discussed by both parties, we must address a threshold contention, raised by a number of amici, who assert that there is no need to consider the retroactivity issue at all in this case. Although defendants themselves do not suggest that application of Proposition 51 to causes of action which accrued prior [****35] to its effective date but which did not come to trial until after such effective date would constitute only a prospective, rather than a retroactive, application of the measure, several amici have put forth that suggestion, arguing that by confining the measure's operation to trials conducted after the initiative's effective date the Court of Appeal simply applied Proposition 51 prospectively. The Court of Appeal did not rest its conclusion [**596] on this theory and, as we explain, the governing cases do not support amici's contention.

In *Aetna Cas. & Surety Co. v. Ind. Acc. Com.* (1947) 30 Cal.2d 388 [182 P.2d 159] -- perhaps the leading modern California decision on the subject -- the same argument was raised by injured parties who contended that a new statute, increasing workers' compensation benefits, should be applied [*1206] to awards made by the workers' compensation board after the effective date of the new statute, even though the awards pertained to injuries which the workers had suffered before the new legislation was enacted. The injured employees argued that such an application of the statute to future awards would constitute a prospective, [****36] rather than a retroactive, application of the statute.

In *Aetna Cas.*, this court, speaking through Chief Justice Gibson, emphatically rejected the argument, explaining that "[HN10] a retrospective law is one which affects rights, obligations, acts, transactions and [***640] conditions which are performed or exist prior to the adoption of the statute." (30 Cal.2d at p. 391.) "Since the industrial injury is the basis for any compensation

award, the law in force at the time of the injury is to be taken as the measure of the injured person's right of recovery." (*Id.* at p. 392.) CA(7) (7) Decisions of both the United States Supreme Court and the courts of our sister states confirm that the application of a tort reform statute to a cause of action which arose prior to the effective date of the statute but which is tried after the statute's effective date would constitute a retroactive application of the statute. (See, e.g., *Winfree v. Nor. Pac. Ry. Co.* (1913) 227 U.S. 296 [57 L. Ed. 518, 33 S. Ct. 273]; *Joseph v. Lowery* (1972) 261 Or. 545 [495 P.2d 273].) Accordingly, amici's argument that the legal principles [****37] relating to the retroactive application of statutes are not relevant in this case is clearly without merit.

B.

The fact that application of Proposition 51 to the instant case would constitute a retroactive rather than a prospective application of the statute is, of course, just the beginning, rather than the conclusion, of our analysis. Although plaintiff maintains that a retroactive application of the statute would be unconstitutional (cf. *In re Marriage of Buol* (1985) 39 Cal.3d 751, 759-764 [218 Cal. Rptr. 31, 705 P.2d 354]), defendants properly observe that in numerous situations courts have upheld legislation which modified legal rules applicable to pending actions. (See, e.g., HN11 San Bernardino County v. Indus. Acc. Com. (1933) 217 Cal. 618, 627-629 [20 P.2d 673].) Because the question whether a statute is to apply retroactively or prospectively is, in the first instance, a policy question for the legislative body which enacts the statute, before reaching any constitutional question we must determine whether, as a matter of statutory interpretation, Proposition 51 should properly be construed as prospective or retroactive. If, as a matter [****38] of statutory interpretation, the provision is prospective, no constitutional question is presented.

CA(8) (8) In resolving the statutory interpretation question, we are guided by familiar legal principles. In the recent decision of *United States v. Security Industrial Bank* (1982) 459 U.S. 70, 79-80 [74 L. Ed. 2d 235, 243-244, 103 S. Ct. 407], Justice (now Chief Justice) Rehnquist succinctly captured the well-established legal precepts governing the interpretation of a statute to determine whether it applies retroactively or prospectively, explaining: "HN12 The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student. [Citations.] This court has often pointed out.

[The] first rule of construction is that legislation must be considered as addressed to the future, not to the past The rule has been expressed in varying degrees of strength but always of one import, that a retrospective operation will not be given to a statute which interferes with antecedent rights . . . unless such be "the unequivocal and inflexible import of the terms, and the [****39] manifest intention of the legislature." [Citation.] (Italics added.)

[**597] California authorities have long embraced this general principle. As Chief Justice Gibson wrote for the court in *Aetna Cas. & Surety Co. v. Ind. Acc. Com.*, *supra*, 30 Cal.2d 388 -- the seminal retroactivity decision noted above -- "[it] is an established canon of interpretation that statutes are not to be given a retrospective operation unless it is clearly made to appear that such was the legislative intent." (30 Cal.2d at p. 393.) This rule has been repeated and followed in innumerable decisions. (See, e.g., *White v. Western Title Ins. Co.* (1985) 40 Cal.3d 870, 884 [221 Cal. Rptr. 509, 710 P.2d 309]; *Glavinich v. Commonwealth Land Title Ins. Co.* (1984) 163 Cal. App. 3d 263, 272 [209 Cal. Rptr. 266]. See generally 5 Witkin, Summary of Cal. Law (8th ed. 1974) Constitutional Law, § 288, pp. 3578-3579.)

Indeed, [HN13](#) [↑] [Civil Code section 3](#), one of the general statutory provisions governing the interpretation of all the provisions of the [****641] Civil Code -- including the provision at issue in this case [****40] -- represents a specific legislative codification of this general legal principle, declaring that "[no] part of [this Code] is retroactive, unless expressly so declared." (Italics added.) ¹¹ Like similar provisions found in many

¹¹ In *In re Marriage of Bouquet* (1976) 16 Cal.3d 583, 587, footnote 3 [128 Cal. Rptr. 427, 546 P.2d 1371], the court specifically recognized that "[section] 3 of the Civil Code embodies the common law presumption against retroactivity," and numerous decisions of this court have recognized that comparable provisions in other codes represent legislative embodiments of this general legal principle. (See, e.g., *Aetna Cas. & Surety Co. v. Ind. Acc. Com.*, *supra*, 30 Cal.2d 388, 395 [Lab. Code]; *In re Estrada* (1965) 63 Cal.2d 740, 746 [48 Cal. Rptr. 172, 408 P.2d 948] [Pen. Code]. See also [HN14](#) [↑] *DiGenova v. State Board of Education* (1962) 57 Cal.2d 167, 172-173 [18 Cal. Rptr. 369, 367 P.2d 865].) To the extent that dictum in a footnote in the Court of Appeal decision in *Andrus v. Municipal Court* (1983) 143 Cal. App. 3d 1041, 1045-1046, footnote 1 [192 Cal. Rptr. 341], discussing a similar provision of the Code of Civil Procedure, suggests that such a provision has no application to amendments to such codes and applies

other codes (see, e.g., [Code Civ. Proc.](#), [**1208] § 3; [Lab. Code](#), § 4), [section 3](#) reflects the common understanding that legislative provisions are presumed to operate prospectively, and that they should be so interpreted "unless express language or clear and unavoidable implication negatives the presumption." (*Glavinich v. Commonwealth Land Title Ins. Co.*, *supra*, 163 Cal. App. 3d 263, 272.)

[****41] The dissenting opinion -- relying on passages in a few decisions of this court to the effect that the presumption of prospectivity is to be "subordinated . . . to the transcendent canon of statutory construction that the design of the Legislature be given effect . . . [and] is to be applied only after, considering all pertinent factors, it is determined that it is impossible to ascertain the legislative intent" (*Marriage of Bouquet*, *supra*, 16 Cal.3d 583, 587 [italics deleted]; *Mannheim v. Superior Court* (1970) 3 Cal.3d 678, 686-687 [91 Cal. Rptr. 585, 478 P.2d 17]; *In re Estrada*, *supra*, 63 Cal.2d 740, 746) -- apparently takes the position that the well-established legal principle which Justice Rehnquist suggested was "familiar to every law student" (see *United States v. Security Industrial Bank*, *supra*, 459 U.S. 70, 79 [74 L. Ed. 2d 235, 243]) is inapplicable in this state and that [Civil Code section 3](#) and other similar statutory provisions have virtually no effect on a court's determination of whether a statute applies prospectively or retroactively. The language in the decisions relied [****42] on by the dissent, however, generally has not been, and should not properly be, interpreted to mean that California has embraced a unique application of the general prospectivity principle, distinct from the approach followed in other jurisdictions (see generally 2 Sutherland on Statutory Construction (4th ed. 1986) § 41.04, pp. 348-350), so that the principle that statutes are presumed to operate prospectively ordinarily has no bearing on a court's analysis of the retroactivity question and may properly be considered by a [**598] court only as a matter of last resort and then only as a tie-breaking factor.

In the years since *Estrada*, *supra*, 63 Cal.2d 740, *Mannheim*, *supra*, 3 Cal.3d 678, and *Marriage of Bouquet*, *supra*, 16 Cal.3d 583, both this court and the Courts of Appeal have generally commenced analysis of the question of whether a statute applies retroactively with a restatement of the fundamental principle that

only to the original provisions of the codes, that dictum is contrary to the numerous Supreme Court decisions noted above and must be disapproved. (See also *Estate of Frees* (1921) 187 Cal. 150, 155-156 [201 P. 112] and cases cited.)

"legislative enactments are generally presumed to operate prospectively and not retroactively unless the Legislature expresses a different intention." (See, e.g., *Fox v. Alexis* (1985) 38 Cal.3d 621, 637 [214 Cal. Rptr. 132, 699 P.2d 309]; [****43] *White v. Western Title Co.*, supra, 40 Cal.3d 870, 884; *Hoffman v. Board of Retirement* (1986) 42 Cal.3d 590, 593 [229 Cal. Rptr. 825, 724 P.2d 511]; *Baker v. Sudo* (1987) 194 Cal. App. 3d 936, 943 [240 Cal. Rptr. 38]; *Sagadin v. Ripper* (1985) 175 Cal. App. 3d 1141, 1156 [221 Cal. Rptr. [***642] 675]; *Glavinich v. Commonwealth Land Title Ins. Co.*, supra, 163 Cal. App. 3d 263, 272.) These numerous precedents demonstrate that California continues to adhere to the time-honored principle, codified [*1209] by the Legislature in *Civil Code section 3* and similar provisions, that in the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature or the voters must have intended a retroactive application. The language in *Estrada*, *Mannheim*, and *Marriage of Bouquet* should not be interpreted as modifying this well-established, legislatively-mandated principle.

[CA\(6b\)](#) [↑] (6b) Applying this general principle in the present matter, we find nothing in the language of Proposition [****44] 51 which expressly indicates that the statute is to apply retroactively.¹² Although each party in this case attempts to stretch the language of isolated portions of the statute to support the position each favors,¹³ we believe that a fair reading of the

¹² The full text of Proposition 51 is set out in the appendix to this opinion.

¹³ Plaintiff, taking his cue in part from a portion of the Court of Appeal decision in *Russell v. Superior Court*, supra, 185 Cal. App. 3d 810, 818-819, suggests that the use of the word "shall" in various passages in the statute indicates that the drafters intended only a future operation. As defendants contend, however, in context we think it is more likely that the use of "shall" was intended to reflect the mandatory nature of the provision, rather than to refer to its temporal operation.

Defendants, in turn, rely on the initial clause of *Civil Code section 1431.2*, which states simply that the provision is to apply "[in] any action" That familiar language, however, merely negates any implication that the new several liability rule was to apply only to a specific category of tort cases -- like the earlier medical malpractice tort legislation -- and provides no indication that a retroactive application was contemplated. Similar [HN15](#) [↑] broad, general language in other statutory provisions has not been considered sufficient to indicate a legislative intent that the statute is to be applied retroactively.

proposition as a whole makes it clear that the subject of retroactivity or prospectivity was simply not addressed. As we have explained, under *Civil Code section 3* and the general principle of prospectivity, the absence of any express provision directing retroactive application strongly supports prospective operation of the measure. Although defendants raise a number of claims in an attempt to escape the force of this well-established principle of statutory interpretation, none of their contentions is persuasive.

[****45] C.

Defendants initially contend that even though there is no express language in the statute calling for retroactive application, an intent that the provision should apply retroactively can clearly be inferred from the objectives of the legislation, as reflected in the stated "findings and declaration of purpose" accompanying the provision [**599] and in the ballot arguments which [*1210] were before the voters at the time the measure was adopted.¹⁴ [****46] [CA\(9\)](#) [↑] (9) As defendants

(See, e.g., *United States v. Security Industrial Bank*, supra, 459 U.S. 70, 82, fn. 12 [74 L. Ed. 2d 235, 245] ["[a] few words of general connotation appearing in the text of statutes should not be given a wide meaning contrary to a settled policy, "excepting as a different purpose is plainly shown." [Citation]"]; *Un. Pac. R.R. v. Laramie Stock Yards* (1913) 231 U.S. 190, 199-202 [58 L. Ed. 179, 182-183, 34 S. Ct. 101].)

¹⁴ [HN17](#) [↑] *Civil Code section 1431.1*, the introductory section of Proposition 51 which sets forth various "findings" and a "declaration of purpose," provides in full: "The People of the State of California find and declare as follows: [para.] (a) The legal doctrine of joint and several liability, also known as 'the deep pocket rule', has resulted in a system of inequity and injustice that has threatened financial bankruptcy of local governments, other public agencies, private individuals and businesses and has resulted in higher prices for goods and services to the public and in higher taxes to the taxpayers. [para.] (b) Some governmental and private defendants are perceived to have substantial financial resources or insurance coverage and have thus been included in lawsuits even though there was little or no basis for finding them at fault. Under joint and several liability, if they are found to share even a fraction of the fault, they often are held financially liable for all the damage. The People -- taxpayers and consumers alike -- ultimately pay for these lawsuits in the form of higher taxes, higher prices and higher insurance premiums. [para.] (c) Local governments have been forced to curtail some essential police, fire and other protections because of the soaring costs of lawsuits and insurance premiums. Therefore, the People of the State of California declare that to remedy these inequities,

[**643] correctly point out, [HN16](#)¹⁵ on a number of occasions in the past we have found that even when a statute did not contain an express provision mandating retroactive application, the legislative history or the context of the enactment provided a sufficiently clear indication that the Legislature intended the statute to operate retrospectively that we found it appropriate to accord the statute a retroactive application. (See, e.g., [Marriage of Bouquet, supra, 16 Cal.3d 583](#); [Mannheim, supra, 3 Cal.3d 678, 686.](#))¹⁵

[****47] [CA\(6c\)](#)¹⁶ (6c) Defendants assert that consideration of the factors deemed relevant to the inquiry into legislative intent in those cases -- e.g., "[the] context [of the legislative enactment], the object in view, the evils to be remedied, the history of the times and of legislation upon the same subject" ([Marriage of *1211 Bouquet, supra, 16 Cal.3d 583, 587](#)) --

defendants in tort actions shall be held financially liable in closer proportion to their degree of fault. To treat them differently is unfair and inequitable. [para.] The People of the State of California further declare that reforms in the liability laws in tort actions are necessary and proper to avoid catastrophic economic consequences for state and local governmental bodies as well as private individuals and businesses."

¹⁵ In [In re Estrada, supra, 63 Cal.2d 740](#), the court also held that a statutory enactment should be applied retroactively despite the absence of an express retroactivity clause, but that case involved considerations quite distinct from the ordinary statutory retroactivity question. In [Estrada](#), the Legislature had amended a criminal statute to reduce the punishment to be imposed on violators; the amendment mitigating punishment was enacted after the defendant in [Estrada](#) had committed the prohibited act but before his conviction was final. Following the rule applied by the United States Supreme Court and a majority of states (see [63 Cal.2d at p. 748](#)), the [Estrada](#) court concluded that the defendant should receive the benefit of the mitigated punishment "because to hold otherwise would be to conclude that the Legislature was motivated by a desire for vengeance, a conclusion not permitted in view of modern theories of penology." ([63 Cal.2d at p. 745.](#))

Although some of the broad language in [Estrada](#) was subsequently invoked in the civil context in the [Mannheim, supra, 3 Cal.3d 678](#), and [Marriage of Bouquet, supra, 16 Cal.3d 583](#), decisions, the rationale for the [Estrada](#) ruling bears little relationship to the determination of the retroactivity of most nonpenal statutes, and, as noted below, other jurisdictions have not applied the special rule applicable to ameliorative penal provisions in determining the retroactivity of a general tort reform measure like Proposition 51. We similarly conclude that the [Estrada](#) decision provides no guidance for the resolution of this case.

supports retroactive application of the legislation at issue here. As we shall explain, we cannot agree.

To begin with, unlike [Marriage of Bouquet](#) or [Mannheim](#), there is nothing in either the statutory "findings and declaration of purpose" or the brochure materials which suggests that, notwithstanding the absence of any express provision on retroactivity, the retroactivity question was actually consciously considered during the enactment process. In [Marriage of Bouquet](#), the court, in concluding that the statute at issue in that case should be applied retroactively, relied, in part, on the Legislature's adoption of a resolution, shortly after [**600](#) the enactment of the measure, indicating that the retroactivity question was specifically discussed during the legislative debate [****48](#) on the measure and declaring that the provision was intended to apply retroactively (see [Marriage of Bouquet, supra, 16 Cal.3d at pp. 588-591](#)); in [Mannheim](#), the statute in question incorporated by reference a separate statutory scheme which had expressly been made retroactive, and the [Mannheim](#) court reasoned that the Legislature must have intended the later statute to have a parallel application to the provision on which it was expressly fashioned. (See [Mannheim, supra, 3 Cal.3d at pp. 686-687.](#)) Defendants can point to nothing in the election brochure materials which provide any comparable confirmation of an actual intention on the part of the drafters or electorate to apply the statute retroactively.

Indeed, when "the history of the times and of legislation upon the same subject" [***644](#) ([Marriage of Bouquet, supra, 16 Cal.3d at p. 587](#)) is considered, it appears rather clear that the drafters of Proposition 51, in omitting any provision with regard to retroactivity, must have recognized that the statute would not be applied retroactively. As we have noted briefly above, the tort reform measure instituted by Proposition [****49](#) 51 paralleled somewhat similar tort reform legislation -- MICRA -- which was enacted in the mid-1970's in response to a liability insurance crisis in the medical malpractice field. In [Bolen v. Woo \(1979\) 96 Cal. App. 3d 944, 958-959 \[158 Cal. Rptr. 454\]](#) and [Robinson v. Pediatric Affiliates Medical Group, Inc. \(1979\) 98 Cal. App. 3d 907, 911-912 \[159 Cal. Rptr. 791\]](#), two separate panels of the Court of Appeal addressed the question whether one of the tort reform provisions of MICRA should apply retroactively to a cause of action that accrued prior to MICRA's enactment but which was tried after the act went into effect. In both [Bolen](#) and [Robinson](#), the courts held that in the absence of a specific provision in the legislation calling for such retroactive application, the general

presumption of prospective application should apply; the *Bolen* court observed that if the Legislature had intended the statute to apply retroactively it "could very easily have inserted such language in the statute itself. It chose not to do so." (96 Cal. App. 3d at p. 959.) Because at least one of the principal institutional proponents and drafters [****50] of Proposition 51 was very [*1212] much involved in the post-MICRA litigation,¹⁶ it appears inescapable that -- given the *Bolen* and *Robinson* decisions -- the drafters of Proposition 51 would have included a specific provision providing for retroactive application of the initiative measure if such retroactive application had been intended. (Cf. *Aetna Cas. & Surety Co.*, supra, 30 Cal.2d 388, 396 [it [HN18](#)] must be assumed that the Legislature was acquainted with the settled rules of statutory interpretation, and that it would have expressly provided for retrospective operation of the amendment if it had so intended.].) Since the drafters declined to insert such a provision in the proposition -- perhaps in order to avoid the adverse political consequences that might have flowed from the inclusion of such a provision -- it would appear improper for this court to read a retroactivity clause into the enactment at this juncture.

[****51] D.

Defendants contend, however, that whether or not *the drafters* of the proposition intended that the measure would apply retroactively, it is the intent of *the electorate* that is controlling, and they maintain that, in light of the purposes of the proposition, [**601] it is evident that the voters must have intended a retroactive application.

This argument, while novel, is flawed in a number of fundamental respects. To begin with, [HN19](#) although the intent of the electorate would prevail over the intent of the drafters if there were a reliable basis for determining that the two were in conflict, in the present case there is simply no basis for finding any such conflict. Neither the Legislative Analyst's analysis of

¹⁶ The Association for California Tort Reform (ACTR) is one of numerous organizations that have filed amici curiae briefs in this case. In its brief, ACTR states that it sponsored the legislation that was "the precursor to and model for Proposition 51" and that its chairman "was the official proponent who filed Proposition 51 with the California Attorney General requesting preparation of a title and summary for placement on the ballot." ACTR participated as an amicus in many of the leading MICRA cases. (E.g., [American Bank & Trust Co. v. Community Hospital](#), supra, 36 Cal.3d 359; [Fein v. Permanente Medical Group](#), supra, 38 Cal.3d 137.)

Proposition 51 nor any of the statements of the proponents or opponents that were before the voters in the ballot pamphlet spoke to the retroactivity question, and thus there is no reason to believe that the electorate harbored any specific thoughts or intent with respect to the retroactivity issue at all. [CA\(10\)](#) (10) Because past cases have long made it clear that [HN20](#) initiative measures are subject to the ordinary rules and canons of statutory construction (see, [****52] e.g., [Carter v. Seaboard Finance Co.](#) (1949) 33 Cal.2d 564, 579-582 [203 P.2d 758]; [Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization](#), [****645] supra, 22 Cal.3d 208, 244-246), informed members of the electorate who happened to consider the retroactivity issue would presumably have concluded that the measure -- like other statutes -- would be [*1213] applied prospectively because no express provision for retroactive application was included in the proposition.

[CA\(6d\)](#) (6d) Furthermore, defendants' claim that the "remedial" purpose of the measure necessarily demonstrates that the electorate must have intended that the proposition apply retroactively cannot be sustained. Although the "findings and declaration of purpose" included in the proposition clearly indicate that the measure was proposed to remedy the perceived inequities resulting under the preexisting joint and several liability doctrine and to create what the proponents considered a fairer system under which "defendants in tort actions shall be held financially liable in closer proportion to their degree of fault" (*Civ. Code*, § 1431.1 [****53]), such [HN21](#) a remedial purpose does not necessarily indicate an intent to apply the statute retroactively. Most statutory changes are, of course, intended to improve a preexisting situation and to bring about a fairer state of affairs, and if such an objective were itself sufficient to demonstrate a clear legislative intent to apply a statute retroactively, almost all statutory provisions and initiative measures would apply retroactively rather than prospectively. In light of the general principles of statutory interpretation set out above, and particularly the provisions of [Civil Code section 3](#), the contention is clearly flawed. (See, e.g. *Aetna Cas. & Surety Co. v. Ind. Acc. Com.*, supra, 30 Cal.2d at p. 395.)¹⁷

¹⁷ Justice Gibson's opinion in *Aetna Cas. & Surety Co.*, supra, clearly demonstrates the untenability of defendants' claim that the remedial nature of a statute is sufficient to support an inference that the statute was intended to apply retroactively. As noted above, in *Aetna* the question before the

[****54] What defendants' contention overlooks is that there are special considerations -- quite distinct from the merits of the substantive [**602] legal change embodied in the new legislation -- that are frequently triggered by the [*1214] application of a new, "improved" legal principle retroactively to circumstances in which individuals may have already taken action in reasonable reliance on the previously existing state of the law. Thus, [HN23](#)^[↑] the fact that the electorate chose to adopt a new remedial rule for the future does not necessarily demonstrate an intent to apply the new rule retroactively to defeat the reasonable expectations of those who have changed their position in reliance on the old law. [CA\(11\)](#)^[↑] (11) The presumption of prospectivity assures that reasonable reliance on current legal principles will not be defeated in the absence of a clear indication of a legislative intent to override such reliance.

The Oregon Supreme Court's decision in [Joseph v. Lowery, supra, 495 P.2d 273](#) illustrates the point quite well, in a context closely related to the instant case. The question at issue in *Joseph* was whether a newly enacted comparative-negligence [****55] statute should be applied retroactively to a [**646] cause of action

court was whether a statute which increased workers' compensation benefits should be applied to workers who had sustained work-related injuries prior to the enactment of the new law but who were not awarded benefits until after the new statute took effect. In that case, unlike the present matter, of course, it was the injured parties who sought retroactive application of the statute; the workers argued that in light of the remedial nature of the increased benefits and the statutory mandate that provisions of the workers' compensation law be liberally construed to extend benefits to injured workers ([Lab. Code, § 3202](#)), the court should infer an intent on the part of the Legislature to apply the act retroactively even though the act contained no express provision to that effect.

In rejecting the argument, the *Aetna* court observed: "No authority is cited for the novel doctrine which would require the court to ignore the rule against retroactive operation with respect to statutes increasing benefits to persons favored by remedial legislation. [HN22](#)^[↑] The rule of liberal construction and the rule that statutes should ordinarily be construed to operate prospectively are neither inconsistent nor mutually exclusive It would be a most peculiar judicial reasoning which would allow one such doctrine to be invoked for the purpose of destroying the other. *It seems clear, therefore, that the legislative intent in favor of the retrospective operation of a statute cannot be implied from the mere fact that the statute is remedial and subject to the rule of liberal construction.*" (Italics added.) (*Aetna Cas. & Surety Co., supra, 30 Cal.2d at p. 395.*)

which accrued before the passage of the statute but which did not come to trial until after the new law went into effect. The plaintiff in that case, like defendants in this case, argued forcefully that the court should infer from the remedial nature of the legislative change that the Legislature intended to apply the newly enacted, more equitable comparative negligence rule to all cases tried after the passage of the new legislation, even when the cause of action accrued prior to the enactment; the plaintiff emphasized, in this regard, that the defendant's "primary conduct" at the time of the accident was obviously not undertaken in reliance on the contributory negligence doctrine.

The Oregon Supreme Court rejected the plaintiff's argument for retroactive application of the statute, explaining: "Certainly, no one has an accident upon the faith of the then existing law. However, it would come as a shock to someone who has estimated his probable liability arising from a past accident, and who has planned his affairs accordingly, to find that his responsibility therefor is not to be determined as of the happening [****56] of the accident but is also dependent upon what the legislature *might* subsequently do. Every day it is necessary in the conduct of the affairs of individuals and of businesses to make a closely calculated estimate of the responsibility or lack thereof resulting from an accident or from other unforeseen and unplanned circumstances and to act in reliance on such estimate. We believe there is merit in the prior view of this court, as demonstrated by its decisions, that, [HN24](#)^[↑] in the absence of an indication to the contrary, legislative acts should not be construed in a manner which changes legal rights and responsibilities arising out of transactions which occur prior to the passage of such acts." ([495 P.2d at p. 276.](#)) The vast majority of other courts -- including the United States Supreme Court -- which have faced the question whether a remedial statute replacing the all-or-nothing contributory negligence doctrine [*1215] with a more equitable comparative negligence rule should be applied retroactively to causes of action which accrued prior to the date of the comparative negligence statute, when the enactment is silent on the retroactivity issue, have reached the same [****57] conclusion as the *Joseph* court, applying the new remedial statute prospectively only.¹⁸

¹⁸ See, e.g., [Winfree v. Nor. Pac. Ry. Co., supra, 227 U.S. 296](#); [Brewster v. Ludtke \(1933\) 211 Wis. 344 \[247 N.W. 449, 450\]](#); [Edwards v. Walker \(1973\) 95 Idaho 289 \[507 P.2d 486, 488\]](#); [Dunham v. Southside National Bank \(1976\) 169 Mont. 466](#)

[****58] [**603] [CA\(6e\)](#) (6e) Although, as we have noted, there is no indication that the voters in approving Proposition 51 consciously considered the retroactivity question at all, if they had considered the issue they might have recognized that retroactive application of the measure could result in placing individuals who had acted in reliance on the old law in a worse position than litigants under the new law. We briefly examine why retroactive application of the proposition could have such a consequence.

To begin with, plaintiffs whose causes of action arose long before Proposition 51 was enacted will often have reasonably relied on the preexisting joint and several liability doctrine in deciding which potential tortfeasors to sue and which not to sue. Given the joint and several liability rule, plaintiffs may reasonably have determined that while [****647] there may have been other tortfeasors -- in addition to the defendants named in their complaint -- who might also be responsible for their injuries, there was no reason to go to the added expense and effort to attempt to join such other tortfeasors, since plaintiffs could recover all of their damages -- economic and noneconomic [****59] -- from the named defendants. Such plaintiffs would have understood, of course, that under the then-governing rules, the named defendants could bring any additional tortfeasors into the suit through cross-complaints if the defendants desired.

While Proposition 51 itself, of course, does not bar a plaintiff from joining additional tortfeasors -- indeed, its effect in the future well may be to encourage plaintiffs to join every conceivable responsible party -- the [*1216]

[\[548 P.2d 1383\]](#); [Rice v. Wadkins \(1976\) 92 Nev. 631 \[555 P.2d 1232, 1233\]](#); [Smith v. Shreeve \(Utah 1976\) 551 P.2d 1261, 1262](#), footnote 2; [Scammon v. City of Saco \(Me. 1968\) 247 A.2d 108, 110](#); [Costa v. Lair \(1976\) 241 Pa. Super. 517 \[363 A.2d 1313, 1314-1315\]](#); [Viers v. Dunlap \(1982\) 1 Ohio St.3d 173 \[438 N.E.2d 881\]](#); contra, [Godfrey v. State \(1975\) 84 Wash.2d 959 \[530 P.2d 630\]](#).

Many of the recent comparative negligence statutes are not silent on the point, but specifically address the prospective/retroactive question. (See generally Schwartz, Comparative Negligence (2d ed. 1986) §§ 8.3-8.5, pp. 143-152.) Of the numerous statutes which expressly speak to the issue, all but two specifically provide for prospective operation. (*Ibid.*) The Uniform Comparative Fault Act, drafted by the National Conference of Commissioners on Uniform State Laws as a model for state laws on the subject, similarly contains a provision which mandates prospective application, declaring that "[this] Act applies to all [claims for relief] [causes of action] which accrue after its effective date." (§ 10.)

retroactive application of the measure to preexisting causes of action would frequently have the effect of depriving plaintiffs of any opportunity to recover the proportion of noneconomic damages attributable to absent tortfeasors, because in many cases the statute of limitations on the plaintiff's preexisting cause of action against such an absent tortfeasor will have run before the enactment of Proposition 51.¹⁹ Thus, while there is nothing in the language or legislative history of Proposition 51 to suggest that the electorate intended to cut off a plaintiff's opportunity to obtain full recovery for noneconomic damages, the retroactive application of the measure would frequently have just such an effect.

[****60] In similar fashion, retroactive application of the proposition to actions which were pending prior to the adoption of the measure would frequently defeat the reasonable expectations of parties who entered into settlement agreements in reliance on the preexisting joint and several liability rule. Acting on the assumption that any nonsettling defendants would remain fully liable for both economic and noneconomic damages, plaintiffs in pre-Proposition 51 actions may frequently have settled with some defendants for a lesser sum than they would have accepted if they were aware that the remaining defendants would only be severally liable for noneconomic damages. By contrast, plaintiffs who settle causes of action accruing after Proposition 51 would be fully aware of the applicable principles.

Furthermore, retroactive application of Proposition 51 could also have unanticipated, adverse consequences for settling defendants as well. As noted above, under pre-Proposition 51 law, a defendant could choose to enter into a settlement agreement with the plaintiff which settled the plaintiff's entire claim against all defendants, and could thereafter bring an equitable comparative indemnity action against [****61] other tortfeasors to compel them to bear their fair share of the amount which the settling defendant had paid in settlement of the plaintiff's claim. (See, e.g., [**604] [Sears, Roebuck & Co. v. International Harvester Co., supra, 82 Cal. App. 3d 492, 496](#); [American Bankers Ins. Co. v. Avco-](#)

¹⁹ Although in the present case we do not know the additional parties plaintiff may have chosen to sue if Proposition 51 had been in effect at the outset of the litigation, defendants -- in connection with their post-Proposition 51 filings -- have suggested that some responsibility for the accident may lie either with some of plaintiff's friends or with plaintiff's parents. The statute of limitations on any cause of action plaintiff may have had against such individuals has, of course, long since run.

Lycoming Division, supra, 97 Cal. App. 3d 732, 736.) Under preexisting law, if a settling defendant pursued such a course of action and if one or more of the culpable tortfeasors proved to be insolvent, the shortfall caused by such insolvency would be shared on an equitable basis by all of the solvent tortfeasors. (See, e.g., Paradise Valley Hospital v. Schlossman, supra, 143 Cal. App. 3d 87, 93.) If Proposition 51 were applied **[*1217]** retroactively to causes of action that accrued prior to its enactment, however, a nonsettling tortfeasor who was faced with an indemnity claim brought by a settling tortfeasor would be able to limit his liability for noneconomic damages to a percentage equal to his own personal degree of fault, and the settling tortfeasor -- who had entered into **[***648]** the settlement in reliance on the preexisting state **[****62]** of the law -- would be left to absorb by himself any proportion of the noneconomic damages that was attributable to an insolvent tortfeasor or tortfeasors.

Thus, retroactive application of the measure to past litigation could have unexpected and potentially unfair consequences for all parties who acted in reliance on the then-existing state of the law. Prospective application of the measure, while withholding the remedial benefits of the provision from defendants in pending actions, would assure that all parties to litigation were aware of the basic "ground rules" when they decided whom to join in the action and on what terms the case should be settled.

Of course, we do not suggest that most or even many voters were aware of the consequences that would result from the retroactive application of Proposition 51. A review of these consequences does indicate, however, that a voter who supported the remedial changes embodied in Proposition 51 would not necessarily have supported the retroactive application of those changes to defeat the reasonable expectations of individuals who had taken irreversible actions in reliance on the preexisting state of the law.

To avoid misunderstanding, **[****63]** a caveat is in order. It is no doubt possible that an informed electorate, aware of the consequences of retroactive application, would nonetheless have chosen to make the statute retroactive if the retroactivity or prospectivity issue had been directly presented to it. The crucial point is simply that because Proposition 51 did not address the retroactivity question, we have no reliable basis for determining how the electorate would have chosen to resolve either the broad threshold issue of whether the measure should be applied prospectively or

retroactively, or the further policy question of *how* retroactively the proposition should apply if it was to apply retroactively: i.e., whether the new rule should apply to cases in which a complaint had not yet been filed, to cases which had not yet come to trial, to cases in which a trial court judgment had not yet been entered, or to cases which were not yet final on appeal.²⁰

[**64] [*1218]** As we have explained above, the well-established presumption that statutes apply prospectively in the absence of a clearly expressed contrary intent gives recognition to the fact that retroactive application of a statute often entails the kind of unanticipated consequences we have discussed, and ensures that courts do not assume that the Legislature or the electorate intended such consequences unless such intent clearly **[**605]** appears. Because in the present matter there is nothing to suggest that the electorate considered these results or intended to depart from the general rule that statutory changes operate prospectively, prospective application is required.²¹

²⁰ The dissenting opinion asserts that in light of the remedial purposes of Proposition 51, "the inference is virtually inescapable" that the electorate intended the proposition to apply to all trials conducted after the effective date of the measure. (See, *post*, at pp. 1232-1233.) The dissenting opinion apparently overlooks the fact, however, that most states which enacted tort reform measures similar to Proposition 51 in response to the same liability crisis which precipitated Proposition 51, and which specifically addressed the retroactivity issue in their statutes, did *not* provide for retroactive application of the newly enacted reforms to all cases tried after the new enactment. (See, *post*, at pp. 1219-1220.) In light of these other enactments, it is difficult to understand how the dissent can find it "inescapable" from the context and purpose of the enactment that such a retroactive application must have been intended.

²¹ The dissenting opinion discusses a number of cases which it suggests support the proposition that remedial statutes are generally intended to apply retroactively. (See *post*, pp. 1233-1235.) The cases discussed by the dissent, however, did not involve general tort reform statutes, like Proposition 51, but rather concerned statutory enactments implementing procedural changes in circumstances in which it was unlikely that retroactive application would defeat a party's reasonable reliance on the displaced procedural rule.

In its discussion of the proper interpretation of remedial statutes, the dissent makes no mention of the numerous decisions of both the United States Supreme Court and of state courts throughout the country which have overwhelmingly concluded that a tort reform statute, which is

[****65] [***649] E.

Defendants next argue that even if the remedial nature of Proposition 51 is not sufficient to indicate an intent on the part of the electorate to apply the measure retroactively, this court should infer such an intent from the fact that the measure's statement of purpose and the election brochure arguments demonstrate that the proposition was adopted to meet a liability insurance crisis. Defendants maintain that because it will be years before causes of action which accrue after the effective date of the proposition actually come to trial, a prospective application of the measure would not effectuate the purpose of alleviating the insurance crisis and thus could not have been intended by the electorate. For a number of reasons, we conclude that this argument cannot be sustained.

To begin with, defendants' account of the consequences of prospective application of the measure is inaccurate in a number of significant respects. First, because liability insurance premiums are based in part, if not exclusively, on the damages that the insurance company anticipates it will incur for the risks which will be covered by the policy, any anticipated reduction in damages to be [****66] awarded in the future for causes of action which arise [*1219] during policy periods following the act should logically be reflected in an immediate reduction in the premiums which potential defendants pay for post-act insurance coverage. Thus, prospective application of the proposition could reasonably have been expected to afford immediate benefits to potential defendants. Similarly, to the extent governmental or other activities had been curtailed because of the fear of the anticipated financial consequences of future accidents, the knowledge that any such future incidents would be governed by the provisions of Proposition 51 would logically support prompt resumption of the activities.

Moreover, because the insurance premiums which potential defendants had paid prior to the enactment of Proposition 51 for coverage of pre-Proposition 51 accidents were presumably computed, at least in part, on the assumption that the then-prevailing joint and several liability doctrine would apply to the covered incidents, a retroactive application of the measure might be expected to provide a windfall to defendants' insurers, rather than a direct benefit to the insureds

silent on the retroactivity question, should be applied prospectively to causes of action accruing after the effective date of the new statute. (See fn. 18, *ante*, p. 1215.)

themselves because the [****67] initiative contained no provision requiring insurers to return any portion of previously collected premiums to their insureds. Indeed, this potential consequence of retroactive application may have been one reason the drafters of the measure chose not to include an express retroactivity provision in the measure; if this potential insurance company windfall from retroactive application had been brought to the attention of the electorate, it might well have detracted from the popularity of the measure.

Finally, defendants' suggestion that a prospective application of Proposition 51 will mean that it will be years before the measure will affect the actual damages paid by defendants in tort cases overlooks the fact that the vast majority of tort actions [**606] are resolved by settlement rather than by trial. Because the amounts at which cases are settled reflect the defendant's potential liability at trial, the effects of Proposition 51 on damages actually paid by defendants are likely to be felt at a much earlier date than defendants predict even if the measure is applied prospectively.

Thus, we cannot agree that prospective application is inconsistent with the objective of alleviating [****68] a liability-insurance crisis.

Indeed, a review of other statutory provisions, similar to Proposition 51, which were enacted in other states at approximately the same time as Proposition 51 and in response to the same concerns over the effects of high liability insurance premiums,²² demonstrates that this factor does [***650] not necessarily [*1220] evidence an intent to apply the statute retroactively to all cases tried after the effective date of the enactment. In the numerous statutes altering the joint and several liability rule which were enacted throughout the country in 1986 and 1987, the various state legislatures not only adopted different substantive variants of several liability (see fns. 5, 6, 7, *ante*), but also arrived at differing conclusions as to whether the newly enacted statutes should be applied retroactively to preexisting causes of action. Several of the new statutes were explicitly made applicable only to causes of action accruing after the date of the new legislation (*Fla. Stat. Ann. § 768.71(2)* (West Supp. 1987); *Mo. Ann. Stat. § 538.235* (Vernon

²² The preambles of a number of the 1986 and 1987 statutes closely track the "Findings and Declaration of Purpose" in Proposition 51. (See, e.g., 1986 Wash. Laws, ch. 305, § 100; Tex. Acts 1987, 70th Leg., 1st C.S., ch. 2, § 1.01, in Tex. Civ. Prac. & Rem. Code Ann., note following § 9.001 (Vernon 1988).)

Supp. 1987); Ill. Ann. Stat., ch. 110, note following [****69] paras. 2-1117, 2-1118 (Smith-Hurd Supp. 1987); 1987 Nev. Stat., ch. 709, § 2), some of the enactments apply only to cases filed on or after the effective date of the statute (1986 Colo. Sess. Laws, ch. 108, § 7; 1986 Wash. Laws, ch. 305, § 910; 1986 N.Y. Laws, ch. 682, § 12; 1987 Tex. Acts, 70th Leg., 1st C.S., ch. 2, § 4.05, in Tex. Civ. Prac. & Rem. Code Ann., note following § 9.001 (Vernon 1988)), and only one of the statutes -- which adopted a several liability rule limited to less culpable governmental defendants -- applies to cases "pending on or commenced on or after" the date of the enactment (1986 Minn. Laws, ch. 455, § 95). These varying responses, of course, are relevant to the question before us only inasmuch as they demonstrate that other legislative bodies which enacted statutes in response to the same liability crisis that precipitated Proposition 51 and which consciously focused on the retroactivity question arrived at different conclusions of whether, and to what extent, such a statutory modification should apply to preexisting causes of action. Because the provision before us is silent on the question, the general presumption which dictates a prospective application [****70] in the absence of a clear contrary intent must control.

The California decision most closely on point directly supports this conclusion. As noted above, in *Bolen v. Woo*, supra, 96 Cal. App. 3d 944, 958-959, the Court of Appeal addressed the question whether one of the tort reform provisions of MICRA should apply retroactively to a cause of action that accrued prior to MICRA's enactment but that was tried after the act went into effect. The defendant in *Bolen*, like defendants in this case, relied heavily on the fact that the preamble of MICRA demonstrated that the measure was adopted in response to a crisis caused by "skyrocketing" liability insurance costs ²³ and argued that that [****71]

²³ The preamble to MICRA read in part: "The Legislature finds and declares that there is a major health care crisis in the State of California attributable to skyrocketing malpractice premium costs and resulting in a potential breakdown of the health delivery system, severe hardships for the medically indigent, a denial of access for the economically marginal, and depletion of physicians such as to substantially worsen the quality of health care available to citizens of this state. The Legislature, acting within the scope of its police powers, finds the statutory remedy herein provided is intended to provide an adequate and reasonable remedy within the limits of what the foregoing public health and safety considerations permit now and into the foreseeable future." (Stats. 1975, 2d Ex. Sess. 1975-1976, ch. 2, § 12.5, p. 4007.)

purpose established [**607] an intent [*1221] to apply the act retroactively. The *Bolen* court rejected the contention, relying on the general principle of prospectivity discussed above and emphasizing that if the Legislature had intended the statute to apply retroactively it "could very easily have inserted such language in the statute itself. It chose not to do so." (96 Cal. App. 3d at p. 959.)

[****72] In light of *Bolen*, if the proponents of Proposition 51 felt that the liability crisis necessitated a retroactive application of the measure's provisions, it seems evident that they would have included an express retroactivity provision in the proposition.

F.

Defendants next argue that, despite the absence of any express retroactivity provision, Proposition 51 should be applied retroactively by analogy to this court's retroactive [**651] application of the decisions in *Li v. Yellow Cab*, supra, 13 Cal.3d 804, and *American Motorcycle Association v. Superior Court*, supra, 20 Cal.3d 578, to at least some cases that were pending at the time those decisions were rendered. (See *Li*, supra, 13 Cal.3d 804, 829; *Safeway stores, Inc. v. Nest-Kart* (1978) 21 Cal.3d 322, 333-334 [146 Cal. Rptr. 550, 579 P.2d 441].) For a number of reasons, those decisions do not support defendants' claim.

First, both *Li*, supra, 13 Cal.3d 804, and *American Motorcycle*, supra, 20 Cal.3d 578, involved changes in common law tort doctrine that were made by judicial decision, not statutory enactment. [****73] As the earlier quotation from Chief Justice Rehnquist makes clear, as a general rule there is a fundamental difference between the retroactivity of statutes and the retroactivity of judicial decisions: "The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student. [Citations.]" (*United States v. Security Industrial Bank*, supra, 459 U.S. 70, 79 [74 L. Ed. 2d 235, 243].) It is because of this difference in the governing legal principles that in most states in which the comparative negligence rule has been adopted through judicial decision -- like California -- the newly adopted rule has been applied to at least some pending cases (see Schwartz, Comparative Negligence (2d ed. 1986) § 8.2, pp. 140-143), while in those states in which comparative negligence has been established by statute, the change has almost uniformly been applied prospectively. (See *id.*, §§ 8.3, 8.4, pp. 143-149; see also fn. 17, *ante.*) Thus, the fact that the [*1222]

judicial modifications of tort doctrines in *Li* and *American Motorcycle* were accorded some retroactive application provides no support [****74] for defendants' claim that the subsequent legislative modification of a tort doctrine in Proposition 51 should apply retroactively.

Second, defendants' argument overlooks a related, but somewhat more fundamental, point. Because in the *Li*, [supra](#), 13 Cal.3d 804, and *American Motorcycle*, [supra](#), 20 Cal.3d 578, cases it was the court which made the policy decision that the common law rules at issue in those cases should be changed, the court was the appropriate body to determine whether or not the new rule should be applied retroactively and, if so, how retroactively. (See generally *Gt. Northern Ry. v. Sunburst Co.* (1932) 287 U.S. 358 [77 L. Ed. 360, 53 S. Ct. 145, 85 A.L.R. 254]; *Peterson v. Superior Court* (1982) 31 Cal.3d 147, 151-153 [181 Cal. Rptr. 784, 642 P.2d 1305].) In the present case, by contrast, it was the electorate who made the policy decision to implement a change in the traditional common law rule, and thus it was the voters who possessed the authority to decide the policy question of whether the new statute should be applied retroactively. Unlike in *Li* or in *American Motorcycle*, in this [****75] case our court has no power to impose its own views as to the wisdom or appropriateness of applying Proposition 51 retroactively. Because, as we have discussed above, the proposition is silent on the retroactivity [**608] question, [Civil Code section 3](#) and well-founded principles of statutory interpretation establish that the statute must be interpreted to apply prospectively.

G.

Finally, defendants contend that Proposition 51 should be applied retroactively by analogy to a line of California cases, beginning with *Tulley v. Tranor* (1878) 53 Cal. 274, which have applied a number of statutory amendments, which modified the legal measure of damages recoverable in an action for wrongful conversion of personal or real property, to all trials conducted after the effective date of the revised statute. (See also *Feckenscher v. Gamble* (1938)) 12 Cal.2d 482 [85 P.2d 885]; *Stout v. Turney* (1978) 22 Cal.3d 718, 727 [150 Cal. Rptr. 637, 586 P.2d 1228].)²⁴

²⁴ In *Tulley*, [supra](#), 53 Cal. 274, the question at issue was the application of the amended version of [Civil Code section 3336](#), setting forth the measure of damages for wrongful conversion of personal property. At the time the cause of action in *Tulley* arose, [section 3336](#) provided, inter alia, that "[the] detriment caused by the wrongful conversion of personal property is

[****76] [**1223] [***652] To begin with, we believe defendants clearly overstate the scope of the *Tulley* line of cases in suggesting that those decisions establish a broad rule that in California any statutory provision which affects the amount of damages which an injured person may recover is presumptively retroactive. As we have seen, the seminal decision in *Aetna Cas. & Surety Co.*, [supra](#), 30 Cal.2d 388 -- decided long after *Tulley*, [supra](#), 53 Cal. 274 -- applied the general presumption of prospective application to a statutory provision which increased the damages or benefits recoverable in a workers' compensation action. Similarly, the two relatively recent MICRA cases noted above (*Bolen v. Woo*, [supra](#), 96 Cal. App. 3d 944; *Robinson v. Pediatrics Affiliates Medical Group, Inc.*, [supra](#), 98 Cal. App. 3d 907) applied the traditional principle of prospective application to a provision of MICRA which affected the damages which a plaintiff could recover in a medical malpractice action. ([Civ. Code, § 3333.1](#) [modification of collateral source rule].) Indeed, in our even more recent decision [****77] in *White v. Western Title Ins. Co.*, [supra](#), 40 Cal.3d 870, 884, this court, after noting that "[it] is [HN25](#) [↑] a general rule of construction . . . that, unless the intention to make it retrospective clearly appears from the act itself, a statute will not be construed to have that effect" [citations]," went on to observe that "[this] rule is particularly applicable to a statute which *diminishes* or

presumed to be the value of the property at the time of conversion, with the interest from that time, *or, where the action has been prosecuted with reasonable diligence, the highest market value of the property at any time between the conversion and the verdict, without interest, at the option of the injured party . . .*" (italics added); prior to the trial of the action, the section was amended to delete the emphasized portion of the statute.

In *Feckenscher*, [supra](#), 12 Cal.2d 482, the statutory change at issue involved a revision of [Civil Code section 3343](#), pertaining to the measure of damages in a real estate fraud action. Although the opinion does not quote the version of [section 3343](#) in effect at the time the action arose, it appears that at that point the statute permitted a defrauded plaintiff to recover a sum equal to the difference between defendant's representation as to the value of the property which plaintiff received and the actual value of that property; as revised, [section 3343](#) permitted recovery of "the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received . . ."

Stout, [supra](#), 22 Cal.3d 718, like *Feckenscher*, [supra](#), 12 Cal.2d 482, dealt with a revision of [Civil Code section 3343](#), setting forth the measure of damages in a real estate fraud action.

extinguishes an existing cause of action." (Italics added.) (*Ibid.*) Thus, it is not accurate to suggest that the ordinary presumption of prospectivity is inapplicable to any statute which modifies damages; after all, [Civil Code section 3](#), which codifies the common law presumption of prospectivity with respect to provisions of the Civil Code, contains no exception for statutes relating to damages.

Instead, [Tulley, supra, 53 Cal. 274](#), and its progeny were primarily concerned with an entirely separate issue. In *Aetna Cas. & Surety Co., supra, 30 Cal.2d 388*, our court, in discussing *Feckenscher* **[**609]** v. *Gamble, supra, 12 Cal.2d 482*-- one of the cases in the *Tulley* line -- observed that **[****78]** in *Feckenscher* the court had found that the language of the statute in question showed that the Legislature intended the measure to be applied retroactively, and that "the court was concerned mainly with the question of whether the Legislature has power to give those laws such retroactive effect." (30 Cal.2d at p. 393.) The *Tulley* decision, too -- after finding that the statutory **[*1224]** language left "no reasonable doubt that the amendment was intended to be applicable to a case in which the conversion had occurred prior to its passage" (53 Cal. at p. 278) ²⁵ -- focused primarily on the question **[****653]** of whether the Legislature had the constitutional authority to apply a new measure of damages to causes of action which accrued prior to the enactment of the new statute but which came to trial after the enactment, concluding that the Legislature did have such authority. (See 53 Cal. at pp. 279-280.) Thus, while *Tulley* and its progeny do provide support for the claim that it is not necessarily unconstitutional for the Legislature to alter the measure of damages with respect to preexisting causes of action, those decisions **[****79]** do not purport to reject the ordinary presumption of prospectivity or to adopt a new legal standard for determining whether the Legislature intended a statute to be retroactive or prospective; the decisions simply found that the language of the statutes at issue in those cases demonstrated that the measures were intended to apply retroactively.

²⁵In reaching its conclusion on the statutory interpretation issue, the *Tulley* court relied on the fact that the section in question provided that "[the] detriment caused by the wrongful conversion of personal property is presumed to be . . ." (italics added), reasoning that "[the] expression 'is presumed to be' indicates that it was intended to establish a legal presumption to operate, and which could only operate, at the trial of the cause . . ." (53 Cal. at pp. 278-279.)

As we have noted above, of course, the question whether Proposition 51 may constitutionally be applied retroactively is quite distinct from the question whether the proposition **[****80]** should be properly interpreted as retroactive or prospective as a matter of statutory interpretation. [CA\(12\)\[↑\] \(12\)](#) The *Aetna Cas. & Surety Co.* decision makes it clear that the *Tulley* line of cases cannot properly be interpreted as displacing ordinary principles of statutory interpretation with regard to the question of retroactivity. (See *Aetna Cas. & Surety Co., supra, 30 Cal.2d at pp. 393-394.*) Other jurisdictions have also generally applied the traditional presumption of prospective application to statutes which modify the amount of damages recoverable in tort actions. (See generally Annot. (1964) 98 A.L.R.2d 1105; Annot. (1977) 80 A.L.R.3d 583, 601-602.)

In any event, Proposition 51 is quite unlike the statutory provisions at issue in [Tulley, supra, 53 Cal. 274](#), or its progeny in a number of important respects. First of all, unlike the statutes in those cases, Proposition 51 does not purport to alter either the measure or the total amount of damages that a plaintiff may recover for a particular tort. Although Proposition 51 does affect the amount of noneconomic damages a particular tortfeasor may be required **[****81]** to pay when more than one tortfeasor is responsible for an injury, and may have the effect of reducing a plaintiff's ultimate recovery if one or more tortfeasors are insolvent, nothing in the measure evidence a legislative **[*1225]** objective of denying a plaintiff the opportunity to obtain full recovery for both economic and noneconomic damages by joining all responsible tortfeasors and collecting the appropriate proportion of noneconomic damages from each tortfeasor. As we have discussed above, however, retroactive application of the measure would often have the effect of placing plaintiffs in pending actions in a worse position than plaintiffs in future actions, since plaintiffs in pending actions may no longer have the ability to join all potentially liable tortfeasors because of the statute of limitations. Thus, whereas application of the statutory provisions at issue in the *Tulley* line of cases to both pending and future actions at least accorded like treatment to current and future plaintiffs, retroactive application in this case would not have an equalizing effect, **[**610]** but would impose a unique detriment on one class of plaintiffs. Accordingly, it is more difficult **[****82]** to assume in this case, than it was in the *Tulley* cases, that retroactive application was intended.

Second, given the nature of the statutory revision at issue in the *Tulley* line of cases, it was unlikely that the

parties in pending actions had taken any irreversible actions or changed their position in reliance on the preexisting measure of damages. By contrast, as discussed above, many plaintiffs and defendants in pending actions undoubtedly relied on the preexisting joint and several liability rule in conducting their litigation prior to enactment of Proposition 51. On this ground, too, there is more reason in this case than in the *Tulley* decisions to question whether a retroactive application of the statute was intended.

Finally, it is impossible to ignore that the statutory change at issue here, modifying a long-standing common law doctrine applicable [***654] to all negligence actions, represents a much more substantial and significant change in the law than the narrow statutory modifications at issue in the *Tulley* cases. Because of the widespread impact of retroactive application of Proposition 51, the need for an express statement of legislative intent [****83] becomes all the more essential.

Accordingly, the *Tulley* line of cases does not support the retroactive application of Proposition 51.²⁶

²⁶ Although defendants in this case have not embraced the argument, several amici contend that Proposition 51 should be applied retroactively on the ground that the measure is "procedural" rather than "substantive." The Court of Appeal, while concluding that retroactive application was warranted, nonetheless expressly rejected this argument, reasoning that because the provision could have a substantial effect on a defendant's liability or a plaintiff's recovery, "its substantive effect is evident."

We agree with the Court of Appeal that retroactive application cannot be supported by characterizing Proposition 51 as merely a "procedural" statute. In addressing the question whether the retroactivity question may be resolved by denominating a statute as "substantive" or "procedural," the court in *Aetna Cas. & Surety, supra*, 30 Cal.2d 388, 394, explained: "In truth, the [HN26](#) distinction relates not so much to the form of the statute as to its effects. If substantial changes are made, even in a statute which might ordinarily be classified as procedural, the operation on existing rights would be retroactive because the legal effects of past events would be changed, and the statute will be construed to operate only in futuro unless the legislative intent to the contrary clearly appears." As explained above, retroactive application of Proposition 51 to preexisting causes of action would have a very definite substantive effect on both plaintiffs and defendants who, during the pending litigation, took irreversible actions in reasonable reliance on the then-existing state of the law. (See also 3 Harper et al., Law of Torts (2d ed. 1986) § 10.1, p. 7 ["The joint and several liability imposed on joint

[****84] [*1226] H.

Having reviewed defendants' numerous arguments, we think it may be useful, in conclusion, to take a last look at one particularly instructive precedent. In *Winfree v. Nor. Pac. Ry. Co. (1913) 227 U.S. 296 [57 L. Ed. 518, 33 S. Ct. 273]*, the United States Supreme Court was faced with a question of statutory interpretation very similar to the question which is before us today. In 1908, the Federal Employers Liability Act -- which granted railroad workers who had been injured in the course of their employment the right to bring a negligence action in federal court against the employer -- had been amended to replace the doctrine of contributory negligence with comparative negligence. In *Winfree*, the plaintiff claimed that although the injury in that case had preceded the 1908 act, the comparative negligence doctrine should nonetheless be applied because the matter had not gone to trial until after the act had gone into effect. The plaintiff maintained that because even before the 1908 enactment the defendant railroad should have known that it could be held liable if its negligence resulted in a worker's injury, there was no reason to deny the [****85] plaintiff the benefit of the new comparative negligence rule.

In *Winfree*, the Supreme Court rejected the plaintiff's contention and held that the [**611] statute could not properly be applied to preexisting causes of action. In reaching its conclusion, the court relied on "the [HN27](#) almost universal rule that statutes are addressed to the future, not to the past. They usually constitute a new factor in the affairs and relations of men and should not be held to affect what has happened unless, indeed, explicit words be used or by clear implication that construction be required." (227 U.S. at p.301 [57 L. Ed. at p. 520].) Because the 1908 amendment "introduced a new policy and quite radically changed the existing law," the court emphasized that it was particularly the kind of statute that "should not be construed as retrospective." (*Id.* at p. 302 [57 L. Ed. at p. 520].)

As we have explained, precisely the same principle is applicable here. [CA\(6f\)](#) (6f) Proposition 51 "introduced a new policy" which will have a [*1227] broad effect on most tort actions in California. Under [Civil Code section 3](#) and the general principles [****86]

tortfeasors or independent concurrent tortfeasors producing an indivisible injury is a 'substantive liability' to pay entire damages. This differs from what might be described as a 'procedural liability' to be joined with other tortfeasors as defendants in a single action.".)

of statutory interpretation, [***655] if the measure was intended to be applied retroactively, a provision directing retroactive application should have been included. In the absence of such an express declaration of retroactivity, we conclude that the proposition must be interpreted as prospective.

V.

Because we have concluded that the Court of Appeal erred in finding that Proposition 51 applies retroactively to this case, there is no need to reach the additional issues, relating to the interpretation and application of various portions of the proposition, which were discussed by the Court of Appeal.

The decision of the Court of Appeal is affirmed insofar as it upholds the constitutionality of Proposition 51, but is reversed insofar as it holds that Proposition 51 applies to causes of action that accrued prior to the effective date of the initiative measure.

Each party shall bear its own costs in these proceedings.

[*1243contd] [SEE APPENDIX IN ORIGINAL]

Concur by: KAUFMAN (In Part)

Dissent by: KAUFMAN (In Part)

Dissent

[*1227contd] [**617] [***661] **KAUFMAN, J.** I concur in the majority's holding that Proposition 51, the Fair Responsibility Act of 1986 (hereafter [****87] Proposition 51 or the Act) violates neither the due process nor the equal protection guarantees of the state or federal Constitutions. I respectfully dissent, however, from its holding that Proposition 51 does not apply to causes of action which accrued before the measure's effective date. I conclude, as did the Court of Appeal, that the Act was designed to apply to all cases yet to be tried, including the instant one. Therefore, I would affirm the judgment of the Court of Appeal in its entirety.

Discussion

Because "nothing in the language of Proposition 51 . . . expressly indicates that the statute is to apply retroactively," the majority concludes that it must apply prospectively. (Majority opn. at p. 1209.) Hence, the majority holds that the modified rule of joint and several

liability enacted by the electorate shall not apply to any "cause of action" that *accrued* prior to the Act's effective date even if suit had not been filed before Proposition 51's enactment.

[*1228] The majority grounds its holding on three fundamental assumptions: 1) that [section 3 of the Civil Code](#) requires an express statement of retroactive intent, 2) that if the drafters [****88] of the Act had intended a retroactive application, they would have said so in the proposition, and 3) that a retroactive intent may not legitimately be inferred from sources other than the proposition itself. Each of these assumptions, as I shall explain, is legally incorrect and inconsistent with prior decisions of this court.

Aside from these three erroneous legal assumptions, the majority justifies its holding on two additional practical considerations. Application of the Act to all cases untried on its effective date, the majority asserts, would result in: 1) unfairness to plaintiffs who may have relied on the former rule of joint and several liability in making such tactical litigation decisions as whom to sue, and with whom and for how much to settle, and 2) an unwarranted "windfall" to insurance companies which computed their pre-Proposition 51 premiums on the basis of the former law. As will appear from the discussion which follows, these asserted practical considerations are for the most part incorrect factually and in any event are unsound as a basis for decision.

The presumption of prospectivity said to be codified in [Civil Code section 3](#) does not [****89] require an express statement of retroactive intent, nor does the absence of such a statement in the Act indicate that its drafters must have intended that the presumption should apply. The paramount consideration here, as in any other matter of statutory construction, is to ascertain the intent of the enacting body so as to effectuate the purpose of the law.

A wide variety of factors may be relevant to the determination of whether the enacting body intended a new statute to be given retroactive effect. As more fully explained below, two factors of particular relevance here are the Act's history and its express remedial purposes. When these are considered in light of the relevant facts and decisional law, the conclusion becomes nearly inescapable that the Act's purposes can be fully served only if it is applied to all cases not tried prior to its effective date.

As to the practical ramifications of an application of the Act to cases not tried before its effective date, a

dispassionate analysis reveals the majority's concerns to be largely groundless. Indeed the majority implicitly concedes as much by holding that the Act shall not apply to any *cause of action* that accrued prior [****90] to its effective date *regardless* of whether the plaintiff has taken any steps which could even arguably be construed as "reliance" on the former law.

I conclude, finally, by noting the strange logic that would attempt to justify a retrospective application of the radical restructuring of tort liability [*1229] which this court effected in *Li v. Yellow Cab Co. (1975) 13 Cal.3d 804 [***662] [119 Cal. Rptr. 858, 532 P.2d 1226, 78 A.L.R.3d 393]*, [**618] yet condemn as "unfair" a retrospective application of the relatively limited reform enacted by the electorate through Proposition 51. The inconsistency does little credit to this court, or to the principle and appearance of judicial impartiality.

1. *Legislative Purpose and the Presumption of Prospectivity*

The first and essentially the only real point of the majority opinion -- intoned, however, with the drumbeat regularity of a Hindu mantra -- is that the "presumption of prospectivity" is dispositive absent an express statement of legislative intent to the contrary. No matter how often repeated, however, the point is profoundly mistaken. This court has held that the presumption of prospectivity [****91] codified in *Civil Code section 3* is relevant "*only after, considering all pertinent factors, it is determined that it is impossible to ascertain the legislative intent.*" (Italics added, *In re Estrada (1965) 63 Cal.2d 740, 746 [48 Cal. Rptr. 172, 408 P.2d 948]*; accord *Fox v. Alexis (1985) 38 Cal.3d 621, 629 [214 Cal. Rptr. 132, 699 P.2d 309]*; *In re Marriage of Bouquet (1976) 16 Cal.3d 583, 587 [128 Cal. Rptr. 427, 546 P.2d 1371]*; *Mannheim v. Superior Court (1970) 3 Cal.3d 678, 686-687 [91 Cal. Rptr. 585, 478 P.2d 17]*.) As *Estrada* counseled, "That rule of construction . . . is not a straightjacket. Where the Legislature has not set forth in so many words what it intended, the rule of construction should not be followed blindly in complete disregard of factors that may give a clue to the legislative intent." (*63 Cal.2d at p. 746*; accord *In re Marriage of Bouquet, supra, 16 Cal.3d at p. 587*; *Mannheim v. Superior Court, supra, 3 Cal.3d at pp. 686-687*.) This has long been the rule. (See, e.g., *Estate of Frees (1921) 187 Cal. 150, 156 [201 P. 112]* [****92] [retroactive operation may be "*inferred . . . from the words of the statute taken by themselves and in connection with the subject matter, and the occasion of*

the enactment" (Italics added.)]) And as this court has recently reaffirmed, "An express declaration that the Legislature intended the law to be applied retroactively is not necessarily required." (*Fox v. Alexis, supra, 38 Cal.3d at p. 629*.)

The majority attempts to distinguish our holdings in *Mannheim, supra, 3 Cal.3d 678* and *Marriage of Bouquet, supra, 16 Cal.3d 583*, on the ground that there is no evidence in this case to show "the retroactivity question was *actually consciously considered* during the enactment process." (Majority opn. at p. 1211, italics added.) None of our prior decisions, however, has ever suggested that *Civil Code section 3* requires proof of a "conscious" legislative decision that a statute or initiative should operate retroactively. On the contrary, *Estrada, Mannheim, Marriage of Bouquet* and *Fox, supra, 38 Cal.3d 621*, all emphatically reaffirm the traditional rule that legislative intent may [****93] -- indeed *must* -- in the absence of an express declaration be [*1230] "deduced" from a "wide variety" of "pertinent factors," including the "context of the legislation, its objective, the evils to be remedied, the history of the times and of legislation upon the same subject, public policy, and contemporaneous construction" (*Fox v. Alexis, supra, 38 Cal.3d at p. 629*; *In re Marriage of Bouquet, supra, 16 Cal.3d at p. 591*; *Mannheim v. Superior Court, supra, 3 Cal.3d at pp. 686-687*; *In re Estrada, supra, 63 Cal.2d at p. 746*.)

The majority's fundamental misunderstanding of these basic principles leads it into other errors. Thus, the majority assumes that "the drafters of Proposition 51 would have included a specific provision providing for retroactive application of the initiative measure if such retroactive application had been intended." (Majority opn. at p. 1212.) That is a false assumption. As we have seen, where the language of the statute is silent, the courts [***663] may *not* automatically assume that the enacting [**619] body must have intended that the law should apply prospectively. [****94] On the contrary, the presumption of prospectivity "[is] to be applied only *after*, considering *all* pertinent factors, it is determined that it is *impossible* to ascertain the legislative intent." (*In re Estrada, supra, 63 Cal.2d at p. 746*, italics added.)

Indeed, if we properly assume that the proponents of Proposition 51 were aware of the relevant law when they chose to remain silent, it is not unlikely that they assumed the Act would apply to all cases not yet tried, and thus had no reason to expressly so provide. As the majority notes, statutes which modify the recoverability

of damages have frequently been held by this court to be applicable to cases not yet tried. (See, e.g. [Tulley v. Tranor \(1878\) 53 Cal. 274](#); [Feckenscher v. Gamble \(1938\) 12 Cal.2d 482 \[85 P.2d 885\]](#); [Stout v. Turney \(1978\) 22 Cal.3d 718 \[150 Cal. Rptr. 637, 586 P.2d 1228\]](#).)¹ Contrary to the majority's assumption, therefore, if anything may reasonably be inferred from the Act's silence (which I do not strongly advocate, inasmuch as the evidence of *intent* is controlling) it is that the Act should apply retrospectively [****95] to all cases not yet tried.

Nor does [Bolen v. Woo \(1979\) 96 Cal. App. 3d 944 \[158 Cal. Rptr. 454\]](#), the "decision most closely on point" according to the majority, suggest otherwise. The issue in that case was whether an amendment to the Civil Code (§ 3333.1) which abrogated the "collateral source" rule in actions against health care providers applied retroactively. The *Bolen* court noted that prior to passage of the legislation, the Legislative Counsel rendered an opinion which counseled that the statute "would fall within the proscription [*1231] against retroactive application . . ." ([96 Cal. App. 3d at p. 958](#).) Thus, "[armed] . . . with . . . counsel's opinion [****96] on retroactivity . . .," the *Bolen* court concluded, the Legislature's silence could be considered sufficient *proof of its intent* that the statute should apply prospectively. ([Id. at p. 959](#).) The majority's reliance on *Bolen* for the proposition that mere legislative silence triggers the presumption of prospectivity is clearly misplaced.

2. Retroactive Intent and Remedial Purpose

Based on the mistaken notion that the presumption of prospectivity governs absent an express declaration to the contrary, the majority concludes that a retroactive intent may not validly be inferred from other sources. However, the law is precisely to the contrary. We have consistently held that the presumption applies "only after, considering *all pertinent factors*, it is determined that it is impossible to ascertain the legislative intent." ([In re Estrada, supra, 63 Cal.2d at p. 746](#), italics added.) As we recently reaffirmed in [Fox v. Alexis, supra, 38 Cal.3d 621](#), a "wide variety of factors may be relevant to our effort to determine whether the Legislature intended a new statute to be given retroactive intent. The

¹ Proposition 51, of course, does not actually change the amount of damages that plaintiffs may be awarded, but merely modifies the allocation of noneconomic damages among tortfeasors. Thus, it constitutes *less* of a change than a modification of the measure of damages so as to reduce the amount recoverable.

context [****97] of the legislation, its objective, the evils to be remedied, the history of the times and of legislation upon the same subject, public policy, and contemporaneous construction may all indicate the legislative purpose." ([Id. at p. 629](#).) Two factors of particular relevance here are the "history of the times" and the perceived "evils to be remedied" by the Act.

The majority laudably prefaces its discussion of Proposition 51 with a "brief historical perspective." (Majority opn. at pp. 1196-1199.) The perspective provided, however, consists almost entirely of prior decision of this court. There is, curiously, almost no mention of the dramatic context in which Proposition 51 was conceived and adopted, of the so-called "liability crisis" or [***664] the pitched battle among government agencies, [**620] business interests, insurers, and consumer advocates over the origins of the perceived crisis or the efficacy of Proposition 51 to alleviate it; no mention of the increasingly common multimillion dollar tort judgments or the alleged inequities of the "deep-pocket" rule that saddled public agencies and other institutions with damages far beyond their proportion of fault; [****98] no mention of the prohibitive insurance premiums that had forced numerous persons and entities from doctors to day-care centers, municipal corporations to corporate giants, to either go "bare" or go out of business; and no mention, finally, of the electorate's overwhelming approval, by a vote of 62 percent to 38 percent, of the tort-reform measure designed to mitigate this crisis, the Fair Responsibility Act of 1986, or Proposition 51.

An awareness of historical context illuminates more than merely the spirit of the Act; it clarifies the letter of the law, as well. The text of the Act [*1232] begins with an unusually forthright statement of "Findings and Declaration of Purpose." The Act sets forth three specific findings: "(a) The legal doctrine of joint and several liability, also known as the 'deep pocket rule', has resulted in a system of inequity and injustice that has threatened financial bankruptcy of local governments, other public agencies, private individuals and businesses and has resulted in higher prices for goods and services to the public and in higher taxes to the taxpayers. [para.] (b) . . . Under joint and several liability, if ['deep pocket defendants'] [****99] are found to share even a fraction of the fault, they often are held financially liable for all the damage. The People -- taxpayers and consumers alike -- ultimately pay for these lawsuits in the form of higher taxes, higher prices and higher insurance premiums. [para.] (c) Local governments have been forced to curtail some essential

police, fire and other protections because of the soaring costs of lawsuits and insurance premiums."

In light of these express findings, the Act explicitly declares that its purpose is "to remedy these inequities" by holding defendants "liable in closer proportion to their degree of fault. To treat them differently is unfair and inequitable." The Act "further [declares] that reforms in the liability laws in tort actions are necessary and proper to avoid catastrophic economic consequences for state and local governmental bodies as well as private individuals and businesses."

Thus, it is clear from the plain language of the Act as well as from the context in which it was adopted, that Proposition 51 was conceived in crisis, and dedicated to the proposition that the "deep pocket rule" has resulted in a system of *inequity and injustice*." Its express [****100] goals were no less than to avert "financial bankruptcy," to "avoid catastrophic economic consequences," to stave off "higher taxes" and "higher prices," and to preserve "essential" public services.

In light of these express remedial purposes, the inference is virtually inescapable that the electorate intended Proposition 51 to apply as soon and as broadly as possible. When the electorate voted to reform a system perceived as "inequitable and unjust," they obviously voted to change that system *now*, not in five or ten years when causes of action that accrued prior to Proposition 51 finally come to trial. When they voted to avert "financial bankruptcy" and "catastrophic economic consequences," to stave off "higher prices . . . and higher taxes," and to preserve essential public "services," they clearly voted for *immediate* relief, not gradual reform five or ten years down the line. A crisis does not call for *future* action. It calls for action *now*, action across the board, action as broad and as comprehensive as the Constitution will allow. It is clear that the purposes of Proposition 51 will be [*1233] fully served only if it is applied to [****101] all cases not tried prior to its effective date.

The law not only permits, but compels such an inference. When legislation seeks to remedy an existing inequity or to impose a less severe penalty than under the former law, the courts of this state have long held that the enacting body must have intended that the statute should apply to matters that occurred prior to its enactment. [***665] This concept found classic expression [**621] in *In re Estrada, supra*, 63 Cal.2d 740, where we held, notwithstanding the statutory presumption against retroactivity, that when an

amendatory statute lessening punishment becomes effective prior to the final date of judgment, the amendment applies rather than the statute in effect when the prohibited act occurred. (*Id. at pp. 744-745*.) The amendment in question had indicated a legislative determination that the former punishment was too severe. Therefore, we reasoned, the Legislature must have intended that the new statute should apply to every case to which it constitutionally could apply, for "to hold otherwise would be to conclude that the Legislature was motivated by a desire for vengeance," an objective [****102] contrary to civilized standards of justice. (*Id. at p. 745*; accord *People v. Durbin (1966) 64 Cal.2d 474, 479 [50 Cal. Rptr. 657, 413 P.2d 433]*; *Holder v. Superior Court (1969) 269 Cal. App. 2d 314, 316-317 [74 Cal. Rptr. 853]*.)

The courts have applied similar reasoning to statutes designed to remedy inequities in the civil law. "In the construction of remedial statutes . . . regard must always be had for the evident purpose for which the statute was enacted, and if the *reason* of the statute extends to past transactions, as well as to those in the future, then it will be so applied . . ." (*Abrams v. Stone (1957) 154 Cal. App. 2d 33, 42 [315 P.2d 453]*, italics added; accord *Coast Bank v. Holmes (1971) 19 Cal. App. 3d 581, 595 [97 Cal. Rptr. 30]*.)

For example, in *Harrison v. Workmen's Comp. Appeals Bd. (1974) 44 Cal. App. 3d 197 [118 Cal. Rptr. 508]*, the court held that an amendment to the Labor Code which provided a cutoff date of five years for employer exposure to claims of occupational injury applied retrospectively to injuries incurred prior to the amendment's [****103] effective date. After reviewing the "procedural morass," delays and expense attendant upon the former law, the court concluded that the remedial purpose of the law required a retrospective application notwithstanding the absence of language in the statute manifesting such an intent: "[The] amended legislation was designed and introduced for the purpose of ameliorating the procedural morass which has faced the board in multiple defendant cases. Thus, it is clear that the *purpose of the amendment was to remedy an immediate situation which was imposing undue delay and expense upon litigants and hardship upon disabled employees . . . [The] object of that legislation will not be effectuated unless [*1234] the board is permitted to apply the amendment retrospectively as well as prospectively*. We conclude that it was the intent of the Legislature that it be so applied." (*Id. at pp. 205-206*, italics added.)

Like reasoning also supported the decision in *City of Sausalito v. County of Marin* (1970) 12 Cal. App. 3d 550 [90 Cal. Rptr. 843], where the court held that an amendment to the Government Code which relaxed the procedural standards [****104] governing local zoning proceedings applied retroactively. "It reasonably appears that the Legislature enacted section 65801 as a *curative statute* for the purpose of terminating recurrence of judicial decisions which had invalidated local zoning proceedings for technical procedural omissions. [Citations.] *This legislative purpose would be fully served only if the section were applied . . . regardless of whether the offending procedural omission occurred before or after the section's enactment.*" (*Id. at pp. 557-558*, italics added.)

In *Andrus v. Municipal Court* (1983) 143 Cal. App. 3d 1041 [192 Cal. Rptr. 341], the issue was whether an amendment that repealed the statutory right to appeal from an extraordinary writ proceeding in the superior court challenging an action in the municipal court, applied to appeals filed before the effective date of the legislation. Though the language of the amendment was silent as to intent, the court concluded that the "obvious goal of the amendment . . . suggests the logic of retroactive application." (*Id. at p. 1046*, italics added.) The former statute, the court noted, provided [****105] broader appellate review [***666] of relatively trivial matters in the [**622] municipal court than was accorded an accused in the superior court. Therefore, "[to] deny retroactive application to the amendment," the court concluded, "is to subscribe to the notion that the Legislature desired to *postpone the demise of a procedural loophole which was inequitable to defendants accused of more serious offenses, [and] placed unnecessary and redundant burdens on the appellate courts We find that proposition absurd.*" (*Id. at p. 1047*, italics added.)

It is, therefore, a fairly prosaic rule which holds that a retrospective intent may be inferred from a specific and compelling remedial purpose. The question before us is whether such an inference is justified in this case. As noted earlier, Proposition 51 was designed with the express intent to "remedy . . . inequities" in the existing rule of joint and several liability, inequities which threatened grave and imminent harm to the public weal. Indeed, such reform was "necessary," the Act declared, "to avoid *catastrophic economic consequences* for state and local governmental bodies as [****106] well as private individuals and businesses." (Italics added.) If this was not language evocative of "the logic of retroactive application" (*Andrus v. Municipal Court*,

supra, 143 Cal. App. 3d at p. 1046), then nothing is.

[*1235] To deny retroactive application to the Act would infer an intent to postpone the repeal of a rule which its drafters expressly condemned as inequitable and unjust. Indeed, it would infer an intent to perpetuate that rule in potentially thousands of actions that accrued prior to the Act's effective date. Instead of a fair and *uniform* system of liability, it would infer that the drafters intended a *dual* system of justice, where the courts would apply a reformed rule of joint and several liability to one set of defendants, and a discredited, inequitable rule to another. I find that proposition patently untenable as well as unjust.

Nevertheless, the majority insists that a retroactive intent may not be inferred from a clear and compelling statement of remedial purpose. The reason, according to the majority, is that "[most] statutory changes are . . . intended to . . . bring about a fairer state of affairs" and therefore "almost [****107] all statutory provisions and initiative measures would apply retroactively rather than prospectively." (Majority opn. at p. 1213.) Furthermore, the majority asserts, this court rejected a similar argument nearly 40 years ago in *Aetna Cas. & Surety Co. v. Ind. Acc. Com.* (1947) 30 Cal.2d 388 [182 P.2d 159]. Neither of these contentions withstands scrutiny.

Aetna concerned the retroactivity of an amendment to the Labor Code that increased workers' compensation benefits. In support of a retrospective application of the law, the injured workers relied on the statutory mandate that provisions of the Workers' Compensation Act are to be "liberally construed" to extend their benefits to injured workers. (*Lab. Code, § 3203*.) We rejected the workers' argument, however, holding that a retrospective intent could not be "implied from the mere fact that the statute is remedial and subject to the rule of liberal construction." (30 Cal.2d at p. 395.) The doctrine of "liberal construction" and the presumption of prospectivity, we noted, were merely two canons of construction, and "[it] would be a most peculiar judicial reasoning," [****108] we observed, "which would allow one such doctrine to be invoked for the purpose of destroying the other." (30 Cal.2d at p. 395.)

Aetna therefore stands for the simple proposition that one general canon of construction (that workers' compensation provisions are to be "liberally" construed) does not supersede another (that statutes are presumed to apply prospectively). The case at bar bears no resemblance to *Aetna*. Here the evidence relating to remedial intent consists not of abstract principles

unrelated to the statute at issue, but of clear and unmistakable statements of particular remedial purposes in the Act itself, and of similar indications implicit in the history of the Act. The cases and authorities previously cited not only permit, but *demand* that we examine these expressions of remedial [***667] purpose for whatever clues they may provide on the question of retroactivity, [**623] and nothing in *Aetna, supra*, 30 Cal.3d 388, indicates otherwise.

[*1236] There is equally little merit to the majority's assertion that the Act's remedial purposes are irrelevant because many statutes could be described as "remedial." The argument [****109] suggests that courts are powerless to weigh the probative value of the evidence of remedial purpose in each case, and decide whether an inference of retrospective intent reasonably and logically follows. Indeed, that is precisely the sort of function which courts perform daily.

Moreover, the purpose here was not merely remedial; it was to remedy a *crisis*. The question before us is whether, from that purpose, it may reasonably be inferred that the Act should apply to all cases not tried prior to its effective date. The evidence and our prior decisions overwhelmingly demonstrate that the answer to that question is "yes."

3. The Fairness Issue

A. The Insurance "Windfall"

I am greatly troubled by the majority's apparent concern that application of the Act to cases untried on the Act's effective date would result in an unwarranted "windfall" to insurance companies because they computed their pre-Proposition 51 premiums on the basis of the former rule of unlimited joint and several liability. A little perspective here is in order. In *Li v. Yellow Cab, supra*, 13 Cal.3d 804, this court abrogated the traditional all-or-nothing doctrine of contributory [****110] negligence and adopted in its place a rule of comparative negligence. A few years later, in *American Motorcycle Assn. v. Superior Court (1978) 20 Cal.3d 578 [146 Cal. Rptr. 182, 578 P.2d 899]*, we applied similar comparative fault principles to multiple tortfeasors, but retained the traditional rule of joint and several liability. In each case, we held that the new rule "shall be applicable to *all cases in which trial has not begun* before the date this decision becomes final . . ." (Italics added, *Li v. Yellow Cab Co., supra*, 13 Cal.3d at p. 829; *Safeway Stores, Inc. v. Nest-Kart (1978) 21 Cal.3d 322, 334 [146 Cal. Rptr. 550, 579 P.2d 441]* [applying retroactively the rule adopted in *American Motorcycle*].)

By thus retrospectively eliminating the existing complete defense of contributory negligence and yet retaining joint and several liability, this court imposed substantially *increased* liability upon insurance companies under policies the premiums for which had been calculated on the basis of the preexisting law. Yet we expressed no concern in those decisions that insurance companies were thereby compelled [****111] to pay greatly increased sums with respect to risks they could not have anticipated and for which they were not compensated. Nor did we decline to apply our abrupt change in the law retrospectively because to do so would have been "unfair." On the contrary, we applied our rulings as broadly as constitutionally permissible, notwithstanding [*1237] strenuous objections that such a radical alteration of existing law required legislative rather than judicial action, because we were "persuaded that logic, practical experience, and *fundamental justice* counsel against the retention of the doctrine rendering contributory negligence a complete bar to recovery . . ." (*Li v. Yellow Cab Co., supra*, 13 Cal.3d at pp. 812-813, italics added.)

Consistency and impartiality would appear to demand, at the very least, that this court view the fiscal consequences to insurance companies of a retrospective application of Proposition 51, with the same cool detachment it manifested in *Li* and *American Motorcycle*. Proposition 51, after all, was also designed to remedy certain perceived *injustices* in the existing tort liability system. If a retrospective application [****112] results in a "windfall" to insurers, what of it? Where the logic and justice of a retroactive application is otherwise compelling, I perceive no principled basis for holding to the contrary simply because the insurance industry might benefit.

Indeed, if the majority's assertion that a retroactive application will result in savings [***668] to insurers is correct (the contention is premised on speculation, not on any hard evidence), it would appear to militate in [**624] favor rather than against retroactivity. As previously discussed, one of the goals of Proposition 51 was to slow the insurance-premium spiral by holding defendants liable for noneconomic damages only in proportion to their percentage of fault. As set forth in the Act's findings, the so-called insurance crisis "threatened financial bankruptcy of local governments . . . higher prices for goods and services to the public and higher taxes to taxpayers." To the extent that the Act results in less exposure and smaller payouts than insurance companies might otherwise have anticipated, it only serves to *further* these goals.

The majority's inflated concern with insurance "windfalls" is thus largely misguided. [****113] That concern does, however, expose the unstated bias underlying the majority's opinion. Implicit in the majority's analysis is the assumption that Proposition 51 was essentially a private-interest bill designed to offer aid and comfort to corporate defendants; the broader its scope, therefore, the greater the prejudice to plaintiffs. However, if we were to judge the question before us strictly on a standard of fairness to *plaintiffs*, there is no doubt that the balance would fall squarely on the side of retroactivity. The Act's statement of findings makes clear that its purpose was not exclusively or even principally to aid insurance companies. Ultimately, it is plaintiffs, not insurers, who suffer when tortfeasors lack insurance to pay judgments. It is the community as a whole, not the insurance industry, which suffers when day-care centers must close because they cannot afford insurance. Parochial interests, to be sure, supported the Act, but the People enacted it. [*1238] Their decision deserves an application equal to the pressing social and economic concerns which inspired it.

B. *The "Reliance" Issue*

Of course, in response to all of the arguments that militate [****114] in favor of retroactivity, one may justly recall that one party's gain is another party's loss. Proposition 51 purported to remedy an "inequity" in the existing joint-and-several doctrine by abrogating the rule as it applied to noneconomic damages. Though the Act placed no limit on the amount of noneconomic damages that plaintiffs could be awarded, it restricted plaintiffs' right to full recovery of such damages in some instances by allowing recovery as to those damages from defendants only in proportion to their fault.

Courts may properly consider whether the retrospective application of a statute would affect substantial rights, or substantially alter rules on which the parties have detrimentally relied. (*Hoffman v. Board of Retirement* (1986) 42 Cal.3d 590, 593 [229 Cal. Rptr. 825, 724 P.2d 511].)² The question presented, therefore, is whether

² Indeed, courts have long attempted to distinguish statutes that affect "substantive" rights from those that affect merely "procedural" rights in determining the propriety of retrospective operation. (See, e.g. *Abrams v. Stone*, *supra*, 154 Cal. App. 2d 33 at p. 41; *Coast Bank v. Holmes*, *supra*, 19 Cal. App. 3d at pp. 593-594.) Some courts have even suggested that statutes which affect only "procedural" matters should not be defined as "retroactive" when applied to events that occurred prior to their effective date. (See, e.g. *Coast Bank v. Holmes*,

an application of the Act to all cases not tried prior to its effective date would, as the majority asserts, unfairly deprive plaintiffs of "a legal doctrine on which [they] may have reasonably relied in conducting their legal affairs prior to the new enactment." (Majority opn. at p. 1194.)

[****115] The majority concludes that an application of the Act to cases not tried before its effective date would place persons who "acted in reliance on the old law in a worse position than litigants under the new law." (Majority opn. at p. 1215.) Two examples of such [***669] detrimental reliance are suggested. First, the majority opines that plaintiffs whose causes of action arose before Proposition [**625] 51 "will often have reasonably relied on the preexisting joint and several liability doctrine in deciding which potential tortfeasors to sue and which not to sue." (Majority opn. at p. 1215.) Thus, the majority suggests that in reliance on the old joint and several rule, plaintiffs' attorneys "often" refrained from filing suit against *potentially liable defendants* in order to save their clients the "added expense" of service of process. (Majority opn. at p. 1215.)

[*1239] There is no evidence that this occurred in any substantial number of cases. On the contrary, general experience teaches that plaintiffs usually sue *everyone* who might be liable for damages. Indeed, in most cases the former rule of joint and several liability encouraged plaintiffs to name as many [****116] defendants as possible because the entire judgment could be recovered from any one defendant, no matter how minimally liable. In the unlikely event, however, that a potentially liable defendant was actually omitted from a complaint in reliance on the former rule, it obviously constituted a tactical decision by the plaintiff to take advantage of a part of the old rule that was entirely unfair to marginally liable, deep-pocket defendants, a part of the very unfairness Proposition 51 was intended to remedy.

The other "reliance" factor cited by the majority concerns settlements. The majority suggests that plaintiffs in pre-Proposition 51 cases "may frequently have settled with some defendants for a lesser sum than they would have accepted if they were aware that

supra, 19 Cal. App. 3d at pp. 593-594; *Morris v. Pacific Electric Ry. Co.* (1935) 2 Cal.2d 764, 768 [43 P.2d 276].) As the majority correctly observes, however, this court has long since rejected such a distinction. (See *Aetna Cas. & Surety Co. v. Ind. Acc. Com.*, *supra*, 30 Cal.2d at pp. 394-395.) The critical issue is not the form of the statute but its "effects." (*Id.* at p. 394.)

the remaining defendants would only be severally liable for noneconomic damages." (Majority opn. at p. 1216.) A moment's thought reveals that this contention, like the first, contains far less than meets the eye.

First, the argument again runs counter to common experience. In a case with multiple defendants of varying degrees of solvency, plaintiffs rarely settle first with the "deep-pocket" defendants in order to pursue the [****117] defendants who are effectively judgment-proof. Where the "deep pocket" defendant does settle first, however, it is not likely to be for substantially less than the case is worth, since there is little likelihood of substantial recovery from the remaining defendants.

Second, it is well to recall exactly what Proposition 51 provides. It repeals the joint and several rule only as applied to *noneconomic* damages, i.e. pain and suffering, emotional distress, loss of consortium and the like. (*Civ. Code, § 1431.2, subd. (b)(2)*.) It has no effect whatsoever on the joint and several rule as applied to the more common tort damages -- medical expenses, loss of earnings, loss of property, costs of repair or replacement, and loss of employment or business opportunities. (*Civ. Code, § 1431.2, subd. (b)(1)*.) Thus, whatever reliance a settling plaintiff may have placed on the former rule of joint and several liability, that reliance *remains largely undisturbed by the enactment of Proposition 51*.

Finally, it is clear that with or without the former joint and several rule, a good faith settlement (at least since our decision in *Tech-Bilt, Inc. v. Woodward-Clyde & Associates* (1985) 38 Cal.3d 488 [213 Cal. Rptr. 256, 698 P.2d 159]) [****118] must fall within a reasonable range of the settlor's proportionate share of liability. (*Id. at p. 499*.) As this court further recognized in *Tech-Bilt*, every settlement involves a multitude of factors which could reasonably [*1240] impel a plaintiff to settle for less than the settling defendant's proportionate share of fault. For example, "a disproportionately low settlement figure is often reasonable in the case of a relatively insolvent, and uninsured, or underinsured, joint tortfeasor." (*Id. at p. 499*, quoting from *Stambaugh v. Superior Court* (1976) 62 Cal. App. 3d 231, 238 [132 Cal. Rptr. 843].) Other factors include the "recognition that a settlor should pay less in settlement than he would if he were found liable after a trial," as well as the obvious avoidance [***670] of the risk, costs and inconvenience of trial. (*Ibid.*)

[**626] We do not mean to suggest by this that the former "deep pockets" rule may not have influenced

some plaintiffs to settle for less than a defendant's proportionate share of noneconomic damages. To the extent any such settlement was for *substantially* less than the settling [****119] defendant's estimated range of liability, however, it was unfair to nonsettling defendants and should not have been sanctioned by the trial court in the first place. (*Tech-Bilt, supra, 38 Cal.3d at p. 499*.) Moreover, when the former rule is viewed as only one out of a *myriad* of factors that *may* have legitimately influenced plaintiffs' decisions to settle for less than a defendant's proportionate share of liability, the question of reliance becomes rather hopelessly speculative. The role that the former joint-and-several rule may have played in the overall decisionmaking process is certainly far less significant than the majority implies.

In light of the foregoing, it is no surprise that the majority itself studiously ignored the "reliance" argument when formulating its holding in this matter. For the majority broadly holds that the Act shall not apply to any "cause of action" that accrued prior to its effective date, regardless of whether plaintiffs have manifested even the slightest potential reliance on the former law. If the "reliance" argument had any merit, the majority surely would have tailored its decision to hold, at a minimum, that the Act would [****120] be inapplicable only to cases filed prior to its effective date. Its failure to do so reveals the makeweight nature of its "reliance" and "unfairness" arguments.

In sum, I am not persuaded by the majority's assertion that a retrospective application of Proposition 51 would result in a significant diminution of plaintiffs' rights or expectations under the former law.³ On the contrary, it is clear that the purposes of the Act and the interests of the public as a whole would be served only by an application of the Act to all cases not yet tried prior to its effective date.

I would note, finally, that our earlier discussion of *Li v. Yellow Cab Co., supra, 13 Cal.3d 804* and *American Motorcycle Assn. v. Superior Court, [*1241] supra, 20 Cal.3d 578*, also bears directly on the issue of fairness [****121] to parties who might have relied on the preexisting law. As the majority acknowledges, our decision to apply the principles of *Li* and *American Motorcycle* retrospectively affected *substantial* rights and expectations arising out of transactions that

³Needless to say, we find no merit in plaintiffs' related contention that a retrospective application of the Act would result in an unconstitutional deprivation of vested rights.

occurred before those decisions. The relatively limited reform effected by Proposition 51 pales in comparison. Yet the same court that unhesitatingly determined to apply retroactively the sweeping changes effected by *Li*, now purports to be offended when the same broad application is urged for the limited reform contained in Proposition 51. It is a puzzlement.

It is an irony, as well. For although, as the majority notes, *Li, supra, 13 Cal.3d 804*, "served to reduce much of the harshness of the original all-or-nothing common law rules, the retention of the common law joint and several liability doctrine" in *American Motorcycle, supra, 20 Cal.3d 578*, nevertheless perpetuated other inequities. Proposition 51 "was addressed," the majority observes, to these remaining problems. (Majority opn. at pp. 1197-1198.) If the inequities in the rule of contributory negligence compelled a retrospective [****122] application of *Li*, notwithstanding its impact on settled expectations, surely the injustice inherent in the unlimited rule of joint and several liability compels an equally broad application of Proposition 51.

The majority, however, concludes otherwise, arguing that because *Li, supra, 13 Cal.3d 804*, was a judicial decision "the court was the appropriate body to determine whether or not the new rule should be [**627] applied retroactively . . ." (Majority opn. at p. 1222.) No one suggests otherwise. The point, however, concerns the fairness of the court's decision to apply *Li* retroactively, not its power to do so.

The majority also attempts to distinguish *Li* on the ground that "statutes operate . . . prospectively, while judicial decisions operate retrospectively." (Majority opn. at p. 1221.) This not only misstates the general rule as applied to statutes (the *intent* of the enacting body governs the interpretation of statutes, not the presumption of prospectivity), but distorts the rule as to judicial decisions, as well. For judicial decisions are not automatically governed by a mindless "presumption" of retroactivity any more than statutes [****123] are governed by a presumption of prospectivity. As this court carefully explained in *Peterson v. Superior Court (1982) 31 Cal.3d 147, 152 [181 Cal. Rptr. 784, 642 P.2d 1305]*, "[The] question of retroactivity [of judicial decisions] depends upon considerations of fairness and public policy." (*Id. at p. 152*; accord *Safeway Stores, Inc. v. Nest-Kart, supra, 21 Cal.3d at p. 333*; *In re Marriage of Brown (1976) 15 Cal.3d 838, 850 [126 Cal. Rptr. 633, 544 P.2d 561, 94 A.L.R.3d 164]*.) As we further explained, the issue comprehends such considerations as the "extent of the public reliance upon

[*1242] the former rule," the "purpose to be served by the new rule," and the "effect on the administration of justice of a retroactive application." (*Id. at pp. 152-153*; see also *Isbell v. County of Sonoma (1978) 21 Cal.3d 61, 74-75 [145 Cal. Rptr. 368, 577 P.2d 188]*; *Neel v. Magana, Olney, Levy, Cathcart & Gelfand (1971) 6 Cal.3d 176, 193 [98 Cal. Rptr. 837, 491 P.2d 421]*.)

If considerations of fairness, public policy and the purposes of the new rule announced in *Li, supra, 13 Cal.3d 804*, [****124] compelled its retroactive application, notwithstanding the extensive reliance placed by insurers and others upon the former rule, surely the same broad application of Proposition 51 is compelled here. It is a strange logic indeed which can justify the retrospective application of a virtual revolution in the common law of civil liability, yet later deny similar scope to an enactment of the electorate designed to redress certain lingering inequities in that selfsame revolution. Perhaps the commentators will be able to reconcile these differing results. I cannot.

For the foregoing reasons, I would affirm the decision of the Court of Appeal in its entirety.⁴

[****125]

End of Document

⁴ Because of its conclusion that Proposition 51 does not apply to the case at bar, the majority does not reach the additional issues decided by the Court of Appeal and briefed by the parties, relating to the apportionment of damages to nonjoined defendants, and the meaning of "economic" damages under Proposition 51. I would affirm the Court of Appeal's well reasoned holding that under Proposition 51, damages must be apportioned among the "universe" of tortfeasors, as well as its holding that "economic" damages include future medical expenses and future loss of earnings.

Graham v. Florida

Supreme Court of the United States

November 9, 2009, Argued; May 17, 2010, Decided; July 6, 2010, Modified

No. 08-7412

Reporter

560 U.S. 48 *; 130 S. Ct. 2011 **; 176 L. Ed. 2d 825 ***; 2010 U.S. LEXIS 3881 ****; 78 U.S.L.W. 4387; 22 Fla. L. Weekly Fed. S 328

TERRANCE JAMAR GRAHAM, Petitioner v. FLORIDA

Prior History: [****1] ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT.

[Graham v. State, 982 So. 2d 43, 2008 Fla. App. LEXIS 5230 \(Fla. Dist. Ct. App. 1st Dist., 2008\)](#)

Disposition: Reversed and remanded.

Core Terms

sentence, juvenile, offenders, parole, nonhomicide, juvenile offender, adults, categorical, cases, life sentence, proportionality, life-without-parole, culpability, prison, offenses, commit, convicted, capital punishment, homicide, rehabilitation, noncapital, robbery, courts, youth, severe, rape, plurality opinion, impose sentence, murder, disproportionality

Case Summary

Procedural Posture

While he was a juvenile, although charged as an adult, defendant pleaded guilty to armed burglary with assault and attempted robbery, was adjudicated guilty after violating conditions of probation, and received the maximum sentence of life imprisonment without parole. Upon the grant of a writ of certiorari, the defendant appealed the judgment of the First District Court of Appeal of Florida which affirmed the defendant's sentence.

Overview

The defendant contended that, as a juvenile who did not commit or intend to commit homicide, the sentence of life imprisonment without parole constituted cruel and

unusual punishment. The U.S. Supreme Court held that *U.S. Const. amend. VIII* prohibited the imposition of a life-without-parole sentence on the juvenile offender who committed a nonhomicide crime and, while the defendant need not be guaranteed eventual release from the life sentence, he must have some realistic opportunity to obtain release before the end of the life term. The practice of sentencing a juvenile who did not commit a homicide offense to life without parole was exceedingly rare and a national community consensus developed against it, and none of the recognized goals of penal sanctions, i.e., retribution, deterrence, incapacitation, and rehabilitation, provided an adequate justification for the sentence. Further, it could not be conclusively determined at the time of sentencing that the juvenile defendant would be a danger to society for the rest of his life, and a sentence of life without parole improperly denied the juvenile offender a chance to demonstrate growth, maturity, and rehabilitation.

Outcome

The judgment affirming the defendant's sentence was reversed, and the case was remanded for further proceedings. 6-3 Decision; 2 Concurrences; 2 Dissents.

LexisNexis® Headnotes

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

[HN1](#) [↓] **Fundamental Rights, Cruel & Unusual Punishment**

See *U.S. Const. amend. VIII*.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

[HN2](#) **Fundamental Rights, Cruel & Unusual Punishment**

To determine whether a punishment is cruel and unusual, courts must look beyond historical conceptions to the evolving standards of decency that mark the progress of a maturing society. This is because the standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

[HN3](#) **Fundamental Rights, Cruel & Unusual Punishment**

The *Cruel and Unusual Punishments Clause* prohibits the imposition of inherently barbaric punishments under all circumstances. Punishments of torture, for example, are forbidden. Under the *Eighth Amendment*, the State must respect the human attributes even of those who have committed serious crimes.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

[HN4](#) **Fundamental Rights, Cruel & Unusual Punishment**

For the most part, the U.S. Supreme Court's precedents consider punishments challenged not as inherently barbaric but as disproportionate to the crime. The concept of proportionality is central to the *Eighth Amendment*. Embodied in the U.S. Constitution's ban on

cruel and unusual punishments is the precept of justice that punishment for crime should be graduated and proportioned to the offense.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

[HN5](#) **Fundamental Rights, Cruel & Unusual Punishment**

Community consensus, while entitled to great weight, is not itself determinative of whether a punishment is cruel and unusual. In accordance with the constitutional design, the task of interpreting the *Eighth Amendment* remains the responsibility of the U.S. Supreme Court. The judicial exercise of independent judgment requires consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question. In this inquiry the Court also considers whether the challenged sentencing practice serves legitimate penological goals.

Criminal Law & Procedure > Juvenile Offenders > Sentencing > General Overview

[HN6](#) **Juvenile Offenders, Sentencing**

Because juveniles have lessened culpability they are less deserving of the most severe punishments. As compared to adults, juveniles have a lack of maturity and an underdeveloped sense of responsibility; they are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure; and their characters are not as well formed. These salient characteristics mean that it is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption. Accordingly, juvenile offenders cannot with reliability be classified among the worst offenders. A juvenile is not absolved of responsibility for his actions, but his transgression is not as morally reprehensible as that of an adult.

Criminal Law & Procedure > Criminal Offenses > Homicide, Manslaughter &

Murder > General Overview

[HN7](#) **Criminal Offenses, Homicide, Manslaughter & Murder**

Defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers. There is a line between homicide and other serious violent offenses against the individual. Serious nonhomicide crimes may be devastating in their harm, but in terms of moral depravity and of the injury to the person and to the public, they cannot be compared to murder in their severity and irrevocability.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

[HN8](#) **Fundamental Rights, Cruel & Unusual Punishment**

Criminal punishment can have different goals, and choosing among them is within a legislature's discretion. It does not follow, however, that the purposes and effects of penal sanctions are irrelevant to the determination of *Eighth Amendment* restrictions. A sentence lacking any legitimate penological justification is by its nature disproportionate to the offense.

Criminal Law &
Procedure > Sentencing > Imposition of
Sentence > Factors

[HN9](#) **Imposition of Sentence, Factors**

Retribution is a legitimate reason to punish. Society is entitled to impose severe sanctions on an offender to express its condemnation of the crime and to seek restoration of the moral imbalance caused by the offense. But the heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Juvenile
Offenders > Sentencing > Age & Term Limits

[HN10](#) **Fundamental Rights, Cruel & Unusual Punishment**

For a juvenile offender who did not commit homicide the *Eighth Amendment* forbids the sentence of life without parole.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Juvenile
Offenders > Sentencing > Age & Term Limits

[HN11](#) **Fundamental Rights, Cruel & Unusual Punishment**

The *Eighth Amendment* does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. It does forbid States from making the judgment at the outset that those offenders never will be fit to reenter society.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Juvenile
Offenders > Sentencing > Age & Term Limits

[HN12](#) **Fundamental Rights, Cruel & Unusual Punishment**

The U.S. Constitution prohibits the imposition of a life-without-parole sentence on a juvenile offender who did not commit homicide. A State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term.

Lawyers' Edition Display

Decision

[***825] Juvenile offender's sentence of life imprisonment without possibility of parole for nonhomicide crime held to violate *Federal Constitution's*

Eighth Amendment prohibition against cruel and unusual punishment.

Summary

Procedural posture: While he was a juvenile, although charged as an adult, defendant pleaded guilty to armed burglary with assault and attempted robbery, was adjudicated guilty after violating conditions of probation, and received the maximum sentence of life imprisonment without parole. Upon the grant of a writ of certiorari, the defendant appealed the judgment of the First District Court of Appeal of Florida which affirmed the defendant's sentence.

Overview: The defendant contended that, as a juvenile who did not commit or intend to commit homicide, the sentence of life imprisonment without parole constituted cruel and unusual punishment. The U.S. Supreme Court held that *U.S. Const. amend. VIII* prohibited the imposition of a life-without-parole sentence on the juvenile offender who [****2] committed a nonhomicide crime and, while the defendant need not be guaranteed eventual release from the life sentence, he must have some realistic opportunity to obtain release before the end of the life term. The practice of sentencing a juvenile who did not commit a homicide offense to life without parole was exceedingly rare and a national community consensus developed against it, and none of the recognized goals of penal sanctions, i.e., retribution, deterrence, incapacitation, and rehabilitation, provided an adequate justification for the sentence. Further, it could not be conclusively determined at the time of sentencing that the juvenile defendant would be a danger to society for the rest of his life, and a sentence of life without parole improperly denied the juvenile offender a chance to demonstrate growth, maturity, and rehabilitation.

[***826] **Outcome:** The judgment affirming the defendant's sentence was reversed, and the case was remanded for further proceedings. 6-3 Decision; 2 Concurrences; 2 Dissents.

Headnotes

CRIMINAL LAW §76 > PROHIBITED PUNISHMENT

> Headnote:

[LEdHN\[1\]](#) [1]

See *U.S. Const. amend. VIII*, which prohibits, among other things, cruel and unusual punishment. (Kennedy, J., joined by Stevens, Ginsburg, Breyer, and Sotomayor, JJ.)

CRIMINAL LAW §76 > CRUEL AND UNUSUAL PUNISHMENT > Headnote:

[LEdHN\[2\]](#) [2]

To determine whether a punishment is cruel and unusual, courts must look beyond historical conceptions to the evolving standards of decency that mark the progress of a maturing society. This is because the standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change. (Kennedy, J., joined by Stevens, Ginsburg, Breyer, and Sotomayor, JJ.)

CRIMINAL LAW §78 > BARBARIC PUNISHMENTS

> Headnote:

[LEdHN\[3\]](#) [3]

The *Cruel and Unusual Punishments Clause* prohibits the imposition of inherently barbaric punishments under all circumstances. Punishments of torture, for example, are forbidden. Under the *Eighth Amendment*, the State must respect the human attributes even of those who have committed serious crimes. (Kennedy, J., joined by Stevens, Ginsburg, Breyer, and Sotomayor, JJ.)

CRIMINAL LAW §78 > PUNISHMENT -- PROPORTIONALITY

> Headnote:

[LEdHN\[4\]](#) [4]

For the most part, the U.S. Supreme Court's precedents consider punishments challenged not as inherently barbaric but as disproportionate to the crime. The concept of proportionality is central to the *Eighth Amendment*. Embodied in the U.S. Constitution's ban on cruel and unusual punishments is the precept of justice that punishment for crime should be graduated and proportioned to the offense. (Kennedy, J., joined by

Stevens, Ginsburg, Breyer, and Sotomayor, JJ.)

CRIMINAL LAW §78 > CRUEL AND UNUSUAL PUNISHMENT -- FACTORS > Headnote:

[LEdHN\[5\]](#) [5]

Community consensus, while entitled to great weight, is not itself determinative of whether a punishment is cruel and unusual. In accordance with the constitutional design, the task of interpreting the *Eighth Amendment* remains the responsibility of the U.S. Supreme Court. The judicial exercise of independent judgment requires consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question. In this inquiry the Court also considers whether the challenged sentencing practice serves legitimate penological goals. (Kennedy, J., joined by Stevens, Ginsburg, Breyer, and Sotomayor, JJ.)

[***827]

CRIMINAL LAW §69 > PUNISHMENTS -- JUVENILES -- CULPABILITY > Headnote:

[LEdHN\[6\]](#) [6]

Because juveniles have lessened culpability they are less deserving of the most severe punishments. As compared to adults, juveniles have a lack of maturity and an underdeveloped sense of responsibility; they are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure; and their characters are not as well formed. These salient characteristics mean that it is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption. Accordingly, juvenile offenders cannot with reliability be classified among the worst offenders. A juvenile is not absolved of responsibility for his actions, but his transgression is not as morally reprehensible as that of an adult. (Kennedy, J., joined by Stevens, Ginsburg, Breyer, and Sotomayor, JJ.)

CRIMINAL LAW §69 > PUNISHMENT -- SERIOUS

NONHOMICIDE CRIMES > Headnote:

[LEdHN\[7\]](#) [7]

Defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers. There is a line between homicide and other serious violent offenses against the individual. Serious nonhomicide crimes may be devastating in their harm, but in terms of moral depravity and of the injury to the person and to the public, they cannot be compared to murder in their severity and irrevocability. (Kennedy, J., joined by Stevens, Ginsburg, Breyer, and Sotomayor, JJ.)

CRIMINAL LAW §78 > PUNISHMENT -- JUSTIFICATION -- DISPROPORTION > Headnote:

[LEdHN\[8\]](#) [8]

Criminal punishment can have different goals, and choosing among them is within a legislature's discretion. It does not follow, however, that the purposes and effects of penal sanctions are irrelevant to the determination of *Eighth Amendment* restrictions. A sentence lacking any legitimate penological justification is by its nature disproportionate to the offense. (Kennedy, J., joined by Stevens, Ginsburg, Breyer, and Sotomayor, JJ.)

CRIMINAL LAW §69 > PUNISHMENT -- RETRIBUTION

> Headnote:

[LEdHN\[9\]](#) [9]

Retribution is a legitimate reason to punish. Society is entitled to impose severe sanctions on an offender to express its condemnation of the crime and to seek restoration of the moral imbalance caused by the offense. But the heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender. (Kennedy, J., joined by Stevens, Ginsburg, Breyer, and Sotomayor, JJ.)

CRIMINAL LAW §79 > JUVENILE OFFENDER --

FORBIDDEN SENTENCE > Headnote:

[LEdHN\[10\]](#) [10]

For a juvenile offender who did not commit homicide the *Eighth Amendment* forbids the sentence of life without parole. (Kennedy, J., joined by Stevens, Ginsburg, Breyer, and Sotomayor, JJ.)

[***828]

CRIMINAL LAW §79 > JUVENILE OFFENDER --

FORBIDDEN SENTENCE > Headnote:

[LEdHN\[11\]](#) [11]

The *Eighth Amendment* does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. It does forbid States from making the judgment at the outset that those offenders never will be fit to reenter society. (Kennedy, J., joined by Stevens, Ginsburg, Breyer, and Sotomayor, JJ.)

CRIMINAL LAW §79 > JUVENILE OFFENDER --

PROHIBITED SENTENCE > Headnote:

[LEdHN\[12\]](#) [12]

The U.S. Constitution prohibits the imposition of a life-without-parole sentence on a juvenile offender who did not commit homicide. A State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term. (Kennedy, J., joined by Stevens, Ginsburg, Breyer, and Sotomayor, JJ.)

Syllabus

[*48] Petitioner Graham was 16 when he committed armed burglary and another crime. Under a plea agreement, the Florida trial court sentenced Graham to probation and withheld adjudication [****3] of guilt. Subsequently, the trial court found that Graham had violated the terms of his probation by committing additional crimes. The trial court adjudicated Graham guilty of the earlier charges, revoked his probation, and sentenced him to life in prison for the burglary. Because Florida has abolished its parole system, the life

sentence left Graham no possibility of release except executive clemency. He challenged his sentence under the *Eighth Amendment's Cruel and Unusual Punishments Clause*, [***829] but the State First District Court of Appeal affirmed.

Held: The Clause does not permit a juvenile offender to be sentenced to life in prison without parole for a nonhomicide crime. Pp. ____ - ____, [176 L. Ed. 2d, at 835-850](#).

(a) Embodied in the cruel and unusual punishments ban is the “precept . . . that punishment for crime should be graduated and proportioned to [the] offense.” [Weems v. United States, 217 U.S. 349, 367, 30 S. Ct. 544, 54 L. Ed. 793](#). The Court's cases implementing the proportionality standard fall within two general classifications. In cases of the first type, the Court has considered all the circumstances to determine whether the length of a term-of-years sentence is unconstitutionally [****4] excessive for a particular defendant's crime. The second classification comprises cases in which the Court has applied certain categorical rules against the death penalty. In a subset of such cases considering the nature of the offense, the Court has concluded that capital punishment is impermissible for nonhomicide crimes against individuals. *E.g.*, [Kennedy v. Louisiana, 554 U.S. 407, 420, 128 S. Ct. 2641, 2660, 171 L. Ed. 2d 525, 550](#). In a second subset, cases turning on the offender's characteristics, the Court has prohibited death for defendants who committed their crimes before age 18, [Roper v. Simmons, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1](#), or whose intellectual functioning is in a low range, [Atkins v. Virginia, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335](#). In cases involving categorical rules, the Court first considers “objective indicia of society's standards, as expressed in legislative enactments and state practice” to determine whether there is a national consensus against the sentencing practice at issue. [Roper, supra, at 563, 125 S. Ct. 1183, 161 L. Ed. 2d 1](#). Next, looking to “the standards elaborated by controlling precedents [*49] and by the Court's own understanding [****5] and interpretation of the *Eighth Amendment's* text, history, meaning, and purpose,” [Kennedy, supra, at 421, 128 S. Ct. 2641, 171 L. Ed. 2d 525](#), the Court determines in the exercise of its own independent judgment whether the punishment in question violates the Constitution, [Roper, supra, at 564, 125 S. Ct. 1183, 161 L. Ed. 2d 1](#). Because this case implicates a particular type of sentence as it applies to an entire class of offenders who have committed a range of crimes, the appropriate analysis is the categorical approach used in *Atkins*,

Roper, and *Kennedy*. Pp. ____-____, [176 L. Ed. 2d, at 835-837](#).

(b) Application of the foregoing approach convinces the Court that the sentencing practice at issue is unconstitutional. Pp. ____-____, [176 L. Ed. 2d, at 837-850](#).

(1) Six jurisdictions do not allow life without parole sentences for any juvenile offenders. Seven jurisdictions permit life without parole for juvenile offenders, but only for homicide crimes. Thirty-seven States, the District of Columbia, and the Federal Government permit sentences of life without parole for a juvenile nonhomicide offender in some circumstances. The State relies on these data to argue that no national consensus against [****6] the sentencing practice in question exists. An examination of actual sentencing practices in those jurisdictions that permit life without parole for juvenile nonhomicide offenders, however, discloses a consensus against the sentence. Nationwide, [***830] there are only 123 juvenile offenders serving life without parole sentences for nonhomicide crimes. Because 77 of those offenders are serving sentences imposed in Florida and the other 46 are imprisoned in just 10 States, it appears that only 11 jurisdictions nationwide in fact impose life without parole sentences on juvenile nonhomicide offenders, while 26 States, the District of Columbia, and the Federal Government do not impose them despite apparent statutory authorization. Given that the statistics reflect nearly all juvenile nonhomicide offenders who have received a life without parole sentence stretching back many years, moreover, it is clear how rare these sentences are, even within the States that do sometimes impose them. While more common in terms of absolute numbers than the sentencing practices in, e.g., *Atkins* and [Enmund v. Florida, 458 U.S. 782, 102 S. Ct. 3368, 73 L. Ed. 2d 1140](#), the type of sentence at issue is actually as rare [****7] as those other sentencing practices when viewed in proportion to the opportunities for its imposition. The fact that many jurisdictions do not expressly prohibit the sentencing practice at issue is not dispositive because it does not necessarily follow that the legislatures in those jurisdictions have deliberately concluded that such sentences would be appropriate. See [Thompson v. Oklahoma, 487 U.S. 815, 826, n. 24, 850, 108 S. Ct. 2687, 101 L. Ed. 2d 702](#). Pp. ____-____, [176 L. Ed. 2d, at 837-841](#).

(2) The inadequacy of penological theory to justify life without parole sentences for juvenile nonhomicide offenders, the limited culpability of such offenders, and

the severity of these sentences all lead the Court [*50] to conclude that the sentencing practice at issue is cruel and unusual. No recent data provide reason to reconsider *Roper's* holding that because juveniles have lessened culpability they are less deserving of the most serious forms of punishment. [543 U.S., at 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1](#). Moreover, defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of such punishments than are murderers. E.g., [Kennedy, supra](#). Serious [****8] nonhomicide crimes "may be devastating in their harm . . . but 'in terms of moral depravity and of the injury to the person and to the public,' . . . they cannot be compared to murder in their 'severity and irrevocability.'" [Id., at 438, 128 S. Ct. 2641, 2660, 171 L. Ed. 2d 525, 550](#). Thus, when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability. Age and the nature of the crime each bear on the analysis. As for the punishment, life without parole is "the second most severe penalty permitted by law," [Harmelin v. Michigan, 501 U.S. 957, 1001, 111 S. Ct. 2680, 115 L. Ed. 2d 836](#), and is especially harsh for a juvenile offender, who will on average serve more years and a greater percentage of his life in prison than an adult offender, see, e.g., [Roper, supra, at 572, 125 S. Ct. 1183, 161 L. Ed. 2d 1](#). And none of the legitimate goals of penal sanctions--retribution, deterrence, incapacitation, and rehabilitation, see [Ewing v. California, 538 U.S. 11, 25, 123 S. Ct. 1179, 155 L. Ed. 2d 108](#)--is adequate to justify life without parole for juvenile nonhomicide offenders, see, e.g., [Roper, 543 U.S., at 571, 573, 125 S. Ct. 1183, 161 L. Ed. 2d 1](#). [****9] Because age "18 is the point where society draws the line for many purposes between childhood and adulthood," it is the age below which a [***831] defendant may not be sentenced to life without parole for a nonhomicide crime. [Id., at 574, 125 S. Ct. 1183, 161 L. Ed. 2d 1](#). A State is not required to guarantee eventual freedom to such an offender, but must impose a sentence that provides some meaningful opportunity for release based on demonstrated maturity and rehabilitation. It is for the State, in the first instance, to explore the means and mechanisms for compliance. Pp. ____-____, [176 L. Ed. 2d, at 841-846](#).

(3) A categorical rule is necessary, given the inadequacy of two alternative approaches to address the relevant constitutional concerns. First, although Florida and other States have made substantial efforts to enact comprehensive rules governing the treatment of youthful offenders, such laws allow the imposition of the type of sentence at issue based only on a discretionary, subjective judgment by a judge or jury that

the juvenile offender is irredeemably depraved, and are therefore insufficient to prevent the possibility that the offender will receive such a sentence despite a lack of [****10] moral culpability. Second, a case-by-case approach requiring that the particular offender's age be weighed against the seriousness of the crime as part of a gross disproportionality inquiry would not allow courts to distinguish with sufficient accuracy the few juvenile offenders having sufficient psychological maturity and depravity to merit a life without parole sentence from the many that have the [*51] capacity for change. Cf. *Roper, supra, at 572-573, 125 S. Ct. 1183, 161 L. Ed. 2d 1*. Nor does such an approach take account of special difficulties encountered by counsel in juvenile representation, given juveniles' impulsiveness, difficulty thinking in terms of long-term benefits, and reluctance to trust adults. A categorical rule avoids the risk that, as a result of these difficulties, a court or jury will erroneously conclude that a particular juvenile is sufficiently culpable to deserve life without parole for a nonhomicide. It also gives the juvenile offender a chance to demonstrate maturity and reform. Pp. ___ - ___, *176 L. Ed. 2d, at 846-848*.

(4) Additional support for the Court's conclusion lies in the fact that the sentencing practice at issue has been rejected the world over: The [****11] United States is the only Nation that imposes this type of sentence. While the judgments of other nations and the international community are not dispositive as to the meaning of the *Eighth Amendment*, the Court has looked abroad to support its independent conclusion that a particular punishment is cruel and unusual. See, e.g., *Roper, supra, at 575-578, 125 S. Ct. 1183, 161 L. Ed. 2d 1*. Pp. ___ - ___, *176 L. Ed. 2d, at 848-850*.

982 So. 2d 43, reversed and remanded.

Counsel: Bryan S. Gowdy argued the cause for petitioner.

Scott D. Makar argued the cause for respondent.

Judges: Kennedy, J., delivered the opinion of the Court, in which Stevens, Ginsburg, Breyer, and Sotomayor, JJ., joined. Stevens, J., filed a concurring opinion, in which Ginsburg and Sotomayor, JJ., joined. Roberts, C. J., filed an opinion concurring in the judgment. Thomas, J., filed a dissenting opinion, in which Scalia, J., joined, and in which Alito, J., joined as to Parts I and III. Alito, J., filed a dissenting opinion.

Opinion by: KENNEDY

Opinion

[*52] [***832] [**2017] Justice **Kennedy** delivered the opinion of the Court.

The issue before the Court is whether the Constitution permits a juvenile offender to be sentenced to life in prison [*53] without [**2018] parole for a nonhomicide crime. The [****12] sentence was imposed by the State of Florida. Petitioner challenges the sentence under the *Eighth Amendment's Cruel and Unusual Punishments Clause*, made applicable to the States by the *Due Process Clause of the Fourteenth Amendment*. *Robinson v. California, 370 U.S. 660, 82 S. Ct. 1417, 8 L. Ed. 2d 758 (1962)*.

I

Petitioner is Terrance Jamar Graham. He was born on January 6, 1987. Graham's parents were addicted to crack cocaine, and their drug use persisted in his early years. Graham was diagnosed with attention deficit hyperactivity disorder in elementary school. He began drinking alcohol and using tobacco at age 9 and smoked marijuana at age 13.

In July 2003, when Graham was age 16, he and three other school-age youths attempted to rob a barbecue restaurant in Jacksonville, Florida. One youth, who worked at the restaurant, left the back door unlocked just before closing time. Graham and another youth, wearing masks, entered through the unlocked door. Graham's masked accomplice twice struck the restaurant manager in the back of the head with a metal bar. When the manager started yelling at the assailant and Graham, the two youths ran out and escaped in a car driven by the third accomplice. [****13] The restaurant manager required stitches for his head injury. No money was taken.

Graham was arrested for the robbery attempt. Under Florida law, it is within a prosecutor's discretion whether to charge 16- and 17-year-olds as adults or juveniles for most felony crimes. Fla. Stat. § 985.227(1)(b) (2003) (subsequently renumbered at § 985.557(1)(b) (2007)). Graham's prosecutor elected to charge Graham as an adult. The charges against Graham were armed burglary with assault or battery, a first-degree felony carrying a maximum penalty of life imprisonment without the possibility of parole, §§ 810.02(1)(b), (2)(a) (2003) ;

and attempted armed robbery, a second-degree [*54] felony carrying a maximum penalty of 15 years' imprisonment, §§ 812.13(2)(b), 777.04(1), (4)(a), 775.082(3)(c).

On December 18, 2003, Graham pleaded guilty to both charges under a plea agreement. Graham wrote a letter to the trial court. After reciting "this is my first and last time getting in trouble," he continued, "I've decided to turn my life around." App. 379-380. Graham said, "I made a promise to God and myself that if I get a second chance, I'm going to do whatever it takes to get to the [National Football League]." *Id.*, [****14] at 380.

The trial court accepted the plea agreement. The court withheld adjudication of guilt as to both charges and sentenced Graham to concurrent 3-year terms of probation. Graham was required to spend the first 12 months of his probation in the county jail, but he received credit for the time he had served awaiting trial, and was released on June 25, 2004.

Less than six months later, on the night of December 2, 2004, Graham again was arrested. The State's case [***833] was as follows: Earlier that evening, Graham participated in a home invasion robbery. His two accomplices were Meigo Bailey and Kirkland Lawrence, both 20-year-old men. According to the State, at 7 p.m. that night, Graham, Bailey, and Lawrence knocked on the door of the home where Carlos Rodriguez lived. Graham, followed by Bailey and Lawrence, forcibly entered the home and held a pistol to Rodriguez's chest. For the next 30 minutes, the three held Rodriguez and another man, a friend of Rodriguez, at gunpoint while they ransacked the home searching for money. Before leaving, Graham and his accomplices [**2019] barricaded Rodriguez and his friend inside a closet.

The State further alleged that Graham, Bailey, and Lawrence, later the same [****15] evening, attempted a second robbery, during which Bailey was shot. Graham, who had borrowed his father's car, drove Bailey and Lawrence to the hospital and left them there. As Graham drove away, a police sergeant [*55] signaled him to stop. Graham continued at a high speed but crashed into a telephone pole. He tried to flee on foot but was apprehended. Three handguns were found in his car.

When detectives interviewed Graham, he denied involvement in the crimes. He said he encountered Bailey and Lawrence only after Bailey had been shot. One of the detectives told Graham that the victims of the home invasion had identified him. He asked Graham,

"Aside from the two robberies tonight how many more were you involved in?" Graham responded, "Two to three before tonight." *Id.*, at 160. The night that Graham allegedly committed the robbery, he was 34 days short of his 18th birthday.

On December 13, 2004, Graham's probation officer filed with the trial court an affidavit asserting that Graham had violated the conditions of his probation by possessing a firearm, committing crimes, and associating with persons engaged in criminal activity. The trial court held hearings on Graham's violations about a year [****16] later, in December 2005 and January 2006. The judge who presided was not the same judge who had accepted Graham's guilty plea to the earlier offenses.

Graham maintained that he had no involvement in the home invasion robbery; but, even after the court underscored that the admission could expose him to a life sentence on the earlier charges, he admitted violating probation conditions by fleeing. The State presented evidence related to the home invasion, including testimony from the victims. The trial court noted that Graham, in admitting his attempt to avoid arrest, had acknowledged violating his probation. The court further found that Graham had violated his probation by committing a home invasion robbery, by possessing a firearm, and by associating with persons engaged in criminal activity.

The trial court held a sentencing hearing. Under Florida law the minimum sentence Graham could receive absent a [*56] downward departure by the judge was 5 years' imprisonment. The maximum was life imprisonment. Graham's attorney requested the minimum nondeparture sentence of 5 years. A presentence report prepared by the Florida Department of Corrections recommended that Graham receive an even lower sentence--at [****17] most 4 years' imprisonment. The State recommended that Graham receive 30 years on the armed burglary [***834] count and 15 years on the attempted armed robbery count.

After hearing Graham's testimony, the trial court explained the sentence it was about to pronounce:

"Mr. Graham, as I look back on your case, yours is really candidly a sad situation. You had, as far as I can tell, you have quite a family structure. You had a lot of people who wanted to try and help you get your life turned around including the court system, and you had a judge who took the step to try and

give you direction through his probation order to give you a chance to get back onto track. And at the time you seemed through your letters that that is exactly what you wanted to do. And I don't know why it is that you threw your life away. I don't know why.

"But you did, and that is what is so sad about this today is that you have actually been given a chance to get [**2020] through this, the original charge, which were very serious charges to begin with. . . . The attempted robbery with a weapon was a very serious charge.

"[I]n a very short period of time you were back before the Court on a violation of this probation, and then here you [****18] are two years later standing before me, literally the--facing a life sentence as to--up to life as to count 1 and up to 15 years as to count 2.

"And I don't understand why you would be given such a great opportunity to do something with your life and [*57] why you would throw it away. The only thing that I can rationalize is that you decided that this is how you were going to lead your life and that there is nothing that we can do for you. And as the state pointed out, that this is an escalating pattern of criminal conduct on your part and that we can't help you any further. We can't do anything to deter you. This is the way you are going to lead your life, and I don't know why you are going to. You've made that decision. I have no idea. But, evidently, that is what you decided to do.

"So then it becomes a focus, if I can't do anything to help you, if I can't do anything to get you back on the right path, then I have to start focusing on the community and trying to protect the community from your actions. And, unfortunately, that is where we are today is I don't see where I can do anything to help you any further. You've evidently decided this is the direction you're going to take in life, [****19] and it's unfortunate that you made that choice.

"I have reviewed the statute. I don't see where any further juvenile sanctions would be appropriate. I don't see where any youthful offender sanctions would be appropriate. Given your escalating pattern of criminal conduct, it is apparent to the Court that you have decided that this is the way you are going to live your life and that the only thing I can do now is to try and protect the community from your

actions." *Id.*, at 392-394.

The trial court found Graham guilty of the earlier armed burglary and attempted armed robbery charges. It sentenced him to the maximum sentence authorized by law on each charge: life imprisonment for the armed burglary and 15 years for the attempted armed robbery. Because [****835] Florida has abolished its parole system, see *Fla. Stat. § 921.002(1)(e) (2003)*, a life sentence gives a defendant no possibility of release unless he is granted executive clemency.

[*58] Graham filed a motion in the trial court challenging his sentence under the *Eighth Amendment*. The motion was deemed denied after the trial court failed to rule on it within 60 days. The First District Court of Appeal of Florida affirmed, concluding that Graham's sentence [****20] was not grossly disproportionate to his crimes. *982 So. 2d 43 (2008)*. The court took note of the seriousness of Graham's offenses and their violent nature, as well as the fact that they "were not committed by a pre-teen, but a seventeen-year-old who was ultimately sentenced at the age of nineteen." *Id.*, at 52. The court concluded further that Graham was incapable of rehabilitation. Although Graham "was given an unheard of probationary sentence for a life felony, . . . wrote a letter expressing his remorse and promising to refrain from the commission of further crime, and . . . had a strong family structure to support him," the court noted, he "rejected his second chance and chose to continue committing crimes at an escalating pace." *Ibid.* The Florida Supreme Court denied review. *990 So. 2d 1058 (2008)* (table).

We granted certiorari. *556 U.S. 1220, 129 S. Ct. 2157, 173 L. Ed. 2d 1155 (2009)*.

[**2021] II

The *Eighth Amendment* states: [HN1\[↑\]](#) [LEdHN1\[1\]\[↑\]](#) [1] "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." [HN2\[↑\]](#) [LEdHN2\[1\]\[↑\]](#) [2] To determine whether a punishment is cruel and unusual, courts must look beyond historical conceptions to " 'the evolving standards of decency that [****21] mark the progress of a maturing society.' *Estelle v. Gamble, 429 U.S. 97, 102, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976)* (quoting *Trop v. Dulles, 356 U.S. 86, 101, 78 S. Ct. 590, 2 L. Ed. 2d 630 (1958)* (plurality opinion)). "This is because '[t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability

must change as the basic mores of society change.' [Kennedy v. Louisiana, 554 U.S. 407, 419, 128 S. Ct. 2641,2649, 171 L. Ed. 2d 525, 538 \(2008\)](#) (quoting [Furman v. Georgia, 408 U.S. 238, 382, 92 S. Ct. 2726, 33 L. Ed. 2d 346 \(1972\)](#) (Burger, C. J., dissenting)).

[HN3](#) [LEdHN](#)[3] [3] [*59] The *Cruel and Unusual Punishments Clause* prohibits the imposition of inherently barbaric punishments under all circumstances. See, e.g., [Hope v. Pelzer, 536 U.S. 730, 122 S. Ct. 2508, 153 L. Ed. 2d 666 \(2002\)](#). “[P]unishments of torture,” for example, “are forbidden.” [Wilkerson v. Utah, 99 U.S. 130, 136, 25 L. Ed. 345 \(1879\)](#). These cases underscore the essential principle that, under the *Eighth Amendment*, the State must respect the human attributes even of those who have committed serious crimes.

[HN4](#) [LEdHN](#)[4] [4] For the most part, however, the [****22] Court's precedents consider punishments challenged not as inherently barbaric but as disproportionate to the crime. The concept of proportionality is central to the *Eighth Amendment*. Embodied in the Constitution's ban on cruel and unusual punishments is the “precept of justice that punishment for crime should be graduated and proportioned to [the] offense.” [Weems v. United States, 217 U.S. 349, 367, 30 S. Ct. 544, 54 L. Ed. 793 \(1910\)](#).

[***836] The Court's cases addressing the proportionality of sentences fall within two general classifications. The first involves challenges to the length of term-of-years sentences given all the circumstances in a particular case. The second comprises cases in which the Court implements the proportionality standard by certain categorical restrictions on the death penalty.

In the first classification the Court considers all of the circumstances of the case to determine whether the sentence is unconstitutionally excessive. Under this approach, the Court has held unconstitutional a life without parole sentence for the defendant's seventh nonviolent felony, the crime of passing a worthless check. [Solem v. Helm, 463 U.S. 277, 103 S. Ct. 3001, 77 L. Ed. 2d 637 \(1983\)](#). [****23] In other cases, however, it has been difficult for the challenger to establish a lack of proportionality. A leading case is [Harmelin v. Michigan, 501 U.S. 957, 111 S. Ct. 2680, 115 L. Ed. 2d 836 \(1991\)](#), in which the offender was sentenced under state law to life without parole for possessing a large quantity of cocaine. A closely divided Court upheld the sentence. The controlling opinion

concluded that the *Eighth Amendment* contains a “narrow [*60] proportionality principle,” that “does not require strict proportionality between crime and sentence” but rather “forbids only extreme sentences that are 'grossly disproportionate' to the crime.” [Id., at 997, 1000-1001, 111 S. Ct. 2680, 115 L. Ed. 2d 836](#) (Kennedy, J., concurring in part and concurring in judgment). Again closely divided, the Court rejected a challenge to a sentence of 25 years to life for the theft of a few golf clubs under California's so-called three-strikes recidivist sentencing [**2022] scheme. [Ewing v. California, 538 U.S. 11, 123 S. Ct. 1179, 155 L. Ed. 2d 108 \(2003\)](#); see also [Lockyer v. Andrade, 538 U.S. 63, 123 S. Ct. 1166, 155 L. Ed. 2d 144 \(2003\)](#). The Court has also upheld a sentence of life with the possibility of parole for [****24] a defendant's third nonviolent felony, the crime of obtaining money by false pretenses, [Rummel v. Estelle, 445 U.S. 263, 100 S. Ct. 1133, 63 L. Ed. 2d 382 \(1980\)](#), and a sentence of 40 years for possession of marijuana with intent to distribute and distribution of marijuana, [Hutto v. Davis, 454 U.S. 370, 102 S. Ct. 703, 70 L. Ed. 2d 556 \(1982\)](#) (*per curiam*).

The controlling opinion in *Harmelin* explained its approach for determining whether a sentence for a term of years is grossly disproportionate for a particular defendant's crime. A court must begin by comparing the gravity of the offense and the severity of the sentence. [501 U.S., at 1005, 111 S. Ct. 2680, 115 L. Ed. 2d 836](#) (opinion of Kennedy, J.). “[I]n the rare case in which [this] threshold comparison . . . leads to an inference of gross disproportionality” the court should then compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions. *Ibid.* If this comparative analysis “validate[s] an initial judgment that [the] sentence is grossly disproportionate,” the sentence is cruel and unusual. *Ibid.*

The second classification [****25] of cases has used categorical rules to define *Eighth Amendment* standards. The previous cases in this classification involved the death penalty. The classification in turn consists of two subsets, one considering the nature of the offense, the other considering the characteristics of the offender. With [***837] respect to the nature of the [*61] offense, the Court has concluded that capital punishment is impermissible for nonhomicide crimes against individuals. [Kennedy, 554 U.S., at 438, 128 S. Ct. 2641, 171 L. Ed. 2d 525](#); see also [Enmund v. Florida, 458 U.S. 782, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 \(1982\)](#); [Coker v. Georgia, 433 U.S. 584, 97 S. Ct.](#)

[2861](#), [53 L. Ed. 2d 982 \(1977\)](#). In cases turning on the characteristics of the offender, the Court has adopted categorical rules prohibiting the death penalty for defendants who committed their crimes before the age of 18, [Roper v. Simmons](#), [543 U.S. 551](#), [125 S. Ct. 1183](#), [161 L. Ed. 2d 1 \(2005\)](#), or whose intellectual functioning is in a low range, [Atkins v. Virginia](#), [536 U.S. 304](#), [122 S. Ct. 2242](#), [153 L. Ed. 2d 335 \(2002\)](#). See also [Thompson v. Oklahoma](#), [487 U.S. 815](#), [108 S. Ct. 2687](#), [101 L. Ed. 2d 702 \(1988\)](#).

In the cases adopting categorical rules the Court has [****26] taken the following approach. The Court first considers “objective indicia of society’s standards, as expressed in legislative enactments and state practice,” to determine whether there is a national consensus against the sentencing practice at issue. [Roper](#), *supra*, at [563](#), [125 S. Ct. 1183](#), [161 L. Ed. 2d 1](#). Next, guided by “the standards elaborated by controlling precedents and by the Court’s own understanding and interpretation of the *Eighth Amendment*’s text, history, meaning, and purpose,” [Kennedy](#), [554 U.S.](#), at [421](#), [128 S. Ct. 2641](#), [2650](#), [171 L. Ed. 2d 525](#), [540](#), the Court must determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution. [Roper](#), *supra*, at [564](#), [125 S. Ct. 1183](#), [161 L. Ed. 2d 1](#).

The present case involves an issue the Court has not considered previously: a categorical challenge to a term-of-years sentence. The approach in cases such as *Harmelin* and *Ewing* is suited for considering a gross proportionality challenge to a particular defendant’s sentence, but here a sentencing practice itself is in question. This case implicates a particular type of sentence as it applies to an entire class of [**2023] offenders who have committed [****27] a range of crimes. As a result, a threshold comparison between the severity of the penalty and the gravity of the crime does not advance the analysis. Here, in addressing the question presented, the appropriate analysis is the one used in cases that involved [*62] the categorical approach, specifically *Atkins*, *Roper*, and *Kennedy*.

III

A

The analysis begins with objective indicia of national consensus. “[T]he ‘clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures.’ [Atkins](#), *supra*, at [312](#), [122 S. Ct. 2242](#), [153 L. Ed. 2d 335](#) (quoting [Penry v. Lynaugh](#), [492 U.S. 302](#), [331](#), [109 S. Ct. 2934](#), [106 L. Ed. 2d 256 \(1989\)](#)). Six jurisdictions do not allow life

without parole sentences for any juvenile offenders. See Appendix, *infra*, Part III. Seven jurisdictions permit life without parole for juvenile offenders, but only for homicide crimes. *Id.*, Part II. Thirty-seven States as well as the District of Columbia permit sentences of life without parole for a juvenile nonhomicide offender in some circumstances. *Id.*, Part I. Federal law also allows for the possibility of life without parole for offenders as young as 13. See, e.g., [18 U.S.C. §§ 2241 \(2006 ed. and Supp. II\)](#), [****28] [5032 \(2006 ed.\)](#). Relying on this [***838] metric, the State and its *amici* argue that there is no national consensus against the sentencing practice at issue.

This argument is incomplete and unavailing. “There are measures of consensus other than legislation.” [Kennedy](#), *supra*, at [433](#), [128 S. Ct. 2641](#), [2657](#), [171 L. Ed. 2d 525](#), [547](#). Actual sentencing practices are an important part of the Court’s inquiry into consensus. See [Enmund](#), *supra*, at [794-796](#), [102 S. Ct. 3368](#), [73 L. Ed. 2d 1140](#); [Thompson](#), *supra*, at [831-832](#), [108 S. Ct. 2687](#), [101 L. Ed. 2d 702](#) (plurality opinion); [Atkins](#), *supra*, at [316](#), [122 S. Ct. 2242](#), [153 L. Ed. 2d 335](#); [Roper](#), *supra*, at [564-565](#), [125 S. Ct. 1183](#), [161 L. Ed. 2d 1](#); [Kennedy](#), *supra*, at [412](#), [128 S. Ct. 2641](#), [171 L. Ed. 2d 525](#). Here, an examination of actual sentencing practices in jurisdictions where the sentence in question is permitted by statute discloses a consensus against its use. Although these statutory schemes contain no explicit prohibition on sentences of life without parole for juvenile nonhomicide offenders, those sentences are most infrequent. According to a recent study, nationwide there are only 109 juvenile offenders serving sentences of life without [*63] parole for [****29] nonhomicide offenses. See P. Annino, D. Rasmussen, & C. Rice, *Juvenile Life without Parole for Non-Homicide Offenses: Florida Compared to Nation 2* (Sept. 14, 2009) (hereinafter Annino).

The State contends that this study’s tally is inaccurate because it does not count juvenile offenders who were convicted of both a homicide and a nonhomicide offense, even when the offender received a life without parole sentence for the nonhomicide. See Brief for Respondent 34; Tr. of Oral Arg. in *Sullivan v. Florida*, O. T. 2009, No. 08-7621, pp. 28-31. This distinction is unpersuasive. Juvenile offenders who committed both homicide and nonhomicide crimes present a different situation for a sentencing judge than juvenile offenders who committed no homicide. It is difficult to say that a defendant who receives a life sentence on a nonhomicide offense but who was at the same time convicted of homicide is not in some sense being

punished in part for the homicide when the judge makes the sentencing determination. The instant case concerns only those juvenile offenders sentenced to life without parole solely for a nonhomicide offense.

Florida further criticizes this study because the authors were unable to [****30] obtain complete information on some States and [**2024] because the study was not peer reviewed. See Brief for Respondent 40. The State does not, however, provide any data of its own. Although in the first instance it is for the litigants to provide data to aid the Court, we have been able to supplement the study's findings. The study's authors were not able to obtain a definitive tally for Nevada, Utah, or Virginia. See Annino 11-13. Our research shows that Nevada has five juvenile nonhomicide offenders serving life without parole sentences, Utah has none, and Virginia has eight. See Letter from Alejandra Livingston, Offender Management Division, Nevada Dept. of Corrections, to Supreme Court Library (Mar. 26, 2010) (available in Clerk of Court's case file); Letter from Steve Gehrke, Utah Dept. of [**64] Corrections, to Supreme Court Library (Mar. 29, 2010) (same); Letter from Dr. Tama S. Celi, Virginia Dept. of Corrections, to Supreme Court Library (Mar. 30, 2010) (same). Finally, since the study was completed, a defendant in Oklahoma has apparently [***839] been sentenced to life without parole for a rape and stabbing he committed at the age of 16. See Stogsdill, Delaware County Teen Sentenced in Rape, [****31] Assault Case, Tulsa World, May 5, 2010, p. A12.

Thus, adding the individuals counted by the study to those we have been able to locate independently, there are 123 juvenile nonhomicide offenders serving life without parole sentences. A significant majority of those, 77 in total, are serving sentences imposed in Florida. Annino 2. The other 46 are imprisoned in just 10 States--California, Delaware, Iowa, Louisiana, Mississippi, Nebraska, Nevada, Oklahoma, South Carolina, and Virginia. *Id.*, at 14; *supra*, at _____, 176 L. Ed. 2d, at 838-839; Letter from Thomas P. Hoey, Dept. of Corrections, Government of the District of Columbia, to Supreme Court Library (Mar. 31, 2010) (available in Clerk of Court's case file); Letter from Judith Simon Garrett, U.S. Dept. of Justice, Federal Bureau of Prisons (BOP), to Supreme Court Library (Apr. 9, 2010) (available in Clerk of Court's case file). Thus, only 11 jurisdictions nationwide in fact impose life without parole sentences on juvenile nonhomicide offenders--and most of those do so quite rarely--while 26 States, the District of Columbia, and the Federal Government do not

impose them despite statutory authorization. *

[**65] The numbers cited above reflect all current convicts in a jurisdiction's penal system, regardless of when they were convicted. It becomes all the more clear how rare these sentences are, even within the jurisdictions that do sometimes impose them, when one considers that a juvenile sentenced to life without parole is likely to live in prison for decades. Thus, these statistics likely reflect nearly [****33] all juvenile nonhomicide offenders who have received a life without parole sentence stretching back many years. It is not certain that this opinion has identified every juvenile nonhomicide offender nationwide serving a life without parole sentence, for the statistics are not precise. The available data, nonetheless, are sufficient to demonstrate how rarely these sentences are imposed even if there are isolated cases that have not been included in the presentations of the parties or the analysis of the Court.

It must be acknowledged that in terms of absolute numbers juvenile life without parole sentences for nonhomicides are more common than the sentencing practices [**2025] at issue in some of this Court's other *Eighth Amendment* cases. See, e.g., *Enmund*, 458 U.S., at 794, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (only six executions of nontriggerman felony murderers between 1954 and 1982), *Atkins*, 536 U.S., at 316, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (only five executions of mentally retarded defendants in 13-year period). This contrast can be instructive, however, if attention is first given to the base number of certain types of offenses. For example, in the year 2007 (the most recent year for which [****34] statistics are available), a total of 13,480 persons, adult and juvenile, were arrested for homicide crimes. That same year, 57,600 juveniles were arrested [***840] for aggravated assault; 3,580 for forcible rape;

*When issued, the Court's [****32] opinion relied on a report from the BOP stating that there are six juvenile nonhomicide offenders serving life without parole in the federal system. The Acting Solicitor General subsequently informed the Court that further review revealed that none of the six prisoners referred to in the earlier BOP report is serving a life without parole sentence solely for a juvenile nonhomicide crime completed before the age of 18. Letter from Neal Kumar Katyal, to William K. Suter, Clerk of Court (May 24, 2010)(available in Clerk of Court's case file). The letter further stated that the Government was not aware of any other federal prisoners serving life without parole sentences solely for juvenile nonhomicide crimes. *Ibid.* The opinion was amended in light of this new information.

34,500 for robbery; 81,900 for burglary; 195,700 for drug offenses; and 7,200 for arson. See Dept. of Justice, Office of Juvenile Justice and Delinquency Prevention, Statistical Briefing Book, online at <http://ojjdp.ncjrs.org/ojstatbb/> (as visited May 14, 2010, and available in Clerk of Court's case file). Although it is not certain how many of these numerous juvenile offenders were eligible for life without parole [*66] sentences, the comparison suggests that in proportion to the opportunities for its imposition, life without parole sentences for juveniles convicted of nonhomicide crimes is as rare as other sentencing practices found to be cruel and unusual.

The evidence of consensus is not undermined by the fact that many jurisdictions do not prohibit life without parole for juvenile nonhomicide offenders. The Court confronted a similar situation in *Thompson*, where a plurality concluded that the death penalty for offenders younger than 16 was unconstitutional. A number of States then allowed [****35] the juvenile death penalty if one considered the statutory scheme. As is the case here, those States authorized the transfer of some juvenile offenders to adult court; and at that point there was no statutory differentiation between adults and juveniles with respect to authorized penalties. The plurality concluded that the transfer laws show “that the States consider 15-year-olds to be old enough to be tried in criminal court for serious crimes (or too old to be dealt with effectively in juvenile court), *but tells us nothing about the judgment these States have made regarding the appropriate punishment for such youthful offenders.*” [487 U.S., at 826, n. 24, 108 S. Ct. 2687, 101 L. Ed. 2d 702](#). Justice O'Connor, concurring in the judgment, took a similar view. *Id.*, [at 850, 108 S. Ct. 2687, 101 L. Ed. 2d 702](#) (“When a legislature provides for some 15-year-olds to be processed through the adult criminal justice system, and capital punishment is available for adults in that jurisdiction, the death penalty becomes at least theoretically applicable to such defendants. . . . [H]owever, it does not necessarily follow that the legislatures in those jurisdictions have deliberately concluded that [****36] it would be appropriate”).

The same reasoning obtains here. Many States have chosen to move away from juvenile court systems and to allow juveniles to be transferred to, or charged directly in, adult court under certain circumstances. Once in adult court, a juvenile offender may receive the same sentence as would be given to an adult offender, including a life without parole [*67] sentence. But the fact that transfer and direct charging laws make life

without parole possible for some juvenile nonhomicide offenders does not justify a judgment that many States intended to subject such offenders to life without parole sentences.

For example, under Florida law a child of any age can be prosecuted as an adult for certain crimes and can be sentenced to life without parole. The State acknowledged at oral argument that even a 5-year-old, theoretically, could receive such [**2026] a sentence under the letter of the law. See Tr. of Oral Arg. 36-37. All would concede this to be unrealistic, but the example underscores that the statutory eligibility of a juvenile offender for life without parole does not indicate that the penalty has been endorsed through deliberate, express, and full legislative consideration. [****37] Similarly, the many States that allow life without parole [***841] for juvenile nonhomicide offenders but do not impose the punishment should not be treated as if they have expressed the view that the sentence is appropriate. The sentencing practice now under consideration is exceedingly rare. And “it is fair to say that a national consensus has developed against it.” [Atkins, supra, at 316, 122 S. Ct. 2242, 153 L. Ed. 2d 335](#).

B

[HN5](#) [↑] [LEdHN5](#) [↑] [5] Community consensus, while “entitled to great weight,” is not itself determinative of whether a punishment is cruel and unusual. [Kennedy, 554 U.S., at 434, 128 S. Ct. 2641, 2658, 171 L. Ed. 2d 525, 548](#). In accordance with the constitutional design, “the task of interpreting the *Eighth Amendment* remains our responsibility.” [Roper, 543 U.S., at 575, 125 S. Ct. 1183, 161 L. Ed. 2d 1](#). The judicial exercise of independent judgment requires consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question. *Id.*, [at 568, 125 S. Ct. 1183, 161 L. Ed. 2d 1](#); [Kennedy, supra, at 418, 128 S. Ct. 2641, 171 L. Ed. 2d 525](#); cf. [Solem, 463 U.S., at 292, 103 S. Ct. 3001, 77 L. Ed. 2d 637](#). In this [****38] inquiry the Court also considers whether the challenged sentencing practice serves legitimate penological goals. [Kennedy, supra, at 443, \[*68\] 128 S. Ct. 2641, 2662, 171 L. Ed. 2d 525, 552](#); [Roper, supra, at 571-572, 125 S. Ct. 1183, 161 L. Ed. 2d 1](#); [Atkins, 536 U.S., at 318-320, 122 S. Ct. 2242, 153 L. Ed. 2d 335](#).

Roper established that [HN6](#) [↑] [LEdHN6](#) [↑] [6] because juveniles have lessened culpability they are less deserving of the most severe punishments. [543](#)

U.S., at 569, 125 S. Ct. 1183, 161 L. Ed. 2d 1. As compared to adults, juveniles have a “ ‘lack of maturity and an underdeveloped sense of responsibility’ ”; they “ ‘are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure’ ”; and their characters are “ ‘not as well formed.’ ” Id., at 569-570, 125 S. Ct. 1183, 161 L. Ed. 2d 1. These salient characteristics mean that “[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.” Id., at 573, 125 S. Ct. 1183, 161 L. Ed. 2d 1. Accordingly, “ ‘juvenile offenders cannot with reliability be classified among [****39] the worst offenders.’ ” Id., at 569, 125 S. Ct. 1183, 161 L. Ed. 2d 1. A juvenile is not absolved of responsibility for his actions, but his transgression “ ‘is not as morally reprehensible as that of an adult.’ ” Thompson, supra, at 835, 108 S. Ct. 2687, 101 L. Ed. 2d 702 (plurality opinion).

No recent data provide reason to reconsider the Court's observations in *Roper* about the nature of juveniles. As petitioner's *amici* point out, developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence. See Brief for American Medical Association et al. as 16-24; Brief for American Psychological Association et al. as 22-27. Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of “ ‘irretrievably depraved character’ ” than are the actions of adults. Roper, 543 U.S., at 570, 125 S. Ct. 1183, 161 L. Ed. 2d 1. It remains true that “[f]rom a moral standpoint it [****842] would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that [****40] a minor's [**2027] character deficiencies will be reformed.” *Ibid.* These matters relate to the status of the offenders in question; and it is relevant to consider [*69] next the nature of the offenses to which this harsh penalty might apply.

The Court has recognized that HN7  LEdHN7  [7] defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers. Kennedy, supra; Enmund, 458 U.S. 782, 102 S. Ct. 3368, 73 L. Ed. 2d 1140; Tison v. Arizona, 481 U.S. 137, 107 S. Ct. 1676, 95 L. Ed. 2d 127 (1987); Coker, 433 U.S. 584, 97 S. Ct. 2861, 53 L. Ed. 2d 982. There is a line “ ‘between homicide and other serious violent offenses against the individual.’ ” Kennedy, 554

U.S., at 438, 128 S. Ct. 2641, 2660, 171 L. Ed. 2d 525, 550. Serious nonhomicide crimes “ ‘may be devastating in their harm . . . but ‘in terms of moral depravity and of the injury to the person and to the public,’ . . . they cannot be compared to murder in their ‘severity and irrevocability.’ ” Id., at 438, 128 S. Ct. 2641, 2660, 171 L. Ed. 2d 525, 550 (quoting Coker, 433 U.S., at 598, 97 S. Ct. 2861, 53 L. Ed. 2d 982 (plurality opinion)). This is because “[l]ife is [****41] over for the victim of the murderer,” but for the victim of even a very serious nonhomicide crime, “ ‘life . . . is not over and normally is not beyond repair.’ ” *Ibid.* (plurality opinion). Although an offense like robbery or rape is “ ‘a serious crime deserving serious punishment,’ ” Enmund, supra, at 797, 102 S. Ct. 3368, 73 L. Ed. 2d 1140, those crimes differ from homicide crimes in a moral sense.

It follows that, when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability. The age of the offender and the nature of the crime each bear on the analysis.

As for the punishment, life without parole is “ ‘the second most severe penalty permitted by law.’ ” Harmelin, 501 U.S., at 1001, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (opinion of Kennedy, J.). It is true that a death sentence is “ ‘unique in its severity and irrevocability,’ ” Gregg v. Georgia, 428 U.S. 153, 187, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.); yet life without parole sentences share some characteristics with death sentences that are shared by no other sentences. The State does not execute the offender sentenced to life [****42] without parole, but the sentence alters the offender's life by a forfeiture that is irrevocable. It deprives [*70] the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency--the remote possibility of which does not mitigate the harshness of the sentence. Solem, 463 U.S., at 300-301, 103 S. Ct. 3001, 77 L. Ed. 2d 637. As one court observed in overturning a life without parole sentence for a juvenile defendant, this sentence “ ‘means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days.’ ” Naovarath v. State, 105 Nev. 525, 526, 779 P.2d 944 (1989).

The Court has recognized the severity of sentences that deny convicts the possibility of parole. In Rummel, 445 U.S. 263, 100 S. Ct. 1133, 63 L. Ed. 2d 382, the Court

rejected an *Eighth Amendment* challenge to a life sentence [***843] for a defendant's third nonviolent felony but stressed that the sentence gave the defendant the possibility of parole. Noting that "parole [****43] is an established variation on imprisonment of convicted criminals," it was evident that an analysis of the petitioner's sentence "could hardly ignore the possibility that he will not actually be imprisoned for the rest of his life." *Id.*, at 280-281, 100 S. Ct. 1133, 63 L. Ed. 2d 382 (internal quotation marks omitted). And in *Solem*, the only previous case striking down a sentence for [**2028] a term of years as grossly disproportionate, the defendant's sentence was deemed "far more severe than the life sentence we considered in *Rummel*," because it did not give the defendant the possibility of parole. 463 U.S., at 297, 100 S. Ct. 1133, 63 L. Ed. 2d 382.

Life without parole is an especially harsh punishment for a juvenile. Under this sentence a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender. A 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only. See *Roper*, *supra*, at 572, 125 S. Ct. 1183, 161 L. Ed. 2d 1; cf. *Harmelin*, *supra*, at 996, 111 S. Ct. 2680, 115 L. Ed. 2d 836 ("In some cases . . . there will be negligible difference between life without parole and other sentences [****44] of imprisonment--for example, . . . a lengthy term [*71] sentence without eligibility for parole, given to a 65-year-old man"). This reality cannot be ignored.

The penological justifications for the sentencing practice are also relevant to the analysis. *Kennedy*, *supra*, at 441, 128 S. Ct. 2641, 171 L. Ed. 2d 525; *Roper*, 543 U.S., at 571-572, 125 S. Ct. 1183, 161 L. Ed. 2d 1; *Atkins*, *supra*, at 318-320, 122 S. Ct. 2242, 153 L. Ed. 2d 335. HN8[↑] LE dHN[8][↑] [8] Criminal punishment can have different goals, and choosing among them is within a legislature's discretion. See *Harmelin*, *supra*, at 999, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (opinion of Kennedy, J.) ("[T]he *Eighth Amendment* does not mandate adoption of any one penological theory"). It does not follow, however, that the purposes and effects of penal sanctions are irrelevant to the determination of *Eighth Amendment* restrictions. A sentence lacking any legitimate penological justification is by its nature disproportionate to the offense. With respect to life without parole for juvenile nonhomicide offenders, none of the goals of penal sanctions that have been recognized as legitimate--retribution, deterrence, incapacitation, and rehabilitation, see *Ewing*, 538 U.S.,

at 25, 123 S. Ct. 1179, 155 L. Ed. 2d 108 [****45] (plurality opinion)--provides an adequate justification.

HN9[↑] LE dHN[9][↑] [9] Retribution is a legitimate reason to punish, but it cannot support the sentence at issue here. Society is entitled to impose severe sanctions on a juvenile nonhomicide offender to express its condemnation of the crime and to seek restoration of the moral imbalance caused by the offense. But "[t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender." *Tison*, *supra*, at 149, 107 S. Ct. 1676, 95 L. Ed. 2d 127. And as *Roper* observed, "[w]hether viewed as an attempt to express the community's moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult." 543 U.S., at 571, 125 S. Ct. [***844] 1183, 161 L. Ed. 2d 1. The case becomes even weaker with respect to a juvenile who did not commit homicide. *Roper* found that "[r]etribution is not proportional if the law's most severe penalty is imposed" on the juvenile murderer. *Ibid.* The considerations underlying that holding support as well the conclusion [*72] that retribution does not justify imposing the second most [****46] severe penalty on the less culpable juvenile nonhomicide offender.

Deterrence does not suffice to justify the sentence either. *Roper* noted that "the same characteristics that render juveniles less culpable than adults suggest . . . that juveniles will be less susceptible to deterrence." *Ibid.* Because juveniles' "lack of maturity and underdeveloped sense of responsibility . . . often result in impetuous and ill-considered actions and decisions," *Johnson v. Texas*, 509 U.S. 350, 367, 113 S. Ct. 2658, 125 L. Ed. 2d 290 (1993), they are less likely to take a possible punishment into consideration when [**2029] making decisions. This is particularly so when that punishment is rarely imposed. That the sentence deters in a few cases is perhaps plausible, but "[t]his argument does not overcome other objections." *Kennedy*, 554 U.S., at 441, 128 S. Ct. 2641, 2662, 171 L. Ed. 2d 525, 552. Even if the punishment has some connection to a valid penological goal, it must be shown that the punishment is not grossly disproportionate in light of the justification offered. Here, in light of juvenile nonhomicide offenders' diminished moral responsibility, any limited deterrent effect provided by life without parole [****47] is not enough to justify the sentence.

Incapacitation, a third legitimate reason for

imprisonment, does not justify the life without parole sentence in question here. Recidivism is a serious risk to public safety, and so incapacitation is an important goal. See Ewing, supra, at 26, 123 S. Ct. 1179, 155 L. Ed. 2d 108 (plurality opinion) (statistics show 67 percent of former inmates released from state prisons are charged with at least one serious new crime within three years). But while incapacitation may be a legitimate penological goal sufficient to justify life without parole in other contexts, it is inadequate to justify that punishment for juveniles who did not commit homicide. To justify life without parole on the assumption that the juvenile offender forever will be a danger to society requires the sentencer to make a judgment that the juvenile is incorrigible. The characteristics of juveniles make that [*73] judgment questionable. "It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." Roper, supra, at 573, 125 S. Ct. 1183, 161 L. Ed. 2d 1. [****48] As one court concluded in a challenge to a life without parole sentence for a 14-year-old, "incorrigibility is inconsistent with youth." Workman v. Commonwealth, 429 S.W.2d 374, 378 (Ky. App. 1968).

Here one cannot dispute that this defendant posed an immediate risk, for he had committed, we can assume, serious crimes early in his term of supervised release and despite his own assurances of reform. Graham deserved to be separated from society for some time in order to prevent what the trial court described as an "escalating pattern of criminal conduct," App. 394, but it does not follow that he would be a risk to society for the rest of his life. Even if the State's [***845] judgment that Graham was incorrigible were later corroborated by prison misbehavior or failure to mature, the sentence was still disproportionate because that judgment was made at the outset. A life without parole sentence improperly denies the juvenile offender a chance to demonstrate growth and maturity. Incapacitation cannot override all other considerations, lest the *Eighth Amendment's* rule against disproportionate sentences be a nullity.

Finally there is rehabilitation, a penological goal that forms the basis of parole [****49] systems. See Solem, 463 U.S., at 300, 103 S. Ct. 3001, 77 L. Ed. 2d 637; Mistretta v. United States, 488 U.S. 361, 363, 109 S. Ct. 647, 102 L. Ed. 2d 714 (1989). The concept of rehabilitation is imprecise; and its utility and proper implementation are the subject of a substantial, dynamic field of inquiry and dialogue. See, e.g., Cullen &

Gendreau, *Assessing Correctional Rehabilitation: Policy, Practice, and Prospects*, 3 *Criminal Justice* 2000, pp. 119-133 (2000) (describing scholarly debates regarding the effectiveness of rehabilitation over the last several decades). It is [*74] for legislatures to determine what rehabilitative techniques are appropriate and effective.

A sentence of life imprisonment without parole, however, cannot be justified by the [**2030] goal of rehabilitation. The penalty forswears altogether the rehabilitative ideal. By denying the defendant the right to reenter the community, the State makes an irrevocable judgment about that person's value and place in society. This judgment is not appropriate in light of a juvenile nonhomicide offender's capacity for change and limited moral culpability. A State's rejection of rehabilitation, moreover, goes beyond a mere expressive judgment. [****50] As one *amicus* notes, defendants serving life without parole sentences are often denied access to vocational training and other rehabilitative services that are available to other inmates. See Brief for Sentencing Project 11-13. For juvenile offenders, who are most in need of and receptive to rehabilitation, see Brief for J. Lawrence Aber et al. as *Amici Curiae* 28-31 (hereinafter Aber Brief), the absence of rehabilitative opportunities or treatment makes the disproportionality of the sentence all the more evident.

In sum, penological theory is not adequate to justify life without parole for juvenile nonhomicide offenders. This determination; the limited culpability of juvenile nonhomicide offenders; and the severity of life without parole sentences all lead to the conclusion that the sentencing practice under consideration is cruel and unusual. This Court now holds that HN10 [↑] LEdHN [10] [↑] [10] for a juvenile offender who did not commit homicide the *Eighth Amendment* forbids the sentence of life without parole. This clear line is necessary to prevent the possibility that life without parole sentences will be imposed on juvenile nonhomicide offenders who are not sufficiently culpable to merit [****51] that punishment. Because "[t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood," those who were below that age when the offense was committed may not be sentenced to [*75] life without parole for a nonhomicide crime. Roper, 543 U.S., at 574, 125 S. Ct. 1183, 161 L. Ed. 2d 1.

A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What the State must do, however, [***846] is give

defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. It is for the State, in the first instance, to explore the means and mechanisms for compliance. It bears emphasis, however, that while the *Eighth Amendment* prohibits a State from imposing a life without parole sentence on a juvenile nonhomicide offender, it does not require the State to release that offender during his natural life. Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives. [HN11](#)^[↑] [LEdHNJ11](#)^[↑] [11] The *Eighth Amendment* does not foreclose the possibility that persons convicted of nonhomicide crimes committed [****52] before adulthood will remain behind bars for life. It does prohibit States from making the judgment at the outset that those offenders never will be fit to reenter society.

C

Categorical rules tend to be imperfect, but one is necessary here. Two alternative approaches are not adequate to address the relevant constitutional concerns. First, the State argues that the laws of Florida and other States governing criminal procedure take sufficient account of the age of a juvenile offender. Here, Florida notes that under its law prosecutors are required to charge 16- and 17-year-old offenders as adults only for certain serious felonies; that prosecutors have discretion to charge those offenders as adults for other felonies; and that prosecutors may not charge nonrecidivist 16- and 17-year-old [**2031] offenders as adults for misdemeanors. Brief for Respondent 54 (citing Fla. Stat. § 985.227 (2003)). The State also stresses that “in only the narrowest of circumstances” does Florida law impose no [*76] age limit whatsoever for prosecuting juveniles in adult court. Brief for Respondent 54.

Florida is correct to say that state laws requiring consideration of a defendant's age in charging decisions are salutary. [****53] An offender's age is relevant to the *Eighth Amendment*, and criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed. Florida, like other States, has made substantial efforts to enact comprehensive rules governing the treatment of youthful offenders by its criminal justice system. See generally Fla. Stat. § 958 *et seq.* (2007).

The provisions the State notes are, nonetheless, by themselves insufficient to address the constitutional

concerns at issue. Nothing in Florida's laws prevents its courts from sentencing a juvenile nonhomicide offender to life without parole based on a subjective judgment that the defendant's crimes demonstrate an “irretrievably depraved character.” *Roper, supra, at 570, 125 S. Ct. 1183, 161 L. Ed. 2d 1*. This is inconsistent with the *Eighth Amendment*. Specific cases are illustrative. In Graham's case the sentencing judge decided to impose life without parole--a sentence greater than that requested by the prosecutor--for Graham's armed burglary conviction. The judge did so because he concluded that Graham was incorrigible: “[Y]ou decided that this is how you were going to lead your life and that there is nothing that [****54] we can do for you. . . . We can't do anything to deter you.” App. 394.

Another example comes from *Sullivan v. Florida, No. 08-7621, 560 U.S. 181, 130 S. Ct. 2059, 176 L. Ed. 2d 919, 2010 U.S. LEXIS 3878* *Sullivan* was argued the same day as this case, but the Court has now dismissed the [***847] writ of certiorari in *Sullivan* as improvidently granted. *Post, p. _____, 130 S. Ct. 2059, 176 L. Ed. 2d 919*. The facts, however, demonstrate the flaws of Florida's system. The petitioner, Joe Sullivan, was prosecuted as an adult for a sexual assault committed when he was 13 years old. Noting Sullivan's past encounters with the law, the sentencing judge concluded that, although Sullivan had been “given opportunity after opportunity to upright himself and take advantage [*77] of the second and third chances he's been given,” he had demonstrated himself to be unwilling to follow the law and needed to be kept away from society for the duration of his life. Brief for Respondent in *Sullivan v. Florida*, O. T. 2009, No. 08-7621, p. 6. The judge sentenced Sullivan to life without parole. As these examples make clear, existing state laws, allowing the imposition of these sentences based only on a discretionary, subjective judgment by [****55] a judge or jury that the offender is irredeemably depraved, are insufficient to prevent the possibility that the offender will receive a life without parole sentence for which he or she lacks the moral culpability.

Another possible approach would be to hold that the *Eighth Amendment* requires courts to take the offender's age into consideration as part of a case-specific gross disproportionality inquiry, weighing it against the seriousness of the crime. This approach would allow courts to account for factual differences between cases and to impose life without parole sentences for particularly heinous crimes. Few, perhaps no, judicial responsibilities are more difficult than sentencing. The task is usually undertaken by trial judges who seek with

diligence and professionalism to take account of the human existence of the offender and the just demands of a wronged society.

The case-by-case approach to sentencing must, however, be confined by some **[**2032]** boundaries. The dilemma of juvenile sentencing demonstrates this. For even if we were to assume that some juvenile nonhomicide offenders might have “sufficient psychological maturity, and at the same time demonstrat[e] sufficient depravity,” *Roper*, 543 U.S., at 572, 125 S. Ct. 1183, 161 L. Ed. 2d 1, **[****56]** to merit a life without parole sentence, it does not follow that courts taking a case-by-case proportionality approach could with sufficient accuracy distinguish the few incorrigible juvenile offenders from the many that have the capacity for change. *Roper* rejected the argument that the *Eighth Amendment* required only that juries be told they must consider **[*78]** the defendant’s age as a mitigating factor in sentencing. The Court concluded that an “unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender’s objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death.” *Id.*, at 573, 125 S. Ct. 1183, 161 L. Ed. 2d 1. Here, as with the death penalty, “[t]he differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive” a sentence of life without parole for a nonhomicide crime “despite insufficient culpability.” *Id.*, at 572-573, 125 S. Ct. 1183, 161 L. Ed. 2d 1.

Another problem with a case-by-case approach is that it does not take account **[****57]** of special difficulties encountered **[***848]** by counsel in juvenile representation. As some *amici* note, the features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings. Juveniles mistrust adults and have limited understandings of the criminal justice system and the roles of the institutional actors within it. They are less likely than adults to work effectively with their lawyers to aid in their defense. Brief for NAACP Legal Defense & Education Fund et al. as *Amici Curiae* 7-12; Henning, Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child’s Counsel in Delinquency Cases, 81 *Notre Dame L. Rev.* 245, 272-273 (2005). Difficulty in weighing long-term consequences; a corresponding impulsiveness; and reluctance to trust defense counsel, seen as part of the adult world a rebellious youth rejects, all can lead to poor decisions

by one charged with a juvenile offense. *Aber* Brief 35. These factors are likely to impair the quality of a juvenile defendant’s representation. Cf. *Atkins*, 536 U.S., at 320, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (“Mentally retarded defendants may be less able to give meaningful assistance to their **[****58]** counsel”). A categorical rule avoids the risk that, as a result of these difficulties, a court or jury will **[*79]** erroneously conclude that a particular juvenile is sufficiently culpable to deserve life without parole for a nonhomicide.

Finally, a categorical rule gives all juvenile nonhomicide offenders a chance to demonstrate maturity and reform. The juvenile should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential. In *Roper*, that deprivation resulted from an execution that brought life to its end. Here, though by a different dynamic, the same concerns apply. Life in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope. Maturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation. A young person who knows that he or she has no chance to leave prison before life’s end has little incentive to become a responsible individual. In some prisons, moreover, the system itself **[**2033]** becomes complicit in the lack of development. As noted above, see *supra*, at ___, 176 L. Ed. 2d, at 845, it is the **[****59]** policy in some prisons to withhold counseling, education, and rehabilitation programs for those who are ineligible for parole consideration. A categorical rule against life without parole for juvenile nonhomicide offenders avoids the perverse consequence in which the lack of maturity that led to an offender’s crime is reinforced by the prison term.

Terrance Graham’s sentence guarantees he will die in prison without any meaningful opportunity to obtain release, no matter what he might do to demonstrate that the bad acts he committed as a teenager are not representative of his true character, even if he spends the next half century attempting to atone for his crimes and learn from his mistakes. The State has denied him any chance to later demonstrate that he is fit to rejoin society based solely on a nonhomicide crime that he committed while he was a child in the eyes of the law. This the *Eighth Amendment* does not permit.

[*80] D

There is support for our conclusion in the fact that, in continuing to impose life without parole sentences on

[***849] juveniles who did not commit homicide, the United States adheres to a sentencing practice rejected the world over. This observation does not control our decision. [****60] The judgments of other nations and the international community are not dispositive as to the meaning of the *Eighth Amendment*. But “ '[t]he climate of international opinion concerning the acceptability of a particular punishment' ” is also “ 'not irrelevant.' ” *Enmund*, 458 U.S., at 796, n. 22, 102 S. Ct. 3368, 73 L. Ed. 2d 1140. The Court has looked beyond our Nation's borders for support for its independent conclusion that a particular punishment is cruel and unusual. See, e.g., *Roper*, 543 U.S., at 575-578, 125 S. Ct. 1183, 161 L. Ed. 2d 1; *Atkins*, supra, at 317-318, n. 21, 122 S. Ct. 2242, 153 L. Ed. 2d 335; *Thompson*, 487 U.S., at 830, 108 S. Ct. 2687, 101 L. Ed. 2d 702 (plurality opinion); *Enmund*, supra, at 796-797, n. 22, 102 S. Ct. 3368, 73 L. Ed. 2d 1140; *Coker*, 433 U.S., at 596, n. 10, 97 S. Ct. 2861, 53 L. Ed. 2d 982 (plurality opinion); *Trop*, 356 U.S., at 102-103, 78 S. Ct. 590, 2 L. Ed. 2d 630 (plurality opinion).

Today we continue that longstanding practice in noting the global consensus against the sentencing practice in question. A recent study concluded that only 11 nations authorize life without parole for juvenile offenders under any circumstances; and only 2 of them, the [****61] United States and Israel, ever impose the punishment in practice. See M. Leighton & C. de la Vega, *Sentencing Our Children To Die in Prison: Global Law and Practice* 4 (2007). An updated version of the study concluded that Israel's “laws allow for parole review of juvenile offenders serving life terms,” but expressed reservations about how that parole review is implemented. De la Vega & Leighton, *Sentencing Our Children To Die in Prison: Global Law and Practice*, 42 U.S. F. L. Rev. 983, 1002-1003 (2008). But even if Israel is counted as allowing life without parole for juvenile offenders, that nation does not appear to impose that sentence for nonhomicide crimes; all of the seven Israeli prisoners whom commentators have identified as serving life sentences for juvenile crimes were [*81] convicted of homicide or attempted homicide. See Amnesty International, Human Rights Watch, *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States* 106, n. 322 (2005); Memorandum and Attachment from Ruth Levush, Law Library of Congress, to Supreme Court Library (Feb. 16, 2010) (available in Clerk of Court's case file).

[**2034] Thus, as petitioner contends and respondent does not contest, [****62] the United States is the only Nation that imposes life without parole sentences on

juvenile nonhomicide offenders. We also note, as petitioner and his *amici* emphasize, that Article 37(a) of the United Nations Convention on the Rights of the Child, Nov. 20, 1989, 1577 U. N. T. S. 3 (entered into force Sept. 2, 1990), ratified by every nation except the United States and Somalia, prohibits the imposition of “life imprisonment without possibility of release . . . for offences committed by persons below eighteen years of age.” Brief for Petitioner 66; Brief for Amnesty International et al. 15-17. As we concluded in *Roper* with respect to the juvenile death penalty, “the United States now stands alone in a world that has turned its face against” life without parole for juvenile nonhomicide offenders. 543 U.S., at 577, 125 S. Ct. 1183, 161 L. Ed. 2d 1.

[***850] The State's *amici* stress that no international legal agreement that is binding on the United States prohibits life without parole for juvenile offenders and thus urge us to ignore the international consensus. See Brief for Solidarity Center for Law and Justice et al. 14-16; Brief for Sixteen Members of United [****63] States House of Representatives 40-43. These arguments miss the mark. The question before us is not whether international law prohibits the United States from imposing the sentence at issue in this case. The question is whether that punishment is cruel and unusual. In that inquiry, “the overwhelming weight of international opinion against” life without parole for nonhomicide offenses committed by juveniles “provide[s] respected and significant confirmation for our own conclusions.” *Roper*, supra, at 578, 125 S. Ct. 1183, 161 L. Ed. 2d 1.

[*82] The debate between petitioner's and respondent's *amici* over whether there is a binding *jus cogens* norm against this sentencing practice is likewise of no import. See Brief for Amnesty International 10-23; Brief for Sixteen Members of United States House of Representatives 4-40. The Court has treated the laws and practices of other nations and international agreements as relevant to the *Eighth Amendment* not because those norms are binding or controlling but because the judgment of the world's nations that a particular sentencing practice is inconsistent with basic principles of decency demonstrates that the Court's rationale has respected [****64] reasoning to support it.

* * *

HN12^[↑] LEdHN^[↑][12] [12] The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide. A State

need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term. The judgment of the First District Court of Appeal of Florida is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

APPENDIX

I. JURISDICTIONS THAT PERMIT LIFE WITHOUT PAROLE FOR JUVENILE NONHOMICIDE OFFENDERS

Alabama [Ala. Code § 12-15-203 \(Supp. 2009\)](#); [§§ 13A-3-3, 13A-5-9\(c\), 13A-6-61 \(2005\)](#); [§ 13A-7-5 \(Supp. 2009\)](#)

Arizona [Ariz. Rev. Stat. Ann. §§ 13-501, § 13-1423 \(West 2010\)](#)

Arkansas [Ark. Code § 9-27-318\(b\) \(2009\)](#); [§ 5-4-501\(c\) \(Supp. 2009\)](#)

[2035]** California [Cal. Penal Code Ann. § 667.7\(a\)\(2\) \(West 1999\)](#); [§ 1170.17 \(West 2004\)](#)

Delaware [Del. Code Ann., Tit., 10, § 1010 \(Supp. 2008\)](#); [id., Tit., 11, § 773\(c\) \(2003\)](#)

[*83] District of Columbia [D. C. Code § 16-2307 \(2009 Supp. Pamphlet\)](#); [§ 22-3020 \(Supp. 2007\)](#)

Florida [Fla. Stat. §§ 810.02, 921.002\(1\)\(e\), 985.557 \(2007\)](#)

[*851]** Georgia Georgia Code Ann. § 15-11-30.2 (2008); **[****65]** [§ 16-6-1\(b\) \(2007\)](#)

Idaho [Idaho Code § 18-6503 \(Lexis 2005\)](#); [§§ 19-2513, 20-509 \(Lexis Supp. 2009\)](#)

Illinois [Ill. Comp. Stat., ch. 705, §§ 405/5-805, 405/5-130 \(West 2008\)](#); [id., ch. 720, § 5/12-13\(b\)\(3\) \(West 2008\)](#); [id., ch. 730, § 5/3-3-3\(d\) \(West 2008\)](#)

Indiana [Ind. Code § 31-30-3-6\(1\)](#); [§ 35-50-2-8.5\(a\) \(West 2004\)](#)

Iowa [Iowa Code §§ 232.45\(6\), 709.2, 902.1 \(2009\)](#)

Louisiana [La. Child. Code Ann., Arts. 305, 857\(A\), \(B\) \(West Supp. 2010\)](#); [La. Rev. Stat. Ann. § 14:44 \(West](#)

[2007\)](#)

Maryland [Md. Cts. & Jud. Proc. Code Ann. §§ 3-8A-03\(d\)\(1\), 3-8A-06\(a\)\(2\) \(Lexis 2006\)](#); [Md. Crim. Law Code Ann. §§ 3-303\(d\)\(2\),\(3\) \(Lexis Supp. 2009\)](#)

Michigan [Mich. Comp. Laws Ann. § 712A.4 \(West 2002\)](#); [§ 750.520b\(2\)\(c\) \(West Supp. 2009\)](#); [§ 769.1 \(West 2000\)](#)

Minnesota [Minn. Stat. §§ 260B.125\(1\), 609.3455\(2\) \(2008\)](#)

Mississippi [Miss. Code Ann. § 43-21-157 \(2009\)](#); [§§ 97-3-53, 99-19-81 \(2007\)](#); [§ 99-19-83 \(2006\)](#)

Missouri [Mo. Rev. Stat. §§ 211.071, 558.018 \(2000\)](#)

Nebraska [Neb. Rev. Stat. §§ 28-105, 28-416\(8\)\(a\), 29-2204\(1\), \(3\), 43-247, 43-276 \(2008\)](#)

Nevada [Nev. Rev. Stat. §§ 62B.330, 200.366 \(2009\)](#)

New Hampshire [N. H. Rev. Stat. Ann. § 169-B:24; § 628:1 \(2007\)](#); [§§ 632-A:2, 651:6 \(Supp. 2009\)](#)

New York [N. Y. Penal Law Ann. §§ 30.00, § 60.06 \(West 2009\)](#); **[****66]** [§ 490.55 \(West 2008\)](#)

North Carolina [N. C. Gen. Stat. Ann. §§ 7B-2200, 15A-1340.16B\(a\) \(Lexis 2009\)](#)

North Dakota [N. D. Cent. Code Ann. § 12.1-04-01 \(Lexis 1997\)](#); [§ 12.1-20-03 \(Lexis Supp. 2009\)](#); [§ 12.1-32-01 \(Lexis 1997\)](#)

Ohio [Ohio Rev. Code Ann. § 2152.10 \(Lexis 2007\)](#); [§ 2907.02 \(Lexis 2006\)](#); [§ 2971.03\(A\)\(2\) \(2010 Lexis Supp. Pamphlet\)](#)

Oklahoma [Okla. Stat., Tit. 10A, §§ 2-5-204, 2-5-205, 2-5-206 \(2009 West Supp.\)](#); [id., Tit. 21, § 1115 \(2007 West Supp.\)](#)

Oregon [Ore. Rev. Stat. §§ 137.707, 137.719\(1\) \(2009\)](#)

Pennsylvania [42 Pa. Cons. Stat. § 6355\(a\) \(2000\)](#); [18 id., § 3121\(e\)\(2\) \(2008\)](#); [61 id., § 6137\(a\) \(2009\)](#)

[*84] Rhode Island [R. I. Gen. Laws §§ 14-1-7, 14-1-7.1, 11-47-3.2 \(Lexis 2002\)](#)

South Carolina [S. C. Code Ann. § 63-19-1210 \(2008 Supp. Pamphlet\)](#); [§ 16-11-311\(B\) \(Westlaw 2009\)](#)

[***852] South Dakota S. D. Codified Laws [§ 26-11-3.1 \(Supp. 2009\)](#); [§ 26-11-4 \(2004\)](#); [§§ 22-3-1, 22-6-1\(2\),\(3\) \(2006\)](#); [§ 24-15-4 \(2004\)](#); [§§ 22-19-1, 22-22-1 \(2006\)](#)

Tennessee [Tenn. Code Ann. §§ 37-1-134, 40-35-120\(g\) \(Westlaw 2010\)](#)

Utah [Utah Code Ann. §§ 78A-6-602, 78A-6-703, 76-5-302 \(Lexis 2008\)](#)

Virginia [Va. Code Ann. §§ 16.1-269.1, § 18.2-61, § 53.1-151\(B1\) \(2009\)](#)

Washington [Wash. Rev. Code § 13.40.110 \(2009 Supp.\)](#); [§§ 9A.04.050, \[****67\] 9.94A.030\(34\), 9.94A.570 \(2008\)](#)

West Virginia W. Va. Code Ann. § 49-5-10 (Lexis 2009); [§ 61-2-14a\(a\) \(Lexis 2005\)](#)

Wisconsin [Wis. Stat. §§ 938.18, 938.183 \(2007-2008\)](#); [§ 939.62\(2m\)\(c\) \(Westlaw 2005\)](#)

Wyoming [Wyo. Stat. Ann. §§ 6-2-306\(d\),\(e\), 14-6-203 \(2009\)](#)

Federal [18 U.S.C. § 2241 \(2006 ed. and Supp. II\)](#); [§ 5032 \(2006 ed.\)](#)

II. JURISDICTIONS THAT PERMIT LIFE WITHOUT PAROLE FOR JUVENILE OFFENDERS CONVICTED OF HOMICIDE CRIMES ONLY

Connecticut [Conn. Gen. Stat. § 53a-35a \(2009\)](#)

Hawaii [Haw. Rev. Stat. § 571-22\(d\) \(2006\)](#); [§ 706-656\(1\) \(2008 Supp. Pamphlet\)](#)

Maine [Me. Rev. Stat. Ann., Tit. 15, § 3101\(4\) \(Supp. 2009\)](#); [id., Tit. 17-A, § 1251 \(2006\)](#)

Massachusetts [Mass Gen. Laws ch. 119, § 74](#); [id., ch. 265, § 2 \(2008\)](#)

New Jersey [N. J. Stat. Ann. § 2A:4A-26 \(West Supp. 2009\)](#); [§ 2C:11-3\(b\)\(2\) \(West Supp. 2009\)](#)

New Mexico [N. M. Stat. Ann. § 31-18-14 \(Supp. 2009\)](#); [§ 31-18-15.2\(A\) \(Westlaw 2010\)](#)

Vermont [Vt. Stat. Ann., Tit. 33, § 5204 \(2009 Cum. Supp.\)](#); [id., Tit. 13, § 2303 \(2009\)](#)

[*85] III. JURISDICTIONS THAT FORBID LIFE WITHOUT PAROLE FOR JUVENILE OFFENDERS

[**2036] Alaska [Alaska Stat. § 12.55.015\(g\) \(2008\)](#)

Colorado [Colo. Rev. Stat. Ann. § 18-1.3-401\(4\)\(b\) \(2009\)](#)

Montana [Mont. Code Ann. § 46-18-222\(1\) \(2009\)](#)

Kansas [Kan. Stat. Ann. § 21-4622 \(West 2007\)](#)

Kentucky [****68] [Ky. Rev. Stat. Ann. § 640.040 \(West 2008\)](#); [Shepherd v. Commonwealth, 251 S. W. 3d 309, 320-321 \(Ky. 2008\)](#)

Texas [Tex. Penal Code Ann. § 12.31 \(West Supp. 2009\)](#)

Concur by: STEVENS; ROBERTS

Concur

[***853] Justice **Stevens**, with whom Justice **Ginsburg** and Justice **Sotomayor** join, concurring.

In his dissenting opinion, Justice Thomas argues that today's holding is not entirely consistent with the controlling opinions in [Lockyer v. Andrade, 538 U.S. 63, 123 S. Ct. 1166, 155 L. Ed. 2d 144 \(2003\)](#), [Ewing v. California, 538 U.S. 11, 123 S. Ct. 1179, 155 L. Ed. 2d 108 \(2003\)](#), [Harmelin v. Michigan, 501 U.S. 957, 111 S. Ct. 2680, 115 L. Ed. 2d 836 \(1991\)](#), and [Rummel v. Estelle, 445 U.S. 263, 100 S. Ct. 1133, 63 L. Ed. 2d 382 \(1980\)](#). *Post*, at ___ - ___, 176 L. Ed. 2d, at 864-865. Given that “evolving standards of decency” have played a central role in our *Eighth Amendment* jurisprudence for at least a century, see [Weems v. United States, 217 U.S. 349, 373-378, 30 S. Ct. 544, 54 L. Ed. 793 \(1910\)](#), this argument suggests the dissenting opinions in those cases more accurately describe the law today than does Justice Thomas' rigid interpretation of the Amendment. Society changes. Knowledge accumulates. We learn, sometimes, from our mistakes. [****69] Punishments that did not seem cruel and unusual at one time may, in the light of reason and experience, be found cruel and unusual at a later time; unless we are to abandon the moral commitment embodied in the *Eighth Amendment*, proportionality review must never become effectively obsolete, *post*, at ___ - ___, 176 L. Ed. 2d, at 864-865, *and n. 2*.

While Justice Thomas would apparently not rule out a death sentence for a \$50 theft by a 7-year-old, see [post, at _____, n. 3, 176 L. Ed. 2d, at 862, 866](#), the Court wisely rejects his static approach to the law. Standards of decency have evolved since 1980. They will never stop doing so.

[*86] Chief Justice **Roberts**, concurring in the judgment.

I agree with the Court that Terrance Graham's sentence of life without parole violates the *Eighth Amendment's* prohibition on "cruel and unusual punishments." Unlike the majority, however, I see no need to invent a new constitutional rule of dubious provenance in reaching that conclusion. Instead, my analysis is based on an application of this Court's precedents, in particular (1) our cases requiring "narrow proportionality" review of noncapital sentences and (2) our conclusion in [Roper v. Simmons, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 \(2005\)](#), [****70] that juvenile offenders are generally less culpable than adults who commit the same crimes.

These cases expressly allow courts addressing allegations that a noncapital sentence violates the *Eighth Amendment* to consider the particular defendant and particular crime at issue. The standards for relief under these precedents are rigorous, and should be. But here Graham's juvenile status--together with the nature of his criminal conduct and the extraordinarily severe punishment imposed--lead me to conclude that his sentence of life without parole is unconstitutional.

I

Our Court has struggled with whether and how to apply the *Cruel and Unusual Punishments Clause* to sentences for noncapital crimes. Some of my colleagues have raised serious and thoughtful questions [**2037] about whether, as an original matter, the [***854] Constitution was understood to require any degree of proportionality between noncapital offenses and their corresponding punishments. See, e.g., [Harmelin v. Michigan, 501 U.S. 957, 962-994, 111 S. Ct. 2680, 115 L. Ed. 2d 836 \(1991\)](#) (principal opinion of Scalia, J.); [post, at _____, 176 L. Ed. 2d, at 861-863, and n. 1](#) (Thomas, J., dissenting). Neither party here asks us to reexamine our [****71] precedents requiring such proportionality, however, and so I approach this case by trying to apply our past decisions to the facts at hand.

[*87] A

Graham's case arises at the intersection of two lines of *Eighth Amendment* precedent. The first consists of decisions holding that the *Cruel and Unusual Punishments Clause* embraces a "narrow proportionality principle" that we apply, on a case-by-case basis, when asked to review noncapital sentences. [Lockyer v. Andrade, 538 U.S. 63, 72, 123 S. Ct. 1166, 155 L. Ed. 2d 144 \(2003\)](#) (internal quotation marks omitted); [Solem v. Helm, 463 U.S. 277, 290, 103 S. Ct. 3001, 77 L. Ed. 2d 637 \(1983\)](#); [Ewing v. California, 538 U.S. 11, 20, 123 S. Ct. 1179, 155 L. Ed. 2d 108 \(2003\)](#) (plurality opinion); [Harmelin, supra, at 996-997, 111 S. Ct. 2680, 115 L. Ed. 2d 836](#) (Kennedy, J., concurring in part and concurring in judgment). This "narrow proportionality principle" does not grant judges blanket authority to second-guess decisions made by legislatures or sentencing courts. On the contrary, a reviewing court will only "rarely" need "to engage in extended analysis to determine that a sentence is *not* constitutionally disproportionate," [Solem, supra, at 290, n. 16, 103 S. Ct. 3001, 77 L. Ed. 2d 637](#) [****72] (emphasis added), and "successful challenges? to noncapital sentences will be all the more "exceedingly rare," [Rummel v. Estelle, 445 U.S. 263, 272, 100 S. Ct. 1133, 63 L. Ed. 2d 382 \(1980\)](#).

We have "not established a clear or consistent path for courts to follow" in applying the highly deferential "narrow proportionality" analysis. [Lockyer, supra, at 72, 123 S. Ct. 1166, 155 L. Ed. 2d 144](#). We have, however, emphasized the primacy of the legislature in setting sentences, the variety of legitimate penological schemes, the state-by-state diversity protected by our federal system, and the requirement that review be guided by objective, rather than subjective, factors. [Ewing, supra, at 23, 123 S. Ct. 1179, 155 L. Ed. 2d 108](#) (plurality opinion); [Harmelin, supra, at 998-1001, 111 S. Ct. 2680, 115 L. Ed. 2d 836](#) (opinion of Kennedy, J.). Most importantly, however, we have explained that the *Eighth Amendment* 'does not require strict proportionality between crime and sentence' "; rather, "it forbids only extreme sentences that are "grossly disproportionate" to the crime.' [Ewing, supra, at 23, 123 S. Ct. 1179, 155 L. Ed. 2d 108](#) (plurality opinion) (quoting [Harmelin, supra, at 1001, 111 S. Ct. 2680, 115 L. Ed. 2d 836](#) [****73] (opinion of Kennedy, J.)).

[*88] Our cases indicate that courts conducting "narrow proportionality" review should begin with a threshold inquiry that compares "the gravity of the offense and the harshness of the penalty." [Solem, 463 U.S., at 290-291, 103 S. Ct. 3001, 77 L. Ed. 2d 637](#). This analysis can consider a particular offender's mental

state and motive in committing the crime, the actual harm caused to his victim or to society by his conduct, and any prior criminal history. *Id.*, at 292-294, 296-297, 103 S. Ct. 3001, 77 L. Ed. 2d 637 [***855] (considering motive, past criminal conduct, alcoholism, and propensity for violence of the particular defendant); see also *Ewing, supra*, at 28-30, 123 S. Ct. 1179, 155 L. Ed. 2d 108 (plurality opinion) (examining defendant's criminal history); *Harmelin, 501 U.S.*, at 1001-1004, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (opinion of Kennedy, [**2038] J.) (noting specific details of the particular crime of conviction).

Only in “the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality,” *id.*, at 1005, 111 S. Ct. 2680, 115 L. Ed. 2d 836, should courts proceed to an “intra-jurisdictional” comparison [****74] of the sentence at issue with those imposed on other criminals in the same jurisdiction, and an “inter-jurisdictional” comparison with sentences imposed for the same crime in other jurisdictions. *Solem, supra*, at 291-292, 103 S. Ct. 3001, 77 L. Ed. 2d 637. If these subsequent comparisons confirm the inference of gross disproportionality, courts should invalidate the sentence as a violation of the *Eighth Amendment*.

B

The second line of precedent relevant to assessing Graham's sentence consists of our cases acknowledging that juvenile offenders are *generally*—though not necessarily in every case—less morally culpable than adults who commit the same crimes. This insight animated our decision in *Thompson v. Oklahoma*, 487 U.S. 815, 108 S. Ct. 2687, 101 L. Ed. 2d 702 (1988), in which we invalidated a capital sentence imposed on a juvenile who had committed his crime under the age of 16. More recently, in *Roper*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1, we extended the prohibition on executions to those who committed their crimes before the age of 18.

[*89] Both *Thompson* and *Roper* arose in the unique context of the death penalty, a punishment that our Court has recognized “must be limited [****75] to those offenders who commit ‘a narrow category of the most serious crimes’ and whose extreme culpability makes them ‘the most deserving of execution.’” 543 U.S., at 568, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (quoting *Atkins v. Virginia*, 536 U.S. 304, 319, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002)). *Roper*'s prohibition on the juvenile death penalty followed from our conclusion that “[t]hree

general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders.” 543 U.S., at 569, 125 S. Ct. 1183, 161 L. Ed. 2d 1. These differences are a lack of maturity and an underdeveloped sense of responsibility, a heightened susceptibility to negative influences and outside pressures, and the fact that the character of a juvenile is “more transitory” and “less fixed” than that of an adult. *Id.*, at 569-570, 125 S. Ct. 1183, 161 L. Ed. 2d 1. Together, these factors establish the “diminished culpability of juveniles,” *id.*, at 571, 125 S. Ct. 1183, 161 L. Ed. 2d 1, and “render suspect any conclusion” that juveniles are among “the worst offenders” for whom the death penalty is reserved, *id.*, at 570, 125 S. Ct. 1183, 161 L. Ed. 2d 1.

Today, [****76] the Court views *Roper* as providing the basis for a new categorical rule that juveniles may never receive a sentence of life without parole for nonhomicide crimes. I disagree. In *Roper*, the Court tailored its analysis of juvenile characteristics to the specific question whether juvenile offenders [***856] could constitutionally be subject to capital punishment. Our answer that they could not be sentenced to death was based on the explicit conclusion that they “cannot with reliability be classified among the *worst* offenders.” *Id.*, at 569, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (emphasis added).

This conclusion does not establish that juveniles can never be eligible for life without parole. A life sentence is of course far less severe than a death sentence, and we have never required that it be imposed only on the very worst offenders, as we have with capital punishment. Treating juvenile life sentences as analogous to capital punishment is at [*90] odds with our longstanding view that “the death penalty is different from other punishments in kind [**2039] rather than degree.” *Solem, supra*, at 294, 103 S. Ct. 3001, 77 L. Ed. 2d 637. It is also at odds with *Roper* itself, which drew the line at capital punishment by [****77] blessing juvenile sentences that are “less severe than death” despite involving “forfeiture of some of the most basic liberties.” 543 U.S., at 573-574, 125 S. Ct. 1183, 161 L. Ed. 2d 1. Indeed, *Roper* explicitly relied on the possible imposition of life without parole on some juvenile offenders. *Id.*, at 572, 125 S. Ct. 1183, 161 L. Ed. 2d 1.

But the fact that *Roper* does not support a categorical rule barring life sentences for all juveniles does not mean that a criminal defendant's age is irrelevant to those sentences. On the contrary, our cases establish

that the “narrow proportionality” review applicable to noncapital cases itself takes the personal “culpability of the offender” into account in examining whether a given punishment is proportionate to the crime. Solem, supra, at 292, 103 S. Ct. 3001, 77 L. Ed. 2d 637. There is no reason why an offender’s juvenile status should be excluded from the analysis. Indeed, given *Roper’s* conclusion that juveniles are typically less blameworthy than adults, 543 U.S., at 571, 125 S. Ct. 1183, 161 L. Ed. 2d 1, an offender’s juvenile status can play a central role in the inquiry.

Justice Thomas disagrees with even our limited reliance on *Roper* on [****78] the ground that the present case does not involve capital punishment. Post, at _____, 176 L. Ed. 2d, at 875 (dissenting opinion). That distinction is important--indeed, it underlies our rejection of the categorical rule declared by the Court. But *Roper’s* conclusion that juveniles are typically less culpable than adults has pertinence beyond capital cases, and rightly informs the case-specific inquiry I believe to be appropriate here.

In short, our existing precedent already provides a sufficient framework for assessing the concerns outlined by the majority. Not every juvenile receiving a life sentence will prevail under this approach. Not every juvenile should. But all will receive the protection that the *Eighth Amendment* requires.

[*91] II

Applying the “narrow proportionality” framework to the particular facts of this case, I conclude that Graham’s sentence of life without parole violates the *Eighth Amendment*.*

* Justice Alito suggests that Graham has failed to preserve any challenge to his sentence based on the “narrow, as-applied proportionality principle.” Post, at _____, 176 L. Ed. 2d, at 877 (dissenting opinion). I disagree. It is true that Graham asks us to declare, categorically, that no [****79] juvenile convicted of a nonhomicide offense may ever be subject to a sentence of life without parole. But he claims that this rule is warranted under the narrow proportionality principle we set forth in Solem v. Helm, 463 U.S. 277, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983), Harmelin v. Michigan, 501 U.S. 957, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991), and Ewing v. California, 538 U.S. 11, 123 S. Ct. 1179, 155 L. Ed. 2d 108 (2003). Brief for Petitioner 30, 31, 54-64. Insofar as he relies on that framework, I believe we may do so as well, even if our analysis results in a narrower holding than the categorical rule Graham seeks. See also Reply Brief for Petitioner 15, n. 8 (“[T]he Court could rule narrowly in this case and hold only

A

I begin with the threshold inquiry [***857] comparing the gravity of Graham’s conduct to the harshness of his penalty. There is no question that the crime for which Graham received his life sentence--armed burglary of a nondomicile with an assault or battery--is “a serious crime deserving serious punishment.” Enmund v. Florida, 458 U.S. 782, 797, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982). [****80] So too is the home invasion robbery that was the basis of Graham’s [**2040] probation violation. But these crimes are certainly less serious than other crimes, such as murder or rape.

As for Graham’s degree of personal culpability, he committed the relevant offenses when he was a juvenile--a stage at which, *Roper* emphasized, one’s “culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.” 543 U.S., at 571, 125 S. Ct. 1183, 161 L. Ed. 2d 1. Graham’s age places him in a significantly different category from the defendants in Rummel, Harmelin, and Ewing, all of whom committed their crimes as adults. Graham’s youth made [*92] him relatively more likely to engage in reckless and dangerous criminal activity than an adult; it also likely enhanced his susceptibility to peer pressure. See, e.g., Roper, supra, at 569, 125 S. Ct. 1183, 161 L. Ed. 2d 1; Johnson v. Texas, 509 U.S. 350, 367, 113 S. Ct. 2658, 125 L. Ed. 2d 290 (1993); Eddings v. Oklahoma, 455 U.S. 104, 115-117, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982). There is no reason to believe that Graham should be denied the general presumption of diminished culpability that *Roper* indicates should apply to juvenile [****81] offenders. If anything, Graham’s in-court statements--including his request for a second chance so that he could “do whatever it takes to get to the NFL”--underscore his immaturity. App. 380.

The fact that Graham committed the crimes that he did proves that he was dangerous and deserved to be punished. But it does not establish that he was *particularly* dangerous--at least relative to the murderers and rapists for whom the sentence of life without parole is typically reserved. On the contrary, his lack of prior criminal convictions, his youth and immaturity, and the difficult circumstances of his upbringing noted by the majority, ante, at _____, 176 L. Ed. 2d, at 832, all suggest that he was markedly less culpable than a typical adult who commits the same offenses.

that petitioner’s sentence of life without parole was unconstitutionally disproportionate”).

Despite these considerations, the trial court sentenced Graham to life in prison without the possibility of parole. This is the second-harshes sentence available under our precedents for *any* crime, and the most severe sanction available for a nonhomicide offense. See [Kennedy v. Louisiana, 554 U.S. 407, 128 S. Ct. 2641, 171 L. Ed. 2d 525 \(2008\)](#). Indeed, as the majority notes, Graham's sentence far exceeded the punishment proposed [****82] by the Florida Department of Corrections (which suggested a sentence of four years, Brief for Petitioner 20), and the state prosecutors [***858] (who asked that he be sentenced to 30 years in prison for the armed burglary, App. 388). No one in Graham's case other than the sentencing judge appears to have believed that Graham deserved to go to prison for life.

Based on the foregoing circumstances, I conclude that there is a strong inference that Graham's sentence of life [*93] imprisonment without parole was grossly disproportionate in violation of the *Eighth Amendment*. I therefore proceed to the next steps of the proportionality analysis.

B

Both intrajurisdictional and interjurisdictional comparisons of Graham's sentence confirm the threshold inference of disproportionality.

Graham's sentence was far more severe than that imposed for similar violations of Florida law, even without taking juvenile status into account. For example, individuals who commit burglary or robbery offenses in Florida receive average sentences of less than 5 years and less than 10 years, respectively. Florida Dept. of Corrections, Annual Report FY 2007-2008: The Guidebook to Corrections in Florida 35. Unsurprisingly, Florida's [****83] juvenile [**2041] criminals receive similarly low sentences--typically less than five years for burglary and less than seven years for robbery. *Id.*, at 36. Graham's life without parole sentence was far more severe than the average sentence imposed on those convicted of murder or manslaughter, who typically receive under 25 years in prison. *Id.*, at 35. As the Court explained in [Solem, 463 U.S., at 291, 103 S. Ct. 3001, 77 L. Ed. 2d 637](#), "[i]f more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive."

Finally, the inference that Graham's sentence is disproportionate is further validated by comparison to

the sentences imposed in other domestic jurisdictions. As the majority opinion explains, Florida is an outlier in its willingness to impose sentences of life without parole on juveniles convicted of nonhomicide crimes. See [ante, at _____, 176 L. Ed. 2d, at 838-839](#).

III

So much for Graham. But what about Milagro Cunningham, a 17-year-old who beat and raped an 8-year-old girl before leaving her to die under 197 pounds of rock in a recycling [*94] bin in a remote landfill? See Musgrave, *Cruel or Necessary? Life [****84] Terms for Youths Spur National Debate*, Palm Beach Post, Oct. 15, 2009, p. 1A. Or Nathan Walker and Jakaris Taylor, the Florida juveniles who together with their friends gang-raped a woman and forced her to perform oral sex on her 12-year-old son? See *3 Sentenced to Life for Gang Rape of Mother*, Associated Press, Oct. 14, 2009. The fact that Graham cannot be sentenced to life without parole for his conduct says nothing whatever about these offenders, or others like them who commit nonhomicide crimes far more reprehensible than the conduct at issue here. The Court uses Graham's case as a vehicle to proclaim a new constitutional rule--applicable well beyond the particular facts of Graham's case--that a sentence of life without parole imposed on *any* juvenile for *any* nonhomicide offense is unconstitutional. This categorical conclusion is as unnecessary as it is unwise.

[***859] A holding this broad is unnecessary because the particular conduct and circumstances at issue in the case before us are not serious enough to justify Graham's sentence. In reaching this conclusion, there is no need for the Court to decide whether that same sentence would be constitutional if imposed for other more heinous [****85] nonhomicide crimes.

A more restrained approach is especially appropriate in light of the Court's apparent recognition that it is perfectly legitimate for a juvenile to receive a sentence of life without parole for committing murder. This means that there is nothing *inherently* unconstitutional about imposing sentences of life without parole on juvenile offenders; rather, the constitutionality of such sentences depends on the particular crimes for which they are imposed. But if the constitutionality of the sentence turns on the particular crime being punished, then the Court should limit its holding to the particular offenses that Graham committed here, and should decline to consider other hypothetical crimes not presented by this case.

[*95] In any event, the Court's categorical conclusion is also unwise. Most importantly, it ignores the fact that some nonhomicide crimes--like the ones committed by Milagro Cunningham, Nathan Walker, and Jakaris Taylor--are especially heinous or grotesque, and thus may be deserving of more severe punishment.

Those under 18 years old may as a general matter have "diminished" culpability relative to adults who commit the same crimes, Roper, 543 U.S., at 571, 125 S. Ct. [**2042] 1183, 161 L. Ed. 2d 1, [****86] but that does not mean that their culpability is always insufficient to justify a life sentence. See generally Thompson, 487 U.S., at 853, 108 S. Ct. 2687, 101 L. Ed. 2d 702 (O'Connor, J., concurring in judgment). It does not take a moral sense that is fully developed in every respect to know that beating and raping an 8-year-old girl and leaving her to die under 197 pounds of rocks is horribly wrong. The single fact of being 17 years old would not afford Cunningham protection against life without parole if the young girl had died--as Cunningham surely expected she would--so why should it do so when she miraculously survived his barbaric brutality?

The Court defends its categorical approach on the grounds that a "clear line is necessary to prevent the possibility that life without parole sentences will be imposed on juvenile nonhomicide offenders who are not sufficiently culpable to merit that punishment." Ante, at _____, 176 L. Ed. 2d, at 845. It argues that a case-by-case approach to proportionality review is constitutionally insufficient because courts might not be able "with sufficient accuracy [to] distinguish the few incorrigible juvenile offenders from the many that have the capacity [****87] for change." Ante, at _____, 176 L. Ed. 2d, at 847.

The Court is of course correct that judges will never have perfect foresight--or perfect wisdom--in making sentencing decisions. But this is true when they sentence adults no less than when they sentence juveniles. It is also true when they sentence juveniles who commit murder no less than when they sentence juveniles who commit other crimes.

[*96] Our system depends upon sentencing judges applying their reasoned judgment to each case that comes before them. As we explained in *Solem*, the whole enterprise of proportionality [****860] review is premised on the "justified" assumption that "courts are competent to judge the gravity of an offense, at least on a relative scale." 463 U.S., at 292, 103 S. Ct. 3001, 77 L. Ed. 2d 637. Indeed, "courts traditionally have made

these judgments" by applying "generally accepted criteria" to analyze "the harm caused or threatened to the victim or society, and the culpability of the offender." Id., at 292, 294, 103 S. Ct. 3001, 77 L. Ed. 2d 637.

* * *

Terrance Graham committed serious offenses, for which he deserves serious punishment. But he was only 16 years old, and under our Court's precedents, his youth is one factor, [****88] among others, that should be considered in deciding whether his punishment was unconstitutionally excessive. In my view, Graham's age--together with the nature of his criminal activity and the unusual severity of his sentence--tips the constitutional balance. I thus concur in the Court's judgment that Graham's sentence of life without parole violated the *Eighth Amendment*.

I would not, however, reach the same conclusion in every case involving a juvenile offender. Some crimes are so heinous, and some juvenile offenders so highly culpable, that a sentence of life without parole may be entirely justified under the Constitution. As we have said, "successful challenges" to noncapital sentences under the *Eighth Amendment* have been--and, in my view, should continue to be--"exceedingly rare." Rummel, 445 U.S., at 272, 100 S. Ct. 1133, 63 L. Ed. 2d 382. But Graham's sentence presents the exceptional case that our precedents have recognized will come along. We should grant Graham the relief to which he is entitled under the *Eighth Amendment*. The Court errs, however, in using this case as a vehicle for unsettling our established jurisprudence and fashioning a categorical rule applicable to far [****89] different cases.

Dissent by: THOMAS; ALITO

Dissent

[*97] [**2043] Justice **Thomas**, with whom Justice **Scalia** joins, and with whom Justice **Alito** joins as to Parts I and III, dissenting.

The Court holds today that it is "grossly disproportionate" and hence unconstitutional for any judge or jury to impose a sentence of life without parole on an offender less than 18 years old, unless he has committed a homicide. Although the text of the Constitution is silent regarding the permissibility of this sentencing practice, and although it would not have

offended the standards that prevailed at the founding, the Court insists that the standards of American society have evolved such that the Constitution now requires its prohibition.

The news of this evolution will, I think, come as a surprise to the American people. Congress, the District of Columbia, and 37 States allow judges and juries to consider this sentencing practice in juvenile nonhomicide cases, and those judges and juries have decided to use it in the very worst cases they have encountered.

The Court does not conclude that life without parole itself is a cruel and unusual punishment. It instead rejects the judgments of those legislatures, judges, and juries regarding what [****90] the Court describes as the “moral” question whether this sentence can ever be “proportiona[te]” when applied to the category of offenders at issue here. [Ante, at ___](#), 176 L. Ed. 2d, at 835 (internal quotation [****861] marks omitted); [ante, at ___](#), 176 L. Ed. 2d, at 853 (Stevens, J., concurring).

I am unwilling to assume that we, as Members of this Court, are any more capable of making such moral judgments than our fellow citizens. Nothing in our training as judges qualifies us for that task, and nothing in Article III gives us that authority.

I respectfully dissent.

I

The Court recounts the facts of Terrance Jamar Graham's case in detail, so only a summary is necessary here. At age [*98] 16 years and 6 months, Graham and two masked accomplices committed a burglary at a small Florida restaurant, during which one of Graham's accomplices twice struck the restaurant manager on the head with a steel pipe when he refused to turn over money to the intruders. Graham was arrested and charged as an adult. He later pleaded guilty to two offenses, including armed burglary with assault or battery, an offense punishable by life imprisonment under Florida law. [Fla. Stat. §§ 810.02\(2\)\(a\), 810.02\(2\)\(b\) \(2007\)](#). The [****91] trial court withheld adjudication on both counts, however, and sentenced Graham to probation, the first 12 months of which he spent in a county detention facility.

Graham reoffended just six months after his release. At a probation revocation hearing, a judge found by a preponderance of the evidence that, at age 17 years and 11 months, Graham invaded a home with two

accomplices and held the homeowner at gunpoint for approximately 30 minutes while his accomplices ransacked the residence. As a result, the judge concluded that Graham had violated his probation and, after additional hearings, adjudicated Graham guilty on both counts arising from the restaurant robbery. The judge imposed the maximum sentence allowed by Florida law on the armed burglary count, life imprisonment without the possibility of parole.

Graham argues, and the Court holds, that this sentence violates the *Eighth Amendment's Cruel and Unusual Punishments Clause* because a life-without-parole sentence is always “grossly disproportionate” when imposed on a person under 18 who commits any crime short of a homicide. [**2044] Brief for Petitioner 24; [ante, at ___](#), 176 L. Ed. 2d, at 844.

II

A

The *Eighth Amendment*, which applies to the [****92] States through the Fourteenth, provides that “[e]xcessive bail shall [*99] not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” It is by now well established that the *Cruel and Unusual Punishments Clause* was originally understood as prohibiting torturous “‘methods of punishment,’ [Harmelin v. Michigan, 501 U.S. 957, 979, 111 S. Ct. 2680, 115 L. Ed. 2d 836 \(1991\)](#) (opinion of Scalia, J.) (quoting Granucci, “Nor Cruel and Unusual Punishments Inflicted” :The Original Meaning, 57 Cal. L. Rev. 839, 842 (1969))--specifically methods akin to those that had been considered cruel and unusual at the time the *Bill of Rights* was adopted, [Baze v. Rees, 553 U.S. 35, 99, 128 S. Ct. 1520, 170 L. Ed. 2d 420 \(2008\)](#) (Thomas, J., concurring in judgment). With one arguable exception, see [Weems v. United States, 217 U.S. 349, 30 S. Ct. 544, 54 L. Ed. 793 \(1910\)](#); [Harmelin, supra, at 990-994, \[****862\] 111 S. Ct. 2680, 115 L. Ed. 2d 836](#) (opinion of Scalia, J.) (discussing the scope and relevance of *Weems'* holding), this Court applied the Clause with that understanding for nearly 170 years after the *Eighth Amendment's* ratification.

More recently, however, the Court has held that the Clause [****93] authorizes it to proscribe not only methods of punishment that qualify as “cruel and unusual,” but also any punishment that the Court deems “grossly disproportionate” to the crime committed. [ante, at ___](#), 176 L. Ed. 2d, at 836 (internal quotation marks omitted). This latter interpretation is entirely the Court's creation. As has been described elsewhere at length,

there is virtually no indication that the *Cruel and Unusual Punishments Clause* originally was understood to require proportionality in sentencing. See [Harmelin, 501 U.S., at 975-985, 111 S. Ct. 2680, 115 L. Ed. 2d 836](#) (opinion of Scalia, J.). Here, it suffices to recall just two points. First, the Clause does not expressly refer to proportionality or invoke any synonym for that term, even though the Framers were familiar with the concept, as evidenced by several founding-era state constitutions that required (albeit without defining) proportional punishments. See [id., at 977-978, 111 S. Ct. 2680, 115 L. Ed. 2d 836](#). In addition, the penal statute adopted by the First Congress demonstrates that proportionality in sentencing was not considered [*100] a constitutional command.¹ See [id., at 980-981, 111 S. Ct. 2680, 115 L. Ed. 2d 836](#) [****94] (noting that the statute prescribed capital punishment for offenses ranging from “ ‘run[nin]g away with . . . goods or merchandise to the value of fifty dollars,’ ” to “murder on the high seas” (quoting 1 Stat. 114)); see also [**2045] Preyer, *Penal Measures in the American Colonies: An Overview*, 26 *Am. J. Legal Hist.* 326, 348-349, 353 (1982) (explaining that crimes in the late 18th-century colonies generally were punished either by fines, whipping, or public “shaming,” or by death, as intermediate sentencing options such as incarceration were not common).

The Court has nonetheless invoked proportionality to declare that capital punishment--though not unconstitutional *per se*--is categorically too harsh a penalty to apply to certain types of crimes and certain

classes of offenders. See [Coker v. Georgia, 433 U.S. 584, 97 S. Ct. 2861, 53 L. Ed. 2d 982 \(1977\)](#) (plurality opinion) (rape of an adult woman); [Kennedy v. Louisiana, 554 U.S. 407, 128 S. Ct. 2641, 171 L. Ed. 2d 525 \(2008\)](#) (rape of a child); [Enmund v. Florida, 458 U.S. 782, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 \(1982\)](#) (felony murder in which the defendant participated in the felony but did not kill or intend to kill); [***863] [Thompson v. Oklahoma, 487 U.S. 815, 108 S. Ct. 2687, 101 L. Ed. 2d 702 \(1988\)](#) [****96] (plurality opinion) (juveniles [*101] under 16); [Roper v. Simmons, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 \(2005\)](#) (juveniles under 18); [Atkins v. Virginia, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 \(2002\)](#) (mentally retarded offenders). In adopting these categorical proportionality rules, the Court intrudes upon areas that the Constitution reserves to other (state and federal) organs of government. The *Eighth Amendment* prohibits the government from inflicting a cruel and unusual method of punishment upon a defendant. Other constitutional provisions ensure the defendant's right to fair process before any punishment is imposed. But, as members of today's majority note, “[s]ociety changes,” [ante, at _____, 176 L. Ed. 2d, at 853](#) (Stevens, J., concurring), and the *Eighth Amendment* leaves the unavoidably moral question of who “deserves” a particular nonprohibited method of punishment to the judgment of the legislatures that authorize the penalty, the prosecutors who seek it, and the judges and juries that impose it under circumstances they deem appropriate.

The Court has nonetheless adopted categorical rules that shield entire classes of offenses and offenders from the death penalty on [****97] the theory that “evolving standards of decency” require this result. [ante, at _____, 176 L. Ed. 2d, at 835](#) (internal quotation marks omitted). The Court has offered assurances that these standards can be reliably measured by “ ‘objective indicia’ ” of “national consensus,” such as state and federal legislation, jury behavior, and (surprisingly, given that we are talking about “national” consensus) international opinion. [ante, at _____, 176 L. Ed. 2d, at 837](#) (quoting [Roper, supra, at 563, 125 S. Ct. 1183, 161 L. Ed. 2d 1](#)); see also [ante, at _____ - _____, 176 L. Ed. 2d, at 836-840, _____ - _____, 176 L. Ed. 2d, at 848-850](#). Yet even assuming that is true, the Framers did not provide for the constitutionality of a particular type of punishment to turn on a “snapshot of American public opinion” taken at the moment a case is decided. [Roper, supra, at 629, 125 S. Ct. 1183, 161 L. Ed. 2d 1](#) (Scalia, J., dissenting). By holding otherwise, the Court pretermits in all but one direction the evolution of the standards it describes, thus

¹The Chief Justice's concurrence suggests that it is unnecessary to remark on the underlying question whether the *Eighth Amendment* requires proportionality in sentencing because “[n]either party here asks us to reexamine our precedents” requiring “proportionality between noncapital offenses and their corresponding punishments.” [Ante, at _____, 176 L. Ed. 2d, at 854](#) (opinion concurring in judgment). I disagree. Both the Court and the concurrence do more than apply existing noncapital proportionality precedents to the particulars of Graham's claim. The Court radically departs from the framework those precedents establish by applying to a noncapital [****95] sentence the categorical proportionality review its prior decisions have reserved for death penalty cases alone. See Part III, *infra*. The concurrence, meanwhile, breathes new life into the case-by-case proportionality approach that previously governed noncapital cases, from which the Court has steadily, and wisely, retreated since [Solem v. Helm, 463 U.S. 277, 103 S. Ct. 3001, 77 L. Ed. 2d 637 \(1983\)](#). See Part IV, *infra*. In dissenting from both choices to expand proportionality review, I find it essential to reexamine the foundations on which that doctrine is built.

“calling a constitutional halt to what may well be a pendulum swing in social attitudes,” [Thompson, supra, at 869, 108 S. Ct. 2687, 101 L. Ed. 2d 702](#) (Scalia, J., dissenting), and [****98] “stunt[ing] [*102] legislative consideration” of new questions of penal policy as they emerge, [Kennedy, supra, at 447, 128 S. Ct. 2641, 2665, 171 L. Ed. 2d 525, 556](#) (Alito, J., dissenting).

But the Court is not content to rely on snapshots of community consensus in any event. [Ante, at _____, 176 L. Ed. 2d, at 841](#) (“Community consensus, while ‘entitled to great weight,’ is not itself determinative” (quoting [Kennedy, supra, at 435, 128 S. Ct. 2641, 2658, 171 L. Ed. 2d 525, 548](#)). Instead, it reserves the right to reject the evidence of consensus it finds whenever its own “independent judgment” points in a [**2046] different direction. [ante, at _____, 176 L. Ed. 2d, at 841](#). The Court thus openly claims the power not only to approve or disapprove of democratic choices in penal policy based on evidence of how society’s standards *have* evolved, but also on the basis of the Court’s “independent” perception of how those standards *should* evolve, which depends on what the Court concedes is “ ‘necessarily . . . a moral [***864] judgment’ ” regarding the propriety of a given punishment in today’s society. [ante, at _____, 176 L. Ed. 2d, at 835](#) (quoting [Kennedy, supra, at 419, 128 S. Ct. 2641, 2649, 171 L. Ed. 2d 525, 548](#)).

The [****99] categorical proportionality review the Court employs in capital cases thus lacks a principled foundation. The Court’s decision today is significant because it does not merely apply this standard—it remarkably expands its reach. For the first time in its history, the Court declares an entire class of offenders immune from a noncapital sentence using the categorical approach it previously reserved for death penalty cases alone.

B

Until today, the Court has based its categorical proportionality rulings on the notion that the Constitution gives special protection to capital defendants because the death penalty is a uniquely severe punishment that must be reserved for only those who are “most deserving of execution.” [Atkins, supra, at 319, 122 S. Ct. 2242, 153 L. Ed. 2d 335](#); see [Roper, supra, at 568, 125 S. Ct. 1183, 161 L. Ed. 2d 1](#); [Eddings v. Oklahoma, 455 U.S. 104, 102 S. Ct. 869, 71 L. Ed. 2d 1 \(1982\)](#); [Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 \(1978\)](#). Of course, the *Eighth Amendment* itself makes no [*103] distinction between capital and noncapital sentencing, but the “ ‘bright line’ ” the Court

drew between the two penalties has for many years served as the principal [****100] justification for the Court’s willingness to reject democratic choices regarding the death penalty. See [Rummel v. Estelle, 445 U.S. 263, 275, 100 S. Ct. 1133, 63 L. Ed. 2d 382 \(1980\)](#).

Today’s decision eviscerates that distinction. “Death is different” no longer. The Court now claims not only the power categorically to reserve the “most severe punishment” for those the Court thinks are “ ‘the most deserving of execution,’ [Roper, supra, at 568, 125 S. Ct. 1183, 161 L. Ed. 2d 1](#) (quoting [Atkins, supra, at 319, 122 S. Ct. 2242, 153 L. Ed. 2d 335](#)), but also to declare that “less culpable” persons are categorically exempt from the “*second* most severe penalty.” [ante, at _____, 176 L. Ed. 2d, at 844](#) (emphasis added). No reliable limiting principle remains to prevent the Court from immunizing any class of offenders from the law’s third, fourth, fifth, or fiftieth most severe penalties as well.

The Court’s departure from the “death is different” distinction is especially mystifying when one considers how long it has resisted crossing that divide. Indeed, for a time the Court declined to apply proportionality principles to noncapital sentences at all, emphasizing that “a sentence of death differs [****101] in kind from any sentence of imprisonment, *no matter how long.*” [Rummel, 445 U.S., at 272, 100 S. Ct. 1133, 63 L. Ed. 2d 382](#) (emphasis added). Based on that rationale, the Court found that the excessiveness of one prison term as compared to another was “properly within the province of legislatures, not courts,” [id., at 275-276, 100 S. Ct. 1133, 63 L. Ed. 2d 382](#), precisely because it involved an “*invariably . . . subjective determination*, there being no clear way to make ‘any constitutional distinction between one term of years and a shorter or longer term of years,’ [Hutto v. Davis, 454 U.S. 370, 373, 102 S. Ct. 703, 70 L. Ed. 2d 556 \(1982\)](#) (*per curiam*) (quoting [Rummel, supra, at 275, 100 S. Ct. 1133, 63 L. Ed. 2d 382](#); emphasis added).

Even when the Court broke from [***865] that understanding in its 5-to-4 decision in [Solem v. Helm, 463 U.S. 277, 103 S. Ct. 3001, \[**2047\] 77 L. Ed. 2d 637 \(1983\)](#) (striking [*104] down as “grossly disproportionate” a life-without-parole sentence imposed on a defendant for passing a worthless check), the Court did so only as applied to the facts of that case; it announced no categorical rule. [Id., at 288, 303, 103 S. Ct. 3001, 77 L. Ed. 2d 637](#). Moreover, the Court soon cabined [****102] *Solem*’s rationale. The controlling opinion in the Court’s very next noncapital

proportionality case emphasized that principles of federalism require substantial deference to legislative choices regarding the proper length of prison sentences. [Harmelin, 501 U.S., at 999, 111 S. Ct. 2680, 115 L. Ed. 2d 836](#) (opinion of Kennedy, J.) (“[M]arked divergences both in underlying theories of sentencing and in the length of prescribed prison terms are the inevitable, often beneficial, result of the federal structure”); [id., at 1000, 111 S. Ct. 2680, 115 L. Ed. 2d 836](#) (“[D]iffering attitudes and perceptions of local conditions may yield different, yet rational, conclusions regarding the appropriate length of prison terms for particular crimes”). That opinion thus concluded that “successful challenges to the proportionality of [prison] sentences [would be] exceedingly rare.” [Id., at 1001, 111 S. Ct. 2680, 115 L. Ed. 2d 836](#) (internal quotation marks omitted).

They have been rare indeed. In the 28 years since *Solem*, the Court has considered just three such challenges and has rejected them all, see [Ewing v. California, 538 U.S. 11, 123 S. Ct. 1179, 155 L. Ed. 2d 108 \(2003\)](#); [Lockyer v. Andrade, 538 U.S. 63, 123 S. Ct. 1166, 155 L. Ed. 2d 144 \(2003\)](#); [\[****103\] Harmelin, supra](#), largely on the theory that criticisms of the “wisdom, cost-efficiency, and effectiveness” of term-of-years prison sentences are “appropriately directed at the legislature[s],” not the courts, [Ewing, supra, at 27, 28, 123 S. Ct. 1179, 155 L. Ed. 2d 108](#) (plurality opinion). The Court correctly notes that those decisions were “closely divided,” [ante, at _____, 176 L. Ed. 2d, at 836](#), but so was *Solem* itself, and it is now fair to describe *Solem* as an outlier.²

[*105] Remarkably, the Court today does more than return to *Solem*'s case-by-case proportionality standard

²Courts and commentators interpreting this Court's decisions have reached this conclusion. See, e.g., [United States v. Polk, 546 F.3d 74, 76 \(CA1 2008\)](#) (“[I]nstances of gross disproportionality [in noncapital cases] will be hen's-teeth rare”); Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, [107 Mich. L. Rev. 1145, 1160 \(2009\)](#) (“*Solem* now stands as an outlier”); Note, *The Capital Punishment Exception: A Case for Constitutionalizing the Substantive Criminal Law*, [104 Colum. L. Rev. 426, 445 \(2004\)](#) (observing that outside of the capital context, “proportionality review has been virtually dormant”); Steiker & Steiker, *Opening a Window or Building a Wall? The [****104] Effect of Eighth Amendment Death Penalty Law and Advocacy on Criminal Justice More Broadly*, [11 U. Pa. J. Const. L. 155, 184 \(2009\)](#) (“*Eighth Amendment* challenges to excessive incarceration [are] essentially non-starters”).

for noncapital sentences; it hurtles past it to impose a *categorical* proportionality rule banning life-without-parole sentences not just in this case, but in *every* case involving a juvenile nonhomicide offender, no matter what the circumstances. Neither the *Eighth Amendment* nor the Court's precedents justify this decision.

III

The Court asserts that categorical proportionality review is necessary here merely because Graham asks for [\[***866\]](#) a categorical rule, see [ante, at _____, 176 L. Ed. 2d, at 837](#), and because the Court thinks clear lines are a good idea, see [ante, at _____, 176 L. Ed. 2d, at 846-848](#). I find those factors wholly insufficient to justify the Court's break from past practice. First, the Court fails to acknowledge that a petitioner seeking to exempt an entire category of offenders from a sentencing practice carries a much heavier burden than one [\[**2048\]](#) seeking case-specific [\[****105\]](#) relief under *Solem*. Unlike the petitioner in *Solem*, Graham must establish not only that his own life-without-parole sentence is “grossly disproportionate,” but also that such a sentence is always grossly disproportionate whenever it is applied to a juvenile nonhomicide offender, no matter how heinous his crime. Cf. [United States v. Salerno, 481 U.S. 739, 107 S. Ct. 2095, 95 L. Ed. 2d 697 \(1987\)](#). Second, even applying the Court's categorical “evolving standards” test, neither objective evidence of national consensus nor the notions of culpability on which the Court's “independent judgment” relies can justify the categorical rule it declares here.

[*106] A

According to the Court, proper *Eighth Amendment* analysis “begins with objective indicia of national consensus,”³ and “[t]he clearest and most reliable

³The Court ignores entirely the threshold inquiry of whether subjecting juvenile offenders to adult penalties was one of the “modes or acts of punishment that had been considered cruel and unusual at the time that the *Bill of Rights* [\[****107\]](#) was adopted.” [Ford v. Wainwright, 477 U.S. 399, 405, 106 S. Ct. 2595, 91 L. Ed. 2d 335 \(1986\)](#). As the Court has noted in the past, however, the evidence is clear that, at the time of the Founding, “the common law set a rebuttable presumption of incapacity to commit any felony at the age of 14, and theoretically permitted [even] capital punishment to be imposed on a person as young as age 7.” [Stanford v. Kentucky, 492 U.S. 361, 368, 109 S. Ct. 2969, 106 L. Ed. 2d 306 \(1989\)](#) (citing 4 W. Blackstone, *Commentaries* *23-*24; 1 M. Hale, *Pleas of the Crown* 24-29 (1800)). It thus seems

objective evidence of contemporary values is the legislation enacted by the country's legislatures," [ante, at ___ - ___, 176 L. Ed. 2d, at 837](#) (internal quotation marks omitted). As such, the analysis should end quickly, because a national "consensus" in favor of the Court's result simply does not exist. The laws of all 50 States, the Federal Government, and the District of Columbia provide that [****106] juveniles over a certain age may be tried in adult court if charged with certain crimes.⁴ See [ante, at ___ - ___, 176 L. Ed. 2d, at 850-852](#) (appendix to opinion of the Court). Forty-five States, the Federal Government, and the District of Columbia expose juvenile offenders charged [*107] in adult court to the very same range of punishments faced by adults charged with the same crimes. See [ante, at ___ - ___, 176 L. Ed. 2d, at 850-852](#), Part I. Eight of those States do not make life-without-parole sentences available for any nonhomicide offender, [***867] regardless of age.⁵ All remaining jurisdictions--the Federal Government, the other 37 States, [**2049] and the District--authorize life-without-parole sentences for certain nonhomicide offenses, and authorize the imposition of such sentences on persons under 18. See *ibid.* Only five States prohibit juvenile offenders from receiving a life-without-parole sentence that could be imposed on an adult convicted of the same crime.⁶

exceedingly unlikely that the imposition of a life-without-parole sentence on a person of Graham's age would run afoul of those standards.

⁴Although the details of state laws vary extensively, they generally permit the transfer of a juvenile offender to adult court through one or more of the following mechanisms: (1) judicial waiver, in which the juvenile court has the authority to waive jurisdiction over the offender and transfer the case to adult court; (2) concurrent jurisdiction, in which adult and juvenile courts share jurisdiction over certain cases and the prosecutor has discretion to file in either court; [****108] or (3) statutory provisions that exclude juveniles who commit certain crimes from juvenile-court jurisdiction. See Dept. of Justice, *Juvenile Offenders and Victims: 1999 National Report* 89, 104 (1999) (hereinafter 1999 DOJ National Report); Feld, *Unmitigated Punishment: Adolescent Criminal Responsibility and LWOP Sentences*, 10 *J. Law & Family Studies* 11, 38-39 (2007).

⁵Alaska entitles all offenders to parole, regardless of their crime. [Alaska Stat. § 12.55.015\(g\) \(2008\)](#). The other seven States provide parole eligibility to all offenders, except those who commit certain homicide crimes. [Conn. Gen. Stat. § 53a-35a \(2009\)](#); [Haw. Rev. Stat. §§ 706-656\(1\)-\(2\) \(1993 and 2008 Supp. Pamphlet\)](#); [Me. Rev. Stat. Ann., Tit. 17-A, § 1251 \(2006\)](#); [Mass. Gen. Laws Ann., ch. 265, § 2 \(West 2008\)](#); [N. J.](#)

No plausible claim of a consensus against this sentencing practice can be made in light of this overwhelming legislative evidence. The sole fact that federal law authorizes this practice singlehandedly refutes the claim that our Nation finds it morally repugnant. The additional reality that 37 out of 50 States (a supermajority of 74%) permit the practice makes the claim utterly implausible. Not only is there no consensus against this penalty, there is a clear legislative consensus *in favor* of its availability.

Undaunted, however, the Court brushes this evidence aside as "incomplete and unavailing," declaring that "[t]here [*108] are measures of consensus other than legislation." [Ante, at ___ - ___, 176 L. Ed. 2d, at 838](#) (quoting [Kennedy, 554 U.S., at 433, 128 S. Ct. 2641, 2657, 171 L. Ed. 2d 525, 547](#)). This is nothing short of stunning. Most importantly, federal civilian law approves this sentencing practice.⁷ And although the Court has never decided how many state laws are necessary to show consensus, the Court has never banished into constitutional exile a sentencing practice that the laws of a majority, [****110] let alone a supermajority, of States expressly permit.⁸

[Stat. Ann. §§ 2C:11-3\(b\)\(2\)-\(3\)](#) (West 2005); [N. M. Stat. Ann. § 31-18-14](#) (Supp. 2009); [Vt. Stat. Ann., Tit. 13, § 2303](#) (2009).

⁶[Colo. Rev. Stat. Ann. § 18-1.3-401\(4\)\(b\)](#) (2009) (authorizing mandatory life sentence with possibility for parole after 40 years for juveniles convicted of class 1 felonies); [Kan. Stat. Ann. §§ 21-4622, 4643](#) (2007); [Ky. Rev. Stat. Ann. § 640.040](#) (West 2006); [Shepherd v. Commonwealth, 251 S. W. 3d 309, 320-321 \(Ky. 2008\)](#); [****109] [Mont. Code Ann. § 46-18-222\(1\)](#) (2009); [Tex. Penal Code Ann. § 12.31](#) (West Supp. 2009).

⁷Although the Court previously has dismissed the relevance of the Uniform Code of Military Justice to its discernment of consensus, see [Kennedy v. Louisiana, 554 U.S. 407, 426, 128 S. Ct. 2641, 171 L. Ed. 2d 525 \(2008\)](#) (statement of Kennedy, J., respecting denial of rehearing), juveniles who enlist in the military are nonetheless eligible for life-without-parole sentences if they commit certain nonhomicide crimes. See [10 U.S.C. §§ 505\(a\)](#) (permitting enlistment at age 17), 856a, 920 (2006 ed., Supp. II).

⁸[Kennedy v. Louisiana, 554 U.S., at 407, 128 S. Ct. 2641, 171 L. Ed. 2d 525 \(2008\)](#) (prohibiting capital punishment for the rape of a child where only six States had enacted statutes authorizing the punishment since [Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 \(1972\)](#) (*per curiam*)); [Roper v. Simmons, 543 U.S. 551, 564, 568, 125 S. Ct. 1183, 161 L. Ed. 2d 1 \(2005\)](#) (prohibiting capital punishment for offenders younger than 18 where 18 of 38 death-penalty

Moreover, the consistency and direction [***868] of recent leg-islation--a factor the Court previously has relied upon when crafting [**2050] categorical proportionality rules, see [Atkins, 536 U.S., at 315-316, 122 S. Ct. 2242, 153 L. Ed. 2d 335](#); [****112] [Roper, 543 U.S., at 565-566, 125 S. Ct. 1183, 161 L. Ed. 2d 1](#) -underscores [*109] the consensus *against* the rule the Court announces here. In my view, the Court cannot point to a national consensus in favor of its rule without assuming a consensus in favor of the two penological points it later discusses: (1) Juveniles are always less culpable than similarly-situated adults, and (2) juveniles who commit nonhomicide crimes should always receive an opportunity to demonstrate rehabilitation through parole. [Ante, at - , - , 176 L. Ed. 2d, at 841-842, 845-846](#). But legislative trends make that assumption untenable.

First, States over the past 20 years have consistently *increased* the severity of punishments for juvenile offenders. See 1999 DOJ National Report 89 (referring to the 1990's as "a time of unprecedented change as State legislatures crack[ed] down on juvenile crime"); *ibid.* (noting that, during that period, "legislatures in 47 States and the District of Columbia enacted laws that made their juvenile justice systems more punitive," principally by "ma[king] it easier to transfer juvenile offenders from the juvenile justice system to the [adult] criminal justice system"); *id.*, at [****113] 104. This, in my view, reveals the States' widespread agreement that juveniles can sometimes act with the same culpability as

States precluded imposition of the penalty on persons under 18 and the remaining 12 States did not permit capital punishment at all); [Atkins v. Virginia, 536 U.S. 304, 314-315, 122 S. Ct. 2242, 153 L. Ed. 2d 335 \(2002\)](#) [****111] (prohibiting capital punishment of mentally retarded persons where 18 of 38 death-penalty States precluded imposition of the penalty on such persons and the remaining States did not authorize capital punishment at all); [Thompson v. Oklahoma, 487 U.S. 815, 826, 829, 108 S. Ct. 2687, 101 L. Ed. 2d 702 \(1988\)](#) (plurality opinion)(prohibiting capital punishment of offenders under 16 where 18 of 36 death-penalty States precluded imposition of the penalty on such persons and the remaining States did not permit capital punishment at all); [Enmund v. Florida, 458 U.S. 782, 789, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 \(1982\)](#) (prohibiting capital punishment for felony murder without proof of intent to kill where eight States allowed the punishment without proof of that element); [Coker v. Georgia, 433 U.S. 584, 593, 97 S. Ct. 2861, 53 L. Ed. 2d 982 \(1977\)](#) (holding capital punishment for the rape of a woman unconstitutional where "[a]t no time in the last 50 years have a majority of the States authorized death as a punishment for rape").

adults and that the law should permit judges and juries to consider adult sentences--including life without parole--in those rare and unfortunate cases. See Feld, Unmitigated Punishment: Adolescent Criminal Responsibility and LWOP Sentences, 10 J. Law & Family Studies 11, 69-70 (2007) (noting that life-without-parole sentences for juveniles have increased since the 1980's); Amnesty International & Human Rights Watch, *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States* 2, 31 (2005) (same).

Second, legislatures have moved away from parole over the same period. Congress abolished parole for federal offenders in 1984 amid criticism that it was subject to "gamesmanship and cynicism," Breyer, *Federal Sentencing Guidelines Revisited*, [11 Fed. Sentencing Rep. 180 \(1999\)](#) (discussing the Sentencing Reform Act of 1984 98 Stat. 1987 98-473, 98 Stat. 1987), [*110] and several States have followed suit, see T. Hughes, D. Wilson, & A. Beck, Dept. of Justice, Bureau of Justice Statistics, *Trends in State Parole, 1990-2000*, p. 1 (2001) (noting that, [****114] by the end of 2000, 16 States had abolished parole for all offenses, while another 4 States had abolished it for certain ones). In light of these developments, the argument that there is nationwide consensus that parole must be available to offenders less than 18 years old in *every* nonhomicide case simply fails.

B

The Court nonetheless dismisses existing legislation, pointing out that [***869] life-without-parole sentences are rarely imposed on juvenile nonhomicide offenders--123 times in recent memory⁹ by the Court's calculation, spread out across 11 States.¹⁰ [ante, at - , 176 L.](#)

⁹ I say "recent memory" because the research relied upon by the Court provides a headcount of juvenile nonhomicide offenders presently incarcerated in this country, but does not provide more specific information about all of the offenders, such [****115] as the dates on which they were convicted.

¹⁰ When issued, the Court's opinion relied on a letter the Court had requested from the Bureau of Prisons (BOP), which stated that there were six juvenile nonhomicide offenders then serving life-without-parole sentences in the federal system. After the Court released its opinion, the Acting Solicitor General disputed the BOP's calculations and stated that none of those six offenders was serving a life without parole sentence solely for a juvenile nonhomicide crime completed before the age of 18. See Letter from Neal Kumar Katyal, Acting Solicitor General, U. S. Dept. of Justice, to Clerk of the Supreme Court (May 24, 2010) (available in Clerk of Court's

[Ed. 2d, at 837-839](#). Based on this rarity of use, [*111] the Court proclaims a consensus against the practice, implying that laws allowing it either reflect the consensus of a prior, less civilized time or are the work of legislatures tone-deaf to moral values of their constituents that this [**2051] Court claims to have easily discerned from afar. See [ante, at _____, 176 L. Ed. 2d, at 838](#).

This logic strains credulity. It has been rejected before. [Gregg v. Georgia, 428 U.S. 153, 182, 96 S. Ct. 2909, 49 L. Ed. 2d 859 \(1976\)](#) (joint opinion of Stewart, Powell, and Stevens, JJ.) (“[T]he relative infrequency of jury verdicts imposing the death sentence does not indicate rejection of capital punishment *per se*. Rather, [it] . . . may well reflect the humane feeling that this most irrevocable of sanctions should be reserved for a small number of extreme cases”). It should also be rejected here. That a punishment is rarely imposed demonstrates nothing more than a general consensus that it should be just that--rarely imposed. It is not proof that the punishment is one the Nation abhors.

The Court nonetheless insists that the 26 States that authorize this penalty, but are not presently incarcerating a juvenile nonhomicide offender on a life-without-parole sentence, cannot [****117] be counted as approving its use. The mere fact that the laws of a jurisdiction permit this penalty, the Court explains, “does not indicate that the penalty has been endorsed through deliberate, express, and full legislative consideration.” [ante, at _____, 176 L. Ed. 2d, at 840](#).

But this misapplies the Court's own evolving standards test. Under that test, “[i]t is not the burden of [a State] to establish a national consensus *approving* what their citizens have voted to do; rather, it is the 'heavy burden' of petitioners to establish a national consensus *against* it.” [Stanford v. Kentucky, 492 U.S. 361, 373, 109 S. Ct.](#)

case file) (noting that five of the six inmates were convicted for participation in unlawful conspiracies that began when they were juveniles but continued after they reached the age of 18, and noting that the sixth inmate was convicted of murder as a predicate offense under the Racketeer Influenced and Corrupt Organizations Act). The Court has amended its opinion in light of the Acting Solicitor General's letter. In my view, the inconsistency between the BOP's classification of these six offenders [****116] and the Solicitor General's is irrelevant. The fact remains that federal law, and the laws of a supermajority of States, permit this sentencing practice. And, as will be explained, see *infra* this page and 16–20, judges and jurors have chosen to impose this sentence in the very worst cases they have encountered.

[2969, 106 L. Ed. 2d 306 \(1989\)](#) (quoting [Gregg, supra, at 175, 96 S. Ct. 2909, 49 L. Ed. 2d 859](#) (joint opinion of Stewart, Powell, and Stevens, JJ.); some emphasis added). In light of this fact, the Court is wrong to equate a jurisdiction's disuse of a [*112] legislatively authorized penalty with its moral opposition to it. The fact that the laws of a jurisdiction permit this sentencing practice demonstrates, at a minimum, that the citizens of that jurisdiction find tolerable the possibility that a jury of their peers could impose a life-without-parole [***870] sentence on a juvenile whose [****118] nonhomicide crime is sufficiently depraved.

The recent case of 16-year-old Keighton Budder illustrates this point. Just weeks before the release of this opinion, an Oklahoma jury sentenced Budder to life without parole after hearing evidence that he viciously attacked a 17-year-old girl who gave him a ride home from a party. See Stogsdill, Teen Gets Life Terms in Stabbing, Rape Case, Tulsa World, Apr. 2, 2010, p. A10; Stogsdill, Delaware County Teen Sentenced in Rape, Assault Case, Tulsa World, May 4, 2010, p. A12. Budder allegedly put the girl's head “into a headlock and sliced her throat,” raped her, stabbed her about 20 times, beat her, and pounded her face into the rocks alongside a dirt road. Teen Gets Life Terms in Stabbing, Rape Case, at A10. Miraculously, the victim survived. *Ibid*.

Budder's crime was rare in its brutality. The sentence the jury imposed was also rare. According to the study relied upon by this Court, Oklahoma had no such offender in its prison system before Budder's offense. P. Annino, D. Rasmussen, [**2052] & C. Rice, Juvenile Life Without Parole for Non-Homicide Offenses: Florida Compared to Nation 2, 14 (Sept. 14, 2009) (Table A). Without his conviction, therefore, [****119] the Court would have counted Oklahoma's citizens as morally opposed to life-without-parole sentences for juveniles nonhomicide offenders.

Yet Oklahoma's experience proves the inescapable flaw in that reasoning: Oklahoma citizens have enacted laws that allow Oklahoma juries to consider life-without-parole sentences in juvenile nonhomicide cases. Oklahoma juries invoke those laws rarely--in the unusual cases that they find exceptionally depraved. I cannot agree with the Court that [*113] Oklahoma citizens should be constitutionally disabled from using this sentencing practice merely because they have not done so more frequently. If anything, the rarity of this penalty's use underscores just how judicious sentencing judges and juries across the country have been in

invoking it.

This fact is entirely consistent with the Court's intuition that juveniles *generally* are less culpable and more capable of growth than adults. See *infra*, at _____, 176 L. Ed. 2d, at 872-873. Graham's own case provides another example. Graham was statutorily eligible for a life-without-parole sentence after his first crime. But the record indicates that the trial court did not give such a sentence serious consideration [****120] at Graham's initial plea hearing. It was only after Graham subsequently violated his parole by invading a home at gunpoint that the maximum sentence was imposed.

In sum, the Court's calculation that 123 juvenile nonhomicide life-without-parole sentences have been imposed nationwide in recent memory, even if accepted, hardly amounts to strong evidence that the sentencing practice offends our common sense of decency.¹¹

¹¹ Because existing legislation plainly suffices to refute any consensus against this sentencing practice, I assume the accuracy of the Court's evidence regarding the frequency with which this sentence has been imposed. But I would be remiss if I did not mention two points about the Court's figures. First, it seems odd that the Court counts only those juveniles sentenced to life without parole and excludes from its analysis all juveniles sentenced to lengthy term-of-years sentences (e.g., 70 or 80 years' imprisonment). It is difficult to argue that a judge or jury imposing such a long sentence--which effectively denies the offender any material opportunity for parole--would express moral outrage at a life-without-parole sentence.

Second, if objective indicia of consensus [****121] were truly important to the Court's analysis, the statistical information presently available would be woefully inadequate to form the basis of an **Eighth Amendment** rule that can be revoked only by constitutional amendment. The only evidence submitted to this Court regarding the frequency of this sentence's imposition was a single study completed after this Court granted certiorari in this case. See P. Annino, D. Rasmussen, & C. Rice, *Juvenile Life Without Parole for Non-Homicide Offenses: Florida Compared to Nation 2* (Sept. 14, 2009). Although I have no reason to question the professionalism with which this study was conducted, the study itself acknowledges that it was incomplete and the first of its kind. See *id.*, at 1. The Court's questionable decision to "complete" the study on its own does not materially increase its reliability. For one thing, by finishing the study itself, the Court prohibits the parties from ever disputing its findings. Complicating matters further, the original study sometimes relied on third-party data rather than data from the States themselves, see *ibid.*; the study has never been peer reviewed; and specific data on all 123 offenders (age, date of

[**2053] [*114] Finally, I cannot help but note that the statistics the Court finds inadequate [***871] to justify the penalty in this case are stronger than those supporting at least one other penalty this Court has upheld. Not long ago, this Court, joined by the author of today's opinion, upheld the application of the death penalty against a 16-year-old, despite the fact that no such punishment had been carried out on a person of that age in this country in nearly 30 years. See *Stanford*, 492 U.S., at 374, 109 S. Ct. 2969, 106 L. Ed. 2d 306. Whatever the statistical frequency with which life-without-parole sentences have been imposed on juvenile nonhomicide offenders in the last 30 years, it is surely greater than zero.

In the end, however, objective factors such as legislation [****123] and the frequency of a penalty's use are merely ornaments in the Court's analysis, window dressing that accompanies its judicial fiat.¹² By the Court's own decree, "[c]ommunity [*115]

conviction, [****122] crime of conviction, etc.), have not been collected, making verification of the Court's headcount impossible. The Court inexplicably blames Florida for all of this. See *ante*, at _____, 176 L. Ed. 2d, at 838. But as already noted, it is not Florida's burden to collect data to prove a national consensus in favor of this sentencing practice, but Graham's "heavy burden" to prove a consensus against it. See *supra*, at _____, 176 L. Ed. 2d, at 869.

¹² I confine to a footnote the Court's discussion of foreign laws and sentencing practices because past opinions explain at length why such factors are irrelevant to the meaning of our Constitution or the Court's discernment of any longstanding tradition in *this* Nation. See *Atkins*, 536 U.S., at 324-325, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (Rehnquist, C. J., dissenting). Here, two points suffice. First, despite the Court's attempt to count the actual number of juvenile nonhomicide offenders serving life-without-parole sentences in other nations (a task even more challenging than counting them within our borders), the *laws* of other countries permit juvenile life-without-parole sentences, see Child Rights Information, Network, C. de la Vega, M. Montesano, & A. Solter, *Human Rights Advocates, Statement on Juvenile Sentencing to Human Rights [****124] Council*, 10th Sess. (Nov. 3, 2009) ("Eleven countries have laws with the potential to permit the sentencing of child offenders to life without the possibility of release", online at <http://www.crin.org/resources/infoDetail.asp?ID=19806>) (as visited May 14, 2010, and available in Clerk of Court's case file)). Second, present legislation notwithstanding, democracies around the world remain free to adopt life-without-parole sentences for juvenile offenders tomorrow if they see fit. Starting today, ours can count itself among the few in which judicial decree prevents voters from making that choice.

consensus . . . is not itself determinative.” [ante, at _____, 176 L. Ed. 2d, at 841](#). Only the independent moral judgment of this Court is sufficient to decide the question. See *ibid*.

C

Lacking any plausible claim to consensus, the Court shifts to the heart of its argument: its “independent judgment” that this sentencing practice does not “serv[e] legitimate penological goals.” *Ibid*. The Court begins that analysis [***872] with the obligatory preamble that “[t]he *Eighth Amendment* does not mandate adoption of any one penological theory,” [ante, at _____, 176 L. Ed. 2d, at 843](#) (quoting *Harmelin, 501 U.S., at 999, 111 S. Ct. 2680, 115 L. Ed. 2d 836* (opinion of Kennedy, J.)), then promptly mandates the adoption of the theories the Court deems best.

First, [****125] the Court acknowledges that, at a minimum, the imposition of life-without-parole sentences on juvenile nonhomicide offenders serves two “legitimate” penological goals: incapacitation and deterrence. [ante, at _____, 176 L. Ed. 2d, at 843-844](#). By definition, such sentences serve the goal of incapacitation by ensuring that juvenile offenders who commit armed burglaries, or those who commit the types of grievous sex crimes described by The Chief Justice, no longer threaten their communities. See [ante, at _____, 176 L. Ed. 2d, at 858](#) (opinion concurring in judgment). That should settle the matter, since the Court acknowledges [*116] that incapacitation is an “important” penological goal. [Ante, at _____, 176 L. Ed. 2d, at 844](#). Yet, the Court finds this goal “inadequate” to justify the life-without-parole sentences here. [ante, at _____, 176 L. Ed. 2d, at 844](#) (emphasis added). A similar fate befalls deterrence. The Court acknowledges that such sentences will deter future juvenile [**2054] offenders, at least to some degree, but rejects that penological goal, not as illegitimate, but as insufficient. [Ante, _____, 176 L. Ed. 2d, at 844](#) (“[A]ny limited deterrent effect provided by life without parole is *not enough* [****126] to justify the sentence.” (emphasis added)).

The Court looks more favorably on rehabilitation, but laments that life-without-parole sentences do little to promote this goal because they result in the offender’s permanent incarceration. [Ante, at _____, 176 L. Ed. 2d, at 845](#). Of course, the Court recognizes that rehabilitation’s “utility and proper implementation” are subject to debate. [Ante, at _____, 176 L. Ed. 2d, at 845](#). But that does not stop it from declaring that a legislature may not “forswea[r] . . . the rehabilitative ideal.” *Ibid*. In other

words, the *Eighth Amendment* does not mandate “any one penological theory,” [ante, at _____, 176 L. Ed. 2d, at 843](#) (internal quotation marks omitted), just one the Court approves.

Ultimately, however, the Court’s “independent judgment” and the proportionality rule itself center on retribution--the notion that a criminal sentence should be proportioned to “ ‘the personal culpability of the criminal offender.’ ” [Ante, at _____, 176 L. Ed. 2d, at 841, 843](#) (quoting *Tison v. Arizona, 481 U.S. 137, 149, 107 S. Ct. 1676, 95 L. Ed. 2d 127 (1987)*). The Court finds that retributive purposes are not served here for two reasons.

1

First, quoting [Roper, 543 U.S., at 569-570, 125 S. Ct. 1183, 161 L. Ed. 2d 1](#), [****127] the Court concludes that juveniles are less culpable than adults because, as compared to adults, they “have a ‘ ‘lack of maturity and an underdeveloped sense of responsibility,’ ” and “their characters are ‘not as well formed.’ ” [Ante, at _____, 176 L. Ed. 2d, at 841](#). As a general matter, this statement is entirely consistent with the [*117] evidence recounted above that judges and juries impose the sentence at issue quite infrequently, despite legislative authorization to do so in many more cases. See Part III-B, *supra*. Our society tends to treat the average juvenile as less culpable than [***873] the average adult. But the question here does not involve the average juvenile. The question, instead, is whether the Constitution prohibits judges and juries from *ever* concluding that an offender under the age of 18 has demonstrated sufficient depravity and incorrigibility to warrant his permanent incarceration.

In holding that the Constitution imposes such a ban, the Court cites “developments in psychology and brain science” indicating that juvenile minds “continue to mature through late adolescence,” [ante, at _____, 176 L. Ed. 2d, at 841](#) (citing Brief for American Medical Association et al. as *Amici Curiae* [****128] 16-24; Brief for American Psychological Association et al. as *Amici Curiae* 22-27 (hereinafter APA Brief)), and that juveniles are “more likely [than adults] to engage in risky behaviors,” *id.*, at 7. But even if such generalizations from social science were relevant to constitutional rulemaking, the Court misstates the data on which it relies.

The Court equates the propensity of a fairly substantial number of youths to engage in “risky” or antisocial behaviors with the propensity of a much smaller group

to commit violent crimes. *ante*, at _____, 176 L. Ed. 2d, at 847. But research relied upon by the *amici* cited in the Court's opinion differentiates between adolescents for whom antisocial behavior is a fleeting symptom and those for whom it is a lifelong pattern. See Moffitt, Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy, 100 Psychological Rev. 674, 678 (1993) (cited in APA Brief 8, 17, 20) (distinguishing between adolescents who are "antisocial only during adolescence" and a smaller group who engage in antisocial behavior "at every life stage" despite "drift[ing] through successive systems aimed at curbing their deviance"). That research further [****129] suggests [**2055] that the pattern of behavior in the [*118] latter group often sets in before 18. See Moffitt, *supra*, at 684 ("The well-documented resistance of antisocial personality disorder to treatments of all kinds seems to suggest that the life-course-persistent style is fixed sometime before age 18"). And, notably, it suggests that violence itself is evidence that an adolescent offender's antisocial behavior is *not* transient. See Moffitt, A Review of Research on the Taxonomy of Life-Course Persistent Versus Adolescence-Limited Antisocial Behavior, in Taking Stock: the Status of Criminological Theory 277, 292-293 (F. Cullen, J. Wright, & K. Blevins eds. 2006) (observing that "life-course persistent" males "tended to specialize in serious offenses (carrying a hidden weapon, assault, robbery, violating court orders), whereas adolescence-limited" ones "specialized in non-serious offenses (theft less than \$5, public drunkenness, giving false information on application forms, pirating computer software, etc.)").

In sum, even if it were relevant, none of this psychological or sociological data is sufficient to support the Court's " 'moral' " conclusion that youth defeats culpability in every case. [****130] *ante*, at _____, 176 L. Ed. 2d, at 841 (quoting *Roper*, 543 U.S., at 570, 125 S. Ct. 1183, 161 L. Ed. 2d 1); see *id.*, at 618, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (Scalia, J., dissenting); R. Epstein, The Case Against Adolescence 171 (2007) (reporting on a study of juvenile reasoning skills and concluding that "most teens are capable of conventional, adult-like moral reasoning").

[**874] The Court responds that a categorical rule is nonetheless necessary to prevent the " 'unacceptable likelihood' " that a judge or jury, unduly swayed by " 'the brutality or cold-blooded nature' " of a juvenile's nonhomicide crime, will sentence him to a life-without-parole sentence for which he possesses " 'insufficient culpability,' " *ante*, at _____, 176 L. Ed. 2d, at 847 (quoting

Roper, *supra*, at 572-573, 125 S. Ct. 1183, 161 L. Ed. 2d 1). I find that justification entirely insufficient. The integrity of our criminal justice system depends on the ability of citizens to stand between the defendant and an outraged public and dispassionately determine his guilt and the proper amount of punishment based on the evidence [*119] presented. That process necessarily admits of human error. But so does the process of judging in which [****131] we engage. As between the two, I find far more "unacceptable" that this Court, swayed by studies reflecting the general tendencies of youth, decree that the people of this country are not fit to decide for themselves when the rare case requires different treatment.

2

That is especially so because, in the end, the Court does not even believe its pronouncements about the juvenile mind. If it did, the categorical rule it announces today would be most peculiar because it leaves intact state and federal laws that permit life-without-parole sentences for juveniles who commit homicides. See *ante*, at _____, 176 L. Ed. 2d, at 845. The Court thus acknowledges that there is nothing inherent in the psyche of a person less than 18 that prevents him from acquiring the moral agency necessary to warrant a life-without-parole sentence. Instead, the Court rejects overwhelming legislative consensus only on the question of which acts are sufficient to demonstrate that moral agency.

The Court is quite willing to accept that a 17-year-old who pulls the trigger on a firearm can demonstrate sufficient depravity and irredeemability to be denied reentry into society, but insists that a 17-year-old who rapes an [****132] 8-year-old and leaves her for dead does not. See *ante*, at _____ - _____, 176 L. Ed. 2d, at 841-843; cf. *ante*, at _____, 176 L. Ed. 2d, at 858 (Roberts, C. J., concurring in judgment) (describing the crime of life-without-parole offender Milagro Cunningham). Thus, the Court's [**2056] conclusion that life-without-parole sentences are "grossly disproportionate" for juvenile nonhomicide offenders in fact has very little to do with its view of juveniles, and much more to do with its perception that "defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers." *ante*, at _____, 176 L. Ed. 2d, at 842.

[*120] That the Court is willing to impose such an exacting constraint on democratic sentencing choices based on such an untestable philosophical conclusion is

remarkable. The question of what acts are “deserving” of what punishments is bound so tightly with questions of morality and social conditions as to make it, almost by definition, a question for legislative resolution. It is true that the Court previously has relied on the notion of proportionality in holding certain classes of offenses categorically exempt [****133] from capital punishment. See *supra*, at _____, 176 L. Ed. 2d, at 862. But never before today has the Court relied on its own view of just deserts to impose a categorical limit on the imposition of a lesser punishment. Its [***875] willingness to cross that well-established boundary raises the question whether any democratic choice regarding appropriate punishment is safe from the Court's ever-expanding constitutional veto.

IV

Although the concurrence avoids the problems associated with expanding categorical proportionality review to noncapital cases, it employs noncapital proportionality analysis in a way that raises the same fundamental concern. Although I do not believe *Solem* merits *stare decisis* treatment, Graham's claim cannot prevail even under that test (as it has been limited by the Court's subsequent precedents). *Solem* instructs a court first to compare the “gravity” of an offender's conduct to the “harshness of the penalty” to determine whether an “inference” of gross disproportionality exists. 463 U.S., at 290-291, 103 S. Ct. 3001, 77 L. Ed. 2d 637. Only in “the rare case” in which such an inference is present should the court proceed to the “objective” part of the inquiry--an intra- and [****134] interjurisdictional comparison of the defendant's sentence with others similarly situated. *Harmelin*, 501 U.S., at 1000, 1005, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (opinion of Kennedy, J.).

[*121] Under the Court's precedents, I fail to see how an “inference” of gross disproportionality arises here. The concurrence notes several arguably mitigating facts--Graham's “lack of prior criminal convictions, his youth and immaturity, and the difficult circumstances of his upbringing.” *ante*, at _____, 176 L. Ed. 2d, at 857 (Roberts, C. J., concurring in judgment). But the Court previously has upheld a life-without-parole sentence imposed on a first-time offender who committed a *nonviolent* drug crime. See *Harmelin*, *supra*, at 1002-1004, 111 S. Ct. 2680, 115 L. Ed. 2d 836. Graham's conviction for an actual violent felony is surely more severe than that offense. As for Graham's age, it is true that *Roper* held juveniles categorically ineligible for capital punishment, but as the concurrence explains,

Roper was based on the “explicit conclusion that [juveniles] ‘cannot with reliability be classified among the *worst* offenders’ ”; it did “not establish that juveniles can never be eligible for life without parole.” [****135] *Ante*, at _____, 176 L. Ed. 2d, at 856 (Roberts, C. J., concurring in judgment) (quoting *Roper*, 543 U.S., at 569, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (emphasis added in opinion of Roberts, C. J.)). In my view, *Roper*'s principles are thus not generally applicable outside the capital sentencing context.

By holding otherwise, the concurrence relies on the same type of subjective judgment as the Court, only it restrains itself to a case-by-case rather than a categorical ruling. The concurrence is quite ready to [**2057] hand Graham “the general presumption of diminished culpability” for juveniles, *ante*, at _____, 176 L. Ed. 2d, at 857, apparently because it believes that Graham's armed burglary and home invasion crimes were “certainly less serious” than murder or rape, *ibid*. It recoils only from the prospect that the Court would extend the same presumption to a juvenile who commits a sex crime. See *ante*, at _____, 176 L. Ed. 2d, at 859. I simply cannot accept that these subjective judgments of proportionality are ones the *Eighth Amendment* authorizes us to make.

The “objective” elements of the *Solem* test provide no additional support for the concurrence's conclusion. The concurrence compares Graham's [***876] sentence [****136] to “similar” sentences [*122] in Florida and concludes that Graham's sentence was “far more severe.” *ante*, at _____, 176 L. Ed. 2d, at 858 (Roberts, C. J., concurring in judgment). But strangely, the concurrence uses average sentences for burglary or robbery offenses as examples of “similar” offenses, even though it seems that a run-of-the-mill burglary or robbery is not at all similar to Graham's criminal history, which includes a charge for armed burglary *with assault*, and a probation violation for invading a home at gunpoint.

And even if Graham's sentence is higher than ones he might have received for an armed burglary with assault in other jurisdictions, see *ante*, at _____ - _____, 176 L. Ed. 2d, at 858, this hardly seems relevant if one takes seriously the principle that “ [a]bsent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will *always* bear the distinction of treating particular offenders more severely than any other State.” *Harmelin*, *supra*, at 1000, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (opinion of Kennedy, J.) (quoting *Rummel*, 445 U.S., at 282, 100 S. Ct. 1133, 63 L. Ed. 2d

382; emphasis added). Applying *Solem*, the Court has upheld a 25-years-to-life [****137] sentence for theft under California's recidivist statute, despite the fact that the State and its *amici* could cite only “a single instance of a similar sentence imposed outside the context of California's three strikes law, out of a prison population [then] approaching two million individuals.” *Ewing*, 538 U.S., at 47, 123 S. Ct. 1179, 155 L. Ed. 2d 108 (Breyer, J., dissenting). It has also upheld a life-without-parole sentence for a first-time drug offender in Michigan charged with possessing 672 grams of cocaine despite the fact that only one other State would have authorized such a stiff penalty for a first-time drug offense, and even that State required a far greater quantity of cocaine (10 kilograms) to trigger the penalty. See *Harmelin*, supra, at 1026, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (White, J., dissenting). Graham's sentence is certainly less rare than the sentences upheld in these cases, so his claim fails even under *Solem*.

* * *

[*123] Both the Court and the concurrence claim their decisions to be narrow ones, but both invite a host of line-drawing problems to which courts must seek answers beyond the strictures of the Constitution. The Court holds that “[a] State is not required [****138] to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime,” but must provide the offender with “some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.” *ante*, at ___, 176 L. Ed. 2d, at 845. But what, exactly, does such a “meaningful” opportunity entail? When must it occur? And what *Eighth Amendment* principles will govern review by the parole boards the Court now demands that States empanel? The Court provides no answers to these questions, which will no doubt embroil the courts for years.¹³

¹³It bears noting that Colorado, one of the five States that prohibit life-without-parole sentences for juvenile nonhomicide offenders, permits such offenders to be sentenced to mandatory terms of imprisonment for up to 40 years. *Colo. Rev. Stat. § 18-1.3-401(4)(b)* (2009). In light of the volume of state and federal legislation that presently *permits* life-without-parole sentences for juvenile nonhomicide offenders, it would be impossible to argue that there is any objective evidence of agreement that a juvenile is constitutionally entitled to a parole hearing any sooner than 40 years after conviction. See Tr. of Oral Arg. 6-7 (counsel [****139] for Graham, stating that, “[o]ur position is that it should be left up to the States to decide. We think that the . . . Colorado provision would probably be constitutional”).

[***877] [**2058] V

The ultimate question in this case is not whether a life-without-parole sentence ‘fits’ the crime at issue here or the crimes of juvenile nonhomicide offenders more generally, but to whom the Constitution assigns that decision. The Florida Legislature has concluded that such sentences should be available for persons under 18 who commit certain crimes, and the trial judge in this case decided to impose that legislatively authorized sentence here. Because a life-without-parole prison sentence is not a “cruel and unusual” method [*124] of punishment under any standard, the *Eighth Amendment* gives this Court no authority to reject those judgments.

It would be unjustifiable for the Court to declare otherwise even if it could claim that a bare majority of state laws supported its independent moral view. The fact that the Court categorically prohibits life-without-parole sentences for juvenile nonhomicide offenders in the face of an overwhelming legislative majority *in favor* of leaving that sentencing option available under [****140] certain cases simply illustrates how far beyond any cognizable constitutional principle the Court has reached to ensure that its own sense of morality and retributive justice pre-empts that of the people and their representatives.

I agree with Justice Stevens that “[w]e learn, sometimes, from our mistakes.” *Ante*, at ___, 176 L. Ed. 2d, at 853 (concurring opinion). Perhaps one day the Court will learn from this one.

I respectfully dissent.

Justice **Alito**, dissenting.

I join Parts I and III of Justice Thomas's dissenting opinion. I write separately to make two points.

First, the Court holds only that “for a juvenile offender who did not commit homicide the *Eighth Amendment* forbids the sentence of *life without parole*.” *Ante*, at ___, 176 L. Ed. 2d, at 845 (emphasis added). Nothing in the Court's opinion affects the imposition of a sentence to a term of years without the possibility of parole. Indeed, petitioner conceded at oral argument that a sentence of as much as 40 years without the possibility of parole “probably” would be constitutional. Tr. of Oral Arg. 6-7; see also *ante*, at ___, n. 12, 176 L. Ed. 2d, at 877 (Thomas, J., dissenting).

Second, the question whether petitioner's sentence [****141] violates the narrow, as-applied proportionality

principle that applies to noncapital sentences is not properly before us in this case. Although petitioner asserted an as-applied proportionality challenge to his sentence before the Florida courts, see [982 So. 2d 43, 51-53 \(Fla. App. 2008\)](#), he did not include [*125] an as-applied claim in his petition for certiorari or in his merits briefs before this Court. Instead, petitioner argued for only a categorical rule banning the imposition of life without parole on *any* juvenile convicted of a nonhomicide offense. Because petitioner abandoned his as-applied claim, I would not reach that issue. See this Court's [Rule 14.1\(a\)](#); [Yee v. Escondido, 503 U.S. 519, 534-538, \[**2059\] 112 S. Ct. 1522, 118 L. Ed. 2d 153 \(1992\)](#).

References

U.S.C.S., *Constitution, Amendment 8*

26 Moore's Federal Practice § 632.20 (Matthew Bender 3d ed.)

L Ed Digest, Criminal Law § 79

L Ed Index, Life Imprisonment; Parole, Probation, and Pardon

Duration of prison sentence as constituting cruel and unusual punishment in violation of *Federal Constitution's Eighth Amendment*--Supreme Court cases. [115 L. Ed. 2d 1169](#).

Federal constitutional guaranty against cruel and unusual punishment. [33 L. Ed. 2d 932](#).

In re Cook

Court of Appeal of California, Fourth Appellate District, Division Three

January 10, 2017, Opinion Filed

G050907

Reporter

7 Cal. App. 5th 393 *; 212 Cal. Rptr. 3d 646 **; 2017 Cal. App. LEXIS 13 ***

In re ANTHONY MAURICE COOK, JR., on Habeas Corpus.

Notice: THE SUPREME COURT OF CALIFORNIA GRANTED REVIEW IN THIS MATTER (see [Cal. Rules of Court, rules 8.1105\(e\)\(1\)\(B\)](#), [8.1115\(e\)](#)) April 12, 2017, S240153.

Subsequent History: Review granted by *In re Cook*, 216 Cal. Rptr. 3d 120, 391 P.3d 1191, 2017 Cal. LEXIS 3014 (Cal., Apr. 12, 2017)

Request granted [In re Cook, 2017 Cal. LEXIS 3559 \(Cal., May 2, 2017\)](#)

Request granted [In re Cook, 2017 Cal. LEXIS 3930 \(Cal., May 9, 2017\)](#)

Request granted [In re Cook, 2017 Cal. LEXIS 5738 \(Cal., July 11, 2017\)](#)

Request granted [In re Cook, 2017 Cal. LEXIS 6401 \(Cal., Aug. 16, 2017\)](#)

Request granted [In re Cook, 2017 Cal. LEXIS 7587 \(Cal., Sept. 27, 2017\)](#)

Request granted [In re Cook, 2017 Cal. LEXIS 8300 \(Cal., Oct. 25, 2017\)](#)

Prior History: [***1] Original proceedings; petition for writ of habeas corpus after a judgment of the Superior Court of San Bernardino County, No. WHCSS1400290, Katrina West, Judge.

[In re Cook, 2016 Cal. App. Unpub. LEXIS 8126 \(Cal. App. 4th Dist., Oct. 11, 2016\)](#)

Disposition: Petition granted.

Core Terms

sentence, habeas corpus, trial court, sections, youth, mitigating evidence, parole hearing, writ petition, factors, murder, youth-related, supplemental, retroactive, convicted, parole, sufficient opportunity, original sentencing, petition for review, time of offense, superior court, youth offender, years to life

Case Summary

Overview

HOLDINGS: [1]-Petitioner, who was 17 years old at the time of his crimes, was not given sufficient opportunity to put on the record the kinds of information that [Pen. Code, §§ 3051 & 4801](#), deem relevant at a youth offender parole hearing; [2]-In light of *People v. Franklin*, petitioner was entitled to a hearing to make a record of mitigating evidence tied to his youth; [3]-The appropriate remedy was to remand the matter to the trial court with directions to conduct a hearing at which petitioner would have the opportunity to make such a record; [4]-Nothing in *Franklin* suggested the Supreme Court intended it to be excepted from the rule of full retroactivity.

Outcome

Petition for writ of habeas corpus granted; matter remanded with directions.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Procedural Defenses > Retroactivity of Decisions > Retroactive Treatment

Governments > Courts > Judicial Precedent

[HN1](#) **Retroactivity of Decisions, Retroactive Treatment**

A previously convicted defendant may obtain relief by habeas corpus when changes in case law expanding a defendant's rights are given retroactive effect.

Governments > Courts > Judicial Precedent

[HN2](#) **Courts, Judicial Precedent**

Changes in case law customarily are fully retroactive. There is an exception to the rule of retroactivity when a judicial opinion changes a settled rule on which the parties had relied. In that situation, considerations of fairness and public policy may require that a decision be given only prospective application.

Criminal Law & Procedure > ... > Procedural
Defenses > Retroactivity of Decisions > Retroactive Treatment

Governments > Courts > Authority to Adjudicate

Governments > Courts > Judicial Precedent

[HN3](#) **Retroactivity of Decisions, Retroactive Treatment**

As the deprivation of the rights granted by *People v. Franklin* is cognizable on habeas corpus, the appellate court has inherent power to fashion the appropriate remedy with consideration toward factors of justice and equity.

Headnotes/Syllabus

Summary

[*393] CALIFORNIA OFFICIAL REPORTS SUMMARY

Petitioner filed a petition for writ of habeas corpus, challenging his sentence of 125 years to life in prison. Petitioner, who was 17 years old when he committed the crimes, contended his sentence was unconstitutional under *Miller v. Alabama*. The Court of Appeal denied the petition. The California Supreme Court granted petitioner's petition for review of the Court

of Appeal's opinion and transferred the matter to that court with directions to vacate its decision and consider whether petitioner was entitled to make a record before the superior court of mitigating evidence tied to his youth. (Superior Court of San Bernardino County, No. WHCSS1400290, Katrina West, Judge.)

The Court of Appeal granted the petition for writ of habeas corpus and remanded the matter with directions to the trial court. Petitioner was not provided sufficient opportunity to put on the record the kinds of information that [Pen. Code, §§ 3051 & 4801](#), deem relevant at a youth offender parole hearing. In light of *People v. Franklin*, petitioner was entitled to a hearing to make a record of mitigating evidence tied to his youth. The appropriate remedy was to remand the matter to the trial court with directions to conduct a hearing at which petitioner would have the opportunity to make such a record. Nothing in *Franklin* suggested the Supreme Court intended it to be excepted from the rule of full retroactivity. (Opinion by Fybel, J., with O'Leary, P. J., and Thompson, J., concurring.)

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

[CA\(1\)](#) (1)

Habeas Corpus § 9—Relief—Youth Offender Parole Hearing—Mitigating Evidence—Tied to Youth.

In a case in which a habeas corpus petitioner challenged his sentence of 125 years in prison for crimes he committed when he was 17 years old, the Court of Appeal concluded that petitioner was not given sufficient opportunity to put on the record the kinds of information that [Pen. Code, §§ 3051 & 4801](#), deem relevant at a youth offender parole hearing. In light of *People v. Franklin*, petitioner was entitled to a hearing to make a record of mitigating evidence tied to his youth.

[[Erwin et al., Cal. Criminal Defense Practice \(2016\) ch. 91, § 91.02](#); 3 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Punishment, §§ 511, 751A; 6 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Criminal Writs, § 45 et seq.]

[CA\(2\)](#) (2)

Habeas Corpus § 9—Relief—Changes in Case Law—

Retroactive Effect.

A previously convicted defendant may obtain relief by habeas corpus when changes in case law expanding a defendant's rights are given retroactive effect.

CA(3) (3)**Courts § 34—Decisions and Orders—Prospective and Retroactive Application—Changes in Case Law.**

Changes in case law customarily are fully retroactive. There is an exception to the rule of retroactivity when a judicial opinion changes a settled rule on which the parties had relied. In that situation, considerations of fairness and public policy may require that a decision be given only prospective application.

CA(4) (4)**Habeas Corpus § 9—Relief—Deprivation of Rights—Appropriate Remedy.**

As the deprivation of the rights granted by *People v. Franklin* is cognizable on habeas corpus, the appellate court has inherent power to fashion the appropriate remedy with consideration toward factors of justice and equity.

Counsel: Anthony Maurice Cook, Jr., in pro. per.; and Michael Sattris, under appointment by the Court of Appeal, for Petitioner Anthony Maurice Cook, Jr..

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina, Theodore Cropley, Parag Agrawal and Lynne G. McGinnis, Deputy Attorneys General, for Respondent The People.

Judges: Opinion by Fybel, J., with O'Leary, P. J., and Thompson, J., concurring.

Opinion by: Fybel, J.

Opinion

[*395]

[**647] FYBEL, J.—

INTRODUCTION

In 2009, the convictions against petitioner Anthony Maurice Cook, Jr. (Petitioner), for two counts of murder, one count of attempted murder, and firearm enhancements were affirmed in *People v. Shaw and Cook* (May 28, 2009, G041439) (nonpub. opn.). By petition for writ of habeas corpus, Petitioner challenged his sentence of 125 years to life in prison. Petitioner, who was 17 years old when he committed the crimes, contended his sentence was unconstitutional under *Miller v. Alabama* (2012) 567 U.S. 460 [183 L. Ed. 2d 407, 132 S.Ct. 2455] (*Miller*) and, as relief, asked to be resentenced.

In *In re Cook* (Apr. 6, 2016, G050907) [***2] (nonpub. opn.) (*Cook*), we denied Petitioner's petition for writ of habeas corpus. We concluded, based on *Montgomery v. Louisiana* (2016) 577 U.S. ____ [136 S.Ct. 718, 193 L. Ed. 2d 599], that *Miller* applied retroactively to cases on collateral review but that recently enacted *Penal Code sections 3051* and *4801* had the effect of curing the unconstitutional sentence imposed on Petitioner. (*Cook, supra*, G050907.) In July 2016, the California Supreme Court granted Petitioner's petition for review of our opinion and transferred the matter to this court with directions to vacate our decision and consider, in light of *People v. Franklin* (2016) 63 Cal.4th 261, 268–269, 283–284 [202 Cal. Rptr. 3d 496, 370 P.3d 1053] (*Franklin*), “whether petitioner is entitled to make a record before the superior court of ‘mitigating evidence tied to his youth.’”

The petition is granted insofar as the relief sought in the prayer of Petitioner's supplemental opening brief seeks a hearing [**648] to allow Petitioner to make a record of mitigating evidence tied to his youth at the time of the offense. The matter is remanded with directions to the trial court to grant Petitioner a hearing at which he can make a record of such mitigating evidence. In doing so, we hold that the relief afforded by *Franklin* is available by both direct review and petition for writ of habeas corpus.

BACKGROUND

In December 2003, Petitioner and Rufus Raymond Shaw shot [***3] and killed Odrum Nader Brooks and his son, Demarcus T. Brooks, while the latter two sat in an automobile. Petitioner was 17 years old at the time. In 2007, a jury convicted Petitioner of two counts of first degree murder (*Pen. Code, § 187, subd. (a)*) and one count of attempted murder (*id.*, §§ 664, 187, subd.

(a), [*396] and found true the allegations that Petitioner personally and intentionally discharged a firearm (*id.*, § 12022.53, *subd.* (c)) and personally and intentionally discharged a firearm proximately causing great bodily injury (*id.*, § 12022.53, *subd.* (d)).

The trial court sentenced Petitioner to an indeterminate term of life with the possibility of parole for the attempted murder, plus five consecutive indeterminate terms of 25 years to life for murder and discharging a firearm, for a total sentence of 125 years to life. The convictions and sentence were affirmed in *People v. Shaw and Cook, supra*, G041439.

In 2014, Petitioner filed a petition for writ of habeas corpus in the superior court in which he had been convicted. The superior court denied the petition without an evidentiary hearing in September 2014.

One month later, Petitioner, who was self-represented at the time, filed a petition for writ of habeas corpus in the Court of Appeal. He sought relief based on *Miller, supra*, 567 U.S. 460 [132 S.Ct. 2455]. Counsel was appointed to represent [***4] Petitioner, and counsel filed a supplement to the petition for writ of habeas corpus and an appendix of exhibits. We issued an order to show cause, in response to which the Attorney General (Respondent) filed a return. Petitioner filed a traverse, thereby joining the issues for review. In April 2016, we issued our opinion in *Cook, supra*, G050907, denying the petition for writ of habeas corpus.

The California Supreme Court granted Petitioner's petition for review of our opinion and transferred the matter to this court with directions. Following transfer, Petitioner filed a supplemental opening brief. Respondent did not file a supplemental brief. After we issued an opinion, we received a petition for rehearing from Respondent informing us that Respondent had never been served with Petitioner's supplemental opening brief and requesting that we accept Respondent's supplemental brief. We granted Respondent's petition for rehearing and accepted Respondent's supplemental brief. Petitioner filed a supplemental responding brief. We have considered the supplemental briefs.

DISCUSSION

I.

In Light of *Franklin*, Petitioner Is Entitled to a Hearing to Make a Record of Mitigating Evidence Tied to Youth.

We noted in *Cook, supra*, G050907, [***5] it was undisputed that Petitioner's sentence of 125 years to life was a de facto sentence of life without the [*397] possibility of parole and that, when sentencing Petitioner, the trial court did not consider his age, youthful attributes, and capacity for reform and rehabilitation. We concluded that *Miller* [***649] applies retroactively to matters on collateral review. (*Montgomery v. Louisiana, supra*, 577 U.S. ___ [136 S.Ct. 718].) As a consequence, we concluded, Petitioner's sentence was unconstitutional under *Miller, supra*, 567 U.S. at page 465 [132 S.Ct. at page 2460] and *People v. Caballero (2012) 55 Cal.4th 262* [145 Cal. Rptr. 3d 286, 282 P.3d 291]. (*Cook, supra*, G050907.) But we were compelled by *Montgomery v. Louisiana, supra*, 577 U.S. ___ [136 S.Ct. 718], to conclude that *Penal Code section 3051* cured the constitutional error in sentencing by giving Petitioner the right to a parole hearing after serving 25 years of his sentence. (*Cook, supra*, G050907.)

The California Supreme Court's order granting Petitioner's petition for review of our opinion transferred the matter to us with directions to vacate our decision and consider, in light of *Franklin, supra*, 63 Cal.4th 261, “whether [P]etitioner is entitled to make a record before the superior court of ‘mitigating evidence tied to his youth.’” In *Franklin*, the defendant was 16 years old when he shot and killed the victim. (*Id. at p. 269.*) A jury convicted the defendant of first degree murder and found true a personal firearm-discharge enhancement. (*Id. at p. 268.*) The defendant was sentenced to two 25-year-to-life [***6] sentences, giving him a total sentence of life in state prison with the possibility of parole after 50 years. (*Ibid.*) The California Supreme Court concluded that *Penal Code sections 3051* and *4801* mooted the defendant's claim that the sentence was unconstitutional because “those statutes provide [the defendant] with the possibility of release after 25 years of imprisonment (*Pen. Code, § 3051, subd. (b)(3)*) and require the Board of Parole Hearings (Board) to ‘give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity’ (*id.*, § *4801, subd. (c)*).” (*Franklin, supra, at p. 268.*)

The California Supreme Court also concluded, however, that the defendant had raised “colorable concerns” over

“whether he was given adequate opportunity at sentencing to make a record of mitigating evidence tied to his youth.” (*Franklin, supra, 63 Cal.4th at pp. 268–269.*) The court explained: “The criteria for parole suitability set forth in *Penal Code sections 3051* and *4801* contemplate that the Board's decisionmaking at [the defendant]'s eventual parole hearing will be informed by youth-related factors, such as his cognitive ability, character, and social and family background at the time of the offense. Because [the defendant] was sentenced before the high court decided *Miller* [***7] and before our Legislature enacted [*Penal Code sections 3051* and *4801*], the trial court understandably saw no relevance to mitigation evidence at sentencing. In light of the changed legal landscape, we remand this case so that the trial court may determine whether [the defendant] was [*398] afforded sufficient opportunity to make such a record at sentencing. This remand is necessarily limited; as *section 3051* contemplates, [the defendant]'s two consecutive 25-year-to-life sentences remain valid, even though the statute has made him eligible for parole during his 25th year of incarceration.” (*Id. at p. 269.*)

The Supreme Court explained that if, after remand, the trial court were to determine the defendant did not have sufficient opportunity to make a record at sentencing, then “the court may receive submissions and, if appropriate, testimony pursuant to procedures set forth in [*Penal Code*] *section 1204* and rule *4.437 of the California Rules of Court*, [**650] and subject to the rules of evidence.” (*Franklin, supra, 63 Cal.4th at p. 284.*) “[The defendant] may place on the record any documents, evaluations, or testimony (subject to cross-examination) that may be relevant at his eventual youth offender parole hearing, and the prosecution likewise may put on the record any evidence that demonstrates the juvenile offender's culpability or cognitive maturity, or otherwise bears on the influence of youth-related factors. The goal of any such proceeding is to provide an opportunity for the parties to make an accurate record of the juvenile offender's characteristics and circumstances at the time of the offense so that the Board, years later, may properly discharge its obligation to ‘give great weight to’ youth-related factors ([*Pen. Code*] § *4801, subd. (c)*) in determining whether the offender is ‘fit to rejoin society’ despite having committed a serious crime ‘while he was a child in the eyes [***8] of the law’ [citation].” (*Ibid.*)

In this case, Petitioner asserts, “the record of [his] characteristics and circumstances at the time of the offense is bare bones at best, with the probation officer's

report consisting of less than a half page of ‘personal history’; as opposed to ensuring a full and accurate record, the report noted that the information in that personal history section was ‘not independently verified.’”

CA(1) (1) We agree with Petitioner. In *Franklin, supra, 63 Cal.4th at page 284*, it was “not clear” whether the defendant “had sufficient opportunity to put on the record the kinds of information that [*Penal Code*] *sections 3051* and *4801* deem relevant at a youth offender parole hearing.” Here, in contrast, it is clear that Petitioner was *not given* sufficient opportunity to make such a record. Petitioner's sentence was imposed before the decision in *Miller* and before enactment of *Penal Code sections 3051* and *4801*. We noted in *Cook* that the trial court, when sentencing Petitioner, did not consider his age, youthful attributes, and capacity for reform and rehabilitation. (*Cook, supra*, G050907.)

Thus, rather than direct the trial court to make the determination whether Petitioner had sufficient opportunity at sentencing to make a record of [*399] “information that will be relevant to the Board as [***9] it fulfills its statutory obligations under [*Penal Code*] *sections 3051* and *4801*” (*Franklin, supra, 63 Cal.4th at pp. 286–287*), we will direct the trial court to conduct a hearing at which Petitioner will have the opportunity to make such a record.

II.

Relief Under *Franklin* Is Available on Habeas Corpus.

Respondent asserts that relief by writ of habeas corpus is unavailable to Petitioner because he is not challenging the legality of his restraint. Respondent argues: “[H]abeas corpus has traditionally been limited to providing a forum for challenges to a custodian's legal authority to hold a petitioner in custody or otherwise restrain his liberty or to the manner in which the petitioner is confined. It has not been used as a procedural mechanism for reopening or supplementing otherwise closed proceedings for any less fundamental purpose.” The relief offered by *Franklin* is, according to Respondent, available only by direct review.

The California Supreme Court's order directing us to reconsider the matter in light of *Franklin* strongly suggests the Supreme Court recognizes that the relief

afforded by that opinion is available by habeas corpus. Otherwise, it seems, the **[**651]** Supreme Court would have denied Petitioner's petition for review.

CA(2)^[↑] **(2)** In any event, Respondent takes an **[***10]** overly narrow view of the scope of the writ of habeas corpus. **HN1**^[↑] A previously convicted defendant may obtain relief by habeas corpus when changes in case law expanding a defendant's rights are given retroactive effect. (E.g., *In re Cortez (1971) 6 Cal.3d 78, 82–83 [98 Cal. Rptr. 307, 490 P.2d 819]* [new California Supreme Court decision justifies habeas corpus relief]; *In re Terry (1971) 4 Cal.3d 911, 916 [95 Cal. Rptr. 31, 484 P.2d 1375]* [new United States Supreme Court decision justifies habeas corpus relief]; *In re Johnson (1970) 3 Cal.3d 404, 407–408, 409–410 [90 Cal. Rptr. 569, 475 P.2d 841]* [same].)

In *Franklin, supra, 63 Cal.4th at pages 286–287*, the California Supreme Court in effect expanded the defendant's rights by remanding the matter to the Court of Appeal with instructions to remand to the trial court to determine whether the defendant was afforded an adequate opportunity to make a record of information relevant to a future determination under *Penal Code sections 3051* and *4801*. *Franklin* thus holds that a defendant has the right at the time of sentencing to present evidence and make a record of information that may be relevant at the eventual youth offender parole hearing.

[*400]

HN2^[↑] **CA(3)**^[↑] **(3)** Changes in case law customarily are fully retroactive. (*People v. Birks (1998) 19 Cal.4th 108, 136 [77 Cal. Rptr. 2d 848, 960 P.2d 1073]*; *Evangelatos v. Superior Court (1988) 44 Cal.3d 1188, 1207 [246 Cal. Rptr. 629, 753 P.2d 585]*.) There is an exception to the rule of retroactivity when a judicial opinion changes a settled rule on which the parties had relied. (*Claxton v. Waters (2004) 34 Cal.4th 367, 378 [18 Cal. Rptr. 3d 246, 96 P.3d 496]*.) In that situation, “[c]onsiderations of fairness and public policy may require that a decision be given only prospective **[***11]** application.” (*Ibid.*) *Franklin* did not change any settled rule on which the parties to this case relied in the trial court or on appeal. Nothing in *Franklin* suggests the California Supreme Court intended it to be excepted from the rule of full retroactivity.

HN3^[↑] **CA(4)**^[↑] **(4)** As the deprivation of the rights granted by *Franklin* is cognizable on habeas corpus, we have inherent power to fashion the appropriate remedy (*In re Crow (1971) 4 Cal.3d 613, 619–620, fn. 7 [94 Cal.*

Rptr. 254, 483 P.2d 1206] with consideration toward factors of justice and equity (*In re Harris (1993) 5 Cal.4th 813, 851 [21 Cal. Rptr. 2d 373, 855 P.2d 391]*). The appropriate remedy, we have concluded, is to remand the matter to the trial court with directions to conduct a hearing at which Petitioner will have the opportunity to make such a record.

Respondent argues that Petitioner should not be afforded habeas corpus relief because, as a practical matter, a hearing conducted 13 years after the commission of the offenses and more than nine years after original sentencing would not be “an efficient or effective way of seeking to augment the existing sentencing record with any further evidence of [Petitioner]’s particular characteristics as a youthful offender in 2003.” According to Respondent, there is no guarantee the original sentencing judge will be available to conduct the hearing, **[***12]** and the parties likely will have to be represented by new defense counsel or prosecutors who might have no familiarity with the matter.

The issues identified by Respondent are inherent in the remedy afforded by *Franklin*, whether granted by direct appeal or collateral challenge. We take judicial notice of the Court of Appeal docket **[**652]** in *People v. Franklin*,¹ which shows that nearly four years elapsed from the date the notice of appeal was lodged (June 5, 2012) to the date on which the Supreme Court issued its opinion (May 26, 2016). Thus, when the court in *Franklin* remanded the matter for a determination whether the defendant had had the opportunity to **[*401]** make a record of youth-related factors, it did so with the knowledge and understanding that such determination and any evidentiary hearing would be conducted more than four years after the date of original sentencing.

As explained in *Franklin, supra, 63 Cal.4th at page 269*, the criteria for parole suitability in *Penal Code sections 3051* and *4801* “contemplate that the Board’s decisionmaking at [the defendant]’s eventual parole hearing will be informed by youth-related factors, such as his cognitive ability, character, and social and family

¹ A print copy of the online Court of Appeal docket is attached to Petitioner’s supplemental responding brief. We take judicial notice of the docket pursuant to *Evidence Code section 452, subdivision (h)* as “[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.”

background at the time of the offense.” It would be most effective to [***13] make a record of those youth-related factors as near in time as possible to the date of original sentencing. Nine years after original sentencing is far from ideal, but it is better than the 15th, 20th, or 25th year of incarceration, which are the possible times for the youth offender parole hearing. ([Pen. Code, § 3051, subd. \(b\)\(1\), \(2\) & \(3\).](#))

DISPOSITION

The petition for writ of habeas corpus is granted insofar as it challenges Petitioner's sentence of 125 years to life without affording Petitioner the opportunity to make a record of mitigating evidence tied to his youth at the time the offense was committed. The matter is remanded with directions to the trial court to conduct a hearing at which Petitioner has the opportunity to make a record of such mitigating evidence. The hearing must be conducted no later than 90 days from the date this opinion is final in this court.

O'Leary, P. J., and Thompson, J., concurred.

Respondent's petition for review by the Supreme Court was granted April 12, 2017, S240153.

End of Document

Matossian v. Fahmie

Court of Appeal of California, First Appellate District, Division One

January 17, 1980

Civ. No. 44033

Reporter

101 Cal. App. 3d 128 *; 161 Cal. Rptr. 532 **; 1980 Cal. App. LEXIS 1381 ***

JOSEPH MATOSSIAN et al., Plaintiffs and Appellants,
v. JOSEPH FAHMIE et al., Defendants and
Respondents

Prior History: [***1] Superior Court of Alameda
County, No. 488342-5, William J. Hayes, Judge.

Disposition: The judgment is affirmed.

Core Terms

protests, license, italics, defendants', alcoholic,
beverages, malicious, grievances, agencies, redress,
motive

Case Summary

Procedural Posture

Plaintiffs appealed the decision of the Superior Court of Alameda County (California) granting defendants' motion for summary judgment in plaintiffs' action for malicious prosecution, abuse of process, and conspiracy to prevent competition.

Overview

Plaintiffs, owners of a delicatessen, applied for a transfer of their liquor license. Upon posting of the required notice interested persons responded with protests. The Department of Alcoholic Beverage Control held a hearing, considered the protests, and then granted plaintiffs' application. Upon denial of a request for reconsideration, defendants appealed to the Appeals Board which affirmed. Plaintiffs sued defendants for malicious prosecution, abuse of process, and conspiracy to prevent competition and sought damages. Defendants' general demurrers to the malicious prosecution and tortious interference with a business, and abuse of process counts of the complaint were sustained without leave to amend. Defendants moved for summary judgment and the lower court granted it.

Plaintiffs appealed. The court concluded that holders of licenses to purvey alcoholic beverages had a right, in combination, to protest the granting or transfer of a similar license for the sole purpose of preventing or limiting competition. The court affirmed the judgment.

Outcome

The court affirmed the lower court's order granting defendants' motion for summary judgment.

LexisNexis® Headnotes

Governments > State & Territorial
Governments > Licenses

[HN1](#) [↓] State & Territorial Governments, Licenses

Pursuant to its constitutional authority the California Legislature has provided that an application for, or transfer of, a license shall be granted by the Department of Alcoholic Beverage Control only if, after a thorough investigation, it is found to be consistent with the public welfare and morals. And it has ordained that the constitutional criteria are not ordinarily served if the license's issuance would tend to create a law enforcement problem, or if issuance would result in or add to an undue concentration of licenses and the applicant fails to show that public convenience or necessity would be served by such issuance.

Governments > State & Territorial
Governments > Licenses

[HN2](#) [↓] State & Territorial Governments, Licenses

In the course of its legislatively directed thorough

investigation the Department of Alcoholic Beverage Control requires public notice of the application to interested persons whose views whether it comports with the public welfare and morals, are invited by way of timely written protests. Any interested person has a right to express his views by filing such a protest, and a right to a hearing thereon.

Administrative Law > Agency
Adjudication > Hearings > General Overview

Governments > State & Territorial
Governments > Licenses

[HN3](#) Agency Adjudication, Hearings

See [Cal. Bus. & Prof. Code §§24013, 24015, 24300](#).

Civil Procedure > ... > Pleadings > Amendment of
Pleadings > General Overview

Constitutional Law > Bill of Rights > Fundamental
Freedom > General Overview

Civil Procedure > Appeals > Standards of Review

[HN4](#) Pleadings, Amendment of Pleadings

In determining constitutional issues such as impairment of the First Amendment, *U.S. Const. amend. I*, right of petition and where the facts are without substantial controversy, the question is one of law for the reviewing court and not of fact.

Constitutional Law > Bill of Rights > Fundamental
Freedom > Freedom of Association

Constitutional Law > Bill of Rights > Fundamental
Freedom > General Overview

Constitutional Law > ... > Fundamental
Freedom > Freedom of Speech > General
Overview

Constitutional Law > ... > Freedom of
Speech > Commercial Speech > General Overview

Constitutional Law > ... > Fundamental
Freedom > Freedom of Speech > Political Speech

[HN5](#) Fundamental Freedoms, Freedom of Association

The right to petition for redress of grievances is not confined to religious or political matters. Commercial speech, like other varieties, is protected by the First Amendment, *U.S. Const. amend. I*. It would be destructive of rights of association and of petition to hold that groups with common interests may not use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests vis-a-vis their competitors.

Constitutional Law > ... > Fundamental
Freedom > Freedom of Speech > General
Overview

[HN6](#) Fundamental Freedoms, Freedom of Speech

The right of the people to petition government does not depend upon "motivation" or "purpose." It is what is done that is significant. The motive, even if malicious, of defendants is unimportant if legal ground existed upon which to predicate their protests and appeal. And patently the right of petition or protest to a governmental agency does not depend upon a successful outcome.

Constitutional Law > ... > Fundamental
Freedom > Freedom of Speech > General
Overview

Constitutional Law > Bill of Rights > Fundamental
Freedom > General Overview

[HN7](#) Fundamental Freedoms, Freedom of Speech

The right to have one's voice heard and one's views considered by the appropriate governmental authority may not be conditioned by a state upon the exaction of a price or punishment or threat of criminal or civil sanctions. For such is the policy of protecting the First Amendment, *U.S. Const. amend. I*, against possible chilling influences.

Constitutional Law > ... > Fundamental
Freedom > Freedom of Speech > General

Overview

[HN8](#) Fundamental Freedoms, Freedom of Speech

Where a statute expressly invites or allows interested persons to protest, or give their views or opinions concerning, proposed or requested governmental administrative action, such persons singly or in combination have a lawful right to do so; in such a case the law will not permit judicial or other inquiry into the persons' purpose or motivation.

Headnotes/Syllabus**Summary****CALIFORNIA OFFICIAL REPORTS SUMMARY**

In an action by the holders of a liquor license for damages against other holders of similar licenses, who contested the transfer of plaintiffs' license, the trial court entered a judgment of dismissal after sustaining defendants' general demurrers to plaintiffs' counts alleging malicious prosecution and tortious interference with a business and abuse of process. Thereafter, the court also granted defendants' motion for a summary judgment on the remaining count alleging conspiracy to prevent competition. The record indicated plaintiffs, the proprietors of a delicatessen, had moved to a larger adjacent premises and had applied to the Department of Alcoholic Beverage Control for a transfer of their license. Defendants protested the transfer, but after a hearing, the department granted plaintiff's application. The Alcoholic Beverage Control Appeals Board affirmed the ruling of the department. Defendants conceded, *arguendo*, the existence of a conspiratorial motive to prohibit excessive competition in their challenge to the transfer of plaintiffs' license. (Superior Court of Alameda County, No. 488342-5, William J. Hayes, Judge.)

The Court of Appeal affirmed. The court held that the holders of licenses to purvey alcoholic beverages have a right, in combination, to protest the granting or transfer of a similar license, even though their protest is for the sole purpose of preventing or limiting competition. Thus, the court held that the trial court properly sustained defendants' demurrer to the counts alleging malicious prosecution and tortious interference with a business and abuse of process. The court also held that no violation of the Cartwright Act, [Bus. & Prof. Code, §§ 16700-16758](#), proscribing combinations in restraint of trade, can be predicated upon mere attempts to

influence the passage or enforcement of laws. Thus, the court also held that the trial court properly granted defendants' motion for summary judgment as to the court alleging conspiracy to prevent competition in violation of the act. (Opinion by Elkington, J., with Racanelli, P. J., and Grodin, J., concurring.)

Headnotes**CALIFORNIA OFFICIAL REPORTS HEADNOTES**

Classified to California Digest of Official Reports, 3d Series

[CA\(1a\)](#) (1a) [CA\(1b\)](#) (1b)**Alcoholic Beverages § 11—Alcoholic Beverage Control Act—Licensing—Transfer of Licenses—Challenge to Application for Transfer—Preventing Competition.**

--Holders of licenses to purvey alcoholic beverages have a right, in combination, to protest the granting or transfer of a similar license, even though their protest is for the sole purpose of preventing or limiting competition. Thus, in an action by the holders of a liquor license for damages against other holders of similar licenses, who challenged plaintiffs' application for transfer of the license, the trial court properly sustained defendants' demurrers to the counts in the complaint alleging malicious prosecution and tortious interference with a business and abuse of process. The record indicated defendants had conceded, *arguendo*, the existence of a conspiratorial motive to prohibit excessive competition in their challenge to plaintiffs' application for transfer of the license. Defendants' use of the legal process consisted of unsuccessful protests to the Department of Alcoholic Beverage Control and a subsequent unsuccessful appeal to the Alcoholic Beverage Control Appeals Board.

[CA\(2\)](#) (2)**Constitutional Law § 10—Construction of Constitutions—Questions of Fact.**

--In determining constitutional issues such as impairment of the right of petition under *U.S. Const., 1st Amend.*, the question is one of law for the reviewing court and not of fact, where the facts are without substantial controversy.

[CA\(3\)](#) (3)**Constitutional Law § 52—First Amendment and Other Fundamental Rights of Citizens—Scope and Nature—Right to Petition Government.**

--The right of petition to governmental agencies, like freedom of speech, freedom of the press, and freedom of religion, has a paramount and preferred place in our democratic system.

[CA\(4\)](#) (4)**Constitutional Law § 64—First Amendment and Other Fundamental Rights of Citizens—Governmental Regulation and Restriction of Fundamental Rights—Clear and Present Danger—Right to Assemble and Petition Government.**

--The very idea of a government implies a right on the part of its citizens to petition for a redress of grievances. Any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation, and only the gravest abuses, endangering paramount interests, give occasion for permissible limitation. It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances.

[CA\(5\)](#) (5)**Constitutional Law § 59—First Amendment and Other Fundamental Rights of Citizens—Governmental Regulation and Restriction of Fundamental Rights—Predetermined Condition.**

--The government is without constitutional authority to impose a predetermined condition on the exercise of a constitutional right or penalize in some manner its use.

[CA\(6\)](#) (6)**Constitutional Law § 55—First Amendment and Other Fundamental Rights of Citizens—Scope and Nature—Freedom of Speech and Expression—Commercial****Speech.**

--The right to petition for redress of grievances is not confined to religious or political matters. Commercial speech, like other varieties, is protected by *U.S. Const., 1st Amend.* It would be destructive of rights of association and of petition to hold that groups with common interests may not use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests vis-a-vis their competitors.

[CA\(7\)](#) (7)**Constitutional Law § 54—First Amendment and Other Fundamental Rights of Citizens—Scope and Nature—Freedom of Association and Assembly—Right to Petition Government—Motivation.**

--The right of the people to petition government does not depend upon motivation or purpose. It is what is done that is significant, and the motive, even if malicious, of defendants is unimportant if legal grounds existed upon which to predicate their protest and appeal. Patently, the right of petition or protest to a governmental agency does not depend upon a successful outcome.

[CA\(8\)](#) (8)**Constitutional Law § 54—First Amendment and Other Fundamental Rights of Citizens—Scope and Nature—Freedom of Association and Assembly—Right to Petition Government—Sanctions.**

--The right to have one's voice heard and one's views considered by the appropriate governmental authority may not be conditioned by a state upon the exaction of a price, punishment or threat of criminal or civil sanctions.

[CA\(9\)](#) (9)**Administrative Law § 45—Administrative Actions—Adjudication—Parties—Statutory Right to Protest.**

--Where a statute expressly invites or allows interested persons to protest or give their views or opinions concerning proposed or requested governmental administrative action, such persons singly or in

combination have a lawful right to do so. In such a case, the law will not permit judicial or other inquiry into the persons' purpose or motivation, and the motive, even if malicious, is unimportant if legal ground existed upon which to predicate their protests. Such a right may not be defeated, abridged or chilled by threat or fear of civil action for exercising it.

[CA\(10\)](#) [↓] (10)

Monopolies and Restraints of Trade § 6—Under Cartwright Act—Federal Law.

--The Cartwright Act, [Bus. & Prof. Code, § 16700-16758](#), proscribing combinations in restraint of trade, is patterned after the federal Sherman Antitrust Act, 15 U.S.C. § 1000 et seq., and the decisions under the latter act are applicable to the former.

[CA\(11\)](#) [↓] (11)

Monopolies and Restraints of Trade § 4—Particular Agreements and Combinations—Sherman Act—Efforts to Influence Public Officials.

--No violation of the Sherman Antitrust Act, 15 U.S.C. § 1 et seq., can be predicated upon mere attempts to influence the passage or enforcement of laws. Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the act. However, there is an exception to the rule which applies when the defendants have in some manner barred their competitors from meaningful access to adjudicatory tribunals and so to usurp that decision making process, or otherwise consisting of a combination of entrepreneurs to harass and deter their competitors from having free and unlimited access to the agencies and courts.

[CA\(12\)](#) [↓] (12)

Monopolies and Restraints of Trade § 7—Under Cartwright Act—Prohibited Agreements and Combinations—Joint Effort to Influence Administrative Actions.

--In an action by the holder of a liquor license for damages against other holders of similar licenses, who protested plaintiffs' application to an administrative

agency for transfer of their license, the trial court properly granted defendants' motion for summary judgment as to a count in the complaint alleging violation of the Cartwright Act, [Bus. & Prof. Code, §§ 16700-16758](#), prohibiting restraints of trade. Plaintiffs made no allegations nor presented proof or offer of proof that defendants had directly or indirectly intended or attempted or conspired to bar plaintiffs from free and unlimited access to the administrative agencies and the courts.

Counsel: H. Tim Hoffman, Gregory Wilcox and Arthur W. Lazear for Plaintiffs and Appellants.

Bronson, Bronson & McKinnon, Paul H. Cyril, Joseph B. Phair, Moore, Clifford, Wolfe, Larson & Trutner, J. Jay Schnack, Barfield, Barfield, Dryden & Ruane, Mattathias N. Smith, Ericksen, Mackenroth & Arbuthnot, R. Opre Wilson, Jr., and Robert G. Levy for Defendants and Respondents.

Judges: Opinion by Elkington, J., with Racanelli, P. J., and Grodin, J., concurring.

Opinion by: ELKINGTON

Opinion

[*132] [**534] [CA\(1a\)](#) [↑] (1a) The question of this appeal is whether holders of licenses to purvey alcoholic beverages have a right, in combination, to protest the granting, or transfer, of a similar license *for the sole purpose of preventing or limiting competition*. We conclude they have such a right of protest and affirm the judgment of the superior court. Our reasons follow.

[*133] [California's Constitution, article XX, section 22](#), provides that such purveyors of alcoholic beverages shall be licensed by the Department of Alcoholic Beverage Control (Department). Such a license will be allowed only [***2] when not contrary to the "*public welfare or morals, . . .*" (Italics added.) Any person aggrieved by action of the Department is given a right of appeal to the Alcoholic Beverage Control Appeals Board (Appeals Board). And the state's Legislature is authorized to implement the constitutional provisions to the end that the public welfare and morals be served.

[HN1](#) [↑] Pursuant to its constitutional authority the Legislature has provided that an application for, or transfer of, a license shall be granted by the Department only if, *after "a thorough investigation"* (italics added), it

is found to be consistent with the public welfare and morals. And it has ordained that the constitutional criteria are not ordinarily served if the license's issuance "would tend to create a law enforcement problem, or if issuance would result in or add to an *undue concentration of licenses* and the applicant fails to show that public convenience or necessity would be served by such issuance." ([Bus. & Prof. Code, § 23958](#); italics added.)

[HN2](#) [↑] In the course of its legislatively directed thorough investigation the Department requires "public notice" of the application to interested persons whose views whether [***3] it comports with the public welfare and morals, are invited by way of timely written "protests." ([Bus. & Prof. Code, §§ 23985, 23986](#).) [HN3](#) [↑] Any interested person has a *right* to express his views by filing such a protest ([Bus. & Prof. Code, § 24013](#)), and a *right* to a hearing thereon ([Bus. & Prof. Code, §§ 24015, 24300](#)).

Further implementation of the constitutional and statutory directions appears in printed "Instructions for preparing and filing protests" which are widely disseminated by the Department. They provide that protests shall set forth specific objections such as: "*Issuance of the license to the premises would result in or add to undue concentration of licenses*" (italics added; and see [Bus. & Prof. Code, § 23958](#)), or "would interfere with the quiet enjoyment of their property by the residents of the area," or with the "respective functions" of a nearby "school, church, hospital or children's public playground"

The plaintiffs Matossian were proprietors of a delicatessen in the City of Berkeley located just beyond the area within "one mile" from [*134] the grounds "belonging to the University of California," in which the sale of alcoholic beverages was [***4] forbidden by [Penal Code section 172](#). They, the several defendants, and many others in the neighborhood, held licenses permitting sale and consumption of beer and wine on their business premises. Having moved to larger adjacent premises where they "planned to serve light foods and beer and wine," plaintiffs applied to the Department for a transfer of their license. Upon posting of the required notice 15 interested persons responded with protests.

The several nonparty protestants gave varying reasons.

*

* Some of them follow: "to add the possibility of a 'wine garden'

[***5] [**535] For some reason, or perhaps no reason, we are not furnished by plaintiffs with a record of defendants' protests; but the briefs make clear that they at least included complaints that granting the license transfer "would result in or add to undue concentration of licenses." We accordingly treat plaintiffs' appeal as though defendants' protests were grounded on that reason alone.

The Department held a hearing, considered the protests, and then granted plaintiffs' application. Upon denial of a request for reconsideration the defendants appealed to the Appeals Board. The other protestants did not so appeal. The Appeals Board affirmed the ruling of the Department.

Thereafter plaintiffs filed the instant action for damages against defendants by which they sought \$ 600,000 and costs. The complaint was in three counts, sounding in (1) "malicious prosecution" and "tortious interference with a business," (2) "abuse of process," and (3) "conspiracy to prevent competition." As to each of them, disregarding conclusory allegations (see 3 Witkin, Cal. Procedure (2d ed. 1971) Pleading, § 272, pp. 1944-1946), the gist of the complaint was that defendants conspired to, and did, [***6] file "meritless protests" for the single purpose to "destroy . . . competition and thereby to gain a business advantage [*135] for themselves," thus causing plaintiffs "to be without a license to carry on their [alcoholic beverage] business for ten (10) months."

For the purpose of clarifying the issues the several defendants in the superior court, and now here, concede, arguendo, "the existence of a conspiratorial motive to prohibit excessive competition."

Defendants' general demurrers to the malicious prosecution and tortious interference with a business, and abuse of process, counts of the complaint were sustained without leave to amend. And thereafter, on

(or whatever) to the already-over-abundant liquor stores in the area would constitute a significant liability in the neighborhood"; "I wish to object to any enlargement of facilities . . . that would allow for increased serving of wine by the glass and beer in this neighborhood." It "is becoming an increasing problem . . . especially among the youth"; "liquor stores are in excess"; "It is not only near the residential area but there is a school, church and playground nearby"; "We object to any further licenses The businesses holding such a license in this area . . . are most sufficient"; "A bar and restaurant at this location would create a disturbance to the quiet and comfortable residential area."

defendants' motion, an order granting summary judgment on the remaining conspiracy to prevent competition count was entered. It is from the ensuing judgment of dismissal of their action that plaintiffs have appealed.

We find the following principles generally apposite to the appeal.

[CA\(2\)](#)^[↑] (2) [HN4](#)^[↑] In determining constitutional issues such as impairment of the First Amendment right of petition, and where as here the facts are without substantial controversy, the question "is one of law [for the reviewing court] and not of fact, [***7] . . ." ([L. A. Teachers Union v. L. A. City Bd. of Ed. \(1969\) 71 Cal.2d 551, 556 \[78 Cal.Rptr. 723, 455 P.2d 827\]](#).)

[CA\(3\)](#)^[↑] (3) The right of petition to governmental agencies, like freedom of speech, of the press, and of religion, has "a paramount and preferred place in our democratic system." ([American Civil Liberties Union v. Board of Education \(1961\) 55 Cal.2d 167, 178 \[10 Cal.Rptr. 647, 359 P.2d 45, 94 A.L.R.2d 1259\]](#) [cert. den., 368 U.S. 819 (7 L.Ed.2d 25, 82 S.Ct. 34)].) "All these, though not identical, are inseparable." ([Thomas v. Collins \(1945\) 323 U.S. 516, 530 \[89 L.Ed. 430, 440, 65 S.Ct. 315\]](#).) "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances." (*U.S. Const., 1st Amend.*) "The people have the right to . . . petition government for redress of grievances, . . ." ([Cal. Const., art. I, § 3.](#))

[CA\(4\)](#)^[↑] (4) "The very idea of a government . . . implies a right on the part of its citizens [**536] . . . to petition for a redress of grievances." ([De Jonge v. Oregon \(1937\) 299 U.S. 353, 364 \[81 L.Ed. 278, 284, 57 S.Ct. 255\]](#).) "[Any] attempt to restrict those liberties must [***8] be justified by clear public interest, threatened not doubtfully or remotely, but by clear and [*136] present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances." ([Thomas v. Collins, supra, 323 U.S. 516, 530 \[89 L.Ed. 430, 440\]](#); italics added, fn. omitted; [American Civil Liberties Union](#)

[v. Board of Education, supra, 55 Cal.2d 167, 179.](#)) [CA\(5\)](#)^[↑] (5) And as said in [In re Allen \(1969\) 71 Cal.2d 388, 391 \[78 Cal.Rptr. 207, 455 P.2d 143\]](#): "The government is without constitutional authority to impose a predetermined condition on the exercise of a constitutional right or penalize in some manner its use."

[CA\(6\)](#)^[↑] (6) [HN5](#)^[↑] The right to petition for redress of grievances is not confined [***9] to "religious or political" matters. ([Thomas v. Collins, supra, 323 U.S. 516, 531 \[89 L.Ed. 430, 441\]](#).) "[Commercial] speech, like other varieties, is protected" by the First Amendment. ([Va. Pharmacy Bd. v. Va. Consumer Council \(1976\) 425 U.S. 748, 770 \[48 L.Ed.2d 346, 363, 96 S.Ct. 1817\]](#).) "[It] would be destructive of rights of association and of petition to hold that groups with common interests may not . . . use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests vis-a-vis their competitors." ([California Transport v. Trucking Unlimited \(1972\) 404 U.S. 508, 510-511 \[30 L.Ed.2d 642, 646, 92 S.Ct. 609\]](#); italics added.)

Where administrative agencies such as the Department must make factual determinations "the widest possible dissemination of information from *diverse and antagonistic sources* is essential to the welfare of the public, . . ." ([Weaver v. Jordan \(1966\) 64 Cal.2d 235, 245 \[49 Cal.Rptr. 537, 411 P.2d 289\]](#) [cert. den., 385 U.S. 844 (17 L.Ed.2d 75, 87 S.Ct. 49)]; italics added.)

[CA\(7\)](#)^[↑] (7) [HN6](#)^[↑] Nor does the right [***10] of the people to petition government depend upon "motivation" or "purpose." It is what is done that is significant. (See [Mine Workers v. Pennington \(1965\) 381 U.S. 657, 670 \[14 L.Ed.2d 626, 636, 85 S.Ct. 1585\]](#); [Weiss v. Willow Tree Civic Ass'n \(S.D.N.Y. 1979\) 467 F.Supp. 803, 817](#); [Sierra Club v. Butz \(N.D.Cal. \[*137\] 1972\) 349 F.Supp. 934, 938.](#)) "[The] motive, even if malicious, of defendants is unimportant if legal ground existed upon which to predicate" their protests and appeal. ([Paskle v. Williams \(1931\) 214 Cal. 482, 487 \[6 P.2d 505\]](#).) And patently the right of petition or protest to a governmental agency does not depend upon a successful outcome.

[CA\(8\)](#)^[↑] (8) In furtherance of these principles it is held that: [HN7](#)^[↑] "The right to have one's voice heard and one's views considered by the appropriate governmental authority" ([Williams v. Rhodes \(1968\) 393 U.S. 23, 41 \[21 L.Ed.2d 24, 37, 89 S.Ct. 5\]](#), Harlan, J., conc.) may not be conditioned by a state upon "the exaction of a price" ([Garrity v. New Jersey \(1967\) 385 U.S. 493, 500](#)

[17 L.Ed.2d 562, 567, 87 S.Ct. 616]), or "punishment" (*Thornhill v. Alabama* (1940) 310 U.S. 88, 101-102 [***11] [84 L.Ed. 1093, 1102, 60 S.Ct. 736]), or "threat of criminal or civil sanctions" (*Nebraska Press Assn. v. Stuart* (1976) 427 U.S. 539, 559 [49 L.Ed.2d 683, 698, 96 S.Ct. 2791]). For such is the "policy of protecting the First Amendment against possible chilling influences." (*Garvin v. Rosenau* (6th Cir. 1972) 455 F.2d 233, 239; and see *Shapiro v. Thompson* (1969) 394 U.S. 618, 631 [22 L.Ed.2d 600, 613, 89 S.Ct. 1322]; *United States v. Jackson* (1968) 390 U.S. 570, 582 [20 L.Ed.2d 138, 147, 88 S.Ct. 1209].)

"It is generally agreed that the liquor industry is one which greatly affects the [*537] public health, safety, welfare and morals of the people Each applicant for a license . . . must subject himself and the premises where the business will be conducted to a thorough investigation." (*Duke Molner etc. Liquor Co. v. Martin* (1960) 180 Cal.App.2d 873, 880-881 [4 Cal.Rptr. 904] [cert. den., 364 U.S. 870 (5 L.Ed.2d 92, 81 S.Ct. 112)]; and see authority there collected.)

CA(9) [↑] (9) We are persuaded by the foregoing authority and considerations that **HNS** [↑] where, as here, a statute expressly invites or allows interested persons to protest, or [***12] give their views or opinions concerning, proposed or requested governmental administrative action, such persons singly or in combination have a *lawful right* to do so; in such a case the law will not permit judicial or other inquiry into the persons' purpose or motivation. As said in *Paskle v. Williams, supra*, 214 Cal. 482, 487, "the motive, even if malicious, of defendants is unimportant if legal ground existed upon which to predicate" their protests. Such a right may not be defeated, or abridged, or "chilled," by threat or fear of civil action for exercising it.

[*138] **CA(1b)** [↑] (1b) We accordingly perceive no error in the order sustaining defendants' demurrer to the complaint's malicious prosecution and tortious interference with a business count.

Adverting now to the abuse of process count of the complaint, we observe that the subject process consisted of defendants' unsuccessful protests and their subsequent appeal to the Appeals Board. As was noted in respect of the malicious prosecution and interference with a business count, here also defendants had a constitutional and statutory right to take the proceedings instituted by the questioned process.

The defendants' demurrer [***13] to the abuse of

process count was properly sustained.

As noted, the judgment as to the remaining count of the complaint was summary. That count was based on the theory of defendants' violation of the state's Cartwright Act (*Bus. & Prof. Code, §§ 16700- 16758*) which proscribes "Combinations in Restraint of Trade." **CA(10)** [↑] (10) The act generally is patterned after the federal Sherman Anti-Trust Act (15 U.S.C. § 1 *et seq.*), "and decisions under the latter act are applicable to the former." (*Corwin v. Los Angeles Newspaper Service Bureau, Inc.* (1971) 4 Cal.3d 842, 852 [94 Cal.Rptr. 785, 484 P.2d 953]; italics added.)

The dispositive authority of the issue before us, we opine, is *Eastern R. Conf. v. Noerr Motors* (1961) 365 U.S. 127 [5 L.Ed.2d 464, 81 S.Ct. 523] (hereafter *Noerr*).

CA(11) [↑] (11) In a not dissimilar context *Noerr* instructs in the following manner: "We accept, as the starting point for our consideration of the case, the same basic construction of the Sherman Act adopted by the courts below -- that no violation of the Act can be predicated upon mere attempts to influence the passage or enforcement of laws." (365 U.S., p. 135 [5 L.Ed.2d, p. 470]; italics added.)

[***14] ". . . *The right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so. It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors Indeed, it is quite probably people [*139] with just such a hope of personal advantage who provide much of the information upon which governments must act. A construction of the Sherman Act that would disqualify people from taking a public position on matters in which they are financially interested would thus deprive the government of a valuable source of information and, at the same time, deprive the people of their right to petition in the very instances in which that right may be of the most importance to them. We reject such a construction of the Act and hold that, at least insofar as the railroads' campaign was directed toward obtaining governmental action, its legality [**538] was not at all affected by any anticompetitive purpose it may have had.*" (*Id.*, pp. 139-140 [***15] [5 L.Ed.2d p. 472]; italics added.)

The same principle was emphasized by the nation's

high court in [Mine Workers v. Pennington, supra, 381 U.S. 657, 670 \[14 L.Ed.2d 626, 636\]](#): "Noerr shields from the Sherman Act a concerted effort to influence public officials *regardless of intent or purpose* [para.] . . . Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act." (Italics added.)

There is, to be sure, an exception to the rule. It will exist when the defendants have in some manner *barred* their "competitors from meaningful access to adjudicatory tribunals and so to usurp that decision making process," or otherwise consisted of a "combination of entrepreneurs to harass and deter their competitors from having 'free and unlimited access' to the agencies and courts, . . ." ([California Transport v. Trucking Unlimited, supra, 404 U.S. 508, 512, 515 \[30 L.Ed.2d 642, 647, 649\]](#).)

[CA\(12\)](#)^[↑] (12) In the case at bench we discern neither allegations, nor proof, nor offer of [***16] proof, that defendants or any of them had directly, or indirectly, intended or attempted or conspired to bar plaintiffs from "free and unlimited access' to the agencies and courts, . . ." Their protests against the transfer of plaintiffs' license, even though motivated by selfish commercial or competitive reasons, were constitutionally protected in relation to the Cartwright Act, also.

The order granting summary judgment as to the instant count was properly entered.

[*140] Plaintiffs' argument that "summary judgment should not be granted to defendants where [plaintiffs have] not been allowed a reasonable time for discovery" is found to be here inapposite. No record reference is made to any request that the summary judgment proceedings be deferred pending such discovery. (See rule 15(a), Cal. Rules of Court.) And we ourselves find no such request.

No abuse of discretion is seen in the superior court's sustaining of defendants' demurrer *without leave to amend*. Plaintiffs made no showing or argument in the superior court and make none here how, or in what manner, the complaint's subject counts could have been successfully amended to state causes of action. Nor does [***17] the record reasonably indicate that such could be done. (See [Routh v. Quinn \(1942\) 20 Cal.2d 488, 493-494 \[127 P.2d 1, 149 A.L.R. 215\]](#); [First Western Bank & Trust Co. v. Bookasta \(1968\) 267](#)

[Cal.App.2d 910, 913 \[73 Cal.Rptr. 657\]](#).)

It is regrettable that the proceedings at hand, as with such proceedings and lawsuits generally, were timetaking and undoubtedly costly to all parties. But such considerations are inherent in our form of government with its constitutional rights and protections, a form which few would wish to change.

The judgment is affirmed.

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Miller v. Alabama

Supreme Court of the United States

March 20, 2012, Argued; June 25, 2012, Decided *

Nos. 10-9646 and 10-9647

* Together with No. 10-9647, Jackson v. Hobbs, Director, Arkansas Department of Correction, on certiorari to the Supreme Court of Arkansas.

Reporter

567 U.S. 460 *; 132 S. Ct. 2455 **; 183 L. Ed. 2d 407 ***; 2012 U.S. LEXIS 4873 ****; 80 U.S.L.W. 4560; 78 A.L.R. Fed. 2d 547; 23 Fla. L. Weekly Fed. S 455; 2012 WL 2368659

EVAN MILLER, Petitioner (No. 10-9646) v. ALABAMA; KUNTRELL JACKSON, Petitioner (No. 10-9647) v. RAY HOBBS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION

Subsequent History: On remand at, Remanded by [Miller v. State, 148 So. 3d 78, 2013 Ala. Crim. App. LEXIS 89 \(Ala. Crim. App., Nov. 8, 2013\)](#)

Prior History: [****1] ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA. ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS.

[Jackson v. Norris, 2011 Ark. 49, 378 S.W.3d 103, 2011 Ark. LEXIS 44 \(Ark., 2011\)](#)
[Miller v. State, 63 So. 3d 676, 2010 Ala. Crim. App. LEXIS 77 \(Ala. Crim. App., 2010\)](#)

Disposition: Reversed and remanded.

Core Terms

sentence, juvenile, parole, cases, mandatory, murder, offenders, adult, life-without-parole, death penalty, kill, nonhomicide, juvenile offender, homicide, offenses, plurality opinion, capital punishment, life sentence, circumstances, categorical, possibility of parole, jurisdictions, youth, legislatures, convicted, prison, intent to kill, today's, individualized sentencing, discretionary

Case Summary**Procedural Posture**

The Court of Criminal Appeals of Alabama denied an appeal, and the Supreme Court of Arkansas denied habeas relief, on the arguments of petitioners, two 14-year-old offenders convicted of murder, that their sentences to life imprisonment without the possibility of parole under the mandatory scheme of *Ala. Code* §§ 13A-5-40(9), 13A-6-2(c) (1982) and *Ark. Code Ann. § 5-4-104(b)* (1997), violated the *Eighth Amendment*. Certiorari was granted.

Overview

Mandatory life without parole for a juvenile precluded

consideration of his chronological age and its hallmark features -- among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevented taking into account the family and home environment surrounding him -- and from which he could not usually extricate himself -- no matter how brutal or dysfunctional. It neglected the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignored that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth -- for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. The *Eighth Amendment* forbade a sentencing scheme that mandated life in prison without possibility of parole for juvenile offenders. While there was, in some states, prosecutorial discretion in deciding whether to try a juvenile as an adult, those provisions were usually silent as to standards, protocols, or appropriate considerations.

Outcome

The judgments of the Arkansas Supreme Court and Alabama Court of Criminal Appeals, holding the mandatory schemes did not violate the *Eighth Amendment*, were reversed. The cases were remanded for further proceedings. 5-4 Decision; 1 opinion; 1 concurrence; 3 dissents.

LexisNexis® Headnotes

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

Criminal Law & Procedure > Sentencing > Sentencing Alternatives > Life Imprisonment in Capital Cases

[HN1](#)  **Fundamental Rights, Cruel & Unusual Punishment**

Mandatory life without parole for those under the age of 18 at the time of their crimes violates the *Eighth Amendment's* prohibition on cruel and unusual punishments.

Criminal Law & Procedure > Juvenile
Offenders > Trial as Adult > Prosecutorial &
Reverse Waiver

[HN2](#) **Trial as Adult, Prosecutorial & Reverse Waiver**

Arkansas law gives prosecutors discretion to charge 14-year-olds as adults when they are alleged to have committed certain serious offenses. [Ark. Code Ann. § 9-27-318\(c\)\(2\)](#) (1998).

Criminal Law & Procedure > Sentencing > Capital
Punishment > General Overview

Criminal Law & Procedure > ... > Murder > Capital
Murder > Penalties

Criminal Law &
Procedure > Sentencing > Sentencing
Alternatives > Life Imprisonment in Capital Cases

[HN3](#) **Sentencing, Capital Punishment**

See [Ark. Code Ann. § 5-4-104\(b\)](#) (1997).

Criminal Law & Procedure > Juvenile
Offenders > Trial as Adult > Prosecutorial &
Reverse Waiver

[HN4](#) **Trial as Adult, Prosecutorial & Reverse Waiver**

A district attorney is allowed to seek removal of a juvenile offender's case to adult court. Ala. Code § 12-15-34 (1977).

Criminal Law &
Procedure > Sentencing > Sentencing
Alternatives > Life Imprisonment in Capital Cases

Criminal Law & Procedure > ... > Murder > Felony

Murder > Penalties

[HN5](#) **Sentencing Alternatives, Life Imprisonment in Capital Cases**

Murder in the course of arson (like capital murder in Arkansas) carries a mandatory minimum punishment of life without parole. Ala. Code §§ 13A-5-40(9), [13A-6-2\(c\)](#) (1982).

Constitutional Law > Bill of Rights > Fundamental
Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Sentencing > Cruel &
Unusual Punishment

[HN6](#) **Fundamental Rights, Cruel & Unusual Punishment**

The *Eighth Amendment's* prohibition of cruel and unusual punishment guarantees individuals the right not to be subjected to excessive sanctions. That right flows from the basic precept of justice that punishment for crime should be graduated and proportioned to both the offender and the offense. The concept of proportionality is central to the *Eighth Amendment*. And, the United States Supreme Court views that concept less through a historical prism than according to the evolving standards of decency that mark the progress of a maturing society.

Constitutional Law > Bill of Rights > Fundamental
Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Sentencing > Cruel &
Unusual Punishment

Criminal Law &
Procedure > Sentencing > Sentencing
Alternatives > Life Imprisonment in Capital Cases

[HN7](#) **Fundamental Rights, Cruel & Unusual Punishment**

Mandatory life-without-parole sentences for juveniles violate the *Eighth Amendment*.

Constitutional Law > Bill of Rights > Fundamental
Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

Criminal Law & Procedure > Juvenile Offenders > Sentencing > General Overview

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Factors

[HN8](#) **Fundamental Rights, Cruel & Unusual Punishment**

Children are constitutionally different from adults for purposes of sentencing. Because juveniles have diminished culpability and greater prospects for reform, they are less deserving of the most severe punishments. There are three significant gaps between juveniles and adults. First, children have a lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking. Second, children are more vulnerable to negative influences and outside pressures, including from their family and peers; they have limited control over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings. And third, a child's character is not as "well formed" as an adult's; his traits are "less fixed" and his actions less likely to be evidence of irretrievable depravity.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

Criminal Law & Procedure > Juvenile Offenders > Sentencing > General Overview

Criminal Law & Procedure > Sentencing > Sentencing Alternatives > Life Imprisonment in Capital Cases

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Factors

[HN9](#) **Fundamental Rights, Cruel & Unusual Punishment**

The distinctive attributes of youth diminish the

penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes. Because the heart of the retribution rationale relates to an offender's blameworthiness, the case for retribution is not as strong with a minor as with an adult. Nor can deterrence do the work in this context, because the same characteristics that render juveniles less culpable than adults -- their immaturity, recklessness, and impetuosity -- make them less likely to consider potential punishment. Deciding that a juvenile offender forever will be a danger to society would require making a judgment that he is incorrigible -- but incorrigibility is inconsistent with youth. Life without parole forswears altogether the rehabilitative ideal. It reflects an irrevocable judgment about an offender's value and place in society, at odds with a child's capacity for change.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

Criminal Law & Procedure > Juvenile Offenders > Sentencing > General Overview

Criminal Law & Procedure > Sentencing > Sentencing Alternatives > Life Imprisonment in Capital Cases

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Factors

[HN10](#) **Fundamental Rights, Cruel & Unusual Punishment**

Youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole. An offender's age is relevant to the *Eighth Amendment*, and so criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Sentencing > Cruel &

Unusual Punishment

Criminal Law & Procedure > Juvenile
Offenders > Sentencing > General Overview

[HN11](#) **Fundamental Rights, Cruel & Unusual Punishment**

Imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

Criminal Law & Procedure > Sentencing > Capital Punishment > Cruel & Unusual Punishment

Criminal Law & Procedure > Sentencing > Capital Punishment > Mitigating Circumstances

Criminal Law &
Procedure > Sentencing > Imposition of Sentence > Factors

[HN12](#) **Fundamental Rights, Cruel & Unusual Punishment**

A statute mandating a death sentence for first-degree murder violates the *Eighth Amendment*. A mandatory scheme is flawed because it gives no significance to the character and record of the individual offender or the circumstances of the offense, and excludes from consideration the possibility of compassionate or mitigating factors. Capital defendants are required to have an opportunity to advance, and the judge or jury a chance to assess, any mitigating factors, so that the death penalty is reserved only for the most culpable defendants committing the most serious offenses.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

Criminal Law & Procedure > Juvenile
Offenders > Sentencing > General Overview

Criminal Law &
Procedure > Sentencing > Imposition of Sentence > Factors

[HN13](#) **Fundamental Rights, Cruel & Unusual Punishment**

A sentencer must have the ability to consider the mitigating qualities of youth. Youth is more than a chronological fact. It is a time of immaturity, irresponsibility, impetuosity, and recklessness. It is a moment and condition of life when a person may be most susceptible to influence and to psychological damage. And its "signature qualities" are all "transient." Just as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered in assessing his culpability.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

Criminal Law & Procedure > Juvenile
Offenders > Sentencing > General Overview

Criminal Law &
Procedure > Sentencing > Sentencing Alternatives > Life Imprisonment in Capital Cases

Criminal Law &
Procedure > Sentencing > Imposition of Sentence > Factors

[HN14](#) **Fundamental Rights, Cruel & Unusual Punishment**

Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features -- among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him -- and from which he cannot usually extricate himself -- no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted

of a lesser offense if not for incompetencies associated with youth--for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

Criminal Law & Procedure > Juvenile Offenders > Sentencing > General Overview

Criminal Law & Procedure > Sentencing > Sentencing Alternatives > Life Imprisonment in Capital Cases

[HN15](#) **Fundamental Rights, Cruel & Unusual Punishment**

The *Eighth Amendment* forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders. By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Sentencing > Capital Punishment > Cruel & Unusual Punishment

Criminal Law & Procedure > Juvenile Offenders > Sentencing > General Overview

Criminal Law & Procedure > Sentencing > Sentencing Alternatives > Life Imprisonment in Capital Cases

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

[HN16](#) **Fundamental Rights, Cruel & Unusual Punishment**

A sentencing rule permissible for adults may not be so for children. Capital punishment generally comports with the *Eighth Amendment* -- except it cannot be imposed on children. So too, life without parole is permissible for

nonhomicide offenses -- except, once again, for children.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

Criminal Law & Procedure > Juvenile Offenders > Sentencing > General Overview

Criminal Law & Procedure > Sentencing > Sentencing Alternatives > Life Imprisonment in Capital Cases

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Factors

[HN17](#) **Fundamental Rights, Cruel & Unusual Punishment**

A judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles. By requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, a mandatory sentencing scheme violates this principle of proportionality, and so the *Eighth Amendment's* ban on cruel and unusual punishment.

Lawyers' Edition Display

Decision

[*407]** *Federal Constitution's Eighth Amendment* held to forbid sentencing scheme that mandated life in prison without possibility of parole for juvenile offenders.

Summary

Procedural posture: The Court of Criminal Appeals of Alabama denied an appeal, and the Supreme Court of Arkansas denied habeas relief, on the arguments of petitioners, two 14-year-old offenders convicted of murder, that their sentences to life imprisonment without the possibility of parole under the mandatory scheme of *Ala. Code* §§13A-5-40(a)(9), [13A-6-2\(c\)](#) (1982) and *Ark. Code Ann. § 5-4-104(b)* (1997), violated the *Eighth*

Amendment. Certiorari was granted.

Overview: Mandatory life without parole for a juvenile precluded consideration of his chronological age and its hallmark features--among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevented taking into account the family and home environment surrounding him--and from which he could not usually extricate himself--no matter how brutal or dysfunctional. It neglected the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignored that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth--for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. The *Eighth Amendment* forbade a sentencing scheme that mandated life in prison without possibility of parole for juvenile offenders. While there was, in some states, prosecutorial discretion in deciding whether to try a juvenile as an adult, those provisions were usually silent as to standards, protocols, or appropriate considerations.

Outcome: The judgments of the Arkansas Supreme Court and Alabama Court of Criminal Appeals, holding the mandatory schemes did not violate the *Eighth Amendment*, were reversed. The cases were remanded for further proceedings. 5-4 Decision; 1 opinion; 1 concurrence; 3 dissents.

Headnotes

CRIMINAL LAW §79 > LIFE SENTENCE -- MINORS

> Headnote:

[LEdHN\[1\]](#) [1]

Mandatory life without parole for those under the age of 18 at the time of their crimes violates the *Eighth Amendment's* prohibition on cruel and unusual punishments. (Kagan, J., joined by Kennedy, Ginsburg, Breyer and Sotomayor, JJ.)

CRIMINAL LAW §41 > MINORS CHARGED AS ADULTS

> Headnote:

[LEdHN\[2\]](#) [2]

Arkansas law gives prosecutors discretion to charge 14-year-olds as adults when they are alleged to have committed certain serious offenses. [Ark. Code Ann. § 9-27-318\(c\)\(2\)](#) (1998). (Kagan, J., joined by Kennedy, Ginsburg, Breyer and Sotomayor, JJ.)

CRIMINAL LAW §69 CRIMINAL LAW §93 > SENTENCING -- CAPITAL MURDER > Headnote:

[LEdHN\[3\]](#) [3]

See [Ark. Code Ann. § 5-4-104\(b\)](#) (1997), which provided: "A defendant convicted of capital murder or treason shall be sentenced to death or life imprisonment without parole." (Kagan, J., joined by Kennedy, Ginsburg, Breyer and Sotomayor, JJ.)

CRIMINAL LAW §41 > MINORS CHARGED AS ADULTS

> Headnote:

[LEdHN\[4\]](#) [4]

A district attorney is allowed to seek removal of a juvenile offender's case to adult court. Ala. Code § 12-15-34 (1977). (Kagan, J., joined by Kennedy, Ginsburg, Breyer and Sotomayor, JJ.)

CRIMINAL LAW §69 > CAPITAL MURDER -- MANDATORY PUNISHMENT > Headnote:

[LEdHN\[5\]](#) [5]

Murder in the course of arson (like capital murder in Arkansas) carries a mandatory minimum punishment of life without parole. Ala. Code §§13A-5-40(a)(9), [13A-6-2\(c\)](#) (1982). (Kagan, J., joined by Kennedy, Ginsburg, Breyer and Sotomayor, JJ.)

CRIMINAL LAW §76 > SENTENCING -- EXCESSIVE SANCTIONS > Headnote:

[LEdHN\[6\]](#) [6]

The *Eighth Amendment's* prohibition of cruel and unusual punishment guarantees individuals the right not to be subjected to excessive sanctions. That right flows from the basic precept of justice that punishment for crime should be graduated and proportioned to both the offender and the offense. The concept of proportionality is central to the *Eighth Amendment*. And, the United States Supreme Court views that concept less through a historical prism than according to the evolving standards of decency that mark the progress of a maturing society. (Kagan, J., joined by Kennedy, Ginsburg, Breyer and Sotomayor, JJ.)

CRIMINAL LAW §79 > MANDATORY SENTENCES -- JUVENILES > Headnote:
[LEdHN\[7\]](#) [7]

Mandatory life-without-parole sentences for juveniles violate the *Eighth Amendment*. (Kagan, J., joined by Kennedy, Ginsburg, Breyer and Sotomayor, JJ.)

[***409]

CRIMINAL LAW §69 > SENTENCING -- JUVENILES > Headnote:
[LEdHN\[8\]](#) [8]

Children are constitutionally different from adults for purposes of sentencing. Because juveniles have diminished culpability and greater prospects for reform, they are less deserving of the most severe punishments. There are three significant gaps between juveniles and adults. First, children have a lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking. Second, children are more vulnerable to negative influences and outside pressures, including from their family and peers; they have limited control over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings. And third, a child's character is not as "well formed" as an adult's; his traits are "less fixed" and his actions less likely to be evidence of irretrievable depravity. (Kagan, J., joined by Kennedy, Ginsburg, Breyer and Sotomayor, JJ.)

CRIMINAL LAW §69 > SENTENCING -- JUVENILES > Headnote:
[LEdHN\[9\]](#) [9]

The distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes. Because the heart of the retribution rationale relates to an offender's blameworthiness, the case for retribution is not as strong with a minor as with an adult. Nor can deterrence do the work in this context, because the same characteristics that render juveniles less culpable than adults--their immaturity, recklessness, and impetuosity--make them less likely to consider potential punishment. Deciding that a juvenile offender forever will be a danger to society would require making a judgment that he is incorrigible--but incorrigibility is inconsistent with youth. Life without parole forswears altogether the rehabilitative ideal. It reflects an irrevocable judgment about an offender's value and place in society, at odds with a child's capacity for change. (Kagan, J., joined by Kennedy, Ginsburg, Breyer and Sotomayor, JJ.)

CRIMINAL LAW §79 > SENTENCING -- JUVENILES -- LIFE WITHOUT PAROLE > Headnote:
[LEdHN\[10\]](#) [10]

Youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole. An offender's age is relevant to the *Eighth Amendment*, and so criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed. (Kagan, J., joined by Kennedy, Ginsburg, Breyer and Sotomayor, JJ.)

CRIMINAL LAW §69 > SENTENCING -- JUVENILES > Headnote:
[LEdHN\[11\]](#) [11]

Imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children. (Kagan, J., joined by Kennedy, Ginsburg, Breyer and Sotomayor, JJ.)

CRIMINAL LAW §93.7 > MANDATORY DEATH SENTENCE -
- MITIGATION > Headnote:

[LEdHN\[12\]](#) [12]

A statute mandating a death sentence for first-degree murder violates the *Eighth Amendment*. A mandatory scheme is flawed because it gives no significance to the character and record of the individual offender or the circumstances of the offense, and excludes from consideration the possibility of compassionate or mitigating factors. Capital defendants are required to have an opportunity to advance, and the judge or jury a chance to assess, any mitigating factors, so that the death penalty is reserved only for the most culpable defendants committing the most serious offenses. (Kagan, J., joined by Kennedy, Ginsburg, Breyer and Sotomayor, JJ.)

[***410]

CRIMINAL LAW §69 > MANDATORY SENTENCING --
YOUTH AS MITIGATING FACTOR > Headnote:

[LEdHN\[13\]](#) [13]

A sentencer must have the ability to consider the mitigating qualities of youth. Youth is more than a chronological fact. It is a time of immaturity, irresponsibility, impetuosity, and recklessness. It is a moment and condition of life when a person may be most susceptible to influence and to psychological damage. And its “signature qualities” are all “transient.” Just as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered in assessing his culpability. (Kagan, J., joined by Kennedy, Ginsburg, Breyer and Sotomayor, JJ.)

CRIMINAL LAW §79 > MANDATORY SENTENCING --
JUVENILES -- LIFE WITHOUT PAROLE > Headnote:

[LEdHN\[14\]](#) [14]

Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features--among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him--and from which he cannot usually extricate himself--no matter how brutal or

dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth--for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys.

CRIMINAL LAW §79 > MANDATORY SENTENCING --
JUVENILES > Headnote:

[LEdHN\[15\]](#) [15]

The *Eighth Amendment* forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders. By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment.

CRIMINAL LAW §79 CRIMINAL LAW §93.3 > SENTENCING -
- JUVENILES -- DEATH -- LIFE WITHOUT PAROLE
> Headnote:

[LEdHN\[16\]](#) [16]

A sentencing rule permissible for adults may not be so for children. Capital punishment generally comports with the *Eighth Amendment*--except it cannot be imposed on children. So too, life without parole is permissible for nonhomicide offenses--except, once again, for children.

CRIMINAL LAW §79 > SENTENCING -- JUVENILES -- LIFE
WITHOUT PAROLE > Headnote:

[LEdHN\[17\]](#) [17]

A judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles. By requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, a mandatory sentencing scheme violates this principle of proportionality, and so the *Eighth*

Amendment's ban on cruel and unusual punishment.

Syllabus

[*461] [***411] [**2457] In each of these cases, a 14-year-old was convicted of murder and sentenced to a mandatory term of life imprisonment without the possibility of parole. In No. 10-9647, petitioner Jackson accompanied two other boys to a video store to commit a robbery; on the way to the store, he learned that one of the boys was carrying a shotgun. Jackson stayed outside the store for most of the robbery, but after he entered, one of his co-conspirators shot and killed the store clerk. Arkansas charged Jackson as an adult with capital felony murder and aggravated robbery, and a jury convicted him of both crimes. The trial court imposed a statutorily mandated sentence of life imprisonment without the possibility of parole. Jackson filed a state habeas petition, arguing that a mandatory life-without-parole term for a 14-year-old violates the *Eighth Amendment*. Disagreeing, the court granted the State's motion to dismiss. The Arkansas Supreme Court affirmed.

In No. 10-9646, petitioner Miller, [****2] along with a friend, beat Miller's neighbor and set fire to his trailer after an evening of drinking and drug use. The neighbor died. Miller was initially charged as a juvenile, but his case was removed to adult court, where he was charged with murder in the course of arson. A jury found Miller guilty, and the trial court imposed a statutorily mandated punishment of life without parole. The Alabama Court of Criminal Appeals [***412] affirmed, holding that Miller's sentence was not overly harsh when compared to his crime, and that its mandatory nature was permissible under the *Eighth Amendment*.

Held: The *Eighth Amendment* forbids a sentencing scheme that mandates [**2458] life in prison without possibility of parole for juvenile homicide offenders. *Pp.* 469-489, 183 L. Ed. 2d, at 417-430.

(a) The *Eighth Amendment's* prohibition of cruel and unusual punishment “guarantees individuals the right not to be subjected to excessive sanctions.” *Roper v. Simmons, 543 U.S. 551, 560, 125 S. Ct. 1183, 161 L. Ed. 2d 1.* That right “flows from the basic ‘precept of justice that punishment for crime should be graduated and proportioned’ ” to both the offender and the offense. *Ibid.*

Two strands of precedent reflecting the concern with

proportionate punishment come together here. The first [****3] has adopted categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty. See, e.g., *Kennedy v. Louisiana, 554 U.S. 407, 128 S. Ct. 2641, 171 L. Ed. 2d 525.* Several cases in this group have specially focused on juvenile offenders, because of their lesser culpability. Thus, *Roper v. Simmons* held that the *Eighth Amendment* bars capital punishment for children, and *Graham v. Florida, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825,* concluded that the Amendment prohibits a sentence of life without the possibility of parole for a juvenile convicted of a nonhomicide offense. *Graham* further likened life without parole for juveniles to the death penalty, thereby evoking a second line of cases. In those decisions, this Court has required sentencing authorities to consider the characteristics of a defendant and the details of his offense before sentencing him to death. See, e.g., *Woodson v. North Carolina, 428 U.S. 280, 96 S. Ct. 2978, 49 L. Ed. 2d 944* (plurality opinion). Here, the confluence of these two lines of precedent leads to the conclusion that mandatory life without parole for juveniles violates the *Eighth Amendment*.

As to the first set of cases: *Roper* and *Graham* establish that children are constitutionally [****4] different from adults for sentencing purposes. Their “ ‘lack of maturity’ ” and “ ‘underdeveloped sense of responsibility’ ” lead to recklessness, impulsivity, and heedless risk-taking. *Roper, 543 U.S., at 569, 125 S. Ct. 1183, 161 L. Ed. 2d 1.* They “are more vulnerable . . . to negative influences and outside pressures,” including from their family and peers; they have limited “contro[ll] over their own environment” and lack the ability to extricate themselves from horrific, crime-producing settings. *Ibid.* And because a child's character is not as “well formed” as an adult's, his traits are “less fixed” and his actions are less likely to be “evidence of irretrievabl[e] deprav[ity].” *Id., at 570, 125 S. Ct. 1183, 161 L. Ed. 2d 1.* *Roper* and *Graham* emphasized that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes.

While *Graham's* flat ban on life without parole was for nonhomicide crimes, nothing that *Graham* said about children is crime-specific. Thus, its reasoning implicates any life-without-parole sentence for a juvenile, even as its categorical bar relates only to nonhomicide offenses. Most fundamentally, *Graham* insists that [****413] youth [****5] matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole.

The mandatory penalty schemes at issue here, however, prevent the sentencer from considering youth and from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender. This contravenes *Graham's* (and also *Roper's*) foundational principle: that imposition of a State's most severe penalties [*462] on juvenile offenders cannot proceed as though they were not children.

[**2459] *Graham* also likened life-without-parole sentences for juveniles to the death penalty. That decision recognized that life-without-parole sentences “share some characteristics with death sentences that are shared by no other sentences.” [560 U.S., at 69, 130 S. Ct. 2011, 176 L. Ed. 2d 825](#). And it treated life without parole for juveniles like this Court's cases treat the death penalty, imposing a categorical bar on its imposition for nonhomicide offenses. By likening life-without-parole sentences for juveniles to the death penalty, *Graham* makes relevant this Court's cases demanding individualized sentencing in capital cases. In particular, those cases have emphasized that sentencers must be able to consider the mitigating [****6] qualities of youth. In light of *Graham's* reasoning, these decisions also show the flaws of imposing mandatory life-without-parole sentences on juvenile homicide offenders. [Pp. 469-480, 183 L. Ed. 2d, at 417-424](#).

(b) The counterarguments of Alabama and Arkansas are unpersuasive. [Pp. 480-489, 183 L. Ed. 2d, at 424-430](#).

(1) The States first contend that [Harmelin v. Michigan, 501 U.S. 957, 111 S. Ct. 2680, 115 L. Ed. 2d 836](#), forecloses a holding that mandatory life-without-parole sentences for juveniles violate the *Eighth Amendment*. *Harmelin* declined to extend the individualized sentencing requirement to noncapital cases “because of the qualitative difference between death and all other penalties.” [Id., at 1006](#) (Kennedy, J., concurring in part and concurring in judgment). But *Harmelin* had nothing to do with children, and did not purport to apply to juvenile offenders. Indeed, since *Harmelin*, this Court has held on multiple occasions that sentencing practices that are permissible for adults may not be so for children. See [Roper, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1](#); [Graham, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825](#).

The States next contend that mandatory life-without-parole terms for juveniles cannot be unconstitutional because 29 jurisdictions impose them on at least some

children convicted of murder. In considering categorical bars [****7] to the death penalty and life without parole, this Court asks as part of the analysis whether legislative enactments and actual sentencing practices show a national consensus against a sentence for a particular class of offenders. But where, as here, this Court does not categorically bar a penalty, but instead requires only that a sentencer follow a certain process, this Court has not scrutinized or relied on legislative enactments in the same way. See, e.g., [Sumner v. Schuman, 483 U.S. 66, 107 S. Ct. 2716, 97 L. Ed. 2d 56](#).

In any event, the “objective indicia of society's standards,” [Graham, 560 U.S., at 61, 130 S. Ct. 2011, 176 L. Ed. 2d 825](#), that the States offer do not distinguish these cases from others holding that a sentencing practice [****414] violates the *Eighth Amendment*. Fewer States impose mandatory life-without-parole sentences on juvenile homicide offenders than authorized the penalty (life-without-parole [*463] for nonhomicide offenders) that this Court invalidated in *Graham*. And as *Graham* and [Thompson v. Oklahoma, 487 U.S. 815, 108 S. Ct. 2687, 101 L. Ed. 2d 702](#), explain, simply counting legislative enactments can present a distorted view. In those cases, as here, the relevant penalty applied to juveniles based on two separate provisions: One allowed the transfer of certain juvenile [****8] offenders to adult court, while another set out penalties for any and all individuals tried there. In those circumstances, this Court reasoned, it was impossible to say whether a legislature had endorsed a given penalty for children (or would do so if presented with the choice). The same is true here. [Pp. 480-487, 183 L. Ed. 2d, at 424-429](#).

[**2460] (2) The States next argue that courts and prosecutors sufficiently consider a juvenile defendant's age, as well as his background and the circumstances of his crime, when deciding whether to try him as an adult. But this argument ignores that many States use mandatory transfer systems. In addition, some lodge the decision in the hands of the prosecutors, rather than courts. And even where judges have transfer-stage discretion, it has limited utility, because the decisionmaker typically will have only partial information about the child or the circumstances of his offense. Finally, because of the limited sentencing options in some juvenile courts, the transfer decision may present a choice between a light sentence as a juvenile and standard sentencing as an adult. It cannot substitute for discretion at post-trial sentencing. [Pp. 487-489, 183 L. Ed. 2d, at 429-430](#).

Counsel: Bryan A. Stevenson argued the cause for petitioners in both cases.

Kent G. Holt argued the cause for respondent in No. 10-9647.

John C. Neiman, Jr. argued the cause for respondent in No. 10-9646.

Judges: Kagan, J., delivered the opinion of the Court, [****9] in which Kennedy, Ginsburg, Breyer, and Sotomayor, JJ., joined. Breyer, J., filed a concurring opinion, in which Sotomayor, J., joined, *post*, p. 489. Roberts, C. J., filed a dissenting opinion, in which Scalia, Thomas, and Alito, JJ., joined, *post*, p. 493. Thomas, J., filed a dissenting opinion, in which Scalia, J., joined, *post*, p. 502. Alito, J., filed a dissenting opinion, in which Scalia, J., joined, *post*, p. 509.

Opinion by: Kagan

Opinion

[*465] Justice **Kagan** delivered the opinion of the Court.

The two 14-year-old offenders in these cases were convicted of murder and sentenced to life imprisonment without the possibility of parole. In neither case did the sentencing authority have any discretion to impose a different punishment. State law mandated that each juvenile die in prison even if a judge or jury would have thought that his youth and its attendant characteristics, along with the nature of his crime, made a lesser sentence (for example, life *with* the possibility of parole) more appropriate. Such a scheme prevents those meting out punishment from considering a juvenile's "lessened culpability" and greater "capacity for change," [Graham v. Florida](#), 560 U.S. 48, 68, 74, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010), and runs afoul of our cases' requirement of individualized sentencing [****10] for defendants facing the most serious penalties. We therefore hold that [HN1](#) [↑] [LEdHN1](#) [↑] [1] mandatory life without parole for those under the age of 18 at the time of their crimes violates the [***415] *Eighth Amendment's* prohibition on "cruel and unusual punishments."

[**2461] |

A

In November 1999, petitioner Kuntrell Jackson, then 14 years old, and two other boys decided to rob a video store. En route to the store, Jackson learned that one of the boys, Derrick Shields, was carrying a sawed-off shotgun in his coat sleeve. Jackson decided to stay outside when the two other boys entered the store. Inside, Shields pointed the gun at the store clerk, Laurie Troup, and demanded that she "give up the money." [Jackson v. State](#), 359 Ark. 87, 89, 194 S.W.3d 757, 759 (2004) (internal quotation marks omitted). Troup refused. A few moments later, Jackson went into the store to find Shields continuing to demand money. At trial, the parties disputed whether Jackson warned Troup that "[w]e ain't playin'," or instead told his friends, "I thought you all was playin'." *Id.*, at 91, 194 S.W.3d, at 760 (internal [*466] quotation marks omitted). When Troup threatened to call the police, Shields shot and killed her. The three boys fled emptyhanded. [****11] See *id.*, at 89-92, 194 S.W.3d, at 758-760.

[HN2](#) [↑] [LEdHN2](#) [↑] [2] Arkansas law gives prosecutors discretion to charge 14-year-olds as adults when they are alleged to have committed certain serious offenses. See [Ark. Code Ann. §9-27-318\(c\)](#) (1998). The prosecutor here exercised that authority by charging Jackson with capital felony murder and aggravated robbery. Jackson moved to transfer the case to juvenile court, but after considering the alleged facts of the crime, a psychiatrist's examination, and Jackson's juvenile arrest history (shoplifting and several incidents of car theft), the trial court denied the motion, and an appellate court affirmed. See [Jackson v. State](#), No. 02-535, 2003 Ark. App. LEXIS 57, 2003 WL 193412, *1 (Ark. App., Jan. 29, 2003); §§9-27-318(d), (e). A jury later convicted Jackson of both crimes. Noting that "in view of [the] verdict, there's only one possible punishment," the judge sentenced Jackson to life without parole. App. in No. 10-9647, p. 55 (hereinafter Jackson App.); see [Ark. Code Ann. §5-4-104\(b\)](#) (1997) ([HN3](#) [↑] [LEdHN3](#) [↑] [3] "A defendant convicted of capital murder or treason shall be sentenced to death or life imprisonment without parole").¹ Jackson did not challenge the sentence on appeal, and the Arkansas Supreme [****12] Court

¹ Jackson was ineligible for the death penalty under [Thompson v. Oklahoma](#), 487 U.S. 815, 108 S. Ct. 2687, 101 L. Ed. 2d 702 (1988) (plurality opinion), which held that capital punishment of offenders under the age of 16 violates the *Eighth Amendment*.

affirmed the convictions. See [359 Ark. 87, 194 S.W.3d 757](#).

Following [Roper v. Simmons, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 \(2005\)](#), in which this Court invalidated the death penalty for all juvenile offenders under the age of 18, Jackson filed a state petition for habeas corpus. He argued, based on *Roper's* reasoning, that a mandatory sentence of life without parole for a 14-year-old also violates the *Eighth Amendment*. The circuit court rejected that argument and granted the State's motion to dismiss. See Jackson App. 72-76. While that ruling was on appeal, this Court held in [Graham v. Florida \[*467\]](#) that life without parole violates the *Eighth Amendment* when imposed on juvenile nonhomicide offenders. After the parties filed briefs addressing that decision, the Arkansas Supreme Court affirmed the dismissal [***416] of Jackson's petition. See [Jackson v. Norris, 2011 Ark. 49, 378 S.W.3d 103](#). The majority found that *Roper* and *Graham* were "narrowly tailored" to their contexts: "death-penalty cases involving [****13] a juvenile and life-imprisonment-without-parole cases for nonhomicide offenses involving a juvenile." [2011 Ark. at 5, 378 S.W.3d, at 106](#). Two justices dissented. They noted that Jackson [**2462] was not the shooter and that "any evidence of intent to kill was severely lacking." [2011 Ark. at 10, 378 S.W.3d, at 109](#) (Danielson, J., dissenting). And they argued that Jackson's mandatory sentence ran afoul of *Graham's* admonition that "[a]n offender's age is relevant to the *Eighth Amendment*, and criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed." [Id., at 10-11, 378 S.W.3d, at 109](#) (quoting [Graham, 560 U.S., at 76, 130 S. Ct. 2011, 176 L. Ed. 2d 825](#)).²

B

Like Jackson, petitioner Evan Miller was 14 years old at

²For the first time in this Court, Arkansas contends that Jackson's sentence was not mandatory. On its view, state law then in effect allowed the trial judge to suspend the life-without-parole sentence and commit Jackson to the Department of Human Services for a "training-school program," at the end of which he could be placed on probation. Brief for Respondent in No. 10-9647, pp. 36-37 (hereinafter Arkansas Brief) (citing Ark. Code Ann. §12-28-403(b)(2) (1999)). But Arkansas never raised that objection in the state [****14] courts, and they treated Jackson's sentence as mandatory. We abide by that interpretation of state law. See, e.g., [Mullaney v. Wilbur, 421 U.S. 684, 690-691, 95 S. Ct. 1881, 44 L. Ed. 2d 508 \(1975\)](#).

the time of his crime. Miller had by then been in and out of foster care because his mother suffered from alcoholism and drug addiction and his stepfather abused him. Miller, too, regularly used drugs and alcohol; and he had attempted suicide four times, the first when he was six years old. See [**468] [E. J. M. v. State, 928 So. 2d 1077, 1081 \(Ala. Crim. App. 2004\)](#) (Cobb, J., concurring in result); App. in No. 10-9646, pp. 26-28 (hereinafter Miller App.).

One night in 2003, Miller was at home with a friend, Colby Smith, when a neighbor, Cole Cannon, came to make a drug deal with Miller's mother. See 6 Record in No. 10-9646, p. 1004. The two boys followed Cannon back to his trailer, where all three smoked marijuana and played drinking games. When Cannon passed out, Miller stole his wallet, splitting about \$300 with Smith. Miller then tried to put the wallet back in Cannon's pocket, but Cannon awoke and grabbed Miller by the throat. Smith hit Cannon with a nearby baseball [****15] bat, and once released, Miller grabbed the bat and repeatedly struck Cannon with it. Miller placed a sheet over Cannon's head, told him " 'I am God, I've come to take your life,' " and delivered one more blow. [63 So. 3d 676, 689 \(Ala. Crim. App. 2010\)](#). The boys then retreated to Miller's trailer, but soon decided to return to Cannon's to cover up evidence of their crime. Once there, they lit two fires. Cannon eventually died from his injuries and smoke inhalation. See [id., at 683-685, 689](#).

Alabama law required that Miller initially be charged as a juvenile, but allowed [HN4](#) [↑] [LEdHN\[4\]](#) [↑] [4] the District Attorney to seek removal of the case to adult court. See Ala. Code §12-15-34 (1977). The D. A. did so, and the juvenile court agreed to the transfer after a [***417] hearing. Citing the nature of the crime, Miller's "mental maturity," and his prior juvenile offenses (truancy and "criminal mischief"), the Alabama Court of Criminal Appeals affirmed. [E.J.M. v. State, No. CR-03-0915, pp. 5-7, 928 So. 2d 1077 \(Aug. 27, 2004\)](#) (unpublished memorandum).³ The State [**469]

³The Court of Criminal Appeals also affirmed the juvenile court's denial of Miller's request for funds to hire his own mental expert for the transfer hearing. The court pointed out that under governing Alabama Supreme Court precedent, "the procedural requirements of a trial do not ordinarily apply" to those hearings. [E.J.M. v. State, 928 So. 2d 1077 \(2004\)](#) (Cobb, J., concurring in result) (internal quotation marks omitted). In a separate opinion, Judge Cobb agreed on the reigning precedent, but urged the State Supreme Court to

accordingly [****2463**] charged Miller as an adult with [HN5](#) [↑] [LEdHNJ5](#) [↑] [5] murder in the course of arson. That crime (like capital murder in Arkansas) carries a mandatory minimum punishment [******16**] of life without parole. See *Ala. Code* §§13A-5-40(a)(9), [13A-6-2\(c\)](#) (1982).

Relying in significant part on testimony from Smith, who had pleaded to a lesser offense, a jury found Miller guilty. He was therefore sentenced to life without the possibility of parole. The Alabama Court of Criminal Appeals affirmed, ruling that life without parole was “not overly harsh when compared to the crime” and that the mandatory nature of the sentencing scheme [******17**] was permissible under the *Eighth Amendment*. [63 So. 3d, at 690](#); see *id.*, [at 686-691](#). The Alabama Supreme Court denied review.

We granted certiorari in both cases, see *565 U.S. 1013, 132 S. Ct. 548, 181 L. Ed. 2d 395 (2011)*, and now reverse.

II

[HN6](#) [↑] [LEdHNJ6](#) [↑] [6] The *Eighth Amendment's* prohibition of cruel and unusual punishment “guarantees individuals the right not to be subjected to excessive sanctions.” *Roper, 543 U.S., at 560, 125 S. Ct. 1183, 161 L. Ed. 2d 1*. That right, we have explained, “flows from the basic ‘precept of justice that punishment for crime should be graduated and proportioned’ ” to both the offender and the offense. *Ibid.* (quoting *Weems v. United States, 217 U.S. 349, 367, 30 S. Ct. 544, 54 L. Ed. 793 (1910)*). As we noted the last time we considered life-without-parole sentences imposed on juveniles, “[t]he concept of proportionality is central to the *Eighth Amendment*.” *Graham, 560 U.S., at 59, 130 S. Ct. 2011, 176 L. Ed. 2d 825*. And we view that concept less through a historical prism than according to “ ‘the evolving standards of decency that mark the progress of a maturing society.’ ” *Estelle [*470] v. Gamble, 429 U.S. 97, 102, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976)* (quoting *Trop v. Dulles, 356 U.S. 86, 101, 78 S. Ct. 590, 2 L. Ed. 2d 630 (1958)* (plurality opinion)).

The cases before us implicate two strands of precedent [******18**] reflecting our concern with proportionate punishment. The first has adopted categorical bans on sentencing practices based on mismatches between the

culpability of a class of offenders and the severity of a penalty. See *Graham, 560 U.S., at 60-61, 130 S. Ct. 2011, 176 L. Ed. 2d 825* (listing cases). So, for example, we have held that imposing the death penalty for nonhomicide crimes against individuals, or imposing it on mentally retarded defendants, violates the *Eighth Amendment*. [******418**] See *Kennedy v. Louisiana, 554 U.S. 407, 128 S. Ct. 2641, 171 L. Ed. 2d 525 (2008)*; *Atkins v. Virginia, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002)*. Several of the cases in this group have specially focused on juvenile offenders, because of their lesser culpability. Thus, *Roper* held that the *Eighth Amendment* bars capital punishment for children, and *Graham* concluded that the Amendment also prohibits a sentence of life without the possibility of parole for a child who committed a nonhomicide offense. *Graham* further likened life without parole for juveniles to the death penalty itself, thereby evoking a second line of our precedents. In those cases, we have prohibited mandatory imposition of capital punishment, requiring that sentencing authorities consider the characteristics of a [******19**] defendant and the details of his [****2464**] offense before sentencing him to death. See *Woodson v. North Carolina, 428 U.S. 280, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976)* (plurality opinion); *Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978)*. Here, the confluence of these two lines of precedent leads to the conclusion that [HN7](#) [↑] [LEdHNJ7](#) [↑] [7] mandatory life-without-parole sentences for juveniles violate the *Eighth Amendment*.⁴

⁴The three dissenting opinions here each take issue with some or all of those precedents. See *post, at 497-498, 183 L. Ed. 2d, at 435-436* (opinion of Roberts, C. J.); *post, at 502-507, 183 L. Ed. 2d, at 438-441* (opinion of Thomas, J.); *post, at 510-513, 183 L. Ed. 2d, at 443-445* (opinion of Alito, J.). That is not surprising: their authors (and joiner) each dissented from some or all of those precedents. See, e.g., *Kennedy, 554 U.S., at 447, 128 S. Ct. 2641, 171 L. Ed. 2d 525* (Alito, J., joined by Roberts, C. J., and Scalia and Thomas, JJ., dissenting); *Roper, 543 U.S., at 607, 125 S. Ct. 1183, 161 L. Ed. 2d 1* (Scalia, J., joined by Thomas, J., dissenting); *Atkins, 536 U.S., at 337, 122 S. Ct. 2242, 153 L. Ed. 2d 335* (Scalia, J., joined by Thomas, J., dissenting); *Thompson, 487 U.S., at 859, 108 S. Ct. 2687, 101 L. Ed. 2d 702* ((Scalia, J., dissenting); *Graham v. Collins, 506 U.S. 461, 487, 113 S. Ct. 892, 122 L. Ed. 2d 260 (1993)* (Thomas, J., concurring) (contending that *Woodson* was wrongly decided). In particular, each disagreed with the majority's reasoning in *Graham*, which is the foundation stone [******20**] of our analysis. See *Graham, 560 U.S., at 86, 130 S. Ct. 2011, 176 L. Ed. 2d 825* (Roberts, C. J., concurring in judgment); *id., at 97, 130 S. Ct. 2011, 176 L. Ed. 2d 825* (Thomas, J., joined by Scalia and Alito, JJ.,

revisit the question in light of transfer hearings' importance. See *id., at 1081* (“[A]lthough later mental evaluation as an adult affords some semblance of procedural due process, it is, in effect, too little, too late”).

[*471] To start with the first set of cases: *Roper* and *Graham* establish that [HN8](#) [LEdHN8](#) [8] children are constitutionally different from adults for purposes of sentencing. Because juveniles have diminished culpability and greater prospects for reform, we explained, “they are less deserving of the most severe punishments.” *Graham*, 560 U.S., at 68, 130 S. Ct. 2011, 176 L. Ed. 2d 825. Those cases relied on three significant gaps between juveniles and adults. First, children have a “ ‘lack of maturity and an underdeveloped sense of responsibility,’ ” leading to recklessness, impulsivity, and heedless risk-taking. *Roper*, 543 U.S., at 569, 125 S. Ct. 1183, 161 L. Ed. 2d 1. Second, children “are more vulnerable . . . to negative influences and outside pressures,” including from [****21] their family and peers; they have limited “contro[l] over their own environment” and lack the ability to extricate themselves from horrific, crime-producing settings. *Ibid.* And third, a child’s character is not as “well formed” as an adult’s; his traits are “less fixed” and his actions less likely to be “evidence of irretrievabl[e] deprav[ity].” *Id.*, at 570, 125 S. Ct. 1183, 161 L. Ed. 2d 1.

Our decisions rested not only on common sense--on what “any parent [****419] knows”--but on science and social science as well. *Id.*, at 569, 125 S. Ct. 1183, 161 L. Ed. 2d 1. In *Roper*, we cited studies showing that “ ‘[o]nly a relatively small proportion of adolescents’ ” who engage in illegal activity “ ‘develop entrenched patterns of problem behavior.’ ” *Id.*, at 570, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (quoting Steinberg & Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 *Am. Psychologist* 1009, 1014 (2003)). And in *Graham*, we noted that “developments in psychology and brain science continue to show fundamental differences between [*472] juvenile and adult minds”--for example, in “parts of the brain involved in behavior control.” 560 U.S., at 68, 130 S. Ct. 2011, 176 L. Ed. 2d 825.⁵ We reasoned that those findings--of [**2465]

dissenting); *id.*, at 124, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (Alito, J., dissenting). While the dissents seek to relitigate old **Eighth Amendment** battles, repeating many arguments this Court has previously (and often) rejected, we apply the logic of *Roper*, *Graham*, and our individualized sentencing decisions to these two cases.

⁵The evidence presented to us in these cases indicates that the science and social science supporting *Roper*’s and *Graham*’s conclusions have become even stronger. See, e.g., Brief for American Psychological Association et al. as *Amici Curiae* 3 (“[A]n ever-growing body of research in

transient rashness, proclivity for [****22] risk, and inability to assess consequences--both lessened a child’s “moral culpability” and enhanced the prospect that, as the years go by and neurological development occurs, his “ ‘deficiencies will be reformed.’ ” *Ibid.* (quoting *Roper*, 543 U.S., at 570, 125 S. Ct. 1183, 161 L. Ed. 2d 1).

Roper and *Graham* emphasized [****23] that [HN9](#) [LEdHN9](#) [9] the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes. Because “ ‘[t]he heart of the retribution rationale’ ” relates to an offender’s blameworthiness, “ ‘the case for retribution is not as strong with a minor as with an adult.’ ” *Graham*, 560 U.S., at 71, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (quoting *Tison v. Arizona*, 481 U.S. 137, 149, 107 S. Ct. 1676, 95 L. Ed. 2d 127 (1987); *Roper*, 543 U.S., at 571, 125 S. Ct. 1183, 161 L. Ed. 2d 1). Nor can deterrence do the work in this context, because “ ‘the same characteristics that render juveniles less culpable than adults’ ”--their immaturity, recklessness, and impetuosity--make them less likely to consider potential punishment. *Graham*, 560 U.S., at 72, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (quoting *Roper*, 543 U.S., at 571, 125 S. Ct. 1183, 161 L. Ed. 2d 1). Similarly, incapacitation could not support the life-without-parole sentence in *Graham*: Deciding that a “juvenile offender forever will be a danger to society” would [*473] require “mak[ing] a judgment that [he] is incorrigible”--but “ ‘incorrigibility is inconsistent with youth.’ ” 560 U.S., at 72-73, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (quoting *Workman v. Commonwealth*, 429 S.W.2d 374, 378 (Ky. App. 1968)). And for the same reason, [****24] rehabilitation could not justify that sentence. Life without parole “forfeits altogether the rehabilitative ideal.” *Graham*, 560 U.S., at 74, 130 S. Ct. 2011, 176 L. Ed. 2d 825. It reflects “an irrevocable judgment about [an offender’s] [****420] value and place in society,” at odds with a child’s capacity for change. *Ibid.*

developmental psychology and neuroscience continues to confirm and strengthen the Court’s conclusions”); *id.*, at 4 (“It is increasingly clear that adolescent brains are not yet fully mature in regions and systems related to higher-order executive functions such as impulse control, planning ahead, and risk avoidance”); Brief for J. Lawrence Aber et al. as *Amici Curiae* 12-28 (discussing post-*Graham* studies); *id.*, at 26-27 (“Numerous studies post-*Graham* indicate that exposure to deviant peers leads to increased deviant behavior and is a consistent predictor of adolescent delinquency” (footnote omitted)).

Graham concluded from this analysis that life-without-parole sentences, like capital punishment, may violate the *Eighth Amendment* when imposed on children. To be sure, *Graham's* flat ban on life without parole applied only to nonhomicide crimes, and the Court took care to distinguish those offenses from murder, based on both moral culpability and consequential harm. See *id.*, at 69, [130 S. Ct. 2011, 176 L. Ed. 2d 825](#). But none of what it said about children--about their distinctive (and transitory) mental traits and environmental vulnerabilities--is crime-specific. Those features are evident in the same way, and to the same degree, when (as in both cases here) a botched robbery turns into a killing. So *Graham's* reasoning implicates any life-without-parole sentence imposed on a juvenile, even as its categorical bar relates only to nonhomicide offenses.

Most fundamentally, *Graham* insists that [HN10](#) [LEdHN\[10\]](#) [10] youth matters in [****25] determining the appropriateness of a lifetime of incarceration without the possibility of parole. In the circumstances there, juvenile status precluded a life-without-parole sentence, even though an adult could receive it for a similar crime. And in other contexts as well, the characteristics of youth, and the [**2466] way they weaken rationales for punishment, can render a life-without-parole sentence disproportionate. Cf. *id.*, at 71-74, [130 S. Ct. 2011, 176 L. Ed. 2d 825](#) (generally doubting the penological justifications for imposing life without parole on juveniles). "An offender's age," we made clear in *Graham*, "is relevant to the *Eighth Amendment*," and so "criminal procedure laws that fail to take defendants' youthfulness into account at all [**474] would be flawed." *Id.*, at 76, [130 S. Ct. 2011, 176 L. Ed. 2d 825](#). The Chief Justice, concurring in the judgment, made a similar point. Although rejecting a categorical bar on life-without-parole sentences for juveniles, he acknowledged "*Roper's* conclusion that juveniles are typically less culpable than adults," and accordingly wrote that "an offender's juvenile status can play a central role" in considering a sentence's proportionality. *Id.*, at 96, [130 S. Ct. 2011, 176 L. Ed. 2d 825](#); see [****26] *id.*, at 90, [130 S. Ct. 2011, 176 L. Ed. 2d 825](#) (*Graham's* "youth is one factor, among others, that should be considered in deciding whether his punishment was unconstitutionally excessive").⁶

⁶In discussing *Graham*, the dissents essentially ignore all of this reasoning. See [post](#), at 495-498, [183 L. Ed. 2d](#), at 434-436 (opinion of Roberts, C. J.); [post](#), at 512-513, [183 L. Ed. 2d](#), at 445 (opinion of Alito, J.). Indeed, The Chief Justice ignores the points made in his own concurring opinion. The

But the mandatory penalty schemes at issue here prevent the sentencer from taking account of these central considerations. By removing youth from the balance--by subjecting a juvenile to the same life-without-parole sentence applicable to an adult--these laws prohibit a sentencing authority from assessing whether the law's harshest term of imprisonment [****27] proportionately punishes [***421] a juvenile offender. That contravenes *Graham's* (and also *Roper's*) foundational principle: that [HN11](#) [LEdHN\[11\]](#) [11] imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children.

And *Graham* makes plain these mandatory schemes' defects in another way: by likening life-without-parole sentences imposed on juveniles to the death penalty itself. Life-without-parole terms, the Court wrote, "share some characteristics with death sentences that are shared by no other sentences." [560 U.S.](#), at 69, [130 S. Ct. 2011, 176 L. Ed. 2d 825](#). Imprisoning an offender until he dies alters the remainder of his life "by a forfeiture [**475] that is irrevocable." *Ibid.* (citing [Solem v. Helm](#), [463 U.S. 277, 300-301, 103 S. Ct. 3001, 77 L. Ed. 2d 637 \(1983\)](#)). And this lengthiest possible incarceration is an "especially harsh punishment for a juvenile," because he will almost inevitably serve "more years and a greater percentage of his life in prison than an adult offender." [Graham](#), [560 U.S.](#), at 70, [130 S. Ct. 2011, 176 L. Ed. 2d 825](#). The penalty when imposed on a teenager, as compared with an older person, is therefore "the same . . . in name only." *Ibid.* at [130 S. Ct. 2011, 176 L. Ed. 2d 825](#). All of that suggested a distinctive set of [****28] legal rules: In part because we viewed this ultimate penalty for juveniles as akin to the death penalty, we treated it similarly to that most severe punishment. We imposed a categorical ban on the sentence's use, in a way unprecedented for a term of imprisonment. See *id.*, at 60, [130 S. Ct. 2011, 176 L. Ed. 2d 825](#); *id.*, at 102, [130 S. Ct. 2011, 176 L. Ed. 2d 825](#) (Thomas, J., dissenting) ("For the first time in its history, the Court declares an entire class of offenders immune from a noncapital sentence using the

only part of *Graham* that the dissents see fit to note is the distinction it drew between homicide and nonhomicide offenses. See [post](#), at 499-500, [183 L. Ed. 2d](#), at 436-437 (opinion of Roberts, C. J.); [post](#), at 512-513, [183 L. Ed. 2d](#), at 445 (opinion of Alito, J.). But contrary to the dissents' charge, our decision today retains that distinction: *Graham* established one rule (a flat ban) for nonhomicide offenses, while we set out a different one (individualized sentencing) for homicide offenses.

categorical approach it [****2467**] previously reserved for death penalty cases alone”). And the bar we adopted mirrored a proscription first established in the death penalty context--that the punishment cannot be imposed for any nonhomicide crimes against individuals. See [Kennedy, 554 U.S. 407, 128 S. Ct. 2641, 171 L. Ed. 2d 525](#); [Coker v. Georgia, 433 U.S. 584, 97 S. Ct. 2861, 53 L. Ed. 2d 982 \(1977\)](#).

That correspondence--*Graham's* “[t]reat[ment] [of] juvenile life sentences as analogous to capital punishment,” [560 U.S., at 89, 130 S. Ct. 2011, 176 L. Ed. 2d 825](#) (Roberts, C. J., concurring in judgment)--makes relevant here a second line of our precedents, demanding individualized sentencing when imposing the death penalty. In [Woodson, 428 U.S. 280, 96 S. Ct. 2978, 49 L. Ed. 2d 944](#), we held that [HN12](#) [[↑](#)] [LEdHN12](#) [[↑](#)] [12] a statute mandating a death sentence for first-degree [******29**] murder violated the *Eighth Amendment*. We thought the mandatory scheme flawed because it gave no significance to “the character and record of the individual offender or the circumstances” of the offense, and “exclud[ed] from consideration . . . the possibility of compassionate or mitigating factors.” *Id.*, at 304, 96 S. Ct. 2978, 49 L. Ed. 2d 944. Subsequent decisions have elaborated on the requirement that capital defendants have an opportunity to advance, and the judge or [***476**] jury a chance to assess, any mitigating factors, so that the death penalty is reserved only for the most culpable defendants committing the most serious offenses. See, e.g., [Sumner v. Shuman, 483 U.S. 66, 74-76, 107 S. Ct. 2716, 97 L. Ed. 2d 56 \(1987\)](#); [Eddings v. Oklahoma, 455 U.S. 104, 110-112, \[*****422**\] 102 S. Ct. 869, 71 L. Ed. 2d 1 \(1982\)](#); [Lockett, 438 U.S., at 597-609, 98 S. Ct. 2954, 57 L. Ed. 2d 973](#) (plurality opinion).

Of special pertinence here, we insisted in these rulings that [HN13](#) [[↑](#)] [LEdHN13](#) [[↑](#)] [13] a sentencer have the ability to consider the “mitigating qualities of youth.” [Johnson v. Texas, 509 U.S. 350, 367, 113 S. Ct. 2658, 125 L. Ed. 2d 290 \(1993\)](#). Everything we said in *Roper* and *Graham* about that stage of life also appears in these decisions. As we observed, “youth is more than a chronological fact.” [Eddings, 455 U.S., at 115, 102 S. Ct. 869, 71 L. Ed. 2d 1](#). It is a time of immaturity, irresponsibility, “impetuousness[,] and [******30**] recklessness.” [Johnson, 509 U.S., at 368, 113 S. Ct. 2658, 125 L. Ed. 2d 290](#). It is a moment and “condition of life when a person may be most susceptible to influence and to psychological damage.” [Eddings, 455 U.S., at 115, 102 S. Ct. 869, 71 L. Ed. 2d 1](#). And its “signature qualities” are all “transient.”

[Johnson, 509 U.S., at 368, 113 S. Ct. 2658, 125 L. Ed. 2d 290](#). *Eddings* is especially on point. There, a 16-year-old shot a police officer point-blank and killed him. We invalidated his death sentence because the judge did not consider evidence of his neglectful and violent family background (including his mother's drug abuse and his father's physical abuse) and his emotional disturbance. We found that evidence “particularly relevant”--more so than it would have been in the case of an adult offender. [455 U.S., at 115, 102 S. Ct. 869, 71 L. Ed. 2d 1](#). We held: “[J]ust as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered” in assessing his culpability. *Id.*, at 116, 102 S. Ct. 869, 71 L. Ed. 2d 1.

In light of *Graham's* reasoning, these decisions too show the flaws of imposing mandatory life-without-parole sentences on juvenile homicide offenders. Such mandatory penalties, by their nature, preclude a sentencer [******31**] from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it. Under these schemes, [***477**] every juvenile will receive the same sentence as every other--the 17-year-old and the 14-year-old, the shooter and the accomplice, the child from a stable household and the child from [****2468**] a chaotic and abusive one. And still worse, each juvenile (including these two 14-year-olds) will receive the same sentence as the vast majority of adults committing similar homicide offenses--but really, as *Graham* noted, a *greater* sentence than those adults will serve.⁷ In meting out the death penalty, the elision of all these differences would be strictly forbidden. And once again, *Graham* indicates that a similar rule should apply when a juvenile confronts a sentence of life (and death) in prison.

So *Graham* and *Roper* and our individualized sentencing cases alike teach that in imposing a State's harshest penalties, a sentencer misses too much if he treats every [*****423**] child as an adult. To recap: [HN14](#)

⁷ Although adults are subject as well to the death penalty in many jurisdictions, very few offenders actually receive that sentence. See, e.g., Dept. of Justice, Bureau of Justice Statistics, S. Rosenmerkel, M. Durose, & D. Farole, *Felony Sentences in State Courts, 2006--Statistical Tables*, p. 28 (Table 4.4) (rev. Nov. 22, 2010). So in practice, the sentencing schemes at issue here [******32**] result in juvenile homicide offenders receiving the same nominal punishment as almost all adults, even though the two classes differ significantly in moral culpability and capacity for change.

[↑](#) [LEdHN\[14\]](#)[↑](#) [14] Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features--among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him--and from which he cannot usually extricate himself--no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth--for example, his inability to deal with police officers [*478] or prosecutors (including on a plea agreement) or his incapacity [****33] to assist his own attorneys. See, e.g., [Graham, 560 U.S., at 78, 130 S. Ct. 2011, 176 L. Ed. 2d 825](#) (“[T]he features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings”); [J. D. B. v. North Carolina, 564 U.S. 261, 269, 131 S. Ct. 2394, 180 L. Ed. 2d 310 \(2011\)](#) (discussing children’s responses to interrogation). And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.

Both cases before us illustrate the problem. Take Jackson’s first. As noted earlier, Jackson did not fire the bullet that killed Laurie Troup; nor did the State argue that he intended her death. Jackson’s conviction was instead based on an aiding-and-abetting theory; and the appellate court affirmed the verdict only because the jury could have believed that when Jackson entered the store, he warned Troup that “[w]e ain’t playin’,” rather than told his friends that “I thought you all was playin’.” See [359 Ark., at 90-92, 194 S.W.3d, at 759-760; supra, at 465, 183 L. Ed. 2d, at 424](#). To be sure, Jackson learned on the way to the video store that his friend Shields was carrying a gun, but his age could well have affected his calculation of the risk that [****34] posed, as well as his willingness to walk away at that point. All these circumstances go to Jackson’s culpability for the offense. See [Graham, 560 U.S., at 69, 130 S. Ct. 2011, 176 L. Ed. 2d 825](#) (“[W]hen compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability”). And so too does Jackson’s family background and immersion in violence: Both his mother and his grandmother had previously shot other individuals. See Record in No. 10-9647, [**2469] pp. 80-82. At the least, a sentencer should look at such facts before depriving a 14-year-old of any prospect of release from prison.

That is true also in Miller’s case. No one can doubt that he and Smith committed a vicious murder. But they did it when high on drugs and alcohol consumed with the adult victim. And if ever a pathological background might have [*479] contributed to a 14-year-old’s commission of a crime, it is here. Miller’s stepfather physically abused him; his alcoholic and drug-addicted mother neglected him; he had been in and out of foster care as a result; and he had tried to kill himself four times, the first when he should have been in kindergarten. See [928 So. 2d, at 1081](#) (Cobb, J., concurring [****35] in result); Miller App. 26-28; [supra, at 467-468, 183 L. Ed. 2d, at 430](#). Nonetheless, Miller’s past criminal history was limited--two instances of truancy and one of “second-degree [****424] criminal mischief.” No. CR-03-0915, at 6 (unpublished memorandum). That Miller deserved severe punishment for killing Cole Cannon is beyond question. But once again, a sentencer needed to examine all these circumstances before concluding that life without any possibility of parole was the appropriate penalty.

We therefore hold that [HN15](#)[↑](#) [LEdHN\[15\]](#)[↑](#) [15] the *Eighth Amendment* forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders. Cf. [Graham, 560 U.S., at 75, 130 S. Ct. 2011, 176 L. Ed. 2d 825](#) (“A State is not required to guarantee eventual freedom,” but must provide “some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation”). By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment. Because that holding is sufficient to decide these cases, we do not consider Jackson’s and Miller’s alternative argument that the *Eighth Amendment* requires a categorical bar on life without [****36] parole for juveniles, or at least for those 14 and younger. But given all we have said in *Roper*, *Graham*, and this decision about children’s diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon. That is especially so because of the great difficulty we noted in *Roper* and *Graham* of distinguishing at this early age between “the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable [*480] corruption.” [Roper, 543 U.S., at 573, 125 S. Ct. 1183, 161 L. Ed. 2d 1; Graham, 560 U.S., at 68, 130 S. Ct. 2011, 176 L. Ed. 2d 825](#). Although we do not foreclose a sentencer’s ability to make that judgment in homicide cases, we require it to take into account how children are different,

and how those differences counsel against irrevocably sentencing them to a lifetime in prison.⁸

III

Alabama and Arkansas offer two kinds of arguments against requiring individualized **[**2470]** consideration before sentencing a juvenile to life imprisonment without possibility of parole. The States (along with the dissents) first contend that the rule we adopt conflicts with aspects of our *Eighth Amendment* caselaw. And they next assert that the rule is unnecessary because individualized circumstances come into play in deciding whether to try a juvenile offender as an adult. We think the States are wrong on both counts.

[*425]** A

The States (along with Justice Thomas) first claim **[****38]** that *Harmelin v. Michigan*, 501 U.S. 957, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991), precludes our holding. The defendant in *Harmelin* was sentenced to a mandatory life-without-parole term for possessing more than 650 grams of cocaine. The Court upheld that penalty, reasoning **[*481]** that “a sentence which is not otherwise cruel and unusual” does not “becom[e] so simply because it is ‘mandatory.’” *Id.*, at 995, 111 S. Ct. 2680, 115 L. Ed. 2d 836. We recognized that a different rule, requiring individualized sentencing, applied in the death penalty context. But we refused to extend that command to noncapital cases “because of the qualitative difference between death and all other penalties.” *Ibid.*; see *id.*, at 1006, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (Kennedy, J., concurring in part and concurring in judgment). According to Alabama,

⁸ Given our holding, and the dissents’ competing position, we see a certain irony in their repeated references to 17-year-olds who have committed the “most heinous” offenses, and their comparison of those defendants to the 14-year-olds here. See *post*, at 494, 183 L. Ed. 2d, at 433 (opinion of Roberts, C. J.) **[****37]** (noting the “17-year old [who] is convicted of deliberately murdering an innocent victim”); *post*, at 495, 183 L. Ed. 2d, at 433 (“the most heinous murders”); *post*, at 499, 183 L. Ed. 2d, at 436 (“the worst types of murder”); *post*, at 513, 183 L. Ed. 2d, at 445 (opinion of Alito, J.) (warning the reader not to be “confused by the particulars” of these two cases); *post*, at 510, 183 L. Ed. 2d, at 443 (discussing the “17\2-year-old who sets off a bomb in a crowded mall”). Our holding requires factfinders to attend to exactly such circumstances--to take into account the differences among defendants and crimes. By contrast, the sentencing schemes that the dissents find permissible altogether preclude considering these factors.

invalidating the mandatory imposition of life-without-parole terms on juveniles “would effectively overrule *Harmelin*.” Brief for Respondent in No. 10-9646, p. 59 (hereinafter Alabama Brief); see Arkansas Brief 39.

We think that argument myopic. *Harmelin* had nothing to do with children and did not purport to apply its holding to the sentencing of juvenile offenders. We have by now held on multiple occasions that [HN16](#) [LEdHN](#) [16](#) [16] a sentencing rule permissible for adults may not be so for children. **[****39]** Capital punishment, our decisions hold, generally comports with the *Eighth Amendment*--except it cannot be imposed on children. See *Roper*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1; *Thompson*, 487 U.S. 815, 108 S. Ct. 2687, 101 L. Ed. 2d 702. So too, life without parole is permissible for nonhomicide offenses--except, once again, for children. See *Graham*, 560 U.S., at 75, 130 S. Ct. 2011, 176 L. Ed. 2d 825. Nor are these sentencing decisions an oddity in the law. To the contrary, “[o]ur history is replete with laws and judicial recognition’ that children cannot be viewed simply as miniature adults.” *J. D. B.*, 564 U.S., at 274, 131 S. Ct. 2394, 180 L. Ed. 2d 310 (quoting *Eddings*, 455 U.S., at 115-116, 102 S. Ct. 869, 71 L. Ed. 2d 1, citing examples from criminal, property, contract, and tort law). So if (as *Harmelin* recognized) “death is different,” children are different too. Indeed, it is the odd legal rule that does *not* have some form of exception for children. In that context, it is no surprise that the law relating to society’s harshest punishments recognizes such a distinction. Cf. *Graham*, 560 U.S., at 91, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (Roberts, C. J., concurring in judgment) (“*Graham*’s age **[*482]** places him in a significantly different category from the defendan[t] in . . . *Harmelin*”). Our ruling thus neither overrules **[****40]** nor undermines nor conflicts with *Harmelin*.

Alabama and Arkansas (along with The Chief Justice and Justice Alito) next contend that because many States impose mandatory life-without-parole sentences on juveniles, we may not hold the practice unconstitutional. In considering categorical bars to the death penalty and life without parole, we ask as part of the analysis whether “ ‘objective indicia of society’s standards, as expressed in legislative enactments and state practice,’ ” show a “national consensus” against a sentence for a particular class of offenders. **[**2471]** *Graham*, 560 U.S., at 61, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (quoting *Roper*, 543 U.S., at 563, 125 S. Ct. 1183, 161 L. Ed. 2d 1). By our **[***426]** count, 29 jurisdictions (28 States and the Federal Government) make a life-without-parole term mandatory for some juveniles

convicted of murder in adult court.⁹ The States argue that this number precludes our holding.

We do not agree; indeed, we think the States' argument on this score *weaker* than the one we rejected in *Graham*. [*483] For starters, the cases here are different from the typical one in which we have tallied legislative enactments. Our decision does not categorically bar a penalty for a class of offenders [****42] or type of crime--as, for example, we did in *Roper* or *Graham*. Instead, it mandates only that a sentencer follow a certain process--considering an offender's youth and attendant characteristics--before imposing a particular penalty. And in so requiring, our decision flows straightforwardly from our precedents: specifically, the principle of *Roper*, *Graham*, and our individualized sentencing cases that youth matters for purposes of meting out the law's most serious punishments. When both of those circumstances have obtained in the past, we have not scrutinized or relied in the same way on legislative enactments. See, e.g., *Sumner v. Shuman*, 483 U.S. 66, 107 S. Ct. 2716, 97 L. Ed. 2d 56 (relying on *Woodson*'s logic to prohibit the mandatory death penalty for murderers already serving life without parole); *Lockett*, 438 U.S., at 602-608, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (plurality opinion) (applying *Woodson* to require that judges and juries consider all mitigating evidence); *Eddings*, 455 U.S., at 110-117, 102 S. Ct. 869, 71 L. Ed. 2d 1 (similar). We see no

difference here.

In any event, the "objective indicia" that the States offer do not distinguish these cases from others holding that a sentencing practice violates the *Eighth Amendment*. In *Graham*, we prohibited life-without-parole terms [****43] for juveniles committing nonhomicide offenses even though 39 jurisdictions permitted that sentence. See 560 U.S., at 62, 130 S. Ct. 2011, 176 L. Ed. 2d 825. That is 10 *more* than impose life without parole on juveniles on a mandatory basis.¹⁰ And [**2472] In *Atkins*, *Roper*, and *Thompson*, [*484] we similarly banned the death penalty in [***427] circumstances in which "less than half" of the "States that permit[ted] capital punishment (for whom the issue exist[ed])" had previously chosen to do so. *Atkins*, 536 U.S., at 342, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (Scalia, J., dissenting) (emphasis deleted); see *id.*, at 313-315, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (majority opinion); *Roper*, 543 U.S., at 564-565, 125 S. Ct. 1183, 161 L. Ed. 2d 1; *Thompson*, 487 U.S., [*485] at 826-827, 108 S. Ct. 2687, 101 L. Ed. 2d 702 (plurality opinion). So we are

⁹The States note that 26 States and the Federal Government make life without parole the mandatory (or mandatory minimum) punishment for some form of murder, and would apply the relevant provision to 14-year-olds (with many applying it to even younger defendants). See Alabama Brief 17-18. In addition, life without parole is mandatory [****41] for older juveniles in Louisiana (age 15 and up) and Texas (age 17). See *La. Child. Code Ann., Arts. 857(A), (B)* (West Supp. 2012); *La. Rev. Stat. Ann. §§14:30(C), 14:30.1(B)* (West Supp. 2012); *Tex. Fam. Code Ann. §§51.02(2)(A), 54.02(a)(2)(A)* (West Supp. 2011); *Tex. Penal Code Ann. §12.31(a)* (West 2011). In many of these jurisdictions, life without parole is the mandatory punishment only for aggravated forms of murder. That distinction makes no difference to our analysis. We have consistently held that limiting a mandatory death penalty law to particular kinds of murder cannot cure the law's "constitutional vice" of disregarding the "circumstances of the particular offense and the character and propensities of the offender." *Roberts v. Louisiana*, 428 U.S. 325, 333, 96 S. Ct. 3001, 49 L. Ed. 2d 974 (1976) (plurality opinion); see *Sumner v. Shuman*, 483 U.S. 66, 107 S. Ct. 2716, 97 L. Ed. 2d 56 (1987). The same analysis applies here, for the same reasons.

¹⁰In assessing indicia of societal standards, *Graham* discussed "[a]ctual sentencing practices" in addition to legislative enactments, noting how infrequently sentencers imposed the statutorily available penalty. 560 U.S., at 62, 130 S. Ct. 2011, 176 L. Ed. 2d 825. Here, we consider the constitutionality of mandatory sentencing schemes--which by definition remove a judge's or jury's discretion--so no comparable gap between legislation and practice can exist. Rather than showing whether sentencers consider life [****44] without parole for juvenile homicide offenders appropriate, the number of juveniles serving this sentence, see *post*, at 493-494, 495-496, 183 L. Ed. 2d, at 433, 434, (Roberts, C. J., dissenting), merely reflects the number who have committed homicide in mandatory-sentencing jurisdictions. For the same reason, The Chief Justice's comparison of ratios in this cases and *Graham* carries little weight. He contrasts the number of mandatory life-without-parole sentences for juvenile murderers, relative to the number of juveniles arrested for murder, with "the corresponding number" of sentences in *Graham* (*i.e.*, the number of life-without-parole sentences for juveniles who committed serious nonhomicide crimes, as compared to

breaking no new ground in these cases.¹¹

Graham and *Thompson* provide special guidance, because they considered the same kind of statutes we do and explained why simply counting them would present a distorted view. Most jurisdictions authorized the death penalty or life without parole for juveniles only through the combination of two independent statutory provisions. One allowed the transfer of certain juvenile offenders to adult court, while another (often in a far-removed part of the code) set out the penalties for any and all individuals [****47] tried there. We reasoned that in those circumstances, it was impossible to say whether a legislature had endorsed a given penalty for children (or would do so if presented with the choice). In *Thompson*, we found that the statutes “[old] us that the States consider 15-year-olds to be old enough to be tried in criminal court for serious crimes (or too old to be dealt with [***428] effectively in juvenile court), but [old] us nothing about the [**2473] judgment these States

arrests for those crimes). *Post*, at 496, 183 L. Ed. 2d, at 434. But because the mandatory nature of the sentences here necessarily makes them more common, The Chief Justice's figures do not “correspon[d]” at all. The higher ratio is mostly a function of removing the sentencer's discretion. Where mandatory sentencing does not itself account for the number of juveniles serving life-without-parole terms, the evidence we have of practice supports our holding. Fifteen jurisdictions make life without parole discretionary for juveniles. See [****45] Alabama Brief 25 (listing 12 States); *Cal. Penal Code Ann. §190.5(b)* (West 2008); *Ind. Code §35-50-2-3(b)* (2011); *N. M. Stat. Ann. §§31-18-13(B), 31-18-14, 31-18-15.2* (2010). According to available data, only about 15% of all juvenile life-without-parole sentences come from those 15 jurisdictions, while 85% come from the 29 mandatory ones. See Tr. of Oral Arg. in No. 10-9646, p. 19; Human Rights Watch, State Distribution of Youth Offenders Serving Juvenile Life Without Parole (JLWOP), Oct. 2, 2009, online at <http://www.hrw.org/news/2009/10/02/state-distribution-juvenile-offenders-serving-juvenile-life-without-parole> (as visited June 21, 2012, and available in Clerk of Court's case file). That figure indicates that when given the choice, sentencers impose life without parole on children relatively rarely. And contrary to The Chief Justice's argument, see *post*, at 497, n. 2, 183 L. Ed. 2d, at 435, we have held that when judges and juries do not often choose to impose a sentence, it at least should not be mandatory. See *Woodson v. North Carolina*, 428 U.S. 280, 295-296, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976) (plurality opinion) (relying on the infrequency with which juries imposed the death penalty when given discretion to hold that its mandatory [****46] imposition violates the *Eighth Amendment*).

¹¹ In response, The Chief Justice complains: “To say that a

have made regarding the appropriate punishment for such youthful offenders.” *487 U.S.*, at 826, n. 24, 108 S. Ct. 2687, 101 L. Ed. 2d 702 (plurality opinion) (emphasis deleted); see also *id.*, at 850, 108 S. Ct. 2687, 101 L. Ed. 2d 702 (O'Connor, J., concurring in judgment); *Roper*, 543 U.S., at 596, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (O'Connor, J., dissenting). And *Graham* echoed that reasoning: Although the confluence of state laws “ma[de] life without parole possible for some juvenile nonhomicide offenders,” it did not “justify a judgment” that many States [*486] actually “intended to subject such offenders” to those sentences. *560 U.S.*, at 67, 130 S. Ct. 2011, 176 L. Ed. 2d 825.¹²

All that is just as true here. Almost all jurisdictions allow some juveniles to be tried in adult court for some kinds of homicide. See Dept. of Justice, H. Snyder & M. Sickmund, *Juvenile Offenders and Victims: 2006 National Report* 110-114 (hereinafter 2006 National Report). But most States do not have separate penalty provisions for those juvenile offenders. Of the 29 jurisdictions mandating life without parole for children, more than half do so by virtue of generally applicable penalty provisions, imposing the sentence without regard to age.¹³ And indeed, some of those States set

sentence may be considered unusual *because* so many legislatures approve it stands precedent on its head.” *Post*, at 497, 183 L. Ed. 2d, at 435. To be clear: That description in no way resembles our opinion. We hold that the sentence violates the *Eighth Amendment* because, as we have exhaustively shown, it conflicts with the fundamental principles of *Roper*, *Graham*, and our individualized sentencing cases. We then show why the number of States imposing this punishment does not preclude our holding, and note how its mandatory nature (in however many States adopt it) makes use of actual sentencing numbers unilluminating.

¹² The Chief Justice attempts to distinguish *Graham* on this point, arguing that there “the extreme rarity with which the sentence in question was imposed could suggest that legislatures [****48] did not really intend the inevitable result of the laws they passed.” *Post*, at 497-498, 183 L. Ed. 2d, at 435. But neither *Graham* nor *Thompson* suggested such reasoning, presumably because the time frame makes it difficult to comprehend. Those cases considered what legislators intended when they enacted, at different moments, separate juvenile-transfer and life-without-parole provisions--by definition, before they knew or could know how many juvenile life-without-parole sentences would result.

¹³ See *Ala. Code §§13A-5-45(f), 13A-6-2(c)* (2005 and Cum. Supp. 2011); *Ariz. Rev. Stat. Ann. §13-752* (West 2010), §41-1604.09(I) (West 2011); *Conn. Gen. Stat. §53a-35a(1)* (2011); *Del. Code Ann., Tit. 11, §4209(a)* (2007); *Fla. Stat.*

no minimum age for who may be transferred to adult court in the first instance, thus applying life-without-parole mandates to children of any [****49] age--be it 17 or 14 or 10 or 6.¹⁴ As in *Graham*, we think that “underscores that the [*487] statutory eligibility of a juvenile offender for life without parole does not indicate that the penalty has been endorsed through deliberate, express, and full legislative consideration.” [560 U.S., at 67, 130 S. Ct. 2011, 176 L. Ed. 2d 825](#). That Alabama and Arkansas can count to 29 by including these possibly (or [***429] probably) inadvertent legislative outcomes does not preclude our determination that mandatory life without parole for juveniles violates the *Eighth Amendment*.

[**2474] B

Nor does the presence of discretion in some jurisdictions' transfer statutes aid the States here. Alabama and Arkansas initially ignore that many States use mandatory transfer systems: A juvenile of a certain age who has committed a specified offense will be tried in adult court, regardless of any individualized circumstances. Of the 29 relevant jurisdictions, about half place at least some juvenile [****51] homicide offenders in adult court automatically, with no apparent opportunity to seek transfer to juvenile court.¹⁵

[§775.082\(1\)](#) (2010); [Haw. Rev. Stat. §706-656\(1\)](#) (1993); [Idaho Code §18-4004](#) (Lexis 2004); [Mich. Comp. Laws Ann. §791.234\(6\)\(a\)](#) (West Cum. Supp. 2012); [Minn. Stat. Ann. §§609.106, subd. 2](#) (West 2009); [Neb. Rev. Stat. §29-2522](#) (2008); [N. H. Rev. Stat. Ann. §630:1-a](#) (West Cum. 2007); [18 Pa. Cons. Stat. §§1102\(a\), \(b\), 61 Pa. Cons. Stat. §6137\(a\)\(1\)](#) (Supp. 2012); [S. D. Codified Laws §22-6-1\(1\)](#) (2006), [§24-15-4](#) (2004); [Vt. Stat. Ann., Tit. 13, §2311\(c\)](#) (2009); [****50] [Wash. Rev. Code §10.95.030\(1\)](#) (2010).

¹⁴ See [Del. Code Ann., Tit. 10, §1010](#) (1999 and Cum. Supp. 2010), Tit. 11, [§4209\(a\)](#) (2007); [Fla. Stat. § 985.56](#) (2010); [§ 775.082\(1\)](#), [Haw. Rev. Stat. §571-22\(d\)](#) (1993), [§706-656\(1\)](#); [Idaho Code §§20-508, 20-509](#) (Lexis Cum. Supp. 2012), [§18-4004](#); [Mich. Comp. Laws Ann. §712A.2d](#) (West 2009), [§791.234\(6\)\(a\)](#); [Neb. Rev. Stat. §§43-247, 29-2522](#) (2008); [42 Pa. Cons. Stat. §6355\(e\)](#) (2000), [18 Pa. Cons. Stat. §1102](#). Other States set ages between 8 and 10 as the minimum for transfer, thus exposing those young children to mandatory life without parole. See [S. D. Codified Laws §§26-8C-2, 26-11-4](#) (2004), [§22-6-1](#) (age 10); [Vt. Stat. Ann., Tit. 33, §5204](#) (2011 Cum. Supp.), Tit. 13, [§2311\(a\)](#) (2009) (age 10); [Wash. Rev. Code §§9A.04.050, 13.40.110](#) (2010), [§10.95.030](#) (age 8).

¹⁵ See [Ala. Code §12-15-204\(a\)](#) (Cum. Supp. 2011); [Ariz. Rev. Stat. Ann. §13-501\(A\)](#) (West Cum. Supp. 2011); [Conn. Gen. Stat. §46b-127](#) (2011); Ill. Comp. Stat. ch. 705, [§§405/5-](#)

Moreover, several States at times lodge this decision exclusively in the [*488] hands of prosecutors, again with no statutory mechanism for judicial reevaluation.¹⁶ And those “prosecutorial discretion laws are usually silent regarding standards, protocols, or appropriate considerations for decisionmaking.” Dept. of Justice, Office of Juvenile Justice and Delinquency Prevention, P. Griffin, S. Addie, B. Adams, & K. Firestine, *Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting 5* (2011).

Even when States give transfer-stage discretion to judges, it has limited utility. First, the decisionmaker typically will have only partial information at this early, pretrial stage about either the child or the circumstances of his offense. Miller's case provides an example. As noted earlier, see n. 3, *supra*, the juvenile court denied Miller's request for his own mental-health expert at the transfer hearing, and the appeals court affirmed on the ground that Miller was not then entitled to the protections and services he would receive at trial. See No. CR-03-0915, at 3-4 (unpublished memorandum). But by then, of course, the expert's testimony could not change the sentence; whatever she said in mitigation, the mandatory life-without-parole prison term would kick in. The key moment for the exercise of discretion is the transfer--and as Miller's case shows, the [****53] judge often does not know then what she will learn, about the offender or the offense, over the course of the proceedings.

Second and still more important, the question at transfer hearings may differ dramatically from the issue at a post-trial sentencing. Because many juvenile systems require that the offender be released at a particular age or after a certain number of years, transfer decisions often present a choice between extremes: light punishment as a child or standard sentencing as an

[130\(1\)\(a\), \(4\)\(a\)](#) (West 2010); [La. Child. Code Ann., Art. 305\(A\)](#) (West Cum. Supp. 2012); [Mass. Gen. Laws, ch. 119, §74](#) (West 2010); [Mich. Comp. Laws Ann. §712A.2\(a\)](#) (West 2002); [Minn. Stat. Ann. §260B.007, subd. 6\(b\)](#) (West Cum. Supp. 2011), [§260B.101, subd. 2](#) (West 2007); [Mo. Rev. Stat. §§211.021\(1\), \(2\)](#) (2011); [N. C. Gen. Stat. Ann. §§7B-1501\(7\), 7B-1601\(a\), 7B-2200](#) (Lexis 2011); [N. H. Rev. Stat. Ann. §169-B:2\(IV\)](#) [****52] (West Cum. Supp. 2011), [§169-B:3](#) (West 2010); [Ohio Rev. Code Ann. §2152.12\(A\)\(1\)\(a\)](#) (Lexis 2011); [Tex. Fam. Code Ann. §51.02\(2\)](#); [Va. Code Ann. §§16.1-241\(A\), 16.1-269.1\(B\), \(D\)](#) (Lexis 2010).

¹⁶ [Fla. Stat. Ann. §985.557\(1\)](#) (West Supp. 2012); [Mich. Comp. Laws Ann. §712A.2\(a\)\(1\)](#); [Va. Code Ann. §§16.1-241\(A\), 16.1-269.1\(C\), \(D\)](#).

adult (here, life without parole). In many States, for example, a [***430] child convicted in juvenile court must be released from custody by the age of 21. See, [**489] e.g., [Ala. Code §12-15-117\(a\)](#) (Cum. Supp. 2011); see generally 2006 National Report 103 (noting limitations on the length of juvenile court sanctions). Discretionary sentencing in adult court would provide different options: There, a judge or jury could choose, rather than a life-without-parole sentence, a lifetime prison term *with* the possibility [**2475] of parole or a lengthy term of years. It is easy to imagine a judge deciding that a minor deserves a (much) harsher sentence than he would receive in juvenile court, while still not thinking life-without-parole [****54] appropriate. For that reason, the discretion available to a judge at the transfer stage cannot substitute for discretion at post-trial sentencing in adult court--and so cannot satisfy the *Eighth Amendment*.

IV

Graham, *Roper*, and our individualized sentencing decisions make clear that [HN17](#) [↑] [LEdHN](#)[17] [↑] [17] a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles. By requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, the mandatory sentencing schemes before us violate this principle of proportionality, and so the *Eighth Amendment's* ban on cruel and unusual punishment. We accordingly reverse the judgments of the Arkansas Supreme Court and Alabama Court of Criminal Appeals and remand the cases for further proceedings not inconsistent with this opinion.

It is so ordered.

Concur by: BREYER

Concur

Justice **Breyer**, with whom Justice **Sotomayor** joins, concurring.

I join the Court's opinion in full. I add that, if the State continues to seek a sentence of life without the possibility of parole for Kuntrell Jackson, [****55] there will have to be a determination [**490] whether Jackson "kill[ed] or intend[ed] to kill" the robbery victim. [Graham v. Florida](#), 560 U.S. 48, 69, 130 S. Ct. 2011, 176 L. Ed.

[2d 825](#) (2010). In my view, without such a finding, the *Eighth Amendment* as interpreted in *Graham* forbids sentencing Jackson to such a sentence, regardless of whether its application is mandatory or discretionary under state law.

In *Graham* we said that "when compared to an adult murderer, a juvenile offender *who did not kill or intend to kill* has a twice diminished moral culpability." *Ibid.* (emphasis added). For one thing, "compared to adults, juveniles have a lack of maturity and an underdeveloped sense of responsibility; they are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure; and their characters are not as well formed." *Id.*, at 68, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (internal quotation marks omitted). See also *ibid.* ("[P]sychology and brain science continue to show fundamental differences between juvenile and adult minds," making their actions "less likely to be evidence of 'irretrievably depraved character' than are the actions of adults" (quoting [Roper v. Simmons](#), 543 U.S. 551, 570, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005))); [****56] *ante*, at 471-472, 183 L. Ed. 2d, at 418-419. [***431] For another thing, *Graham* recognized that lack of intent normally diminishes the "moral culpability" that attaches to the crime in question, making those that do not intend to kill "categorically less deserving of the most serious forms of punishment than are murderers." 560 U.S., at 69, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (citing [Kennedy v. Louisiana](#), 554 U.S. 407, 434-435, 128 S. Ct. 2641, 171 L. Ed. 2d 525 (2008); [Enmund v. Florida](#), 458 U.S. 782, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982); [Tison v. Arizona](#), 481 U.S. 137, 107 S. Ct. 1676, 95 L. Ed. 2d 127 (1987)). And we concluded that, because of this "twice diminished moral culpability," the *Eighth Amendment* forbids the imposition upon juveniles of a sentence of life without parole for nonhomicide cases. [Graham, supra](#), at 69, 82, 130 S. Ct. 2011, 176 L. Ed. 2d 825.

Given *Graham's* reasoning, the kinds of homicide that can subject a juvenile offender [**2476] to life without parole must exclude instances where the juvenile himself neither kills nor intends to kill the victim. Quite simply, if the juvenile either kills or intends to kill the victim, he lacks "twice diminished" [**491] responsibility. But where the juvenile neither kills nor intends to kill, both features emphasized in *Graham* as extenuating apply. The Chief Justice' dissent itself here would permit life without parole [****57] for "juveniles who commit the worst types of murder," *post*, at 499, 183 L. Ed. 2d, at 436 (opinion of Roberts, C. J.), but that phrase does not readily fit the culpability of one who did not himself kill or

intend to kill.

I recognize that in the context of felony-murder cases, the question of intent is a complicated one. The felony-murder doctrine traditionally attributes death caused in the course of a felony to all participants who intended to commit the felony, regardless of whether they killed or intended to kill. See 2 W. LaFave, *Substantive Criminal Law* §§14.5(a) and (c) (2d ed. 2003). This rule has been based on the idea of “transferred intent”; the defendant’s intent to commit the felony satisfies the intent to kill required for murder. See S. Kadish, S. Schulhofer, & C. Steiker, *Criminal Law and Its Processes* 439 (8th ed. 2007); 2 C. Torcia, *Wharton’s Criminal Law* § 147 (15th ed. 1994).

But in my opinion, this type of “transferred intent” is not sufficient to satisfy the intent to murder that could subject a juvenile to a sentence of life without parole. As an initial matter, this Court has made clear that this artificially constructed kind of intent does not count as intent for purposes of the *Eighth Amendment*. [****58] We do not rely on transferred intent in determining if an adult may receive the death penalty. Thus, the Constitution forbids imposing capital punishment upon an aider and abettor in a robbery, where that individual did not intend to kill and simply was “in the car by the side of the road . . . , waiting to help the robbers escape.” *Enmund, supra, at 788, 102 S. Ct. 3368, 73 L. Ed. 2d 1140*. Cf. *Tison, supra, at 157-158, 107 S. Ct. 1676, 95 L. Ed. 2d 127* (capital punishment permissible for aider and abettor where kidnaping led to death because he was “actively involved” in every aspect of the kidnaping and his behavior showed “a reckless disregard for human life”). Given *Graham*, this holding applies to juvenile sentences of life without [****492] parole *a fortiori*. See *ante, at 475-476, 183 L. Ed. 2d, at 421-422*. Indeed, even juveniles who meet the *Tison* standard of “reckless disregard” may not be eligible for life [****432] without parole. Rather, *Graham* dictates a clear rule: The only juveniles who may constitutionally be sentenced to life without parole are those convicted of homicide offenses who “kill or intend to kill.” *560 U.S., at 69, 130 S. Ct. 2011, 176 L. Ed. 2d 825*.

Moreover, regardless of our law with respect to adults, there is no basis for imposing a sentence of life without parole upon a juvenile who did [****59] not himself kill or intend to kill. At base, the theory of transferring a defendant’s intent is premised on the idea that one engaged in a dangerous felony should understand the risk that the victim of the felony could be killed, even by

a confederate. See 2 LaFave, *supra*, § 14.5(c). Yet the ability to consider the full consequences of a course of action and to adjust one’s conduct accordingly is precisely what we know juveniles lack capacity to do effectively. *Ante, at 471-472, 183 L. Ed. 2d, at 418-419*. Justice Frankfurter cautioned, “Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to a determination of a State’s duty toward children.” *May v. Anderson, 345 U.S. 528, 536, 73 S. Ct. 840, 97 L. Ed. 1221, 67 Ohio Law Abs. 468 (1953)* (concurring opinion). To apply the doctrine of transferred intent here, where the juvenile did not kill, to sentence a juvenile [****2477] to life without parole would involve such “fallacious reasoning.” *Ibid.*

This is, as far as I can tell, precisely the situation present in Kuntrell Jackson’s case. Jackson simply went along with older boys to rob a video store. On the way, he became aware that a confederate had a gun. He initially stayed outside the store, and went in briefly, saying [****60] something like “We ain’t playin’ ” or “ I thought you all was playin,’ ” before an older confederate shot and killed the store clerk. *Jackson v. State, 359 Ark. 87, 91, 194 S.W.3d 757, 760 (2004)*. Crucially, the jury found him guilty of first-degree murder under a statute that permitted them to convict if Jackson [****493] “attempted to commit or committed an aggravated robbery, and, in the course of that offense, he, or an accomplice, caused [the clerk’s] death under circumstance manifesting extreme indifference to the value of human life.” *Ibid.* See *Ark. Code Ann. §5-10-101(a)(1)* (1997); *ante, at 478, 183 L. Ed. 2d, at 423*. Thus, to be found guilty, Jackson did not need to kill the clerk (it is conceded he did not), nor did he need to have intent to kill or even “extreme indifference.” As long as one of the teenage accomplices in the robbery acted with extreme indifference to the value of human life, Jackson could be convicted of capital murder. *Ibid.*

The upshot is that Jackson, who did not kill the clerk, might not have intended to do so either. See *Jackson v. Norris, 2011 Ark. 49, at 10, 378 S.W.3d 103, 109* (Danielson, J., dissenting) (“[A]ny evidence of [Jackson’s] intent to kill was severely lacking”). In that case, [****61] the *Eighth Amendment* simply forbids imposition of a life term without the possibility of parole. If, on remand, however, there is a finding that Jackson did intend to cause the clerk’s death, the question remains open whether the *Eighth Amendment* prohibits the imposition of life without parole upon a juvenile in those circumstances as well. *Ante, at 479, 183 L. Ed. 2d, at 424*.

Dissent by: ROBERTS; THOMAS; ALITO

Dissent

Chief Justice **Roberts**, with whom Justice **Scalia**, Justice **Thomas**, and Justice **Alito** join, dissenting.

[**433] Determining the appropriate sentence for a teenager convicted of murder presents grave and challenging questions of morality and social policy. Our role, however, is to apply the law, not to answer such questions. The pertinent law here is the *Eighth Amendment to the Constitution*, which prohibits “cruel and unusual punishments.” Today, the Court invokes that Amendment to ban a punishment that the Court does not itself characterize as unusual, and that could not plausibly be described as such. I therefore dissent.

The parties agree that nearly 2,500 prisoners are presently serving life sentences without the possibility of parole for [*494] murders they committed before the age of 18. Brief for Petitioner in No. 10-9647, p. [****62] 62, n. 80 (Jackson Brief); Brief for Respondent in No. 10-9646, p. 30 (Alabama Brief). The Court accepts that over 2,000 of those prisoners received that sentence because it was mandated by a legislature. [Ante, at 483, n. 10, 183 L. Ed. 2d, at 427](#). And it recognizes that the Federal Government and most States impose such mandatory sentences. [Ante, at 482, 183 L. Ed. 2d, at 425-426](#). Put simply, if a 17-year-old is convicted of deliberately murdering an innocent victim, it is not “unusual” for the murderer to receive a mandatory sentence of life without parole. That reality should preclude finding that mandatory life imprisonment for juvenile killers violates the *Eighth Amendment*.

Our precedent supports this conclusion. When determining whether a punishment is cruel and unusual, this Court typically begins with “ ‘objective indicia of society’s standards, as expressed in legislative enactments and state practice.’ ” [Graham v. Florida, 560 U.S. 48, 61, 130 S. Ct. 2011, 176 L. Ed. 2d 825 \(2010\)](#); see also, e.g., [Kennedy v. Louisiana, 554 U.S. 407, 422, 128 S. Ct. 2641, 171 L. Ed. 2d 525 \(2008\)](#); [Roper v. Simmons, 543 U.S. 551, 564, 125 S. Ct. 1183, 161 L. Ed. 2d 1 \(2005\)](#). We look to these “objective indicia” to ensure that we are not simply following our own subjective values or beliefs. [Gregg v. Georgia, 428 U.S. 153, 173, 96 S. Ct. 2909, 49 L. Ed. 2d 859 \(1976\)](#) [****63] (joint opinion of Stewart, Powell, and Stevens, JJ.). Such tangible evidence of societal

standards enables us to determine whether there is a “consensus against” a given sentencing practice. [Graham, supra, at 61, 130 S. Ct. 2011, 176 L. Ed. 2d 825](#). If there is, the punishment may be regarded as “unusual.” But when, as here, most States formally require and frequently impose the punishment in question, there is no objective basis for that conclusion.

Our *Eighth Amendment* cases have also said that we should take guidance from “evolving standards of decency that mark the progress of a maturing society.” [Ante, at 469, 183 L. Ed. 2d, at 417](#) (quoting [Estelle v. Gamble, 429 U.S. 97, 102, 97 S. Ct. 285, 50 L. Ed. 2d 251 \(1976\)](#); internal quotation marks omitted). Mercy toward the guilty can be a form of decency, and a maturing society may abandon harsh [*495] punishments that it comes to view as unnecessary or unjust. But decency is not the same as leniency. A decent society protects the innocent from violence. A mature society may determine that this requires removing those guilty of the most heinous murders from its midst, both as protection for its other members and as a concrete expression of its standards of decency. As judges we have no basis for deciding that progress [****64] toward greater decency can move [****434] only in the direction of easing sanctions on the guilty.

In this case, there is little doubt about the direction of society’s evolution: For most of the 20th century, American sentencing practices emphasized rehabilitation of the offender and the availability of parole. But by the 1980’s, outcry against repeat offenders, broad disaffection with the rehabilitative model, and other factors led many legislatures to reduce or eliminate the possibility of parole, imposing longer sentences in order to punish criminals and prevent them from committing more crimes. See, e.g., Alschuler, *The Changing Purposes of Criminal Punishment*, [70 U. Chi. L. Rev. 1, 1-13 \(2003\)](#); see generally *Crime and Public Policy* (J. Wilson & J. Petersilia eds. 2011). Statutes establishing life without parole sentences in particular became more common in the past quarter century. See [Baze v. Rees, 553 U.S. 35, and n. 10, 78, 128 S. Ct. 1520, 170 L. Ed. 2d 420 \(2008\)](#) (Stevens, J., concurring in judgment). And the parties agree that most States have changed their laws relatively recently to expose teenage murderers to mandatory life without parole. Jackson Brief 54-55; Alabama Brief 4-5.

The Court attempts to avoid the import [****65] of the fact that so many jurisdictions have embraced the sentencing practice at issue by comparing these cases

to the Court's prior *Eighth Amendment* cases. The Court notes that *Graham* found a punishment authorized in 39 jurisdictions unconstitutional, whereas the punishment it bans today is mandated in 10 fewer. [Ante, at 483, 183 L. Ed. 2d, at 426](#). But *Graham* went to considerable lengths to show that although theoretically allowed in many [*496] States, the sentence at issue in that case was "exceedingly rare" in practice. [560 U.S., at 67, 130 S. Ct. 2011, 176 L. Ed. 2d 825](#). The Court explained that only 123 prisoners in the entire Nation were serving life without parole for nonhomicide crimes committed as juveniles, with more than half in a single State. It contrasted that with statistics showing nearly 400,000 juveniles were arrested for serious nonhomicide [**2479] offenses in a single year. Based on the sentence's rarity despite the many opportunities to impose it, *Graham* concluded that there was a national consensus against life without parole for juvenile nonhomicide crimes. [Id., at 64-67, 130 S. Ct. 2011, 176 L. Ed. 2d 825](#).

Here the number of mandatory life without parole sentences for juvenile murderers, relative to the number of juveniles arrested [****66] for murder, is over 5,000 times higher than the corresponding number in *Graham*. There is thus nothing in these cases like the evidence of national consensus in *Graham*.¹

The Court disregards these numbers, claiming that the prevalence of the sentence in question results from the number of statutes requiring its imposition. [Ante, at 484, n. 10, 183 \[***435\] L. Ed. 2d, at 426](#). True enough. The sentence at issue is statutorily mandated life without parole. Such a sentence can only result from statutes requiring its imposition. In *Graham* the [****67] Court relied on the low number of actual sentences to explain why the high number of statutes allowing such sentences was not dispositive. Here, the Court excuses the high number of actual sentences by citing the high number of statutes imposing [*497] it. To say that a

¹ *Graham* stated that 123 prisoners were serving life without parole for nonhomicide offenses committed as juveniles, while in 2007 alone 380,480 juveniles were arrested for serious nonhomicide crimes. [560 U.S., at 64-65, 130 S. Ct. 2011, 176 L. Ed. 2d 825](#). I use 2,000 as the number of prisoners serving mandatory life without parole sentences for murders committed as juveniles, because all seem to accept that the number is at least that high. And the same source *Graham* used reports that 1,170 juveniles were arrested for murder and nonnegligent homicide in 2009. Dept. of Justice, Office of Juvenile Justice and Delinquency Prevention, C. Puzanhera & B. Adams, *Juvenile Arrests 2009*, p. 4 (Dec. 2011).

sentence may be considered unusual *because* so many legislatures approve it stands precedent on its head.²³³

The Court also advances another reason for discounting the laws enacted by Congress and most state legislatures. Some of the jurisdictions that impose mandatory life without parole on juvenile murderers do so as a result of two statutes: one providing that juveniles charged with serious crimes may be tried as adults, and another generally mandating that those convicted of murder be imprisoned for life. According to the Court, our cases suggest that where the sentence results from the interaction of two such statutes, the legislature can be considered to have imposed the resulting sentences "inadvertent[ly]." [Ante, at 485-487, 183 L. Ed. 2d, at 427-429](#). The Court relies on *Graham* and *Thompson v. Oklahoma*, [487 U.S. 815, 826, n. 24, 108 S. Ct. 2687, 101 L. Ed. 2d 702 \(1988\)](#) (plurality opinion), for the proposition that these laws are therefore not valid evidence of society's views on the punishment at issue.

It is a fair question whether this Court should ever assume a legislature is so ignorant of its own laws that it does not understand that two of them interact [**2480] with each other, especially on an issue of such importance as the one before us. But in *Graham* and *Thompson* it was at [****69] least plausible as a practical matter. In *Graham*, the extreme rarity with [*498] which the sentence in question was imposed could suggest that legislatures did not really intend the

² The Court's reference to discretionary sentencing practices is a distraction. See [ante, at 483-484, n. 10, 183 L. Ed. 2d, at 427](#). The premise of the Court's decision is that mandatory sentences are categorically different from discretionary ones. So under the Court's own logic, whether discretionary sentences are common or uncommon has nothing to do with whether mandatory sentences are unusual. In any event, if analysis of discretionary sentences were relevant, it would not provide objective support for today's decision. The Court states that "about 15% of all juvenile life-without-parole sentences"--meaning nearly 400 sentences--were imposed at the discretion of a judge or jury. [Ante, at 484, n. 10, 183 L. Ed. 2d, at 427](#). Thus the number of discretionary life without parole sentences for juvenile murderers, relative to the number of juveniles arrested for murder, [****68] is about 1,000 times higher than the corresponding number in *Graham*.

³ The Court claims that I "take issue with some or all of these precedents" and "seek to relitigate" them. [Ante, at 470-471, n. 4, 183 L. Ed. 2d, at 418](#). Not so: Applying this Court's cases exactly as they stand, I do not believe they support the Court's decision in these cases.

inevitable result of the laws they passed. See [560 U.S., at 66-67, 130 S. Ct. 2011, 176 L. Ed. 2d 825](#). In *Thompson*, the sentencing practice was even rarer--only 20 defendants had received it in the last century. [487 U.S., at 832, 108 S. Ct. 2687, 101 L. Ed. 2d 702](#) (plurality opinion). Perhaps under those facts it could be argued that the legislature was not fully aware that a teenager could receive the particular sentence in question. But here the widespread and recent imposition of the sentence makes it implausible to characterize this sentencing practice as a collateral consequence of legislative ignorance.

[**436] Nor do we display our usual respect for elected officials by asserting that legislators have *accidentally* required 2,000 teenagers to spend the rest of their lives in jail. This is particularly true given that [****70] our well-publicized decision in *Graham* alerted legislatures to the possibility that teenagers were subject to life without parole only because of legislative inadvertence. I am aware of no effort in the wake of *Graham* to correct any supposed legislative oversight. Indeed, in amending its laws in response to *Graham* one legislature made especially clear that it *does* intend juveniles who commit first-degree murder to receive mandatory life without parole. See [Iowa Code Ann. §902.1](#) (West Cum. Supp. 2012).

In the end, the Court does not actually conclude that mandatory life sentences for juvenile murderers are unusual. It instead claims that precedent “leads to” today’s decision, primarily relying on *Graham* and *Roper*. [Ante, at 470, 183 L. Ed. 2d, at 412](#). Petitioners argue that the reasoning of those cases “compels” finding in their favor. Jackson Brief 34. The Court is apparently unwilling to go so far, asserting only that precedent points in that direction. But today’s decision invalidates the laws of dozens of legislatures and Congress. This Court is [*499] not easily led to such a result. See, e.g., [United States v. Harris, 106 U.S. 629, 635, 1 S. Ct. 601, 27 L. Ed. 290, 4 Ky. L. Rptr. 739 \(1883\)](#) (courts must presume an Act of Congress is constitutional “unless the [****71] lack of constitutional authority . . . is clearly demonstrated”). Because the Court does not rely on the *Eighth Amendment’s* text or objective evidence of society’s standards, its analysis of precedent alone must bear the “heavy burden [that] rests on those who would attack the judgment of the representatives of the people.” [Gregg, 428 U.S., at 175, 96 S. Ct. 2909, 49 L. Ed. 2d 859](#). If the Court is unwilling to say that precedent compels today’s decision, perhaps it should reconsider that decision.

In any event, the Court’s holding does not follow from *Roper* and *Graham*. Those cases undoubtedly stand for the proposition that teenagers are less mature, less responsible, and less fixed in their ways than adults--not that a Supreme Court case was needed to establish that. What they do not stand for, and do not even suggest, is that legislators--who also know that teenagers are different from adults--may not require life without parole for juveniles who commit the worst types of murder.

That *Graham* does not imply today’s result could not be clearer. In barring life [**2481] without parole for juvenile nonhomicide offenders, *Graham* stated that “[t]here is a [****72] line ‘between homicide and other serious violent offenses against the individual.’ [560 U.S., at 69, 130 S. Ct. 2011, 176 L. Ed. 2d 825](#) (quoting [Kennedy, 554 U.S., at 438, 128 S. Ct. 2641, 171 L. Ed. 2d 525](#)). The whole point of drawing a line between one issue and another is to say that they are different and should be treated differently. In other words, the two are in different categories. Which *Graham* also said: “defendants who do not kill, intend to kill, or foresee that life will be taken are *categorically* less deserving of the most serious forms of punishment than are murderers.” [560 U.S., at _____, 130 S. Ct. 2011, 176 L. Ed. 2d 825](#) (emphasis added). Of course, to be especially clear that what is said about one issue does not apply to another, one could say that the two issues cannot be compared. *Graham* [**437] said that too: “Serious nonhomicide crimes . . . cannot be compared to murder.” [*500] *Ibid.* (internal quotation marks omitted). A case that expressly puts an issue in a different category from its own subject, draws a line between the two, and states that the two should not be compared, cannot fairly be said to control that issue.

Roper provides even less support for the Court’s holding. In that case, the Court held that the death penalty [****73] could not be imposed for offenses committed by juveniles, no matter how serious their crimes. In doing so, *Roper* also set itself in a different category than these cases, by expressly invoking “special” *Eighth Amendment* analysis for death penalty cases. [543 U.S., at 568-569, 125 S. Ct. 1183, 161 L. Ed. 2d 1](#). But more importantly, *Roper* reasoned that the death penalty was not needed to deter juvenile murderers in part because “life imprisonment without the possibility of parole” was available. [Id., at 572, 125 S. Ct. 1183, 161 L. Ed. 2d 1](#). In a classic bait and switch, the Court now tells state legislatures that--*Roper’s* promise notwithstanding--they do not have power to guarantee that once someone commits a heinous

murder, he will never do so again. It would be enough if today's decision proved Justice Scalia's prescience in writing that *Roper's* "reassurance . . . gives little comfort." *Id.*, at 623, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (dissenting opinion). To claim that *Roper* actually "leads to" revoking its own reassurance surely goes too far.

Today's decision does not offer *Roper* and *Graham's* false promises of restraint. Indeed, the Court's opinion suggests that it is merely a way station on the path to further judicial displacement of the legislative role in prescribing appropriate punishment [****74] for crime. The Court's analysis focuses on the mandatory nature of the sentences in these cases. See *ante*, at 474-480, 183 L. Ed. 2d, at 420-424. But then--although doing so is entirely unnecessary to the rule it announces--the Court states that even when a life without parole sentence is not mandatory, "we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *Ante*, at 479, 183 L. Ed. 2d, at 424. Today's holding may be limited to mandatory sentences, but the Court has already announced that discretionary [*501] life without parole for juveniles should be "uncommon"--or, to use a common synonym, "unusual."

Indeed, the Court's gratuitous prediction appears to be nothing other than an invitation to overturn life without parole sentences imposed by juries and trial judges. If that invitation is widely accepted and such sentences for juvenile offenders do in fact become "uncommon," the Court will have bootstrapped its way to declaring that the *Eighth Amendment* absolutely prohibits them.

This process has no discernible end point--or at least none consistent with our Nation's legal traditions. *Roper* and *Graham* [**2482] attempted to limit their reasoning to the circumstances they addressed--*Roper* to the death [****75] penalty, and *Graham* to nonhomicide crimes. Having cast aside those limits, the Court cannot now offer a credible substitute, and does not even try. After all, the Court tells us, "none of what [*Graham*] said about children . . . is crime-specific." *Ante*, at 473, 183 L. Ed. 2d, at 420. The principle behind today's decision seems to be only that because juveniles are different from adults, they must be sentenced differently. See *ante*, at 476-480, 183 L. Ed. 2d, at 422-424. [***438] There is no clear reason that principle would not bar all mandatory sentences for juveniles, or any juvenile sentence as harsh as what a similarly situated adult would receive. Unless confined, the only stopping point for the Court's analysis would be never permitting juvenile offenders to be tried as adults. Learning that an

Amendment that bars only "unusual" punishments requires the abolition of this uniformly established practice would be startling indeed.

* * *

It is a great tragedy when a juvenile commits murder--most of all for the innocent victims. But also for the murderer, whose life has gone so wrong so early. And for society as well, which has lost one or more of its members to deliberate violence, and must harshly punish another. In recent years, our society [****76] has moved toward requiring that the [*502] murderer, his age notwithstanding, be imprisoned for the remainder of his life. Members of this Court may disagree with that choice. Perhaps science and policy suggest society should show greater mercy to young killers, giving them a greater chance to reform themselves at the risk that they will kill again. See *ante*, at 471-474, 183 L. Ed. 2d, at 418-420. But that is not our decision to make. Neither the text of the Constitution nor our precedent prohibits legislatures from requiring that juvenile murderers be sentenced to life without parole. I respectfully dissent.

Justice **Thomas**, with whom Justice **Scalia** joins, dissenting.

Today, the Court holds that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the *Eighth Amendment's* prohibition on 'cruel and unusual punishments.'" *Ante*, at 465, 183 L. Ed. 2d, at 415. To reach that result, the Court relies on two lines of precedent. The first involves the categorical prohibition of certain punishments for specified classes of offenders. The second requires individualized sentencing in the capital punishment context. Neither line is consistent with the original understanding of the *Cruel and Unusual Punishments Clause*. [****77] The Court compounds its errors by combining these lines of precedent and extending them to reach a result that is even less legitimate than the foundation on which it is built. Because the Court upsets the legislatively enacted sentencing regimes of 29 jurisdictions without constitutional warrant, I respectfully dissent.¹

I

The Court first relies on its cases "adopt[ing] categorical bans on sentencing practices based on mismatches

¹ I join The Chief Justice's opinion because it accurately explains that, even accepting the Court's precedents, the Court's holding in today's cases is unsupported.

between the culpability of a class of offenders and the severity of a penalty.” *Ante*, at 470, 183 L. Ed. 2d, at 417. Of these categorical proportionality [*503] cases, the Court places particular emphasis on *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005), and *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010). In *Roper*, the Court held that the Constitution prohibits the execution of an offender who was under 18 at the time of his offense. 543 U.S., at [**2483] 578, 125 S. Ct. 1183, 161 L. Ed. 2d 1. The *Roper* Court looked to, among other things, its own sense of parental [***439] intuition and “scientific and sociological studies” to conclude that offenders under the age of 18 “cannot with [****78] reliability be classified among the worst offenders.” *Id.*, at 569, 125 S. Ct. 1183, 161 L. Ed. 2d 1. In *Graham*, the Court relied on similar considerations to conclude that the Constitution prohibits a life-without-parole sentence for a nonhomicide offender who was under the age of 18 at the time of his offense. 560 U.S., at 74, 130 S. Ct. 2011, 176 L. Ed. 2d 825.

The Court now concludes that *mandatory* life-without-parole sentences for duly convicted juvenile murderers “contraven[e] *Graham's* (and also *Roper's*) foundational principle: that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children.” *Ante*, at 474, 183 L. Ed. 2d, at 413. But neither *Roper* nor *Graham* held that specific procedural rules are required for sentencing juvenile homicide offenders. And, the logic of those cases should not be extended to create such a requirement.

The *Eighth Amendment*, made applicable to the States by the *Fourteenth Amendment*, provides that: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” As I have previously explained, “the *Cruel and Unusual Punishments Clause* was originally understood as prohibiting torturous *methods* of punishment--specifically [****79] methods akin to those that had been considered cruel and unusual at the time the *Bill of Rights* was adopted.” *Graham, supra*, at 99, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (dissenting opinion) (internal quotation marks and citations omitted).² The Clause

²Neither the Court nor petitioners argue that petitioners' sentences would have been among “the ‘modes or acts of punishment that had been considered cruel and unusual at the time that the *Bill of Rights* was adopted.’” *Graham*, 560 U.S., at 106, n.3 130 S. Ct. 2011, 176 L. Ed. 2d 825 (Thomas, J.,

does not contain a “proportionality [*504] principle.” *Ewing v. California*, 538 U.S. 11, 32, 123 S. Ct. 1179, 155 L. Ed. 2d 108 (2003) (Thomas, J., concurring in judgment); see generally *Harmelin v. Michigan*, 501 U.S. 957, 975-985, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991) (opinion of Scalia, J.). In short, it does not authorize courts to invalidate any punishment they deem disproportionate to the severity of the crime or to a particular class of offenders. Instead, the Clause “leaves the unavoidably moral question of who ‘deserves’ a particular nonprohibited method of punishment to the judgment of the legislatures that authorize the penalty.” *Graham, supra*, at 101, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (Thomas, J., dissenting).

The legislatures of Arkansas and Alabama, like those of 27 other jurisdictions, *ante*, at 482, 183 L. Ed. 2d, at 425-426, have determined that all offenders convicted of specified homicide offenses, whether juveniles or not, deserve a sentence of life in prison without the possibility of [***440] parole. Nothing in our Constitution authorizes this Court to supplant that choice.

II

To invalidate mandatory life-without-parole sentences for juveniles, the Court also [**2484] relies on its cases “prohibit[ing] mandatory imposition of capital punishment.” *Ante*, at 470, 183 L. Ed. 2d, at 418. The Court reasons that, because *Graham* compared juvenile life-without-parole sentences to the death penalty, the “distinctive [****81] set of legal rules” that this Court has imposed in the capital punishment context, including the requirement of individualized sentencing, is “relevant” here. *Ante*, at 475, 183 L. Ed. 2d, at 421-422. But even accepting an analogy between capital and juvenile life-without-parole sentences, this Court's cases prohibiting [*505] mandatory capital sentencing schemes have no basis in the original understanding of the *Eighth Amendment*, and, thus, cannot justify a prohibition of sentencing schemes that mandate life-without-parole

dissenting) (quoting *Ford v. Wainwright*, 477 U.S. 399, 405, 106 S. Ct. 2595, 91 L. Ed. 2d 335 (1986)). [****80] Nor could they. Petitioners were 14 years old at the time they committed their crimes. When the *Bill of Rights* was ratified, 14-year-olds were subject to trial and punishment as adult offenders. See *Roper v. Simmons*, 543 U.S. 551, 609, n. 1, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (Scalia, J., dissenting). Further, mandatory death sentences were common at that time. See *Harmelin v. Michigan*, 501 U.S. 957, 994-995, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991). It is therefore implausible that a 14-year-old's mandatory prison sentence--of any length, with or without parole--would have been viewed as cruel and unusual.

sentences for juveniles.

A

In a line of cases following [Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 \(1972\)](#) (*per curiam*), this Court prohibited the mandatory imposition of the death penalty. See [Woodson v. North Carolina, 428 U.S. 280, 96 S. Ct. 2978, 49 L. Ed. 2d 944 \(1976\)](#) (plurality opinion); [Roberts v. Louisiana, 428 U.S. 325, 96 S. Ct. 3001, 49 L. Ed. 2d 974 \(1976\)](#) (same); [Sumner v. Shuman, 483 U.S. 66, 107 S. Ct. 2716, 97 L. Ed. 2d 56 \(1987\)](#). *Furman* first announced the principle that States may not permit sentencers to exercise unguided discretion in imposing the death penalty. See generally [408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346](#). In response to *Furman*, many States passed new laws that made the death penalty mandatory following conviction of specified crimes, thereby eliminating the offending discretion. See [Gregg v. Georgia, 428 U.S. 153, 180-181, 96 S. Ct. 2909, 49 L. Ed. 2d 859 \(1976\)](#) [****82] (joint opinion of Stewart, Powell, and Stevens, JJ.). The Court invalidated those statutes in *Woodson*, *Roberts*, and *Sumner*. The Court reasoned that mandatory capital sentencing schemes were problematic, because they failed “to allow the particularized consideration” of “relevant facets of the character and record of the individual offender or the circumstances of the particular offense.” [Woodson, supra, at 303-304, 96 S. Ct. 2978, 49 L. Ed. 2d 944](#) (plurality opinion).³

[*506] In my view, *Woodson* and its progeny were wrongly decided. As discussed above, the *Cruel and Unusual Punishments Clause*, as originally understood, prohibits “torturous methods of punishment.” See

³The Court later extended *Woodson*, requiring that capital defendants be permitted to present, and sentencers in capital cases be permitted to consider, any relevant mitigating evidence, including the age of the defendant. See, e.g., [Lockett v. Ohio, 438 U.S. 586, 597-608, 98 S. Ct. 2954, 57 L. Ed. 2d 973 \(1978\)](#) (plurality opinion); [Eddings v. Oklahoma, 455 U.S. 104, 110-112, 102 S. Ct. 869, 71 L. Ed. 2d 1 \(1982\)](#); [Skipper v. South Carolina, 476 U.S. 1, 4-5, 106 S. Ct. 1669, 90 L. Ed. 2d 1 \(1986\)](#); [Johnson v. Texas, 509 U.S. 350, 361-368, 113 S. Ct. 2658, 125 L. Ed. 2d 290 \(1993\)](#). Whatever the validity of the requirement that sentencers be permitted to consider all mitigating evidence when deciding whether to impose a *nonmandatory* capital sentence, the Court certainly was wrong to prohibit *mandatory* capital sentences. See [Graham v. Collins, 506 U.S. 461, 488-500, 113 S. Ct. 892, 122 L. Ed. 2d 260 \(1993\)](#) (Thomas, J., [****83] concurring).

[Graham, 560 U.S., at 99, 130 S. Ct. \[***441\] 2011, 176 L. Ed. 2d 825](#) (Thomas, J., dissenting) (internal quotation marks omitted). It is not concerned with whether a particular lawful method of punishment--whether capital or noncapital--is imposed pursuant to a mandatory or discretionary sentencing regime. See [Gardner v. Florida, 430 U.S. 349, 371, 97 S. Ct. 1197, 51 L. Ed. 2d 393 \(1977\)](#) (Rehnquist, J., dissenting) (“The prohibition of the *Eighth Amendment* relates to the character of the punishment, and not to the process by which it is [**2485] imposed”). In fact, “[i]n the early days of the Republic,” each crime generally had a defined punishment “prescribed with specificity by the legislature.” [United States v. Grayson, 438 U.S. 41, 45, 98 S. Ct. 2610, 57 L. Ed. 2d 582 \(1978\)](#). Capital sentences, to which the Court analogizes, were treated no differently. “[M]andatory death sentences abounded in our first Penal Code” and were “common in the several States--both at the time of the founding and throughout the 19th century.” [Harmelin, supra, at 994-995, 111 S. Ct. 2680, 115 L. Ed. 2d 836](#); see also [Woodson, supra, at 289, 96 S. Ct. 2978, 49 L. Ed. 2d 944 \[****84\]](#) (plurality opinion) (“At the time the *Eighth Amendment* was adopted in 1791, the States uniformly followed the common-law practice of making death the exclusive and mandatory sentence for certain specified offenses”). Accordingly, the idea that the mandatory imposition of an otherwise-constitutional sentence renders that sentence cruel and unusual finds “no support in the text and history of the *Eighth Amendment*.” [Harmelin, supra, at 994, 111 S. Ct. 2680, 115 L. Ed. 2d 836](#).

Moreover, mandatory death penalty schemes were “a perfectly reasonable legislative response to the concerns expressed in *Furman*” regarding unguided sentencing discretion, in that they “eliminat[ed] explicit jury discretion and treat[ed] all defendants equally.” [Graham v. Collins, 506 U.S. 461, 487, 113 S. Ct. 892, 122 L. Ed. 2d 260 \(1993\)](#) (Thomas, J., concurring). And, as Justice White explained more than 30 years ago, “a State is not constitutionally forbidden to provide that the commission of certain crimes conclusively establishes that a criminal's character [*507] is such that he deserves death.” [Roberts, supra, at 358, 96 S. Ct. 3001, 49 L. Ed. 2d 974](#) (dissenting opinion). Thus, there is no basis for concluding that a mandatory capital sentencing scheme is unconstitutional. Because the Court's cases requiring individualized [****85] sentencing in the capital context are wrongly decided, they cannot serve as a valid foundation for the novel rule regarding mandatory life-without-parole sentences for juveniles that the Court announces today.

B

In any event, this Court has already declined to extend its individualized-sentencing rule beyond the death penalty context. In *Harmelin*, the defendant was convicted of possessing a large quantity of drugs. [501 U.S., at 961, 111 S. Ct. 2680, 115 L. Ed. 2d 836](#) (opinion of Scalia, J.). In accordance with Michigan law, he was sentenced to a mandatory term of life in prison without the possibility of parole. *Ibid.* Citing the same line of death penalty precedents on which the Court relies today, the defendant argued that his sentence, due to its mandatory nature, violated the *Cruel and Unusual Punishments Clause*. *Id.*, at 994-995, [111 S. Ct. 2680, 115 L. Ed. 2d 836](#) (opinion of the Court).

[**442] The Court rejected that argument, explaining that “[t]here can be no serious contention . . . that a sentence which is not otherwise cruel and unusual becomes so simply because it is ‘mandatory.’” *Id.*, at 995, [111 S. Ct. 2680, 115 L. Ed. 2d 836](#). In so doing, the Court refused to analogize to its death penalty cases. The Court noted that those cases had “repeatedly suggested that there is no comparable [individualized-sentencing] [****86] requirement outside the capital context, because of the qualitative difference between death and all other penalties.” *Ibid.* The Court observed that, “even where the difference” between a sentence of life without parole and other sentences of imprisonment “is the greatest,” such a sentence “cannot be compared with death.” *Id.*, at 996, [111 S. Ct. 2680, 115 L. Ed. 2d 836](#). Therefore, the Court concluded that the line of cases requiring individualized sentencing had been drawn at capital cases, and that there was “no basis for extending it further.” *Ibid.*

[*508] [**2486] *Harmelin*'s reasoning logically extends to these cases. Obviously, the younger the defendant, “the great[er]” the difference between a sentence of life without parole and other terms of imprisonment. *Ibid.* But under *Harmelin*'s rationale, the defendant's age is immaterial to the *Eighth Amendment* analysis. Thus, the result in today's cases should be the same as that in *Harmelin*. Petitioners, like the defendant in *Harmelin*, were not sentenced to death. Accordingly, this Court's cases “creating and clarifying the individualized capital sentencing doctrine” do not apply. *Id.*, at 995, [111 S. Ct. 2680, 115 L. Ed. 2d 836](#) (internal quotation marks omitted).

Nothing about our Constitution, or about the qualitative difference [****87] between any term of imprisonment and death, has changed since *Harmelin* was decided 21

years ago. What *has* changed (or, better yet, “evolved”) is this Court's ever-expanding line of categorical proportionality cases. The Court now uses *Roper* and *Graham* to jettison *Harmelin*'s clear distinction between capital and noncapital cases and to apply the former to noncapital juvenile offenders.⁴ The Court's decision to do so is even less supportable than the precedents used to reach it.

III

As The Chief Justice notes, [ante, at 500, 183 L. Ed. 2d, at 437](#) (dissenting opinion), the Court lays the groundwork for future incursions on the States' authority to sentence criminals. In its categorical [****88] proportionality cases, the Court has considered “ ‘objective indicia of society's standards, as expressed in legislative enactments and state practice’ to determine whether [**509] there is a national consensus against the sentencing practice at issue.” [Graham, 560 U.S., at 61, 130 S. Ct. 2011, 176 L. Ed. 2d 825](#) (quoting [Roper, 543 U.S., at 563, 125 S. Ct. 1183, 161 L. Ed. 2d 1](#)). In *Graham*, for example, the Court looked to “[a]ctual sentencing practices” to conclude that there was a [***443] national consensus against life-without-parole sentences for juvenile nonhomicide offenders. [560 U.S., at 62-65, 130 S. Ct. 2011, 176 L. Ed. 2d 825](#); see also [Roper, supra, at 564-565, 125 S. Ct. 1183, 161 L. Ed. 2d 1](#); [Atkins v. Virginia, 536 U.S. 304, 316, 122 S. Ct. 2242, 153 L. Ed. 2d 335 \(2002\)](#).

Today, the Court makes clear that, even though its decision leaves intact the discretionary imposition of life-without-parole sentences for juvenile homicide offenders, it “think[s] appropriate occasions for sentencing juveniles to [life without parole] will be uncommon.” [Ante, at 479, 183 L. Ed. 2d, at 424](#). That statement may well cause trial judges to shy away from imposing life without parole sentences and embolden appellate judges to set them aside when they are imposed. And, when a future petitioner seeks a categorical ban on sentences of life without parole for

⁴In support of its decision not to apply *Harmelin* to juvenile offenders, the Court also observes that “ [o]ur history is replete with laws and judicial recognition that children cannot be viewed simply as miniature adults.” [Ante, at 481, 183 L. Ed. 2d, at 425](#) (quoting [J. D. B. v. North Carolina, 564 U.S. 261, 274, 131 S. Ct. 2394, 180 L. Ed. 2d 310 \(2011\)](#) (some internal quotation marks omitted)). That is no doubt true as a general matter, but it does not justify usurping authority that rightfully belongs to the people by imposing a constitutional rule where none exists.

juvenile [****89] homicide offenders, this Court will most assuredly look to the “actual sentencing practices” triggered by these cases. The Court has, thus, gone from “merely” divining the societal consensus of today to shaping the societal consensus of tomorrow.

* * *

Today's decision invalidates a constitutionally permissible sentencing system based on nothing more than the Court's belief that “its own sense of morality . . . [**2487] preempts that of the people and their representatives.” *Graham, supra, at 124, 130 S. Ct. 2011, 176 L. Ed. 2d 825* (Thomas, J., dissenting). Because nothing in the Constitution grants the Court the authority it exercises today, I respectfully dissent.

Justice **Alito**, with whom Justice **Scalia** joins, dissenting.

The Court now holds that Congress and the legislatures of the 50 States are prohibited by the Constitution from identifying any category [**510] of murderers under the age of 18 who must be sentenced to life imprisonment without parole. Even a 17½-year-old who sets off a bomb in a crowded mall or guns down a dozen students and teachers is a “child” and [****90] must be given a chance to persuade a judge to permit his release into society. Nothing in the Constitution supports this arrogation of legislative authority.

The Court long ago abandoned the original meaning of the *Eighth Amendment*, holding instead that the prohibition of “cruel and unusual punishment” embodies the “evolving standards of decency that mark the progress of a maturing society.” *Trop v. Dulles, 356 U.S. 86, 101, 78 S. Ct. 590, 2 L. Ed. 2d 630 (1958)* (plurality opinion); see also *Graham v. Florida, 560 U.S. 48, 58, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010)*; *Kennedy v. Louisiana, 554 U.S. 407, 419, 128 S. Ct. 2641, 171 L. Ed. 2d 525 (2008)*; *Roper v. Simmons, 543 U.S. 551, 560-561, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005)*; *Atkins v. Virginia, 536 U.S. 304, 311-312, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002)*; *Hudson v. McMillian, 503 U.S. 1, 8, 112 S. Ct. 995, 117 L. Ed. 2d 156 (1992)*; *Ford v. Wainwright, 477 U.S. 399, 406, 106 S. Ct. 2595, 91 L. Ed. 2d 335 (1986)*; *Rhodes v. Chapman, 452 U.S. 337, 346, 101 S. Ct. 2392, 69 L. Ed. 2d 59 (1981)*; *Estelle v. Gamble, 429 U.S. 97, 102, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976)*. Both the provenance and philosophical basis for this standard were problematic from the start. (Is it true that our society is inexorably evolving in the direction of greater and greater decency? Who says so,

and how did this particular philosophy of history [***444] find its way into our fundamental law? And in any event, aren't elected representatives [****91] more likely than unaccountable judges to reflect changing societal standards?) But at least at the start, the Court insisted that these “evolving standards” represented something other than the personal views of five Justices. See *Rummel v. Estelle, 445 U.S. 263, 275, 100 S. Ct. 1133, 63 L. Ed. 2d 382 (1980)* (explaining that “the Court's *Eighth Amendment* judgments should neither be nor appear to be merely the subjective views of individual Justices”). Instead, the Court looked for objective indicia of our society's moral standards and the trajectory of our moral “evolution.” See *id., at 274-275, 100 S. Ct. 1133, 63 L. Ed. 2d 382* (emphasizing that “ ‘judgment should be informed by objective factors to the maximum possible extent’ ” (quoting [**511] *Coker v. Georgia, 433 U.S. 584, 592, 97 S. Ct. 2861, 53 L. Ed. 2d 982 (1977)* (plurality opinion))).

In this search for objective indicia, the Court toyed with the use of public opinion polls, see *Atkins, supra, at 316, n. 21, 122 S. Ct. 2242, 153 L. Ed. 2d 335*, and occasionally relied on foreign law, see *Roper v. Simmons, supra, at 575, 125 S. Ct. 1183, 161 L. Ed. 2d 1*; *Enmund v. Florida, 458 U.S. 782, 796, n. 22, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982)*; *Thompson v. Oklahoma, 487 U.S. 815, 830-831, 108 S. Ct. 2687, 101 L. Ed. 2d 702 (1988)*; *Coker, 433 U.S., at 596, n. 10, 97 S. Ct. 2861, 53 L. Ed. 2d 982* (plurality opinion).

In the main, however, the staple of this inquiry was the tallying of the positions taken by state [****92] legislatures. Thus, in *Coker*, which held that the *Eighth Amendment* prohibits the imposition of the death penalty [**2488] for the rape of an adult woman, the Court noted that only one State permitted that practice. *Id., at 595-596, 97 S. Ct. 2861, 53 L. Ed. 2d 982*. In *Enmund*, where the Court held that the *Eighth Amendment* forbids capital punishment for ordinary felony murder, both federal law and the law of 28 of the 36 States that authorized the death penalty at the time rejected that punishment. *458 U.S., at 789, 102 S. Ct. 3368, 73 L. Ed. 2d 1140*.

While the tally in these early cases may be characterized as evidence of a national consensus, the evidence became weaker and weaker in later cases. In *Atkins*, which held that low-IQ defendants may not be sentenced to death, the Court found an anti-death-penalty consensus even though more than half of the States that allowed capital punishment permitted the practice. See *536 U.S., at 342, 122 S. Ct. 2242, 153 L.*

[Ed. 2d 335](#) (Scalia, J., dissenting) (observing that less than half of the 38 States that permit capital punishment have enacted legislation barring execution of the mentally retarded). The Court attempted to get around this problem by noting that there was a pronounced trend against this punishment. See [id., at 313-315, 122 S. Ct. 2242, 153 L. Ed. 2d 335](#) (listing 18 States that [****93] had amended their laws since 1986 to prohibit the execution of mentally retarded persons).

The importance of trend evidence, however, was not long lived. In *Roper*, which outlawed capital punishment for defendants between the ages of 16 and 18, the lineup of the [*512] States was the same as in *Atkins*, but the trend in favor of abolition--five States during the past 15 years--was less impressive. [Roper, 543 U.S., at 564-565, 125 S. Ct. 1183, 161 L. Ed. 2d 1](#). Nevertheless, the Court held that the absence of a strong trend in support of [***445] abolition did not matter. See [id., at 566, 125 S. Ct. 1183, 161 L. Ed. 2d 1](#) ("Any difference between this case and *Atkins* with respect to the pace of abolition is thus counterbalanced by the consistent direction of the change").

In *Kennedy v. Louisiana*, the Court went further. Holding that the *Eighth Amendment* prohibits capital punishment for the brutal rape of a 12-year-old girl, the Court disregarded a nascent legislative trend *in favor of permitting capital punishment* for this narrowly defined and heinous crime. See [554 U.S., at 433, 128 S. Ct. 2641, 171 L. Ed. 2d 525](#) (explaining that, although "the total number of States to have made child rape a capital offense . . . is six," "[t]his is not an indication of a trend or change in direction comparable to the [****94] one supported by data in *Roper*"). The Court felt no need to see whether this trend developed further--perhaps because true moral evolution can lead in only one direction. And despite the argument that the rape of a young child may involve greater depravity than some murders, the Court proclaimed that homicide is categorically different from all (or maybe almost all) other offenses. See [id., at 438, 128 S. Ct. 2641, 171 L. Ed. 2d 525](#) (stating that nonhomicide crimes, including child rape, "may be devastating in their harm . . . but in terms of moral depravity and of the injury to the person and to the public, they cannot be compared to murder in their severity and irrevocability" (internal quotation marks omitted)). As the Court had previously put it, "death is different." [Ford, supra, at 411, 106 S. Ct. 2595, 91 L. Ed. 2d 335](#) (plurality opinion).

Two years after *Kennedy*, in *Graham v. Florida*, any pretense of heeding a legislative consensus was

discarded. In *Graham*, federal law and the law of 37 States and the District of Columbia permitted a minor to be sentenced to life imprisonment without parole for nonhomicide crimes, but [*513] despite this unmistakable evidence of a national consensus, the Court held that the practice violates the *Eighth Amendment*. [****95] See [560 U.S., at 97, 130 S. Ct. 2011, 176 L. Ed. 2d 825 \[**2489\]](#) (Thomas, J., dissenting). The Court, however, drew a distinction between minors who murder and minors who commit other heinous offenses, so at least in that sense the principle that death is different lived on.

Today, that principle is entirely put to rest, for here we are concerned with the imposition of a term of imprisonment on offenders who kill. The two (carefully selected) cases before us concern very young defendants, and despite the brutality and evident depravity exhibited by at least one of the petitioners, it is hard not to feel sympathy for a 14-year-old sentenced to life without the possibility of release. But no one should be confused by the particulars of the two cases before us. The category of murderers that the Court delicately calls "children" (murderers under the age of 18) consists overwhelmingly of young men who are fast approaching the legal age of adulthood. Evan Miller and Kuntrell Jackson are anomalies; much more typical are murderers like Christopher Simmons, who committed a brutal thrill-killing just seven months shy of his 18th birthday. [Roper, supra, at 556, 125 S. Ct. 1183, 161 L. Ed. 2d 1](#).

Seventeen-year-olds commit a significant number of murders every [****96] [***446] year,¹ and some of these crimes are incredibly brutal. Many of these murderers are at least as mature as the average 18-year-old. See [Thompson, supra, at 854, 108 S. Ct. 2687, 101 L. Ed. 2d 702](#) (O'Connor, J., concurring in judgment) (noting that maturity may "vary widely among different individuals of the same age"). Congress and the legislatures of 43 States have concluded that at least some of these murderers should be sentenced to prison without parole, and 28 States and the [*514] Federal Government have decided that for some of these offenders life without parole should be mandatory. See [ante, at 482-483, and nn. 9-10, 183 L. Ed. 2d, at 426-427](#). The majority of this Court now overrules these

¹ Between 2002 and 2010, 17-year-olds committed an average combined total of 424 murders and nonnegligent homicides per year. See Dept. of Justice, Bureau of Justice Statistics, § 4, Arrests, Age of persons arrested (Table 4.7).

legislative judgments.²

It is true that, at least for now, the Court apparently permits a trial judge to make an individualized decision that a particular minor convicted of murder should be sentenced to life without parole, but do not expect this possibility to last very long. The majority goes out of its way to express the view that the imposition of a sentence of [****98] life without parole on a “child” (*i.e.*, a murderer under the age of 18) should be uncommon. Having held in *Graham* that a trial judge with discretionary sentencing authority may not impose a sentence of life without parole on a minor [**2490] who has committed a nonhomicide offense, the Justices in the majority may soon extend that holding to minors who commit murder. We will see.

What today's decision shows is that our *Eighth Amendment* cases are no longer tied to any objective indicia of society's standards. Our *Eighth Amendment* case law is now entirely inward looking. After entirely disregarding objective [*515] indicia of our society's standards in *Graham*, the Court now extrapolates from *Graham*. Future cases may extrapolate from today's holding, and this process may continue until the majority brings sentencing practices into line with whatever the majority views as truly evolved standards of decency.

The *Eighth Amendment* imposes certain limits on the sentences that may be imposed in criminal cases, but for the most part it leaves questions of sentencing policy to be determined by Congress and the state

²As the Court noted in [Mistretta v. United States, 488 U.S. 361, 366, 109 S. Ct. 647, 102 L. Ed. 2d 714 \(1989\)](#), Congress passed the Sentencing Reform Act of 1984 to eliminate discretionary sentencing and parole because it concluded that these practices had led to gross abuses. The Senate Report for the 1984 bill rejected what it called the “outmoded [****97] rehabilitation model” for federal criminal sentencing. S. Rep. No. 98-225, p. 38 (1983). According to the Report, “almost everyone involved in the criminal justice system now doubts that rehabilitation can be induced reliably in a prison setting, and it is now quite certain that no one can really detect whether or when a prisoner is rehabilitated.” *Ibid.* The Report also “observed that the indeterminate-sentencing system had two 'unjustif[ed], and 'shameful' consequences. The first was the great variation among sentences imposed by the different judges upon similarly situated offenders. The second was uncertainty as to the time the offender would spend in prison. Each was a serious impediment to an evenhanded and effective operation of the criminal justice system.” [Mistretta, supra, at 366, 109 S. Ct. 647, 102 L. Ed. 2d 714](#) (quoting S. Rep. No. 98-225, at. 38, 65 (citation omitted)).

legislatures--and with good reason. Determining the length of imprisonment that is appropriate for [****99] a particular offense and a particular offender inevitably [***447] involves a balancing of interests. If imprisonment does nothing else, it removes the criminal from the general population and prevents him from committing additional crimes in the outside world. When a legislature prescribes that a category of killers must be sentenced to life imprisonment, the legislature, which presumably reflects the views of the electorate, is taking the position that the risk that these offenders will kill again outweighs any countervailing consideration, including reduced culpability due to immaturity or the possibility of rehabilitation. When the majority of this Court countermands that democratic decision, what the majority is saying is that members of society must be exposed to the risk that these convicted murderers, if released from custody, will murder again.

Unless our cases change course, we will continue to march toward some vision of evolutionary culmination that the Court has not yet disclosed. The Constitution does not authorize us to take the country on this journey.

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L Ed Digest, Criminal Law §§ 69, 79

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Validity, under [****100] Federal Constitution, of imposing death penalty on particular categories of offenders--Supreme Court cases. [161 L. Ed. 2d 1173](#).

Duration of prison sentence as constituting cruel and unusual punishment in violation of *Federal Constitution's Eighth Amendment*--Supreme Court cases. [115 L. Ed. 2d 1169](#).

Validity of death penalty, under Federal Constitution, as affected by consideration of aggravating or mitigating circumstances--Supreme Court cases. [111 L. Ed. 2d 947](#).

Federal constitutional guaranty against cruel and unusual punishment--Supreme Court cases. [33 L. Ed. 2d 932](#).

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People v. Caballero

Supreme Court of California

August 16, 2012, Filed

S190647

Reporter

55 Cal. 4th 262 *; 282 P.3d 291 **; 145 Cal. Rptr. 3d 286 ***; 2012 Cal. LEXIS 7664 ****; 2012 WL 3516135

THE PEOPLE, Plaintiff and Respondent, v. RODRIGO CABALLERO, Defendant and Appellant. In re RODRIGO CABALLERO on Habeas Corpus.

Subsequent History: Reported at [People v. Caballero \(Rodrigo\), 2012 Cal. LEXIS 8511 \(Cal., Aug. 16, 2012\)](#)

Decision reached on appeal by [People v. Caballero, 2014 Cal. App. Unpub. LEXIS 5801 \(Cal. App. 2d Dist., Aug. 19, 2014\)](#)

Prior History: [****1] Superior Court of Los Angeles County, No. MA043902, Hayden A. Zacky, Judge. Court of Appeal, Second Appellate District, Division Four, Nos. B217709|B221833.

[People v. Caballero, 191 Cal. App. 4th 1248, 119 Cal. Rptr. 3d 920, 2011 Cal. App. LEXIS 41 \(Cal. App. 2d Dist., Jan. 18, 2011\)](#)

Core Terms

sentence, parole, juvenile, nonhomicide, offenders, juvenile offender, homicide, rehabilitation, maturity, convicted, possibility of parole, attempted murder, life sentence, categorical, lifetime, offenses, prison, impose sentence, years to life, adult, term of years, high court, kill, trial court, imprisonment, expectancy, applies, murder, cases, ban

Case Summary

Procedural Posture

Defendant juvenile sought review of a judgment of the Court of Appeal, Second Appellate District, Division Four, which affirmed his three attempted murder convictions and his total sentence of 110 years to life.

Overview

The court observed that the United States Supreme Court had held that the Eighth Amendment prohibited states from sentencing a juvenile convicted of nonhomicide offenses to life imprisonment without the possibility of parole. Consistent with that holding, the court held that sentencing a juvenile offender for a nonhomicide offense to a term of years with a parole eligibility date that fell outside the juvenile offender's natural life expectancy constituted cruel and unusual punishment in violation of the Eighth Amendment. Although proper authorities might later determine that youths should remain incarcerated for their natural lives, the State could not deprive them at sentencing of a meaningful opportunity to demonstrate their rehabilitation and fitness to reenter society in the future. In the instant case, the 110-year-to-life sentence imposed on defendant contravened the United States Supreme Court's mandate against cruel and unusual punishment under the Eighth Amendment because he would not become parole eligible until over 100 years from now and, consequently, would have no opportunity to demonstrate growth and maturity to try to secure his release.

Outcome

The court reversed the judgment of the court of appeal and remanded the matter for reconsideration.

LexisNexis® Headnotes

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Age & Term Limits

Criminal Law & Procedure > Sentencing > Cruel &

Unusual Punishment

[HN1](#)  Fundamental Rights, Cruel & Unusual Punishment

Nonhomicide crimes differ from homicide crimes in a moral sense, and a juvenile nonhomicide offender has a twice diminished moral culpability as opposed to an adult convicted of murder--both because of the juvenile's crime and because of his or her undeveloped moral sense. No legitimate penological interest justifies a life without parole sentence for juvenile nonhomicide offenders. Although the State is by no means required to guarantee eventual freedom to a juvenile convicted of a nonhomicide offense, the Eighth Amendment requires the State to afford the juvenile offender a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation, and a life without parole sentence improperly denies the juvenile offender a chance to demonstrate growth and maturity. A life without parole sentence is particularly harsh for a juvenile offender who will, on average, serve more years and a greater percentage of his or her life in prison than an adult offender.

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Age & Term Limits

Criminal Law & Procedure > Sentencing > Imposition of Sentence > General Overview

[HN2](#)  Sentencing, Age & Term Limits

The ban on life without parole sentences for juvenile offenders in nonhomicide cases applies to their sentencing equation regardless of intent in the crime's commission, or how a sentencing court structures the life without parole sentence.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Age & Term Limits

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

[HN3](#)  Fundamental Rights, Cruel & Unusual**Punishment**

Sentencing a juvenile offender for a nonhomicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender's natural life expectancy constitutes cruel and unusual punishment in violation of the Eighth Amendment. Although proper authorities may later determine that youths should remain incarcerated for their natural lives, the state may not deprive them at sentencing of a meaningful opportunity to demonstrate their rehabilitation and fitness to reenter society in the future.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Age & Term Limits

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

[HN4](#)  Fundamental Rights, Cruel & Unusual Punishment

Under the United States Supreme Court's nonhomicide ruling in [Graham v. Florida, 130 S. Ct. 2011](#), a sentencing court must consider all mitigating circumstances attendant in a juvenile offender's crime and life, including but not limited to his chronological age at the time of the crime, whether he was a direct perpetrator or an aider and abettor, and his physical and mental development, so that it can impose a time when the juvenile will be able to seek parole from the parole board. The board of parole hearings will then determine whether the juvenile must be released from prison based on demonstrated maturity and rehabilitation. Defendants who were sentenced for crimes they committed as juveniles who seek to modify life without parole or equivalent de facto sentences already imposed may file petitions for a writ of habeas corpus in the trial court in order to allow the court to weigh the mitigating evidence in determining the extent of incarceration required before parole hearings. Because every case will be different, trial courts have not been given a precise time-frame for setting these future parole hearings in a nonhomicide case. However, the sentence must not violate the defendant's Eighth Amendment rights and must provide him a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation under the United States Supreme Court's mandate.

Headnotes/Syllabus

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

A jury convicted defendant juvenile of three counts of attempted murder. He received a total sentence of 110 years to life. (Superior Court of Los Angeles County, No. MA043902, Hayden A. Zacky, Judge.) The Court of Appeal, Second Dist., Div. Four, Nos. B217709 and B221833, affirmed the judgment, reasoning that a holding of the United States Supreme Court banning life without parole sentences for juvenile offenders in nonhomicide cases applied a categorical rule specifically limited to juvenile nonhomicide offenders receiving an explicitly designated life without parole sentence.

The Supreme Court reversed the judgment of the Court of Appeal and remanded the matter for reconsideration. Consistent with the United States Supreme Court's nonhomicide holding, the court held that sentencing a juvenile offender for a nonhomicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender's natural life expectancy constitutes cruel and unusual punishment in violation of *U.S. Const., 8th Amend.* Although proper authorities may later determine that youths should remain incarcerated for their natural lives, the state may not deprive them at sentencing of a meaningful opportunity to demonstrate their rehabilitation and fitness to reenter society in the future. In the instant case, the 110-year-to-life sentence imposed on defendant contravened the United States Supreme Court's mandate against cruel and unusual punishment under *U.S. Const., 8th Amend.*, because defendant would not become parole eligible until over 100 years from now and, consequently, would have no opportunity to demonstrate growth and maturity to try to secure his release. (Opinion by Chin, J., with Cantil-Sakauye, C. J., Kennard, Baxter, and Corrigan, JJ., concurring. Concurring opinion by Werdegar, J., with Liu, J., concurring (see p. 269).)

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

[CA\(1\)](#) [↓] (1)

Criminal Law § 519.2—Punishment—Cruel and

Unusual—Life Without Parole—Juvenile Nonhomicide Offenders.

Nonhomicide crimes [*263] differ from homicide crimes in a moral sense, and a juvenile nonhomicide offender has a twice-diminished moral culpability as opposed to an adult convicted of murder—both because of the juvenile's crime and because of his or her undeveloped moral sense. No legitimate penological interest justifies a life without parole sentence for juvenile nonhomicide offenders. Although the state is by no means required to guarantee eventual freedom to a juvenile convicted of a nonhomicide offense, *U.S. Const., 8th Amend.*, requires the state to afford the juvenile offender a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. A life without parole sentence is particularly harsh for a juvenile offender who will, on average, serve more years and a greater percentage of his or her life in prison than an adult offender. The ban on life without parole sentences for juvenile offenders in nonhomicide cases applies to their sentencing equation regardless of intent in the crime's commission, or how a sentencing court structures the life without parole sentence.

[CA\(2\)](#) [↓] (2)

Criminal Law § 519.2—Punishment—Cruel and Unusual—Term-of-years Sentence Amounting to Life Without Parole—Juvenile Nonhomicide Offenders.

A 110-year-to-life sentence imposed on a juvenile defendant convicted of three counts of attempted murder contravened the United States Supreme Court's mandate against cruel and unusual punishment under *U.S. Const., 8th Amend.*, because he would not become parole eligible until over 100 years from now and, consequently, would have no opportunity to demonstrate growth and maturity to try to secure his release.

[Erwin et al., *Cal. Criminal Defense Practice* (2012) ch. 91, § 91.02; 3 *Witkin & Epstein, Cal. Criminal Law* (4th ed. 2012) Punishment, § 511.]

[CA\(3\)](#) [↓] (3)

Criminal Law § 519.2—Punishment—Cruel and Unusual—Term-of-years Sentence Amounting to Life Without Parole—Juvenile Nonhomicide Offenders.

Sentencing a juvenile offender for a nonhomicide

offense to a term of years with a parole eligibility date that falls outside the juvenile offender's natural life expectancy constitutes cruel and unusual punishment in violation of *U.S. Const., 8th Amend.* Although proper authorities may later determine that youths should remain incarcerated for their natural lives, the state may not deprive them at sentencing of a meaningful opportunity to demonstrate their rehabilitation and fitness to reenter society in the future. Under the United States Supreme Court's nonhomicide ruling in *Graham v. Florida*, the sentencing court must consider all mitigating circumstances attendant in the juvenile's crime and life, including but not limited to his or her chronological age at the time of the crime, whether the juvenile offender [*264] was a direct perpetrator or an aider and abettor, and his or her physical and mental development, so that it can impose a time when the juvenile offender will be able to seek parole from the parole board. The Board of Parole Hearings will then determine whether the juvenile offender must be released from prison based on demonstrated maturity and rehabilitation. Defendants who were sentenced for crimes they committed as juveniles who seek to modify life without parole or equivalent de facto sentences already imposed may file petitions for writs of habeas corpus in the trial court in order to allow the court to weigh the mitigating evidence in determining the extent of incarceration required before parole hearings. Because every case will be different, the California Supreme Court has declined to provide trial courts with a precise timeframe for setting these future parole hearings in a nonhomicide case. However, the sentence must not violate the defendant's *Eighth Amendment* rights and must provide him or her a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation under the United States Supreme Court's mandate.

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Amici Curie on behalf of Defendant and Appellant.

Edmund G. Brown, Jr., and Kamala D. Harris, Attorneys General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Chung L. Mar, Lauren E. Dana, Jaime L. Fuster and Lawrence M. Daniels, Deputy Attorneys General, for Plaintiff and Respondent.

Judges: Opinion by Chin, J., with Cantil-Sakauye, C. J., Kennard, Baxter, [****2] and Corrigan, JJ., concurring. Concurring opinion by Werdegar, J., with Liu, J., concurring.

Opinion by: Chin [*265]

Opinion

[***288] [**293] **CHIN, J.**—In *Graham v. Florida* (2010) 560 U.S. 48 [176 L. Ed. 2d 825, 130 S. Ct. 2011] (*Graham*), the high court held that the *Eighth Amendment* prohibits states from sentencing a juvenile convicted of nonhomicide offenses to life imprisonment without the possibility of parole. (560 U.S. at p. [130 S. Ct. at p. 2030].) ¹ We must determine here whether a 110-year-to-life sentence imposed on a juvenile convicted of nonhomicide offenses contravenes *Graham's* mandate against cruel and unusual punishment under the *Eighth Amendment*. We conclude it does.

FACTUAL AND PROCEDURAL BACKGROUND

On the afternoon of June 6, 2007, 16-year-old defendant, Rodrigo Caballero, opened fire on three teenage boys who were members of a rival gang. Adrian Bautista, Carlos Vargas, and Vincent Valle, members of the Val Verde Park Gang, were rounding a street corner on foot when defendant jumped out of a green Toyota and yelled out the name of his gang, either “Vario Lancas” or “Lancas.” Vargas responded by shouting, “Val Verde.” Defendant began shooting [****3] at the group. Neither Vargas nor Valle was hit by the gunfire; Bautista was hit in the upper back, near his shoulder blade.

¹ The *Eighth Amendment* applies to the states. (*Robinson v. California* (1962) 370 U.S. 660 [8 L. Ed. 2d 758, 82 S. Ct. 1417].)

A jury convicted defendant of three counts of attempted murder (*Pen. Code, §§ 664, 187, subd. (a)*).² The jury found true that defendant personally and intentionally discharged a firearm (§ 12022.53, *subds. (c), (d)*) and inflicted great bodily harm on one victim (§ 12022.7), and that defendant committed the crimes for the benefit of a criminal street gang (§ 186.22, *subd. (b)(1)(C)*). Defendant, a diagnosed schizophrenic, testified in his own behalf after he was treated with antipsychotic medication. He told the jury both that he “was straight trying to kill somebody” and that he did not intend to kill anyone. The trial court sentenced defendant to 15 years to life for the first attempted murder count, plus a consecutive 25 years to life for the firearm enhancement. (§ 12022.53, *subd. (d)*.) For the second attempted murder, the court imposed an additional consecutive term of 15 years to life, plus 20 years for the firearm enhancement on that count. (§ 12022.53, *subd. (c)*.) On the third attempted murder count, the court sentenced defendant to another consecutive term [****4] of 15 years to life, plus 20 years for the corresponding firearm enhancement. (§ 12022.53, *subd. (c)*.) Defendant’s total sentence was 110 years to life. The Court of Appeal affirmed the trial court’s judgment in its entirety.

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We granted defendant’s petition for review to determine whether *Graham* prohibits imposition of the sentence here.

DISCUSSION

In *Graham*, the 16-year-old defendant, Terrance Graham, committed armed burglary and attempted armed robbery, was sentenced to probation, and subsequently violated the terms of his probation when he committed other crimes. (*Graham, supra, 560 U.S. at p. ____ [130 S. Ct. at p. 2020]*.) The trial court revoked his probation and sentenced him to life in prison for the burglary. (*Ibid.*) Graham’s sentence amounted to a life sentence without the possibility of parole because Florida had abolished its parole system, leaving Graham with no possibility of release unless [****289] he was granted executive clemency. (*Id. at p. ____ [130 S. Ct. at p. 2015]*.)

[CA\(1\)](#)[↑] (1) The high court stated that [HN1](#)[↑] nonhomicide crimes differ from homicide crimes in a

“moral sense” and that a juvenile nonhomicide offender has a [****5] “twice diminished moral culpability” as opposed to an adult convicted of murder—both because of his crime and because of his undeveloped moral sense. (*Graham, supra, 560 U.S. at p. ____ [130 S. Ct. at p. 2027]*.) The court relied on studies showing that “developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence. [Citations.] Juveniles are [also] more capable of change than are adults, and their actions are less likely to be evidence of ‘irretrievably depraved character’ than are the actions of adults.” (*Id. at p. ____ [130 S. Ct. at p. 2026]*, quoting *Roper v. Simmons (2005) 543 U.S. 551, 570 [161 L. Ed. 2d 1, 125 S. Ct. 1183]*.) No legitimate penological interest, the court concluded, justifies a life without parole sentence for juvenile nonhomicide offenders. (*Graham, at p. ____ [130 S. Ct. at p. 2030]*.)

Although the state is by no means required to guarantee eventual freedom to a juvenile convicted of a nonhomicide offense, *Graham* holds that the *Eighth Amendment* requires the state to afford the juvenile offender a “meaningful opportunity to obtain release based on [****6] demonstrated maturity and rehabilitation,” and that “[a] life without parole sentence improperly denies the juvenile offender a chance to demonstrate growth and maturity.” (*Graham, supra, 560 U.S. at p. ____ [130 S. Ct. at pp. 2029–2030]*.) The court observed that a life without parole sentence is particularly harsh for a juvenile offender who “will on average serve more years and a greater percentage of his life in prison than an adult offender.” (*Id. at p. ____ [130 S. Ct. at p. 2028]*.) *Graham* likened a life without parole sentence for nonhomicide offenders to the death penalty itself, given their youth and the prospect that, as the years progress, juveniles can reform their deficiencies and become contributing members of society. (*Ibid.*)

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The People assert that *Graham*’s ban on life without parole sentences does not apply to juvenile offenders who commit attempted murder, with its requisite intent to kill. The People also claim that a cumulative sentence for distinct crimes does not present a cognizable *Eighth Amendment* claim, concluding that each of defendant’s sentences was permissible individually because each

²All statutory references are to the Penal Code unless otherwise indicated.

included the possibility of parole within his lifetime.³ In addition, the Court [****7] of Appeal reasoned that *Graham* applied a categorical rule specifically limited to juvenile nonhomicide offenders receiving an explicitly designated life without parole sentence: “[I]f [*Graham*] had intended to broaden the class of offenders within the scope of its decision, it would have [included] ... any juvenile offender who received the functional equivalent of a life sentence without the possibility of parole for a nonhomicide offense.” The [***290] Court of Appeal found support for its conclusion in Justice Alito’s dissent in *Graham*: “Nothing in the Court’s opinion affects the imposition of a sentence to a term of years without the possibility of parole.” (*Graham, supra, 560 U.S. at p. [130 S. Ct. at p. 2058]* (dis. opn. of Alito, J.)). *Graham*’s scope and application, however, were recently clarified in *Miller v. Alabama* (2012) 567 U.S. [183 L. Ed. 2d 407, 132 S. Ct. 2455] (*Miller*).

In *Miller*, the United States Supreme Court extended *Graham*’s reasoning (but not its categorical ban) to homicide cases, and, in so doing, made it clear that *Graham*’s “flat [HN2](#) [↑] ban” on life without parole sentences for juvenile offenders in nonhomicide cases applies to their sentencing equation regardless of intent in the crime’s commission, or how a sentencing court structures the life without parole sentence. (*Miller, supra, 567 U.S. at pp. [132 S. Ct. at pp. 2465, 2469]*.) The high court was careful to emphasize that *Graham*’s “categorical bar” on life without parole applied “only to nonhomicide crimes.” (*Id. at p. [132 S. Ct. at p. 2465]*.) But the court also observed that “none of what [*Graham*] [**295] said about children—about their distinctive (and transitory) mental traits and [****9] environmental vulnerabilities—is crime-specific. Those features are evident in the same way, and to the same degree, when ... a botched robbery turns into a killing. So *Graham*’s reasoning implicates any life-without-parole sentence imposed on a juvenile, even as

³ The People also rely on *Lockyer v. Andrade* (2003) 538 U.S. 63 [155 L. Ed. 2d 144, 123 S. Ct. 1166] for the proposition that a juvenile offender may receive consecutive mandatory terms exceeding his or her life expectancy without implicating the prohibition against cruel and unusual punishment. In our view, no such conclusion may be drawn. In fact, in *Lockyer* [****8] the high court noted that it has never provided specific guidance “in determining whether a particular sentence for a term of years can violate the *Eighth Amendment*,” observing that it had “not established a clear or consistent path for courts to follow.” (*Id. at p. 72*.) We note that the term “life expectancy” means the normal life expectancy of a healthy person of defendant’s age and gender living in the United States.

its categorical bar relates only to nonhomicide offenses.” (*Miller, supra, 567 U.S. [132 S. Ct. at p. 2465]*.) *Miller* therefore made it clear that *Graham*’s “flat ban” on life [*268] without parole sentences applies to all nonhomicide cases involving juvenile offenders, including the term-of-years sentence that amounts to the functional equivalent of a life without parole sentence imposed in this case.⁴

[CA\(2\)](#) [↑] (2) Defendant in the present matter will become parole eligible over 100 years from now. (§ 3046, subd. (b) [requiring defendant to serve a minimum of 110 years before becoming parole eligible].) Consequently, he would have no opportunity to “demonstrate growth and maturity” to try to secure his release, in contravention of *Graham*’s dictate. (*Graham, supra, 560 U.S. at p. [130 S. Ct. at p. 2029]*; see *People v. Mendez* (2010) 188 Cal.App.4th 47, 50–51 [114 Cal. Rptr. 3d 870] [****11] [holding that a sentence of 84 years to life was the equivalent of life without parole under *Graham*, and therefore cruel and unusual punishment].) *Graham*’s analysis does not focus on the precise sentence meted out. Instead, as noted above, it holds that a state must provide a juvenile offender [***291] “with some realistic opportunity to obtain release” from prison during his or her expected lifetime. (*Graham, supra, 560 U.S. at p. [130 S. Ct. at p. 2034]*.)

⁴ Although *Miller* concluded that *Graham*’s categorical ban on life without parole sentences applies only to all nonhomicide offenses, the court emphasized that in homicide cases, states are forbidden from imposing a “[m]andatory life without parole for a juvenile.” (*Miller, supra, 567 U.S. at p. [132 S. Ct. at p. 2468]*.) The high court noted that such mandatory sentences preclude consideration of juveniles’ chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. [****10] It prevents taking into account the family and home environment that surround them—no matter how brutal or dysfunctional. (*Ibid.*) Thus, in *Miller* the high court did “not foreclose a sentencer’s ability” to determine whether it was dealing with homicide cases and the “‘rare juvenile offender whose crime reflects irreparable corruption.’” (*Id. at p. [132 S.Ct. at p. 2469]*, quoting *Roper, supra, 543 U.S. at p. 573*; see *Graham, supra, 560 U.S. at p. [130 S. Ct. at p. 2026]*.) The court requires sentencers in homicide cases “to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.” (*Miller, supra, 567 U.S. at p. [132 S. Ct. at p. 2469]*.) We leave *Miller*’s application in the homicide context to a case that poses the issue.

CONCLUSION

[CA\(3\)](#)^[↑] (3) Consistent with the high court's holding in [Graham, supra, 560 U.S. 48 \[130 S. Ct. 2011\]](#), we conclude that [HN3](#)^[↑] sentencing a juvenile offender for a nonhomicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender's natural life expectancy constitutes cruel and unusual punishment in violation of the *Eighth Amendment*. Although proper authorities may later determine that youths should remain incarcerated for their natural lives, the state may not deprive them at sentencing of a meaningful opportunity to demonstrate their rehabilitation and fitness to reenter society in the future. [HN4](#)^[↑] Under *Graham's* nonhomicide ruling, the sentencing court must consider all mitigating circumstances attendant in [\[****12\]](#) the [\[*269\]](#) juvenile's crime and life, including but not limited to his or her chronological age at the time of the crime, whether the juvenile offender was a direct perpetrator or an aider and abettor, and his or her physical and mental development, so that it can impose a time when the juvenile offender will be able to seek parole from the parole board. The Board of Parole Hearings will then determine whether the juvenile offender must be released from prison "based on demonstrated maturity and rehabilitation." ([560 U.S. at p. \[130 S. Ct. at p. 2030\]](#).) Defendants who were sentenced for crimes they committed as juveniles who seek to modify life without parole or equivalent de facto sentences already imposed may file petitions for writs of habeas corpus in the trial court in order to allow the court to weigh the mitigating evidence in determining the extent of incarceration required before parole [\[**296\]](#) hearings. Because every case will be different, we will not provide trial courts with a precise timeframe for setting these future parole hearings in a nonhomicide case. However, the sentence must not violate the defendant's *Eighth Amendment* rights and must provide him or her a "meaningful opportunity [\[****13\]](#) to obtain release based on demonstrated maturity and rehabilitation" under *Graham's* mandate.

We reverse the judgment of the Court of Appeal and remand the matter for reconsideration in light of this opinion.⁵

⁵We urge the Legislature to enact legislation establishing a parole eligibility mechanism that provides a defendant serving a de facto life sentence without possibility of parole for nonhomicide crimes that he or she committed as a juvenile with the opportunity to obtain release on a showing of [rehabilitation and maturity](#).

Cantil-Sakauye, C. J., Kennard, J., Baxter, J., and Corrigan, J., concurred.

Concur by: Werdegar

Concur

WERDEGAR, J., Concurring.—As the majority recognizes, the United States Supreme Court held in [Graham v. Florida \(2010\) 560 U.S. 48, \[176 L. Ed. 2d 825, 130 S. Ct. 2011, 2034\]](#) (*Graham*) that "[t]he Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide. A State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term." Consequently, I concur in the majority's holding that, consistent with *Graham*, "sentencing a juvenile offender [\[****14\]](#) for a nonhomicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender's natural life expectancy constitutes cruel and unusual punishment in violation of the *Eighth Amendment*." [\[***292\]](#) (Maj. opn., *ante*, at p. 268.) In so holding, however, we are extending the high court's jurisprudence to a situation that court has not had occasion to address.

Recently, the United States Supreme Court addressed a different aspect of this issue: juvenile offenders who commit *homicide* offenses. ([Miller v. \[**270\] Alabama \(2012\) 567 U.S. \[183 L. Ed. 2d 407, 132 S. Ct. 2455\]](#) (*Miller*).) *Miller* concluded that even for juvenile homicide offenders, a *mandatory* sentence of life imprisonment without the possibility of parole violates the proportionality requirement of the *Eighth Amendment to the United States Constitution* because it requires "that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes." ([Miller, 567 U.S. at p. \[132 S. Ct. at p. 2475\]](#).) For homicide offenses, then, *Miller* eschewed the "categorical bar" on life without parole sentences imposed in *Graham* ([Miller, 567 U.S. at p. \[132 S. Ct. at p. 2465\]](#)), [\[****15\]](#) and instead left open the possibility that juvenile murderers could, in a sentencing court's discretion, be sentenced to spend the rest of their lives in prison with no hope of parole (short of a grant of executive clemency).

Defendant Rodrigo Caballero was 16 years old, and thus a juvenile, when he committed his crimes. In light

of *Miller*, we must first decide whether he committed a homicide or a nonhomicide offense. The jury convicted defendant of three counts of attempted premeditated and deliberate murder. (*Pen. Code, § 664, subd. (a)*.) Two of his victims escaped physical injury completely, while one was injured but survived the shooting. As *Graham* explains, such “[s]erious nonhomicide crimes ‘may be devastating in their harm ... but “in terms of moral depravity and of the injury to the person and to the public,” ... they cannot be compared to murder in their “severity and irrevocability.”’ [(Quoting *Kennedy v. Louisiana* (2008) 554 U.S. 407, 438 [171 L. Ed. 2d 525, 128 S. Ct. 2641].)] This is because “[l]ife is over for the victim of the murderer,” but for the victim of even a very serious nonhomicide crime, ‘life ... is not over and normally is not beyond repair.’ [(Quoting *Coker v. Georgia* (1977) 433 U.S. 584, 598 [53 L. Ed. 2d 982, 97 S. Ct. 2861] [****16] (plur. opn.).)] Although an offense like robbery or rape is ‘a serious crime deserving serious punishment,’ [citation], those crimes differ from homicide crimes in a [**297] moral sense.” (*Graham, supra, 560 U.S. at p. ____ [130 S. Ct. at p. 2027]*.) Because the crime of attempted murder, even when premeditated and deliberate, does not rise to the severity or irrevocability of actually taking another’s life, it must be classified as a nonhomicide offense within the meaning of *Graham*. ¹ [***293] (See *Manuel v. State*

¹ *Graham* itself is not crystal clear on this point. As respondent points out, *Graham* at one point says, “[t]he Court has recognized that defendants who do not kill, *intend to kill*, or *foresee that life will be taken* are categorically less deserving of the most serious forms of punishment than are murderers.” (*Graham, supra, 560 U.S. at p. ____ [130 S. Ct. at p. 2027]*, [****17] italics added.) Here, defendant’s convictions for attempted murder necessarily demonstrate the jury found he acted with the intent to kill. (*People v. Gonzalez* (2012) 54 Cal.4th 643, 653 [142 Cal. Rptr. 3d 893, 278 P.3d 1242].)

Graham also relied heavily on a scholarly paper to conclude that “nationwide there are only 109 juvenile offenders serving sentences of life without parole for nonhomicide offenses” (*Graham, supra, 560 U.S. at p. ____ [130 S. Ct. at p. 2023]*), but that paper defined homicide crimes to *include attempted murder* (Annino et al., *Juvenile Life without Parole for Non-Homicide Offenses: Florida Compared to Nation* [updated Sept. 14, 2009], Public Interest Law Center, College of Law, Fla. State Univ., p. 4 [for purposes of the study, “[i]ndividuals convicted of attempted homicide ... are defined as homicide offenders”]). Finally, in recognizing the worldwide consensus against imprisoning juveniles for life with no chance of parole, *Graham* noted that only two countries—the United States and Israel—impose that sentence in practice, and that “all of the seven Israeli prisoners whom commentators have identified as

(*Fla. Dist. Ct. App. 2010*) 48 So. 3d [*271] 94, cert. den. *sub nom. Florida v. Manuel* (2011) 565 U.S. ____ [181 L. Ed. 2d 259, 132 S. Ct. 446] [finding attempted murder a nonhomicide offense under *Graham*].) Like the majority, therefore, I conclude this case falls within *Graham*’s categorical bar prohibiting life without parole sentences for juveniles who commit nonhomicide offenses.

Because *Graham* imposes a “flat ban” on such sentences (*Miller, supra, 567 U.S. at p. ____ [132 S. Ct. at p. 2465]*), we must next determine whether defendant’s sentence of 110 years to life is the legal equivalent of life without parole. Although respondent appears to concede that defendant’s sentence is the functional equivalent of a life without parole term, they nevertheless argue his sentence is distinguishable from the sentence prohibited in *Graham* because it is comprised of component parts that only when added together constitute a term longer than a person can serve in a normal lifetime. For this purported distinction they cite comments from the *Graham* dissenters. (See *Graham, supra, 560 U.S. at p. ____, fn. 11 [130 S. Ct. at p. 2052, fn. 11] [****19]* (dis. opn. of Thomas, J.) [opining that the *Graham* majority “excludes from its analysis all juveniles sentenced to lengthy term-of-years sentences (e.g., 70 or 80 years’ imprisonment)”; *id. at p. ____ [130 S. Ct. at p. 2058]* (dis. opn. of Alito, J.) [“Nothing in the Court’s opinion affects the imposition of a sentence to a term of years without the possibility of parole.”].)

Characterization by the *Graham* dissenters of the scope of the majority opinion is, of course, dubious authority (see *Glover v. Board of Retirement* (1989) 214 Cal. App. 3d 1327, 1337 [263 Cal. Rptr. 224] [the “ ‘majority opinion of the Supreme Court states the law and ... a dissenting opinion has no function except to express the private view of the dissenter’ ”]), but in any event the purported distinction between a single sentence of life without [*272] parole and one of component parts

serving life sentences for juvenile crimes were convicted of homicide or attempted homicide.” (*Graham, supra, 560 U.S. at p. ____ [130 S. Ct. at p. 2033]*, [****18] italics added.)

Despite these slight inconsistencies in *Graham*’s analysis, the main thrust of its reasoning is that crimes resulting in the death of another human being are qualitatively different from all others, both in their severity, moral depravity, and irrevocability, and the **Eighth Amendment to the United States Constitution** demands courts take cognizance of that fact when sentencing those who committed their crimes while still children.

adding up to 110 years to life is unpersuasive. The gist of *Graham* is not only that life sentences for juveniles are *unusual* as a statistical matter, they are *cruel* as well because “developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds” (*Graham, supra, 560 U.S. at p. [130 S. Ct. at p. 2026]*), [****20] “[j]uveniles are more capable of change than are adults, and their actions are less likely to be evidence of ‘irretrievably depraved character’ than are the actions of adults” (*ibid.*), and that accordingly, [**298] “ ‘a greater possibility exists that a minor’s character deficiencies will be reformed’ ” (*id. at pp. [130 S. Ct. at pp. 2026–2027]*).

Further, the high court in *Graham* noted that, “[w]ith respect to life without parole for juvenile nonhomicide offenders, [***294] none of the goals of penal sanctions that have been recognized as legitimate—retribution, deterrence, incapacitation, and rehabilitation [citation]—provides an adequate justification.” (*Graham, supra, 560 U.S. at p. [130 S. Ct. at p. 2028]*.) First, although “ [t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender ” (*ibid.*), this concern applies equally whether the sentence is one of life without parole or a term of years that cannot be served within the offender’s lifetime. Second, society’s interest in deterring socially unacceptable behavior by imposing long sentences does not justify sentences of life without parole for juvenile nonhomicide [****21] offenders “[b]ecause juveniles’ ‘lack of maturity and underdeveloped sense of responsibility ... often result in impetuous and ill-considered actions and decisions,’ [citation], [such that] they are less likely to take a possible punishment into consideration when making decisions.” (*Id. at pp. [130 S. Ct. at pp. 2028–2029]*.) Third, although lifetime incapacitation will admittedly prevent criminals from reoffending, imposing that severe punishment on juvenile nonhomicide offenders labels them as incorrigible and incapable of change, and thus denies to them “a chance to demonstrate growth and maturity.” (*Id. at p. [130 S. Ct. at p. 2029]*.) These concerns remain true whether the sentence is life without parole or a term of years exceeding the offender’s life expectancy.

The fourth consideration mentioned by the *Graham* court—rehabilitation—is perhaps the most salient factor as applied to underage offenders. As *Graham* explained: “A sentence of life imprisonment without parole ... cannot be justified by the goal of rehabilitation. The penalty forswears altogether the rehabilitative ideal.

By denying the defendant the right to reenter the community, the State makes an irrevocable [****22] judgment about that person’s value and place in society. This judgment is not appropriate in light of a juvenile nonhomicide offender’s capacity for change and limited moral culpability.” (*Graham, supra, 560 U.S. at pp. [130 [273] S. Ct. at pp. 2029–2030]*.) Like a sentence of life without parole, a prison sentence of such length that it cannot be served within an offender’s lifetime similarly denies his or her “right to reenter the community” (*ibid.*), and so equally implicates *Graham*’s reasoning that concerns over rehabilitation cannot justify a lifetime of imprisonment for nonhomicide juvenile offenders.

Although the facts of this case differ from those in *Graham* in that defendant was not sentenced to a single term of life without parole, I agree with the majority that *Graham* applies. Because defendant committed three nonhomicide crimes while still a juvenile and was sentenced to the functional equivalent of life in prison with no possibility of parole, he is entitled to the benefit of what *Miller* termed *Graham*’s “categorical bar” (*Miller, supra, 567 U.S. at p. [132 S. Ct. at p. 2465]*) on sentences of life in prison with no “meaningful opportunity to obtain release based on demonstrated [****23] maturity and rehabilitation” (*Graham, supra, 560 U.S. at p. [130 S. Ct. at p. 2030]*.) I also agree that the Legislature is an appropriate body to establish a mechanism to implement *Graham*’s directives for the future (maj. opn., *ante*, at p. 269, fn. 5), and that “every case will be different ...” (*id.* at p. 269). But irrespective of whether the Legislature, in the future, steps in to enact procedures under which juveniles in defendant’s position may be resentenced, the trial court in this case must resentence defendant to a term that does not violate [***295] his rights. (See *In re Hawthorne (2005) 35 Cal.4th 40 [24 Cal. Rptr. 3d 189, 105 P.3d 552]* [affording the defendant relief under *Atkins v. Virginia (2002) 536 U.S. 304 [153 L. Ed. 2d 335, 122 S. Ct. 2242]* when his case did not qualify for the preconviction proceedings set forth in *Pen. Code, § 1376*.)² Accordingly, I would [**299] provide the lower court greater guidance on remand in this case, for we have before us a defendant on whom an unconstitutional sentence was pronounced. That violation must be remedied. *Graham* does not require defendant be given a parole hearing *sometime* in the future; it prohibits a

² Because the constitutionality of any new sentence may be challenged on appeal, this court may be called upon to provide further guidance.

55 Cal. 4th 262, *273; 282 P.3d 291, **299; 145 Cal. Rptr. 3d 286, ***295; 2012 Cal. LEXIS 7664, ****23

court from sentencing him to such a term lacking that possibility *at the outset*. Therefore, I would remand the case [****24] to the trial court with directions to resentence defendant to a term that does not violate his constitutional rights, that is, a sentence that, although undoubtedly lengthy, provides him with a “meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.” ([Graham, 560 U.S. at p. \[130 S. Ct. at p. 2030\]](#).)

[*274]

With those caveats in mind, I concur in the majority's decision to reverse the judgment of the Court of Appeal.

Liu, J., concurred.

End of Document

People v. Contreras

Supreme Court of California

February 26, 2018, Filed

S224564

Reporter

4 Cal. 5th 349 *; 411 P.3d 445 **; 229 Cal. Rptr. 3d 249 ***; 2018 Cal. LEXIS 1008 ****

THE PEOPLE, Plaintiff and Respondent, v. LEONEL CONTRERAS et al., Defendants and Appellants.

Notice: As modified Apr. 11, 2018.

Subsequent History: Reported at [People v. Contreras & Rodriguez, 2018 Cal. LEXIS 1556 \(Cal., Feb. 26, 2018\)](#)

Later proceeding at [People v. Contreras & Rodriguez, 2018 Cal. LEXIS 2185 \(Cal., Mar. 23, 2018\)](#)

Modified by [People v. Contreras, 2018 Cal. LEXIS 2528 \(Cal., Apr. 11, 2018\)](#)

Request granted, Modified by [People v. Contreras & Rodriguez, 2018 Cal. LEXIS 2731 \(Cal., Apr. 11, 2018\)](#)

Prior History: [****1] Superior Court of San Diego County, No. SCD236438, Peter C. Deddeh, Judge. Court of Appeal, Fourth Appellate District, Division One, No. D063428.

[People v. Contreras, 2015 Cal. App. Unpub. LEXIS 210 \(Cal. App. 4th Dist., Jan. 14, 2015\)](#)

Core Terms

sentence, parole, juvenile, juvenile offender, offenders, nonhomicide, prison, elderly, parole hearing, inmates, rehabilitation, life expectancy, convicted, years to life, trial court, high court, maturity, defendants', regulations, credits, incarceration, parole eligibility, meaningful opportunity, suitability, offenses, offers, life sentence, eligible for parole, provides, factors

Case Summary

Overview

HOLDINGS: [1]-Sentencing juvenile nonhomicide offenders who committed sex offenses to lengthy terms reflected a judgment that they were irretrievably incorrigible and violated the prohibition against cruel and unusual punishment under the *Eighth Amendment, U.S. Const., 8th Amend.*, even if their parole eligibility dates were within their expected lifespans, because the chance for release from prison would come near the end of their lives and was not a realistic opportunity for release under the United States Supreme Court's case law contemplating a sufficient period to achieve reintegration into society; [2]-The outer boundary of a lawful sentence could not be determined by reference to life expectancy tables, an approach that would be of doubtful constitutionality under [Cal. Const., art. I, § 7, subd. \(a\)](#), because such tables reflected group-based differences such as gender and race.

Outcome

Affirmed and remanded.

LexisNexis® Headnotes

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

HN1  **Fundamental Rights, Cruel & Unusual Punishment**

The *Eighth Amendment, U.S. Const., 8th Amend.*, ban on cruel and unusual punishment flows from the basic precept of justice that punishment for crime should be graduated and proportioned to the offense. By protecting even those convicted of heinous crimes, the

Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Age & Term Limits

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

[HN2](#) **Fundamental Rights, Cruel & Unusual Punishment**

The United States Supreme Court has interpreted the *Eighth Amendment, U.S. Const., 8th Amend.*, to impose unique constraints on the sentencing of juveniles who commit serious crimes. This case law reflects the principle that children are constitutionally different from adults for purposes of sentencing. From this principle, the high court has derived a number of limitations on juvenile sentencing: (1) no individual may be executed for an offense committed when he or she was a juvenile; (2) no juvenile who commits a nonhomicide offense may be sentenced to life without parole (LWOP); and (3) no juvenile who commits a homicide offense may be automatically sentenced to LWOP. Although juveniles may be punished for nonhomicide offenses with long sentences, they must have some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. This analysis does not focus on the precise sentence meted out. Instead, it holds that a state must provide a juvenile offender with some realistic opportunity to obtain release from prison during his or her expected lifetime. The *Eighth Amendment* does not allow juveniles who commit nonhomicide crimes to be sentenced to LWOP or to a term of years well in excess of natural life expectancy.

Governments > Courts > Judicial Precedent

[HN3](#) **Courts, Judicial Precedent**

Language in a judicial opinion is to be understood in accordance with the facts and issues before the court. An opinion is not authority for propositions not considered.

Constitutional Law > Equal Protection > Gender & Sex

Constitutional Law > Equal Protection > National Origin & Race

Constitutional Law > Equal Protection > Judicial Review > Standards of Review

[HN4](#) **Equal Protection, Gender & Sex**

Discrimination based on gender violates the equal protection clause of the California Constitution, as set forth in [Cal. Const., art. I, § 7, subd. \(a\)](#), and triggers the highest level of scrutiny. In order to satisfy that standard, the state must demonstrate not simply that there is a rational, constitutionally legitimate interest that supports the differential treatment at issue, but instead that the state interest is a constitutionally compelling one that justifies the disparate treatment prescribed by the statute in question. And the state must demonstrate that the distinctions drawn by the statute (or statutory scheme) are necessary to further that interest. Racial classifications are evaluated under the same constitutional standard.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Age & Term Limits

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

[HN5](#) **Fundamental Rights, Cruel & Unusual Punishment**

There can be no constitutional rule that employs a concept of life expectancy whose meaning depends on the facts presented in each case. Determining the validity of lengthy term-of-years sentences under the *Eighth Amendment, U.S. Const., 8th Amend.*, through a case-by-case inquiry into competing evidence of the life expectancy most pertinent to a particular juvenile defendant would lead to problems of disparate sentencing. Moreover, even if there were a legally and empirically sound approach to estimating life expectancy, it must be noted that a life expectancy is an average. In a normal distribution, about half of a population reaches or exceeds its life expectancy, while the other half does not. Juvenile nonhomicide offenders

must be given some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. An opportunity to obtain release does not seem meaningful or realistic if the chance of living long enough to make use of that opportunity is roughly the same as a coin toss. Of course, there can be no guarantee that every juvenile offender who suffers a lengthy sentence will live until his or her parole eligibility date. But the outer boundary of a lawful sentence cannot be fixed by a concept that by definition would not afford a realistic opportunity for release to a substantial fraction of juvenile offenders.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Age & Term Limits

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

[HN6](#) **Fundamental Rights, Cruel & Unusual Punishment**

In addition to raising legal and empirical difficulties, an actuarial approach to determining whether a juvenile nonhomicide offender has a meaningful opportunity to obtain release is misguided at a more fundamental level. When evaluating a sentence that clearly exceeds natural life expectancy, it is straightforward to conclude that the sentence is functionally equivalent to life without parole (LWOP) as an actuarial matter. But the issue of functional equivalence in this context is not limited to determining whether a term-of-years sentence is actuarially equivalent to LWOP. There is a separate and distinct question whether a lengthy term-of-years sentence, though not clearly exceeding a juvenile offender's natural lifespan, may nonetheless impinge on the same substantive concerns that make the imposition of LWOP on juvenile nonhomicide offenders impermissible under the *Eighth Amendment, U.S. Const., 8th Amend.* To resolve this question of functional equivalence, the proper starting point is not a life expectancy table but the reasoning of the United States Supreme Court in its case law.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Age & Term Limits

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

[HN7](#) **Fundamental Rights, Cruel & Unusual Punishment**

The United States Supreme Court has held that the *Eighth Amendment, U.S. Const., 8th Amend.*, categorically prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide. Central to the high court's analysis was its consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question. As compared to adults, juveniles have a lack of maturity and an underdeveloped sense of responsibility; they are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure; and their characters are not as well formed. These salient characteristics mean that it is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption. Further, defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers. Although an offense like robbery or rape is a serious crime deserving serious punishment, those crimes differ from homicide crimes in a moral sense.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Age & Term Limits

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

[HN8](#) **Fundamental Rights, Cruel & Unusual Punishment**

A sentence of life without parole deprives a convict of the most basic liberties without giving hope of restoration. In addition, life without parole is an especially harsh punishment for a juvenile. Under this sentence a juvenile offender will on average serve more years and a greater percentage of his life in prison than

an adult offender. The United States Supreme Court has evaluated such a sentence against the penological goals of retribution, deterrence, incapacitation, and rehabilitation. Linking retribution to culpability, the case for retribution is not as strong with a minor as with an adult and becomes even weaker with respect to a juvenile who did not commit homicide. As for deterrence, because juveniles' lack of maturity and underdeveloped sense of responsibility often result in impetuous and ill-considered actions and decisions, they are less likely to take a possible punishment into consideration when making decisions. Recidivism is a serious risk to public safety, and so incapacitation is an important goal. But the characteristics of juveniles make it questionable to conclude that a juvenile offender is incorrigible; indeed, incorrigibility is inconsistent with youth. A sentencing authority may not make a judgment at the outset that a juvenile nonhomicide offender will be a risk to society for the rest of his life.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Age & Term Limits

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

[HN9](#) **Fundamental Rights, Cruel & Unusual Punishment**

A sentence of life without parole (LWOP) forswears altogether the rehabilitative ideal. By denying the defendant the right to reenter the community, the state makes an irrevocable judgment about that person's value and place in society. This judgment is not appropriate in light of a juvenile nonhomicide offender's capacity for change and limited moral culpability. Inmates sentenced to LWOP are often denied access to vocational training and other rehabilitative services that are available to other inmates, making all the more evident the disproportionality of LWOP when imposed on juvenile offenders, who are most in need of and receptive to rehabilitation. In sum, penological theory is not adequate to justify life without parole for juvenile nonhomicide offenders.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Age & Term Limits

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

[HN10](#) **Fundamental Rights, Cruel & Unusual Punishment**

What emerges from the United States Supreme Court's case law is not a constitutional prohibition on harsh sentences for juveniles who commit serious crimes. Nor must a state release a juvenile nonhomicide offender during his natural life. Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives. But states are prohibited from making a judgment at the outset that those offenders never will be fit to reenter society. What a state must do is give those defendants some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. While finding life without parole impermissible for juvenile nonhomicide offenders, the high court did not define the maximum length of incarceration before parole eligibility that would be permissible. But a lawful sentence must recognize a juvenile nonhomicide offender's capacity for change and limited moral culpability. A lawful sentence must offer hope of restoration, a chance to demonstrate maturity and reform, a chance for fulfillment outside prison walls, and a chance for reconciliation with society. A lawful sentence must offer the opportunity to achieve maturity of judgment and self-recognition of human worth and potential. A lawful sentence must offer the juvenile offender an incentive to become a responsible individual.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Age & Term Limits

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

[HN11](#) **Fundamental Rights, Cruel & Unusual Punishment**

Although the United States Supreme Court has not defined what it means for a juvenile offender to rejoin society, its language envisions more than the mere act

of release or a de minimis quantum of time outside of prison. Case law speaks of the chance to rejoin society in qualitative terms — the rehabilitative ideal — contemplating a sufficient period to achieve reintegration as a productive and respected member of the citizenry. The chance for reconciliation with society, the right to reenter the community, and the opportunity to reclaim one's value and place in society all indicate concern for a measure of belonging and redemption that goes beyond mere freedom from confinement. Juvenile nonhomicide offenders should not be denied access to vocational training and education, among other rehabilitative services. Such programming enables a juvenile offender to hold a job or otherwise participate as a productive member of society if released. A directive that the juvenile should not be deprived of the opportunity to achieve self-recognition of human worth and potential implies the juvenile may someday have the opportunity to realize that potential. For any individual released after decades of incarceration, adjusting to ordinary civic life is a complex and gradual process. Confinement with no possibility of release until an advanced age seems unlikely to allow for reintegration.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Age & Term Limits

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

[HN12](#) **Fundamental Rights, Cruel & Unusual Punishment**

In underscoring the capacity of juveniles to change, the United States Supreme Court has made clear that a juvenile offender's prospect of rehabilitation is not simply a matter of outgrowing the transient qualities of youth; it also depends on the incentives and opportunities available to the juvenile going forward. A young person who knows that he or she has no chance to leave prison before life's end has little incentive to become a responsible individual. The same is true of a young person who knows he or she has no chance to leave prison for 50 years.

Constitutional Law > Bill of Rights > Fundamental

Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Age & Term Limits

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

[HN13](#) **Fundamental Rights, Cruel & Unusual Punishment**

A sentence of 50 years to life imprisonment bears an attenuated relationship to legitimate penological goals. Such a sentence, though less harsh than life without parole (LWOP), is still an especially harsh punishment for a juvenile, who will on average serve more years and a greater percentage of his life in prison than an adult offender. It is also a highly severe punishment for a juvenile nonhomicide offender who, when compared to an adult murderer, has a twice diminished moral culpability. The retributive case for a 50-years-to-life sentence, as for LWOP, is weakened by the juvenile nonhomicide offender's age and the nature of the crime. As for deterrence, the observation that juveniles have limited ability to consider consequences when making decisions applies to a sentence of 50 years to life just as it does to a sentence of LWOP. And as for incapacitation, a judgment that a juvenile offender will be incorrigible for the next 50 years is no less questionable than a judgment that the juvenile offender will be incorrigible forever.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Age & Term Limits

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

[HN14](#) **Fundamental Rights, Cruel & Unusual Punishment**

A sentence of life without parole (LWOP) may not be imposed on juveniles who commit nonhomicide offenses, even if it may be imposed (rarely) on juveniles who commit homicide offenses or on adults who commit nonhomicide offenses. This case law from the United States Supreme Court does not hold or suggest that only LWOP sentences, and no sentences other than LWOP, violate the *Eighth Amendment, U.S. Const., 8th*

Amend., when imposed on a juvenile nonhomicide offender. Its reasoning applies to a term-of-years sentence that amounts to the functional equivalent of a life without parole sentence. The line that it drew between lawful and unlawful sentences for juvenile nonhomicide offenders is not between LWOP and other sentences, but between sentences that do and sentences that do not provide some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Age & Term Limits

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

[HN15](#) **Fundamental Rights, Cruel & Unusual Punishment**

Ultimately, any line-drawing must depend on a considered judgment as to whether the parole eligibility date of a lengthy sentence offers a juvenile offender a realistic hope of release and a genuine opportunity to reintegrate into society. Reasonable minds may disagree on such judgments, but an approach based on life expectancy would not avoid subjective and quite likely divergent assessments of what constitutes adequate reintegration into society, and the time necessary to accomplish this reentry.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Age & Term Limits

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

[HN16](#) **Fundamental Rights, Cruel & Unusual Punishment**

In light of a juvenile nonhomicide offender's capacity for change and limited moral culpability, no sentencing court is permitted to render a judgment at the outset that a juvenile nonhomicide offender is incorrigible. The

sentencing of each defendant must be guided by the central intuition of the United States Supreme Court's case law in this area — that children who commit even heinous crimes are capable of change.

Governments > Courts

[HN17](#) **Governments, Courts**

A cardinal principle of judicial restraint is that if it is not necessary to decide more, it is necessary not to decide more.

Headnotes/Syllabus

Summary

[*349] CALIFORNIA OFFICIAL REPORTS SUMMARY

Defendants, convicted in a joint trial of kidnapping and sexual offenses that they committed as juveniles, received lengthy sentences. (Superior Court of San Diego County, No. SCD236438, Peter C. Deddeh, Judge.) The Court of Appeal, Fourth District, Div. One, No. D063428, affirmed the convictions while reversing the sentences.

The Supreme Court affirmed the Court of Appeal and remanded for resentencing. The court concluded that the sentences reflected a judgment that defendants were irretrievably incorrigible and violated the prohibition against cruel and unusual punishment under *U.S. Const., 8th Amend.*, even if their parole eligibility dates were within their expected lifespans, because the chance for release from prison would come near the end of their lives and was not a realistic opportunity for release under the United States Supreme Court's case law contemplating a sufficient period to achieve reintegration into society. The court held that the outer boundary of a lawful sentence cannot be determined by reference to life expectancy tables, an approach that would be of doubtful constitutionality (*Cal. Const., art. I, § 7, subd. (a)*) because life expectancy calculations reflect group-based differences such as gender and race. (Opinion by Liu, J., with Chin, Cuéllar, and Kruger, J, concurring. Dissenting opinion by Cantil-Sakauye, C. J., with Corrigan, J., and Kriegler, J.,* concurring (see p.

* Associate Justice of the Court of Appeal, Second Appellate District, Division Five, assigned by the Chief Justice pursuant to [article VI, section 6 of the California Constitution](#).

383). Dissenting opinion by Kriegler, J.,* with Cantil-Sakauye, C. J., and Corrigan, J., concurring (see p. 411).)

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

[CA\(1\)](#) (1)

Criminal Law § 518—Punishment—Cruel and Unusual—Scope and Nature of Protection.

The *Eighth Amendment* ban on cruel and unusual punishment flows from the basic precept of justice that punishment for crime should be graduated and proportioned to the offense. By [*350] protecting even those convicted of heinous crimes, *U.S. Const., 8th Amend.*, reaffirms the duty of the government to respect the dignity of all persons.

[CA\(2\)](#) (2)

Criminal Law § 519.2—Punishment—Cruel and Unusual—Lengthy Sentences for Juvenile Nonhomicide Offenders—Requirement of Meaningful Opportunity To Obtain Release.

The United States Supreme Court has interpreted *U.S. Const., 8th Amend.*, to impose unique constraints on the sentencing of juveniles who commit serious crimes. This case law reflects the principle that children are constitutionally different from adults for purposes of sentencing. From this principle, the high court has derived a number of limitations on juvenile sentencing: (1) no individual may be executed for an offense committed when he or she was a juvenile; (2) no juvenile who commits a nonhomicide offense may be sentenced to life without parole (LWOP); and (3) no juvenile who commits a homicide offense may be automatically sentenced to LWOP. Although juveniles may be punished for nonhomicide offenses with long sentences, they must have some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. This analysis does not focus on the precise sentence meted out. Instead, it holds that a state must provide a juvenile offender with some realistic opportunity to obtain release from prison during his or her expected lifetime. *U.S. Const., 8th Amend.*, does not allow juveniles who commit nonhomicide crimes to be sentenced to LWOP or to a term of years well in excess of natural life expectancy.

[CA\(3\)](#) (3)

Courts § 38—Decisions and Orders—Doctrine of Stare Decisis—Identity of Law and Fact—Propositions Not Considered.

Language in a judicial opinion is to be understood in accordance with the facts and issues before the court. An opinion is not authority for propositions not considered.

[CA\(4\)](#) (4)

Constitutional Law § 87.2—Equal Protection—Classification—Judicial Review—Strict Standard—Gender Discrimination and Racial Classifications.

Discrimination based on gender violates the equal protection clause of the California Constitution ([Cal. Const., art. I, § 7, subd. \(a\)](#)) and triggers the highest level of scrutiny. In order to satisfy that standard, the state must demonstrate not simply that there is a rational, constitutionally legitimate interest that supports the differential treatment at issue, but instead that the state interest is a constitutionally compelling one that justifies the disparate treatment prescribed by the statute in question. And the state must demonstrate that the distinctions drawn by the statute (or statutory scheme) are necessary to further that interest. Racial classifications are evaluated under the same constitutional standard.

[*351] [CA\(5\)](#) (5)

Criminal Law § 519.2—Punishment—Cruel and Unusual—Lengthy Sentences for Juvenile Nonhomicide Offenders—Requirement of Meaningful Opportunity To Obtain Release—Life Expectancy.

There can be no constitutional rule that employs a concept of life expectancy whose meaning depends on the facts presented in each case. Determining the validity of lengthy term-of-years sentences under *U.S. Const., 8th Amend.*, through a case-by-case inquiry into competing evidence of the life expectancy most pertinent to a particular juvenile defendant would lead to problems of disparate sentencing. Moreover, even if there were a legally and empirically sound approach to estimating life expectancy, it must be noted that a life expectancy is an average. In a normal distribution, about half of a population reaches or exceeds its life

expectancy, while the other half does not. Juvenile nonhomicide offenders must be given some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. An opportunity to obtain release does not seem meaningful or realistic if the chance of living long enough to make use of that opportunity is roughly the same as a coin toss. Of course, there can be no guarantee that every juvenile offender who suffers a lengthy sentence will live until his or her parole eligibility date. But the outer boundary of a lawful sentence cannot be fixed by a concept that by definition would not afford a realistic opportunity for release to a substantial fraction of juvenile offenders.

[CA\(6\)](#) (6)

Criminal Law § 519.2—Punishment—Cruel and Unusual—Lengthy Sentences for Juvenile Nonhomicide Offenders—Requirement of Meaningful Opportunity To Obtain Release—Life Expectancy.

In addition to raising legal and empirical difficulties, an actuarial approach to determining whether a juvenile nonhomicide offender has a meaningful opportunity to obtain release is misguided at a more fundamental level. When evaluating a sentence that clearly exceeds natural life expectancy, it is straightforward to conclude that the sentence is functionally equivalent to life without parole (LWOP) as an actuarial matter. But the issue of functional equivalence in this context is not limited to determining whether a term-of-years sentence is actuarially equivalent to LWOP. There is a separate and distinct question whether a lengthy term-of-years sentence, though not clearly exceeding a juvenile offender's natural lifespan, may nonetheless impinge on the same substantive concerns that make the imposition of LWOP on juvenile nonhomicide offenders impermissible under *U.S. Const., 8th Amend.* To resolve this question of functional equivalence, the proper starting point is not a life expectancy table but the reasoning of the United States Supreme Court in its case law.

[*352] [CA\(7\)](#) (7)

Criminal Law § 519.2—Punishment—Cruel and Unusual—Lengthy Sentences for Juvenile Nonhomicide Offenders—Factors Considered.

The United States Supreme Court has held that *U.S. Const., 8th Amend.*, categorically prohibits the

imposition of a life without parole sentence on a juvenile offender who did not commit homicide. Central to the high court's analysis was its consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question. As compared to adults, juveniles have a lack of maturity and an underdeveloped sense of responsibility; they are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure; and their characters are not as well formed. These salient characteristics mean that it is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption. Further, defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers. Although an offense like robbery or rape is a serious crime deserving serious punishment, those crimes differ from homicide crimes in a moral sense.

[CA\(8\)](#) (8)

Criminal Law § 519.2—Punishment—Cruel and Unusual—Lengthy Sentences for Juvenile Nonhomicide Offenders—Factors Considered.

A sentence of life without parole deprives a convict of the most basic liberties without giving hope of restoration. In addition, life without parole is an especially harsh punishment for a juvenile. Under this sentence a juvenile offender will on average serve more years and a greater percentage of his or her life in prison than an adult offender. The United States Supreme Court has evaluated such a sentence against the penological goals of retribution, deterrence, incapacitation, and rehabilitation. Linking retribution to culpability, the case for retribution is not as strong with a minor as with an adult and becomes even weaker with respect to a juvenile who did not commit homicide. As for deterrence, because juveniles' lack of maturity and underdeveloped sense of responsibility often result in impetuous and ill-considered actions and decisions, they are less likely to take a possible punishment into consideration when making decisions. Recidivism is a serious risk to public safety, and so incapacitation is an important goal. But the characteristics of juveniles make it questionable to conclude that a juvenile offender is incorrigible; indeed, incorrigibility is inconsistent with youth. A sentencing authority may not make a judgment

at the outset that a juvenile nonhomicide offender will be a risk to society for the rest of his or her life.

[*353] [CA\(9\)](#) (9)

Criminal Law § 519.2—Punishment—Cruel and Unusual—Lengthy Sentences for Juvenile Nonhomicide Offenders—Factors Considered.

A sentence of life without parole (LWOP) forswears altogether the rehabilitative ideal. By denying the defendant the right to reenter the community, the state makes an irrevocable judgment about that person's value and place in society. This judgment is not appropriate in light of a juvenile nonhomicide offender's capacity for change and limited moral culpability. Inmates sentenced to LWOP are often denied access to vocational training and other rehabilitative services that are available to other inmates, making all the more evident the disproportionality of LWOP when imposed on juvenile offenders, who are most in need of and receptive to rehabilitation. In sum, penological theory is not adequate to justify life without parole for juvenile nonhomicide offenders.

[CA\(10\)](#) (10)

Criminal Law § 519.2—Punishment—Cruel and Unusual—Lengthy Sentences for Juvenile Nonhomicide Offenders—Factors Considered.

What emerges from the United States Supreme Court's case law is not a constitutional prohibition on harsh sentences for juveniles who commit serious crimes. Nor must a state release a juvenile nonhomicide offender during his or her natural life. Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives. But states are prohibited from making a judgment at the outset that those offenders never will be fit to reenter society. What a state must do is give those defendants some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. While finding life without parole impermissible for juvenile nonhomicide offenders, the high court did not define the maximum length of incarceration before parole eligibility that would be permissible. But a lawful sentence must recognize a juvenile nonhomicide offender's capacity for change and limited moral culpability. A lawful sentence must offer hope of restoration, a chance to demonstrate maturity

and reform, a chance for fulfillment outside prison walls, and a chance for reconciliation with society. A lawful sentence must offer the opportunity to achieve maturity of judgment and self-recognition of human worth and potential. A lawful sentence must offer the juvenile offender an incentive to become a responsible individual.

[CA\(11\)](#) (11)

Criminal Law § 519.2—Punishment—Cruel and Unusual—Lengthy Sentences for Juvenile Nonhomicide Offenders—Requirement of Meaningful Opportunity To Obtain Release.

Even assuming defendants' parole eligibility dates were within their expected lifespans, the chance for release would come near the end of their lives; even if released, they would have spent the vast majority of adulthood in prison. These sentences tended to reflect a judgment that defendants were irretrievably incorrigible and fell short of giving them the realistic chance for release [*354] contemplated by the United States Supreme Court's case law on *Eighth Amendment* restrictions on sentencing juvenile nonhomicide offenders.

[[Erwin et al., Cal. Criminal Defense Practice \(2017\) ch. 91, § 91.02.](#)]

[CA\(12\)](#) (12)

Criminal Law § 519.2—Punishment—Cruel and Unusual—Lengthy Sentences for Juvenile Nonhomicide Offenders—Requirement of Meaningful Opportunity To Obtain Release.

Although the United States Supreme Court has not defined what it means for a juvenile offender to rejoin society, its language envisions more than the mere act of release or a de minimis quantum of time outside of prison. Case law speaks of the chance to rejoin society in qualitative terms—the rehabilitative ideal—contemplating a sufficient period to achieve reintegration as a productive and respected member of the citizenry. The chance for reconciliation with society, the right to reenter the community, and the opportunity to reclaim one's value and place in society all indicate concern for a measure of belonging and redemption that goes beyond mere freedom from confinement. Juvenile nonhomicide offenders should not be denied access to vocational training and education, among other

rehabilitative services. Such programming enables a juvenile offender to hold a job or otherwise participate as a productive member of society if released. A directive that the juvenile should not be deprived of the opportunity to achieve self-recognition of human worth and potential implies the juvenile may someday have the opportunity to realize that potential. For any individual released after decades of incarceration, adjusting to ordinary civic life is a complex and gradual process. Confinement with no possibility of release until an advanced age seems unlikely to allow for reintegration.

[CA\(13\)](#) (13)

Criminal Law § 519.2—Punishment—Cruel and Unusual—Lengthy Sentences for Juvenile Nonhomicide Offenders—Requirement of Meaningful Opportunity To Obtain Release—Factors Considered.

In underscoring the capacity of juveniles to change, the United States Supreme Court has made clear that a juvenile offender's prospect of rehabilitation is not simply a matter of outgrowing the transient qualities of youth; it also depends on the incentives and opportunities available to the juvenile going forward. A young person who knows that he or she has no chance to leave prison before life's end has little incentive to become a responsible individual. The same is true of a young person who knows he or she has no chance to leave prison for 50 years.

[CA\(14\)](#) (14)

Criminal Law § 519.2—Punishment—Cruel and Unusual—Lengthy Sentences for Juvenile Nonhomicide Offenders—Requirement of Meaningful Opportunity To Obtain Release—Factors Considered.

A sentence of 50 years to life imprisonment bears an attenuated relationship to [*355] legitimate penological goals. Such a sentence, though less harsh than life without parole (LWOP), is still an especially harsh punishment for a juvenile, who will on average serve more years and a greater percentage of his or her life in prison than an adult offender. It is also a highly severe punishment for a juvenile nonhomicide offender who, when compared to an adult murderer, has a twice diminished moral culpability. The retributive case for a 50-year-to-life sentence, as for LWOP, is weakened by the juvenile nonhomicide offender's age and the nature of the crime. As for deterrence, the observation that

juveniles have limited ability to consider consequences when making decisions applies to a sentence of 50 years to life just as it does to a sentence of LWOP. And as for incapacitation, a judgment that a juvenile offender will be incorrigible for the next 50 years is no less questionable than a judgment that the juvenile offender will be incorrigible forever.

[CA\(15\)](#) (15)

Criminal Law § 519.2—Punishment—Cruel and Unusual—Lengthy Sentences for Juvenile Nonhomicide Offenders—Requirement of Meaningful Opportunity To Obtain Release.

A sentence of life without parole (LWOP) may not be imposed on juveniles who commit nonhomicide offenses, even if it may be imposed (rarely) on juveniles who commit homicide offenses or on adults who commit nonhomicide offenses. This case law from the United States Supreme Court does not hold or suggest that only LWOP sentences, and no sentences other than LWOP, violate *U.S. Const., 8th Amend.*, when imposed on a juvenile nonhomicide offender. Its reasoning applies to a term-of-years sentence that amounts to the functional equivalent of a LWOP sentence. The line that it drew between lawful and unlawful sentences for juvenile nonhomicide offenders is not between LWOP and other sentences, but between sentences that do and sentences that do not provide some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.

[CA\(16\)](#) (16)

Criminal Law § 519.2—Punishment—Cruel and Unusual—Lengthy Sentences for Juvenile Nonhomicide Offenders—Requirement of Meaningful Opportunity To Obtain Release—Life Expectancy.

Ultimately, any line-drawing must depend on a considered judgment as to whether the parole eligibility date of a lengthy sentence offers a juvenile offender a realistic hope of release and a genuine opportunity to reintegrate into society. Reasonable minds may disagree on such judgments, but an approach based on life expectancy would not avoid subjective and quite likely divergent assessments of what constitutes adequate reintegration into society, and the time necessary to accomplish this reentry.

[*356] [CA\(17\)](#) [↓] (17)

Criminal Law § 519.2—Punishment—Cruel and Unusual—Lengthy Sentences for Juvenile Nonhomicide Offenders—Requirement of Meaningful Opportunity To Obtain Release—Factors Considered.

In light of a juvenile nonhomicide offender's capacity for change and limited moral culpability, no sentencing court is permitted to render a judgment at the outset that a juvenile nonhomicide offender is incorrigible. The sentencing of each defendant must be guided by the central intuition of the United States Supreme Court's case law in this area—that children who commit even heinous crimes are capable of change.

[CA\(18\)](#) [↓] (18)

Courts § 32—Decisions and Orders—Power and Duty of Courts—Judicial Restraint.

A cardinal principle of judicial restraint is that if it is not necessary to decide more, it is necessary not to decide more.

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Judges: Opinion by Liu, J., with Chin, Cuéllar and Kruger, JJ, concurring. Dissenting opinion by Cantil-Sakauye, C. J., with Corrigan and Kriegler, JJ., concurring. Dissenting opinion by, Kriegler, J.,*, with

Cantil-Sakauye, C. J., and Corrigan, J., concurring.

Opinion by: LIU

Opinion

[**446] [***250] LIU, J.—Defendants Leonel Contreras and William Rodriguez were convicted in a joint trial of kidnapping and sexual [****2] offenses they committed as 16 year olds. Rodriguez was sentenced to a term of 50 years to life, and Contreras was sentenced to a term of 58 years to life. We granted review to determine whether the sentences imposed on these juvenile nonhomicide offenders violate the *Eighth Amendment* as interpreted in *People v. Caballero (2012) 55 Cal.4th 262, 268* [145 Cal. Rptr. 3d 286, 282 P.3d 291] (*Caballero*) and *Graham v. Florida (2010) 560 U.S. 48* [176 L. Ed. 2d 825, 130 S. Ct. 2011] (*Graham*). We hold that these sentences are unconstitutional under the reasoning of *Graham*.

[*357]

I.

On September 3, 2011, Jane Doe 1 and Jane Doe 2 attended a birthday party for Doe 1's uncle in the Rancho Peñasquitos area of San Diego County. Doe 1 was 16 years old, and Doe 2 was 15 years old. In the evening, Doe 1 and Doe 2 went for a walk to a greenbelt nearby and sat near a tree to talk. Two teenagers, later identified as Contreras and Rodriguez, walked past them dressed in dark clothing and with their hoods up. Shortly thereafter, defendants walked up behind Doe 1 and Doe 2, tackled them, and forced them to walk across the street, up an embankment, and into a vegetated area. Contreras held a knife to Doe 1's neck and told her to tell Doe 2 to “shut the fuck up” multiple times. Rodriguez covered Doe 2's mouth with his hand, tied a bandana around her mouth, and threatened to hurt her if she screamed. Doe [****3] 2 repeatedly tried to get away, fell once from struggling, and at one point bit Rodriguez's hand.

Rodriguez raped and sodomized Doe 2. Contreras raped Doe 1 and forced her to orally copulate him. Rodriguez then raped and sodomized Doe 1 and forced her to orally copulate him. Contreras put a knife to Doe 2's neck, raped her, and forced her to orally copulate him. Rodriguez forced [***251] Doe 2 and then Doe 1 to orally copulate him. Defendants then told Doe 1 and Doe 2 to get dressed. Rodriguez told Doe 1 and Doe 2

* Associate Justice of the Court of Appeal, Second Appellate District, Division Five, assigned by the Chief Justice pursuant to [article VI, section 6, of the California Constitution](#).

not to tell anyone what happened. One of defendants said they would follow Doe 1 and Doe 2 home and come after them and one of Doe 1's family members if they told anyone what had happened. Doe 1 and Doe 2 walked to the street and saw Doe 1's parents, who had been searching for them.

In 2012, defendants were charged as adults under [Welfare and Institutions Code former section 707, subdivision \(d\)\(1\)](#) and [\(2\)\(A\)](#) (amended by Prop. 57, § 4.2, eff. Nov. 9, 2016) and were jointly tried before separate juries. A jury convicted Contreras of conspiracy to commit kidnapping and forcible rape ([Pen. Code, § 182, subd. \(a\)\(1\)](#)); all undesignated statutory references are to this code), rape by foreign object ([§ 289, subd. \(a\)\(1\)\(A\)](#)), two counts of kidnapping ([§ 207, subd. \(a\)](#)), seven counts of forcible rape ([§ 261, subd. \(a\)\(2\)](#)), eight counts of forcible [****4] oral copulation ([§ 288a, subd. \(c\)\(2\)\(A\)](#)), and two counts of sodomy by use of force ([§ 286, subd. \(c\)\(2\)\(A\)](#)). The jury found true allegations that Contreras committed the crimes with use of a knife ([§ 12022.3, subd. \(a\)](#)) as [**447] well as allegations that many of the sexual assault crimes were committed during a kidnapping, against more than one victim, and with a knife within the meaning of [subdivisions \(d\)\(2\), \(e\)\(1\), \(3\), and \(4\) of section 667.61](#), the “One Strike” law.

On the same day, a jury convicted Rodriguez of two counts of kidnapping ([§ 207, subd. \(a\)](#)), two counts of forcible rape ([§ 261, subd. \(a\)\(2\)](#)), four [*358] counts of forcible oral copulation ([§ 288a, subd. \(c\)\(2\)\(A\)](#)), and two counts of sodomy by use of force ([§ 286, subd. \(c\)\(2\)\(A\)](#)). The jury found true allegations that Rodriguez had committed the sexual assault crimes during a kidnapping and against multiple victims within the meaning of [subdivisions \(d\)\(2\)](#) and [\(e\)\(4\) of section 667.61](#).

At defendants' sentencing hearings, the parties and the trial court agreed that the court could not impose the statutory maximum sentences of several hundred years, as those sentences would fall outside of defendants' natural life expectancies. At Rodriguez's hearing, defense counsel noted that Rodriguez had no criminal history, and the court acknowledged his “very difficult upbringing.” But the court said, “I [****5] have to weigh that against the horrible scars that you have left on these two girls.” The court then sentenced Rodriguez to two consecutive terms of 25 years to life. The court observed that it was required to sentence Rodriguez to additional consecutive terms of 25 years to life under [section 667.61, subdivision \(i\)](#) but reasoned that doing

so would violate *Graham* and *Caballero*.

At Contreras's hearing, defense counsel noted that Contreras had no arrests and one prior misdemeanor for vandalism. The court said, “I think that Mr. Rodriguez was a follower. Mr. Contreras was the shot caller.” The trial judge identified the “brutal and callous and ruthless” nature of the crimes and expressed skepticism about Contreras's ability to rehabilitate: “I think his brain is developed into who he is” Based on these factors, among others, the court stated, “I think that it's only appropriate that he suffer the same punishment that Mr. Rodriguez did and plus he used a knife, so he should get a little bit more.” The court sentenced Contreras to two consecutive terms of 25 years to life in addition to two four-year terms and imposed many additional concurrent or stayed sentences. The trial judge concluded by noting, “If I could [****6] sentence you to 640 years to life, I would have. ... Because you were a minor, you were spared that sentence.”

[**252] Defendants appealed their convictions and sentences on multiple grounds. The Court of Appeal affirmed the convictions but reversed defendants' sentences. It held that the sentences “preclude any possibility of parole until [defendants] are near the end of their lifetimes” and thus “fall[] short of giving them the realistic chance for release contemplated by *Graham*.” The Court of Appeal remanded the matter to the trial court for resentencing, with instructions to consider the circumstances of the crimes, including the existence of multiple victims, together with all mitigating circumstances, and to impose a parole eligibility date consistent with the holding in *Graham*.

We granted review and deferred briefing pending our decision in [People v. Franklin \(2016\) 63 Cal.4th 261 \[202 Cal. Rptr. 3d 496, 370 P.3d 1053\] \[*359\]](#) (*Franklin*). In *Franklin*, we held that juvenile homicide offenders may not be sentenced to the functional equivalent of life without parole (LWOP) without certain protections afforded by the *Eighth Amendment* as interpreted in [Miller v. Alabama \(2012\) 567 U.S. 460 \[183 L. Ed. 2d 407, 132 S. Ct. 2455\]](#) (*Miller*). ([Franklin, at p. 276.](#)) The defendant there had been sentenced to 50 years to life for first degree murder, and he claimed that his sentence [****7] was the functional equivalent of LWOP and was imposed in violation of *Miller*. We held that because [section 3051](#) entitles Franklin to a youth offender parole hearing during his 25th year of incarceration, his sentence “is neither LWOP nor its functional equivalent” and thus gives rise to “no *Miller* claim.” ([Franklin, at p. 280.](#))

A youth offender parole hearing is not available to juveniles convicted under the One Strike law, as defendants were here. (§ 3051, subd. (h).) Because *Franklin* does [**448] not resolve this case, we ordered briefing to address whether Rodriguez's sentence of 50 years to life or Contreras's sentence of 58 years to life violates the *Eighth Amendment*.

II.

HN1 **CA(1)** (1) The *Eighth Amendment* ban on cruel and unusual punishment “flows from the basic “precept of justice that punishment for crime should be graduated and proportioned to [the] offense.” [Citation.]” (*Roper v. Simmons* (2005) 543 U.S. 551, 560 [161 L. Ed. 2d 1, 125 S. Ct. 1183] (*Roper*)). “By protecting even those convicted of heinous crimes, the *Eighth Amendment* reaffirms the duty of the government to respect the dignity of all persons.” (*Ibid.*; see *Robinson v. California* (1962) 370 U.S. 660, 667 [8 L. Ed. 2d 758, 82 S. Ct. 1417] [8th Amend. applies to the states].)

HN2 **CA(2)** (2) The United States Supreme Court has interpreted the *Eighth Amendment* to impose unique constraints on the sentencing of juveniles who commit serious crimes. This case law reflects the principle that “children are constitutionally [****8] different from adults for purposes of sentencing.” (*Miller, supra*, 567 U.S. at p. 471.) “From this principle, the high court has derived a number of limitations on juvenile sentencing: (1) no individual may be executed for an offense committed when he or she was a juvenile (*Roper, [supra]*, 543 U.S. at p. 578); (2) no juvenile who commits a nonhomicide offense may be sentenced to LWOP (*Graham, supra*, 560 U.S. at p. 74); and (3) no juvenile who commits a homicide offense may be automatically sentenced to LWOP (*Miller, at p. [465]*).” (*Franklin, supra*, 63 Cal.4th at pp. 273–274; see *Montgomery v. Louisiana* (2016) 577 U.S. _____, [193 L. Ed. 2d 599, 136 S. Ct. 718, 734] (*Montgomery*) [***253] [“*Miller* announced a substantive rule of constitutional law” that applies retroactively.]) The second limitation is relevant here: Because Contreras and Rodriguez committed [*360] nonhomicide offenses, the *Eighth Amendment* does not permit them to be sentenced to LWOP. Although they may be punished with long sentences, they must have “some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.” (*Graham, at p. 75*.)

In *Caballero*, we held that a juvenile defendant's sentence of 110 years to life for three counts of

attempted murder was the functional equivalent of LWOP and, under *Graham*, violated the *Eighth Amendment*. (*Caballero, supra*, 55 Cal.4th at p. 268.) We rejected the argument that *Graham's* prohibition on LWOP does not apply to aggregated sentences for distinct crimes [****9] where each sentence individually provides for the possibility of parole within a juvenile's expected lifespan. (*Id. at pp. 267–268*.) We said: “*Graham's* analysis does not focus on the precise sentence meted out. Instead, ... it holds that a state must provide a juvenile offender ‘with some realistic opportunity to obtain release’ from prison during his or her expected lifetime.” (*Id. at p. 268*.)

Graham and *Caballero* together hold that the *Eighth Amendment* does not allow juveniles who commit nonhomicide crimes to be sentenced to LWOP or to a term of years well in excess of natural life expectancy. But neither *Graham* nor *Caballero* considered whether a lengthy sentence short of LWOP or its equivalent would likewise violate the *Eighth Amendment* in this context. The question here is whether Rodriguez's sentence of 50 years to life or Contreras's sentence of 58 years to life for nonhomicide offenses violates the same *Eighth Amendment* principles that bar the imposition of LWOP for their crimes.

A.

The Attorney General says we “should adopt the following rule: any term of imprisonment that provides a juvenile offender with an opportunity for parole within his or her expected natural lifetime is not the functional equivalent of LWOP” The Attorney General urges [****10] us to determine natural life expectancy by looking to a report published by the Centers for Disease Control and Prevention (CDC), based on 2010 data, providing the life expectancies of various age and gender cohorts [**449] living in the United States. (See Arias, National Vital Statistics Reports, United States Life Tables (Nov. 6, 2014) vol. 63, no. 7, p. 1 (2010 Life Tables).) According to that report, a 16-year-old boy in the United States is expected to live an additional 60.9 years, for a total life expectancy of 76.9 years. (*Id.* at p. 11, table 2.) Noting that “Rodriguez will be 66 years old when first eligible for parole, and Contreras will be 74 years old when first eligible for parole,” the Attorney General contends that “[b]ecause it affords appellants an opportunity for parole within their expected natural lifetimes, a sentence of 50 years to life [*361] and 58 years to life is not the functional equivalent of LWOP and therefore may be constitutionally imposed.” As

explained below, this actuarial approach urged by the Attorney General is practically and conceptually problematic.

[CA\(3\)](#)^[↑] (3) As an initial matter, we find unpersuasive the Attorney General's claim that we already decided in *Caballero* that a term-of-years sentence [****11] does not violate the *Eighth Amendment* if it allows the possibility of parole at some point during the juvenile offender's natural life expectancy. *Caballero* held that “sentencing a juvenile offender for a nonhomicide offense to a [***254] term of years with a parole eligibility date that falls outside the juvenile offender's natural life expectancy constitutes cruel and unusual punishment in violation of the *Eighth Amendment*.” (*Caballero, supra, 55 Cal.4th at p. 268.*) But the defendant in *Caballero* challenged a sentence allowing for parole eligibility “over 100 years from now.” (*Ibid.*) In that context, it was enough to note that the parole eligibility date “falls outside the juvenile offender's natural life expectancy.” (*Ibid.*) We had no occasion to consider whether a term-of-years sentence violates the *Eighth Amendment* only if it exceeds a juvenile defendant's natural life expectancy. (See *Kinsman v. Unocal Corp. (2005) 37 Cal.4th 659, 680 [36 Cal. Rptr. 3d 495, 123 P.3d 931]* [“It is axiomatic that [HN3](#)^[↑] language in a judicial opinion is to be understood in accordance with the facts and issues before the court. An opinion is not authority for propositions not considered.”].)

Taken on its own terms, the Attorney General's actuarial approach gives rise to a tangle of legal and empirical difficulties. In defining life expectancy, the Attorney General relies on our [****12] statement in *Caballero* that “the term ‘life expectancy’ means the normal life expectancy of a healthy person of defendant's age and gender living in the United States.” (*Caballero, supra, 55 Cal.4th at p. 267, fn. 3,* italics added.) But this passing statement was unnecessary to our decision because the 110-year-to-life sentence at issue clearly exceeded the defendant's life expectancy under any definition. Although a gender-specific approach to determining life expectancy reflects the reality that females generally live longer than males (see 2010 Life Tables, *supra*, at p. 2 [“The difference in life expectancy between the sexes was 4.8 years in 2010 ... ”]), we did not examine in *Caballero* whether it would be constitutional to authorize lengthier sentences for girls than for boys in determining the parameters of lawful punishment for juvenile nonhomicide offenders.

[CA\(4\)](#)^[↑] (4) “We long ago concluded that [HN4](#)^[↑]

discrimination based on gender violates the [equal protection clause of the California Constitution \(art. I, § 7, subd. \(a\)\)](#) and triggers the highest level of scrutiny. (*Sail'er Inn, Inc. v. Kirby (1971) 5 Cal.3d 1, 17–20 [95 Cal. Rptr. 329, 485 P.2d 529].*)” ([Catholic \[***362\] Charities of Sacramento, Inc. v. Superior Court \(2004\) 32 Cal.4th 527, 564 \[10 Cal. Rptr. 3d 283, 85 P.3d 67\].](#)) “In order to satisfy that standard, the state must demonstrate not simply that there is a rational, constitutionally legitimate interest that supports the differential treatment at issue, but instead that the state interest is a *constitutionally compelling* one [****13] that justifies the disparate treatment prescribed by the statute in question. [Citation.]” ([In re Marriage Cases \(2008\) 43 Cal.4th 757, 847 \[76 Cal. Rptr. 3d 683, 183 P.3d 384\].](#)) And “the state must demonstrate that the distinctions drawn by the statute (or statutory scheme) are *necessary* to further that interest. [Citation.]” ([Id. at p. 848.](#))

It is unclear whether sentencing juveniles based on gender-specific life expectancies [**450] would satisfy strict scrutiny. But assuming it would, there would then be no reason why the definition of life expectancy should not also account for well-documented racial differences, since racial classifications are evaluated under the same constitutional standard. (See [Johnson v. California \(2005\) 543 U.S. 499, 505 \[160 L. Ed. 2d 949, 125 S. Ct. 1141\]; Coral Construction, Inc. v. City and County of San Francisco \(2010\) 50 Cal.4th 315, 337 \[113 Cal. Rptr. 3d 279, 235 P.3d 947\].](#)) According to the CDC report on which the Attorney General relies, life expectancy in 2010 was [***255] 83.8 years for Hispanic females, 81.3 years for non-Hispanic white females, 78.0 years for black females, 78.7 years for Hispanic males, 76.5 years for white males, and 71.8 years for black males. (2010 Life Tables, *supra*, at p. 5.) These differences present a conundrum: Although persons of different races and genders are not similarly situated in terms of life expectancy, it seems doubtful that considering such differences in juvenile sentencing would pass constitutional muster.

Moreover, were we to adopt the Attorney [****14] General's proposed rule, it is not obvious why the definition of life expectancy should ignore other group-based differences that may be relevant to a particular juvenile defendant. The Pacific Juvenile Defender Center (PJDC), as amicus curiae, notes that life expectancy is affected by many “variables that have long been studied by social scientists but are not included in U.S. Census or vital statistics reports— income, education, region, type of community, access to

regular health care, and the like” (See Cummings & Colling, *There is No Meaningful Opportunity in Meaningless Data: Why It Is Unconstitutional to Use Life Expectancy Tables in Post-Graham Sentences* (2014) 18 U.C. Davis J. Juvenile L. & Policy 267, 282.)

Defendants and PJDC highlight the relevance of one variable in particular: incarceration. PJDC cites studies showing that incarceration accelerates the aging process and results in life expectancies substantially shorter than estimates for the general population. (See Patterson, *The Dose-Response of [*363] Time Served in Prison on Mortality: New York State, 1989–2003* (2013) 103 Am. J. Pub. Health 523, 526 [finding each year of incarceration correlated with a 15.6 [****15] percent increase in odds of death for parolees and a two-year decline in life expectancy]; U.S. Dept. of Justice, Nat. Inst. of Corrections, *Correctional Health Care: Addressing the Needs of Elderly, Chronically Ill, and Terminally Ill Inmates* (2004) pp. 9–10 (Correctional Health Care) [stresses of incarceration intensify the health problems of elderly inmates and accelerate aging processes]; see also Spaulding et al., *Prisoner Survival Inside and Outside of the Institution: Implications for Health-Care Planning* (2011) 173 Am. J. Epidemiology 479, 484 [currently and formerly incarcerated individuals in Georgia have “overall heightened mortality ... over 15 years of follow-up relative to the general Georgia population,” with significant differences by race, gender, and time incarcerated].) One state high court has taken such evidence into account in determining whether a term-of-years sentence violates the *Eighth Amendment*. (See *Casiano v. Commissioner of Correction* (Conn. 2015) 317 Conn. 52 [115 A.3d 1031, 1046] (Casiano).)

On the other hand, it has been suggested that inmates who “have aged in place are generally the best adapted to prison life because they have been in prison since their youth and have adjusted to it.” (Correctional Health Care, *supra*, at p. 10.) Further, although incarceration has its stresses, it may [****16] shield inmates from other stresses that would afflict them outside of prison, including violence, accidents, and poor access to health care. (See Spaulding et al., *supra*, at pp. 482–485; Rosen et al., *All-Cause and Cause-Specific Mortality Among Black and White North Carolina State Prisoners, 1995–2005* (2011) 21 Ann. Epidemiology 719, 725–726 [average death rates for currently incarcerated black men in North Carolina prisons are significantly lower than for the black population in the state overall, but currently incarcerated white men have slightly higher average death rates than white men in the state].) In addition, the Attorney General asserts that although

race, region, and economic status may affect death rates outside prison, [***256] such findings are not necessarily true “for those inside prison, where living conditions, medical treatment, and wealth are roughly the same for all.”

[**451] CA(5)[↑] (5) The record in this case contains no findings by the trial court on these matters. At sentencing, the prosecution introduced evidence of statistical life expectancies, and neither defendant presented evidence demonstrating shorter life expectancy in prison. HNS[↑] But we decline to adopt a constitutional rule that employs a concept of life expectancy whose [****17] meaning depends on the facts presented in each case. Determining the validity of lengthy term-of-years sentences under the *Eighth Amendment* through a case-by-case inquiry into competing evidence of the life expectancy most pertinent to a particular juvenile defendant would lead to problems of disparate sentencing. Moreover, even if there were a legally and empirically sound approach to estimating life expectancy, it must be noted that a life expectancy is an average. (2010 Life [*364] Tables, *supra*, at p. 2.) In a normal distribution, about half of a population reaches or exceeds its life expectancy, while the other half does not. Under *Graham*, juvenile nonhomicide offenders must be given “some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.” (*Graham, supra*, 560 U.S. at p. 75; see *id. at p. 82* [the state must give juvenile nonhomicide offenders “some realistic opportunity to obtain release before the end of [a life] term”].) An opportunity to obtain release does not seem “meaningful” or “realistic” within the meaning of *Graham* if the chance of living long enough to make use of that opportunity is roughly the same as a coin toss. (Cf. dis. opn. of Cantil-Sakauye, *C. J., post, at p. 394*.) Of course, there can be no guarantee that every juvenile offender who suffers a lengthy sentence will live until [****18] his or her parole eligibility date. But we do not believe the outer boundary of a lawful sentence can be fixed by a concept that *by definition* would not afford a realistic opportunity for release to a substantial fraction of juvenile offenders.

B.

HNS[↑] CA(6)[↑] (6) In addition to raising legal and empirical difficulties, the actuarial approach proposed by the Attorney General is misguided at a more fundamental level. When evaluating a sentence that clearly exceeds natural life expectancy, like the 110-

year-to-life sentence in *Caballero*, it is straightforward to conclude that the sentence is “functionally equivalent” to LWOP as an actuarial matter. (*Caballero, supra, 55 Cal.4th at p. 268.*) But the issue of functional equivalence in this context is not limited to determining whether a term-of-years sentence is actuarially equivalent to LWOP. Although the Attorney General trains his inquiry on that question, there is a separate and distinct question whether a lengthy term-of-years sentence, though not clearly exceeding a juvenile offender's natural lifespan, may nonetheless impinge on the same substantive concerns that make the imposition of LWOP on juvenile nonhomicide offenders impermissible under the *Eighth Amendment*. This latter notion of functional equivalence [****19]—that a term-of-years sentence may function like LWOP *with respect to the Eighth Amendment concerns that constrain lawful punishment for juvenile nonhomicide offenders*—is what we must address in this case. (See *State v. Null (Iowa 2013) 836 N.W.2d 41, 71* “[W]e do not believe the determination of whether the principles of *Miller* or *Graham* apply in a given case should turn on the niceties of epidemiology, genetic analysis, or actuarial sciences in determining precise mortality dates.”.) To resolve this question, the proper starting point is not a [***257] life expectancy table but the reasoning of the high court in *Graham*.

The defendant in *Graham*, at age 16, was charged in Florida as an adult for armed burglary with assault or battery, which carried a maximum sentence of LWOP, and attempted armed robbery, which carried a maximum sentence of 15 years. (*Graham, supra, 560 U.S. at pp. 53–54.*) *Graham* pleaded guilty to [***365] both charges and, in a letter to the trial court, said “this is my first and last time getting in trouble” and “I've decided to turn my life around.” (*Id. at p. 54.*) The trial court withheld adjudication of guilt and sentenced him to probation. (*Ibid.*) Less than six months later, 34 days before his 18th birthday, *Graham* participated in a home invasion robbery and afterward admitted [****20] he had violated his probation conditions. (*Id. at pp. 54–55.*) At that point, the trial court found *Graham* guilty of the earlier [***452] armed burglary and attempted armed robbery. (*Id. at pp. 55–57.*)

CA(7) [↑] (7) At sentencing, the trial court said: “Mr. *Graham*, as I look back on your case, yours is really candidly a sad situation. You had, as far as I can tell, you have quite a family structure. You had a lot of people who wanted to try and help you get your life turned around including the court system, and you had a judge who took the step to try and give you direction

through his probation order to give you a chance to get back onto track. And at the time you seemed through your letters that that is exactly what you wanted to do. And I don't know why it is that you threw your life away. ... [¶] But you did, and that is what is so sad about this today [¶] ... [¶] And I don't understand why you would be given such a great opportunity to do something with your life and why you would throw it away. The only thing that I can rationalize is that you decided that this is how you were going to lead your life and that there is nothing that we can do for you. And as the state pointed out, that this is an escalating pattern [****21] of criminal conduct on your part and that we can't help you any further. We can't do anything to deter you. This is the way you are going to lead your life [¶] ... [¶] ... I don't see where any further youthful offender sanctions would be appropriate. Given your escalating pattern of criminal conduct, it is apparent to the Court that you have decided that this is the way you are going to live your life and that the only thing I can do now is to try and protect the community from your actions.’ ” (*Graham, supra, 560 U.S. at pp. 56–57.*) The trial court sentenced *Graham* to the maximum penalty for both crimes: LWOP for the armed burglary and 15 years in prison for the attempted armed robbery. (*Id. at p. 57.*) **HNT** [↑] The high court held that the *Eighth Amendment* categorically “prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide.” (*Id. at p. 82.*)

Central to the high court's analysis was its “consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question.” (*Graham, supra, 560 U.S. at p. 67.*) As for culpability, the high court reiterated its observations in *Roper* that “[a]s compared to adults, juveniles have a “‘lack of maturity and an underdeveloped [****22] sense of responsibility’”; they ‘are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure’; and their characters are ‘not as well formed.’ [Citation.] These salient characteristics mean that ‘[i]t is difficult even for expert psychologists [***366] to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose [***258] crime reflects irreparable corruption.’ ” (*Graham, at p. 68*, quoting *Roper, supra, 543 U.S. at pp. 569–570, 573.*) Further, the high court underscored that “defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers. ... Although an offense like robbery or rape is ‘a serious crime deserving

serious punishment,' those crimes differ from homicide crimes in a moral sense." (*Graham, at p. 69*, citations omitted.)

[CA\(8\)](#)^[↑] (8) As for the punishment, the high court noted that [HN8](#)^[↑] a sentence of LWOP "deprives the convict of the most basic liberties without giving hope of restoration." (*Graham, supra, 560 U.S. at pp. 69–70*; see *id. at p. 70* ["this sentence 'means denial of hope; it means that good behavior and character improvement are immaterial']"). In addition, "[l]ife without parole [****23] is an especially harsh punishment for a juvenile. Under this sentence a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender. ... This reality cannot be ignored." (*Ibid.*)

The high court then evaluated the sentence against the penological goals of "retribution, deterrence, incapacitation, and rehabilitation." (*Graham, supra, 560 U.S. at p. 71.*) Linking retribution to culpability, the high court said "'the case for retribution is not as strong with a minor as with an adult'" and "becomes even weaker with respect to a juvenile who did not commit homicide." [**453] (*Ibid.*) As for deterrence, the high court said that "[b]ecause juveniles' 'lack of maturity and underdeveloped sense of responsibility ... often result in impetuous and ill-considered actions and decisions,' [citation], they are less likely to take a possible punishment into consideration when making decisions." (*Id. at p. 72.*)

As for incapacitation, the high court acknowledged that "[r]ecidivism is a serious risk to public safety, and so incapacitation is an important goal." (*Graham, supra, 560 U.S. at p. 72.*) But the "characteristics of juveniles" make it "questionable" to conclude that a juvenile offender is incorrigible; indeed, "incorrigibility is inconsistent [****24] with youth." (*Id. at pp. 72–73.*) A sentencing authority may not make a judgment "at the outset" that a juvenile nonhomicide offender will "be a risk to society for the rest of his life." (*Id. at p. 73.*) This was true even for Graham, who had violated the terms of his probation "despite his own assurances of reform" and had engaged in "what the trial court described as an 'escalating pattern of criminal conduct.'" (*Ibid.*) "A life without parole sentence improperly denies the juvenile offender a chance to demonstrate growth and maturity." (*Ibid.*)

[CA\(9\)](#)^[↑] (9) The high court then discussed rehabilitation and explained that [HN9](#)^[↑] LWOP "forfeits altogether the rehabilitative ideal. By denying

the defendant the [*367] right to reenter the community, the State makes an irrevocable judgment about that person's value and place in society. This judgment is not appropriate in light of a juvenile nonhomicide offender's capacity for change and limited moral culpability." (*Graham, supra, 560 U.S. at p. 74.*) The high court also noted that inmates sentenced to LWOP "are often denied access to vocational training and other rehabilitative services that are available to other inmates," making "all the more evident" the disproportionality of LWOP when imposed on "juvenile offenders, [****25] who are most in need of and receptive to rehabilitation." (*Ibid.*) "In sum," *Graham* concluded, "penological theory is not adequate to justify life without parole for juvenile nonhomicide offenders." (*Ibid.*)

[****259] C.

[HN10](#)^[↑] [CA\(10\)](#)^[↑] (10) What emerges from *Graham* is not a constitutional prohibition on harsh sentences for juveniles who commit serious crimes. (*Graham, supra, 560 U.S. at p. 71* ["Society is entitled to impose severe sanctions on a juvenile nonhomicide offender to express its condemnation of the crime and to seek restoration of the moral imbalance caused by the offense."].) Nor does *Graham* "require the State to release [a juvenile nonhomicide] offender during his natural life. Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives." (*Id. at p. 75.*) But *Graham* "does prohibit States from making the judgment at the outset that those offenders never will be fit to reenter society." (*Ibid.*) "What the State must do ... is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." (*Ibid.*)

While finding LWOP impermissible for juvenile nonhomicide offenders, the high court did not define [****26] the maximum length of incarceration before parole eligibility that would be permissible in light of the concerns it set forth in *Graham*. But the high court made clear the nature of its concerns: A lawful sentence must recognize "a juvenile nonhomicide offender's capacity for change and limited moral culpability." (*Graham, supra, 560 U.S. at p. 74.*) A lawful sentence must offer "hope of restoration" (*id. at p. 70*), "a chance to demonstrate maturity and reform" (*id. at p. 79*), a "chance for fulfillment outside prison walls," and a "chance for reconciliation with society" (*ibid.*). A lawful sentence must offer "the opportunity to achieve maturity

of judgment and self-recognition of human worth and potential.” (*Ibid.*) A lawful sentence must offer the juvenile offender an “incentive to become a responsible individual.” (*Ibid.*)

[CA\(11\)](#)^[↑] (11) Although the Attorney General says a penalty is not invalid under *Graham* unless it “is tantamount to [a] sentence of [**454] death,” he does not [*368] seriously contend that a term-of-years sentence with parole eligibility at *any* point before the end of life expectancy—whether it is one year, one month, or one day—would satisfy the *Eighth Amendment*. Even assuming defendants’ parole eligibility dates are within their expected lifespans, the [****27] chance for release would come near the end of their lives; even if released, they will have spent the vast majority of adulthood in prison. We agree with the Court of Appeal that these sentences “tend to reflect a judgment Rodriguez and Contreras are irretrievably incorrigible” and “fall[] short of giving them the realistic chance for release contemplated by *Graham*.”

[CA\(12\)](#)^[↑] (12) Several considerations support this conclusion. First, [HN11](#)^[↑] although the high court has not defined what it means for a juvenile offender “to rejoin society” ([Graham, supra, 560 U.S. at p. 79](#)), the language of *Graham* suggests that the high court envisioned more than the mere act of release or a de minimis quantum of time outside of prison. *Graham* spoke of the chance to rejoin society in qualitative terms—“the rehabilitative ideal” (*id. at p. 74*)—that contemplate a sufficient period to achieve reintegration as a productive and respected member of the citizenry. The “chance for reconciliation with society” (*id. at p. 79*), “the right to reenter the community” (*id. at p. 74*), and the opportunity to reclaim one’s “value and place in society” (*ibid.*) all indicate concern for a measure of belonging and redemption that goes beyond mere freedom from confinement. It is also significant that [****28] *Graham* [***260] said juvenile nonhomicide offenders should not be denied access to “vocational training” and “education,” among other rehabilitative services. (*id. at pp. 74, 79*.) Presumably one purpose of such programming is to enable a juvenile offender to hold a job or otherwise participate as a productive member of society if released. *Graham*’s directive that “[t]he juvenile should not be deprived of the opportunity to achieve ... self-recognition of human worth and potential” implies that the juvenile may someday have the opportunity to realize that “potential.” (*id. at p. 79*.) For any individual released after decades of incarceration, adjusting to ordinary civic life is undoubtedly a complex and gradual process.

Confinement with no possibility of release until age 66 or age 74 seems unlikely to allow for the reintegration that *Graham* contemplates.

[CA\(13\)](#)^[↑] (13) Second, [HN12](#)^[↑] in underscoring the capacity of juveniles to change, *Graham* made clear that a juvenile offender’s prospect of rehabilitation is not simply a matter of outgrowing the transient qualities of youth; it also depends on the incentives and opportunities available to the juvenile going forward. (See, e.g., [Graham, supra, 560 U.S. at p. 79](#) [prison system may “become[] complicit in the lack of development” [****29] of a juvenile offender by “withhold[ing] counseling, education, and rehabilitation programs”].) Importantly, *Graham* said “[a] young person who knows that he or she has no chance to leave prison before life’s end has little incentive to become a responsible individual.” (*Ibid.*) We believe the same is true here: A young person who knows he or she has [*369] no chance to leave prison for 50 years “has little incentive to become a responsible individual.” (*Ibid.*)

[CA\(14\)](#)^[↑] (14) Third, [HN13](#)^[↑] a sentence of 50 years to life imprisonment bears an attenuated relationship to legitimate penological goals under the reasoning of *Graham*. Such a sentence, though less harsh than LWOP, is still “an especially harsh punishment for a juvenile,” who “will on average serve more years and a greater percentage of his life in prison than an adult offender.” ([Graham, supra, 560 U.S. at p. 70](#).) It is also a highly severe punishment for a juvenile nonhomicide offender who, “when compared to an adult murderer,” has “a twice diminished moral culpability.” (*id. at p. 69*; cf. [§ 190, subd. \(a\)](#) [penalty for adult who commits first degree murder simpliciter is 25 years to life].) The retributive case for a 50-year-to-life sentence, as for LWOP, is weakened by the juvenile nonhomicide offender’s “age ... and the [****30] nature of the crime.” ([Graham, at p. 69](#).) As for deterrence, *Graham*’s observation that juveniles have limited ability to consider consequences when making decisions (*id. at p. 72*) applies to a sentence of 50 years to life just as it does to a sentence of LWOP. And as for incapacitation, a judgment that a juvenile [**455] offender will be incorrigible for the next 50 years is no less “questionable” than a judgment that the juvenile offender will be incorrigible “forever.” (*id. at pp. 72–73*; see [Montgomery, supra, 577 U.S. at p. ___](#) [136 S.Ct. at p. 736] [“*Miller*’s central intuition” is “that children who commit even heinous crimes are capable of change”].) Finally, as noted, a sentence of 50 years to life “cannot be justified by the goal of rehabilitation” because it offers

a juvenile offender “little incentive to become a responsible individual.” (*Graham, at pp. 74, 79.*)

Fourth, our conclusion that a sentence of 50 years to life is functionally equivalent to LWOP is consistent with the decisions of other state high courts. Setting aside courts that have disagreed with our case law holding that *Graham* and *Miller* apply [***261] to aggregated sentences (see *Franklin, supra, 63 Cal.4th at p. 276; Caballero, supra, 55 Cal.4th at pp. 267–268*), we are not aware of any state high court that has found incarceration of a juvenile for 50 years or more before parole eligibility to fall outside the strictures [****31] of *Graham* and *Miller*. (See *State v. Zuber (2017) 227 N.J. 422 [152 A.3d 197, 212]* [110-year sentence with parole eligibility after 55 years “is the practical equivalent of life without parole”]; *Casiano, supra, 115 A.3d at p. 1044* [same for 50-year sentence]; *Bear Cloud v. State of Wyoming (2014) 2014 WY 113 [334 P.3d 132, 142]* [same for 45-year-to-life sentence]; *State v. Null, supra, 836 N.W.2d at p. 71* [same for 75-year sentence with parole eligibility after 52.5 years]; but cf. *Collins v. State (Fla. Dist. Ct. App. 2016) 189 So.3d 342, 343* [55-year sentence with parole eligibility after 52 years does not violate *Graham*]; *United States v. Mathurin (11th Cir. 2017) 868 F.3d 921, 934–936* [57-year sentence, which defendant could reduce to a near-50-year sentence by earning good-time credits, does not violate *Graham*].)

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Finally, our conclusion is also consistent with state legislation adopted in the wake of *Graham* and *Miller*, assuming that the parole hearings in these statutory schemes provide for meaningful consideration of the inmate’s age at the time of the offense and demonstrated maturity and rehabilitation. (See *Ark. Code Ann. § 16-93-621(a)(1)* [juvenile nonhomicide offenders eligible for parole after 20 years]; *Colo. Rev. Stat. Ann. § 18-1.3-401(4)(c)(I)(B)* [juvenile offenders sentenced to LWOP for a crime other than first degree murder resentenced to life with opportunity for parole after 40 years]; *Conn. Gen. Stat. Ann. § 54-125a(f)(1)* [juvenile offenders sentenced to over 50 years eligible for parole after 30 years, and juvenile offenders sentenced to between 10 and 50 years eligible for parole after the [****32] greater of 12 years or 60% of the sentence]; *Del. Code Ann. tit. 11, § 4204A(d)* [juvenile offender convicted of a crime other than first degree murder eligible for resentencing after 20 years]; *D.C. Code Ann. § 24-403.03(a)* [juvenile offenders eligible for sentence reduction after 20 years]; *Fla. Stat. Ann. § 921.1402(2)(d)* [juvenile offenders convicted of offenses other than murder entitled to review of

sentence after 20 years]; *La. Rev. Stat. § 15:574.4(D)(1)* [juvenile offenders sentenced to life for crimes other than first or second degree murder eligible for parole after 30 years]; Sen. Bill No. 16 (La. 2017 Reg. Sess.) [juvenile offenders sentenced to life for crimes other than first or second degree murder eligible for parole after 25 years, effective Aug. 2017]; *Mo. Rev. Stat. Ann. § 558.047(1)* [juvenile offenders sentenced to LWOP eligible for review of sentence after 25 years]; *Nev. Rev. Stat. Ann. § 213.12135* [juvenile nonhomicide offenders eligible for parole after 15 years]; House Bill No. 1195 (N.D. 2017 Reg. Sess.) [juvenile offenders eligible for sentence reduction after 20 years]; *W. Va. Code § 61-11-23(b)* [juvenile offenders eligible for parole after 15 years]; *Wyo. Stat. Ann. § 6-10-301(c)* [juvenile offenders sentenced to life eligible for parole after 25 years]; but see *Wash. Rev. Code § 9.94A.730(1)* [juvenile offenders eligible for release after 20 years, except for those serving sentences for aggravated first degree murder or certain [****33] sex offenses].) In enacting these sentencing reforms, these state legislatures observed that sentencing juvenile nonhomicide offenders to 50 or more years of incarceration without parole eligibility is not consistent with *Graham*. (See, e.g., Sen. Bill No. 294 (Ark. 2017 Reg. Sess.) § 2; *Colo. Rev. Stat. Ann. § 16-13-1001*; [**456] Sen. Judiciary Com., Summary of Sen. Bill No. 796 (Conn. 2015 Reg. Sess.) § 1; Synopsis of Sen. Bill No. 9 (Del. [***262] 2013–2014 Reg. Sess.); House Judiciary Com., Crim. J. Subcom., Analysis of Sen. Bill No. 384 (Fla. 2014 Reg. Sess.) Jan. 3, 2014, pp. 1–4; Resume Dig. for Sen. Bill No. 317 (La. 2012 Reg. Sess.); Resume Dig. for Sen. Bill No. 16 (La. 2017 Reg. Sess.).)

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D.

The Chief Justice criticizes our decision today as an “unwarranted extension of *Graham*.” (Dis. opn. of Cantil-Sakauye, C. J., *post*, at p. 384.) She observes that “*Graham* ... invalidated a narrowly defined, specific type of sentence” for juvenile nonhomicide offenders—namely, life without parole, “the second most severe penalty permitted by law.” (Id. at pp. 389–390, quoting *Graham, supra, 560 U.S. at p. 69.*) Our decision, she contends, ignores “the limited nature of the holding in *Graham*” and disregards the “clear line” that *Graham* drew in demarcating the type of sentence that violates [****34] the *Eighth Amendment*. (Dis. opn. of Cantil-Sakauye, C. J., *post*, at pp. 385, 390, 398, & fn. 7, 400, quoting *Graham, at p. 74.*)

But what exactly is the “clear line” that *Graham* drew? Here is the passage where those words appear in *Graham*: “[P]enological theory is not adequate to justify life without parole for juvenile nonhomicide offenders. This determination; the limited culpability of juvenile nonhomicide offenders; and the severity of life without parole sentences all lead to the conclusion that the sentencing practice under consideration is cruel and unusual. This Court now holds that for a juvenile offender who did not commit homicide the *Eighth Amendment* forbids the sentence of life without parole. This clear line is necessary to prevent the possibility that life without parole sentences will be imposed on juvenile nonhomicide offenders who are not sufficiently culpable to merit that punishment. Because ‘[t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood,’ those who were below that age when the offense was committed may not be sentenced to life without parole for a nonhomicide crime.” (*Graham, supra, 560 U.S. at pp. 74–75.*)

[CA\(15\)](#) [↑](#) (15) The Chief Justice reads the phrase “clear line” to distinguish between LWOP and other types of [\[****35\]](#) sentences. But in context, the phrase more sensibly refers to two other distinctions: (1) between homicide and nonhomicide offenses, and (2) between juvenile and adult offenders. The “line” that *Graham* made “clear” is that [HN14](#) [↑](#) LWOP may not be imposed on *juveniles* who commit *nonhomicide* offenses, even if it may be imposed (rarely) on juveniles who commit *homicide* offenses or on *adults* who commit nonhomicide offenses. In drawing this line, the majority in *Graham* was rejecting Chief Justice Roberts’s view that the *Eighth Amendment* does not support a “categorical rule that juveniles may never receive a sentence of life without parole for nonhomicide crimes” and instead “allow[s] courts ... to consider the particular defendant and particular crime at issue.” (*Graham, supra, 560 U.S. at pp. 89, 86* (conc. opn. of Roberts, C. J.); see *id. at pp. 93–95* [arguing that some juvenile nonhomicide offenders may deserve an LWOP sentence].) *Graham* does not hold or suggest that only LWOP sentences, and [\[*372\]](#) no sentences other than LWOP, violate the *Eighth Amendment* when imposed on a juvenile nonhomicide offender.

Indeed, our dissenting colleagues do not contend that the reasoning of *Graham* is limited to LWOP sentences, for we have already rejected that proposition in *Caballero*. The Attorney General [\[****36\]](#) argued in *Caballero* that “a cumulative sentence for [\[***263\]](#) distinct crimes does not present a cognizable *Eighth*

Amendment claim In addition, the Court of Appeal reasoned that *Graham* applied a categorical rule specifically limited to juvenile nonhomicide offenders receiving an explicitly designated life without parole sentence” (*Caballero, supra, 55 Cal.4th at p. 267.*) At the time we decided *Caballero*, several appellate courts had held that *Graham* applies [\[**457\]](#) only to LWOP sentences and not to any individual or aggregate term-of-years sentences. (See *Bunch v. Smith (6th Cir. 2012) 685 F.3d 546, 552*; *Henry v. State (Fla. Dist. Ct. App. 2012) 82 So.3d 1084, 1089*; *State v. Kasic (Ct. App. 2011) 228 Ariz. 228 [265 P.3d 410, 415].*) Notwithstanding these arguments and authorities, we unanimously held that *Graham*’s reasoning applies to a “term-of-years sentence that amounts to the functional equivalent of a life without parole sentence.” (*Caballero, supra, 55 Cal.4th at p. 268*; see *id. at pp. 271–273* (conc. opn. of Werdegar, J.).)

As the Chief Justice acknowledges, the “line” that *Graham* actually drew between lawful and unlawful sentences for juvenile nonhomicide offenders is not between LWOP and other sentences, but between sentences that do and sentences that do not provide “some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.” (Dis. opn. of Cantil-Sakauye, C. J., *post*, at p. 390, quoting *Graham, supra, 560 U.S. at p. 75.*) Whatever “abstraction,” [\[****37\]](#) “vagueness,” or “subjectiv[ity]” (dis. opn. of Cantil-Sakauye, C. J., *post*, at p. 399) there may be in analyzing whether a particular sentence provides “some meaningful opportunity to obtain release” (*Graham, at p. 75*), we are obligated to apply the rule stated by the high court, and that is what our opinion today does.

The Chief Justice would hold that a sentence provides a meaningful opportunity for release if it allows for parole eligibility within a defendant’s life expectancy. (Dis. opn. of Cantil-Sakauye, C. J., *post*, at pp. 393–394.) This approach is problematic for reasons we have explained above. (*Ante*, at pp. 360–364.) The Chief Justice does not dispute that the life expectancy tables she relies on show significant disparities by race and gender. Her response is that apart from race, sex, and custodial status, “juvenile defendants belong to a nearly infinite number of cohorts” with varying life expectancies. (Dis. opn. of Cantil-Sakauye, C. J., *post*, at p. 395.) She then says: “Given that a defendant could be placed within any of many peer groups for purposes of assessing his or her life expectancy, and given as well [\[*373\]](#) the need to use *some* conception of life expectancy as a benchmark, reliance on general population [\[****38\]](#) life

expectancies makes good sense as providing an administrable rule of decision that is consistent with *Graham*.” (*Id.* at p. 395.) This is a non-sequitur. Why does reliance on general-population life expectancies make good sense when it is acknowledged that life expectancies vary by race, sex, custodial status, and other traits as well? Such an approach seems quite arbitrary.

Even if general-population life expectancies were relevant to evaluating whether a particular sentence provides a meaningful opportunity for release, the Chief Justice does not answer the crucial question of how many years before the end of a defendant's life expectancy must parole eligibility be provided in order to satisfy *Graham*. The Chief Justice believes five years is sufficient. (Dis. opn. of Cantil-Sakauye, C. J., *post*, at pp. 394, 395–396 [parole eligibility at age 74 falls “well within” the general life [***264] expectancy of 79 years for 15 to 16 year olds].) But why is five years sufficient? Why not require 10, 15, or 25 years? And if five years is sufficient, then what about four years? three? two? or one?

[HN15](#)  [CA\(16\)](#)  (16) Ultimately, any line-drawing must depend on a considered judgment as to whether the parole eligibility date of a lengthy [****39] sentence offers a juvenile offender a realistic hope of release and a genuine opportunity to reintegrate into society. Reasonable minds may disagree on such judgments, but it is specious to contend that an approach based on life expectancy would avoid “subjective and quite likely divergent assessments of what constitutes adequate reintegration into society, and the time necessary to accomplish this reentry.” (Dis. opn. of Cantil-Sakauye, C. J., *post*, at p. 400.) In the end, the Chief Justice's conclusion that defendants' sentences are lawful rests on her view that “profound life experiences still may lie ahead of someone [**458] released from prison at age 66 or 74.” (*Id.* at p. 399.) Whatever the merits of this view, the analysis that underlies it is not more “objective,” more “workable,” or more conducive to drawing a “clear line” (*id.* at pp. 398, 399.–400) than the analysis set forth in our opinion today. Indeed, the Chief Justice's approach calls for the very sort of line-drawing she purports to disavow: Under her approach as under ours, the controlling inquiry is not simply whether defendants' sentences provide for parole eligibility within their life expectancies, but whether the sentences “impinge on the same substantive [****40] concerns that make the imposition of LWOP on juvenile nonhomicide offenders impermissible under the *Eighth Amendment*.” (*Ante*, at p. 364.)

III.

After oral argument in this case, the Governor on October 11, 2017, signed into law Assembly Bill No. 1448 (2017–2018 Reg. Sess.) (Assembly Bill [*374] 1448) and Senate Bill No. 394 (2017–2018 Reg. Sess.) (Senate Bill 394). Assembly Bill 1448 codifies the Elderly Parole Program, under which prisoners age 60 or older who have served at least 25 years in prison are entitled to a parole hearing. (Assem. Bill No. 1448 (2017–2018 Reg. Sess.) § 3.) Senate Bill 394 extends eligibility for a youth offender parole hearing after 25 years of incarceration to a person who was convicted of certain controlling offenses committed before 18 years of age and sentenced to life without the possibility of parole. (Sen. Bill No. 394 (2017–2018 Reg. Sess.) § 1.) In addition, upon the passage of Proposition 57 in the November 2016 elections, the Department of Corrections and Rehabilitation (CDCR) issued new regulations governing the ability of inmates to earn custody credit to advance their parole dates. We vacated submission of this case and ordered supplemental briefing from the parties on what bearing, if any, Assembly Bill 1448, Senate Bill 394, or the regulations [****41] codified at [sections 3043, 3043.2, 3043.3, 3043.4, 3043.5, and 3043.6 of title 15 of the California Code of Regulations](#) have on the question presented.

The Chief Justice contends that regardless of whether defendants' original sentences are valid, the recent legislation authorizing elderly parole means “both defendants will have an opportunity for parole at age 60,” and “[a] sentence offering an opportunity for parole no later than age 60 is not invalid under *Graham*.” (Dis. opn. of Cantil-Sakauye, C. J., *post*, at p. 401.) Further, she asserts, “even without the Elderly Parole Program, Rodriguez may be eligible for parole when he is 57 years old, simply by earning good-conduct credits” (*id.* at p. 401), and “Contreras could advance his initial parole date to age 64 through good [***265] conduct” (*id.* at p. 409). As explained below, we decline to resolve whether the newly enacted legislation and regulations affect the validity of defendants' sentences and instead leave these novel issues for the lower courts to address in the first instance.

A.

The elderly parole statute provides that when considering the release of an eligible inmate, the Board

of Parole Hearings (Board) “shall give special consideration to whether age, time served, and diminished physical [****42] condition, if any, have reduced the elderly inmate's risk for future violence.” (§ 3055, subd. (c).) A key question is whether an elderly parole hearing offers a juvenile offender a “meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.” (*Graham, supra, 560 U.S. at p. 75*, italics added.)

The legislative history of Assembly Bill 1448 indicates that the legislation's main purpose was to curb rising medical costs of the geriatric inmate population and to provide a “compassionate” release for those elderly individuals. (Assem. Conc. in Sen. Amends. to Assem. Bill No. 1448 (2017–2018 [*375] Reg. Sess.) as amended Sept. 6, 2017.) In contrast to the statute authorizing youth offender parole hearings, the text of the elderly parole statute does not mention youth-related considerations or rehabilitation. (Compare § 3051, subd. (f)(1) with § 3055.)

The Attorney General contends that elderly parole hearings are governed by [section 4801, subdivision \(c\)](#) and are thus required to consider youth-related factors associated [**459] with the controlling offense. [Section 4801, subdivision \(c\)](#) says: “When a prisoner committed his or her controlling offense, as defined in [subdivision \(a\) of Section 3051](#), when he or she was 25 years of age or younger, the board, in reviewing a prisoner's suitability for parole pursuant to [Section 3041.5](#), shall give great weight [****43] to the diminished culpability of youth as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law.” Noting that the provisions for parole hearings set forth in [section 3041.5](#) apply to “all hearings for the purpose of reviewing an inmate's parole suitability” (§ 3041.5, subd. (a)), the Attorney General argues that “they necessarily therefore apply to parole consideration under the Elderly Parole Program.”

But it is questionable whether the Board is reviewing an inmate's suitability for parole “pursuant to [Section 3041.5](#)” (§ 4801, subd. (c)) when it conducts an elderly parole hearing. The elderly parole statute contains a provision that makes applicable [section 3041.5, subdivision \(b\)\(3\)](#)'s schedule for a subsequent parole hearing in the event of a parole denial (§ 3055, subd. (f)) and another provision stating that “when considering a request for an advance hearing pursuant to [subdivision \(d\) of Section 3041.5](#), the board shall consider whether the inmate meets or will meet the criteria [for the Elderly

Parole Program]” (§ 3055, subd. (d)). These provisions, which appear to treat [section 3041.5](#)'s parole procedures as separate and distinct from those in [section 3055](#), suggest that an elderly parole hearing is conducted pursuant to [section 3055](#), not pursuant to [section 3041.5](#).

The Chief Justice does not endorse [****44] the Attorney General's interpretation of the statute and instead asserts that “the decision whether to grant elderly parole is concerned with the same question of public safety that governs conventional parole hearings.” (Dis. opn. of Cantil-Sakauye, C. J., *post*, at p. 402.) At conventional parole hearings, “[a]ll relevant, reliable information [***266] available to the panel shall be considered in determining suitability for parole. Such information shall include the circumstances of the prisoner's: social history; past and present mental state; ... past and present attitude toward the crime; ... and any other information which bears on the prisoner's suitability for release.” (*Cal. Code Regs., tit. 15, § 2281, subd. (b)*.)” (*Id.* at p. 402, fn. omitted.) She contends that “[a]lthough in an elderly parole hearing ‘special [*376] consideration’ is given to the three factors specified in [section 3055, subdivision \(c\)](#), there is no suggestion that these ‘special’ considerations somehow skew the basic question before the panel.” (*Id.* at p. 403.)

But the Chief Justice's interpretation is not the only plausible reading of the elderly parole statute, and we decline to issue a definitive interpretation less than five months after the statute's enactment, before any Court of Appeal has filed a published opinion [****45] applying it in the context of juvenile sentencing, and before CDCR has adopted any implementing regulations. We are not certain, for example, that the statute would preclude CDCR from adopting regulations that focus the Elderly Parole Program on identifying those inmates who no longer pose a risk of future violence primarily because of their age, illness, or other physical incapacitation, while leaving all other inmates age 60 or older who may be suitable for parole to the ordinary parole process. Such an interpretation does not appear foreclosed by the statutory text, and it seems consistent with the Legislature's purpose of reducing costs of geriatric care and providing compassionate release for elderly inmates. Yet it is questionable whether such a parole hearing would provide juvenile offenders with a “meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.” (*Graham, supra, 560 U.S. at p. 75*, italics added.) The record before us contains no information on how the Elderly Parole Program actually operates or

what considerations, apart from the “special considerations” set forth in the statute ([§ 3055, subd. \(c\)](#)), guide the Board's determination of suitability for elderly parole. This information [****46] may be developed on remand.

[**460] The Chief Justice says such development is unnecessary, noting that we required no similar information before finding the availability of a youth offender parole hearing sufficient to moot the *Eighth Amendment* claim in *Franklin*. (Dis. opn. of Cantil-Sakauye, C. J., *post*, at pp. 405–406, citing [Franklin, supra, 63 Cal.4th at pp. 284–286](#).) But *Franklin* addressed legislation whose explicit and specific purpose is “to establish a parole eligibility mechanism that provides a person serving a sentence for crimes that he or she committed as a juvenile the opportunity to obtain release when he or she has shown that he or she has been rehabilitated and gained maturity, in accordance with the decision of the California Supreme Court in [*Caballero*] and the decisions of the United States Supreme Court in *Graham* ... and *Miller* It is the intent of the Legislature to create a process by which growth and maturity of youthful offenders can be assessed and a meaningful opportunity for release established.” (Sen. Bill No. 260 (2013–2014 Reg. Sess.) § 1.) As noted, the statute expressly mandates consideration of youth-related factors in youth offender parole hearings. ([§§ 3051, subd. \(e\), 4801, subd. \(c\)](#).) For this reason, and because [sections 3051 and 4801](#) contemplate [****47] that “juvenile offenders [must] have an adequate opportunity to make a record of factors, including youth-related factors, relevant to the eventual [*377] parole determination,” we were assured “at this point” that a juvenile offender eligible for [***267] such a hearing has a meaningful opportunity for release within the meaning of *Graham*. ([Franklin, at p. 286](#).) Neither the text nor history of the elderly parole statute contains any indication that the Legislature intended elderly parole hearings to be responsive to the *Eighth Amendment* concerns raised by lengthy juvenile sentences.

Even assuming that elderly parole hearings consider normal parole factors, it is not clear that elderly parole eligibility after 44 years in prison would provide the 16-year-old nonhomicide offenders in this case with the “hope of restoration” and realistic opportunity to reintegrate into society that *Graham* requires. ([Graham, supra, 560 U.S. at p. 70](#).) The Chief Justice notes that [Bear Cloud v. State, supra, 334 P.3d 132](#) invalidated a 45-year sentence for a 16-year-old nonhomicide offender, but that three other state high courts have held

that parole eligibility at or around age 60 passes constitutional muster. (Dis. opn. of Cantil-Sakauye, C. J., *post*, at pp. 407–408.) Among them, only [Angel v. Commonwealth \(2011\) 281 Va. 248 \[704 S.E.2d 386\]](#) (*Angel*) concluded that a geriatric release program [****48] for inmates who are 60 or older satisfies *Graham*. The Virginia Supreme Court's holding was premised on its understanding that “the factors used in the normal parole consideration process apply to conditional release decisions under [Virginia's geriatric release] statute.” ([Angel, at p. 402](#).)

Notably, in [Virginia v. LeBlanc \(2017\) 582 U.S. ___ \[198 L. Ed. 2d 186, 137 S. Ct. 1726\]](#) (*LeBlanc*), the high court considered on habeas corpus review whether Virginia's geriatric release program provides a meaningful opportunity for a juvenile nonhomicide offender to obtain release based on demonstrated maturity and rehabilitation. The trial court in *LeBlanc*, relying on *Angel*, rejected the defendant's *Eighth Amendment* challenge, and the high court held that the trial court's ruling was not objectively unreasonable. (*LeBlanc*, at p. ___ [137 S.Ct. at p. 1729].) In so doing, the high court emphasized that it was applying the deferential standard of review required by the *federal Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)* (28 U.S.C. § 2254(d)(1)) and that “[t]here are reasonable arguments on both sides.” (*LeBlanc*, at p. ___ [137 S.Ct. at p. 1729].) On one hand, because Virginia's geriatric release program considers “normal parole factors,” it “could allow the Parole Board to order a former juvenile offender's conditional release in light of his or her ‘demonstrated maturity and rehabilitation.’” [****49] (*Ibid.*) On the other hand, there were concerns “that the Parole Board's substantial discretion to deny geriatric release deprives juvenile nonhomicide offenders a meaningful opportunity to seek parole and that juveniles cannot seek geriatric release until they have spent at least four decades in prison.” (*Ibid.*) The high [**461] court thus recognized there is a reasonable argument that even an elderly parole process that considers normal parole factors could, in practice, fail to provide a meaningful opportunity for [*378] release and that incarcerating a juvenile nonhomicide offender for 40 years or more without parole eligibility is simply too long under *Graham*.

Defendants here raise an additional concern: Juvenile offenders for whom the Elderly Parole Program provides the first opportunity for release will invariably spend more time in prison before parole eligibility compared to adult inmates who committed the same crime and served at least 25 years before age 60—a result at odds

with the high court's "conclusion in *Roper v. Simmons*, [supra,] 543 U.S. 551 ... , that juvenile offenders are generally less culpable than adults who commit the same crimes." (*Graham, supra*, 560 U.S. at p. 86 [***268] (conc. opn. of Roberts, C. J.); see *Roper, supra*, 543 U.S. at p. 570.) In *Graham*, the high court reasoned that "[***50] [l]ife without parole is an especially harsh punishment for a juvenile" because "a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender." (*Graham, at p. 70*.) Defendants contend the same reasoning applies to a sentence of more than 40 years without parole eligibility. (*Id. at p. 71* ["This reality cannot be ignored."].)

These issues are novel and substantial, and we leave them for the lower courts to address in the first instance. Like the high court in *LeBlanc*, we decline to resolve in this case whether the availability of an elderly parole hearing at age 60 for a juvenile nonhomicide offender satisfies the *Eighth Amendment* concerns set forth in *Graham*.

B.

Apart from defendants' eligibility for elderly parole, the Chief Justice claims that "simply by maximizing the good-conduct credits that are available" to them under Proposition 57, Rodriguez can advance his initial parole date to age 57 and Contreras can advance his initial parole date to age 64. (Dis. opn. of Cantil-Sakauye, *C. J., post, at p. 409*.) But as with elderly parole, no Court of Appeal has filed a published opinion addressing the relevance of good conduct credit to the constitutionality of a juvenile [***51] sentence, and the regulations, promulgated less than one year ago, remain in emergency form. (*Cal. Code Regs., tit. 15, § 3043.2*.) In addition, the record before us contains no information on how good conduct credit operates in practice.

The Chief Justice rests her calculations on defendants' ability to earn the maximum amount of good conduct credit, but neither she nor Justice Kriegler makes any mention of the myriad ways inmates can lose such credit. Good conduct credit is subject to forfeiture upon "a finding of guilt of a serious rule violation in accordance with *section 3323*." (*Cal. Code Regs., tit. 15, § 3043.2, subd. (c)*.) The activities that can constitute a "serious rule violation" span a [*379] broad range of conduct. (*Id.*, §§ 3315, 3323.) A "credit forfeiture of 61–90 days" is assessed for, among other violations, "[l]ate return from a temporary community

leave" or "[f]ighting." (*Id.*, § 3323, subd. (f)(7), (9).) A "credit forfeiture of 31–60 days" is assessed for, among other violations, "damage to ... state property valued at less than \$ 400," "[p]ossession of alcoholic beverages or intoxicating substances in a community-access facility under the jurisdiction of CDCR," or "[g]ambling." (*Id.*, § 3323, subd. (g)(1), (2), (5).) A "credit forfeiture of 0–30 days" is assessed for, among other violations, "[m]isuse, alteration, unauthorized acquisition, or exchange of personal [****52] property, state funds, or state property" or "[h]arassment of another person, group, or entity." (*Id.*, § 3323, subd. (h)(4), (11); see also *id.*, § 3315, subd. (a)(3) [listing 27 offenses that qualify as a "serious rule violation," including "(G) Possession of five dollars or more without authorization" and "(H) Acts of ... disrespect which by reason of intensity or context create a potential for violence"].)

In positing an initial parole date at age 57 for Rodriguez and at age 64 for Contreras, our dissenting colleagues assume that correctional authorities will not revoke any good conduct credit that defendants earn while [**462] incarcerated for 40-plus years, citing select cases of inmates who have demonstrated good prison behavior (though none of them served anything close to 40 years). (See dis. opn. of Kriegler, *J., post, at pp. 417–418*.) But the [***269] record before us contains no information on how likely it is that an inmate can achieve a spotless prison record over a span of four or more decades. Nor is it clear that *Graham's* requirement of a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" (*Graham, supra*, 560 U.S. at p. 75) would be satisfied by a parole eligibility date that is contingent upon a perfect or near-perfect record [****53] in prison. (See *id., at p. 70* ["the remote possibility" of release does not satisfy the *Eighth Amendment*].) As with elderly parole, we leave these novel issues for the lower courts to address in the first instance.

IV.

For the reasons above, we agree with the Court of Appeal that defendants' sentences violate the *Eighth Amendment* under the standards articulated in *Graham*. We affirm the judgment of the Court of Appeal and remand these matters for resentencing. The sentencing court is directed to consider, in light of this opinion, any mitigating circumstances of defendants' crimes and lives, and the impact of any new legislation and regulations on appropriate sentencing. The sentencing court is further directed to impose a time by which

defendants may seek parole, consistent with this opinion.

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Justice Kriegler says this disposition “is likely to leave the trial judge mystified” because the trial court already considered any mitigating circumstances of defendants’ crime and lives in imposing their original sentences. (Dis. opn. of Kriegler, *J., post, at p. 413*.) But the trial court did not undertake its sentencing analysis with the benefit of our opinion today. In addition, the trial court appeared to stray from the fundamental teaching [****54] of *Graham* when it said at Contreras’s sentencing: “So somebody with that kind of psychology is not somebody I feel confident is going to rehabilitate, change, and become a different person regardless of his brain development. I think his brain is developed into who he is and who he was demonstrated on that whole event where he raped those two girls.” (Cf. dis. opn. of Kriegler, *J., post, at p. 414* [asserting that defendants’ crimes “reveal[] the actions of violent sexual predators, not that of rogue youths misbehaving on a lark”].)

[CA\(17\)](#) [↑] (17) The trial court in *Graham* had similarly concluded that the 16-year-old defendant, a recidivist felon, was not capable of rehabilitation: “I don’t see where I can do anything to help you any further. You’ve evidently decided this is the direction you’re going to take in life, and it’s unfortunate that you made that choice. [¶] ... Given your escalating pattern of criminal conduct, it is apparent to the Court that you have decided that this is the way you are going to live your life and that the only thing I can do now is to try and protect the community from your actions.” (*Graham, supra, 560 U.S. at p. 57*.) But the key holding of *Graham* is that [HN16](#) [↑] “in light of a juvenile nonhomicide offender’s [****55] capacity for change and limited moral culpability” (*id. at p. 74*), no sentencing court is permitted to render a judgment “at the outset” that a juvenile nonhomicide offender is incorrigible (*id. at pp. 73, 75*). On remand, the sentencing of each defendant must be guided by the “central intuition” of the high court’s case law in this area—“that children who commit even heinous crimes are capable of change.” (*Montgomery, supra, 577 U.S. at p. [136 S. Ct. at p. 736]*; see *Miller, supra, 567 U.S. at p. 473* [“none of what [*Graham*] said about children ... is crime-specific”].)

In so holding, we do not minimize the gravity of defendants’ crimes or their lasting impact on the victims and their families. [***270] No one reading the disturbing facts of this case could disagree with the trial

court that the crimes were “awful and shocking.” The Court of Appeal was correct to observe that “[w]hatever their final sentences, Rodriguez and Contreras will need to do more than simply bide their time in prison to demonstrate [**463] parole suitability. ... The record before us indicates Rodriguez and Contreras have much work ahead of them if they hope to one day persuade the Board they no longer present a current danger to society and should be released on parole.”

[CA\(18\)](#) [↑] (18) Our dissenting colleagues further assert that our decision today provides [****56] “virtually no guidance” (dis. opn. of Cantil-Sakauye, C. J., *post, at p. 384* [*381]) and “not a whiff of direction” (dis. opn. of Kriegler, *J., post, at p. 411*) on what length of sentence below 50 years will satisfy *Graham*. But in this context, we find it prudent to follow [HN17](#) [↑] a “cardinal principle of judicial restraint—if it is not necessary to decide more, it is necessary not to decide more.” (*PDK Laboratories Inc. v. U.S. Drug Enforcement Administration (D.C. Cir. 2004) 362 F.3d 786, 799* (conc. opn. of Roberts, J.).)

Today’s decision, building on *Caballero*, elucidates *Graham*’s applicability to a term-of-years sentence, and our reasoning will inform the application of *Graham* by California courts going forward. Our disposition takes the approach we took in *Caballero*, where we unanimously declared the defendant’s 110-year-to-life sentence unconstitutional and remanded for the sentencing court to “consider all mitigating circumstances attendant in the juvenile’s crime and life ... so that it can impose a time when the juvenile offender will be able to seek parole from the parole board.” (*Caballero, supra, 55 Cal.4th at pp. 268–269*; see *id. at p. 273* (conc. opn. of Werdegar, J.).) No member of this court suggested that we should provide further guidance on what would constitute a lawful sentence. Instead, the court’s opinion expressly stated [****57] that “we will not provide trial courts with a precise timeframe for setting these future parole hearings in a nonhomicide case.” (*Id. at p. 269*.)

As it turns out, our restraint in *Caballero* proved well advised. Our opinion concluded with a footnote “urg[ing] the Legislature to enact legislation establishing a parole eligibility mechanism that provides a defendant serving a de facto life sentence without possibility of parole for nonhomicide crimes that he or she committed as a juvenile with the opportunity to obtain release on a showing of rehabilitation and maturity.” (*Caballero, supra, 55 Cal.4th at p. 269, fn. 5*.) The Legislature responded the following year with Senate Bill No. 260

(2013–2014 Reg. Sess.). This legislation made it unnecessary for us to decide *Eighth Amendment* challenges to sentences of 25 years or more for a broad range of juvenile homicide and nonhomicide offenses; juvenile offenders serving such sentences are now entitled to a youth offender parole hearing during their 25th year of incarceration. (§ 3051, subd. (b)(3); see *Franklin, supra*, 63 Cal.4th at pp. 277–280; cf. *Franklin, at pp. 284–286* [leaving undecided whether youth offender parole hearings, “in practice,” will conform to applicable statutory and constitutional law].) In addition, whereas Senate Bill No. 260 (2013–2014 Reg. Sess.) made youth offender parole hearings available for juveniles who committed their [****58] controlling offense before age 18 (Stats. 2013, ch. 312, § 5), the Legislature has since amended the age threshold to age 23 (Stats. 2015, ch. 471, § 2) and now to age 25 (Stats. 2017, ch. 684, § 2.5 [eff. Jan. 1, 2018]). Moreover, the Legislature’s enactment of Senate Bill 394 just a few months ago [***271] extended youth offender parole hearings in the 25th year of incarceration to juveniles serving an LWOP sentence. (§ 3051, subd. (b)(4).) One Strike offenders remain ineligible for youth offender parole hearings. (§ 3051, subd. (h).) But in light of [*382] the changing statutory landscape, we see no reason to opine here on constitutional and statutory issues that may be rendered moot by further legislative action.

Finally, we note defendants’ contention that the current treatment of juvenile One Strike offenders is anomalous given that juveniles convicted of special circumstance murder and sentenced to LWOP are now eligible for parole during their 25th year in prison. This scheme appears at odds with the high court’s observation that “defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers. ... Although an [**464] offense like robbery [****59] or rape is ‘a serious crime deserving serious punishment,’ those crimes differ from homicide crimes in a moral sense.” (*Graham, supra*, 560 U.S. at p. 69, citations omitted.) In the death penalty context, the high court has said “there is a distinction between intentional first-degree murder on the one hand and nonhomicide crimes against individual persons, even including child rape, on the other. The latter crimes may be devastating in their harm, as here, but ‘in terms of moral depravity and of the injury to the person and to the public,’ they cannot be compared to murder in their ‘severity and irrevocability.’” (*Kennedy v. Louisiana (2008) 554 U.S. 407, 438 [171 L. Ed. 2d 525, 128 S. Ct. 2641]*, citation omitted.)

The parties point to no other provision of our Penal Code, and we are aware of none, that treats a nonhomicide offense more harshly than special circumstance murder. (Compare § 190.2 [prescribing penalty of death or LWOP for special circumstance murder] with § 667.61 [prescribing maximum penalty of 25 years to life or, when the victim is under age 14, LWOP for aggravated rape offenses].) We are also unaware of any other jurisdiction that punishes juveniles for aggravated rape offenses more severely than for the most aggravated forms of murder. Further, we note the concern raised by amicus curiae PJDC [****60] that if defendants had killed their victims after the sexual assaults and had been sentenced to LWOP, they would have been eligible for a youth offender parole hearing after 25 years of incarceration. (Cf. *Kennedy v. Louisiana, supra*, 554 U.S. at p. 445 “[B]y in effect making the punishment for child rape and murder equivalent, a State that punishes child rape by death may remove a strong incentive for the rapist not to kill the victim.”.)

Defendants contend that this treatment of juvenile One Strike offenders violates principles of equal protection and the *Eighth Amendment*. There is also a colorable claim that it constitutes “unusual punishment” within the meaning of *article I, section 17 of the California Constitution*. As with the other issues arising from new legislation, we decline to resolve these contentions here. It suffices to note, as we did in *Caballero*, that the current penal scheme for juveniles may warrant additional legislative attention.

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CONCLUSION

We affirm the judgment of the Court of Appeal and remand these matters for resentencing. The sentencing court is directed to consider, in light of this opinion, any mitigating circumstances of defendants’ crimes and lives, and the impact of any new legislation and regulations on appropriate sentencing. The sentencing court is further directed [****61] to impose a time by which [***272] defendants may seek parole, consistent with this opinion.

Chin, J., Cuéllar, J., and Kruger, J., concurred.

Dissent by: Cantil-Sakauye and Kriegler

Dissent

CANTIL-SAKAUYE, C. J., Dissenting.—I respectfully dissent. The majority's erroneous interpretation and extension of [Graham v. Florida \(2010\) 560 U.S. 48 \[176 L. Ed. 2d 825, 130 S. Ct. 2011\]](#) (*Graham*) yield a result the *Graham* court did not intend—the categorical condemnation of all sentences in which juvenile offenders convicted of nonhomicide crimes will serve a term of 50 years or greater. At the same time, the majority fails to properly account for legislation and regulations that afford defendants William Rodriguez and Leonel Contreras an initial opportunity for parole no later than when they reach the age of 60. These measures take defendants' sentences outside of *Graham's* purview even under the majority's mistaken approach to that decision. Defendants' sentences do not violate the *Eighth Amendment to the United States Constitution*, and I would so hold.

In [Graham, supra, 560 U.S. 48](#), the high court invalidated a particular type of prison sentence—one of life imprisonment without the possibility of parole (life without parole)—when imposed upon a juvenile **[**465]** convicted only of a nonhomicide crime or crimes. The court took great care in describing the type of sentence it considered “cruel **[****62]** and unusual” under the *Eighth Amendment*. (*U.S. Const., 8th Amend.*) The majority in *Graham* characterized life without parole as “the second most severe penalty permitted by law.” ([Graham, at p. 69](#), quoting [Harmelin v. Michigan \(1991\) 501 U.S. 957, 1001 \[115 L. Ed. 2d 836, 111 S. Ct. 2680\]](#) (conc. opn. of Kennedy, J.).) A life without parole sentence, the court stressed, “alters the offender's life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency.” ([Graham, at pp. 69–70.](#)) Such a sentence “means that ... [the convict] will remain in prison for the rest of his days.” (*Id., at p. 70*, quoting [Naovarath v. State \(1989\) 105 Nev. 525 \[779 P.2d 944\]](#).) “Life in prison without the possibility of parole,” the *Graham* court emphasized, “gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope.” ([Graham, at p. 79.](#))

Today, the majority declares unconstitutional a range of sentences that most certainly are *not* the second most severe penalty permitted by law; that *do* **[*384]** offer hope of restoration of basic liberties; that *do not* necessarily mean that defendants will remain in prison for the rest of their days; and that *do* give a chance for fulfillment outside prison walls, *do* give a chance for reconciliation with society, and *do* offer hope. In short, the majority **[****63]** extends *Graham* to invalidate an

array of sentences that are qualitatively different from the sort of punishment that *Graham* was concerned with.

The majority asserts, unconvincingly, that behind *Graham's* cautious and consistent phrasing lies a more far-reaching intent to invalidate all sentences that do not provide juvenile offenders convicted of nonhomicide crimes with an opportunity for parole at an age when release would, in the majority's view, be sufficiently conducive to their full reintegration into society. This reading of *Graham* is flawed on several **[***273]** levels. It is inconsistent with the careful, incremental approach the high court has taken when addressing categorical *Eighth Amendment* challenges to sentencing practices. It defies the *Graham* court's articulations of its subject and holding, and represents an inadequately justified extension of that decision. It departs from this court's prior description of *Graham* as demanding that a juvenile offender convicted of a nonhomicide crime must receive “some realistic opportunity to obtain release” from prison *during his or her expected lifetime.*” ([People v. Caballero \(2012\) 55 Cal.4th 262, 268 \[145 Cal. Rptr. 3d 286, 282 P.3d 291\]](#) (*Caballero*), italics added, quoting [Graham, supra, 560 U.S. at p. 82.](#)) And it unnecessarily premises a constitutional rule on the majority's **[****64]** subjective and speculative views regarding the timeframe necessary to have a meaningful postcustodial life. The result is a dubious judicial incursion into the legislative sphere, pitched at such a high level of abstraction that it provides sentencing courts with virtually no guidance for determining whether a lengthy prison sentence of less than 50 years will be held lawful.

The majority's rendering of *Graham* is not only wrong, it is also unnecessary. The majority's analysis assumes that defendants will first become eligible for parole at ages 66 and 74, after serving terms of 50 and 58 years, respectively. That assumption is incorrect. Both defendants will be eligible for parole no later than age 60 under the Elderly Parole Program recently codified by the Legislature. (See [Pen. Code, § 3055.](#)) ¹ Defendants may be eligible for parole even sooner due to recently expanded programs for earning good conduct and other credits. ([Cal. Code Regs., tit. 15, §§ 3043.2](#) [good conduct credits], [3043.3](#) [milestone completion credits], [3043.4](#) [rehabilitative achievement credits], [3043.5](#) [educational merit credits].) A sentence that affords a meaningful opportunity for parole at age

¹ Subsequent statutory references are to the Penal Code except as otherwise indicated.

60 or earlier cannot properly be characterized as a sentence of life [****65] without parole or its functional equivalent, even under the majority's unwarranted extension of *Graham*.

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[**466] In sum, the majority opinion gives short shrift to the limited nature of the holding in *Graham*, to our prior understanding of that decision, and to the steps California has taken toward ensuring that juvenile offenders convicted of nonhomicide offenses receive “some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.” (*Graham, supra, 560 U.S. at p. 75.*) And in significantly expanding the *Graham* rule, the majority ultimately condemns as unconstitutional sentences that are materially different from the ones defendants actually will serve. Therefore, I respectfully dissent.

I. FACTUAL AND PROCEDURAL BACKGROUND

The Court of Appeal offered this recitation of the facts presented at trial regarding the brutal series of sexual assaults that led to the sentences before us:

“[Jane] Doe 2, then 15, accompanied [Jane] Doe 1, then 16, and Doe 1’s parents to a party for one of Doe 1’s relatives. The party was at the relative’s house. At dusk, while the party was still going on, the girls went for a walk and sat down by a tree in an open space area. Contreras, then 16, and Rodriguez, then 16, [****66] walked past them. Both boys wore dark clothing with hoods covering their heads. Rodriguez wore a red and black cap, a dark-colored Padres T-shirt, and a long-sleeve, plaid or checkered jacket with a gray hood. Contreras [***274] wore a long-sleeve, dark-colored, hooded jacket.

“A short time later, Contreras and Rodriguez tackled the girls from behind. Contreras tackled Doe 1 and Rodriguez tackled Doe 2. Both boys wore bandanas covering their noses and mouths. Contreras held a knife to Doe 1’s throat. One of boys asked for the girls’ cell phones.

“The boys pulled the girls up and started taking them toward a street. Rodriguez covered Doe 2’s mouth with his hand as she struggled to get away. Contreras repeatedly told Doe 1 to tell Doe 2 to ‘shut the f—k up.’ The boys forced the girls to walk across the street, up an embankment, and into a wooded area. As they started going up the embankment, Doe 2 continued to struggle and threw her weight backward, causing both

her and Rodriguez to stumble. Doe 2 bit Rodriguez’s hand and tried to get away. However, Doe 1, at Contreras’s direction, told Doe 2 to be quiet and stop resisting.

“When Doe 2 got up off the ground, Rodriguez tied his bandana around her [****67] mouth and told her he would hurt her if she screamed. He took her to a clearing. Contreras took Doe 1 to a different location nearby. The area was not lighted and was not visible from the street.

“Rodriguez took off Doe 2’s shorts and underwear. He told her to get down. As she lay on her back, he got on top of her, put his penis in her vagina, and [*386] started thrusting in and out. He pulled down the bandana and kissed her, putting his tongue in her mouth. He told her not to scream or he would hurt Doe 1. He asked her if she liked what he was doing. She was wearing a purity ring and had never had sexual intercourse before. His actions were painful and caused her to wince.

“After what seemed like a long time to Doe 2, Rodriguez made her flip over. As she lay on her stomach, he put his penis in her anus and started thrusting in and out.

“As Rodriguez was assaulting Doe 2, Contreras had Doe 1 lay down. He took off her shorts, underwear, and shoes, had her help him take off her dress, and had her take off her bra. He touched her breasts and tried to push his penis into her vagina, but his penis was soft. He asked her whether she was a virgin and she told him she was. He put his fingers in her [****68] vagina for a couple of seconds, which was painful for her. He told her to keep her legs open and pushed his now erect penis into her, which was also painful for her. He then started thrusting in and out.

“After awhile, he took his penis out of her vagina, stood up, told her to suck it, and warned her he did not want to feel any teeth. He put his penis in her mouth and pushed her head back and forth. She gagged and threw up. He then pushed his penis back into her vagina. He told her to keep quiet and keep her legs open. She tried to keep quiet, but made some noise because she was uncomfortable. He told her to shut up. He kept the knife in his pocket during the sex acts.

[**467] “Around this time, Rodriguez called over to Contreras and the two boys switched places. Rodriguez kissed Doe 1 and bit her cheek and neck. He put his penis in her vagina and thrust in and out. He then put his penis in her mouth and pushed her head back and

forth. She gagged and threw up again. He lay down on the ground, had her get on top of him, pushed his penis into her anus, and had her ‘hump’ him by moving up and down. After a couple of minutes, he had her sit back down. He put his penis in her mouth again and pushed [****69] her head back and forth. She gagged and threw up again.

“As Rodriguez was engaging in sex acts with Doe 1, Contreras took off Doe 2’s dress and had her help him take off her [***275] bra. Once all of her clothes were off, he had her lay on her back. While holding the knife to her neck, he told her to open her legs ‘really wide.’ He then put his penis into her vagina and started thrusting. The action was painful to her. He asked whether she was a virgin and she told him she was. He also asked whether she had a boyfriend and where she went to school. She told him she did not have a boyfriend and what school she attended.

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“After some period of time, Contreras moved further up on Doe 2. While holding the knife in his hand, he put his penis in her mouth and told her to suck it. She turned her head away and told him she could not breathe. He put his penis back in her mouth and told her to try. She turned her head away again. He changed their positions so he lay on his back and she was on top of him. He told her to put his penis in her vagina. She told him she did not know how, so he put it in himself. He told her to jump up and down, but she did not know what he meant. He thrust up and down while [****70] fondling her breasts. His knife was on the ground nearby. When they were in this position, Contreras’s bandana slipped and Doe 2 got a good look at his face.

“At some point, Contreras asked Doe 2, ‘Did [Rodriguez] f—k your mouth?’ She told him no. Rodriguez then brought Doe 1 over to the same place as Doe 2. Once more, Rodriguez put his penis in Doe 1’s mouth and pushed her head back and forth. Once more, she threw up. Afterwards, the two boys switched again.

“Rodriguez had Doe 2 get on her back and he put his penis in her mouth. She turned her head away and told him she could not breathe, but he put his penis back in her mouth. While this was occurring, Contreras put his penis in Doe 1’s mouth. He moved her head back and forth and warned her he did not want to feel any teeth. She gagged yet again. Neither Contreras nor Rodriguez wore a condom during any of the sex acts.

“When the boys decided to stop, they had the girls put their clothes back on. As Doe 2 was getting dressed,

Rodriguez kissed Doe 2, touched her legs, put his finger in her vagina, and told her she was beautiful. Before Doe 1 got dressed, Rodriguez also kissed her and asked her if she liked what had happened. He told [****71] her she was beautiful and that, if they had known each other before, she would have been his girlfriend.

“Meanwhile, Contreras pulled a bicycle from the bushes. The boys then directed the girls which way to go and told them not to say anything to anyone. One of the boys said they would follow the girls home and come after the girls if they ever told anyone. Contreras also threatened to find and hurt one of Doe 1’s young relatives.

“The girls walked down the slope and across the street, where they met up with Doe 1’s parents, who had been looking for them. They got in Doe 1’s parents’ car and left. Doe 1’s mother asked where they had been and what had happened to them.

“At first, the girls did not say anything. Doe 2 did not say anything because she thought the boys were still close by and she just wanted to get away. [*388] However, Doe 1’s mother asked them directly if they had been raped and they acknowledged they had been. Doe 1’s parents took them back to Doe 1’s relative’s home, where someone called the police.”

The case was tried before two juries. One convicted Rodriguez of two counts of forcible rape ([§ 261, subd. \(a\)\(2\)](#)), two counts of kidnapping ([§ 207, subd. \(a\)](#)), four counts of forcible oral copulation ([§ 288a, subd. \(c\)\(2\)\(A\)](#)), and two [****72] counts of sodomy by use [**468] of force ([§ 286, subd. \(c\)\(2\)\(A\)](#)). The jury also found true allegations [***276] that Rodriguez had committed the sexual assault crimes during a kidnapping and against multiple victims ([§ 667.61, subds. \(d\)\(2\) & \(e\)\(4\)](#)). The other jury convicted Contreras of seven counts of forcible rape ([§ 261, subd. \(a\)\(2\)](#)), conspiracy to commit kidnapping and forcible rape ([§ 182, subd. \(a\)\(1\)](#)), rape by foreign object ([§ 289, subd. \(a\)\(1\)\(A\)](#)), two counts of kidnapping ([§ 207, subd. \(a\)](#)), eight counts of forcible oral copulation ([§ 288a, subd. \(c\)\(2\)\(A\)](#)), and two counts of sodomy by use of force ([§ 286, subd. \(c\)\(2\)\(A\)](#)). This jury returned true findings on allegations that Contreras committed the crimes with use of a knife ([§ 12022.3, subd. \(a\)](#)), as well as other allegations bringing Contreras’s case, like Rodriguez’s, within the purview of the “One Strike” law for sentencing purposes ([§ 667.61, subds. \(d\)\(2\), \(e\)\(1\), \(3\), & \(4\)](#)).

These convictions and findings meant that under the One Strike law, defendants faced sentences whereby their first opportunity for parole would not arise until long after their natural lifespans had elapsed. (See §§ 667.6, *subd. (d)*, 667.61, *subd. (i)*.) At the time of sentencing, however, the trial court recognized that in *Caballero*, *supra*, 55 Cal.4th 262, this court had construed *Graham* as directing that a juvenile offender convicted of a nonhomicide crime receive “some realistic opportunity to obtain release’ from prison during his or her expected [****73] lifetime.” (*Caballero*, *supra*, 55 Cal.4th at p. 268.) The court advised Rodriguez that had he been an adult, it would have had “no problem” sentencing him to the maximum term of 200 years to life. The court observed, however, that it “couldn’t give [Rodriguez] 75 years to life because that would probably take him outside of this life expectancy. ... So probably the most I could give him is 50 to life,” which Rodriguez’s attorney conceded was a lawful sentence under *Caballero*. The court imposed this sentence on Rodriguez, sentencing him to two consecutive terms of 25 years to life on the two forcible rape counts, and running the terms on all other counts concurrently. With regard to Contreras, the court acknowledged a prospective statutory sentence of 620 years to life. To comply with *Graham*, the court imposed a sentence of 58 years to life. This sentence was comprised of two consecutive terms of 25 years to life on two forcible rape counts and an eight-year term on the knife enhancement, with all other terms to run concurrently. [*389]

II. DISCUSSION

As explained below, the majority adopts a faulty, overbroad construction of *Graham*, and extends that decision well beyond the boundaries marked by the high court. And it does so needlessly, [****74] because the sentences here are quite different from the ones condemned by the majority. Defendants will become eligible for parole not at ages 66 and 74, as the majority generally assumes, but no later than age 60. These sentences comport with the *Eighth Amendment* even under the majority’s unjustified extrapolation from *Graham*, making it unnecessary to announce a general standard in today’s decision.

A. The Majority Misconstrues *Graham*

1. *Graham* is concerned only with sentences of life without parole and functionally equivalent sentences

In *Graham*, *supra*, 560 U.S. 48, the United States

Supreme Court considered whether the *Eighth Amendment to the United States Constitution* absolutely prohibits the imposition of a sentence of life without the possibility of parole on a juvenile offender convicted only of a nonhomicide offense. In resolving [***277] this question, the court applied its “categorical” strain of *Eighth Amendment* jurisprudence. (See *Graham*, at pp. 60–62.) This approach evaluates whether a particular type of punishment is “cruel and unusual” (*U.S. Const., 8th Amend.*) in all of its applications, or is categorically prohibited with regard to a certain class of offenders. (*Graham*, at pp. 60–61.) Prior to *Graham*, the high court had applied this form of analysis only to sentences of death. (*Id.*, at p. 60.)

As befits the categorical approach, *Graham*, *supra*, 560 U.S. 48, ultimately invalidated [****75] a narrowly defined, specific type of sentence—one that does not [**469] afford a juvenile offender convicted of a nonhomicide crime “some realistic opportunity to obtain release.” (*Id.*, at p. 82.)² Again and again in its analysis, the *Graham* court stressed the distinctive characteristics of a sentence of life without parole that made it vulnerable to an *Eighth Amendment* challenge. [*390] The court described life without parole as “the second most severe penalty permitted by law,” and observed that “life without parole sentences share some characteristics with death sentences that are shared by no other sentences.” (*Id.*, at p. 69.) A life without parole sentence, the court emphasized, “alters the offender’s life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency.” (*Id.*, at pp. 69–70.) Such a sentence “means that ... [the convict] will remain in prison for the rest of his days.” (*Id.*, at p. 70.) “Life in prison without the possibility of

²The court in *Graham*, *supra*, 560 U.S. 48, began its categorical analysis by considering whether there were “objective indicia of society’s standards, as expressed in legislative enactments and state practice’ to determine whether there [was] a national consensus against the sentencing practice at issue.” (*Id.*, at p. 61; see also *id.*, at pp. 62–67.) The court acknowledged that a substantial majority of states, and the District of Columbia, allowed juveniles to be sentenced to life without parole for a nonhomicide crime. (*Id.*, at p. 62.) The court emphasized, however, that at the time of its decision, there were only 123 juvenile nonhomicide offenders serving “life without parole” sentences nationwide, 77 of whom were serving sentences in Florida. (*Id.*, at p. 64.) The court did not conduct any similar canvass of juvenile nonhomicide offenders serving lengthy terms other than “life without parole,” or states that authorized such sentences.

parole,” the court emphasized, “gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope.” (*Id.*, at p. 79.) Even if the defendant in *Graham* were to spend “the next half century [****76] attempting to atone for his crimes and learn from his mistakes,” the court observed, his “sentence guarantees he will die in prison.” (*Ibid.*)

Graham, supra, 560 U.S. 48, concluded that for a juvenile offender convicted of a nonhomicide crime, a sentence that guarantees death in prison was unjustified by any prevailing penological rationale, be it retribution, deterrence, incapacitation, or rehabilitation. (*Id.*, at pp. 71–74.) The court thus believed it necessary to draw a “clear line” that prohibits the imposition of life without parole sentences on juvenile offenders who commit only nonhomicide offenses. (*Id.*, at p. 74.) It articulated this line as follows: “[a] State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What the State must do, however, is give defendants like *Graham* some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. It is for the State, in the first instance, to [***278] explore the means and mechanisms for compliance.” (*Id.*, at p. 75.) Later, the court reiterated, “A State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release [****77] before the end of that term.” (*Id.*, at p. 82.)

Graham, supra, 560 U.S. 48, was an extension of the Supreme Court’s prior *Eighth Amendment* jurisprudence, but a limited one. The restrained nature of the *Graham* holding, and the deference it afforded states to “in the first instance ... explore the means and mechanisms for compliance” (*id.*, at p. 75), were consistent with the careful, incremental approach the high court has taken when addressing *Eighth Amendment* questions. The court has been properly mindful that it is the legislature, not the judiciary, that the public anticipates will define the parameters of permissible criminal sentences. (See *Rummel v. Estelle* (1980) 445 U.S. 263, 274 [63 L. Ed. 2d 382, 100 S. Ct. 1133] [“one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence actually imposed is purely a matter of legislative [***391] prerogative”].) We have expressed similar views. (*People v. [**470] Wingo* (1975) 14 Cal.3d 169, 174 [121 Cal. Rptr. 97, 534 P.2d 1001] [“The doctrine of

separation of powers is firmly entrenched in the law of California, and a court should not lightly encroach on matters which are uniquely in the domain of the Legislature. Perhaps foremost among these are the definition of crime and the determination [****78] of punishment.”].)

2. Subsequent judicial application of *Graham*

Some courts have regarded the *Graham* holding as very narrowly circumscribed. To these courts, *Graham*’s reach does not extend to aggregate sentences arising out of convictions for multiple nonhomicide crimes imposed as a specific term of years, or a specific term of years to life, even if the initial opportunity for parole appears outside of the juvenile offender’s life expectancy. (E.g., *Bunch v. Smith* (6th Cir. 2012) 685 F.3d 546, 552; *Lucero v. People* (2017) 2017 CO 49 [394 P.3d 1128, 1133]; *State v. Brown* (La. 2013) 118 So.3d 332, 342; *Willbanks v. Dept. of Corrections* (Mo. 2017) 522 S.W.3d 238, 246–247.)³

Other courts—including our own court—have concluded that a juvenile offender convicted of a nonhomicide crime or crimes does not have the “realistic opportunity to obtain release” (*Graham*, supra, 560 U.S. at p. 82) that *Graham* requires when he or she is sentenced to a term of years in which the initial opportunity for parole plainly arises outside of normal life expectancy, even when multiple convictions are involved. (*Caballero*, supra, 55 Cal.4th at p. 268; see also *Budder v. Addison* (10th Cir. 2017) 851 F.3d 1047, 1059; *Moore v. Biter* (9th Cir. 2013) 725 F.3d 1184, 1192; *Henry v. State* (Fla. 2015) 175 So.3d 675, 679–680; *State v. Boston* (Nev. 2015) 363 P.3d 453, 458–459.) Like a sentence explicitly imposed as “life without parole,” an aggregate sentence of a term of years in which the initial opportunity for release certainly will come only after the inmate’s death—in other words, one that is [***279] the functional equivalent of life without parole—“means that ... [the convict] [****79] will remain in prison for the rest of his days.” (*Graham*, at p. 70.)

When this court adopted the latter interpretation of *Graham*, we related our view of what that decision holds. In *Caballero*, supra, 55 Cal.4th 262, we concluded that a sentence of 110 years to life fell within *Graham*’s strictures. We observed that “[d]efendant in

³ A subset of this line of precedent finds *Graham* applicable to a term-of-years sentence for a *single* crime, but inapplicable when multiple offenses are involved. (*State ex rel. Morgan v. State* (La. 2016) 217 So. 3d 266, 271–277.)

the present matter will become parole eligible over 100 years from now. [Citation.] Consequently, he would have no opportunity to ‘demonstrate growth and maturity’ to try to secure his release, in contravention of *Graham*’s dictate. [Citations.] *Graham*’s analysis does not [*392] focus on the precise sentence meted out. Instead, as noted above, it holds that a state must provide a juvenile offender ‘with some realistic opportunity to obtain release’ from prison *during his or her expected lifetime*.” (*Id.*, at p. 268, italics added.) We later reiterated, “Consistent with the high court’s holding in *Graham* ... we conclude that sentencing a juvenile offender for a nonhomicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender’s natural life expectancy constitutes cruel and unusual punishment in violation of the *Eighth Amendment*.” (*Ibid.*) Significantly, these descriptions of *Graham* in *Caballero* represented [****80] a positive articulation of the Supreme Court’s holding, not merely an application of *Graham* to a particular sentence that left our view regarding the scope of that ruling unclear.

Caballero thus interpreted *Graham* in a manner comporting with the high court’s focus and phrasing—unlike the majority here. The language used within *Graham* itself establishes, and our precedent has recognized, that the *Graham* court was concerned with prohibiting a relatively discrete class of sentences that do not afford a prisoner “some realistic opportunity to obtain release’ from prison during his or her expected lifetime” (*Caballero*, *supra*, 55 Cal.4th at p. 268, [**471] quoting *Graham*, *supra*, 560 U.S. at p. 82). These, and only these, sentences involve “the second most severe penalty permitted by law.” (*Graham*, at p. 69.) These, and only these, sentences “share some characteristics with death sentences that are shared by no other sentences.” (*Ibid.*) And these, and only these, sentences mean that a defendant “will remain in prison for the rest of his days.” (*Id.*, at p. 70.)

3. The majority offers an overbroad construction of *Graham*

Compare the careful and consistent language used in *Graham* with the holding today. The majority provides that “[a] lawful sentence must recognize ‘a juvenile nonhomicide [****81] offender’s capacity for change and limited moral culpability.’ [Citation.] A lawful sentence must offer ‘hope of restoration’ [citation], ‘a chance to demonstrate maturity and reform’ [citation], ‘a chance for fulfillment outside prison walls,’ and ‘a chance for reconciliation with society’ [citation]. A lawful sentence must offer ‘the opportunity to achieve maturity

of judgment and self-recognition of human worth and potential.’ [Citation.] A lawful sentence must offer the juvenile offender an ‘incentive to become a responsible individual.’” (Maj. opn., *ante*, at p. 367, quoting *Graham*, *supra*, 560 U.S. at pp. 69–70, 74, 79.)⁴

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⁴ In describing what a lawful sentence entails, the majority offers several quotations from *Graham* (maj. opn., *ante*, at p. 367), but omits accompanying language that the high court used to frame and limit its holding, some of which appears elsewhere in the majority opinion. The text below shows how the words and phrases quoted by the majority in articulating its holding actually appeared within the *Graham* opinion:

“A sentence of life imprisonment without parole, however, cannot be justified by the goal of rehabilitation. The penalty forswears altogether the rehabilitative ideal. By denying the defendant the right to reenter the community, the State makes an irrevocable judgment about that person’s value and place in society. This judgment is not appropriate in light of a juvenile nonhomicide offender’s capacity for change and limited moral culpability.” (*Graham*, *supra*, 560 U.S. at p. 74, italics added.) Here the majority omits the high court’s constraining language regarding the penalty it was concerned with—one that “forswears altogether the rehabilitative ideal,” and makes an “irrevocable judgment” about the offender (*ibid.*), which the sentences before us do not.

“The State does not execute the offender sentenced to life without parole, but the sentence alters the offender’s life by a forfeiture that is irrevocable. [****82] It deprives the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency—the remote possibility of which does not mitigate the harshness of the sentence.” (*Graham*, *supra*, 560 U.S. at pp. 69–70, italics added.) Here, the majority omits *Graham*’s use of “irrevocable” in describing the forfeiture at issue. To similar effect, the majority also does not include the fact that the “hope of restoration” *Graham* addressed involved only the convict’s “most basic liberties.”

“Life in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope.” (*Graham*, *supra*, 560 U.S. at p. 79, italics added.) The majority here omits the word “no,” with its obvious limiting force, notwithstanding the fact that *Graham* used this word on three separate occasions.

“[A] categorical rule gives all juvenile nonhomicide offenders a chance to demonstrate maturity and reform. The juvenile should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential.” (*Graham*, *supra*, 560 U.S. at p. 79, italics added.) Here, the majority omits the fact that the *Graham* court viewed itself as announcing a “categorical rule.”

[***280] The majority thus invalidates sentences in which an initial opportunity for parole (or another possible avenue for release) arises even well within a defendant's life expectancy. What *Graham, supra*, 560 U.S. 48, meant to say, the majority professes— notwithstanding the limiting language interwoven throughout that opinion—is that a lawful sentence must provide more than a “meaningful” (*id.*, at p. 75) or “realistic opportunity to obtain release” (*id.*, at p. 82). According to the majority, the state also must structure prison sentences to offer an initial opportunity for release at a juncture that affords sufficient [****83] time for the inmate to fully reintegrate into society. Although the majority declines to explain what constitutes an adequate postcustodial buffer, today's ruling makes clear that in the majority's view, an initial opportunity for release at age 66 or 74 does not provide enough time.

Today's ruling thus declares unconstitutional a range of sentences that are qualitatively [**472] different from the sentences of life without parole that *Graham* addressed. Neither Rodriguez's sentence of 50 years to life nor Contreras's sentence of 58 years to life represents “the second most severe penalty permitted by law.” (*Graham, supra*, 560 U.S. at p. 69.) Neither sentence ensures an “irrevocable” forfeiture of the inmate's liberties “without giving hope of restoration.” (*Id.*, at pp. 69–70.) Neither sentence means that the defendant “will remain in prison for the rest of his days.” (*Id.*, at p. 70.) [**394] Neither sentence “gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope.” (*Id.*, at p. 79, italics added.) Neither sentence “guarantees” the defendant “will die in prison.” (*Ibid.*)

[***281] On the contrary, the sentences here afford defendants a “meaningful” (*Graham, supra*, 560 U.S. at p. 75) and “realistic” (*id.*, at p. 82) opportunity for parole within their lifetimes. Both defendants [****84] will be eligible for parole well within prevailing life expectancies for people their age. (Nat. Vital Statistics System, U.S. Dept. of Health & Human Services, United States Life Tables, 2010 (Nov. 6, 2014) p. 9 (National Vital Statistics System Study) [projecting an average life expectancy of approximately 79 years for persons aged 15 to 16 in the United States as of 2010] <https://www.cdc.gov/nchs/data/nvsr/nvsr63/nvsr63_07.pdf> [as of Feb. 26, 2018].) Furthermore, extrapolating a median age at death from average life expectancy figures, as the majority does (maj. opn., ante, at pp. 363–364), in fact significantly underestimates the likelihood that a person will live to a certain age. (See Nat. Vital Statistics System Study, at pp. 2, 9–10

[providing data and associated interpretive guidance forecasting that as of 2010, a 15-year-old member of the general public has a greater than 57 percent chance of surviving to age 80, and a greater than 50 percent chance of surviving to age 82].)

The majority refuses to consider these or any other empirical data for purposes of determining when a sentence affords a “meaningful” (*Graham, supra*, 560 U.S. at p. 75) or “realistic” (*id.*, at p. 82) opportunity for release. The majority expresses concern that use of such data would entail a choice between, on the one hand, disadvantaging members of a cohort [****85] that may in the aggregate have a lower life expectancy than that of the general public; or on the other, improperly relying on race, gender, or other characteristics in assessing whether a sentence falls sufficiently within a defendant's life expectancy. (Maj. opn., ante, at pp. 361–364.)

There are three responses. First, some reliance on lifespan data is not merely recognized by our precedent (*Caballero, supra*, 55 Cal.4th at p. 268), but is unavoidable when determining whether a sentence affords a “realistic opportunity to obtain release.” (*Graham, supra*, 560 U.S. at p. 82, italics added.) In *People v. Franklin* (2016) 63 Cal.4th 261 [202 Cal. Rptr. 3d 496, 370 P.3d 1053] (*Franklin*), for example, this court also considered an *Eighth Amendment* challenge to a sentence of 50 years to life imposed on a juvenile, who characterized the sentence as the functional equivalent of life without parole. We found this challenge mooted by the Legislature's then-recent enactment of a system of youth offender parole hearings (see § 3051) that provides for a parole hearing no later than an eligible offender's 25th year of [**395] incarceration. (*Franklin, at pp. 279–280.*)⁵ Under this program, the defendant in *Franklin* would be eligible for parole at the age of 41 years. (*Franklin, at p. 279.*) A sentence affording a meaningful opportunity for parole at such a juncture, we concluded, was not the functional [****86] equivalent of a sentence of life without parole. (*Ibid.*) To have drawn this conclusion, we must have mapped the defendant's sentence against some conception of his life expectancy. And, truth be told, the majority here must have engaged in comparable benchmarking. In invalidating defendants' sentences on the ground that they provide insufficient time for reintegration into

⁵ Defendants are not eligible for these hearings because they were sentenced under the One Strike law. (See § 3051, subd. (h).)

society [***282] [**473] upon early parole, the majority must have *some* notion of defendants' life expectancy in mind. The majority, however, does not disclose this figure.

Second, although the majority emphasizes its concerns with life expectancies based on race, sex, and custodial status, juvenile defendants belong to a nearly infinite number of cohorts. Some of these groups may have longer life expectancies than the general population, others shorter. To assign more importance to a defendant's membership in one cohort than to his or her presence in another would be speculative. Given that a defendant could be placed within any of many peer groups for purposes of assessing his or her life expectancy, and given as well the need to use *some* conception of life expectancy as a benchmark, reliance on general population life expectancies [****87] makes good sense as providing an administrable rule of decision that is consistent with *Graham*.

Third, and most fundamentally, the majority's concerns derive from its fundamental mischaracterization of what *Graham, supra, 560 U.S. 48*, requires. The majority appears to impose upon the People the burden of showing that defendants do *not* belong to any cohort in which the average member lacks a high probability of surviving until well past the ages of 66 or 74. That is not what *Graham* holds, and is also inconsistent with the general principle that the *defendant* bears a "considerable burden" to show a punishment is cruel and unusual." (*People v. Meneses (2011) 193 Cal.App.4th 1087, 1092 [123 Cal. Rptr. 3d 387]*, quoting *People v. Wingo, supra, 14 Cal.3d at p. 174*.) As discussed *ante*, *Graham* requires only a "meaningful" (*Graham, at p. 75*) or "realistic" (*id., at p. 82*) opportunity for parole, not a certain one (which would be impossible to guarantee); and it does not require the very substantial postcustodial period that the majority demands. A sentence that [*396] offers an initial parole hearing at age 66 or 74, well within prevailing public life expectancies, offers the sort of opportunity that *Graham* contemplates.⁶

B. The Majority Provides No Persuasive Rationale for Extending *Graham*

⁶The majority expresses concerns about a sentence that affords an opportunity for release only a day, week, or month before an inmate's death. (Maj. opn., *ante*, at pp. 367–368.) But such inopportune timing may be an issue with *any* prison sentence, no matter how long or short it may be.

The preceding discussion establishes that there is a basic disconnect [****88] between *Graham* itself, and the majority's interpretation of that decision. *Graham, supra, 560 U.S. 48*, condemned one type of sentence; the majority, another altogether. To bridge this gap, the majority justifies its holding as a logical extension of aspects of *Graham's* reasoning. But the majority's analysis on these points is unpersuasive.

1. The majority's discussion of penological objectives does not support its expansion of *Graham*

The majority's principal justification for extending *Graham* to the sentences here is the cursory survey it conducts of the four penological rationales for sentencing practices that *Graham* considered. (See *Graham, supra, 560 U.S. at pp. 71–74*.) The majority perceives from this review inadequate justification for the sentences here. (Maj. opn., *ante*, at p. 369.) But the majority's discussion of these penological [***283] objectives proves both too much and too little.

The discussion proves too much, in that the majority's vague critiques of the prison terms imposed on defendants as insufficiently justified by reference to these penological objectives could be read to forbid *any* lengthy sentence imposed upon a juvenile offender. We are told that "[t]he retributive case for a 50-year-to-life sentence, as for [life without parole], is weakened [****89] by the juvenile nonhomicide offender's 'age ... and the nature of the crime.' [Citation.] As for deterrence, *Graham's* observation that juveniles have limited ability to consider consequences when making decisions [citation] applies to a sentence of 50 years to life just as it does to a sentence of [life without parole]. And as for incapacitation, a judgment that a juvenile offender will be incorrigible for the next 50 [**474] years is no less 'questionable' than a judgment that the juvenile offender will be incorrigible 'forever.' [Citations.] Finally, as noted, a sentence of 50 years to life 'cannot be justified by the goal of rehabilitation' because it offers a juvenile offender 'little incentive to become a responsible individual.' [Citation.]" (Maj. opn., *ante*, at p. 369.) On each of these points, the majority offers no limiting principle that would [*397] establish why similarly broad criticisms could not be lodged against the sentence we upheld as lawful in *Franklin, supra, 63 Cal.4th at pages 279–280*, which afforded an initial opportunity for parole only after 25 years of incarceration.

Meanwhile, a more careful analysis establishes that the majority's survey of penological objectives proves too little, because the sentences here are [****90] better

justified by reference to penological aims than the life without parole sentences addressed in *Graham* were. With regard to retribution, the *Graham* court was concerned with a perceived lack of proportionality between a nonhomicide crime and imposition of “the second most severe penalty” on a juvenile. (*Graham, supra, 560 U.S. at p. 72*; see also *id., at p. 71*.) But the proportionality analysis is different here. The sentences here are not as severe as one that “guarantees” the defendant “will die in prison.” (*Id., at p. 79*.) A sentence that withholds *any* hope of release signifies a final determination that the juvenile will never again be fit to reenter society. A sentence that affords some hope of parole within prevailing life expectancies does not send a similar message. Such a sentence manifests a belief that the offender can change. Consistent with this belief, it offers the prospect of release. Likewise, a sentence that offers a “meaningful” (*id., at p. 75*) and “realistic” (*id., at p. 82*) chance of parole within the offender’s lifespan, as the sentences here do, does not utterly forswear the rehabilitative ideal, or demand incapacitation forever, regardless of whether the inmate remains a threat to public safety. (See *§ 3041, subd. (b)(1)* [describing the standard for [****91] a grant of parole].) Instead, such a sentence recognizes that the offender may become an improved person while in prison, which may give him or her the possibility of release.

Finally, *Graham, supra, 560 U.S. 48*, perceived the fourth penological objective it discussed, deterrence, as an insufficient justification for a sentence of life without parole for a juvenile offender convicted only of a nonhomicide crime. (*Id., at p. 72*.) The *Graham* court believed that juveniles may not be deterred by the prospect of a lifelong prison term, particularly given how rarely such a term had been imposed for a [***284] nonhomicide crime. (*Ibid.*) But *Graham* did not categorically cast lengthier terms of incarceration as having *no* marginal deterrence value for juveniles, relative to shorter terms. Nor did the court suggest that deterrence, together with other penological rationales, would not provide an adequate justification for a sentence that *does* offer an opportunity for parole within prevailing lifespans. (See *ibid.* [noting that “any limited deterrent effect provided by life without parole is not enough to justify the sentence”].)

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In short, a proper review of the penological objectives of sentencing further establishes that the majority has improperly [****92] extended *Graham* to an array of sentences that are materially different from the type of

sentence condemned by the Supreme Court.

2. *Graham did not endorse an approach as vague as the majority’s*

Lastly, regardless of whether the majority is better described as adopting an erroneous interpretation of *Graham*, or as an improper extension of that decision, its holding fails to heed the Supreme Court’s guidance regarding the need for workable, objective rules in the *Eighth Amendment* sphere.

In appropriate instances, the Supreme Court has drawn clear lines for the administration of a constitutional rule. (See, e.g., *County of Riverside v. McLaughlin (1991) 500 U.S. 44, 56 [114 L. Ed. 2d 49, 111 S. Ct. 1661]* [specifying 48 hours as the maximum period to fulfill the judicial presentment and probable-cause determination requirement of *Gerstein v. Pugh (1975) 420 U.S. 103 [43 L. Ed. 2d 54, 95 S. Ct. 854]*]; cf. *Maryland v. Shatzer (2010) 559 U.S. 98, 110 [175 L. Ed. 2d 1045, 130 S. Ct. 1213]*.) The court has regarded [**475] such an approach as preferable to a “vague standard” that fails to provide “sufficient guidance,” particularly when adoption of a rule would avoid having “judges in the role of making legislative judgments.” (*County of Riverside v. McLaughlin, at p. 56*.) It would represent a logical application of this general principle to rely on life expectancies in ascertaining whether a sentence comports with *Graham*, particularly given the *Graham* court’s express [****93] avowal that it was drawing a “clear line” with its decision. (*Graham, supra, 560 U.S. at p. 74*.)⁷

The majority’s approach, in contrast, turns on highly subjective impressions regarding matters such as what adequate postcustodial reintegration into society entails, and the time necessary to accomplish this assimilation. It thus runs counter to the high court’s stated view that “*Eighth Amendment* judgments should not be, or appear to be, merely the subjective views of individual Justices; judgment should be informed by objective factors to the maximum possible extent.” (*Rummel v.*

⁷The majority asserts that the reference in *Graham, supra, 560 U.S. 48*, to drawing a “clear line” (*id., at p. 74*) signified only that the court was distinguishing between juvenile and adult offenders, and between homicide and nonhomicide crimes—not describing the types of sentences it was prohibiting. (Maj. opn., *ante*, at p. 371.) But under the majority’s reading of *Graham*, which ignores the limiting language interlacing that decision as a whole, the high court was not drawing a “clear line” *at all* with its ruling—contrary to its assertion that it was.

[Estelle, supra, 445 U.S. at pp. 274–275](#), quoting [Coker v. Georgia \(1977\) 433 U.S. 584, 592 \[53 L. Ed. 2d *399\] 982, 97 S. Ct. 2861](#)] (plur. opn. of White, J.). Today's decision instead announces precisely the sort of “vague standard” involving “legislative judgments” ([County of Riverside v. McLaughlin, supra, 500 U.S. at p. 56](#)) [***285] that the Supreme Court has told us to avoid.

To repeat, the majority holds that under the *Eighth Amendment*, “[a] lawful sentence must recognize ‘a juvenile nonhomicide offender’s capacity for change and limited moral culpability.’ [Citation.] A lawful sentence must offer ‘hope of restoration’ [citation], ‘a chance to demonstrate maturity and reform’ [citation], a ‘chance for fulfillment outside prison walls,’ and a ‘chance for reconciliation with society’ [citation]. A lawful sentence must offer ‘the opportunity to achieve [****94] maturity of judgment and self-recognition of human worth and potential.’ [Citation.] A lawful sentence must offer the juvenile offender an ‘incentive to become a responsible individual.’” (Maj. opn., *ante*, at p. 367.) One could regard all of these as worthwhile objectives, and certainly *Graham* condemned sentences of *life without parole*, as imposed on juvenile offenders who committed only nonhomicide crimes, on grounds that included the perception that they offered *no* hope of freedom, *no* chance to demonstrate that they had matured, and *no* opportunity for fulfillment outside prison. But this aspect of *Graham* simply makes the Supreme Court’s limiting language, which the majority omits in relating its holding, all the more important. What the Supreme Court in *Graham* appreciated—but today’s decision does not—is the need for coherent rules for application in specific cases.

The courts of this state, capable though they are, undoubtedly will struggle to apply standards presented at the majority holding’s high level of abstraction. The inevitable disagreements will be resolved only by another set of highly subjective judgments on appeal, and so forth. Even as applied here, the vagueness [****95] inherent in the majority’s approach makes it unclear that defendants’ sentences are unlawful. We know that the sentences are unconstitutional only because the majority tells us as much. Yet I anticipate that even the majority would concede that profound life experiences still may lie ahead of someone released from prison at age 66 or 74. The majority describes these ages as falling “near the end” of a person’s life, language that suggests that fulfillment at such a juncture is well-nigh impossible. (Maj. opn., *ante*, at pp. 367–368.) The millions of

productively employed senior citizens would beg to differ (see [State v. Smith \(2017\) 295 Neb. 957 \[**476\] \[892 N.W.2d 52, 66\]](#) [“in today’s society, it is not unusual for people to work well into their seventies”]), as would the millions more who have retired from the workforce, or perhaps never entered it, but represent valued contributors to their families and communities. And, I anticipate, many inmates who are freed from custody at these ages also would disagree with the assessment that they are “near the end” of their lives. True, prisoners who are released from prison after serving lengthy terms will need to adjust to their changed circumstances. [*400] But substantial fulfillment—whether in the form of [****96] rapprochement or reunions with friends and family, community service, continuing education, employment, or otherwise—does not necessarily arrive only after many years outside of custody, particularly for those who *already* have demonstrated maturity and the capacity to reform.

Given the degree of subjectivity entailed in applying the majority’s approach to sentences of 50 years to life and 58 years to life, how these standards apply to sentences of *less* than 50 years to life presents even more difficult questions. (See, e.g., [People v. Bell \(2016\) 3 Cal.App.5th 865 \[208 Cal. Rptr. 3d 102\]](#), review granted Jan. 11, 2017, S238339.) Here again, I doubt this is what [Graham, supra, 560 U.S. 48](#), intended: a series of judicial decisions upholding or invalidating sentences affording an opportunity for pa [****286] role at age 65, 64, 63, 62, or younger, based on judges’ subjective and quite likely divergent assessments of what constitutes adequate reintegration into society, and the time necessary to accomplish this reentry. The *Graham* court said it was drawing a “clear line.” (*Id.*, at p. 74.) I would not obfuscate what the high court sought to clarify.

The majority opinion asserts that using life expectancy as a measure for the constitutionality of a sentence under [Graham, supra, 560 U.S. 48](#), implicates as much vagueness and [****97] subjectivity as its own approach does. (Maj. opn., *ante*, at pp. 372–373.) This false equivalence once again mischaracterizes *Graham*. The majority asserts that both approaches “depend on a considered judgment as to whether the parole eligibility date of a lengthy sentence offers a juvenile offender a realistic hope of release and a genuine opportunity to reintegrate into society.” (*Id.*, at p. 373.) But, as the foregoing text makes clear, only the first half of this rule comes from *Graham*. The second half (“and a genuine opportunity to reintegrate into society”) is the majority’s own creation. (*Ibid.*) This modification effectively displaces the relatively straightforward and objective

Graham inquiry into whether sentence affords a “meaningful opportunity to obtain release” (*Graham, at p. 75*), with a far more idiosyncratic inquiry into whether a sentence offers what the majority considers a sufficiently meaningful *period* of release.⁸

The majority's revision of the *Graham* rule also infiltrates its errant assessment that the “crucial question” in this case is how long a defendant can expect to live after his or her first opportunity for parole arrives (maj. [*401] opn., *ante*, at p. 373), and its attempt to characterize [****98] the disagreement here as concerned only with the length of this period (*ibid.*). The *truly* crucial question, of course, is what *Graham, supra, 560 U.S. 48*, holds. As discussed above, and as recognized in *Caballero*, the core of the *Graham* holding is that a defendant must receive a “meaningful” (*id., at p. 75*) and “realistic” (*id., at p. 82*) opportunity to obtain release. A defendant made eligible for parole at an age within general population life expectancies receives such an opportunity. Many defendants who earn parole at such a juncture will have a robust postcustodial period of freedom. Some will not, as would be true of any sentence. But it is the opportunity for release, not the precise length of postcustodial [**477] period, that lies at the heart of the *Graham* ruling. The majority errs in shifting the law toward a different position.

C. Even Under the Majority's Approach, the Sentences Here Satisfy *Graham*

The majority's holding is doubly misguided because it presumes that defendants will not have a “meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation” (*Graham, supra, 560 U.S. at p. 75*) until they reach the ages of 66 and 74. But this too is wrong. Under the state's Elderly Parole Program for prison inmates (§ 3055), both defendants [****99] will have an opportunity for parole at age 60. Furthermore, even [***287] without the Elderly Parole Program, Rodriguez may be eligible for parole when he is 57 years old, simply by earning good-conduct credits. (*Cal. Code Regs., tit. 15, § 3043.2.*) A sentence offering an opportunity for parole no later than age 60 is not

⁸The majority also mischaracterizes this dissent's critique of the vague and overbroad nature of its holding as somehow implicitly endorsing the view that a substantial postcustodial period is constitutionally required under *Graham*. (Maj. opn., *ante*, at p. 373.) To the contrary, in observing that defendants' sentences in fact afford them an opportunity for reintegration into society, this dissent merely explains how the majority's analysis is flawed even when taken on its own terms.

invalid under *Graham*, even under the majority's flawed construction of that decision.

1. The Elderly Parole Program offers defendants a meaningful opportunity for parole at age 60

In 2014, the State of California instituted the Elderly Parole Program in response to a long-running prison-population lawsuit in federal court (case No. 3:01-cv-01351-JST (N.D.Cal.)), which now bears the title *Brown v. Plata*. The program was codified by the Legislature last year. (See Assem. Bill No. 1448 (2017–2018 Reg. Sess.)) Aside from certain exceptions not pertinent here, the program is available to any state inmate who is “60 years of age or older and has served a minimum of 25 years of continuous incarceration on his or her current sentence.” (§ 3055, *subd. (a)*.)

Under the Elderly Parole Program, an eligible inmate “shall meet with the [Board of Parole Hearings] pursuant to *subdivision (a) of Section 3041*. If [the] inmate is found suitable for parole under the Elderly Parole [****100] Program, the [Board of Parole Hearings] shall release the individual on parole as [**402] provided in *Section 3041*.” (§ 3055, *subd. (e)*.) The elderly parole statute also directs that “[w]hen considering the release of an inmate specified by *subdivision (a)* pursuant to *Section 3041*, the [Board of Parole Hearings] shall give special consideration to whether age, time served, and diminished physical condition, if any, have reduced the elderly inmate's risk for future violence.” (§ 3055, *subd. (c)*.)⁹

As reflected in the statutory reference to an inmate's “risk for future violence” (§ 3055, *subd. (c)*), the decision whether to grant elderly parole is concerned with the same question of public safety that governs conventional parole hearings. (See § 3041, *subd. (b)(1)* [“The panel or the board, sitting en banc, shall grant parole to an inmate unless it determines that the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration for this individual.”]; *Cal. Code Regs., tit. 15, § 2281, subd. (a)* [“[r]egardless of the length of time served, a life prisoner shall be found unsuitable for and denied parole if in the judgment of the panel the prisoner will pose an

⁹If parole is not granted, the Board of Parole Hearings shall set the time for a subsequent elderly parole hearing in accordance with general statutory provisions regarding the setting of next parole hearings. (§ 3041.5, *subd. (b)(3)*.)

unreasonable risk of danger [****101] to society if released from prison”).¹⁰ In making this determination, “[a]ll relevant, reliable information available to the panel shall be considered in determining suitability for parole. Such information [**478] shall include the circumstances [***288] of the prisoner’s: social history; past and present mental state; ... past and present attitude toward the crime; ... and any other information which bears on the prisoner’s suitability for release.” (*Cal. Code Regs., tit. 15, § 2281, subd. (b).*)¹¹ [**403]

Although in an elderly parole hearing “special consideration” is given to the three factors specified in [section 3055, subdivision \(c\)](#), there is no suggestion that these “special” considerations somehow skew the basic question before the panel. In other words, there is no indication that within the elderly parole process, an inmate for whom “consideration of the public safety” *does not* require “a more lengthy period of incarceration” ([§ 3041, subd. \(b\)\(1\)](#)) would nevertheless be denied parole because he or she is too healthy or robust. On the contrary, the statutory reference to “special consideration” being given to “time served” in Elderly Parole Program proceedings corroborates that these hearings are to take into account the enhanced maturity that may come from time in custody, along [****102]

¹⁰This court has explained that “changes in a prisoner’s maturity, understanding, and mental state” that come with “the passage of time” are “highly probative to the determination of current dangerousness” in a parole hearing. (*In re Lawrence* (2008) 44 Cal.4th 1181, 1219–1220 [82 Cal. Rptr. 3d 169, 190 P.3d 535].) We also have noted that “[a]t some point ... when there is affirmative evidence, based upon the prisoner’s subsequent behavior and current mental state, that the prisoner, if released, would not currently be dangerous, his or her past offense may no longer realistically constitute a reliable or accurate indicator of the prisoner’s current dangerousness.” (*Id., at p. 1219.*)

¹¹Specific circumstances tending to show suitability for parole include “reasonably stable relationships with others” ([Cal. Code Regs., tit. 15, § 2281, subd. \(d\)\(2\)](#)); “[s]igns of [r]emorse,” including “indications that [the inmate] understands the nature and magnitude of the offense” (*id., subd. (d)(3)*); the “[m]otivation for [the] [c]rime” (*id., subd. (d)(4)*); whether “[t]he prisoner’s present age reduces the probability of recidivism” (*id., subd. (d)(7)*); the fact that “[t]he prisoner has made realistic plans for release or has developed marketable skills that can be put to use upon release” (*id., subd. (d)(8)*); and whether the inmate’s “[i]nstitutional activities indicate an enhanced ability to function within the law upon release” (*id., subd. (d)(9)*).

with all other relevant facts. ([§ 3055, subd. \(c\).](#))¹²

The Elderly Parole Program thus offers a meaningful vehicle for juvenile offenders who have been sentenced to lengthy terms to secure their release at age 60. Inexplicably, even though we requested and received supplemental briefing on this program, the majority declines to address its impact on defendants’ *Eighth Amendment* claims. The majority instead remands the matter for the sentencing court and the parties to develop a record “on how the Elderly Parole Program actually operates,” along with other matters. (Maj. opn., *ante*, at p. 376.) This remand is both regrettable and wholly unnecessary.

The majority’s rationale for remanding the matter is not entirely clear. Defendants express concerns that in practice, the Elderly Parole Program may not give “great weight to the diminished culpability of youth as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law.” ([§ 4801, subd. \(c\).](#)) But as noted, “[a]ll relevant, reliable information” ([Cal. Code Regs., tit. 15, § 2281, subd. \(b\)](#)) is to be considered in a parole hearing, including an elderly parole hearing. There is no reason to believe that salient facts regarding the diminished [****103] culpability of juveniles, hallmark features of youth, and an inmate’s subsequent growth and increased maturity, where pertinent, are somehow *excluded* from consideration in an elderly parole hearing, or given short shrift. Unless the prospect of parole at age 60 comes too late to satisfy the *Eighth Amendment*—a point discussed below—the Constitution [****289] requires no more.¹³

¹²The majority asserts that this “is not the only plausible reading of the elderly parole statute,” and “decline[s] to issue a definitive interpretation less than five months after the statute’s enactment.” (Maj. opn., *ante*, at p. 376.) But as Justice Kriegler observes (dis. opn. of Kriegler, [J., post, at p. 416](#)), it is our job as judges to interpret the law. This responsibility does not depend on whether the law is of ancient vintage, or newly enacted.

¹³The ruling in [Graham, supra, 560 U.S. 48](#) cannot reasonably be understood as formalistically demanding that state parole laws be rewritten to *explicitly* identify a juvenile offender’s youth at the time of the crime of commitment, and related considerations, as factors to be accorded weight in the parole decision. Indeed, several of the statutes that the majority points toward as adequate responses to *Graham* (maj. opn., *ante*, at pp. 369–370) lack such language.

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[**479] Nor is a remand necessary for any other reason. Again, the majority seeks to develop a record concerning “how the Elderly Parole Program actually operates.” (Maj. opn., *ante*, at p. 376.) Yet there is nothing in the record to suggest that elderly parole hearings function differently from how they have been described above.¹⁴ Even Contreras, in his supplemental brief, acknowledges that parole decisions under the Elderly Parole Program are based on an assessment of whether the inmate’s release would threaten public safety. Likewise, in a filing with the federal court overseeing the *Brown v. Plata* litigation, the state has explained that in an elderly parole hearing, the Board of Parole Hearings “will give special consideration to eligible inmates’ advanced age, long-term [****104] confinement, and diminished physical condition, if any. *The board will also consider all other*

Moreover, the high court’s subsequent case law is inconsistent with any such view. In [Virginia v. LeBlanc \(2017\) 582 U.S. \[198 L. Ed. 2d 186, 137 S. Ct. 1726\]](#) (*LeBlanc*), discussed in greater detail *post*, the high court regarded a Virginia geriatric parole program’s application of “normal parole factors” as tending to show that the program represented an adequate avenue for release under *Graham*. (*Id.*, at p. ___ [137 S.Ct. at p. 1729].) Similarly, in [Montgomery v. Louisiana \(2016\) 577 U.S. \[193 L. Ed. 2d 599, 136 S. Ct. 718\]](#), the United States Supreme Court drew attention to Wyoming’s parole statute ([Wyo. Stat. Ann. § 6-10-301\(c\)](#)), which provides juvenile offenders sentenced to life without parole with an opportunity for parole after 25 years of incarceration. The high court cast the statute as an adequate postconviction remedy for a violation of [Miller v. Alabama \(2012\) 567 U.S. 460, 470 \[183 L. Ed. 2d 407, 132 S. Ct. 2455\]](#) (*Miller*), which forbade mandatory sentences of life without parole on juveniles convicted of homicide crimes. (*Montgomery v. Louisiana*, 577 U.S. at p. ___ [136 S.Ct. at p. 736].) The Wyoming statute does not explicitly provide for any special consideration to be given to the hallmark features of youth in connection with the parole decision. Nor do the Wyoming Board of Parole’s policies and procedures, which provide only that “[p]arole may be granted to an eligible inmate at the sole discretion of the Board when in the opinion of the Board there is a reasonable probability that an inmate of a correctional facility can be released without a detriment to the community or himself/herself.” (Wyoming Board of Parole, Policy and Procedure Manual (2018) p. 36.)

¹⁴Nor does the majority specify with any precision the additional facts that the parties are supposed to develop on remand, to guide any future assessment whether the Elderly Parole Program adequately addresses the constitutional flaw perceived in defendants’ sentences.

relevant information when determining whether or not there is a reasonable likelihood that consideration of the public and victim’s safety does not require the additional period of incarceration of the inmate.” (Board of Parole Hearings, Elderly Parole Program (June 16, 2014) p. 1, <https://www.cdcr.ca.gov/BOPH/docs/Policy/Elderly_Parole_Program_Overview.pdf> [as of Feb. 26, 2018], italics added.) A remand order should be based on something more substantive than an inchoate concern that a duly enacted government program is not what the relevant statutes and regulations say it is, and what the parties tell us it is.

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Similarly, the majority speculates that the Department of Corrections and Rehabilitation someday might adopt “regulations that focus the Elderly Parole Program on identifying those inmates who [***290] no longer pose a risk of future violence primarily because of their age, illness, or other physical incapacitation, while leaving all other inmates age 60 or older who may be suitable for parole to the ordinary parole process.” (Maj. opn., *ante*, at p. 376.) But this a strawperson argument, for no such regulations exist, or are on the horizon. Although one can [****105] always conjure up what-if scenarios about future changes in the law, such conjecture does not provide a basis for ignoring our responsibility to interpret the law as it presently stands.

In fact, we have declined to indulge this sort of speculation under similar circumstances. In [Franklin, supra, 63 Cal.4th 261](#), an amicus curiae asserted that the youth offender parole hearing program (§ 3051) would not operate in practice as the governing statutes said it would, and therefore would not provide the defendant and those similarly situated with a meaningful opportunity for release. ([Franklin, at pp. 284–285.](#)) Unlike here, however, we did not treat such a possibility as providing a basis to decline to apply a statute as written. Instead, in concluding that the youth offender parole hearing program mooted the defendant’s *Eighth Amendment* challenge, we noted the “absence of any concrete controversy in this case concerning” the actual functioning of the program. (*Id.*, at p. 286.)

[**480] The majority claims that the situation in *Franklin* differed from the one here in that the “explicit and specific purpose” of the statute that created the youth offender parole hearing program at issue in *Franklin* was to provide an early opportunity for juvenile offenders to seek parole. (Maj. opn., [****106] *ante*, at p. 376.) Here, by comparison, “[n]either the text nor history of the elderly parole statute contains any

indication that the Legislature intended elderly parole hearings to be responsive to the *Eighth Amendment* concerns raised by lengthy juvenile sentences.” (*Id.* at p. 377.) But this purported distinction, which says nothing about how the Elderly Parole Program actually functions, does not provide a basis to avoid our duty to construe the law.¹⁵ If the majority takes the view that the Elderly Parole Program does not provide [*406] juvenile offenders with a “meaningful opportunity to obtain release” under *Graham, supra, 560 U.S. at page 75*, it should simply say so, and explain why, rather than engage in statutory interpretation in order to avoid statutory interpretation.¹⁶

[***291] 2. A sentence that provides a juvenile offender convicted of a nonhomicide crime a meaningful opportunity for release at age 60 is constitutional under *Graham*

The majority's decision to remand this matter means

¹⁵ That the Elderly Parole Program originally may have been developed to ameliorate crowded prison conditions does not connote that it fails to provide a meaningful opportunity for parole. As discussed above, the pertinent statutes and regulations establish that the program provides such an opportunity, and there is no contrary indication. (See also Dept. of Corrections and Rehabilitation, December 15, 2017 Update to the Three-Judge Court (Dec. 15, 2017) p. 5, <<https://www.cdcr.ca.gov/News/docs/3JP-Dec-2017.pdf>> [as of Feb. 26, 2018] [reflecting that inmates received parole in more than 25 percent of all elderly parole hearings].) Furthermore, in codifying the program, the Legislature had in mind more than merely prison headcounts and related expenses. Repeatedly, legislative analyses of the measure enacting the program referenced the fact that inmates eligible for elderly parole pose less of a threat to public safety than other inmates if released. (See, e.g., Assem. Conc. Sen. Amends. to Assem. Bill No. 1448 (2017–2018 Reg. Sess.) as amended Sept. 6, 2017, p. 5 [noting the lower recidivism rate of inmates released from prison at ages 60 and older]; Assem. Com. on Appropriations, Analysis of Assem. Bill No. 1448 (2017–2018 Reg. Sess.) as amended Mar. 28, 2017, p. 1 [same].)

¹⁶ Here, the majority tries to synchronize its holding with that in *Caballero, supra, 55 Cal.4th 262*, by identifying a similarity in style, if not substance. The majority states that in *Caballero*, “[n]o member of this court suggested that we should provide further guidance on what would constitute a lawful sentence.” (Maj. opn., *ante*, at p. 381.) That is because the court provided sufficient guidance within the *Caballero* majority opinion itself, in its description of *Graham's* holding and its relationship to life

that it does not consider whether *Graham* prohibits a sentence that offers an opportunity for parole no later than age 60. I would address this question, and conclude that it does not. As explained [****107] below, even under the majority's view that a sentence that affords an initial opportunity for parole at the age of 66 or 74 is unlikely to provide a juvenile offender with a sufficient period to adequately reintegrate into society, and is therefore unconstitutional (maj. opn., *ante*, at p. 368), the same cannot be said of a sentence that affords an opportunity for parole at age 60.¹⁷

[*407]

[**481] A sentence affording an opportunity for parole at age 60 offers a juvenile offender a substantial likelihood of spending not just a few, but many productive years outside of custody, if he or she demonstrates sufficient maturity to secure parole. During this time, a juvenile offender who has been released on parole because his or her personal development confirmed *Graham's* intuitions can

expectancy.

The majority also claims that its approach reflects “judicial restraint.” (Maj. opn., *ante*, at p. 381.) Coming as it does within an opinion that dubiously extends *Graham* to new frontiers, this is an unwarranted assertion. Notably, shortly after claiming to exercise restraint, the majority unnecessarily opines on the supposedly “anomalous” nature of the parole status of One Strike offenders in light of recent changes in the law. (*Id.*, at p. 382.) This comment is hardly an exercise of restraint, suggesting instead a view toward the merits of an equal protection challenge to the sentences here—an issue that lies beyond the scope of review in this case.

¹⁷ It is true that a juvenile offender whose first opportunity for parole comes through an elderly parole hearing may serve a longer term before being eligible for a parole hearing than an adult offender who committed the same crime, and received the same sentence, would serve. But—even putting aside the fact that a juvenile offender may be in a better position than an adult offender who committed the same offense to secure elderly parole—no theory of the *Eighth Amendment*

participate in the workforce,¹⁸ develop interpersonal relationships, and otherwise seek and obtain the degree of personal fulfillment contemplated by the majority.

Indeed, many of the majority opinion's arguments for invalidating sentences that afford an initial opportunity for parole at [***292] ages 66 and 74 lose their force, or cut in the opposite direction, when applied to sentences that afford an initial [****108] opportunity for parole at age 60. For example, the majority opinion relies on the fact that all state high courts to have considered sentences of 50 years to life or longer, when imposed on juvenile offenders convicted of nonhomicide crimes, have struck those sentences as unconstitutional. (Maj. opn., *ante*, at p. 369.)¹⁹ But the

demands that, regardless of the length of a juvenile's sentence (be it one year, 10 years, or more), he or she must serve a shorter term than a similarly situated adult defendant, or an equivalent term. The concern expressed in *Graham, supra*, 560 U.S. at page 70, about life without the possibility of parole representing an “especially harsh punishment for a juvenile” because he or she would “on average serve more years and a greater percentage of his life in prison than an adult offender” represented an additional reason to condemn *life without parole* sentences, in particular—not a more far-reaching impeachment of sentencing practices generally.

¹⁸ According to the Bureau of Labor Statistics, in 2017 there were 10,930,000 people in the United States workforce between the ages of 60 and 64, representing more than half of the entire civilian noninstitutional population cohort within this age range. (Bureau of Labor Statistics, U.S. Dept. Labor, Labor Force Statistics from the Current Population Survey, Employment status of the civilian noninstitutional population by age, sex, and race (Jan. 19, 2018) <<https://www.bls.gov/cps/cpsaat03.htm>> [as of Feb. 26, 2018].)

¹⁹ I recognize the existence of these decisions regarding lengthy sentences that afford a juvenile offender an initial opportunity for release in his or her mid-to-late 60s, or later, as infirm under either *Graham* or *Miller*. (Maj. opn., *ante*, at p. 369 [listing cases].) The majority also recognizes contrary precedent, however—such as that of the federal court of appeals in *U.S. v. Mathurin (11th Cir. 2017) 868 F.3d 921, 934–935 (Mathurin)*, which held that a sentence affording an initial opportunity for parole at age 67 was not prohibited by *Graham*. In addition, intermediate appellate courts in other states have regarded sentences affording an opportunity for parole in a juvenile offender's mid-to-late 60s, or which involved a term of 50 years, as lawful under *Graham* or *Miller*, depending on the offense involved. (See *People v. Lehmkuhl (2013) 2013 COA 98 [369 P.3d 635, 637]* [sentence offering initial possibility of parole at age 67 not invalid under *Graham*, given the defendant's life expectancy]; *People v. Jackson*

balance of the case law from even this highly refined subset of courts shifts when what is being considered is a sentence that affords an opportunity for parole at age 60. The weight of authority regards such a sentence as passing muster under *Graham*. (See *State v. Smith, supra*, 892 N.W.2d at pp. 64–66 [holding that a nonhomicide sentence [*408] affording an opportunity for release at 62 comports with *Graham*]; *Angel v. Commonwealth (2011) 281 Va. 248 [704 S.E.2d 386, 401–402]* [rejecting an 8th Amend. claim in light of a state geriatric release program affording an opportunity for release at 60, where “the factors used in the normal parole consideration process apply to conditional release decisions under [the] statute”]; cf. *State v. Charles, supra*, 892 N.W.2d at p. 921 [finding a sentence lawful under *Miller*, noting that “[b]ecause [defendant] has the opportunity for release at age 60, his sentence does not ‘guarantee[] he will die in prison without any meaningful opportunity to obtain release’”]; but see *Bear Cloud v. State (2014) 2014 WY 113 [334 P.3d 132, 147]* [regarding a 45-year sentence [****109] with parole eligibility at age 61 as subject to *Miller*].)

Recognizing the lack of authority for its position, the majority searches for support [**482] from an unlikely source: *LeBlanc, supra*, 582 U.S. ____ [137 S.Ct. 1726], a recent high court decision that *denied* habeas corpus relief under circumstances similar to those present here. The court in *LeBlanc* determined that lower federal courts had overstepped their authority under the *federal Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)* (28 U.S.C. § 2254(d)(1)) in granting habeas corpus relief to a petitioner who claimed that his sentence, which offered an opportunity for geriatric parole at age 60, violated *Graham, supra*, 560 U.S. 48. [***293] The Supreme Court stated that it was expressing “no view on the merits of the underlying’ *Eighth Amendment* claim,” but concluded that a Virginia

(2016) 2016 IL App (1st) 143025 [408 Ill.Dec. 388, 65 N.E.3d 864, 875–876] [50-year sentence not a de facto life sentence under *Miller*]; *McCullough v. State (2017) 233 Md.App. 702 [168 A.3d 1045, 1069]*, cert. granted (Md. 2017) 171 A.3d 612 [regarding a sentence offering an opportunity for parole at 67 as lawful under *Graham*]; but see *People v. Buffer (2017) 2017 IL App (1st) 142931 [412 Ill.Dec. 490, 75 N.E.3d 470, 482]* [sentence offering first possibility of release at age 66 a de facto life sentence].) Moreover, some state supreme courts that have found sentences of shortly less than 50 years to life to be *valid* under *Graham* or *Miller* have not ruled on whether a sentence of 50 years to life or 58 years to life would be invalid under the high court's rulings. (E.g., *State v. Smith, supra*, 892 N.W.2d at pp. 64–66; *State v. Charles (2017) 2017 SD 10 [892 N.W.2d 915, 921]*.)

state court's determination that the inmate's sentence comported with *Graham* was not “objectively unreasonable in light of this Court's current case law.” (*LeBlanc*, at p. ___ [137 S.Ct. at p. 1729].)

The court in *LeBlanc*, *supra*, 582 U.S. ___ [137 S.Ct. 1726] also noted that “[p]erhaps the logical next step from *Graham* would be to hold that a geriatric release program does not satisfy the *Eighth Amendment*, but ‘perhaps not.’” (*Id.*, at p. ___ [137 S.Ct. at p. 1729].) The court observed that “[T]here are reasonable arguments [****110] on both sides.’ [Citation.]” (*Ibid.*) With respect to the state, these arguments included the fact that “the geriatric release program employed normal parole factors,” consideration of which “could allow the Parole Board to order a former juvenile offender's conditional release in light of his or her ‘demonstrated maturity and rehabilitation.’” (*Ibid.*) With respect to the habeas corpus petitioner, the arguments to the contrary included “the contentions that the Parole Board's substantial discretion to deny geriatric release deprives juvenile nonhomicide offenders a meaningful opportunity to seek parole and that juveniles cannot seek geriatric release until they have spent at least four decades in prison.” (*Ibid.*)

Properly understood, *LeBlanc*, *supra*, 582 U.S. ___ [137 S.Ct. 1726] undermines the majority's position. First, the high court's analysis further [*409] confirms that the employment of “normal parole factors” in the parole process (*id.*, at p. ___ [137 S.Ct. at p. 1729]), as the Elderly Parole Program does, affords a juvenile offender a “meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.” (*Graham*, *supra*, 560 U.S. at p. 75.) Second, *LeBlanc* perceived any invalidation of a sentence such as the one imposed upon the habeas corpus petitioner before [****111] it as a potential “‘next step’” from *Graham*—but not compelled by *Graham* itself. (*LeBlanc*, at p. ___ [137 S.Ct. at p. 1729], italics added.) Our job is not to anticipate the infinite array of possible next steps that the Supreme Court may take that would break new ground in the law, but to apply the law as it stands. Third, to the extent that the court identified “reasonable arguments” suggesting that the sentence before it might be subject to close review as a “next step” from *Graham*, this discussion was dicta,²⁰ as underscored

²⁰ When a federal court reviews a state court judgment under *AEDPA*, what is decisive is whether there are reasonable arguments *in support of* the state court's application of Supreme Court holdings, not whether contrary arguments may

by the *LeBlanc* court's reminder that it was expressing no view on the merits of the issue. (*Ibid.*) Fourth, and finally, the *LeBlanc* court's determination that the procedural posture of that case meant that there was no need for it to resolve the substantive merits of the habeas corpus petitioner's *Eighth Amendment* claim provides no support for this court avoiding *its own* responsibility to decide the *Eighth Amendment* issue before it.

3. Defendants' eligibility for conduct credits further establishes that their sentences are lawful

The majority also refuses to discuss the impact that conduct credits will have on defendants' sentences. (Maj. opn., *ante*, at pp. 378–379.) In fact, 60 represents the [***294] latest age at which [****112] defendants will become eligible for parole. Rodriguez has it wholly within his power to advance his parole hearing to age 57 simply by maximizing the good-conduct [**483] credits that are available to him under state law. Contreras could advance his initial parole date to age 64 through good conduct. (See *Cal. Code Regs., tit. 15, § 3043.2.*) Both defendants could receive even earlier parole hearings by earning other types of conduct credits.²¹ Although the majority declines to acknowledge the impact [*410] of any of these programs, the availability of these credits provides an additional, independent basis for concluding that defendants are not serving

exist. (See *White v. Woodall* (2014) 572 U.S. ___, ___ [188 L. Ed. 2d 698, 134 S. Ct. 1697, 1702].)

²¹ I agree with the majority that the parties have not developed a record that would allow us to precisely predict whether or to what extent defendants will be able to take advantage of the programs that generate milestone completion credits (*Cal. Code Regs., tit. 15, § 3043.3*), rehabilitative achievement credits (*id.*, § 3043.4), and educational merit credits (*id.*, § 3043.5). If the availability of credits under these programs were dispositive of the constitutional question, a remand might be warranted. But it is not.

These regulations, as well as *title 15, section 3043.2 of the California Code of Regulations*, have been promulgated as emergency regulations by the Department of Corrections and Rehabilitation to implement Proposition 57 (as approved by voters, Gen. Elec. (Nov. 8, 2016)), Safety and The Public Rehabilitation Act of 2016. (See *Cal. Const., art. I, § 32, subs. (a)(2), (b); Gov. Code, § 11346.1* [describing emergency regulations and the process through which they are adopted].) Formal rulemaking is in progress to replace these emergency measures with permanent regulations with similar terms. (Cal. Reg. Notice Register 2017, No. 28-Z, p. 1037.)

unlawful sentences.

In considering whether a juvenile offender is serving a life sentence under *Graham*, it is appropriate to assume that the juvenile will maximize available good-conduct credits. After all, good conduct in prison merely substantiates *Graham's* intuitions regarding the possibility of maturation and redemption. In *Mathurin*, [supra](#), [868 F.3d 921](#), for example, the court described as an “important additional factor that is absolutely pivotal to [the] inquiry” into the lawfulness of a sentence under *Graham* the fact that the defendant could “shorten his sentence by earning good-time credit.” (*Id.*, at p. [934](#).) The [****113] court in *Mathurin* acknowledged that “[i]t is true that [d]efendant may not receive all of the [available] good-time credit if he misbehaves and thereby forfeits some of that credit.” (*Id.*, at p. [935](#).) That fact notwithstanding, the court determined that it was proper to take the credits into account because “it is totally within [d]efendant’s own power to shorten the sentence imposed.” (*Ibid.*) Furthermore, the court stressed that “good-time credits provide a potent rehabilitative incentive for juvenile offenders subject to lengthy sentences, which, according to the Supreme Court’s rationale in *Graham* is an important objective. ... Similar to parole, the ability to earn good-time credits ... [gives] the juvenile offender a reason to pursue and exhibit ‘maturity and rehabilitation.’” (*Id.*, at p. [935](#), quoting *Graham*, [supra](#), [560 U.S. at p. 75](#).) Consistent with *Mathurin*, other courts have similarly factored an assumption of maximized good-conduct credits into an assessment of a sentence’s length, for purposes of determining whether the sentence comports with *Graham*. (E.g., *State v. Smith*, [supra](#), [892 N.W.2d at p. 64](#); *People v. Evans* (2017) [2017 IL App \(1st\) 143562 \[416 Ill.Dec. 769, 86 N.E.3d 1054, 1057\]](#); see also *Steilman v. Michael* (2017) [2017 MT 310 \[389 Mont. 512, 407 P.3d 313\]](#) [taking good-time credits into account in concluding that a sentence imposed upon a juvenile for a homicide crime did not violate *Miller*]; cf. *U.S. v. Tocco* (2d Cir. 1998) [135 F.3d 116, 132](#) [taking maximized good-conduct credits [****114] into account in determining whether a sentence represented [***295] a life term under the 18 U.S.C. § 34]; but see *Johnson v. State* (Fla. 2017) [215 So.3d 1237, 1242](#) [declining to consider the sentence-reducing effect of “gain time” in connection with a *Graham* claim].)

I too would take the availability of good-conduct credits into account in determining whether defendants’ sentences violate the *Eighth Amendment*. Maximizing these credits, by itself, would not advance Contreras’s initial [*411] parole hearing before age 60, but it would

make Rodriguez eligible for parole at age 57. No plausible argument exists that such a sentence is tantamount to a life term, or would offer an inadequate time for reconciliation with society under the majority’s reasoning. And although good-conduct credits, on their own, would not advance Contreras’s first opportunity for parole before the time of his initial elderly parole hearing at age 60, the majority has not adequately justified [**484] its failure to give effect to that recent legislation, nor has it explained how its reasoning would apply to a sentence that affords a juvenile offender the possibility of parole at age 64.

III. CONCLUSION

Today’s decision opens the door to ill-advised and ill-informed incursions into sentencing questions that have, to [****115] this point, properly been understood as the Legislature’s domain. Had the Supreme Court in *Graham* directed this type of judicial intervention, that would be one thing. But it did not, and the majority errs in expanding *Graham* well beyond the more limited and more reasonable boundaries marked by the high court. Moreover, the decision today does not even resolve the lawfulness of the sentences that defendants actually will serve. I would not remand this matter for the resolution of phantom issues of fact, or to punt the legal issues involved to other courts. The victims of brutal and senseless crimes such as those committed by defendants deserve better; so too do the trial courts of this state, the Legislature, and defendants themselves. Therefore, I respectfully dissent.

Corrigan, J., and Kriegler, J.,* concurred.

KRIEGLER, J.,* Dissenting.—A trial court may reasonably expect that a reviewing court will (1) not direct it to hold a hearing and make findings it has already made, and (2) provide some guidance explaining how the trial court can avoid error upon remand. The disposition in this case requires the trial court to consider issues it has already ruled on, and at the [****116] same time, provides not a whiff of direction on how the lower court is expected to cure the

* Associate Justice of the Court of Appeal, Second Appellate District, Division Five, assigned by the Chief Justice pursuant to [article VI, section 6, of the California Constitution](#).

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purported error. I respectfully dissent.

The dissent of the Chief Justice, which I join without reservation, correctly analyzes whether the sentences imposed on defendants Leonel Contreras and William Steven Rodriguez violate the *Eighth Amendment's* prohibition on cruel and unusual punishment as interpreted in [People v. Caballero \(2012\) 55 Cal.4th 262 \[145 Cal. Rptr. 3d 286, 282 P.3d 291\]](#) (*Caballero*) and [Graham v. Florida \(2010\) 560 U.S. 48 \[176 L. Ed. 2d 825, 130 S. Ct. 2011\]](#) (*Graham*). [***296] I write separately on three points. First, the factual issues on which the remand is based (consideration of mitigating factors in the crimes or defendants' lives) have already been resolved by the trial court, and remand for those purposes is a futile act. Second, the alternative grounds for remand—to create a factual record regarding the operation of the recently enacted Elderly Parole Program ([Pen. Code, § 3055](#))¹ and the 2017 regulations issued by the Department of Corrections and Rehabilitation pursuant to [article I, section 32 of the California Constitution](#), as added by Proposition 57²—are issues this court can resolve de novo as a matter of statutory interpretation. The new statute and Regulations provide two ways to resolve this case with certainty, without prolonging the pain and suffering of the young women horribly victimized by these defendants. Third, [****117] the remand without meaningful guidance as to what the majority believes to be the constitutional limits of one strike sentences imposed on juvenile sexual predators regrettably sets the stage for years of continuing litigation on an issue that can and should be resolved in this appeal.

[**485] The reality is that since the time review was granted in this case, defendants' sentences have been substantially altered by the new Elderly Parole Program ([§ 3055](#)) and the conduct credit regulations generated under the authority of [section 32, subdivision \(b\) of article I of the California Constitution](#), as added by Proposition 57. At the time of sentencing, it was understood that Contreras would receive his first parole eligibility hearing at age 74, and Rodriguez's first

¹ Statutory references are to the Penal Code unless otherwise indicated.

² [California Code of Regulations, title 15, sections 3043.2 to 3043.5](#) (Regulations or Proposition 57 Parole Regulations). Proposition 57, known as the Public Safety and Rehabilitation Act of 2016, was passed by the voters in November 2016. (See Voter Information Guide, Gen. Elec. (Nov. 8, 2016) § 1, p. 141 (Proposition 57); see also *id.*, § 3, p. 141.)

hearing would be at age 66. These dates are no longer accurate, although the majority addresses the case as if the dates continue to be operative. Under the elderly parole program, as a matter of law, defendants will have their first parole suitability hearing at age 60. In addition, defendants are eligible for a variety of conduct credits, which allow them to reduce their sentences by as much as 50 percent per year. If defendants take advantage of the new Regulations, they have the potential to advance their [****118] initial parole suitability hearings to a date prior to age 60. I would hold that a parole eligibility at age 60 or younger is not a de facto life sentence and does not otherwise violate the *Eighth Amendment* as to juvenile violent sexual offenders.

[*413]

A. *The remand order requires the sentencing court to consider factors it has already taken into account.*

The language of the disposition is likely to leave the trial judge mystified. The majority commands “[t]he sentencing court ... to consider ... any mitigating circumstances of defendants' crimes and lives, and the impact of any new legislation and regulations on appropriate sentencing. The sentencing court is further directed to impose a time by which defendants may seek parole, consistent with this opinion.” (Maj. opn., *ante*, at p. 379.) As to the first portion of the remand order, the trial court at the original sentencing hearings has already thoroughly considered “any mitigating circumstances of defendants' crimes and lives.” (*Ibid.*) No claim is made by defendants that the court failed to consider any [***297] mitigating factors as to the crimes and their life experiences. There is nothing left for the trial court to consider on this subject other than to repeat [****119] itself.

The trial court conducted separate sentencing hearings for defendants, beginning with Rodriguez. The court “read and considered the probation report” and “read and considered the psychological evaluations” submitted on behalf of Rodriguez. The court considered argument from counsel for Rodriguez, who emphasized that her client fully acknowledged his responsibility for the crimes and has been “remorseful about it from the beginning.” Counsel noted Rodriguez felt “a tremendous sense of shame and guilt for what he did and for what he did to these girls,” pointing out that a psychological evaluation stated Rodriguez would carry that shame and guilt for the rest of his life. Counsel asked the court to consider Rodriguez's age at the time of the offenses (16), all the mitigating circumstances of his life (“unrelenting abuse throughout his childhood,” as described by one reporting doctor), and the scientific

evidence relating to the development of the brain.

The sentencing court acknowledged that *Graham* and *Caballero* were the controlling cases and that it “cannot give a juvenile offender the equivalent of life without parole.” The court expressly recognized that the full statutory [****120] sentence required under the one strike sentencing scheme (§ 667.61) was inconsistent with the *Eighth Amendment* as to juvenile one strike offenders, and to impose a constitutional sentence, it would have to disregard the mandatory consecutive sentences otherwise required by the one strike sentencing scheme. The court agreed Rodriguez’s “background is terrible,” but tempered that comment with, “this crime is terrible.” After considering argument from the prosecutor, the court observed that Rodriguez “was not a passive participant. He was a very active participant.” The court believed it could not constitutionally impose a sentence of 75 years to life, “so probably the most I could give him is 50 to life.” The court repeated that it had read the psychological report, which showed that “Mr. Rodriguez has had a very [*414] difficult upbringing.” But the court recounted that “it is awful and shocking how long this incident lasted even though [**486] these girls were protesting and the great lengths Mr. Rodriguez and Mr. Contreras went to get these girls to a secluded place so they could have their way with them.” The court described one victim’s “heartbreaking” testimony that she asked the doctor performing the sexual assault [****121] examination if she could still wear her chastity ring. The court was understandably adamant that concurrent sentences were inappropriate, “because in my thinking, you don’t get a free victim.” The court stated it would have had no problem imposing a sentence of 200 years to life, “but the law says I can’t do that.” Rodriguez was sentenced to two consecutive terms of 25 years to life.

Given this record, there is no reason to remand Rodriguez’s case for consideration of “any mitigating circumstances of defendants’ crimes and lives.” There is no mitigating evidence attendant to Rodriguez’s crimes. Rodriguez has never had the audacity to suggest there is anything remotely mitigating about the crimes. The majority offers no clue as to what the mitigating evidence relating to the crimes might be. The victims will undoubtedly be shocked by the suggestion that there may be some aspect of Rodriguez’s crimes that is mitigating. The court also considered the mitigating circumstances personal to Rodriguez, but found them dwarfed by the enormity of the offenses he committed. The court’s findings are amply supported by the record. Rodriguez’s crimes were not the product of youthful

indiscretion. [****122] The brutality of defendants’ conduct [***298] (see dis. opn. of Cantil-Sakauye, *C. J., ante, at pp. 385–388*) reveals the actions of violent sexual predators, not that of rogue youths misbehaving on a lark.

The record of the sentencing hearing as to Contreras essentially followed the same pattern as that of Rodriguez. The court stated that it read all of Contreras’s “submissions including the two psychological reports.” The court acknowledged it could not impose, under decisions of the United States and California Supreme Courts, the maximum sentence on the 21 guilty verdicts suffered by Contreras, which would have generated a sentence of as much as 620 years to life. The prosecutor argued that a minimum sentence of 50 years to life complied with *Caballero*, pointing out that *Caballero* leaves the actual number of years up to the trial court. With remarkable foresight, and anticipating this appeal, the trial court replied, “They are just going to tell us, ‘you figure it out.’ Then they are going to tell us, ‘you are wrong’ when it goes up to the Court of Appeals [*sic*].”

The court expressed its understanding and agreement with the research on the development of the juvenile brain. But the court questioned the honesty [****123] of Contreras, who denied responsibility, despite the overwhelming evidence of his guilt. The court discounted the value of the diagnoses of the psychologists, because they were based on statements of a defendant who was not [*415] telling the truth. The court considered Contreras the “shot caller” in the crimes because “[h]e was definitely the guy in charge of this particular event. It was brutal and callous and ruthless.” The court pointed to Contreras’s manipulative attitude during his interview with law enforcement as an indication that “his brain is developed into who he is [and] who he was demonstrated on that whole event where he raped those girls. [¶] So he used a knife. He threatened them. I don’t—I am not confident that people with that kind of psychology are rehabilitatable.” The court imposed the same 50-year-to-life sentence given Rodriguez, but enhanced it by eight years for Contreras’s use of a knife, again stating, “you don’t get a free victim.” Although the court felt that Contreras deserved the full term required by law “based on your attitude and your behavior in this case,” he “was spared that sentence” under the *Eighth Amendment*.

As with Rodriguez, there are no mitigating circumstances relating [****124] to the crimes committed by Contreras for the trial court to consider on

remand. The court considered the psychological reports on Contreras, but understandably found them of little value since he denied culpability. A remand to examine the mitigating circumstances of Contreras's crimes and his life experiences is an exercise in futility.

As to the first portion of the order on remand, the disconnect between the majority [****487**] opinion and the reality of what has already occurred in the trial court is startling. The trial court has made its findings on these issues. Those findings are supported by substantial evidence and are unchallenged. There is nothing left for the trial court to consider on these issues.

B. This court can resolve the issues relating to the Elderly Parole Program by statutory construction.

Because the trial court has already considered, and rejected, the notion of mitigating circumstances as to the crimes and defendants' lives, as a practical matter all that is left of the remand order is for the sentencing court "to consider ... the impact of any new legislation and regulations on appropriate sentencing," and "to impose a time by which defendants may seek parole, consistent [******125**] with this opinion." (Maj. opn., ante, at p. 379.) [*****299**] The application of the new [section 3055](#) presents a legal question, not a factual one. No remand is needed.

The majority is unwilling to address whether an initial parole hearing for these defendants at age 60 violates the *Eighth Amendment*.³ The reluctance is [***416**] understandable from the majority's point of view, because neither [Graham, supra, 560 U.S. 48](#) (which prohibits life without parole for nonhomicide juvenile offenders) nor [Caballero, supra, 55 Cal.4th 262](#) (which prohibits a sentence in years exceeding a juvenile's life expectancy) supports a categorical ban on initial parole suitability hearings for sexually violent juvenile offenders at age 60.

As the dissent of the Chief Justice demonstrates, the parole board at an elderly parole hearing will consider all relevant circumstances, including defendants' youth

³ It is particularly troubling that the majority declines to resolve whether an initial parole suitability hearing at age 60 for one strike juvenile offenders comes too late to satisfy the *Eighth Amendment*. A lengthy hearing in the trial court upon remand to consider the operation of the Elderly Parole Program will end up being a complete waste of time if this court later determines that an initial suitability hearing at age 60 is inconsistent with the reasoning in *Graham*.

and the attributes of youth, in determining parole suitability. The majority is uncertain how the Elderly Parole Program will operate. But how the various parole statutes work in pari materia is a legal issue which we address de novo. (See [Lexin v. Superior Court \(2010\) 47 Cal.4th 1050, 1072, 1090–1091 \[103 Cal. Rptr. 3d 767, 222 P.3d 214\]](#) ["on issues of statutory interpretation, our review is de novo," and "[i]t is a basic canon of statutory construction that statutes in pari materia should be construed together [******126**] so that all parts of the statutory scheme are given effect".]) There is no reason for this issue of law to be decided in the first instance by the trial court.

The majority is unwilling to resolve this (and other issues) because of the "novel issues" (maj. opn., ante, at p. 374) associated with it. There is nothing novel about the interpretation of the statutes relating to the evidence that may be considered at an initial parole hearing. Certainly no evidentiary hearing is required to resolve that issue in this case.

C. The Proposition 57 Parole Regulations afford defendants an opportunity for an initial parole hearing prior to age 60.

The Proposition 57 Parole Regulations adopted by the Department of Corrections and Rehabilitation permit defendants to earn credits that approach 50 percent annually. As the Chief Justice correctly notes, Rodriguez may reduce his initial parole suitability date to age 57 simply by behaving in prison. ([Regs., § 3043.2.](#)) There are abundant additional credits defendants may earn, including: (1) milestone completion credit of 12 weeks per 12 month period ([Regs., § 3043.3](#)); (2) rehabilitative achievement credit of four weeks per year ([Regs., § 3043.4](#)); and (3) educational merit credit [******127**] in increments of 90 days for a high school diploma or GED, and 180 days for the "Offender Mentor Certification Program," associate of arts or science degree, bachelor of arts or science degree, or postgraduate degree ([Regs., § 3043.5](#)). [***417**] While it may not be possible for defendants to earn the full amount of credits, the fact [****488**] remains both have the ability to reduce their initial parole suitability date to below age 60.

There is no reason to remand to the trial court to determine how the credits will be awarded by prison officials. The Regulations [*****300**] have the force of law, and we should presume that official duty will be regularly performed by the Department of Corrections and Rehabilitation. ([Evid. Code, § 664.](#)) The majority's characterization of how the system of credits will

operate as “novel” (maj. opn., *ante*, at p. 374) is again odd, considering that conduct credits have long been a component of California's sentencing law, and this court has addressed entitlement to conduct credits as a matter of law in various cases. (*In re Martinez (2003) 30 Cal.4th 29, 34–37 [131 Cal. Rptr. 2d 921, 65 P.3d 411]; In re Cervera (2001) 24 Cal.4th 1073, 1077–1080 [103 Cal. Rptr. 2d 762, 16 P.3d 176]; People v. Thomas (1999) 21 Cal.4th 1122, 1125–1130 [90 Cal. Rptr. 2d 642, 988 P.2d 563]; People v. Sage (1980) 26 Cal.3d 498, 502–506 [165 Cal. Rptr. 280, 611 P.2d 874].*) The current Regulations were drafted to aid in rehabilitation of inmates and reduction in the prison population through incentives. There is no reason to doubt, at this point, that most [****128] if not all of the conduct credit programs will be available to defendants. According to the Department of Corrections and Rehabilitation, “the credit-earning opportunities for Milestone Completion, Rehabilitative Achievement, Educational Merit, and Extraordinary Conduct, ... went into effect on August 1, 2017.”

(<https://news.cdcr.ca.gov/news-releases/2017/11/29/cdcr-issues-amended-proposition-57-regulations>) [as of Feb. 26, 2018].) The department has stated that it “gives inmates a strong incentive to participate in and complete rehabilitative programs.” (*Ibid.*) The program is in place, and no evidentiary hearing is required at this point to explore its operation.

The majority faults the failure of the two dissents to consider that Contreras and Rodriguez may commit misconduct in prison and forfeit their good conduct credits, suggesting this is a reason why the Regulations do not help to solve the *Eighth Amendment* issue presented. (Maj. opn., *ante*, at pp. 378–379.) According to the majority, “the record before us contains no information on how likely it is that an inmate can achieve a spotless prison record over a span of four or more decades.” (Maj. opn., *ante*, at p. 379.) There is no need for an evidentiary record on this point, because abundant California case law—including decisions of this [****129] court—demonstrates that inmates convicted of the most serious offenses are capable of being incarcerated for extended periods with no disciplinary actions, or only trivial violations not resulting in loss of conduct credits. (*In re Shaputis (2008) 44 Cal.4th 1241, 1249 [82 Cal. Rptr. 3d 213, 190 P.3d 573]* [“Petitioner has remained discipline free throughout his incarceration” spanning two decades]; *In re Rosenkrantz (2002) 29 Cal.4th 616, 630, 682 [128 Cal. Rptr. 2d 104, 59 P.3d [*418] 174]* [petitioner convicted of second degree murder engaged in no disciplinary misconduct in prison over 16 years]; *In re Morganti (2012) 204 Cal.App.4th 904, 909 [139 Cal. Rptr. 3d 430]*

[inmate “has functioned without behavioral problems for almost 20 years”]; *In re McDonald (2010) 189 Cal.App.4th 1008, 1017 [118 Cal. Rptr. 3d 145]* [inmate “had been a model prisoner who had never been disciplined for serious misconduct in prison”]; *In re Cerny (2009) 178 Cal.App.4th 1303, 1305 [101 Cal. Rptr. 3d 200]* [inmate convicted of second degree murder in 1981 “has not been disciplined for violating prison rules”]; *In re Scott (2004) 119 Cal.App.4th 871, 898 [15 Cal. Rptr. 3d 32]* [inmate convicted of second degree murder in 1986 “has been disciplinary-free’ in prison”]; see also *In re Lawrence (2008) 44 Cal.4th 1181, 1199 [82 Cal. Rptr. 3d 169, 190 P.3d 535]* [“petitioner had been counseled eight times for misconduct, including as recently as 2005, but ... she has not been subject to any disciplinary actions”]; *In re Stonerod (2013) 215 Cal.App.4th 596, 605 [155 Cal. Rptr. 3d 639]* [***301] [“petitioner has an exemplary prison history; his only disciplinary citation was for ‘leaving an unattended hotpot in his cell’ in 1990”].⁴

[**489] I disagree with the majority's speculative proposition that Contreras and Rodriguez [****130] will suffer a forfeiture of credits due to misconduct. They have every reason to comply and remain discipline free. The Regulations create an opportunity for inmates to demonstrate rehabilitation and advance the initial parole suitability date, a point the majority makes by citing *Graham, supra, 560 U.S. at page 79*, for the proposition that rehabilitation “depends on the incentives and opportunities available to the juvenile going forward.” (Maj. opn., *ante*, at p. 36818.) If Contreras and Rodriguez forfeit conduct credits due to serious misconduct, they will demonstrate a lack of parole suitability. (*In re Reed (2009) 171 Cal.App.4th 1071, 1085 [90 Cal. Rptr. 3d 303]*.) But speculation as to their potential for misconduct in prison has no bearing on an *Eighth Amendment* analysis, because as the majority recognizes, Contreras and Rodriguez may be held in prison for life, and it is up to them to earn the right to release. (Maj. opn., *ante*, at p. 380.)

I would address the applicability of the Regulations now, rather than deferring to some undefined factfinding hearing in the trial court.

[*419]

D. *The remand order provides no guidance to the trial*

⁴ This list of citations is illustrative, not exhaustive. It does not take into account those inmates who were granted parole without further litigation, or Court of Appeal decisions not certified for publication. (*Cal. Rules of Court, rule 8.1115(a)*.)

court on how the resentencing hearing should be conducted or how the court might formulate a sentence that does not violate the Eighth Amendment.

The trial court predicted the result [****131] in this case. The court worked to craft sentences that complied with *Graham* and *Caballero*, and now has been told it was wrong, but the majority offers no description of what would solve the problem it perceives. The trial judge did a commendable job performing the unpleasant assignment of presiding over a case involving violent sexual assaults on young women. He is entitled to some suggestions as to how the majority wants to remedy the problem it sees, particularly since any reduction of defendants' sentences will trample on the Legislature's authority to fix the punishment for crimes.

The Legislature has repeatedly determined that one strike juvenile offenders are not entitled to a youth offender parole hearing under [section 3051](#). An early version of [section 3051](#) did not exclude juvenile one strike offenders from a youth offender parole hearing (Legis. Counsel's Dig., Sen. Bill No. 260 (2013–2014 Reg. Sess.) as amended June 27, 2013, p. 5), but the legislation was amended several months later to specifically exclude this class of offenders (Legis. Counsel's Dig., Sen. Bill No. 260 (2013–2014 Reg. Sess.) as amended Sept. 3, 2013, p. 9). Subsequent amendments to the statute have maintained the exclusion of [****132] one strike juvenile offenders from [section 3051](#) hearings. Instead, the Legislature has provided for a parole hearing for one strike juvenile offenders at age 60 under [section 3055](#). Establishing a longer period of incarceration before parole suitability hearings for juvenile one strike offenders is consistent with the state's long-standing policy recognizing the unique danger of recidivism posed by violent sexual offenders. (See §§ 290 [registration requirement for sex offenders], [6600 et seq.](#) [civil commitment for sexually [***302] violent predators]; [Evid. Code, § 1108](#) [in a prosecution for a sexual offense evidence of defendant's commission of another sexual offense is not inadmissible to prove a disposition to commit the charged crime].) Case law from this court is replete with examples of recidivism by sex offenders. (See [People v. Davis \(2009\) 46 Cal.4th 539, 602–603 \[94 Cal. Rptr. 3d 322, 208 P.3d 78\]](#); [People v. Falsetta \(1999\) 21 Cal.4th 903, 909–910 \[89 Cal. Rptr. 2d 847, 986 P.2d 182\]](#); [People v. Frank \(1990\) 51 Cal.3d 718, 724–725 \[274 Cal. Rptr. 372, 798 P.2d 1215\]](#).)

Any reduction in sentence in this case, or alteration of parole dates, will be inconsistent with statutory law. If

existing law must be ignored in order to satisfy the *Eighth Amendment* as to an entire body of offenders, that is a policy decision best made by this court rather than a single trial court judge, whose ruling will not be binding, or even citable, in any other court of the [*420] state. But at a minimum, the trial court is [****133] entitled to some vision of how to accomplish the result desired by the majority.

The majority's nonspecific remand order sets the stage for an extended Socratic dialogue between the trial court and the appellate [**490] court, in which the trial court whittles away a de minimis portion of a one strike juvenile sentence, awaiting a response from the appellate court. It is not difficult to imagine this case going through several cycles of sentencing hearings and further remands on appeal. In the meantime, the victims of these 2011 offenses endure additional delay, uncertainty, and a lack of finality, a result inconsistent with the plain language of the California Constitution. “Victims of crime are entitled to finality in their criminal cases. Lengthy appeals and other post-judgment proceedings that challenge criminal convictions, frequent and difficult parole hearings that threaten to release criminal offenders, and the ongoing threat that the sentences of criminal wrongdoers will be reduced, prolong the suffering of crime victims for many years after the crimes themselves have been perpetrated. This prolonged suffering of crime victims and their families must come to an end.” ([Cal. Const., art. I, § 28, subd. \(a\)\(6\).](#))

The unguided [****134] remand also has the potential to lead to arbitrarily disparate parole suitability dates for similarly situated one strike juvenile offenders. One judge might order a parole suitability hearing at age 45, another based on identical commitment offenses might order a hearing at age 50, and yet another might select age 55. The potential for disparate parole dates for similar offenses is not only unfair to defendants and an administrative nightmare for prison officials, it is inconsistent with the categorical requirements of [Graham, supra, 560 U.S. 48](#).

If a parole suitability hearing for juvenile one strike offenders at age 60 violates the *Eighth Amendment*, this court should say so now, and explain the contours of what the *Eighth Amendment* requires for this class of offenders. I respectfully dissent.

Cantil-Sakauye, C. J., and Corrigan, J., concurred.

End of Document

People v. Franklin

Supreme Court of California

May 26, 2016, Filed

S217699

Reporter

63 Cal. 4th 261 *; 370 P.3d 1053 **; 202 Cal. Rptr. 3d 496 ***; 2016 Cal. LEXIS 3592 ****; 2016 WL 3017136

THE PEOPLE, Plaintiff and Respondent, v. TYRIS LAMAR FRANKLIN, Defendant and Appellant.

Subsequent History: Reported at [People v. Franklin, 2016 Cal. LEXIS 5970 \(Cal., May 26, 2016\)](#)

US Supreme Court certiorari denied by [Franklin v. California, 2016 U.S. LEXIS 7352 \(U.S., Dec. 5, 2016\)](#)

Prior History: [****1] Superior Court of Contra Costa County, No. 05-110301-9, Leslie G. Landau, Judge. Court of Appeal, First Appellate District, Division Three, No. A135607.

[People v. Franklin, 224 Cal. App. 4th 296, 168 Cal. Rptr. 3d 370, 2014 Cal. App. LEXIS 197 \(Cal. App. 1st Dist., 2014\)](#)

Core Terms

sentence, juvenile, parole hearing, youth offender, juvenile offender, offender's, parole, youth, maturity, trial court, meaningful opportunity, functional equivalent, incarceration, adults, years to life, culpability, serving, murder, prison, diminished, life sentence, great weight, mandatory, features, statutes, rehabilitation, suitability, eligible, hallmark, moot

Case Summary

Overview

HOLDINGS: [1]-A juvenile could not be sentenced to the functional equivalent of life without parole for a homicide offense without the protections required by the Eighth Amendment, U.S. Const., 8th Amend., of discretion to impose a less severe sentence and consideration of youth-related mitigating factors; [2]-Because the availability of a youth offender parole hearing under

[Pen. Code, §§ 3051, 3046, subd. \(c\), 4801](#), allowed an inmate who had been convicted as a juvenile of a homicide offense and sentenced to a lengthy mandatory term to obtain a meaningful opportunity for release during the 25th year of incarceration, which was not the functional equivalent of life without parole, the inmate's constitutional claim was rendered moot; [3]-A remand was appropriate to give the inmate an opportunity to make a sufficient record of information relevant to the youth offender parole hearing.

Outcome

Affirmed and remanded.

LexisNexis® Headnotes

Criminal Law & Procedure > Juvenile Offenders > Trial as Adult > Prosecutorial & Reverse Waiver

Criminal Law & Procedure > Juvenile Offenders > Sentencing

[HN1](#) [📄] **Trial as Adult, Prosecutorial & Reverse Waiver**

Under [Welf. & Inst. Code, § 707, subd. \(d\)\(1\)](#), the district attorney may file an accusatory pleading in criminal court without first seeking authorization from a juvenile court in cases where a minor 16 years of age or older is accused of committing one of the violent or serious offenses enumerated in [§ 707, subd. \(b\)](#), including murder. Once a juvenile offender is tried and convicted in criminal court, the trial court may be statutorily obligated to impose a lengthy sentence.

Criminal Law & Procedure > Postconviction
Proceedings > Parole

[HN2](#) **Postconviction Proceedings, Parole**

[Pen. Code, § 3046, subd. \(a\)\(2\)](#), provides that an individual serving a life sentence may not be paroled until he has served the minimum term or minimum period of confinement under a life sentence before eligibility for parole. [Section 3046, subd. \(b\)](#), further provides that where two or more life sentences are ordered to run consecutively, the inmate may not be paroled until he or she has served the term specified in [§ 3046, subd. \(a\)](#), on each of the life sentences. In essence, where two indeterminate sentences run consecutively, a defendant must serve the full minimum term of each before becoming eligible for parole.

Constitutional Law > Bill of Rights > Fundamental
Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Sentencing > Cruel &
Unusual Punishment

Criminal Law & Procedure > Juvenile
Offenders > Sentencing

[HN3](#) **Fundamental Rights, Cruel & Unusual Punishment**

The Eighth *Amendment, U.S. Const., 8th Amend.*, prohibition on cruel and unusual punishment guarantees individuals the right not to be subjected to excessive sanctions. This prohibition encompasses the foundational principle that the imposition of a state's most severe penalties on juvenile offenders cannot proceed as though they were not children. From this principle, the United States Supreme Court has derived a number of limitations on juvenile sentencing: (1) no individual may be executed for an offense committed when he or she was a juvenile; (2) no juvenile who commits a nonhomicide offense may be sentenced to life without parole (LWOP); and (3) no juvenile who commits a homicide offense may be automatically sentenced to LWOP.

Constitutional Law > Bill of Rights > Fundamental
Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Sentencing > Cruel &

Unusual Punishment

Criminal Law & Procedure > Juvenile
Offenders > Sentencing

[HN4](#) **Fundamental Rights, Cruel & Unusual Punishment**

Children are constitutionally different for purposes of sentencing for several reasons based not only on common sense — on what any parent knows — but on science and social science as well. First, children have a lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking. Second, children are more vulnerable to negative influences and outside pressures, including from their family and peers; they have limited control over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings. And third, a child's character is not as well formed as an adult's; his traits are less fixed and his actions less likely to be evidence of irretrievable depravity. These distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes. Because the heart of the retribution rationale relates to an offender's blameworthiness, the case for retribution is not as strong with a minor as with an adult. Nor can deterrence do the work in this context, because the same characteristics that render juveniles less culpable than adults — their immaturity, recklessness, and impetuosity — make them less likely to consider potential punishment.

Constitutional Law > Bill of Rights > Fundamental
Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Sentencing > Cruel &
Unusual Punishment

Criminal Law & Procedure > Juvenile
Offenders > Sentencing

[HN5](#) **Fundamental Rights, Cruel & Unusual Punishment**

Deciding that a juvenile offender forever will be a danger to society would require making a judgment that he is incorrigible, but incorrigibility is inconsistent with youth. And for the same reason, rehabilitation cannot justify a sentence of life without parole (LWOP), which forswears

altogether the rehabilitative ideal. It reflects an irrevocable judgment about an offender's value and place in society, at odds with a child's capacity for change. Life without parole for juveniles has been likened to the death penalty itself. Thus, a state may not require a sentencing authority to impose LWOP on juvenile homicide offenders; the sentencing authority must have individualized discretion to impose a less severe sentence and, in exercising that discretion, must take into account a wide array of youth-related mitigating factors. While declining to decide whether the Eighth *Amendment*, *U.S. Const.*, 8th Amend., requires a categorical bar on life without parole for juveniles, or at least for those 14 and younger, the United States Supreme Court has said appropriate occasions for sentencing juveniles to this harshest possible penalty are uncommon. That is so because of the great difficulty of distinguishing at this early age between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

Criminal Law & Procedure > Juvenile Offenders > Sentencing

[HN6](#) **Fundamental Rights, Cruel & Unusual Punishment**

Although a sentencer's ability to make a judgment that a juvenile offender forever will be a danger to society has not been foreclosed in homicide cases, the sentencer is required to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

Criminal Law & Procedure > Juvenile Offenders > Sentencing

[HN7](#) **Fundamental Rights, Cruel & Unusual Punishment**

A juvenile may not be sentenced to the functional equivalent of life without parole for a homicide offense without the protections outlined in case law requiring that the sentencing authority must have individualized discretion to impose a less severe sentence and, in exercising that discretion, must take into account youth-related mitigating factors.

Criminal Law & Procedure > Postconviction Proceedings > Parole

Criminal Law & Procedure > Juvenile Offenders > Sentencing

[HN8](#) **Postconviction Proceedings, Parole**

See Stats. 2013, ch. 312, § 1.

Criminal Law & Procedure > Postconviction Proceedings > Parole

Criminal Law & Procedure > Juvenile Offenders > Sentencing

[HN9](#) **Postconviction Proceedings, Parole**

[Pen. Code, § 3051](#), requires the California Board of Parole Hearings to conduct a youth offender parole hearing during the 15th, 20th, or 25th year of a juvenile offender's incarceration. [§ 3051, subd. \(b\)](#). The date of the hearing depends on the offender's controlling offense, which is defined as the offense or enhancement for which any sentencing court imposed the longest term of imprisonment. [§ 3051, subd. \(a\)\(2\)\(B\)](#). A juvenile offender whose controlling offense carries a term of 25 years to life or greater is eligible for release on parole by the board during his or her 25th year of incarceration at a youth offender parole hearing, unless previously released or entitled to an earlier parole consideration hearing pursuant to other statutory provisions. [§ 3051, subd. \(b\)\(3\)](#). The statute excludes several categories of juvenile offenders from eligibility for a youth offender parole hearing: those who are sentenced under the Three Strikes Law, [Pen. Code, §§ 667, subds. \(b\)-\(i\), 1170.12](#), or Jessica's Law, [Pen. Code, § 667.61](#); those who are sentenced to life without parole; and those who commit another crime

subsequent to attaining 23 years of age for which malice aforethought is a necessary element of the crime or for which the individual is sentenced to life in prison. [§ 3051, subd. \(h\)](#).

Criminal Law & Procedure > Postconviction Proceedings > Parole

Criminal Law & Procedure > Juvenile Offenders > Sentencing

[HN10](#) **Postconviction Proceedings, Parole**

[Pen. Code, § 3051](#), reflects the Legislature's judgment that 25 years is the maximum amount of time that a juvenile offender may serve before becoming eligible for parole. Apart from the categories of offenders expressly excluded by the statute, [§ 3051](#) provides all juvenile offenders with a parole hearing during or before their 25th year of incarceration. The statute establishes what is, in the Legislature's view, the appropriate time to determine whether a juvenile offender has rehabilitated and gained maturity so that he or she may have a meaningful opportunity to obtain release. [§ 3051, subd. \(e\)](#).

Criminal Law & Procedure > Postconviction Proceedings > Parole

Criminal Law & Procedure > Juvenile Offenders > Sentencing

[HN11](#) **Postconviction Proceedings, Parole**

[Pen. Code, §§ 3051, 3046](#), have superseded the statutorily mandated sentences of inmates who committed their controlling offense before the age of 18. The statutory text makes clear that the Legislature intended youth offender parole hearings to apply retrospectively, that is, to all eligible youth offenders regardless of the date of conviction. [Section 3051, subd. \(b\)](#), makes eligible all persons convicted of a controlling offense that was committed before the person had attained 23 years of age.

Criminal Law & Procedure > Postconviction Proceedings > Parole

Criminal Law & Procedure > Juvenile

Offenders > Sentencing

[HN12](#) **Postconviction Proceedings, Parole**

See [Pen. Code, § 3051, subd. \(i\)](#).

Criminal Law & Procedure > Postconviction Proceedings > Parole

Criminal Law & Procedure > Juvenile Offenders > Sentencing

[HN13](#) **Postconviction Proceedings, Parole**

The Legislature did not envision that the original sentences of eligible youth offenders would be vacated and that new sentences would be imposed to reflect parole eligibility during the 15th, 20th, or 25th year of incarceration. The continued operation of the original sentence is evident from the fact that an inmate remains bound by that sentence, with no eligibility for a youth offender parole hearing, if subsequent to attaining 23 years of age the inmate commits an additional crime for which malice aforethought is a necessary element or for which the individual is sentenced to life in prison. [Pen. Code, § 3051, subd. \(h\)](#). But [§ 3051](#) has changed the manner in which the juvenile offender's original sentence operates by capping the number of years that he or she may be imprisoned before becoming eligible for release on parole. The Legislature has effected this change by operation of law, with no additional resentencing procedure required.

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

Criminal Law & Procedure > Postconviction Proceedings > Parole

Criminal Law & Procedure > Juvenile Offenders > Sentencing

[HN14](#) **Sentencing, Cruel & Unusual Punishment**

Mootness of a cruel and unusual punishment challenge to a life sentence or its functional equivalent imposed upon an inmate who was a youth offender is limited to circumstances where [Pen. Code, § 3051](#), entitles the inmate to a youth offender parole hearing against the backdrop of an otherwise lengthy mandatory sentence.

Evidence > Judicial Notice > Adjudicative
Facts > Judicial Records

[HN15](#) **Adjudicative Facts, Judicial Records**

A court may take judicial notice of the existence of a document in a court file, but can only take judicial notice of the truth of facts asserted in documents such as orders, findings of fact and conclusions of law, and judgments. [Evid. Code, § 452, subd. \(d\)](#).

Constitutional Law > Bill of Rights > Fundamental
Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Postconviction
Proceedings > Parole

Criminal Law & Procedure > Juvenile
Offenders > Sentencing

[HN16](#) **Fundamental Rights, Cruel & Unusual Punishment**

[Pen. Code, § 3051](#), effectively reforms the parole eligibility date of a juvenile offender's original sentence so that the longest possible term of incarceration before parole eligibility is 25 years. Such an offender is not subject to a sentence that presumes his incorrigibility; by operation of law, he is entitled to a parole hearing and possible release after 25 years of incarceration. He is not serving a life without parole sentence or its functional equivalent, so the constitutional requirements for properly evaluating a juvenile offender's incorrigibility at the outset do not apply.

Criminal Law & Procedure > Sentencing > Cruel &
Unusual Punishment

Criminal Law & Procedure > Postconviction
Proceedings > Parole

Criminal Law & Procedure > Juvenile
Offenders > Sentencing

[HN17](#) **Sentencing, Cruel & Unusual Punishment**

The case law has not restricted the ability of states to impose life with parole sentences on juvenile offenders;

such sentences necessarily contemplate that a parole authority will decide whether a juvenile offender is suitable for release.

Constitutional Law > Bill of Rights > Fundamental
Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Postconviction
Proceedings > Parole

Criminal Law & Procedure > Juvenile
Offenders > Sentencing

[HN18](#) **Fundamental Rights, Cruel & Unusual Punishment**

The Legislature has declared that the youth offender parole hearing to consider release shall provide for a meaningful opportunity to obtain release, as stated in [Pen. Code, § 3051, subd. \(e\)](#), and that in order to provide such a meaningful opportunity, the California Board of Parole Hearings shall give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity. [Pen. Code, § 4801, subd. \(c\)](#). These statutory provisions echo language in constitutional decisions of the United States Supreme Court and the California Supreme Court. The core recognition underlying this body of case law is that children are, as a class, constitutionally different from adults due to distinctive attributes of youth that diminish the penological justifications for imposing the harshest sentences on juvenile offenders. Among these hallmark features of youth are immaturity, impetuosity, and failure to appreciate risks and consequences, as well as the capacity for growth and change. It is because of these marked and well understood differences between children and adults that the law categorically prohibits the imposition of certain penalties, including mandatory life with parole, on juvenile offenders.

Criminal Law & Procedure > Postconviction
Proceedings > Parole

Criminal Law & Procedure > Juvenile
Offenders > Sentencing

[HN19](#) **Postconviction Proceedings, Parole**

The statutes contemplate that information regarding a

juvenile offender's characteristics and circumstances at the time of the offense will be available at a youth offender parole hearing to facilitate consideration by the California Board of Parole Hearings. For example, [Pen. Code, § 3051, subd. \(f\)\(2\)](#), provides that family members, friends, school personnel, faith leaders, and representatives from community-based organizations with knowledge about the individual before the crime may submit statements for review by the board. Assembling such statements about the individual before the crime is typically a task more easily done at or near the time of the juvenile's offense rather than decades later when memories have faded, records may have been lost or destroyed, or family or community members may have relocated or passed away. In addition, [§ 3051, subd. \(f\)\(1\)](#), provides that any psychological evaluations and risk assessment instruments used by the board in assessing growth and maturity shall take into consideration any subsequent growth and increased maturity of the individual. Consideration of subsequent growth and increased maturity implies the availability of information about the offender when he was a juvenile.

Criminal Law & Procedure > Postconviction Proceedings > Parole

Criminal Law & Procedure > Juvenile Offenders > Sentencing

[HN20](#) **Postconviction Proceedings, Parole**

The goal of a presentation of youth-related factors at a sentencing proceeding is to provide an opportunity for the parties to make an accurate record of the juvenile offender's characteristics and circumstances at the time of the offense so that the California Board of Parole Hearings, years later, may properly discharge its obligation to give great weight to youth-related factors under [Pen. Code, § 4801, subd. \(c\)](#), in determining whether the offender is fit to rejoin society despite having committed a serious crime while he was a child in the eyes of the law.

Criminal Law & Procedure > Postconviction Proceedings > Parole

Criminal Law & Procedure > Juvenile Offenders > Sentencing

[HN21](#) **Postconviction Proceedings, Parole**

See [Pen. Code, § 3051, subd. \(e\)](#).

Headnotes/Syllabus

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

The trial court sentenced defendant, convicted as a juvenile of a homicide offense, to a lengthy mandatory term. (Superior Court of Contra Costa County, No. 05-110301-9, Leslie G. Landau, Judge.) The Court of Appeal, First Dist., Div. Three, No. A135607, affirmed.

The Supreme Court affirmed and remanded. The court held that a juvenile cannot be sentenced to the functional equivalent of life without parole for a homicide offense without the protections required by *U.S. Const., 8th Amend.*, of discretion to impose a less severe sentence and consideration of youth-related mitigating factors. Because the availability of a youth offender parole hearing ([Pen. Code, §§ 3051, 3046, subd. \(c\), 4801](#)) allowed the inmate to obtain a meaningful opportunity for release during the 25th year of incarceration, which was not the functional equivalent of life without parole, the inmate's constitutional claim was rendered moot. A remand was appropriate to give the inmate an opportunity to make a sufficient record of information relevant to the youth offender parole hearing. (Opinion by Liu, J., with Cantil-Sakauye, C. J., Chin, Corrigan, Cuéllar, and Kruger, JJ., concurring. Concurring and dissenting opinion by Werdegar, J. (see p. 287).)

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

[CA\(1\)](#) (1)

**Delinquent, Dependent and Neglected Children § 90—
Delinquent Children—Filing in Criminal Court Without
Need for Authorization.**

Under [Welf. & Inst. Code, § 707, subd. \(d\)\(1\)](#), the district attorney may file an accusatory pleading in criminal court without first seeking authorization from a juvenile court in cases where a minor 16 years of age or older is accused of committing one of the violent or serious

offenses enumerated in [§ 707, subd. \(b\)](#), including murder. Once a juvenile offender is tried and convicted in criminal court, the trial court may be statutorily obligated to impose a lengthy sentence.

[*262] [CA\(2\)](#) (2)

Penal and Correctional Institutions § 22—Prisoners—Parole—Eligibility—Inmate Serving Life Sentence.

[Pen. Code, § 3046, subd. \(a\)\(2\)](#), provides that an individual serving a life sentence may not be paroled until he or she has served the minimum term or minimum period of confinement under a life sentence before eligibility for parole. [Section 3046, subd. \(b\)](#), further provides that where two or more life sentences are ordered to run consecutively, the inmate may not be paroled until he or she has served the term specified in [§ 3046, subd. \(a\)](#), on each of the life sentences. In essence, where two indeterminate sentences run consecutively, a defendant must serve the full minimum term of each before becoming eligible for parole.

[CA\(3\)](#) (3)

Criminal Law § 519.2—Punishment—Cruel and Unusual—Juvenile Sentencing.

The *U.S. Const., 8th Amend.*, prohibition on cruel and unusual punishment guarantees individuals the right not to be subjected to excessive sanctions. This prohibition encompasses the foundational principle that the imposition of a state's most severe penalties on juvenile offenders cannot proceed as though they were not children. From this principle, the United States Supreme Court has derived a number of limitations on juvenile sentencing: (1) no individual may be executed for an offense committed when he or she was a juvenile; (2) no juvenile who commits a nonhomicide offense may be sentenced to life without parole (LWOP); and (3) no juvenile who commits a homicide offense may be automatically sentenced to LWOP.

[CA\(4\)](#) (4)

Criminal Law § 519.2—Punishment—Cruel and Unusual—Juvenile Sentencing.

Children are constitutionally different for purposes of sentencing for several reasons based not only on common sense—on what any parent knows—but on

science and social science as well. First, children have a lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking. Second, children are more vulnerable to negative influences and outside pressures, including from their family and peers; they have limited control over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings. And third, a child's character is not as well formed as an adult's; a child's traits are less fixed and his or her actions less likely to be evidence of irretrievable depravity. These distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes. Because the heart of the retribution rationale relates to an offender's blameworthiness, the case for retribution is not as strong with a minor as with an adult. Nor can deterrence do the work in this context, because the same characteristics that render juveniles less culpable than adults—their immaturity, recklessness, and impetuosity—make them less likely to consider potential punishment.

[*263] [CA\(5\)](#) (5)

Criminal Law § 519.2—Punishment—Cruel and Unusual—Juvenile Sentencing.

Deciding that a juvenile offender forever will be a danger to society would require making a judgment that the offender is incorrigible, but incorrigibility is inconsistent with youth. And for the same reason, rehabilitation cannot justify a sentence of life without parole (LWOP), which forswears altogether the rehabilitative ideal. It reflects an irrevocable judgment about an offender's value and place in society, at odds with a child's capacity for change. Life without parole for juveniles has been likened to the death penalty itself. Thus, a state may not require a sentencing authority to impose LWOP on juvenile homicide offenders; the sentencing authority must have individualized discretion to impose a less severe sentence and, in exercising that discretion, must take into account a wide array of youth-related mitigating factors. While declining to decide whether *U.S. Const., 8th Amend.*, requires a categorical bar on life without parole for juveniles, or at least for those 14 and younger, the United States Supreme Court has said appropriate occasions for sentencing juveniles to this harshest possible penalty are uncommon. That is so because of the great difficulty of distinguishing at this early age between the juvenile offender whose crime

reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.

[CA\(6\)](#) [↓] (6)

Criminal Law § 519.2—Punishment—Cruel and Unusual—Juvenile Sentencing.

Although a sentencer's ability to make a judgment that a juvenile offender forever will be a danger to society has not been foreclosed in homicide cases, the sentencer is required to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.

[CA\(7\)](#) [↓] (7)

Criminal Law § 519.2—Punishment—Cruel and Unusual—Juvenile Sentencing.

A juvenile may not be sentenced to the functional equivalent of life without parole for a homicide offense without the protections outlined in case law requiring that the sentencing authority must have individualized discretion to impose a less severe sentence and, in exercising that discretion, must take into account youth-related mitigating factors.

[CA\(8\)](#) [↓] (8)

Penal and Correctional Institutions § 22—Prisoners—Parole—Eligibility—Youth Offender Parole Hearing.

[Pen. Code, § 3051](#), requires the California Board of Parole Hearings to conduct a youth offender parole hearing during the 15th, 20th, or 25th year of a juvenile offender's incarceration ([§ 3051, subd. \(b\)](#)). The date of the hearing depends on the offender's controlling offense, which is defined as the offense or enhancement for which any sentencing court imposed the [*264] longest term of imprisonment ([§ 3051, subd. \(a\)\(2\)\(B\)](#)). A juvenile offender whose controlling offense carries a term of 25 years to life or greater is eligible for release on parole by the board during his or her 25th year of incarceration at a youth offender parole hearing, unless previously released or entitled to an earlier parole consideration hearing pursuant to other statutory provisions ([§ 3051, subd. \(b\)\(3\)](#)). The statute excludes several categories of juvenile offenders from eligibility for a youth offender parole hearing: those who are

sentenced under the "Three Strikes" law ([Pen. Code, §§ 667, subds. \(b\)–\(j\), 1170.12](#)), or Jessica's Law ([Pen. Code, § 667.61](#)); those who are sentenced to life without parole; and those who commit another crime subsequent to attaining 23 years of age for which malice aforethought is a necessary element of the crime or for which the individual is sentenced to life in prison ([§ 3051, subd. \(h\)](#)).

[CA\(9\)](#) [↓] (9)

Penal and Correctional Institutions § 22—Prisoners—Parole—Eligibility—Youth Offender Parole Hearing.

[Pen. Code, § 3051](#), reflects the Legislature's judgment that 25 years is the maximum amount of time that a juvenile offender may serve before becoming eligible for parole. Apart from the categories of offenders expressly excluded by the statute, [§ 3051](#) provides all juvenile offenders with a parole hearing during or before their 25th year of incarceration. The statute establishes what is, in the Legislature's view, the appropriate time to determine whether a juvenile offender has rehabilitated and gained maturity so that he or she may have a meaningful opportunity to obtain release ([§ 3051, subd. \(e\)](#)).

[CA\(10\)](#) [↓] (10)

Penal and Correctional Institutions § 22—Prisoners—Parole—Eligibility—Youth Offender Parole Hearing.

[Pen. Code, §§ 3051, 3046](#), have superseded the statutorily mandated sentences of inmates who committed their controlling offense before the age of 18. The statutory text makes clear that the Legislature intended youth offender parole hearings to apply retrospectively, that is, to all eligible youth offenders regardless of the date of conviction. [Section 3051, subd. \(b\)](#), makes eligible all persons convicted of a controlling offense that was committed before the person had attained 23 years of age.

[CA\(11\)](#) [↓] (11)

Penal and Correctional Institutions § 22—Prisoners—Parole—Eligibility—Youth Offender Parole Hearing.

The Legislature did not envision that the original sentences of eligible youth offenders would be vacated and that new sentences would be imposed to reflect

parole eligibility during the 15th, 20th, or 25th year of incarceration. The continued operation of the original sentence is evident from the fact that an inmate remains bound by that sentence, with no eligibility for a youth [*265] offender parole hearing, if subsequent to attaining 23 years of age the inmate commits an additional crime for which malice aforethought is a necessary element or for which the individual is sentenced to life in prison (*Pen. Code, § 3051, subd. (h)*). But *§ 3051* has changed the manner in which the juvenile offender's original sentence operates by capping the number of years that he or she may be imprisoned before becoming eligible for release on parole. The Legislature has effected this change by operation of law, with no additional resentencing procedure required.

[CA\(12\)](#) [↓] (12)

Penal and Correctional Institutions § 22—Prisoners—Parole—Eligibility—Youth Offender Parole Hearing—Mootness of Cruel and Unusual Punishment Claim.

The combined operation of *Pen. Code, §§ 3051, 3046, subd. (c), 4801*, meant that an inmate convicted as a juvenile was serving a life sentence that included a meaningful opportunity for release during his 25th year of incarceration. Such a sentence was neither life without parole (LWOP) nor its functional equivalent. Because the inmate was not serving an LWOP sentence or its functional equivalent, no cruel and unusual punishment claim arose. The Legislature's enactment of Sen. Bill No. 260 (2013–2014 Reg. Sess.) rendered moot the inmate's challenge to his original sentence.

[*Erwin et al., Cal. Criminal Defense Practice (2016) ch. 104, § 104.04A*; 3 Witkin & Epstein, *Cal. Criminal Law* (4th ed. 2012) Punishment, § 511.]

[CA\(13\)](#) [↓] (13)

Penal and Correctional Institutions § 22—Prisoners—Parole—Eligibility—Youth Offender Parole Hearing—Mootness of Cruel and Unusual Punishment Claim.

Mootness of a cruel and unusual punishment challenge to a life sentence or its functional equivalent imposed upon an inmate who was a youth offender is limited to circumstances where *Pen. Code, § 3051*, entitles the inmate to a youth offender parole hearing against the

backdrop of an otherwise lengthy mandatory sentence.

[CA\(14\)](#) [↓] (14)

Evidence § 9—Judicial Notice—Matters Subject to Notice—Matters Pertaining to Courts—Documents in Court Files.

A court may take judicial notice of the existence of a document in a court file, but can only take judicial notice of the truth of facts asserted in documents such as orders, findings of fact and conclusions of law, and judgments (*Evid. Code, § 452, subd. (d)*).

[CA\(15\)](#) [↓] (15)

Penal and Correctional Institutions § 22—Prisoners—Parole—Eligibility—Youth Offender Parole Hearing—Incorrigibility Not Presumed.

Pen. Code, § 3051, effectively reforms the parole eligibility [*266] date of a juvenile offender's original sentence so that the longest possible term of incarceration before parole eligibility is 25 years. Such an offender is not subject to a sentence that presumes the offender's incorrigibility; by operation of law, the offender is entitled to a parole hearing and possible release after 25 years of incarceration. The offender is not serving a life without parole sentence or its functional equivalent, so the constitutional requirements for properly evaluating a juvenile offender's incorrigibility at the outset do not apply.

[CA\(16\)](#) [↓] (16)

Penal and Correctional Institutions § 22—Prisoners—Parole—Determining Suitability of Youth Offender.

The case law has not restricted the ability of states to impose life with parole sentences on juvenile offenders; such sentences necessarily contemplate that a parole authority will decide whether a juvenile offender is suitable for release.

[CA\(17\)](#) [↓] (17)

Penal and Correctional Institutions § 22—Prisoners—Parole—Youth Offender Parole Hearing—Consideration of Youth-related Factors.

The Legislature has declared that the youth offender parole hearing to consider release shall provide for a meaningful opportunity to obtain release ([Pen. Code, § 3051, subd. \(e\)](#)), and that in order to provide such a meaningful opportunity, the California Board of Parole Hearings shall give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity ([Pen. Code, § 4801, subd. \(c\)](#)). These statutory provisions echo language in constitutional decisions of the United States Supreme Court and the California Supreme Court. The core recognition underlying this body of case law is that children are, as a class, constitutionally different from adults due to distinctive attributes of youth that diminish the penological justifications for imposing the harshest sentences on juvenile offenders. Among these hallmark features of youth are immaturity, impetuosity, and failure to appreciate risks and consequences, as well as the capacity for growth and change. It is because of these marked and well-understood differences between children and adults that the law categorically prohibits the imposition of certain penalties, including mandatory life with parole, on juvenile offenders.

[CA\(18\)](#) [↓] (18)

Penal and Correctional Institutions § 22—Prisoners—Parole—Youth Offender Parole Hearing—Consideration of Youth-related Factors.

The statutes contemplate that information regarding a juvenile offender's characteristics and circumstances at the time of the offense will be available at a youth offender parole hearing to facilitate consideration by the California Board of Parole Hearings. For example, [Pen. Code, § 3051, subd. \(f\)\(2\)](#), provides that family members, friends, school personnel, **[*267]** faith leaders, and representatives from community-based organizations with knowledge about the individual before the crime may submit statements for review by the board. Assembling such statements about the individual before the crime is typically a task more easily done at or near the time of the juvenile's offense rather than decades later when memories have faded, records may have been lost or destroyed, or family or community members may have relocated or passed away. In addition, [§ 3051, subd. \(f\)\(1\)](#), provides that any psychological evaluations and risk assessment instruments used by the board in assessing growth and maturity shall take into consideration any subsequent growth and increased maturity of the individual.

Consideration of subsequent growth and increased maturity implies the availability of information about the offender when he or she was a juvenile.

[CA\(19\)](#) [↓] (19)

Penal and Correctional Institutions § 22—Prisoners—Parole—Youth Offender Parole Hearing—Consideration of Youth-related Factors.

The goal of a presentation of youth-related factors at a sentencing proceeding is to provide an opportunity for the parties to make an accurate record of the juvenile offender's characteristics and circumstances at the time of the offense so that the California Board of Parole Hearings, years later, may properly discharge its obligation to give great weight to youth-related factors ([Pen. Code, § 4801, subd. \(c\)](#)), in determining whether the offender is fit to rejoin society despite having committed a serious crime while he or she was a child in the eyes of the law.

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Judges: Opinion by Liu, J., with Cantil-Sakauye, C. J., Chin, Corrigan, Cuéllar, and Kruger, JJ., concurring. Concurring and dissenting opinion by Werdegar, J.

Opinion by: Liu

Opinion

[*268]

[*498] [**1054] LIU, J.—Defendant Tyris Lamar**

Franklin was 16 years old at the time he shot and killed another teenager. A jury convicted Franklin of first degree murder and found true a personal firearm-discharge [****2] enhancement. The trial court was obligated by statute to impose two consecutive 25-year-to-life sentences, so Franklin's total sentence was life in state prison with the possibility of parole after 50 years.

After Franklin was sentenced, the United States Supreme Court held that the *Eighth Amendment to the federal Constitution* prohibits a mandatory life without parole (LWOP) sentence for a juvenile offender who commits homicide. (*Miller v. Alabama (2012) 567 U.S. 460, 465 [183 L. Ed. 2d 407, 132 S. Ct. 2455, 2460]* (*Miller*)). Shortly thereafter, we held in *People v. Caballero (2012) 55 Cal.4th 262 [145 Cal. Rptr. 3d 286, 282 P.3d 291]* (*Caballero*) that the prohibition on life without parole sentences for all juvenile nonhomicide offenders established in *Graham v. Florida (2010) 560 U.S. 48 [176 L. Ed. 2d 825, 130 S. Ct. 2011]* (*Graham*) applied to sentences that were the “functional equivalent of a life without parole sentence,” including *Caballero's* term of 110 years to life. (*Caballero, at p. 268.*) Franklin challenges the constitutionality of his 50-year-to-life sentence under these authorities.

We granted review to answer two questions: Does *Penal Code section 3051* moot Franklin's constitutional challenge to his sentence by requiring that he receive a parole hearing during his 25th year of incarceration? If not, then does the state's sentencing scheme, which required the trial court to sentence Franklin to 50 years to life in prison for his crimes, violate *Miller's* prohibition against mandatory [****3] LWOP sentences for juveniles?

We answer the first question in the affirmative: *Penal Code sections 3051* and *4801*—recently enacted by the Legislature to bring juvenile sentencing in conformity with *Miller, Graham, and Caballero*—moot Franklin's constitutional claim. Consistent with constitutional dictates, those statutes provide Franklin with the possibility of release after 25 years of imprisonment (*Pen. Code, § 3051, subd. (b)(3)*) and require the Board of Parole Hearings (Board) to “give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity” (*id., § 4801, subd. (c)*). In light of this holding, we need not decide whether a life sentence with parole eligibility after 50 years of incarceration is the functional equivalent of an LWOP sentence and, if so, whether it is unconstitutional in Franklin's case.

Although Franklin's constitutional claim has been mooted by the passage of Senate Bill No. 260 (2013–2014 Reg. Sess.) (Senate Bill No. 260), he [*269] raises colorable concerns as [**1055] to whether he was given adequate opportunity at sentencing to make a record of mitigating evidence tied to his youth. The criteria for parole suitability set forth in *Penal Code sections 3051* and *4801* contemplate [****4] that the Board's decisionmaking at Franklin's eventual parole hearing will be informed by youth-related factors, such as his cognitive ability, character, and social and family background at the time of the offense. Because Franklin was sentenced before the high court decided *Miller* and before our Legislature enacted Senate Bill No. 260, the trial court understandably saw no relevance to mitigation evidence at sentencing. In light of [***499] the changed legal landscape, we remand this case so that the trial court may determine whether Franklin was afforded sufficient opportunity to make such a record at sentencing. This remand is necessarily limited; as *section 3051* contemplates, Franklin's two consecutive sentences of 25 years to life remain valid, even though the statute has made him eligible for parole during his 25th year of incarceration.

I.

On January 10, 2011, Franklin, at age 16, murdered another 16-year-old boy, Gene Grisby. Over the course of a one-year period preceding the crime, Franklin had been involved in numerous and increasingly dangerous altercations with a group of boys who lived in the Crescent Park housing project in Richmond and referred to themselves as the “Crescent Park gang.” At first, [****5] Franklin engaged in fistfights with members of the Crescent Park gang, including Gene and another juvenile named Kian. But the boys soon began to arm themselves. According to Franklin and his grandmother, Crescent Park gang members had fired multiple gunshots into his home while his family was inside. Franklin believed that Gene associated with the individuals responsible for this incident. Crescent Park gang members had also shot the windows out of Franklin's mother's car and slashed her tires. Franklin also testified that the Friday before the murder, Kian and another Crescent Park gang member had come to his classroom, where Kian pulled up his shirt to display a gun on his hip. Franklin saw this gesture as a serious threat.

After the incident at school, Franklin told his older brother, Demond, that Kian had threatened him with a

gun at school. This prompted Demond to loan him a .22-caliber pistol for protection the following Monday morning, the day of the murder. That same day, Kian and other Crescent Park gang members attacked Franklin's 13-year-old brother, Terrell. The attackers told Terrell that they were also looking for Franklin. Demond called Franklin to inform him that Terrell [****6] had been attacked.

After learning about the attack, Franklin told his friends that Terrell had been “jumped” and asked an older teenager for a ride to the Crescent Park [*270] housing complex. Franklin testified at trial that he was angry and afraid for his family. He did not know what the Crescent Park gang was going to do next and wanted to confront them. According to Franklin, he did not plan to shoot anyone but knew there was a “possibility that I might.”

Upon arriving at the housing complex, Franklin spotted Gene walking on a street and asked the driver to unlock the car door. Another passenger in the car, Khalifa, asked: “Why we riding up on Gene when he don't have anything to do with the situation?” According to Khalifa, Franklin answered something like, “It don't matter. He is from the Crescents” or, “It doesn't matter. They beat up my brother.” According to another passenger, Jaswinder, Franklin said something like, “It doesn't matter. He's still from Crescent Park.”

As Franklin exited the car, he pulled the .22-caliber pistol from his waistband. According to a witness who observed the murder from a balcony across the street, Franklin walked around the car and, without saying anything, [****7] shot Gene several times. The witness testified that Franklin began shooting “shortly after he got out of the car” and before he reached Gene. Jaswinder and Khalifa also did not hear any conversation between Franklin and Gene before Franklin began shooting.

[**1056] Franklin testified that as he approached Gene, he asked, “Which one of you motherfuckers just jumped my little brother?” [****500] Gene replied, “Fuck you and fuck your little brother.” Franklin testified that Gene's response angered him and made him feel “numb.” According to Franklin: “It was like—it was so much. It was, it was like everything just—I don't know, just—it just, I don't know. Like, I—I wasn't in my body no more. It was like I don't remember everything like.” After shooting Gene, Franklin got back into the car, and the car sped off. Inside the car, Franklin said something like, “That Crescent Park dude is a sucker.”

Gene's aunt testified that when she heard the gunshots,

she looked out the window of the apartment where she and Gene lived and saw a young man with a handgun fire multiple shots. A few minutes later, Gene ran through the front door of the apartment, holding his right shoulder exclaiming, “I've been hit,” [****8] before collapsing on the floor. Richmond police responded to the shooting and found Gene on the floor of his apartment with multiple gunshot wounds to his head and body. Gene was pronounced dead at the scene.

The district attorney charged Franklin with first degree murder under [Penal Code section 187](#) and alleged a personal firearm-discharge enhancement under [Penal Code section 12022.53, subdivision \(a\)\(1\)](#). (All undesignated statutory references are to the Penal Code.) Because Franklin was charged with murder and was 16 years of age at the time of the offense, the district [*271] attorney exercised his discretion to file charges directly in criminal court rather than juvenile court. ([Welf. & Inst. Code, § 707, subds. \(b\), \(d\)](#).) A jury convicted Franklin of first degree murder and found true the personal firearm-discharge allegation.

At sentencing, Franklin apologized for his crime: “I do want to say I'm sorry, but sorry is a simple word, though. I didn't have no thoughts about killing him, you know. I don't know. It's hard to explain. But I do want to apologize to the family for taking your son, and I do want to apologize to my mother for taking me away from her and my family. I want to say sorry, but, like I said, sorry is ... sorry can't explain the way I feel. Like you said you can't sleep at [****9] night. I can't sleep at night, either. I haven't been able to sleep at night for a lot of years now, you know. I'm not good with emotion, so I'm ... I really wish this didn't happen. I wish I could have found another way, but, like I said, I want to say sorry, but sorry is just—I don't know no other words to use. I don't know. I don't know. I'd like to say sorry to my mother, too. I would like to say sorry to each and every one of you all for what I did.”

The trial court imposed a mandatory sentence of 25 years to life for the murder ([§ 190, subd. \(a\)](#)) and a mandatory consecutive sentence of 25 years to life for the firearm enhancement ([§ 12022.53, subd. \(d\)](#)) for a total term of 50 years to life. Explaining the sentence, the court said: “The sentence is the sentence that's prescribed by law, not one that the Court chooses. And I will impose it in this case, but first I just want to say a couple of words to both families. I see a lot of pain in this courtroom all the time. And so often it's because of senseless things that happen. And if there's a senseless case, this is a senseless case. We've got two young

men's lives destroyed. ... We've lost two young men. And for what? It's so senseless. I would have loved to [****10] have seen these two young men grow up to be people, to be the people they're supposed to be, both of them. And neither of them is going to have that opportunity. It's because of unspeakably stupid choices that you made, Mr. Franklin. And I just hope that something can come out of this that's productive. I'm impressed with Gene[s] ... [***501] family's dignity going through this. Their empathy for Mr. Franklin's family and even Mr. Franklin. And I'm impressed with Mr. Franklin's family's understanding and empathy for [Gene]'s family. And if we can take something from this, I would love for it to be, get the guns out of Richmond, get the violence out of Richmond, and don't have these young black men going after each other because we see it so much in this courthouse. And what ends up happening is we have some young men going to prison for the best years of their lives at the least, and other young men who don't get to [**1057] grow up. And how crazy is this? How crazy. So if both families can do anything to try to make some sense and find some good out of this, work together to try to get the guns out of Richmond, [*272] get the guns out of the pockets of these young men who haven't got the frontal lobes [****11] yet to figure out how to deal with their issues."

Franklin appealed, arguing that the trial court made numerous instructional and evidentiary errors and that, because he was 16 years old when he committed the crime, his sentence violates the *Eighth Amendment's* prohibition against cruel and unusual punishment as interpreted in *Miller, supra, 567 U.S. 460 [132 S.Ct. 2455]*. The Court of Appeal affirmed Franklin's conviction and sentence. The court assumed without deciding that "the sentence, when imposed, violated the *Eighth Amendment* and that had there been no intervening developments, remand for resentencing would have been required." But the court held that "any potential constitutional infirmity in [defendant's] sentence has been cured by the subsequently enacted *Penal Code section 3051*, which affords youth offenders a parole hearing sooner than had they been an adult." Thus, "defendant's sentence is no longer the functional equivalent of an LWOP sentence and no further exercise of discretion at this time is necessary."

We granted review.

II.

As the trial court noted, Franklin's sentence was statutorily mandated at the time it was imposed. The interaction of two features of California law gives rise to the possibility of mandatory lengthy sentences for juvenile offenders: (1) statutes [****12] authorizing and sometimes requiring a criminal court to exercise jurisdiction over juvenile offenders and (2) statutes restricting the trial court's discretion to impose concurrent sentences or to strike certain sentencing enhancements.

[HN1](#)^[↑] [CA\(1\)](#)^[↑] (1) Under *Welfare and Institutions Code section 707, subdivision (d)(1)*, the district attorney may file an accusatory pleading in criminal court without first seeking authorization from a juvenile court in cases where a "minor 16 years of age or older who is accused of committing [one of the violent or serious offenses] enumerated in [\[section 707, subdivision \(b\)\]](#)," including murder. Here the district attorney filed an accusatory pleading in criminal court because Franklin was a 16 year old accused of committing murder.

Once a juvenile offender is tried and convicted in criminal court, the trial court may be statutorily obligated to impose a lengthy sentence. In this case, the jury convicted Franklin of first degree murder ([§ 187](#)) and found true an enhancement for the personal and intentional discharge of a firearm that proximately caused great bodily injury or death ([§ 12022.53, subd. \(d\)](#)). [Section 190, subdivision \(a\)](#) required the trial court to impose a term of 25 [*273] years to life for the murder, and [section 12022.53, subdivision \(d\)](#) required "an additional and consecutive term of imprisonment" of 25 years to life. Although [section 1385, subdivision \(c\)](#) provides trial [****13] courts with discretion [***502] to dismiss or strike the additional punishment associated with an offense or enhancement "in the furtherance of justice," [section 12022.53, subdivision \(h\)](#) prohibits trial courts from striking a firearm enhancement. (See [People v. Chiu \(2003\) 113 Cal.App.4th 1260, 1265 \[7 Cal. Rptr. 3d 193\]](#).) The court was therefore required by statute to sentence Franklin to two consecutive terms of 25 years to life.

[HN2](#)^[↑] [CA\(2\)](#)^[↑] (2) [Section 3046, subdivision \(a\)\(2\)](#) provides that an individual serving a life sentence may not be paroled until he has served the "minimum term or minimum period of confinement under a life sentence before eligibility for parole." [Section 3046, subdivision \(b\)](#) further provides that where, as here, two or more life sentences are ordered to run consecutively, the inmate may not be paroled "until he or she has served the term

specified in [subdivision \(a\)](#) on each of the life sentences.” In essence, where two indeterminate sentences run consecutively, a defendant must serve the full minimum term of each before becoming eligible for parole. (See [People v. Felix \(2000\) 22 Cal.4th 651, 656 \[94 Cal. Rptr. 2d 54, 995 P.2d 186\]](#).) The minimum term of Franklin's sentence for murder is 25 years, as is the minimum term of his sentence for the firearm enhancement. **[**1058]** Thus, Franklin would first become eligible for parole after 50 years of imprisonment at the age of 66.

III.

Franklin claims that this sentence violates the *Eighth Amendment* because **[****14]** it is effectively a term of life without parole imposed by statute, without judicial consideration of his youth and its relevance for sentencing. This claim is grounded in a series of United States Supreme Court cases assigning constitutional significance to characteristics of youth long known to common sense and increasingly substantiated through science.

A.

[HN3](#) [CA\(3\)](#) **(3)** The *Eighth Amendment* prohibition on cruel and unusual punishment “guarantees individuals the right not to be subjected to excessive sanctions.” ([Roper v. Simmons \(2005\) 543 U.S. 551, 560 \[161 L. Ed. 2d 1, 125 S. Ct. 1183\]](#) (*Roper*); see [Robinson v. California \(1962\) 370 U.S. 660, 667 \[8 L. Ed. 2d 758, 82 S. Ct. 1417\]](#) [*8th Amend.* is binding on the states through the *14th Amend.*].) This prohibition encompasses the “foundational principle” that the “imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children.” ([Miller, supra, 567 U.S. at p. 474 \[132 S.Ct. at p. 2466\]](#).) From this principle, the high court has derived a **[*274]** number of limitations on juvenile sentencing: (1) no individual may be executed for an offense committed when he or she was a juvenile ([Roper, 543 U.S. at p. 578](#)); (2) no juvenile who commits a nonhomicide offense may be sentenced to LWOP ([Graham, supra, 560 U.S. at p. 74](#)); and (3) no juvenile who commits a homicide offense may be automatically sentenced to LWOP ([Miller, at p. 464 \[132 S.Ct. at p. 2460\]](#)).

[CA\(4\)](#) **(4)** *Miller* addressed two cases, each of which involved a 14-year-old offender tried as an adult,

convicted **[****15]** of murder, and sentenced to LWOP under a state law that did not allow the sentencing authority to impose a less severe punishment. In prohibiting such mandatory LWOP sentences, the high court in *Miller* affirmed and amplified its observations in *Graham* and *Roper* that [HN4](#) children are “constitutionally different ... for purposes of sentencing” for several reasons based “not only on common sense—on what ‘any parent knows’—but on science and social science **[***503]** as well.” ([Miller, supra, 567 U.S. at p. 479 \[132 S.Ct. at p. 2464\]](#); see [id. at p. 472, fn. 5 \[132 S.Ct. at p. 2464\]](#) [“the science and social science supporting *Roper's* and *Graham's* conclusions have become even stronger”].) “First, children have a “‘lack of maturity and an underdeveloped sense of responsibility,’” leading to recklessness, impulsivity, and heedless risk-taking. ... Second, children ‘are more vulnerable ... to negative influences and outside pressures,’ including from their family and peers; they have limited ‘contro[ll] over their own environment’ and lack the ability to extricate themselves from horrific, crime-producing settings. ... And third, a child's character is not as ‘well formed’ as an adult's; his traits are ‘less fixed’ and his actions less likely to be ‘evidence of irretrievabl[e] deprav[ity].’” ([Miller, at p. 471 \[132 S.Ct. at p. 2464\]](#), citations **[****16]** omitted.)

[CA\(5\)](#) **(5)** These “distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes. Because “[t]he heart of the retribution rationale” relates to an offender's blameworthiness, “the case for retribution is not as strong with a minor as with an adult.” ... Nor can deterrence do the work in this context, because “the same characteristics that render juveniles less culpable than adults”—their immaturity, recklessness, and impetuosity—make them less likely to consider potential punishment. ... Similarly, incapacitation could not support the life-without-parole sentence in *Graham*: [HN5](#) Deciding that a ‘juvenile offender forever will be a danger to society’ would require ‘mak[ing] a judgment that [he] is incorrigible’—but “‘incorrigibility is inconsistent with youth.’” ... And for the same reason, rehabilitation could not justify that sentence. Life without parole ‘forfeits altogether the rehabilitative ideal.’ ... It reflects ‘an irrevocable judgment about [an offender's] value and place in society,’ at odds with a child's capacity for change.” ([Miller, supra, 567 U.S. at p. 473 \[132 S.Ct. at p. 2465\]](#), citations omitted.)

[*275]

Miller **[****17]** also relied on cases that have

“elaborated on the requirement that capital defendants have an opportunity to advance, and the judge or jury a chance to assess, any mitigating factors, so that the death penalty is reserved only for the most culpable defendants committing the most serious offenses.” (*Miller, supra*, 567 U.S. at p. 476 [132 S.Ct. at p. 2467], citing *Woodson v. North Carolina* (1976) 428 U.S. 280 [49 L. Ed. 2d 944, 96 S. Ct. 2978] and related cases.) These cases were relevant, the high court explained, because *Graham* had “likened life without parole for juveniles to the death penalty itself.” (*Miller, at p. 470*; see *id. at p. 474* [132 S.Ct. at p. 2466] [“Imprisoning an offender until he dies alters the remainder of his life ‘by a forfeiture that is irrevocable.’ [Graham, supra, 560 U.S. at p. 69.]”].)

CA(6) **(6)** Based on the “confluence” of the considerations above, the high court concluded that “in imposing a State’s harshest penalties, a sentencer misses too much if he treats every child as an adult.” (*Miller, supra*, 567 U.S. at pp. 461, 477 [132 S.Ct. at pp. 2464, 2468].) *Miller* thus held that a state may not require a sentencing authority to impose LWOP on juvenile homicide offenders; the sentencing authority must have individualized discretion to impose a less severe sentence and, in exercising that discretion, must take into account a wide array of youth-related mitigating factors. (*Id. at pp. 477–480* [132 S.Ct. at pp. 2468–2469].) While declining to decide whether “the Eighth Amendment requires a categorical [****18] bar on life without parole for juveniles, or at least for those 14 and younger” (*id. at p. 479* [132 S.Ct. at p. 2469]), the high court concluded by saying: [***504] “[G]iven all we have said in *Roper*, *Graham*, and this decision about children’s diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon. That is especially so because of the great difficulty we noted in *Roper* and *Graham* of distinguishing at this early age between ‘the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.’ [Citations.] **HN6** Although we do not foreclose a sentencer’s ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison” (*ibid.*).

B.

Since *Graham* and *Miller*, courts throughout the country

have examined whether the high court’s restrictions on LWOP sentences apply to lengthy sentences with a release date near or beyond a juvenile’s life expectancy. In *Caballero*, we held that the defendant’s 110-year [****19] sentence was the “functional equivalent” of life without parole and thus violated *Graham*’s prohibition against LWOP sentences for juvenile offenders convicted of nonhomicide [*276] crimes. (*Caballero, supra*, 55 Cal.4th at p. 268; see *Sumner v. Shuman* (1987) 483 U.S. 66, 83 [97 L. Ed. 2d 56, 107 S. Ct. 2716] [“there is no basis for distinguishing ... between an inmate serving a life sentence without possibility of parole and a person serving several sentences of a number of years, the total of which exceeds his normal life expectancy”].) But we did not further elaborate what it means for a sentence to be the “functional equivalent” of LWOP, and we left open how our holding should be applied in the case of a juvenile homicide offender. (See *Caballero, at p. 268, fn. 4*.)

CA(7) **(7)** We now hold that just as *Graham* applies to sentences that are the “functional equivalent of a life without parole sentence” (*Caballero, supra*, 55 Cal.4th at p. 268), so too does *Miller* apply to such functionally equivalent sentences. As we noted in *Caballero*, *Miller* “extended *Graham*’s reasoning” to homicide offenses, observing that “none of what [*Graham*] said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific.” (*Caballero, at p. 267*, quoting *Miller, supra*, 567 U.S. at p. 473 [132 S.Ct. at p. 2465].) Because [**1060] sentences that are the functional equivalent of LWOP implicate *Graham*’s reasoning [****20] (*Caballero, at p. 268*), and because “*Graham*’s reasoning implicates any life-without-parole sentence imposed on a juvenile” whether for a homicide or nonhomicide offense (*id. at p. 267*, quoting *Miller, supra*, 567 U.S. at p. 473 [132 S.Ct. at p. 2465]), a sentence that is the functional equivalent of LWOP under *Caballero* is subject to the strictures of *Miller* just as it is subject to the rule of *Graham*. In short, **HN7** a juvenile may not be sentenced to the functional equivalent of LWOP for a homicide offense without the protections outlined in *Miller*.

IV.

As noted, Franklin would first become eligible for parole at age 66 under the sentence imposed by the trial court. That sentence was mandatory; the trial court had no discretion to consider Franklin’s youth as a mitigating factor. According to Franklin, the 50-year-to-life

sentence [***505] means he will not experience any substantial period of normal adult life; instead, he will either die in prison or have the possibility of geriatric release. He contends that his sentence is the “functional equivalent” of LWOP (*Caballero, supra, 55 Cal.4th at p. 268*) and that it was imposed without the protections set forth in *Miller*.

After Franklin's sentencing, the Legislature passed Senate Bill No. 260, which became effective January 1, 2014, and added [sections 3051, 3046, subdivision \(c\), and 4801, subdivision \(c\)](#) to the [****21] Penal Code. The Attorney General contends these new provisions entitle Franklin to a parole hearing during his 25th year in prison and thus renders moot any infirmity in Franklin's sentence under *Miller*. We agree with the Attorney General: Senate [*277] Bill No. 260 has mooted Franklin's claim under *Miller*. As explained below, [section 3051](#) has superseded Franklin's sentence so that notwithstanding his original term of 50 years to life, he is eligible for a “youth offender parole hearing” during the 25th year of his sentence. Crucially, the Legislature's recent enactment also requires the Board not just to consider but to “give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law.” ([§ 4801, subd. \(c\)](#).) For those juvenile offenders eligible for youth offender parole hearings, the provisions of Senate Bill No. 260 are designed to ensure they will have a meaningful opportunity for release no more than 25 years into their incarceration.

Our interpretation of [section 3051](#) begins with the recognition that the Legislature passed Senate Bill No. 260 explicitly to bring juvenile sentencing [****22] into conformity with *Graham, Miller, and Caballero*. Section 1 of the enactment states in part: [HN8](#) [↑] “The purpose of this act is to establish a parole eligibility mechanism that provides a person serving a sentence for crimes that he or she committed as a juvenile the opportunity to obtain release when he or she has shown that he or she has been rehabilitated and gained maturity, in accordance with the decision of the California Supreme Court in *People v. Caballero*, [supra](#),] [55 Cal.4th 262 \[145 Cal. Rptr. 3d 286, 282 P.3d 291\]](#) and the decisions of the United States Supreme Court in *Graham v. Florida*, [supra](#),] [560 U.S. 48 \[176 L. Ed. 2d 825, 130 S. Ct. 2011\]](#), and *Miller v. Alabama*, [supra](#),] [183 L.E.2d 407](#). ... It is the intent of the Legislature to create a process by which growth and maturity of youthful offenders can be assessed and a meaningful

opportunity for release established.” (Stats. 2013, ch. 312, § 1, italics added.) Since its passage, the statute and associated Penal Code provisions have been amended to apply to offenders sentenced to state prison for crimes committed when they were under 23 years of age. (Stats. 2015, ch. 471.)

[CA\(8\)](#) [↑] (8) At the heart of Senate Bill No. 260 was the addition of [HN9](#) [↑] [section 3051](#), which requires the Board to conduct a “youth offender parole hearing” during the 15th, 20th, or 25th year of a juvenile offender's incarceration. ([§ 3051, subd. \(b\)](#).) The date of the hearing depends on the offender's “[c]ontrolling offense,” [****23] which is defined as “the offense or [**1061] enhancement for which any sentencing court imposed the longest term of imprisonment.” (*Id.*, [subd. \(a\)\(2\)\(B\)](#).) A juvenile offender whose controlling offense carries a term of 25 years to life or greater is “eligible for release on parole by the board during his or her 25th year of incarceration at a youth offender parole hearing, unless previously released or entitled to an earlier parole consideration hearing pursuant to other statutory provisions.” [***506] (*Id.*, [subd. \(b\)\(3\)](#).) The statute excludes several categories of juvenile offenders from eligibility for a youth offender parole hearing: those who are sentenced under the “Three [*278] Strikes” law ([§§ 667, subds. \(b\)–\(i\), 1170.12](#)) or Jessica's Law ([§ 667.61](#)), those who are sentenced to life without parole, and those who commit another crime “subsequent to attaining 23 years of age ... for which malice aforethought is a necessary element of the crime or for which the individual is sentenced to life in prison” ([§ 3051, subd. \(h\)](#); see Stats. 2015, ch. 471, § 1 [changing the age after which malice aforethought crimes are disqualifying from 18 to 23]).

[HN10](#) [↑] [CA\(9\)](#) [↑] (9) [Section 3051](#) thus reflects the Legislature's judgment that 25 years is the maximum amount of time that a juvenile offender may serve [****24] before becoming eligible for parole. Apart from the categories of offenders expressly excluded by the statute, [section 3051](#) provides all juvenile offenders with a parole hearing during or before their 25th year of incarceration. The statute establishes what is, in the Legislature's view, the appropriate time to determine whether a juvenile offender has “rehabilitated and gained maturity” (Stats. 2013, ch. 312, § 1) so that he or she may have “a meaningful opportunity to obtain release” ([§ 3051, subd. \(e\)](#)).

[HN11](#) [↑] [CA\(10\)](#) [↑] (10) [Sections 3051](#) and [3046](#) have thus superseded the statutorily mandated sentences of inmates who, like Franklin, committed their controlling

offense before the age of 18. The statutory text makes clear that the Legislature intended youth offender parole hearings to apply retrospectively, that is, to all eligible youth offenders regardless of the date of conviction. [Section 3051, subdivision \(b\)](#) makes eligible all persons “convicted of a [**1062] controlling offense that was committed before the person had attained 23 years of age.” In addition, [section 3051, subdivision \(j\)](#) says: [HN12](#) [↑] “The board shall complete all youth offender parole hearings for individuals who became entitled to have their parole suitability considered at a youth offender parole hearing prior to the effective date of [this section] by July [****25] 1, 2015.” This provision would be meaningless if the statute did not apply to juvenile offenders already sentenced at the time of enactment.

[HN13](#) [↑] [CA\(11\)](#) [↑] (11) The Legislature did not envision that the original sentences of eligible youth offenders would be vacated and that new sentences would be imposed to reflect parole eligibility during the 15th, 20th, or 25th year of incarceration. The continued operation of the original sentence is evident from the fact that an inmate remains bound by that sentence, with no eligibility for a youth offender parole hearing, if “subsequent to attaining 23 years of age” the inmate “commits an additional crime for which malice aforethought is a necessary element ... or for which the individual is sentenced to life in prison.” ([§ 3051, subd. \(h\)](#); Stats. 2015, ch. 471.) But [section 3051](#) has changed the manner in which the juvenile offender's original sentence operates by capping the number of years that he or she may be imprisoned before becoming eligible for release on parole. The Legislature [*279] has effected this change by operation of law, with no additional resentencing procedure required. (Cf. [State v. Mares \(2014\) 2014 WY 126 \[335 P.3d 487, 498\]](#) [holding that a similar statute had “converted” juvenile offenders’ sentences “by the operation of the [****26] amended statutes” regardless of when those juveniles were originally sentenced, and that no judicial intervention was required to effectuate their new parole eligibility].)

In this case, the trial court sentenced Franklin to a mandatory term of 25 years to life under [section 190](#) for first degree murder and to a consecutive mandatory term of 25 years to life under [section 12022.53](#) [***507] on the firearm enhancement. Either the homicide offense or the firearm enhancement could be considered the “controlling offense” under [section 3051, subdivision \(a\)\(2\)\(B\)](#). Regardless of which is considered controlling, Franklin is a “person who was convicted of a controlling offense that was committed before the

person had attained 23 years of age and for which the sentence is a life term of 25 years to life.” ([§ 3051, subd. \(b\)\(3\)](#).) As such, Franklin “shall be eligible for release on parole by the board during his ... 25th year of incarceration at a youth offender parole hearing.” (*Ibid.*)

Franklin does not argue that a life sentence with parole eligibility during his 25th year of incarceration, when he will be 41 years old, is the functional equivalent of LWOP. We conclude that such a sentence is not the functional equivalent of LWOP, and we are not aware of any court that has so held. [****27] Instead, Franklin urges us to conclude that his 50-year-to-life sentence is the functional equivalent of LWOP and, in light of that conclusion, to “construe [[section 12022.53, subdivision \(h\)](#)’s] prohibition on striking [section 12022.53](#) enhancements as inapplicable to cases involving juvenile offenders, in which imposition of the enhancement would result in a functional life without parole sentence.” He seeks relief in the form of resentencing whereby the trial court would strike the firearm enhancement and impose only a single term of 25 years to life for the first degree murder. But we see no basis for rewriting [section 12022.53, subdivision \(h\)](#)’s prohibition on striking firearm allegations in light of the Legislature's determination that inmates such as Franklin, despite the mandatory character of their original sentences, are now entitled to a youth offender parole hearing during their 25th year of incarceration. Even if [section 12022.53, subdivision \(h\)](#) could be construed to authorize the trial court to strike the firearm enhancement, it is not clear how the imposition of a single term of 25 years to life for first degree murder would put Franklin in a better or different position, from the standpoint of *Miller*'s concerns, than [section 3051](#)'s requirement of a youth offender parole hearing during his 25th [****28] year of incarceration.

[CA\(12\)](#) [↑] (12) In sum, the combined operation of [section 3051](#), [section 3046, subdivision \(c\)](#), and [section 4801](#) means that Franklin is now serving a life [*280] sentence that includes a meaningful opportunity for release during his 25th year of incarceration. Such a sentence is neither LWOP nor its functional equivalent. Because Franklin is not serving an LWOP sentence or its functional equivalent, no *Miller* claim arises here. The Legislature's enactment of Senate Bill No. 260 has rendered moot Franklin's challenge to his original sentence under *Miller*.

[HN14](#) [↑] [CA\(13\)](#) [↑] (13) Our mootness holding is limited to circumstances where, as here, [section 3051](#) entitles an inmate to a youth offender parole hearing

against the backdrop of an otherwise lengthy mandatory sentence. We express no view on *Miller* claims by juvenile offenders who are ineligible for such a hearing under [section 3051, subdivision \(h\)](#), or who are serving lengthy sentences imposed under discretionary rather than mandatory sentencing statutes.

V.

[CA\(14\)](#) [↑](#) (14) Franklin and amicus curiae Post-Conviction Justice Project of the University of Southern California Gould School of Law (PCJP) advance a number of arguments against the conclusion that his *Miller* claim is moot. In addition, Franklin has requested that we take judicial notice of four amicus curiae [****29] briefs filed in *In re Alariste*, review granted February 19, 2014, S214652, and *In re Bonilla*, review granted February 19, 2014, S214960. [****508] [HN15](#) [↑](#) “A court may take judicial notice of the existence of each document in a court file, but can only take judicial notice of the truth of facts asserted in documents such as orders, findings of fact and conclusions of law, and judgments.” (*Day v. Sharp* (1975) 50 Cal. App. 3d 904, 914 [123 Cal. Rptr. 918], italics omitted; see *Evid. Code, § 452, subd. (d)* [“Records of ... any court of this state” are among the matters that may be judicially noticed].) Because Franklin does not argue that the existence (as opposed to the content) of these briefs is relevant here, we deny his request for judicial notice.

A.

Franklin relies on our reasoning in *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1386–1387 [171 Cal. Rptr. 3d 421, 324 P.3d 245] (*Gutierrez*), that the availability of a procedure under *section 1170, subdivision (d)(2)* to petition for recall an LWOP sentence after a [**1063] juvenile offender has served 15 years in prison does not remedy the constitutional difficulty under *Miller* of applying a presumption in favor of LWOP under *section 190.5, subdivision (b)* in cases of special circumstance murder. In *Gutierrez*, the Attorney General argued that *section 1170, subdivision (d)(2)* “eliminate[d] any constitutional problems” arising from an otherwise unconstitutional LWOP sentence because the possibility of recall and resentencing converted the juvenile’s sentence [****30] to a [*281] term other than LWOP. (*Gutierrez, supra, 58 Cal.4th at p. 1384.*) We rejected this contention and held that “*Graham* spoke of providing juvenile offenders with a ‘meaningful

opportunity to obtain release’ as a constitutionally required alternative to—not as an after-the-fact corrective for—‘making the judgment at the outset that those offenders never will be fit to reenter society.’” (*Gutierrez, supra, 58 Cal.4th at p. 1386*, quoting *Graham, supra, 560 U.S. at p. 75.*) According to Franklin, *section 3051*, like *section 1170, subdivision (d)(2)*, does not satisfy the mandate of *Miller* because it permits a trial court to abdicate its responsibility to ensure that a juvenile offender’s sentence comports with the *Eighth Amendment* “at the outset.” (*Gutierrez, supra, 58 Cal.4th at p. 1386*, quoting *Graham, supra, 560 U.S. at p. 75.*)

But this argument misses a crucial difference between *section 3051* and *section 1170, subdivision (d)(2)*. *Section 1170, subdivision (d)(2)(A)(i)* provides that a juvenile offender sentenced to LWOP may, after serving at least 15 years of that sentence, “submit to the sentencing court a petition for recall and resentencing.” If the sentencing court determines “by a preponderance of the evidence that the statements in the petition are true,” the court “shall hold a hearing to consider whether to recall the sentence ... and to resentence the defendant” to a term not exceeding that of the defendant’s original sentence. (§ 1170, *subd. (d)(2)(E).*) In deciding whether to recall the sentence and resentence [****31] the defendant, the statute instructs the court to consider a variety of factors addressing his culpability for the original offense and efforts toward rehabilitation. (§ 1170, *subd. (d)(2)(F).*) If the court does not recall the sentence, the defendant may petition again after serving 20 years and, if unsuccessful, again after serving 24 years. (§ 1170, *subd. (d)(2)(H).*)

[HN16](#) [↑](#) [CA\(15\)](#) [↑](#) (15) *Section 3051*, by contrast, effectively reforms the parole eligibility date of a juvenile offender’s original sentence so that the longest possible term of incarceration before parole eligibility is 25 years. *Section 1170, subdivision (d)(2)* [****509] has no similar effect on a juvenile offender’s LWOP sentence; it provides that a juvenile offender may, after serving 15 years of an LWOP sentence, petition a court for recall of the original sentence. In *Gutierrez*, the trial court had imposed an LWOP sentence without considering youth-based mitigating factors in the manner required by *Miller*; *Gutierrez* was sentenced under a scheme that presumed his incorrigibility “at the outset,” and the resulting sentence would remain in effect unless and until he filed a successful petition for recall. (*Gutierrez, supra, 58 Cal.4th at pp. 1386–1387*; see *id. at p. 1386* [“A sentence of life without parole under *section 190.5(b)* remains *fully effective* after the enactment of

section 1170(d)(2).”) Franklin is not subject [****32] to a sentence that presumes his incorrigibility; by operation of law, he is entitled to a parole hearing and possible release after 25 years of incarceration. Unlike Gutierrez, Franklin is [*282] not serving an LWOP sentence or its functional equivalent, so the constitutional requirements for properly evaluating a juvenile offender’s incorrigibility “at the outset” do not apply here. (*Ibid.*)

B.

[CA\(16\)](#)[↑] (16) Franklin contends that because “the youthful parole hearing system is completely administrative,” it cannot fulfill *Miller*’s mandate that a judge consider the relevance of his youth for sentencing. But the relief Franklin himself seeks—a remand for resentencing to a single term of 25 years to life on the murder charge—would still mean that his ultimate release date will be determined by [**1064] an administrative decision maker. [HN17](#)[↑] *Miller* did not restrict the ability of states to impose life *with* parole sentences on juvenile offenders; such sentences necessarily contemplate that a parole authority will decide whether a juvenile offender is suitable for release.

C.

Although nothing in *Miller* prohibits reliance on an administrative hearing to determine Franklin’s ultimate release date, Franklin contends that [****33] the statutory scheme does not set forth adequate procedures to ensure a “meaningful opportunity for release” (§ 3051, *subd.* (e)) and that his sentence, even with parole eligibility during his 25th year of incarceration, thus remains the functional equivalent of a mandatory LWOP sentence imposed in violation of *Miller*. Senate Bill No. 260 directs the administrative entity that will determine if and when Franklin is released to “give great weight” (§ 4801, *subd.* (c)) to the salient characteristics of youth outlined in *Miller*, *Graham*, and *Caballero*. Franklin argues that the Board will not be able to give great weight to these characteristics at a youth offender parole hearing because “there would be no reliable way to measure his cognitive abilities, maturity, and other youth factors when the offense was committed 25 years prior.”

Franklin notes that his own sentencing proceeding resulted in a record that may be incomplete or missing mitigation information because the trial court deemed

such information irrelevant to its pronouncement of his mandatory sentence. Franklin was sentenced in 2011, before the high court’s decision in *Miller* and before our Legislature’s enactment of Senate Bill No. 260 in response to *Miller*, [****34] *Graham*, and *Caballero*. When Franklin’s attorney did not receive a probation report until the morning of sentencing, the trial court acknowledged that this delay would ordinarily merit a continuance. But the court, recognizing that it lacked discretion in sentencing Franklin, proceeded with sentencing [***510] and allowed the defense to submit mitigation information at a later date. At the postsentencing hearing where these materials were submitted, Franklin’s attorney raised concerns about the record at his eventual [*283] parole hearing. In response, the trial court said, “it sort of doesn’t matter because the statute mandates the sentence here. So there’s no basis and occasion for any findings to be made on aggravation and mitigation at all.” The court eventually admitted a mitigating statement submitted by Franklin and a handwritten note from his mother. But the court expressed “misgiving” that because of the mandatory sentences, “[a]t no point in the process is anyone, other than the district attorney’s office, ever able to really consider that this is a juvenile.”

[HN18](#)[↑] [CA\(17\)](#)[↑] (17) The Legislature has declared that “[t]he youth offender parole hearing to consider release shall provide for a meaningful opportunity to obtain [****35] release” (§ 3051, *subd.* (e)) and that in order to provide such a meaningful opportunity, the Board “shall give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity” (§ 4801, *subd.* (c)). These statutory provisions echo language in constitutional decisions of the high court and this court. (See *Miller*, *supra*, 567 U.S. at p. 477 [132 S.Ct. at p. 2468] [“chronological age and its hallmark features”]; *Graham*, *supra*, 560 U.S. at p. 75 [“meaningful opportunity to obtain release”]; *Roper*, *supra*, 543 U.S. at p. 571 [“diminished culpability of juveniles”]; accord, *Caballero*, *supra*, 55 Cal.4th at p. 268, *fn.* 4.) The core recognition underlying this body of case law is that children are, as a class, “constitutionally different from adults” due to “distinctive attributes of youth” that “diminish the penological justifications for imposing the harshest sentences on juvenile offenders.” (*Miller*, at p. 472 [132 S.Ct. at p. 2458].) Among these “hallmark features” of youth are “immaturity, impetuosity, and failure to appreciate risks and consequences,” as well as the capacity for growth and change. (*Id.* at p. 477 [132 S.Ct. at p. 2468].) It is because of these “marked and well

understood” differences between children and adults (*Roper, at p. 572*) that the law categorically prohibits the imposition of certain penalties, including mandatory LWOP, on juvenile offenders (*Montgomery v. Louisiana (2016) 577 U.S. _____, _____ [193 L. Ed. 2d 599, 136 S. Ct. 718, 732–737]*). [**1065]

CA(18)[↑] (18) In [****36] directing the Board to “give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner” (§ 4801, *subd. (c)*), **HN19[↑]** the statutes also contemplate that information regarding the juvenile offender's characteristics and circumstances at the time of the offense will be available at a youth offender parole hearing to facilitate the Board's consideration. For example, *section 3051, subdivision (f)(2)* provides that “[f]amily members, friends, school personnel, faith leaders, and representatives from community-based organizations with knowledge about the individual before the crime ... may submit statements for review by the board.” Assembling such statements “about the individual before the crime” is typically a task more easily done at or near the time of the juvenile's offense [**284] rather than decades later when memories have faded, records may have been lost or destroyed, or family or community members may have relocated or passed away. (*Ibid.*) In addition, *section 3051, subdivision (f)(1)* provides that any “psychological evaluations and risk assessment instruments” used by the Board in assessing growth and [***511] maturity “shall take into consideration ... any subsequent growth [****37] and increased maturity of the individual.” Consideration of “subsequent growth and increased maturity” implies the availability of information about the offender when he was a juvenile. (*Ibid.*)

It is not clear whether Franklin had sufficient opportunity to put on the record the kinds of information that *sections 3051* and *4801* deem relevant at a youth offender parole hearing. Thus, although Franklin need not be resentenced—as explained (*ante*, at pp. 277–281), Franklin's two consecutive 25-year-to-life sentences remain valid, even though *section 3051, subdivision (b)(3)* has altered his parole eligibility date by operation of law—we remand the matter to the trial court for a determination of whether Franklin was afforded sufficient opportunity to make a record of information relevant to his eventual youth offender parole hearing.

CA(19)[↑] (19) If the trial court determines that Franklin did not have sufficient opportunity, then the court may

receive submissions and, if appropriate, testimony pursuant to procedures set forth in *section 1204* and *rule 4.437 of the California Rules of Court*, and subject to the rules of evidence. Franklin may place on the record any documents, evaluations, or testimony (subject to cross-examination) that may be relevant at his eventual youth offender parole hearing, and the prosecution [****38] likewise may put on the record any evidence that demonstrates the juvenile offender's culpability or cognitive maturity, or otherwise bears on the influence of youth-related factors. **HN20[↑]** The goal of any such proceeding is to provide an opportunity for the parties to make an accurate record of the juvenile offender's characteristics and circumstances at the time of the offense so that the Board, years later, may properly discharge its obligation to “give great weight to” youth-related factors (§ 4801, *subd. (c)*) in determining whether the offender is “fit to rejoin society” despite having committed a serious crime “while he was a child in the eyes of the law” (*Graham, supra, 560 U.S. at p. 79*).

D.

Finally, amicus curiae PCJP contends that despite the announced purpose of Senate Bill No. 260, youth offender parole hearings will not, in practice, “afford the juvenile offender a ‘meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation’” (*Caballero, supra, 55 Cal.4th at p. 266*, quoting *Graham, supra, 560 U.S. at p. 73*) and therefore cannot render moot a *Miller* challenge to a lengthy mandatory sentence that is [**285] functionally equivalent to LWOP. PCJP's argument subsumes several concerns distinct from those we have considered above.

First, although the Governor, like the Board, is [****39] required to “give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance [**1066] with relevant case law” (§ 4801, *subd. (c)*; see *Cal. Const., art. V, § 8*; *Pen. Code, § 3041.2*; *In re Rosenkrantz (2002) 29 Cal.4th 616, 664 [128 Cal. Rptr. 2d 104, 59 P.3d 174]*), PCJP notes that the Governor, in reviewing Board decisions that find persons serving an indeterminate term for murder suitable for parole, has historically reversed such decisions at a very high rate. Second, PCJP observes that judicial review of parole denials is “highly deferential” and limited to determining “whether a modicum of evidence supports the parole

suitability decision.” (*In re Shaputis* (2011) 53 Cal.4th 192, 221 [***512] [134 Cal. Rptr. 3d 86, 265 P.3d 253].) Third, PCJP contends that some of the suitability criteria used by the Board run counter to the high court’s observations concerning the mitigating attributes of youth. For example, a finding that “[t]he motive for the crime is inexplicable or very trivial in relation to the offense” is a factor tending to show unsuitability (*Cal. Code Regs., tit. 15, § 2281, subd. (c)(1)(E)*), even though “such a motive correlates with hallmark features of youth like ‘impetuosity, and failure to appreciate risks and consequences.’” An unstable social history also counts against suitability (*id., subd. (c)(3)*), even though youth [****40] “are more vulnerable ... to negative influences and outside pressures ... [,] have limited control over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings’ (*Miller, supra, at p. 471* [132 S.Ct. at p. 2464].” Fourth, PCJP argues that developing a record of mitigation focused on youth-related attributes for the purpose of a youth offender parole hearing is “unachievable in practice” given resource constraints. And fifth, PCJP contends that juvenile offenders serving lengthy sentences have little access to education and rehabilitative programs that may serve to forestall “the perverse consequence in which the lack of maturity that led to an offender’s crime is reinforced by the prison term.” (*Graham, supra, 560 U.S. at p. 79.*)

We have no occasion in this case to express any view on the concerns raised by PCJP. As noted, the Legislature enacted Senate Bill No. 260 with “the intent ... to create a process by which growth and maturity of youthful offenders can be assessed and a meaningful opportunity for release established.” (Stats. 2013, ch. 312, § 1.) *Section 4801, subdivision (c)* directs that the Board, in conducting a youth offender parole hearing, “shall give great weight to the diminished culpability of juveniles as compared [****41] to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law.” And *section 3051, subdivision (e)* says: *HN21* [↑] “The youth offender parole hearing to consider release [*286] shall provide for a meaningful opportunity to obtain release. The board shall review and, as necessary, revise existing regulations and adopt new regulations regarding determinations of suitability made pursuant to this section, *subdivision (c) of Section 4801*, and other related topics, consistent with relevant case law, in order to provide that meaningful opportunity for release.”

As of this writing, the Board has yet to revise existing

regulations or adopt new regulations applicable to youth offender parole hearings. In advance of regulatory action by the Board, and in the absence of any concrete controversy in this case concerning suitability criteria or their application by the Board or the Governor, it would be premature for this court to opine on whether and, if so, how existing suitability criteria, parole hearing procedures, or other practices must be revised to conform to the dictates of applicable statutory and constitutional law. So long as juvenile offenders have an adequate opportunity to make [****42] a record of factors, including youth-related factors, relevant to the eventual parole determination, we cannot say at this point that the broad directives set forth by Senate Bill No. 260 are inadequate to ensure that juvenile offenders have a realistic and meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.

CONCLUSION

The high court has made clear that “imposition of a State’s most severe penalties on juvenile offenders cannot proceed as [***513] though they were not children.” (*Miller, supra, 567 U.S. at p. 474* [132 S.Ct. at p. 2466].) “It is [**1067] for the State, in the first instance, to explore the means and mechanisms for compliance” with this directive. (*Graham, supra, 560 U.S. at p. 75.*) The Legislature has devised such a means by enacting *section 3051* and related statutes in Senate Bill No. 260. Those statutes have effectively reformed Franklin’s statutorily mandated sentence so that he will become eligible for parole, at a hearing that must give great weight to youth-related mitigating factors, during his 25th year of incarceration. By operation of law, Franklin’s sentence is not functionally equivalent to LWOP, and the record here does not include evidence that the Legislature’s mandate that youth offender parole hearings must provide [****43] for a meaningful opportunity to obtain release is unachievable in practice. We thus conclude that Franklin’s *Eighth Amendment* challenge to his original sentence has been rendered moot.

For the reasons above, we affirm Franklin’s sentence but remand the matter to the Court of Appeal with instructions to remand to the trial court for the limited purpose of determining whether Franklin was afforded an adequate [*287] opportunity to make a record of information that will be relevant to the Board as it fulfills its statutory obligations under *sections 3051* and *4801*.

Cantil-Sakauye, C. J., Chin, J., Corrigan, J., Cuéllar, J., and Kruger, J., concurred.

Concur by: Werdegar (In Part) Werdegar (In Part)

Dissent

WERDEGAR, J., Concurring and Dissenting.—Defendant Tyris Lamar Franklin was sentenced to prison for a term of 50 years to life for his conviction of first degree murder using a firearm (*Pen. Code, §§ 187, 12022.53*),¹ committed when he was 16 years old. I agree with the majority that the question whether his sentence may be considered the equivalent of life in prison with no possibility of parole (LWOP), and thus subject to *United States Constitution Eighth Amendment* limits (*Miller v. Alabama (2012) 567 U.S. 460 [183 L. Ed. 2d 407, 132 S. Ct. 2455]* (*Miller*)), is moot following the Legislature's passage of legislation giving defendant the opportunity for a youth offender parole hearing after 25 years of incarceration. [****44]

I part company with the majority over its further conclusion that we must remand the case “for a determination of whether Franklin was afforded sufficient opportunity to make a record of information relevant to his eventual youth offender parole hearing.” (Maj. opn., *ante*, at p. 284.) Notably, the majority does not claim a remand for what might be termed a “baseline hearing” is constitutionally mandated by *Miller, supra, 567 U.S. 460 [183 L. Ed. 2d 407, 132 S. Ct. 2455]*. Rather, the premise of the majority's remand for a baseline hearing is statutory. No statute, of course, specifically authorizes such hearings. The majority, however, reasons that because the statutory scheme directs the Board of Parole Hearings (Board) to give “great weight to ... any subsequent growth and increased maturity of the prisoner” (*§ 4801, subd. (c)*), the statutes “contemplate ... information regarding the juvenile offender's characteristics and circumstances at the time of the offense will be available” (maj. opn., *ante*, at p. 283).

The Legislature's charge to the Board at future youth offender parole hearings is to give the individual “a meaningful opportunity [***514] to obtain release.” (*§ 3051, subd. (e)*.) To this end, the Board “shall give great weight [****45] to the diminished culpability of juveniles as compared to adults, the hallmark features of youth,

and any subsequent growth and increased maturity of the prisoner *in accordance with relevant case law.*” (*§ 4801, subd. (c)*, italics added.) Family members and others “with knowledge about the individual before the crime or his or her growth and maturity since the time of the crime may submit statements for review by the board.” (*§ 3051, subd. (f)(2)*.) But to “contemplate” that such information may be taken into consideration is not to [***288] *mandate* procedures to enable the offender at the time of sentence or, for those sentenced before enactment of the statute, years after judgment is final, to make a record of such information, including live testimony and the opportunity for cross-examination, in effect a [***1068] new sentence hearing. No “relevant case law” (*§ 3051, subd. (e); § 4801, subd. (c)*) so requires. Indeed, what case law establishes is that youth and immaturity differentiate juvenile offenders from adults and must be taken into account in connection with sentencing; youthful offenders should not be viewed as incorrigible, but subject to growth and maturity. (*Miller, supra, 567 U.S. at pp. 472–473 [183 L. Ed. 2d at pp. 419, 420, 132 S.Ct. at p. 2465]* [a finding of incorrigibility is “inconsistent with youth” and “at odds with a child's capacity for change”]; [****46] *Graham v. Florida (2010) 560 U.S. 48, 74 [176 L. Ed. 2d 825, 130 S. Ct. 2011]* [LWOP is incompatible with juvenile offender's “capacity for change”].) Statutory authorization for the Board, in its discretion, to use “psychological evaluations and risk assessment instruments” administered by licensed psychologists (*§ 3051, subd. (f)(1)*) supports the conclusion the Legislature intended the Board's focus to be on the prisoner's current circumstances, his or her maturity and efforts at rehabilitation, irrespective of the particular factors that may have influenced him or her at the time of the offense. Such assessments and evaluations are viewed as informative of themselves without regard to any baseline of the individual offender.

In sum, I am unpersuaded a youthful offender will be deprived of a “meaningful opportunity to obtain release” (*§ 3051, subd. (e)*), or that the Board will be unable to fairly consider a youthful offender's diminished culpability, later growth, or increased maturity (*§ 4801, subd. (c)*), unless we impose on the trial courts a new, judicially created, extrastatutory procedure entitling such offenders to a type of penalty phase trial, replete with opposing experts and family members and friends, subject to cross-examination, testifying to the offender's youthful immaturity. The statutory scheme, [****47] in my view, does not bear the weight of the majority's conclusion that such a hearing is required to effectuate its purpose of affording a youthful offender a meaningful

¹ All further statutory references are to the Penal Code.

opportunity to obtain release. Rather, in borrowing the “diminished culpability” of juveniles and the “hallmark features” of youth language from *Miller, supra, 567 U.S. at pages 471 and 477 [183 L.Ed.2d at pp. 418 & 423, 132 S.Ct. at pp. 2464 & 2468]*, and inserting it in *section 4801, subdivision (c)*, the Legislature signaled its agreement with the United States Supreme Court that those factors are inherent in juveniles and are generally deemed to mitigate the culpability of a juvenile who has committed a severe crime. The focus of the statutory scheme is the psychological growth and “increased maturity” of the youthful offender (*§ 4801, subd. (c)*), now an adult, as manifested by his or her behavior and efforts to rehabilitate himself or herself during his incarceration, as against his or **[***515]** her presumed immaturity at the time of the offense.

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Had the Legislature intended—or “contemplated,” as the majority fashions it—that a youthful offender at the time of his or her sentencing (or thereafter if sentence was imposed before enactment of the statute) would have the opportunity to make a record of his or her character and the influences and circumstances of **[****48]** the offense in order to provide a meaningful opportunity for future parole, it surely would have said so. Instead, it provided the offender the opportunity at the time of the hearing to submit, in the form of “statements” (*§ 3051, subd. (f)(2)*), such information as may be available, and provided the Board the option to consider the results of psychological testing (*id., subd. (f)(1)*). Absent more specific legislative authorization, I disagree with my colleagues that, in order to effectuate the Legislature’s purpose,² we must now remand the case to permit the trial court to determine whether **[**1069]** defendant “was afforded an adequate opportunity to make a record of information that will be relevant [in a future parole

²The preface to the relevant legislation declared in pertinent part: “The purpose of this act is to establish a parole eligibility mechanism that provides a person serving a sentence for crimes that he or she committed as a juvenile the opportunity to obtain release when he or she has shown that he or she has been rehabilitated and gained maturity, in accordance with the decision of the California Supreme Court in *People v. Caballero* (2012) 55 Cal.4th 262 [145 Cal. Rptr. 3d 286, 282 P.3d 291] and the decisions of the United States Supreme Court in *Graham v. Florida*, *supra*,] 560 U.S. 48, and *Miller v. Alabama*, *supra*, 567 U.S. 460,] [183 L. Ed. 2d 407, 132 S. Ct. 2455].” (Stats. 2013, ch. 312, § 1.) Further: “It is **[****49]** the intent of the Legislature to create a process by which growth and maturity of youthful offenders can be assessed and a meaningful opportunity for release established.” (*Ibid.*)

hearing].” (Maj. opn., *ante*, at pp. 286–287.)

Unless we find the Legislature’s statutory response to *Miller, supra, 567 U.S. 460 [183 L. Ed. 2d 407, 132 S. Ct. 2455]* failed to cure the potential *Eighth Amendment* problem associated with imposing an LWOP term (or its equivalent) on a juvenile offender, or that the current scheme would be absurd without providing youthful offenders with a baseline hearing (*Ennabe v. Manosa* (2014) 58 Cal.4th 697, 721 [168 Cal. Rptr. 3d 440, 319 P.3d 201] [courts will not give statutes a literal meaning if doing so leads to absurd consequences]), we should not rewrite the statute to provide for such hearings. “[A]s this court has often recognized, the judicial role in a democratic society is fundamentally to interpret laws, not to write them. The latter power belongs primarily to the people and the political branches of government” [Citation.] It cannot be too often repeated that due respect for the political branches of our government requires us to interpret the laws in accordance with the expressed intention of the Legislature. “This court has no power to rewrite the statute so as to make it conform to a presumed intention which is not expressed.” (*California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 633 [59 Cal. Rptr. 2d 671, 927 P.2d 1175].)

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I have no doubt that **[****50]** affording youthful life prisoners the opportunity for a baseline hearing could well inure to their benefit in any future parole hearing. For that reason, we may now anticipate petitions for such hearings will be filed in numerous courts throughout California as juvenile life prisoners (and those youthful offenders who have been sentenced to the equivalent of LWOP) seek to take advantage of this court’s ruling. Indeed, holding periodic update hearings to evaluate a youthful offender’s **[***516]** progress towards parole suitability would also be beneficial. So, too, might it be for adult offenders. But this court is not authorized to create and require such procedures simply because they might be a good idea.

In short, judicial restraint counsels that we hesitate to create on our own initiative new procedural rules neither constitutionally nor legislatively required in the guise of implementing an unexpressed legislative intent. The Legislature is in the best position, as the Board begins to discharge its responsibilities under the new youth offender parole hearing statutes, to consider and implement any new evidentiary procedures that experience may suggest would be necessary or desirable.

Because [****51] I believe a failure to remand and give defendant the opportunity to present evidence in a baseline hearing would not render his sentence unconstitutional under [Miller, supra, 567 U.S. 460 \[183 L. Ed. 2d 407, 132 S. Ct. 2455\]](#) or the *Eighth Amendment*, and because I see no evidence in the statutory scheme the Legislature intended to create such procedures, I respectfully dissent from that part of the majority's decision remanding the case for a baseline hearing. The Legislature, of course, remains free to amend the pertinent statutes to specifically authorize such hearings.

End of Document

People v. Perez

Court of Appeal of California, Fourth Appellate District, Division Three

August 1, 2016, Opinion Filed

G050927

Reporter

3 Cal. App. 5th 612 *; 208 Cal. Rptr. 3d 34 **; 2016 Cal. App. LEXIS 787 ***

THE PEOPLE, Plaintiff and Respondent, v. JOSHUA PEREZ, Defendant and Appellant.

Subsequent History: [***1] The Publication Status of this Document has been Changed by the Court from Unpublished to Published September 22, 2016.

Modified and rehearing denied by [People v. Perez, 2016 Cal. App. Unpub. LEXIS 6476 \(Cal. App. 4th Dist., Aug. 30, 2016\)](#)

Prior History: Appeal from a judgment of the Superior Court of Orange County, No. 12WF0669, John Conley, Judge.

[People v. Perez, 2016 Cal. App. Unpub. LEXIS 5765 \(Cal. App. 4th Dist., Aug. 1, 2016\)](#)

Disposition: Affirmed and remanded with directions.

Core Terms

sentence, juvenile, counts, parole hearing, juvenile offender, youth offender, years to life, offender's, trial court, parole, cruel and unusual punishment, firearm enhancement, years old

Case Summary

Overview

HOLDINGS: [1]-In a case in which a jury convicted defendant of three counts of attempted premeditated murder, one count of discharging a firearm with gross negligence, and one count of vandalism, the appellate court concluded that defendant's 86-years-to-life sentence for crimes defendant committed when he was 20 years old did not constitute cruel and unusual punishment because he was not a juvenile at the time of

the offenses; [2]-That did not end the inquiry, however, as the legislature amended [Pen. Code, § 3051](#), to provide that anyone who committed his or her controlling offense before reaching 23 years of age is entitled to a youth offender parole hearing; [3]-The record established defendant did not have a sufficient opportunity to put on the record the kinds of information that [Pen. Code, §§ 3051 & 4801](#), deem relevant at a youth offender parole hearing.

Outcome

Judgment affirmed; limited remand ordered.

LexisNexis® Headnotes

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

Criminal Law & Procedure > Sentencing > Proportionality

[HN1](#) [↓] **Fundamental Rights, Cruel & Unusual Punishment**

Absent gross disproportionality in the defendant's sentence, no Eighth Amendment violation will be found. Similarly, a sentence will not be found unconstitutional under the California Constitution unless it is so disproportionate to the defendant's crime and circumstances that it shocks the conscience or offends traditional notions of human dignity.

Constitutional Law > Bill of Rights > Fundamental

Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Juvenile
Offenders > Sentencing > Capital Punishment

Criminal Law & Procedure > Sentencing > Capital
Punishment > Cruel & Unusual Punishment

Criminal Law & Procedure > Sentencing > Cruel &
Unusual Punishment

[HN2](#) **Fundamental Rights, Cruel & Unusual Punishment**

The imposition of capital punishment on juvenile offenders for any offense whatsoever violates the Eighth Amendment.

Constitutional Law > Bill of Rights > Fundamental
Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Juvenile
Offenders > Sentencing > Age & Term Limits

Criminal Law & Procedure > Sentencing > Cruel &
Unusual Punishment

Criminal Law & Procedure > Postconviction
Proceedings > Parole

[HN3](#) **Fundamental Rights, Cruel & Unusual Punishment**

The Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders, although a trial court could in its discretion impose such a sentence after considering how children are different and how the differences weigh against a life sentence.

Constitutional Law > Bill of Rights > Fundamental
Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Juvenile
Offenders > Sentencing > Age & Term Limits

Criminal Law & Procedure > Sentencing > Cruel &
Unusual Punishment

Criminal Law & Procedure > Postconviction
Proceedings > Parole

[HN4](#) **Fundamental Rights, Cruel & Unusual Punishment**

Sentencing a juvenile offender for a nonhomicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender's natural life expectancy constitutes cruel and unusual punishment in violation of the Eighth Amendment.

Constitutional Law > Bill of Rights > Fundamental
Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Juvenile
Offenders > Sentencing > Age & Term Limits

Governments > Courts > Judicial Precedent

Criminal Law & Procedure > Sentencing > Cruel &
Unusual Punishment

[HN5](#) **Fundamental Rights, Cruel & Unusual Punishment**

The U.S. Supreme Court and the California Supreme Court have concluded that 18 years old is the bright line rule regarding sentencing of juvenile offenders, and the California Courts of Appeal are bound by their holdings.

Criminal Law & Procedure > Juvenile
Offenders > Sentencing > Age & Term Limits

Criminal Law & Procedure > Postconviction
Proceedings > Parole

[HN6](#) **Sentencing, Age & Term Limits**

[Pen. Code, § 3051, subd. \(b\)](#), requires the Board of Parole Hearings to conduct a youth offender parole hearing during the 15th, 20th, or 25th year of a juvenile offender's incarceration depending on the controlling offense. A juvenile offender whose controlling offense carries a term of 25 years to life or greater is eligible for release on parole by the board during his or her 25th year of incarceration at a youth offender parole hearing, unless previously released or entitled to an earlier parole consideration hearing pursuant to other statutory provisions. [§ 3051, subd. \(b\)\(3\)](#). [Section 3051, subd. \(h\)](#), excludes several categories of juvenile offenders. In October 2015, the California Legislature amended [§ 3051](#), and effective January 1, 2016, anyone who

committed his or her controlling offense before reaching 23 years of age is entitled to a youth offender parole hearing. [§ 3051, subd. \(a\)\(1\)](#).

under the California Constitution unless it is so disproportionate to the defendant's crime and circumstances that it shocks the conscience or offends traditional notions of human dignity.

Headnotes/Syllabus

Summary

[*612] CALIFORNIA OFFICIAL REPORTS SUMMARY

A jury convicted defendant of three counts of attempted premeditated murder, one count of discharging a firearm with gross negligence, and one count of vandalism. The jury found true premeditation and firearm enhancements. The trial court sentenced defendant to a determinate term of 40 years in prison and an indeterminate term of 46 years to life in prison. (Superior Court of Orange County, No. 12WF0669, John Conley, Judge.)

The Court of Appeal affirmed the judgment, but ordered a remand for the limited purpose of affording both parties the opportunity to make an accurate record of defendant's characteristics and circumstances at the time of the offense. The court concluded that defendant's 86-year-to-life sentence for crimes defendant committed when he was 20 years old did not constitute cruel and unusual punishment because he was not a juvenile at the time of the offenses. That did not end the inquiry, however, as the Legislature amended [Pen. Code, § 3051](#), to provide that anyone who committed his or her controlling offense before reaching 23 years of age is entitled to a youth offender parole hearing. The record established defendant did not have a sufficient opportunity to put on the record the kinds of information that [Pen. Code, §§ 3051 & 4801](#), deem relevant at a youth offender parole hearing. (Opinion by O'Leary, P. J., with Moore and Fybel, JJ., concurring.)

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

[CA\(1\)](#) (1)

Criminal Law § 518—Punishment—Cruel and Unusual—Disproportionality.

Absent gross disproportionality in the defendant's sentence, no *Eighth Amendment* violation will be found. Similarly, a sentence will not be found unconstitutional

[CA\(2\)](#) (2)

Criminal Law § 519—Punishment—Cruel and Unusual—Death Penalty—Juvenile Offenders.

The imposition of capital punishment on juvenile offenders for any offense whatsoever violates *U.S. Const., 8th Amend.*

[CA\(3\)](#) (3)

Criminal Law § 518—Punishment—Cruel and Unusual—Juvenile Offenders—Parole—Life Sentence.

U.S. Const., 8th Amend., forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders, although a trial court could in its discretion impose such a sentence after considering how children are different and how the differences weigh against a life sentence.

[CA\(4\)](#) (4)

Criminal Law § 518—Punishment—Cruel and Unusual—Juvenile Offenders—Parole—Natural Life Expectancy.

Sentencing a juvenile offender for a nonhomicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender's natural life expectancy constitutes cruel and unusual punishment in violation of *U.S. Const., 8th Amend.*

[CA\(5\)](#) (5)

Criminal Law § 518—Punishment—Cruel and Unusual—Juvenile Offenders—18 Years Old—Bright Line Rule.

The United States Supreme Court and the California Supreme Court have concluded that 18 years old is the bright-line rule regarding sentencing of juvenile offenders, and the California Courts of Appeal are bound by their holdings.

[CA\(6\)](#) (6)

**Criminal Law § 518—Punishment—Cruel and Unusual—
Juvenile Offenders—Youth Offender Parole Hearing—
Under 23 Years of Age.**

Defendant's 86-year-to-life sentence for crimes defendant committed when he was 20 years old did not constitute cruel and unusual punishment. That did not end the inquiry, however, as the Legislature amended [Pen. Code, § 3051](#), to provide that anyone who committed his or her controlling offense before reaching 23 years of age is entitled to a youth offender parole hearing. The record established defendant did not have a sufficient opportunity to put on the record the kinds of information that [Pen. Code, §§ 3051 & 4801](#), deem relevant at a youth offender parole hearing.

[[Erwin et al., Cal. Criminal Defense Practice \(2016\) ch. 120, § 120.01](#); 3 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Punishment, § 511.]

CA(7) (7)

**Penal and Correctional Institutions § 22—Youth
Offender Parole Hearing—Under 23 Years of Age.**

[Pen. Code, § 3051, subd. \(b\)](#), requires the Board of Parole Hearings to conduct a youth offender parole hearing during the 15th, 20th, or 25th year of a juvenile offender's incarceration depending on the controlling offense. A juvenile offender whose controlling offense carries a term of 25 years to life or greater is eligible for release on parole by the board during his or her 25th year of incarceration at a youth offender parole hearing, unless previously released or entitled to an earlier parole consideration hearing pursuant to other statutory provisions ([§ 3051, subd. \(b\)\(3\)](#)). [Section 3051, subd. \(h\)](#), excludes several categories of juvenile offenders. In October 2015, the Legislature amended [§ 3051](#), and effective January 1, 2016, anyone who committed his or her controlling offense before reaching 23 years of age is entitled to a youth offender parole hearing ([§ 3051, subd. \(a\)\(1\)](#)).

Counsel: Christopher Nalls, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Collette Cavalier and Andrew Mestman, Deputy Attorneys General, for Plaintiff and Respondent.

Judges: Opinion by O'Leary, P. J., with Moore and

Fybel, JJ., concurring.

Opinion by: O'Leary, P. J.

Opinion

[35] O'LEARY, P. J.**—Joshua Perez appeals from a judgment after a jury convicted him of three counts of attempted premeditated murder, discharging a firearm with gross negligence, and vandalism and found true firearm enhancements. Perez argues his 86-year-to-life sentence constitutes cruel and unusual punishment. Although we disagree his 86-year-to-life sentence constitutes cruel and unusual punishment, we must remand the matter for further proceedings consistent with this opinion. We affirm the judgment and order a limited remand.

FACTS

One evening, “Mobbing our Professions Crew” (MOPC) gang member Julio Diaz and MOPC associates Gregorio Ariza and Christian Rodriguez were in front of Ariza's apartment. A dark-colored car stopped in front of a **[*615]** nearby home. Two heavysset **[***2]** Hispanics were in the car. Moments later, someone fired several shots at Diaz, Rodriguez, and Ariza. The gunman yelled “EBK” and ran away. MOPC and the “Every Body Killer” (EBK) gang were rival gangs, and they had recent skirmishes. Diaz suffered gunshot wounds to his torso and lower back.

The next day, officers interviewed 20-year-old Perez at the police department. After waiving his rights pursuant to [Miranda v. Arizona \(1966\) 384 U.S. 436 \[16 L.Ed.2d 694, 86 S.Ct. 1602\]](#), Perez admitted he had a “beef” with Diaz and they had fought in the past. Perez initially denied any involvement in the shooting. Perez eventually admitted he “did it,” claiming he did so because Diaz was going to “smoke” him. Perez claimed he “did it all [him]self” because he was “tired of that guy.” Perez admitted he unloaded his weapon, a .45-caliber handgun, at the three victims. He disposed of the gun in the ocean; officers found .45-caliber ammunition in a box in his bedroom. Perez admitted he yelled “EBK” after the shooting.

An amended information charged Perez with three counts of attempted premeditated murder ([Pen. Code, §§ 664, subd. \(a\), 187, subd. \(a\)](#); all further statutory references are to the Penal Code) (counts 1–3), discharging a firearm with gross negligence ([§ 246.3](#),

[subd. \(a\)](#)) (count 4), street terrorism (§ 186.22, [subd. \(a\)](#)) (count 5), vandalism (§ 594, [subds. \(a\)](#) & [***3 \(b\)\(1\)](#)) (count 6), and gang-related vandalism (§§ 186.22, [subd. \(d\)](#), [594, subds. \(a\)](#) & [\(b\)\(1\)](#)) (count 7).¹ The information alleged Perez committed counts 1, 2, 3, 4, and 6 for the benefit of a criminal street gang (§ 186.22, [subd. \(b\)](#)). As to count 1, the information alleged he personally discharged [***36](#) a firearm causing great bodily injury (§ 12022.53, [subd. \(d\)](#)). With respect to counts 2 and 3, the information alleged he personally discharged a firearm (§ 12022.53, [subd. \(c\)](#)).

At trial, Perez testified that on the night of the shooting he drank two 40-ounce beers. Perez got his gun and walked to his friend's house. When Perez saw Diaz, he shot in Diaz's direction to scare him. He did not shoot directly at him and was not trying to kill anyone.

The jury convicted Perez of counts 1, 2, 3, 4, and 6 but acquitted him of counts 5 and 7. The jury found true the premeditation and firearm enhancements. Both the prosecution and Perez's defense counsel filed sentencing briefs; Perez argued, among other things, that although he was not a juvenile, his youth meant the maximum sentence would constitute cruel and unusual punishment.

[\[*616\]](#)

The trial court sentenced Perez to a determinate term of 40 years in prison and an indeterminate term [***4](#) of 46 years to life in prison as follows: count 1—seven years to life plus 25 years to life for the personal use of a firearm enhancement; count 2—seven years to life plus 20 years for the personal use of a firearm enhancement; and count 3—seven years to life plus 20 years for the personal use of a firearm enhancement. The court imposed two-year consecutive sentences on counts 4 and 6.

DISCUSSION

[CA\(1\)](#)[\[↑\]](#) (1) The United States Supreme Court has made it clear that [HN1](#)[\[↑\]](#) absent gross disproportionality in the defendant's sentence, no *Eighth Amendment* violation will be found. (See, e.g., [Ewing v. California \(2003\) 538 U.S. 11 \[155 L.Ed.2d 108, 123 S.Ct. 1179\]](#) [upholding 25-year-to-life sentence for grand theft with priors]; [Lockyer v. Andrade \(2003\) 538 U.S. 63 \[155 L. Ed. 2d 144, 123 S. Ct. 1166\]](#) [upholding 50-year-to-life sentence for petty thefts with priors].) Similarly, a

sentence will not be found unconstitutional under the California Constitution unless it is so disproportionate to the defendant's crime and circumstances that it shocks the conscience or offends traditional notions of human dignity. (See [People v. Dillon \(1983\) 34 Cal.3d 441 \[194 Cal. Rptr. 390, 668 P.2d 697\]](#); [In re Lynch \(1972\) 8 Cal.3d 410, 424 \[105 Cal. Rptr. 217, 503 P.2d 921\]](#).)

[CA\(2\)](#)[\[↑\]](#) (2) In [Roper v. Simmons \(2005\) 543 U.S. 551, 575 \[161 L.Ed.2d 1, 125 S.Ct. 1183\]](#) (*Roper*), the court held [HN2](#)[\[↑\]](#) the imposition of capital punishment on juvenile offenders for any offense whatsoever violated the *Eighth Amendment*. In [Graham v. Florida \(2010\) 560 U.S. 48, 74 \[176 L.Ed.2d 825, 130 S.Ct. 2011\]](#) (*Graham*), the court held the imposition of a life-without-possibility-of-parole sentence on a juvenile offender for a nonhomicide [***5](#) offense violated the *Eighth Amendment*. [CA\(3\)](#)[\[↑\]](#) (3) Finally, in [Miller v. Alabama \(2012\) 567 U.S. 460, 471, 479 \[183 L.Ed.2d 407, 132 S.Ct. 2455, 2464, 2469\]](#) (*Miller*), the court held [HN3](#)[\[↑\]](#) “the *Eighth Amendment* forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders,” although a trial court could in its discretion impose such a sentence after considering how children are different and how the differences weigh against a life sentence.

[CA\(4\)](#)[\[↑\]](#) (4) In [People v. Caballero \(2012\) 55 Cal.4th 262, 268 \[145 Cal. Rptr. 3d 286, 282 P.3d 291\]](#) (*Caballero*), the California Supreme Court concluded that, under the reasoning of these United States Supreme Court cases, [HN4](#)[\[↑\]](#) “sentencing a juvenile offender for a nonhomicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender's natural life expectancy constitutes cruel and unusual punishment in violation of the *Eighth Amendment*.”

[\[*617\]](#)

[***37](#) Relying on *Roper*, *Graham*, *Miller*, and *Caballero*, Perez, who was 20 years old at the time of the offenses, argues their rationales although “not directly applicable to him,” should “appl[y] equally to defendants of [his] age.” Perez acknowledges two cases from the Second District, Division Four, [People v. Argeta \(2012\) 210 Cal.App.4th 1478 \[149 Cal. Rptr. 3d 243\]](#) (*Argeta*), and [People v. Abundio \(2013\) 221 Cal.App.4th 1211 \[165 Cal. Rptr. 3d 183\]](#) (*Abundio*), rejected similar claims.

In [Argeta, supra, 210 Cal.App.4th at page 1482](#), the court stated as follows: “[Defendant] was 18 and was convicted of first degree murder as a principal. His

¹ Counts 4, 5, 6, and 7 concern events that occurred on other occasions and are not relevant to the issues presented in this appeal.

counsel argue[d] that since the crime was committed only [***6] five months after [defendant's] 18th birthday the rationale applicable to the sentencing of juveniles should apply to him. We do not agree. These arguments regarding sentencing have been made in the past, and while '[d]rawing the line at 18 years of age is subject ... to the objections always raised against categorical rules ... [, it] is the point where society draws the line for many purposes between childhood and adulthood.' [Citations.] Making an exception for a defendant who committed a crime just five months past his 18th birthday opens the door for the next defendant who is only six months into adulthood. Such arguments would have no logical end, and so a line must be drawn at some point. We respect the line our society has drawn and which the United States Supreme Court has relied on for sentencing purposes, and conclude [defendant's] sentence is not cruel and/or unusual under *Graham*, *Miller*, or *Caballero*." (See *Abundio, supra*, 221 *Cal.App.4th at pp. 1220–1221*.)

CA(5)[↑] (5) We conclude the reasoning in *Argeta* is persuasive and adopt it here. Thus, because Perez was not a juvenile at the time of the offenses, *Roper*, *Graham*, *Miller*, and *Caballero* are not applicable. We decline Perez's invitation to conclude new insights and societal understandings [***7] about the juvenile brain require us to conclude the bright line of 18 years old in the criminal sentencing context is unconstitutional. **HN5[↑]** Our nation's, and our state's, highest court have concluded 18 years old is the bright-line rule and we are bound by their holdings. (*People v. Bradley* (1969) 1 *Cal.3d 80, 86* [81 *Cal. Rptr. 457, 460 P.2d 129*] [Courts of Appeal bound by Supreme Court of United States on federal law matters]; *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 *Cal.2d 450, 455* [20 *Cal. Rptr. 321, 369 P.2d 937*] [Courts of Appeal bound by Supreme Court precedent].)

Perez contends that if this court concludes *Miller* and *Caballero* "do not categorically apply" to him, the considerations in those cases and others concerning juveniles do apply in a proportional analysis. He cites to language [*618] from *People v. Gutierrez* (2014) 58 *Cal.4th 1354, 1380* [171 *Cal. Rptr. 3d 421, 324 P.3d 245*], where the court, citing to *Miller*, stated, "[D]evelopmental immaturity persists through late adolescence." Perez's reliance on *Gutierrez* is misplaced. *Gutierrez* involved two 17-year-old offenders who were sentenced to life without the possibility of parole. (*Id. at p. 1360*.) The *Gutierrez* court considered the sentences in light of *section 190.5, subdivision (b)*, a statute concerning 16 and 17 year olds who commit

special circumstances murder, and *Miller*. (*Gutierrez, supra*, 58 *Cal.4th at p. 1360*.) None of the concerns present in *Gutierrez* are present here.

CA(6)[↑] (6) Perez was 20 years old when he committed the offenses and, therefore, he was not a juvenile. [***8] Thus, pursuant to the factors articulated in *Miller, supra*, 567 *U.S. at pages 478–480* [***38] 132 *S.Ct. at pages 2468–2469*], and adopted in *Gutierrez, supra*, 58 *Cal.4th at pages 1388–1390*, Perez's 86-year-to-life sentence did not constitute cruel and unusual punishment. That does not end our inquiry however.

CA(7)[↑] (7) In response to *Graham*, *Miller*, and *Caballero*, the California Legislature passed Senate Bill No. 260 (2013–2014 Reg. Sess.), which became effective January 1, 2014, and enacted *sections 3051, 3046, subdivision (c)*, and *4801, subdivision (c)*, to provide a parole eligibility mechanism for juvenile offenders. **HN6[↑]** *Section 3051, subdivision (b)*, requires the Board of Parole Hearings to conduct a "youth offender parole hearing" during the 15th, 20th, or 25th year of a juvenile offender's incarceration depending on the controlling offense. (*§ 3051, subd. (b)*.) A juvenile offender whose controlling offense carries a term of 25 years to life or greater is "eligible for release on parole by the board during his or her 25th year of incarceration at a youth offender parole hearing, unless previously released or entitled to an earlier parole consideration hearing pursuant to other statutory provisions." (*§ 3051, subd. (b)(3)*.) *Section 3051, subdivision (h)*, excludes several categories of juvenile offenders, none of which are applicable here. In October 2015, the Legislature amended *section 3051*, and effective January 1, 2016, anyone who committed his or her controlling offense before [***9] reaching 23 years of age is entitled to a youth offender parole hearing. (*§ 3051, subd. (a)(1)*), amended by Stats. 2015, ch. 471, § 1.)

A few months ago, the California Supreme Court filed its opinion in *People v. Franklin* (2016) 63 *Cal.4th 261* [202 *Cal.Rptr.3d 496, 370 P.3d 1053*] (*Franklin*). In *Franklin*, the trial court sentenced the defendant to two mandatory terms of 25 years to life for offenses committed when he was 16 years old. The court held the defendant's constitutional challenge to the sentence had been mooted by the enactment of *sections 3051* and *4801*, [*619] which gave the defendant the possibility of release after 25 years of imprisonment. (*Franklin, supra*, 63 *Cal.4th at p. 268*.) The court concluded that although resentencing was unnecessary, the court had to remand the matter because it could not

determine whether the defendant had sufficient opportunity in the trial court “to put on the record the kinds of information that [sections 3051](#) and [4801](#) deem relevant at a youth offender parole hearing.” (*Franklin, supra, 63 Cal.4th at p. 284.*) The court concluded as follows: “If the trial court determines that [the defendant] did not have sufficient opportunity, then the court may receive submissions and, if appropriate, testimony pursuant to procedures set forth in [section 1204](#) and [rule 4.437 of the California Rules of Court](#), and subject to the rules of evidence. [The defendant] may place on the record any documents, evaluations, or testimony (subject to cross-examination) that may be relevant at [***10] his eventual youth offender parole hearing, and the prosecution likewise may put on the record any evidence that demonstrates the juvenile offender’s culpability or cognitive maturity, or otherwise bears on the influence of youth-related factors.” (*Ibid.*)²

[**39] Here, the trial court sentenced Perez in October 2014. Effective January 1, 2016, [section 3051](#) provided youth offender parole hearings for those who committed their controlling offense under 23 years of age, and in May 2016, the Supreme Court decided *Franklin, supra, 63 Cal.4th 261*. The record establishes Perez did not have a sufficient opportunity to put on the record the kinds of information that [sections 3051](#) and [4801](#) deem relevant at a youth offender parole hearing. Thus, we order a limited remand for both parties “to make an accurate record of the juvenile offender’s characteristics and circumstances at the time of the offense so that the Board, years later, may [***11] properly discharge its obligation to ‘give great weight to’ youth-related factors ... in determining whether the offender is ‘fit to rejoin society’ despite having committed a serious crime” (*Franklin, supra, 63 Cal.4th at p. 284*, citation omitted.)

DISPOSITION

The matter is remanded for the limited purpose of affording both parties the opportunity to make an accurate record of Perez’s characteristics and [*620] circumstances at the time of the offense as set forth in *Franklin, supra, 63 Cal.4th 261*. In all other respects, the judgment is affirmed.

²In his petition for rehearing, Perez argues the Legislature’s amendment of [section 3051](#) and the Supreme Court’s decision in *Franklin, supra, 63 Cal.4th 261*, both of which occurred after briefing was complete in this case, require a limited remand. We invited the Attorney General to file an answer to Perez’s petition for rehearing. The Attorney General declined our invitation.

Moore, J., and Fybel, J., concurred.

A petition for a rehearing was denied August 30, 2016, and the opinion was modified to read as printed above.

End of Document

Roper v. Simmons

Supreme Court of the United States

October 13, 2004, Argued ; March 1, 2005, Decided

No. 03-633

Reporter

543 U.S. 551 *; 125 S. Ct. 1183 **; 161 L. Ed. 2d 1 ***; 2005 U.S. LEXIS 2200 ****; 73 U.S.L.W. 4153; 18 Fla. L. Weekly Fed. S 131

DONALD P. ROPER, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER, Petitioner v. CHRISTOPHER SIMMONS

Prior History: [****1] ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI.

[State ex rel. Simmons v. Roper, 112 S.W.3d 397, 2003 Mo. LEXIS 123 \(Mo., 2003\)](#)

Disposition: Affirmed.

Core Terms

death penalty, juveniles, offenders, capital punishment, mentally retarded, adults, murder, maturity, youth, plurality opinion, executions, minimum age, culpability, sentencing, cases, juvenile offender, proportionality, decisions, juries, Rights, legislatures, categorical, mitigating, countries, decency, death sentence, individuals, views, objective evidence, jurors

Case Summary

Procedural Posture

Respondent juvenile committed murder at the age of 17. He was tried and sentenced to death. He filed a petition for state postconviction relief, arguing that the reasoning forbidding the execution of mentally retarded persons established that *U.S. Const. amend. VIII* also prohibited the execution of a juvenile who was under 18 when the crime was committed. The Missouri Supreme Court agreed. Certiorari was granted.

Overview

The Court began with a review of objective indicia of consensus on juvenile capital punishment, as expressed by the enactments of legislatures that had addressed

the question. Thirty states had prohibited the juvenile death penalty: 12 that had rejected the death penalty altogether and 18 that had maintained it but, by express provision or judicial interpretation, excluded juveniles from its reach. The Court noted that even in the 20 states without a formal prohibition on executing juveniles, the practice was infrequent. The Court held that this provided sufficient evidence that American society viewed juveniles as categorically less culpable than the average criminal and went on to provide three reasons: (1) the lack of maturity and an underdeveloped sense of responsibility were found in youth more often than in adults and were more understandable among the young; (2) juveniles were more vulnerable or susceptible to negative influences and outside pressures, including peer pressure; and (3) the character of a juvenile was not as well formed as that of an adult. The Court held that the *Eighth Amendment* forbids the imposition of the death penalty on juvenile offenders under 18.

Outcome

The judgment setting aside the sentence of death imposed upon the respondent was affirmed.

LexisNexis® Headnotes

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

[HN1](#) [↓] **Fundamental Rights, Cruel & Unusual Punishment**

See *U.S. Const. amend. VIII*.

543 U.S. 551, *551; 125 S. Ct. 1183, **1183; 161 L. Ed. 2d 1, ***1; 2005 U.S. LEXIS 2200, ****1

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

which punishments are so disproportionate as to be cruel and unusual.

Constitutional Law > Bill of Rights > State Application

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

[HN2](#) **Fundamental Rights, Cruel & Unusual Punishment**

The *Eighth Amendment* is applicable to the states through the *Fourteenth Amendment*.

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Capital Punishment

Criminal Law & Procedure > Sentencing > Capital Punishment > General Overview

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Sentencing > Capital Punishment > Cruel & Unusual Punishment

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

[HN5](#) **Fundamental Rights, Cruel & Unusual Punishment**

[HN3](#) **Fundamental Rights, Cruel & Unusual Punishment**

The *Eighth Amendment* guarantees individuals the right not to be subjected to excessive sanctions. The right flows from the basic precept of justice that punishment for crime should be graduated and proportioned to the offense. By protecting even those convicted of heinous crimes, the *Eighth Amendment* reaffirms the duty of the government to respect the dignity of all persons.

A majority of states have rejected the imposition of the death penalty on juvenile offenders under 18, and the United States Supreme Court holds this is required by the *Eighth Amendment*.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

Criminal Law & Procedure > Sentencing > Capital Punishment > General Overview

Governments > Courts > Judicial Precedent

Criminal Law & Procedure > ... > Murder > Capital Murder > Penalties

[HN4](#) **Fundamental Rights, Cruel & Unusual Punishment**

The prohibition against cruel and unusual punishments in the *Eighth Amendment*, like other expansive language in the Constitution, must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design. To implement this framework the United States Supreme Court has established the propriety and has affirmed the necessity of referring to the evolving standards of decency that mark the progress of a maturing society to determine

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Capital Punishment

Criminal Law & Procedure > Sentencing > Capital Punishment > Aggravating Circumstances

Criminal Law & Procedure > Sentencing > Capital Punishment > Cruel & Unusual Punishment

Criminal Law & Procedure > Sentencing > Capital Punishment > Intellectual Disabilities

Criminal Law & Procedure > Sentencing > Capital Punishment > Mitigating Circumstances

[HN6](#) **Fundamental Rights, Cruel & Unusual Punishment**

Because the death penalty is the most severe

punishment, the *Eighth Amendment* applies to it with special force. Capital punishment must be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution. This principle is implemented throughout the capital sentencing process. States must give narrow and precise definition to the aggravating factors that can result in a capital sentence. In any capital case a defendant has wide latitude to raise as a mitigating factor any aspect of his or her character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. There are a number of crimes that beyond question are severe in absolute terms, yet the death penalty may not be imposed for their commission. The death penalty may not be imposed on certain classes of offenders, such as juveniles under 16, the insane, and the mentally retarded, no matter how heinous the crime. These rules vindicate the underlying principle that the death penalty is reserved for a narrow category of crimes and offenders.

Criminal Law & Procedure > Juvenile
Offenders > Sentencing > Capital Punishment

[HN7](#) Sentencing, Capital Punishment

[Stanford v. Kentucky, 492 U.S. 361 \(1989\)](#), should be deemed no longer controlling on the issue of juvenile capital punishment.

Criminal Law & Procedure > Juvenile
Offenders > Sentencing > Capital Punishment

International Law > Individuals & Sovereign
States > Human Rights > General Overview

Constitutional Law > Bill of Rights > Fundamental
Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Sentencing > Capital
Punishment > Cruel & Unusual Punishment

Criminal Law & Procedure > Sentencing > Cruel &
Unusual Punishment

[HN8](#) Sentencing, Capital Punishment

The United States Supreme 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.

Lawyers' Edition Display

Decision

[***1] Federal Constitution's Eighth Amendment proscription of cruel and unusual punishment held to prohibit imposition of death penalty for crimes committed when offenders were under age of 18 years.

Summary

In [Stanford v Kentucky \(1989\) 492 U.S. 361, 106 L. Ed. 2d 306, 109 S. Ct. 2969](#), reh den 492 U.S. 937, 106 L. Ed. 2d 635, 110 S. Ct. 23, the United States Supreme Court held that imposition of the death penalty on offenders for murders committed at 16 and 17 years of age did not constitute cruel and unusual punishment in violation of the *Federal Constitution's Eighth Amendment*.

After an accused had reached the age of 18 years, he was convicted in a Missouri state court of murder, and was sentenced to death, for a homicide committed when he was aged 17. The Missouri Supreme Court affirmed ([944 S.W.2d 165](#), cert den 522 U.S. 953, 139 L. Ed. 2d 293, 118 S. Ct. 376), and the United States Court of Appeals for the Eighth Circuit denied the accused's petition for a writ of habeas corpus ([235 F.3d 1124](#), cert den 534 U.S. 924, 151 L. Ed. 2d 206, 122 S. Ct. 280).

Subsequently, the United States Supreme Court, in [Atkins v Virginia \(2002\) 536 U.S. 304, 153 L. Ed. 2d 335, 122 S. Ct. 2242](#), held that the execution of offenders who were mentally retarded constituted cruel and unusual punishment in violation of the *Eighth Amendment*.

The accused filed a new petition for state postconviction relief, arguing that the reasoning of *Atkins* established that the Constitution prohibited execution of an offender for a crime committed when the offender was under 18. The Supreme Court of Missouri, agreeing with the accused's argument, (1) set aside the accused's death sentence, and (2) resentenced him to life imprisonment without eligibility for release ([112 S.W.3d 397](#)).

[***2] On certiorari, the United States Supreme Court

affirmed. In an opinion by Kennedy, J., joined by Stevens, Souter, Ginsburg, and Breyer, JJ., it was held that the *Eighth Amendment* proscription against cruel and unusual punishment prohibited imposition of the death penalty for crimes committed when offenders were under 18 years of age, as:

(1) The evidence of national consensus against the death penalty for juveniles was similar, and in some respects parallel, to the evidence held sufficient in *Atkins* to demonstrate a national consensus against the death penalty for offenders who were mentally retarded.

(2) When enacting the Federal Death Penalty Act ([18 U.S.C.S. § 3591](#)) in 1994, Congress had determined that the death penalty should not extend to juveniles.

(3) As in *Atkins*, the objective indicia of consensus in the instant case provided sufficient evidence that society presently viewed juveniles as categorically less culpable than the average criminal.

(4) General maturity-related differences between juveniles under 18 and adults demonstrated that juvenile offenders could not with reliability be classified among the worst offenders.

(5) The reasoning applied by a plurality of the court concerning the immaturity of people under the age of 16 in [Thompson v Oklahoma \(1988\) 487 U.S. 815, 101 L. Ed. 2d 702, 108 S. Ct. 2687](#)--where the court had held that the *Eighth Amendment* prohibited imposition of the death penalty for offenses committed when offenders were under 16--applied to all offenders under 18.

(6) Once the diminished culpability of juveniles was recognized, it was evident that the penological justifications (restitution and deterrence) for the death penalty applied to juveniles with lesser force than to adults.

(7) The age of 18 was the point where, for many purposes, society drew the line between childhood and adulthood.

(8) The United States was the only country in the world that continued to give official sanction to the juvenile death penalty.

Stevens, J., joined by Ginsburg, J., concurring, expressed the view that perhaps even more important than the Supreme Court's specific holding was the court's reaffirmation of the basic principle that evolving

standards of decency informed the court's interpretation of the *Eighth Amendment*.

O'Connor, J., dissenting, expressed the view that (1) the court's decision was not justified by (a) the objective evidence of contemporary societal values, (b) the court's moral proportionality analysis, or (c) the two in tandem; (2) the evidence before the court failed to demonstrate conclusively that any national consensus against capital punishment of 17-year-old offenders had emerged in the brief period since the court had upheld the constitutionality of this practice in *Stanford*; (3) the court had adduced no evidence impeaching the seemingly reasonable conclusion reached by many state legislatures that at least some 17-year-old murderers were sufficiently mature to deserve the death penalty in an appropriate case; and (4) it had not been shown that capital sentencing juries were incapable of accurately assessing a youthful defendant's maturity or of giving due weight to the mitigating characteristics associated with youth.

[***3] Scalia, J., joined by Rehnquist, Ch. J., and Thomas, J., dissenting, expressed the view that (1) the court had (a) proclaimed itself sole arbiter of the nation's moral standards, and (b) in the course of discharging that responsibility, had purported to take guidance from the views of foreign courts and legislatures; and (2) the meaning of the *Eighth Amendment*, no more than the meaning of other provisions of the Constitution, ought not to be determined by the subjective views of (a) five members of the Supreme Court, and (b) like-minded foreigners.

Headnotes

[***4]

CRIMINAL LAW §93.3 > EVIDENCE §980 -- *Eighth Amendment* -- death penalty -- crime committed when offender was under age of 18 -- national consensus

> Headnote:

[LEdHN1A](#) [↕] [1A] [LEdHN1B](#) [↕] [1B] [LEdHN1C](#) [↕]
[1C](#) [LEdHN1D](#) [↕] [1D] [LEdHN1E](#) [↕]
[1E](#) [LEdHN1F](#) [↕] [1F] [LEdHN1G](#) [↕]
[1G](#) [LEdHN1H](#) [↕] [1H] [LEdHN1I](#) [↕] [1I] [LEdHN1J](#) [↕]
[1J](#) [LEdHN1K](#) [↕] [1K]

The *Federal Constitution's Eighth Amendment* proscription against cruel and unusual punishment prohibited imposition of the death penalty for crimes

committed when offenders were under 18 years of age, as:

(1) The evidence of national consensus against the death penalty for juveniles was similar, and in some respects parallel, to the evidence held sufficient in [Atkins v Virginia \(2002\) 536 U.S. 304, 153 L. Ed. 2d 335, 122 S. Ct. 2242](#)--in which the United States Supreme Court had held that the execution of offenders who were mentally retarded violated the *Eighth Amendment*--to demonstrate a national consensus against the death penalty for the mentally retarded, for:

(A) Similarly to Atkins, in the instant case, 30 states prohibited the juvenile death penalty, comprising (i) 12 that had rejected the death penalty altogether, and (ii) 18 that maintained it but, by express provision or by judicial interpretation, excluded juveniles from its reach.

(b) Also similarly to Atkins, in the instant case, even in the 20 states without a formal prohibition on executing juveniles, the practice was infrequent.

(c) Though less dramatic than the change from a prior contrary decision to Atkins, the change from [Stanford v Kentucky \(1989\) 492 U.S. 361, 106 L. Ed. 2d 306, 109 S. Ct. 2969](#)--in which the court had held that imposition of the death penalty on offenders for murders committed at 16 and 17 years of age did not violate the *Eighth Amendment*--to the instant case was significant, for the same consistency of direction of change had been demonstrated, where since Stanford, no state that previously had prohibited capital punishment for juveniles had reinstated it.

(2) When enacting the Federal Death Penalty Act ([18 U.S.C.S. § 3591](#)) in 1994, Congress had determined that the death penalty should not extend to juveniles.

(3) As in Atkins, the objective indicia of consensus in the instant case--(a) the rejection of death penalty for offenders under 18 in the majority of states; (b) the infrequency of its use even where it remained on the books; and (c) the consistency in the trend toward abolition of the practice--provided sufficient evidence that society presently viewed juveniles as categorically less culpable than the average criminal.

(4) General maturity-related differences between juveniles under 18 and adults demonstrated that juvenile offenders could not with reliability be classified among the worst offenders.

(5) The reasoning applied by a plurality of the court concerning the immaturity of people under the age of 16 in [Thompson v Oklahoma \(1988\) 487 U.S. 815, 101 L. Ed. 2d 702, 108 S. Ct. 2687](#)--where the court had held that the *Eighth Amendment* prohibited imposition of the death penalty for offenses committed when the offenders were under 16--applied to all offenders under 18.

(6) Once the diminished culpability of juveniles was recognized, it was evident that the penological justifications (restitution and deterrence) for the death penalty applied to juveniles with lesser force than to adults. The differences between juvenile and adult offenders were too marked and too well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability.

(7) The age of 18 was the point where, for many purposes, society drew the line between childhood and adulthood.

(8) The United States was the only country in the world that continued to give official sanction to the juvenile death penalty.

(Kennedy, J., joined by Stevens, Souter, Ginsburg, and Breyer, JJ.)

CRIMINAL LAW §77 > -- cruel and unusual punishment -- states > Headnote:

[LEdHNJ2](#)[] [2]

The *Federal Constitution's Eighth Amendment* provision that excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted is applicable to the states through the *Fourteenth Amendment*. (Kennedy, J., joined by Stevens, Souter, Ginsburg, and Breyer, JJ.)

CRIMINAL LAW §76 > -- *Eighth Amendment* -- excessive punishment -- evolving standards > Headnote:

[LEdHNJ3A](#)[] [3A][LEdHNJ3B](#)[] [3B]

The *Federal Constitution's Eighth Amendment* guarantee to individuals of the right not to be subjected to excessive sanctions flows from the basic precept of

justice that punishment for crime should be graduated and proportioned to the offense. By protecting even those convicted of heinous crimes, the *Eighth Amendment* reaffirms the duty of the government to respect the dignity of all persons. The *Eighth Amendment's* prohibition against cruel and unusual punishments, like other expansive language in the Constitution, must be interpreted according to the prohibition's text, (1) by considering history, tradition, and precedent; and (2) with due regard for the prohibition's purpose and function in the constitutional design. To implement this framework, the United States Supreme Court has established the propriety, and affirmed the necessity, of referring to the evolving standards of decency that mark the progress of a maturing society to determine which punishments are so disproportionate as to be cruel and unusual. (Kennedy, J., joined by Stevens, Souter, Ginsburg, and Breyer, JJ.)

[***5]

EVIDENCE §980 > -- juvenile death penalty -- force of general trend > Headnote:
[LEdHN4](#)[] [4]

For purposes of determining whether the *Federal Constitution's Eighth Amendment* proscription against cruel and unusual punishment prohibited imposition of the death penalty for crimes committed when offenders were under 18 years of age, the fact that since the United States Supreme Court's decision in [Stanford v Kentucky \(1989\) 492 U.S. 361, 106 L. Ed. 2d 306, 109 S. Ct. 2969](#)--that imposition of the death penalty on offenders for murders committed at 16 and 17 years of age did not violate the *Eighth Amendment*--no state that previously had prohibited capital punishment for juveniles had reinstated it, coupled with the trend toward abolition of the juvenile death penalty, carried special force in light of (1) the general popularity of anticrime legislation; and (2) the particular trend in recent years toward cracking down on juvenile crime in other respects. Thus, any difference between the instant case and [Atkins v Virginia \(2002\) 536 U.S. 304, 153 L. Ed. 2d 335, 122 S. Ct. 2242](#)--in which the Supreme Court had held that the execution of offenders who were mentally retarded violated the *Eighth Amendment*--with respect to the pace of abolition was counterbalanced by the consistent direction of the change. (Kennedy, J., joined by Stevens, Souter, Ginsburg, and Breyer, JJ.)

CRIMINAL LAW §93 > -- death penalty -- *Eighth Amendment* > Headnote:
[LEdHN5](#)[] [5]

Because the death penalty is the most severe punishment, the *Federal Constitution's Eighth Amendment* prohibition of cruel and unusual punishment applies to the death penalty with special force. Capital punishment must be limited to those offenders (1) who commit a narrow category of the most serious crimes; and (2) whose extreme culpability makes them the most deserving of execution. (Kennedy, J., joined by Stevens, Souter, Ginsburg, and Breyer, JJ.)

CRIMINAL LAW §93.7 > -- death penalty -- aggravating and mitigating factors > Headnote:
[LEdHN6](#)[] [6]

Under the *Federal Constitution's Eighth Amendment* prohibition of cruel and unusual punishment, states must give narrow and precise definition to the aggravating factors that can result in a capital sentence. Also, in any capital case, a defendant has wide latitude to raise as a mitigating factor (1) any aspect of his or her character or record; and (2) any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. (Kennedy, J., joined by Stevens, Souter, Ginsburg, and Breyer, JJ.)

CRIMINAL LAW §93.3 > -- death penalty -- severe crimes -- *Eighth Amendment* > Headnote:
[LEdHN7](#)[] [7]

There are a number of crimes--such as (1) rape of an adult woman; and (2) felony murder where defendant did not (a) kill, (b) attempt to kill, or (c) intend to kill--that beyond question are severe in absolute terms, yet under the *Federal Constitution's Eighth Amendment* prohibition of cruel and unusual punishment, the death penalty may not be imposed for those crimes' commission. (Kennedy, J., joined by Stevens, Souter, Ginsburg, and Breyer, JJ.)

[***6]

CRIMINAL LAW §93 > CRIMINAL LAW §93.3 > -- death penalty -- crimes and offenders > Headnote:
[LEdHN\[8\]](#) [8]

Under the *Federal Constitution's Eighth Amendment* prohibition of cruel and unusual punishment, the death penalty may not be imposed on certain classes of offenders--such as (1) juveniles under 16 years of age, (2) the insane, and (3) the mentally retarded--no matter how heinous the crime. These rules vindicate the underlying principle that the death penalty is reserved for a narrow category of crimes and offenders. (Kennedy, J., joined by Stevens, Souter, Ginsburg, and Breyer, JJ.)

CRIMINAL LAW §93.3 > -- death penalty -- juveniles under age of 18 -- *Eighth Amendment* > Headnote:
[LEdHN\[9A\]](#) [9A] [LEdHN\[9B\]](#) [9B]

For purposes of determining whether the *Federal Constitution's Eighth Amendment* proscription against cruel and unusual punishment prohibited imposition of the death penalty for crimes committed when offenders were under 18 years of age:

(1) Three general differences between juveniles under 18 and adults demonstrated that juvenile offenders could not with reliability be classified among the worst offenders:

(a) As any parent knew, and some scientific and sociological studies tended to confirm, a lack of maturity and an underdeveloped sense of responsibility were (i) found in youth more often than in adults; and (ii) more understandable among the young. These qualities often resulted in impetuous and ill-considered actions and decisions. It had been noted that adolescents were overrepresented statistically in virtually every category of reckless behavior. In recognition of the comparative immaturity and irresponsibility of juveniles, almost every state prohibited those under 18 years of age from voting, serving on juries, or marrying without parental consent.

(b) Juveniles were more vulnerable or susceptible to negative influences and outside pressures, including peer pressure, than were adults. This was explained in part by the prevailing circumstance that juveniles had less control, or less experience with control, over their own environment.

(c) The character of a juvenile was not as well formed as that of an adult. The personality traits of juveniles were more transitory, less fixed.

(2) These differences rendered suspect any conclusion that a juvenile fell among the worst offenders. The susceptibility of juveniles to immature and irresponsible behavior meant that their irresponsible conduct was not as morally reprehensible as that of an adult. Juveniles' vulnerability and comparative lack of control over their immediate surroundings meant that juveniles had a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment. The reality that juveniles still struggled to define their identity meant that it was less supportable to conclude that even a heinous crime committed by a juvenile was evidence of irretrievably depraved character. From a moral standpoint, it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility existed that a minor's character deficiencies would be reformed.

(Kennedy, J., joined by Stevens, Souter, Ginsburg, and Breyer, JJ.)

[***7]

CRIMINAL LAW §93.3 > -- death penalty -- juveniles under age of 18 -- retribution -- deterrence > Headnote:
[LEdHN\[10A\]](#) [10A] [LEdHN\[10B\]](#) [10B]

For purposes of determining whether the *Federal Constitution's Eighth Amendment* proscription against cruel and unusual punishment prohibited imposition of the death penalty for crimes committed when offenders were under 18 years of age, where the United States Supreme Court had held in [Atkins v Virginia \(2002\) 536 U.S. 304, 153 L. Ed. 2d 335, 122 S. Ct. 2242](#), that there were two distinct social purposes-- retribution and deterrence of capital crimes by prospective offenders--served by the death penalty:

(1) As for retribution, (a) the court had remarked in *Atkins* that if the culpability of the average murderer was insufficient to justify the most extreme sanction available to the state, then the lesser culpability of the mentally retarded offender did not merit that form of retribution; and (b) the same conclusions followed from the lesser culpability of the juvenile offender, as (i) whether viewed as an attempt to express the community's moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution was not as strong with a

minor as with an adult, and (ii) retribution was not proportional if the law's most severe penalty was imposed on one whose culpability or blameworthiness was diminished to a substantial degree by reason of youth and immaturity.

(2) As for deterrence, (a) it was unclear whether the death penalty had a significant, or even measurable, deterrent effect on juveniles; (b) the absence of evidence of deterrent effect was of special concern, because the same characteristics that rendered juveniles less culpable than adults suggested as well that juveniles would be less susceptible to deterrence; and (c) to the extent that the juvenile death penalty might have residual deterrent effect, the punishment of life imprisonment without the possibility of parole was a severe sanction, in particular for a young person.

(Kennedy, J., joined by Stevens, Souter, Ginsburg, and Breyer, JJ.)

CRIMINAL LAW §69 > -- penalty schemes > Headnote:
[LEdHN\[11\]](#) [11]

In general, the United States Supreme Court leaves to legislatures the assessment of the efficacy of various criminal penalty schemes. (Kennedy, J., joined by Stevens, Souter, Ginsburg, and Breyer, JJ.)

CRIMINAL LAW §93.7 > -- death penalty -- circumstances -- youth of offender > Headnote:
[LEdHN\[12\]](#) [12]

A central feature of death-penalty sentencing is a particular assessment of the (1) circumstances of the crime, and (2) characteristics of the offender. The system is designed to consider both aggravating and mitigating circumstances, including youth, in every case. (Kennedy, J., joined by Stevens, Souter, Ginsburg, and Breyer, JJ.)

[***8]

CRIMINAL LAW §93.3 > CRIMINAL LAW §93.7 > -- death penalty -- mitigating arguments -- youthful offender > Headnote:

[LEdHN\[13A\]](#) [13A] [LEdHN\[13B\]](#) [13B]

For purposes of determining whether the *Federal Constitution's Eighth Amendment* proscription against cruel and unusual punishment prohibited imposition of the death penalty for crimes committed when offenders were under 18 years of age, the differences between juvenile and adult offenders were too marked and too well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability, as:

(1) An unacceptable likelihood existed that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death, for in some cases a defendant's youth might even be counted against the defendant, where, for example, in the instant death-penalty case, the prosecutor had argued that the youth of the defendant, who was 17 years old when he had committed the homicide in question, was aggravating rather than mitigating.

(2) While this sort of overreaching could be corrected by a particular rule to insure that the mitigating force of youth was not overlooked, that would not address the court's larger concerns, for (a) it was difficult even for expert psychologists to differentiate between (i) the juvenile offender whose crime reflected unfortunate yet transient immaturity, and (ii) the rare juvenile offender whose crime reflected irreparable corruption; (b) the court understood this difficulty to underlie the rule forbidding psychiatrists from diagnosing any patient under 18 as having antisocial personality disorder; and (c) states ought to refrain from asking jurors to issue the far graver condemnation that a juvenile offender merited the death penalty.

(Kennedy, J., joined by Stevens, Souter, Ginsburg, and Breyer, JJ.)

CRIMINAL LAW §93.3 > EVIDENCE §980 -- juvenile death penalty -- *Eighth Amendment* -- weight of international opinion > Headnote:
[LEdHN\[14A\]](#) [14A] [LEdHN\[14B\]](#) [14B]

For purposes of determining whether the *Federal*

Constitution's Eighth Amendment proscription against cruel and unusual punishment prohibited imposition of the death penalty for crimes committed when offenders were under 18 years of age, the reality that the United States was the only country in the world that continued to give official sanction to the juvenile death penalty did not become controlling, for the task of interpreting the *Eighth Amendment* remained the United States Supreme Court's responsibility. However, it was proper that the court acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people might often be a factor in the crime in question, where, at least from the time of the court's decision in [Trop v Dulles \(1958\) 356 U.S. 86, 2 L. Ed. 2d 630, 78 S. Ct. 590](#), the court had 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. Thus, the opinion of the world community, while not controlling the court's outcome, provided respected and significant confirmation for the court's conclusions. It did not lessen the court's fidelity to the Constitution, or the court's pride in the Constitution's origins, to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscored the centrality of those same rights within the United States' heritage of freedom. (Kennedy, J., joined by Stevens, Souter, Ginsburg, and Breyer, JJ.)

[***9] [***10]

CRIMINAL LAW §93.3 > -- juvenile death penalty -- relevance of United Kingdom's experience > Headnote:

[LEdHN\[15\]](#)[15]

For purposes of determining whether the *Federal Constitution's Eighth Amendment* proscription against cruel and unusual punishment prohibited imposition of the death penalty for crimes committed when offenders were under 18 years of age, although the international covenants prohibiting the juvenile death penalty were of more recent date, it was instructive to note that the United Kingdom had abolished the juvenile death penalty before these covenants came into being. The United Kingdom's experience bore particular relevance to the *Eighth Amendment* question, in light of (1) the historic ties between the United Kingdom and the United States; and (2) the *Eighth Amendment's* origins, as the amendment was modeled on a parallel provision in the English Declaration of Rights of 1689. In the 56 years

that had passed since the United Kingdom had abolished the juvenile death penalty, the weight of authority against it there, and in the international community, had become well established. (Kennedy, J., joined by Stevens, Souter, Ginsburg, and Breyer, JJ.)

Syllabus

At age 17, respondent Simmons planned and committed a capital murder. After he had turned 18, he was sentenced to death. His direct appeal and subsequent petitions for state and federal postconviction relief were rejected. This Court then held, in [Atkins v. Virginia, 536 U.S. 304, 153 L. Ed. 2d 335, 122 S. Ct. 2242](#), that the *Eighth Amendment*, applicable to the States through the *Fourteenth Amendment* [****2], prohibits the execution of a mentally retarded person. Simmons filed a new petition for state postconviction relief, arguing that *Atkins'* reasoning established that the Constitution prohibits the execution of a juvenile who was under 18 when he committed his crime. The Missouri Supreme Court agreed and set aside Simmons' death sentence in favor of life imprisonment without eligibility for release. It held that, although [Stanford v. Kentucky, 492 U.S. 361, 106 L. Ed. 2d 306, 109 S. Ct. 2969](#), rejected the proposition that the Constitution bars capital punishment for juvenile offenders younger than 18, a national consensus has developed against the execution of those offenders since *Stanford*.

Held:

The *Eighth* and *Fourteenth Amendments* forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed.

(a) The *Eighth Amendment's* prohibition against "cruel and unusual punishments" must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design. To implement this framework this Court has established the propriety [****3] and affirmed the necessity of referring to "the evolving standards of decency that mark the progress of a maturing society" to determine which punishments are so disproportionate as to be "cruel and unusual." [Trop v. Dulles, 356 U.S. 86, 100-101, 2 L. Ed. 2d 630, 78 S. Ct. 590](#). In 1988, in [Thompson v. Oklahoma, 487 U.S. 815, 818-838, 101 L. Ed. 2d 702, 108 S. Ct. 2687](#), a plurality determined that national standards of decency did not permit the execution of any offender under age 16 at the time of the crime. The

next year, in *Stanford*, a 5-to-4 Court referred to contemporary standards of decency, but concluded the *Eighth* and *Fourteenth Amendments* did not proscribe the execution of offenders over 15 but under 18 because 22 of 37 death penalty States permitted that penalty for 16-year-old offenders, and 25 permitted it for 17-year-olds, thereby indicating there was no national consensus. [492 U.S., at 370-371, 106 L. Ed. 2d 306, 109 S. Ct. 2969](#). A plurality also "emphatically reject[ed]" the suggestion that the Court should bring its own judgment to bear on the acceptability of the juvenile death penalty. [Id., at 377-378, 106 L. Ed. 2d 306, 109 S. Ct. 2969 \[****4\]](#). That same day the Court held, in *Penry v. Lynaugh*, [492 U.S. 302, 334, 106 L. Ed. 2d 256, 109 S. Ct. 2934](#), that the *Eighth Amendment* did not mandate a categorical exemption from the death penalty for mentally retarded persons because only two States had enacted laws banning such executions. Three Terms ago in *Atkins*, however, the Court held that standards of decency had evolved since *Penry* and now demonstrated that the execution of the mentally retarded is cruel and unusual punishment. The *Atkins* Court noted that objective indicia of society's standards, [***11] as expressed in pertinent legislative enactments and state practice, demonstrated that such executions had become so truly unusual that it was fair to say that a national consensus has developed against them. [536 U.S., at 314-315, 153 L. Ed. 2d 335, 122 S. Ct. 2242](#). The Court also returned to the rule, established in decisions predating *Stanford*, that the Constitution contemplates that the Court's own judgment be brought to bear on the question of the acceptability of the death penalty. [536 U.S., at 312, 153 L. Ed. 2d 335, 122 S. Ct. 2242](#). After observing that mental retardation diminishes [****5] personal culpability even if the offender can distinguish right from wrong, [id., at 318, 153 L. Ed. 2d 335, 122 S. Ct. 2242](#), and that mentally retarded offenders' impairments make it less defensible to impose the death penalty as retribution for past crimes or as a real deterrent to future crimes, [id., at 319-320, 153 L. Ed. 2d 335, 122 S. Ct. 2242](#), the Court ruled that the death penalty constitutes an excessive sanction for the entire category of mentally retarded offenders, and that the *Eighth Amendment* places a substantive restriction on the State's power to take such an offender's life, [id., at 321, 153 L. Ed. 2d 335, 122 S. Ct. 2242](#). Just as the *Atkins* Court reconsidered the issue decided in *Penry*, the Court now reconsiders the issue decided in *Stanford*.

(b) Both objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question, and the Court's own

determination in the exercise of its independent judgment, demonstrate that the death penalty is a disproportionate punishment for juveniles.

(1) As in *Atkins*, the objective indicia of national consensus here--the rejection of the juvenile [****6] death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice--provide sufficient evidence that today society views juveniles, in the words *Atkins* used respecting the mentally retarded, as "categorically less culpable than the average criminal," [536 U.S., at 316, 153 L. Ed. 2d 335, 122 S. Ct. 2242](#). The evidence of such consensus is similar, and in some respects parallel, to the evidence in *Atkins*: 30 States prohibit the juvenile death penalty, including 12 that have rejected it altogether and 18 that maintain it but, by express provision or judicial interpretation, exclude juveniles from its reach. Moreover, even in the 20 States without a formal prohibition, the execution of juveniles is infrequent. Although, by contrast to *Atkins*, the rate of change in reducing the incidence of the juvenile death penalty, or in taking specific steps to abolish it, has been less dramatic, the difference between this case and *Atkins* in that respect is counterbalanced by the consistent direction of the change toward abolition. Indeed, the slower pace here may be explained [****7] by the simple fact that the impropriety of executing juveniles between 16 and 18 years old gained wide recognition earlier than the impropriety of executing the mentally retarded.

(2) Rejection of the imposition of the death penalty on juvenile offenders under 18 is required by the *Eighth Amendment*. Capital punishment must be limited to those offenders who commit "a narrow category of the most serious crimes" and whose extreme culpability makes [***12] them "the most deserving of execution." [Atkins, supra, at 319, 153 L. Ed. 335, 122 S. Ct. 2242](#). Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders. Juveniles' susceptibility to immature and irresponsible behavior means "their irresponsible conduct is not as morally reprehensible as that of an adult." [Thompson v. Oklahoma, 487 U.S. 815, 835, 101 L. Ed. 2d 702, 108 S. Ct. 2687](#). Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment. See [****8] [Stanford, supra, at 395, 106 L. Ed. 2d 306, 109 S. Ct. 2969](#). The reality that

juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. The *Thompson* plurality recognized the import of these characteristics with respect to juveniles under 16. [487 U.S., at 833-838, 101 L.Ed. 2d 702, 108 S. Ct. 2687](#). The same reasoning applies to all juvenile offenders under 18. Once juveniles' diminished culpability is recognized, it is evident that neither of the two penological justifications for the death penalty--retribution and deterrence of capital crimes by prospective offenders, e.g., [Atkins, supra, at 319, 153 L. Ed. 2d 335, 122 S. Ct. 2242](#) -- provides adequate justification for imposing that penalty on juveniles. Although the Court cannot deny or overlook the brutal crimes too many juvenile offenders have committed, it disagrees with petitioner's contention that, given the Court's own insistence on individualized consideration in capital sentencing, it is arbitrary and unnecessary to adopt a categorical rule barring imposition of the [****9] death penalty on an offender under 18. An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death. When a juvenile commits a heinous crime, the State can exact forfeiture of some of the most basic liberties, but the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity. While drawing the line at 18 is subject to the objections always raised against categorical rules, that is the point where society draws the line for many purposes between childhood and adulthood and the age at which the line for death eligibility ought to rest. *Stanford* should be deemed no longer controlling on this issue.

(c) The overwhelming weight of international opinion against the juvenile death penalty is not controlling here, but provides respected and significant confirmation for the Court's determination that the penalty is disproportionate punishment for offenders under 18. See, e.g. [****10] , [Thompson, supra, at 830-831, and n. 31, 101 L. Ed. 2d 702, 108 S. Ct. 2687](#). The United States is the only country in the world that continues to give official sanction to the juvenile penalty. It does not lessen fidelity to the Constitution or pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples [***13] underscores the centrality of those same rights within our own heritage of freedom.

[112 S. W. 3d 397](#), affirmed.

Counsel: James R. Layton argued the cause for petitioner.

Seth P. Waxman argued the cause for respondent.

Judges: Kennedy, J., delivered the opinion of the Court, in which Stevens, Souter, Ginsburg, and Breyer, JJ., joined. Stevens, J., filed a concurring opinion, in which Ginsburg, J., joined, *post*, p. 587. O'Connor, J., filed a dissenting opinion, *post*, p. 587. Scalia, J., filed a dissenting opinion, in which Rehnquist, C. J., and Thomas, J., joined, *post*, p. 607.

Opinion by: KENNEDY

Opinion

[*555] [**1187] Justice **Kennedy** delivered the opinion of the Court.

[LEdHN\[1A\]](#)^[↑] [1A] This case requires us to address, for the second time in a decade and a half, whether it is permissible under the *Eighth* and *Fourteenth Amendments to the Constitution of the United States* to execute a juvenile offender who was older [*556] than 15 but younger than 18 when he committed a capital crime. In [Stanford v. Kentucky, 492 U.S. 361, 106 L. Ed. 2d 306, 109 S. Ct. 2969 \(1989\)](#), a divided Court rejected the proposition that the Constitution bars capital punishment for juvenile offenders in this age group. We reconsider the question.

I

At the age of 17, when he was still a junior in high school, Christopher Simmons, the respondent here, committed murder. About nine months later, after he had turned 18, he was tried and sentenced to death. There is little doubt that Simmons was the instigator of the crime. Before its commission Simmons said he wanted to murder someone. In chilling, callous terms he talked about his plan, discussing it for the most part with two friends, Charles Benjamin and John Tessler, then aged 15 and 16 respectively. Simmons proposed to commit burglary and murder by breaking and entering, tying up a victim, and throwing the victim off a [****12] bridge. Simmons assured his friends they could "get away with it" because they were minors.

The three met at about 2 a.m. on the night of the murder, but Tessmer left before the other two set out. (The State later charged Tessmer with conspiracy, but dropped the charge in exchange for his testimony against Simmons.) Simmons and Benjamin entered the home of the victim, Shirley Crook, after reaching through an open window and unlocking the [**1188] back door. Simmons turned on a hallway light. Awakened, Mrs. Crook called out, "Who's there?" In response Simmons entered Mrs. Crook's bedroom, where he recognized her from a previous car accident involving them both. Simmons later admitted this confirmed his resolve to murder her.

Using duct tape to cover her eyes and mouth and bind her hands, the two perpetrators put Mrs. Crook in her minivan and drove to a state park. They reinforced the bindings, covered her head with a towel, and walked her to a railroad [*557] trestle spanning the Meramec River. There they tied her hands and feet together with electrical wire, wrapped her whole face in duct tape and threw her from the bridge, drowning her in the waters below.

By [****13] the afternoon of September 9, Steven Crook had returned home from an overnight trip, found his bedroom in disarray, and reported his wife missing. On the same afternoon [***14] fishermen recovered the victim's body from the river. Simmons, meanwhile, was bragging about the killing, telling friends he had killed a woman "because the bitch seen my face."

The next day, after receiving information of Simmons' involvement, police arrested him at his high school and took him to the police station in Fenton, Missouri. They read him his *Miranda* rights. Simmons waived his right to an attorney and agreed to answer questions. After less than two hours of interrogation, Simmons confessed to the murder and agreed to perform a videotaped reenactment at the crime scene.

The State charged Simmons with burglary, kidnaping, stealing, and murder in the first degree. As Simmons was 17 at the time of the crime, he was outside the criminal jurisdiction of Missouri's juvenile court system. See *Mo. Rev. Stat. §§ 211.021* (2000) and *211.031 (Supp. 2003)*. He was tried as an adult. At trial the State introduced Simmons' confession and the videotaped reenactment of the crime, along with testimony [****14] that Simmons discussed the crime in advance and bragged about it later. The defense called no witnesses in the guilt phase. The jury having returned a verdict of murder, the trial proceeded to the

penalty phase.

The State sought the death penalty. As aggravating factors, the State submitted that the murder was committed for the purpose of receiving money; was committed for the purpose of avoiding, interfering with, or preventing lawful arrest of the defendant; and involved depravity of mind and was outrageously and wantonly vile, horrible, and inhuman. [*558] The State called Shirley Crook's husband, daughter, and two sisters, who presented moving evidence of the devastation her death had brought to their lives.

In mitigation Simmons' attorneys first called an officer of the Missouri juvenile justice system, who testified that Simmons had no prior convictions and that no previous charges had been filed against him. Simmons' mother, father, two younger half brothers, a neighbor, and a friend took the stand to tell the jurors of the close relationships they had formed with Simmons and to plead for mercy on his behalf. Simmons' mother, in particular, testified to the responsibility [****15] Simmons demonstrated in taking care of his two younger half brothers and of his grandmother and to his capacity to show love for them.

During closing arguments, both the prosecutor and defense counsel addressed Simmons' age, which the trial judge had instructed the jurors they could consider as a mitigating factor. Defense counsel reminded the jurors that juveniles of Simmons' age cannot drink, serve on juries, or even see certain movies, because "the legislatures [**1189] have wisely decided that individuals of a certain age aren't responsible enough." Defense counsel argued that Simmons' age should make "a huge difference to [the jurors] in deciding just exactly what sort of punishment to make." In rebuttal, the prosecutor gave the following response: "Age, he says. Think about age. Seventeen years old. Isn't that scary? Doesn't that scare you? Mitigating? Quite the contrary I submit. Quite the contrary."

The jury recommended the death penalty after finding the State had [***15] proved each of the three aggravating factors submitted to it. Accepting the jury's recommendation, the trial judge imposed the death penalty.

Simmons obtained new counsel, who moved [****16] in the trial court to set aside the conviction and sentence. One argument was that Simmons had received ineffective assistance at trial. To support this contention, the new counsel called [*559] as witnesses Simmons' trial attorney, Simmons' friends and

neighbors, and clinical psychologists who had evaluated him.

Part of the submission was that Simmons was "very immature," "very impulsive," and "very susceptible to being manipulated or influenced." The experts testified about Simmons' background including a difficult home environment and dramatic changes in behavior, accompanied by poor school performance in adolescence. Simmons was absent from home for long periods, spending time using alcohol and drugs with other teenagers or young adults. The contention by Simmons' postconviction counsel was that these matters should have been established in the sentencing proceeding.

The trial court found no constitutional violation by reason of ineffective assistance of counsel and denied the motion for postconviction relief. In a consolidated appeal from Simmons' conviction and sentence, and from the denial of postconviction relief, the Missouri Supreme Court affirmed. [****17] State v. Simmons, 944 S.W.2d 165, 169 (en banc), cert denied, 522 U.S. 953, 139 L. Ed. 2d 293, 118 S. Ct. 376 (1997). The federal courts denied Simmons' petition for a writ of habeas corpus. Simmons v. Bowersox, 235 F.3d 1124, 1127 (CA8), cert denied, 534 U.S. 924, 151 L. Ed. 2d 206, 122 S. Ct. 280 (2001).

After these proceedings in Simmons' case had run their course, this Court held that the *Eighth* and *Fourteenth Amendments* prohibit the execution of a mentally retarded person. Atkins v. Virginia, 536 U.S. 304, 153 L. Ed. 2d 335, 122 S. Ct. 2242 (2002). Simmons filed a new petition for state postconviction relief, arguing that the reasoning of *Atkins* established that the Constitution prohibits the execution of a juvenile who was under 18 when the crime was committed.

The Missouri Supreme Court agreed. State ex rel. Simmons v. Roper, 112 S.W.3d 397 (2003) (en banc). It held that since *Stanford*,

"a national consensus has developed against the execution of juvenile offenders, as demonstrated by the fact that eighteen states now bar such executions for juveniles, [*560] that twelve other states bar executions altogether, [****18] that no state has lowered its age of execution below 18 since *Stanford*, that five states have legislatively or by case law raised or established the minimum age at 18, and that the imposition of the juvenile death penalty has become truly unusual over the last

decade." 112 S.W.3d, at 399.

On this reasoning it set aside Simmons' death sentence and resentenced him to "life imprisonment without eligibility for probation, parole, or release except by act of the Governor." Id., at 413.

[**1190] We granted certiorari, 540 U.S. 1160, 157 L. Ed. 2d 1204, 124 S. Ct. 1171 (2004), and now affirm.

II

LEdHN2[↑] [2] LEdHN3A[↑] [3A] The *Eighth Amendment* provides: HN1[↑] [****16] "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." HN2[↑] The provision is applicable to the States through the *Fourteenth Amendment*. Furman v. Georgia, 408 U.S. 238, 239, 33 L. Ed. 2d 346, 92 S. Ct. 2726 (1972) (*per curiam*); Robinson v. California, 370 U.S. 660, 666-667, 8 L. Ed. 2d 758, 82 S. Ct. 1417 (1962); [****19] Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 463, 91 L. Ed. 422, 67 S. Ct. 374 (1947) (plurality opinion). As the Court explained in *Atkins*, HN3[↑] the *Eighth Amendment* guarantees individuals the right not to be subjected to excessive sanctions. The right flows from the basic "precept of justice that punishment for crime should be graduated and proportioned to [the] offense." 536 U.S., at 311, 153 L. Ed. 2d 335, 122 S. Ct. 2242 (quoting Weems v. United States, 217 U.S. 349, 367, 54 L. Ed. 793, 30 S. Ct. 544 (1910)). By protecting even those convicted of heinous crimes, the *Eighth Amendment* reaffirms the duty of the government to respect the dignity of all persons.

LEdHN3B[↑] [3B] HN4[↑] The prohibition against "cruel and unusual punishments," like other expansive language in the Constitution, must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design. To implement this [*561] framework we have established the propriety and affirmed the necessity of referring to "the evolving standards of decency that mark the progress of a maturing society" [****20] to determine which punishments are so disproportionate as to be cruel and unusual. Trop v. Dulles, 356 U.S. 86, 100-101, 2 L. Ed. 2d 630, 78 S. Ct. 590 (1958) (plurality opinion).

In Thompson v. Oklahoma, 487 U.S. 815, 101 L. Ed. 2d 702, 108 S. Ct. 2687 (1988), a plurality of the Court determined that our standards of decency do not permit the execution of any offender under the age of 16 at the

time of the crime. Id., at 818-838, 101 L. Ed. 2d 702, 108 S. Ct. 2687 (opinion of Stevens, J., joined by Brennan, Marshall, and Blackmun, JJ.). The plurality opinion explained that no death penalty State that had given express consideration to a minimum age for the death penalty had set the age lower than 16. Id., at 826-829, 101 L. Ed. 2d 702, 108 S. Ct. 2687. The plurality also observed that "[t]he conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense is consistent with the views that have been expressed by respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community. [****21] " Id., at 830, 101 L. Ed. 2d 702, 108 S. Ct. 2687. The opinion further noted that juries imposed the death penalty on offenders under 16 with exceeding rarity; the last execution of an offender for a crime committed under the age of 16 had been carried out in 1948, 40 years prior. Id., at 832-833, 101 L. Ed. 2d 702, 108 S. Ct. 2687.

Bringing its independent judgment to bear on the permissibility of the death penalty for a 15-year-old offender, the *Thompson* plurality stressed that "[t]he reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally [***17] reprehensible as that of an adult." Id., at 835, 101 L. Ed. 2d 702, 108 S. Ct. 2687. According to the plurality, the lesser culpability of offenders under 16 made the death penalty inappropriate as a form of retribution, while the low likelihood that [**1191] offenders under 16 engaged in "the kind of cost-benefit analysis that [***562] attaches any weight to the possibility of execution" made the death penalty ineffective as a means of deterrence. [****22] Id., at 836-838, 101 L. Ed. 2d 702, 108 S. Ct. 2687. With Justice O'Connor concurring in the judgment on narrower grounds, id., at 848-859, 101 L. Ed. 2d 702, 108 S. Ct. 2687, the Court set aside the death sentence that had been imposed on the 15-year-old offender.

The next year, in *Stanford v. Kentucky*, 492 U.S. 361, 106 L. Ed. 2d 306, 109 S. Ct. 2969 (1989), the Court, over a dissenting opinion joined by four Justices, referred to contemporary standards of decency in this country and concluded the *Eighth* and *Fourteenth Amendments* did not proscribe the execution of juvenile offenders over 15 but under 18. The Court noted that 22 of the 37 death penalty States permitted the death penalty for 16-year-old offenders, and, among these 37 States, 25 permitted it for 17-year-old offenders. These

numbers, in the Court's view, indicated there was no national consensus "sufficient to label a particular punishment cruel and unusual." Id., at 370-371, 106 L. Ed. 2d 306, 109 S. Ct. 2969. A plurality of the Court also "emphatically reject[ed]" the suggestion that the Court should bring its own judgment to bear on the acceptability of the juvenile death penalty. [****23] Id., at 377-378, 106 L. Ed. 2d 306, 109 S. Ct. 2969 (opinion of Scalia, J., joined by Rehnquist, C. J., and White and Kennedy, JJ.); see also id., at 382, 106 L. Ed. 2d 306, 109 S. Ct. 2969 (O'Connor, J., concurring in part and concurring in judgment) (criticizing the plurality's refusal "to judge whether the "'nexus between the punishment imposed and the defendant's blameworthiness"' is proportional").

The same day the Court decided *Stanford*, it held that the *Eighth Amendment* did not mandate a categorical exemption from the death penalty for the mentally retarded. *Penry v. Lynaugh*, 492 U.S. 302, 106 L. Ed. 2d 256, 109 S. Ct. 2934 (1989). In reaching this conclusion it stressed that only two States had enacted laws banning the imposition of the death penalty on a mentally retarded person convicted of a capital offense. Id., at 334, 106 L. Ed. 2d 256, 109 S. Ct. 2934. According to the Court, "the two state statutes prohibiting execution of the mentally retarded, even when added to the 14 States that have rejected capital punishment completely, [***563] [did] not provide sufficient evidence at present of a national consensus." *Ibid.*

[****24] Three Terms ago the subject was reconsidered in *Atkins*. We held that standards of decency have evolved since *Penry* and now demonstrate that the execution of the mentally retarded is cruel and unusual punishment. The Court noted objective indicia of society's standards, as expressed in legislative enactments and state practice with respect to executions of the mentally retarded. When *Atkins* was decided only a minority of States permitted the practice, and even in those States it was rare. 536 U.S., at 314-315, 153 L. Ed. 2d 335, 122 S. Ct. 2242. On the basis of these indicia the Court determined that executing mentally retarded [***18] offenders "has become truly unusual, and it is fair to say that a national consensus has developed against it." Id., at 316, 153 L. Ed. 2d 335, 122 S. Ct. 2242.

The inquiry into our society's evolving standards of decency did not end there. The *Atkins* Court neither repeated nor relied upon the statement in *Stanford* that the Court's independent judgment has no bearing on the

acceptability of a particular punishment under the *Eighth Amendment*. Instead we returned to the rule, established in decisions predating *Stanford*, [****25] that "the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the *Eighth Amendment*." [**1192] 536 U.S., at 312, 153 L. Ed. 2d 335, 122 S. Ct. 2242 (quoting *Coker v. Georgia*, 433 U.S. 584, 597, 53 L. Ed. 2d 982, 97 S. Ct. 2861 (1977) (plurality opinion)). Mental retardation, the Court said, diminishes personal culpability even if the offender can distinguish right from wrong. 536 U.S., at 318, 153 L. Ed. 2d 335, 122 S. Ct. 2242. The impairments of mentally retarded offenders make it less defensible to impose the death penalty as retribution for past crimes and less likely that the death penalty will have a real deterrent effect. Id., at 319-320, 153 L. Ed. 2d 335, 122 S. Ct. 2242. Based on these considerations and on the finding of national consensus against executing the mentally retarded, the Court ruled that the death penalty constitutes an excessive sanction for the entire category of mentally retarded offenders, [*564] and that the *Eighth Amendment* "places a substantive restriction on the State's power to take the life' of a mentally retarded [****26] offender." Id., at 321, 153 L. Ed. 2d 335, 122 S. Ct. 2242 (quoting *Ford v. Wainwright*, 477 U.S. 399, 405, 91 L. Ed. 2d 335, 106 S. Ct. 2595 (1986)).

Just as the *Atkins* Court reconsidered the issue decided in *Penry*, we now reconsider the issue decided in *Stanford*. The beginning point is a review of objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question. These data give us essential instruction. We then must determine, in the exercise of our own independent judgment, whether the death penalty is a disproportionate punishment for juveniles.

III

A

LEdHN[1B][↑] [1B] The evidence of national consensus against the death penalty for juveniles is similar, and in some respects parallel, to the evidence *Atkins* held sufficient to demonstrate a national consensus against the death penalty for the mentally retarded. When *Atkins* was decided, 30 States prohibited the death penalty for the mentally retarded. This number comprised 12 that had abandoned the death penalty altogether, and 18 that maintained it but excluded the mentally retarded from its reach. [****27]

536 U.S., at 313-315, 153 L. Ed. 2d 335, 122 S. Ct. 2242. By a similar calculation in this case, 30 States prohibit the juvenile death penalty, comprising 12 that have rejected the death penalty altogether and 18 that maintain it but, by express provision or judicial interpretation, exclude juveniles from its reach. See Appendix A, *infra*. *Atkins* emphasized that even in the 20 States without formal prohibition, the practice of executing the [****19] mentally retarded was infrequent. Since *Penry*, only five States had executed offenders known to have an IQ under 70. 536 U.S., at 316, 153 L. Ed. 2d 335, 122 S. Ct. 2242. In the present case, too, even in the 20 States without a formal prohibition on executing juveniles, the practice is infrequent. Since *Stanford*, six States have executed prisoners for crimes committed as juveniles. [*565] In the past 10 years, only three have done so: Oklahoma, Texas, and Virginia. See V. Streib, *The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes, January 1, 1973-December 31, 2004*, No. 76, p 4 (2005), available at <http://www.law.onu.edu/faculty/streib/documents/JuvDeathDec2004.pdf> (last updated [****28] Jan. 31, 2005) (as visited Feb. 25, 2005, and available in Clerk of Court's case file). In December 2003 the Governor of Kentucky decided to spare the life of Kevin Stanford, and commuted his sentence to one of life imprisonment without parole, with the declaration that "[w]e ought not be executing people who, legally, were children." *Lexington Herald Leader*, Dec. 9, 2003, p B3, 2003 WL 65043346. By this act the Governor ensured Kentucky would not add itself to the list of [**1193] States that have executed juveniles within the last 10 years even by the execution of the very defendant whose death sentence the Court had upheld in *Stanford v. Kentucky*.

There is, to be sure, at least one difference between the evidence of consensus in *Atkins* and in this case. Impressive in *Atkins* was the rate of abolition of the death penalty for the mentally retarded. Sixteen States that permitted the execution of the mentally retarded at the time of *Penry* had prohibited the practice by the time we heard *Atkins*. By contrast, the rate of change in reducing the incidence of the juvenile death penalty, or in taking specific steps to abolish it, has been slower. Five [****29] States that allowed the juvenile death penalty at the time of *Stanford* have abandoned it in the intervening 15 years--four through legislative enactments and one through judicial decision. Streib, *supra*, at 5, 7; *State v. Furman*, 122 Wn.2d 440, 858 P.2d 1092 (1993) (en banc).

LEdHN[1C][↑] [1C] LEdHN[4][↑] [4] Though less

dramatic than the change from *Penry* to *Atkins* ("telling," to borrow the word *Atkins* used to describe this difference, [536 U.S., at 315, n. 18, 153 L. Ed. 2d 335, 122 S. Ct. 2242](#)), we still consider the change from *Stanford* to this case to be significant. As noted in *Atkins*, with respect to the States that had abandoned [*566] the death penalty for the mentally retarded since *Penry*, "[i]t is not so much the number of these States that is significant, but the consistency of the direction of change." [536 U.S., at 315, 153 L. Ed. 2d 335, 122 S. Ct. 2242](#). In particular we found it significant that, in the wake of *Penry*, no State that had already prohibited the execution of the mentally retarded had passed legislation to reinstate the penalty. [****30] [536 U.S., at 315-316, 153 L. Ed. 2d 335, 122 S. Ct. 2242](#). The number of States that have abandoned capital punishment for juvenile offenders since *Stanford* is smaller than the number of States that abandoned capital punishment for the mentally retarded after *Penry*; yet we think the same consistency of direction of change has been demonstrated. Since *Stanford*, no State that previously prohibited capital punishment for juveniles has reinstated it. This fact, [***20] coupled with the trend toward abolition of the juvenile death penalty, carries special force in light of the general popularity of anticrime legislation, [Atkins, supra, at 315, 153 L. Ed. 2d 335, 122 S. Ct. 2242](#), and in light of the particular trend in recent years toward cracking down on juvenile crime in other respects, see H. Snyder & M. Sickmund, National Center for Juvenile Justice, *Juvenile Offenders and Victims: 1999 National Report* 89, 133 (Sept. 1999); Scott & Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. Crim. L. & C. 137, 148 (1997). Any difference between this case and *Atkins* with respect to the pace of abolition is thus [****31] counterbalanced by the consistent direction of the change.

The slower pace of abolition of the juvenile death penalty over the past 15 years, moreover, may have a simple explanation. When we heard *Penry*, only two death penalty States had already prohibited the execution of the mentally retarded. When we heard *Stanford*, by contrast, 12 death penalty States had already prohibited the execution of any juvenile under 18, and 15 had prohibited the execution of any juvenile under 17. If anything, this shows that the impropriety of executing juveniles between 16 and 18 years of age [*567] gained wide recognition earlier than the impropriety of executing the mentally retarded. In the words of the Missouri Supreme Court: "It would be the ultimate in irony if the very fact that the

inappropriateness of the death penalty for juveniles was broadly recognized sooner than it was recognized for the mentally retarded were to become a reason to continue the execution [***1194] of juveniles now that the execution of the mentally retarded has been barred." [****32] [112 S.W.3d, at 408, n. 10](#).

[LEdHN1D](#)[↑] [1D] Petitioner cannot show national consensus in favor of capital punishment for juveniles but still resists the conclusion that any consensus exists against it. Petitioner supports this position with, in particular, the observation that when the Senate ratified the International Covenant on Civil and Political Rights (ICCPR), Dec. 19, 1966, 999 U. N. T. S. 171 (entered into force Mar. 23, 1976), it did so subject to the President's proposed reservation regarding Article 6(5) of that treaty, which prohibits capital punishment for juveniles. Brief for Petitioner 27. This reservation at best provides only faint support for petitioner's argument. First, the reservation was passed in 1992; since then, five States have abandoned capital punishment for juveniles. Second, Congress considered the issue when enacting the Federal Death Penalty Act in 1994, and determined that the death penalty should not extend to juveniles. See [18 U.S.C. § 3591](#). The reservation to Article 6(5) of the ICCPR provides minimal evidence that there is not now a national consensus against juvenile executions.

[****33] As in *Atkins*, the objective indicia of consensus in this case--the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice--provide sufficient evidence that today our society views juveniles, in the words *Atkins* used respecting the mentally retarded, as "categorically less culpable than the [***21] average criminal." [536 U.S., at 316, 153 L. Ed. 2d 335, 122 S. Ct. 2242](#).

[*568] B

[HN5](#)[↑] A majority of States have rejected the imposition of the death penalty on juvenile offenders under 18, and we now hold this is required by the *Eighth Amendment*.

[LEdHN5](#)[↑] [5] [LEdHN6](#)[↑] [6] [LEdHN7](#)[↑] [7] [LEdHN8](#)[↑] [8] [HN6](#)[↑] Because the death penalty is the most severe punishment, the *Eighth Amendment* applies to it with special force. [Thompson, 487 U.S., at 856, 101 L. Ed. 2d 702, 108 S. Ct. 2687](#) (O'Connor, J., concurring in judgment). Capital punishment must be

limited to those offenders who commit "a narrow category of the most serious crimes" and whose extreme culpability makes them "the most deserving of execution." [****34] Atkins, supra, at 319, 153 L. Ed. 2d 335, 122 S. Ct. 2242. This principle is implemented throughout the capital sentencing process. States must give narrow and precise definition to the aggravating factors that can result in a capital sentence. Godfrey v. Georgia, 446 U.S. 420, 428-429, 64 L. Ed. 2d 398, 100 S. Ct. 1759 (1980) (plurality opinion). In any capital case a defendant has wide latitude to raise as a mitigating factor "any aspect of [his or her] character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 604, 57 L. Ed. 2d 973, 98 S. Ct. 2954 (1978) (plurality opinion); Eddings v. Oklahoma, 455 U.S. 104, 110-112, 71 L. Ed. 2d 1, 102 S. Ct. 869 (1982); see also Johnson v. Texas, 509 U.S. 350, 359-362, 125 L. Ed. 2d 290, 113 S. Ct. 2658 (1993) (summarizing the Court's jurisprudence after Furman v. Georgia, 408 U.S. 238, 33 L. Ed. 2d 346, 92 S. Ct. 2726 (1972) (*per curiam*), with respect to a sentencer's consideration of aggravating and mitigating factors). [****35] There are a number of crimes that beyond question are severe in absolute terms, yet the death penalty may not be imposed for their commission. Coker v. Georgia, 433 U.S. 584, 53 L. Ed. 2d 982, 97 S. Ct. 2861 (1977) (rape of an adult woman); Enmund v. Florida, 458 U.S. 782, 73 L. Ed. 2d 1140, 102 S. Ct. 3368 (1982) (felony murder where [**1195] defendant did not kill, attempt to kill, or intend to kill). The death penalty may not be imposed on certain classes of offenders, such as juveniles under 16, the insane, and the mentally retarded, no matter how heinous the crime. Thompson v. Oklahoma, supra; Ford v. Wainwright, 477 U.S. 399, 91 L. Ed. 2d 335, 106 S. Ct. 2595 (1986); Atkins, supra. These rules vindicate the underlying principle [*569] that the death penalty is reserved for a narrow category of crimes and offenders.

LEdHN[1E][↑] [1E] LEdHN[9A][↑] [9A] Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders. First, as any parent knows and as the scientific and sociological studies respondent and his *amici* [****36] cite tend to confirm, "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions." Johnson, supra, at 367, 125 L. Ed. 2d 290,

113 S. Ct. 2658; see also Eddings, supra, at 115-116, 71 L. Ed. 2d 1, 102 S. Ct. 869 ("Even the normal 16-year-old customarily lacks the maturity of an adult"). It has been noted that "adolescents are overrepresented [***22] statistically in virtually every category of reckless behavior." Arnett, Reckless Behavior in Adolescence: A Developmental Perspective, 12 *Developmental Review* 339 (1992). In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent. See Appendixes B-D, *infra*.

LEdHN[9B][↑] [9B] The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. [****37] Eddings, supra, at 115, 71 L. Ed. 2d 1, 102 S. Ct. 869 ("[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage"). This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment. See Steinberg & Scott, Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 *Am. Psychologist* 1009, 1014 (2003) (hereinafter Steinberg & Scott) ("[A]s legal minors, [juveniles] lack the freedom that adults have to extricate themselves from a criminogenic setting").

[*570] The third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed. See generally E. Erikson, *Identity: Youth and Crisis* (1968).

These differences render suspect any conclusion that a juvenile falls among the worst offenders. The susceptibility of juveniles to immature and irresponsible behavior means "their irresponsible conduct is not as morally reprehensible [****38] as that of an adult." Thompson, supra, at 835, 101 L. Ed. 2d 702, 108 S. Ct. 2687 (plurality opinion). Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment. See Stanford, 492 U.S., at 395, 106 L. Ed. 2d 306, 109 S. Ct. 2969 (Brennan, J., dissenting). The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably

depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will **[**1196]** be reformed. Indeed, "[t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuosity and recklessness that may dominate in younger years can subside." **[****39]** Johnson, supra, at 368, 125 L. Ed. 2d 290, 113 S. Ct. 2658; see also Steinberg & Scott 1014 ("For most teens, [risky or antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled. Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood").

[LEdHN1F](#)^[↑] [1F] In *Thompson*, a plurality of the Court recognized the import of these characteristics with respect to juveniles under 16, and relied on them to **[**23]** hold that the *Eighth Amendment* prohibited the imposition of the death penalty on juveniles **[*571]** below that age. 487 U.S., at 833-838, 101 L. Ed. 2d 702, 108 S. Ct. 2687. We conclude the same reasoning applies to all juvenile offenders under 18.

[LEdHN1G](#)^[↑] [1G] [LEdHN10A](#)^[↑] [10A] Once the diminished culpability of juveniles is recognized, it is evident that the penological justifications for the death penalty apply to them with lesser force than to adults. We have held there are two distinct social purposes served by the death penalty: "retribution and deterrence of capital crimes **[****40]** by prospective offenders." Atkins, 536 U.S., at 319, 153 L. Ed. 2d 335, 122 S. Ct. 2242 (quoting Gregg v. Georgia, 428 U.S. 153, 183, 49 L. Ed. 2d 859, 96 S. Ct. 2909 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.)). As for retribution, we remarked in *Atkins* that "[i]f the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution." 536 U.S., at 319, 153 L. Ed. 2d 335, 122 S. Ct. 2242. The same conclusions follow from the lesser culpability of the juvenile offender. Whether viewed as an attempt to express the community's moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult. Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.

[LEdHN10B](#)^[↑] [10B] [LEdHN11](#)^[↑] [11] As for deterrence, it is unclear whether the death penalty has a significant or even measurable deterrent effect on juveniles, as counsel for petitioner acknowledged at oral argument. Tr. of Oral Arg. 48. In general we leave to legislatures the assessment of the efficacy of various criminal penalty schemes, see Harmelin v. Michigan, 501 U.S. 957, 998-999, 115 L. Ed. 2d 836, 111 S. Ct. 2680 (1991) (Kennedy, J., concurring in part and concurring in judgment). Here, however, the absence of evidence of deterrent effect is of special concern because the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence. In particular, as the plurality observed in **[*572]** *Thompson*, "[t]he likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent." 487 U.S., at 837, 101 L. Ed. 2d 702, 108 S. Ct. 2687. To the extent the juvenile death penalty might have residual deterrent effect, it is worth noting that the punishment of life imprisonment without the **[****42]** possibility of parole is itself a severe sanction, in particular for a young person.

[LEdHN12](#)^[↑] [12] In concluding that neither retribution nor deterrence provides adequate justification for imposing the death penalty on juvenile offenders, we cannot deny or overlook the brutal crimes too many juvenile offenders have committed. See Brief for **[**1197]** Alabama et al. as *Amici Curiae*. Certainly it can be argued, although we by no means concede the point, that a rare case might arise in which a juvenile offender has sufficient psychological maturity, and at the same time demonstrates sufficient depravity, to merit a sentence of death. Indeed, this possibility is the linchpin of one contention pressed by **[**24]** petitioner and his *amici*. They assert that even assuming the truth of the observations we have made about juveniles' diminished culpability in general, jurors nonetheless should be allowed to consider mitigating arguments related to youth on a case-by-case basis, and in some cases to impose the death penalty if justified. A central feature of death penalty sentencing is a particular assessment of the circumstances of the crime and the characteristics of **[****43]** the offender. The system is designed to consider both aggravating and mitigating circumstances, including youth, in every case. Given this Court's own insistence on individualized consideration, petitioner maintains that it is both arbitrary and unnecessary to adopt a categorical rule barring imposition of the death penalty on any offender under 18 years of age.

[LEdHN\[1H\]](#)^[↑] [1H] [LEdHN\[13A\]](#)^[↑] [13A] We disagree. The differences between juvenile and adult offenders are too marked and well understood to risk allowing [*573] a youthful person to receive the death penalty despite insufficient culpability. An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death. In some cases a defendant's youth may even be counted against him. In this very case, as we noted above, the prosecutor argued Simmons' youth was aggravating rather than mitigating. [****44] [Supra, at 558, 161 L. Ed. 2d, at 14](#). While this sort of overreaching could be corrected by a particular rule to ensure that the mitigating force of youth is not overlooked, that would not address our larger concerns.

[LEdHN\[13B\]](#)^[↑] [13B] It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption. See Steinberg & Scott 1014-1016. As we understand it, this difficulty underlies the rule forbidding psychiatrists from diagnosing any patient under 18 as having antisocial personality disorder, a disorder also referred to as psychopathy or sociopathy, and which is characterized by callousness, cynicism, and contempt for the feelings, rights, and suffering of others. American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 701-706 (4th ed. text rev. 2000); see also Steinberg & Scott 1015. If trained psychiatrists with the advantage of clinical testing and observation refrain, despite diagnostic expertise, from assessing any juvenile under 18 as having antisocial personality disorder, [****45] we conclude that States should refrain from asking jurors to issue a far graver condemnation--that a juvenile offender merits the death penalty. When a juvenile offender commits a heinous crime, the State can exact forfeiture of some [*574] of the most basic liberties, but the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity.

[LEdHN\[1I\]](#)^[↑] [1I] Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under [***25] 18 have already attained a level of maturity

some adults will never reach. For the [***1198] reasons we have discussed, however, a line must be drawn. The plurality opinion in *Thompson* drew the line at 16. In the intervening years the *Thompson* plurality's conclusion that offenders under 16 may not be executed has not been challenged. The logic of *Thompson* extends to those who are under 18. The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, [****46] we conclude, the age at which the line for death eligibility ought to rest.

These considerations mean [HN7](#)^[↑] *Stanford v Kentucky* should be deemed no longer controlling on this issue. To the extent *Stanford* was based on review of the objective indicia of consensus that obtained in 1989, [492 U.S., at 370-371, 106 L. Ed. 2d 306, 109 S. Ct. 2969](#), it suffices to note that those indicia have changed. [Supra, at 564-567, 161 L. Ed. 2d, at 18-21](#). It should be observed, furthermore, that the *Stanford* Court should have considered those States that had abandoned the death penalty altogether as part of the consensus against the juvenile death penalty, [492 U.S., at 370, n. 2, 106 L. Ed. 2d 306, 109 S. Ct. 2969](#); a State's decision to bar the death penalty altogether of necessity demonstrates a judgment that the death penalty is inappropriate for all offenders, including juveniles. Last, to the extent *Stanford* was based on a rejection of the idea that this Court is required to bring its independent judgment to bear on the proportionality of the death penalty for a particular class of crimes or offenders, [****47] [id., at 377-378, 106 L. Ed. 2d 306, 109 S. Ct. 2969](#) (plurality opinion), it suffices to note that this rejection was inconsistent with prior *Eighth Amendment* decisions, [Thompson, 487 U.S., at 833-838, \[*575\] 101 L. Ed. 2d 702, 108 S. Ct. 2687](#) (plurality opinion); [Enmund, 458 U.S., at 797, 73 L. Ed. 2d 1140, 102 S. Ct. 3368](#); [Coker, 433 U.S., at 597, 53 L. Ed. 2d 982, 97 S. Ct. 2861](#) (plurality opinion). It is also inconsistent with the premises of our recent decision in *Atkins*. [536 U.S., at 312-313, 317-321, 153 L. Ed. 2d 335, 122 S. Ct. 2242](#).

In holding that the death penalty cannot be imposed upon juvenile offenders, we take into account the circumstance that some States have relied on *Stanford* in seeking the death penalty against juvenile offenders. This consideration, however, does not outweigh our conclusion that *Stanford* should no longer control in those few pending cases or in those yet to arise.

IV

[LEdHN\[1J\]](#) [1J] [LEdHN\[14A\]](#) [14A] Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world [****48] that continues to give official sanction to the juvenile death penalty. This reality does not become controlling, for the task of interpreting the *Eighth Amendment* remains our responsibility. Yet at least from the time of the Court's decision in *Trop*, [HN8](#) 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." [356 U.S., at 102-103, 2 L. Ed. 2d 630, 78 S. Ct. 590](#) (plurality opinion) ("The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment [***26] for crime"); see also [Atkins, supra, at 317, n. 21, 153 L. Ed. 2d 335, 122 S. Ct. 2242](#) (recognizing that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved"); [Thompson, supra, at 830-831, and n. 31, 101 L. Ed. 2d 702, 108 S. Ct. 2687](#) (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 [****49] that "[w]e have previously recognized the relevance of the views of the international community [*576] in determining whether a punishment is cruel [***1199] and unusual"); [Enmund, supra, at 796-797, n. 22, 73 L. Ed. 2d 1140, 102 S. Ct. 3368](#) (observing that "the doctrine of felony murder has been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe"); [Coker, supra, at 596, n. 10, 53 L. Ed. 2d 982, 97 S. Ct. 2861](#) (plurality opinion) ("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").

As respondent and a number of *amici* emphasize, Article 37 of the United Nations Convention on the Rights of the Child, which every country in the world has ratified save for the United States and Somalia, contains an express prohibition on capital punishment for crimes committed by juveniles under 18. United Nations Convention on the Rights of the Child, Art. 37, Nov. 20, 1989, 1577 U. N. T. S. 3, [28 I. L. M. 1448, 1468-1470](#) (entered into force Sept. 2, 1990); Brief [****50] for Respondent 48; Brief for European Union et al. as *Amici Curiae* 12-13; Brief for President James Earl Carter, Jr., et al. as *Amici Curiae* 9; Brief for Former U. S.

Diplomats Morton Abramowitz et al. as *Amici Curiae* 7; Brief for Human Rights Committee of the Bar of England and Wales et al. as *Amici Curiae* 13-14. No ratifying country has entered a reservation to the provision prohibiting the execution of juvenile offenders. Parallel prohibitions are contained in other significant international covenants. See ICCPR, Art. 6(5), 999 U. N. T. S., at 175 (prohibiting capital punishment for anyone under 18 at the time of offense) (signed and ratified by the United States subject to a reservation regarding Article 6(5), as noted, [supra, at 567, 161 L. Ed. 2d, at 20](#)); American Convention on Human Rights: Pact of San Jose, Costa Rica, Art. 4(5), Nov. 22, 1969, 1144 U. N. T. S. 146 (entered into force July 19, 1978) (same); African Charter on the Rights and Welfare of the Child, Art. 5(3), OAU Doc. CAB/LEG/24.9/49 (1990) (entered into force Nov. 29, 1999) (same).

[*577] Respondent and his *amici* have submitted, and petitioner does not contest, that only [****51] seven countries other than the United States have executed juvenile offenders since 1990: Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China. Since then each of these countries has either abolished capital punishment for juveniles or made public disavowal of the practice. Brief for Respondent 49-50. In sum, it is fair to say that the United States now stands alone in a world that has [***27] turned its face against the juvenile death penalty.

[LEdHN\[15\]](#) [15] Though the international covenants prohibiting the juvenile death penalty are of more recent date, it is instructive to note that the United Kingdom abolished the juvenile death penalty before these covenants came into being. The United Kingdom's experience bears particular relevance here in light of the historic ties between our countries and in light of the *Eighth Amendment's* own origins. The Amendment was modeled on a parallel provision in the English Declaration of Rights of 1689, which provided: "[E]xcessive Bail ought not to be required nor excessive Fines imposed; nor cruel and unusual Punishments inflicted." 1 W. & M., ch. 2, § 10, in 3 Eng. Stat. at Large 441 [****52] (1770); see also [Trop, supra, at 100, 2 L. Ed. 2d 630, 78 S. Ct. 590](#) (plurality opinion). As of now, the United Kingdom has abolished the death penalty in its entirety; but, decades before it took this step, it recognized the disproportionate nature of the juvenile death penalty; and it abolished that penalty as a separate matter. In 1930 an official committee recommended that the minimum age for execution be raised to 21. House of Commons Report from the

Select Committee on Capital Punishment (1930), **[**1200]** 193, p 44. Parliament then enacted the Children and Young Person's Act of 1933, 23 Geo. 5, ch. 12, which prevented execution of those aged 18 at the date of the sentence. And in 1948, Parliament enacted the Criminal Justice Act, 11 & 12 Geo. 6, ch. 58, prohibiting the execution of any person under 18 at the time of the offense. In the 56 years that have passed **[*578]** since the United Kingdom abolished the juvenile death penalty, the weight of authority against it there, and in the international community, has become well established.

[LEdHN\[14B\]](#)[\[↑\]](#) [14B] It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime. See Brief for Human Rights Committee of the Bar of England and Wales et al. as *Amici Curiae* 10-11. The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.

Over time, from one generation to the next, the Constitution has come to earn the high respect and even, as Madison dared to hope, the veneration of the American people. See *The Federalist* No. 49, p 314 (C. Rossiter ed. 1961). The document sets forth, and rests upon, innovative principles original to the American experience, such as federalism; a proven balance in political mechanisms through separation of powers; specific guarantees for the accused in criminal cases; and broad provisions to secure individual freedom and preserve human dignity. These doctrines and guarantees are central to the American experience and remain essential to our present-day self-definition and national **[****54]** identity. Not the least of the reasons we honor the Constitution, then, is because we know it to be our own. It 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.

[*28]** * * *

[LEdHN\[1K\]](#)[\[↑\]](#) [1K] The *Eighth* and *Fourteenth Amendments* forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed. The judgment **[*579]** of the Missouri Supreme Court setting aside the sentence of

death imposed upon Christopher Simmons is affirmed.

It is so ordered.

[*29]** APPENDIX A TO OPINION OF THE COURT

I. STATES THAT PERMIT THE IMPOSITION OF THE DEATH PENALTY ON JUVENILES

[Go to table 1](#)

[**55]**

[*580] **[***30]** **[**1201]** II. STATES THAT RETAIN THE DEATH PENALTY, BUT SET THE MINIMUM AGE AT 18

[Go to table 2](#)

[**56]**

* * *

During the past year, decisions by the highest courts of Kansas and New York invalidated provisions in those States' death penalty statutes. [State v. Marsh, 278 Kan. 520, 102 P. 3d 445 \(2004\)](#) (invalidating provision that required imposition of the death penalty if aggravating and mitigating circumstances were found to be in equal balance); [People v. LaValle, 3 N.Y.3d 88, 817 N.E.2d 341, 783 N.Y.S.2d 485 \(2004\)](#) (invalidating mandatory requirement to instruct the jury that, in the case of jury deadlock as to the appropriate sentence in a capital case, the defendant would receive a sentence of life imprisonment with parole eligibility after serving a minimum of 20 to 25 years). Due to these decisions, it would appear that in these States the death penalty remains on the books, but that as a practical matter it might not be imposed on anyone until there is a change of course in these decisions, or until the respective state legislatures remedy the problems the courts have identified. [Marsh, supra, at 524-526, 544-546, 102 P.3d, at 452, 464](#); **[****57]** [LaValle, supra, at 99, 817 N. E. 2d, at 344](#).

[*581] **[***31]** III. STATES WITHOUT THE DEATH PENALTY

[Go to table 3](#)

[*32] [**1202]** APPENDIX B TO OPINION OF THE COURT

STATE STATUTES ESTABLISHING A MINIMUM AGE TO VOTE

 [Go to table4](#)

[**58]**
* * *

[1203] [***33] [*583]** The *Twenty-Sixth Amendment to the Constitution of the United States* provides that "[t]he right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age."

[*34]** APPENDIX C TO OPINION OF THE COURT

STATE STATUTES ESTABLISHING A MINIMUM AGE FOR JURY SERVICE

 [Go to table5](#)

[**59] [***35]**

[1204] [*585] [***36]** APPENDIX D TO OPINION OF THE COURT

STATE STATUTES ESTABLISHING A MINIMUM AGE FOR MARRIAGE WITHOUT PARENTAL OR JUDICIAL CONSENT

 [Go to table6](#)

[**60] [***37]**

Concur by: Stevens

Concur

[*587] [*38] [**1205]** Justice **Stevens**, with whom Justice **Ginsburg** joins, concurring.

Perhaps even more important than our specific holding today is our reaffirmation of the basic principle that informs the Court's interpretation of the *Eighth Amendment*. If the meaning of that Amendment had been frozen when it was originally drafted, it would impose no impediment to the execution of 7-year-old children today. See [Stanford v. Kentucky, 492 U.S.](#)

[361, 368, 106 L. Ed. 2d 306, 109 S. Ct. 2969 \(1989\)](#) (describing the common law at the time of the Amendment's adoption). The evolving standards of decency that have driven our construction of this critically important part of the *Bill of Rights* foreclose any such reading of the Amendment. In the best tradition of the common law, the pace of that evolution is a matter for continuing debate; but that our understanding of the Constitution does change from time to time has been settled since John Marshall breathed life into its text. If great lawyers of his day--Alexander Hamilton, for example--were sitting with us today, I would expect them to join **[****61]** Justice Kennedy's opinion for the Court. In all events, I do so without hesitation.

Dissent by: O'CONNOR; SCALIA

Dissent

[1206]** Justice **O'Connor**, dissenting.

The Court's decision today establishes a categorical rule forbidding the execution of any offender for any crime committed before his 18th birthday, no matter how deliberate, wanton, or cruel the offense. Neither the objective evidence of contemporary societal values, nor the Court's moral proportionality analysis, nor the two in tandem suffice to justify this ruling.

[*588] Although the Court finds support for its decision in the fact that a majority of the States now disallow capital punishment of 17-year-old offenders, it refrains from asserting that its holding is compelled by a genuine national consensus. Indeed, the evidence before us fails to demonstrate conclusively that any such consensus has emerged in the brief period since we upheld the constitutionality of this practice in [\[****62\] Stanford v. Kentucky, 492 U.S. 361, 106 L. Ed. 2d 306, 109 S. Ct. 2969 \(1989\)](#).

Instead, the rule decreed by the Court rests, ultimately, on its independent moral judgment that death is a disproportionately severe punishment for any 17-year-old offender. I do not subscribe to this judgment. Adolescents as a class are undoubtedly less mature, and therefore less culpable for their misconduct, than adults. But the Court has adduced no evidence impeaching the seemingly reasonable conclusion reached by many state legislatures: that at least some 17-year-old murderers are sufficiently mature to deserve the death penalty in an appropriate case. Nor has it been shown that capital sentencing juries are incapable

of accurately assessing a youthful defendant's maturity or of giving due weight to the mitigating characteristics associated with youth.

On this record--and especially in light of the fact that so little has changed since our recent decision in *Stanford*--I would not substitute our judgment about the moral propriety of capital punishment for 17-year-old murderers for the judgments of the Nation's legislatures. Rather, I would demand a clearer showing that our [****63] society truly has set its face against [***39] this practice before reading the *Eighth Amendment* categorically to forbid it.

I

A

Let me begin by making clear that I agree with much of the Court's description of the general principles that guide our *Eighth Amendment* jurisprudence. The Amendment [***589] bars not only punishments that are inherently "'barbaric,'" but also those that are "'excessive' in relation to the crime committed." *Coker v. Georgia*, 433 U.S. 584, 592, 53 L. Ed. 2d 982, 97 S. Ct. 2861 (1977) (plurality opinion). A sanction is therefore beyond the State's authority to inflict if it makes "no measurable contribution" to acceptable penal goals or is "grossly out of proportion to the severity of the crime." *Ibid.* The basic "precept of justice that punishment for crime should be . . . proportioned to [the] offense," *Weems v. United States*, 217 U.S. 349, 367, 54 L. Ed. 793, 30 S. Ct. 544 (1910), applies with special force to the death penalty. In capital cases, the Constitution demands that the punishment be tailored both to the nature of the crime itself and to the defendant's "personal responsibility and moral guilt." [****64] *Enmund v. Florida*, 458 U.S. 782, 801, 73 L. Ed. 2d 1140, 102 S. Ct. 3368 (1982); see also *id.*, at 825, 73 L. Ed. 2d 1140, 102 S. Ct. 3368 (O'Connor, J., dissenting); *Tison v. Arizona*, 481 U.S. 137, 149, 95 L. Ed. 2d 127, 107 S. Ct. 1676 (1987); *Eddings v. Oklahoma*, 455 U.S. 104, 111-112, 71 L. Ed. 2d 1, 102 S. Ct. 869 (1982).

It is by now beyond serious dispute that the *Eighth Amendment's* prohibition of "cruel and unusual punishments" is not a static command. Its mandate would be [***1207] little more than a dead letter today if it barred only those sanctions--like the execution of children under the age of seven--that civilized society had already repudiated in 1791. See *ante*, at 587, 161 L. Ed. 2d, at 38 (Stevens, J., concurring); cf. *Stanford*,

supra, at 368, 106 L. Ed. 2d 306, 109 S. Ct. 2969 (discussing the common law rule at the time the *Bill of Rights* was adopted). Rather, because "[t]he basic concept underlying the *Eighth Amendment* is nothing less than the dignity of man," the Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." [****65] *Trop v. Dulles*, 356 U.S. 86, 100-101, 2 L. Ed. 2d 630, 78 S. Ct. 590 (1958) (plurality opinion). In discerning those standards, we look to "objective factors to the maximum possible extent." *Coker, supra*, at 592, 53 L. Ed. 2d 982, 97 S. Ct. 2861 (plurality opinion). Laws enacted by the Nation's legislatures provide the "clearest and most reliable objective evidence of contemporary values." *Penry v. Lynaugh*, 492 U.S. 302, 331, 106 L. Ed. 2d 256, 109 S. Ct. 2934 (1989). [***590] And data reflecting the actions of sentencing juries, where available, can also afford "'a significant and reliable objective index'" of societal mores. *Coker, supra*, at 596, 53 L. Ed. 2d 982, 97 S. Ct. 2861 (plurality opinion) (quoting *Gregg v. Georgia*, 428 U.S. 153, 181, 49 L. Ed. 2d 859, 96 S. Ct. 2909 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.)).

Although objective evidence of this nature is entitled to great weight, it does not end our inquiry. Rather, as the Court today reaffirms, see [****66] *ante*, at 563, 574-575, 161 L. Ed. 2d, at 18, 24-25, "the Constitution contemplates that in the end our [***40] own judgment will be brought to bear on the question of the acceptability of the death penalty under the *Eighth Amendment*," *Coker, supra*, at 597, 53 L. Ed. 2d 982, 97 S. Ct. 2861 (plurality opinion). "[P]roportionality--at least as regards capital punishment--not only requires an inquiry into contemporary standards as expressed by legislators and jurors, but also involves the notion that the magnitude of the punishment imposed must be related to the degree of the harm inflicted on the victim, as well as to the degree of the defendant's blameworthiness." *Enmund, supra*, at 815, 73 L. Ed. 2d 1140, 102 S. Ct. 3368 (O'Connor, J., dissenting). We therefore have a "constitutional obligation" to judge for ourselves whether the death penalty is excessive punishment for a particular offense or class of offenders. See *Stanford*, 492 U.S., at 382, 106 L. Ed. 2d 306, 109 S. Ct. 2969 (O'Connor, J., concurring in part and concurring in judgment); see also [****67] *Enmund, supra*, at 797, 73 L. Ed. 2d 1140, 102 S. Ct. 3368 ("[I]t is for us ultimately to judge whether the *Eighth Amendment* permits imposition of the death penalty").

B

Twice in the last two decades, the Court has applied these principles in deciding whether the *Eighth Amendment* permits capital punishment of adolescent offenders. In *Thompson v. Oklahoma*, 487 U.S. 815, 101 L. Ed. 2d 702, 108 S. Ct. 2687 (1988), a plurality of four Justices concluded that the *Eighth Amendment* barred capital punishment of an offender for a crime committed before the age of 16. I concurred in that judgment on narrower grounds. At the time, 32 state legislatures had "definitely concluded that no 15-year-old should be exposed to the threat [*591] of execution," and no legislature had affirmatively endorsed such a practice. *Id.*, at 849, 101 L. Ed. 2d 702, 108 S. Ct. 2687 (O'Connor, J., concurring in judgment). While acknowledging that a national consensus forbidding the execution of 15-year-old offenders "very likely" did exist, I declined to adopt that conclusion as a matter of constitutional law without clearer evidentiary support. [****68] *Ibid.* Nor, in my view, could the issue be decided based on moral proportionality arguments of the type advanced [**1208] by the Court today. Granting the premise "that adolescents are generally less blameworthy than adults who commit similar crimes," I wrote, "it does not necessarily follow that all 15-year-olds are incapable of the moral culpability that would justify the imposition of capital punishment." *Id.*, at 853, 101 L. Ed. 2d 702, 108 S. Ct. 2687. Similarly, we had before us no evidence "that 15-year-olds as a class are inherently incapable of being deterred from major crimes by the prospect of the death penalty." *Ibid.* I determined instead that, in light of the strong but inconclusive evidence of a national consensus against capital punishment of under-16 offenders, concerns rooted in the *Eighth Amendment* required that we apply a clear statement rule. Because the capital punishment statute in *Thompson* did not specify the minimum age at which commission of a capital crime would be punishable by death, I concluded that the statute could not be read to authorize the death penalty for a 15-year-old offender. [****69] *Id.*, at 857-858, 101 L. Ed. 2d 702, 108 S. Ct. 2687.

The next year, in *Stanford v. Kentucky*, supra, the Court held that the [***41] execution of 16- or 17-year-old capital murderers did not violate the *Eighth Amendment*. I again wrote separately, concurring in part and concurring in the judgment. At that time, 25 States did not permit the execution of under-18 offenders, including 13 that lacked the death penalty altogether. See *id.*, at 370, 106 L. Ed. 2d 306, 109 S. Ct. 2969. While noting that "[t]he day may come when there is such general legislative rejection of the execution of 16-

or 17-year-old capital murderers that a clear national consensus can be said to have developed," I concluded that that day had not yet arrived. *Id.*, at 381-382, 106 L. Ed. 2d 306, 109 S. Ct. 2969. [*592] I reaffirmed my view that, beyond assessing the actions of legislatures and juries, the Court has a constitutional obligation to judge for itself whether capital punishment is a proportionate response to the defendant's blameworthiness. *Id.*, at 382, 106 L. Ed. 2d 306, 109 S. Ct. 2969. Nevertheless, I [****70] concluded that proportionality arguments similar to those endorsed by the Court today did not justify a categorical *Eighth Amendment* rule against capital punishment of 16- and 17-year-old offenders. See *ibid.* (citing *Thompson*, supra, at 853-854, 101 L. Ed. 2d 702, 108 S. Ct. 2687 (O'Connor, J., concurring in judgment)).

The Court has also twice addressed the constitutionality of capital punishment of mentally retarded offenders. In *Penry v. Lynaugh*, 492 U.S. 302, 106 L. Ed. 2d 256, 109 S. Ct. 2934 (1989), decided the same year as *Stanford*, we rejected the claim that the *Eighth Amendment* barred the execution of the mentally retarded. At that time, only two States specifically prohibited the practice, while 14 others did not have capital punishment at all. *492 U.S.*, at 334, 106 L. Ed. 2d 256, 109 S. Ct. 2934. Much had changed when we revisited the question three Terms ago in *Atkins v. Virginia*, 536 U.S. 304, 153 L. Ed. 2d 335, 122 S. Ct. 2242 (2002). In *Atkins*, the Court reversed *Penry* and held that the *Eighth Amendment* forbids capital punishment of mentally retarded offenders. [****71] *536 U.S.*, at 321, 153 L. Ed. 2d 335, 122 S. Ct. 2242. In the 13 years between *Penry* and *Atkins*, there had been a wave of legislation prohibiting the execution of such offenders. By the time we heard *Atkins*, 30 States barred the death penalty for the mentally retarded, and even among those States theoretically permitting such punishment, very few had executed a mentally retarded offender in recent history. *536 U.S.*, at 314-316, 153 L. Ed. 2d 335, 122 S. Ct. 2242. On the basis of this evidence, the Court determined that it was "fair to say that a national consensus ha[d] developed against" the practice. *Id.*, at 316, 153 L. Ed. 2d 335, 122 S. Ct. 2242.

[**1209] But our decision in *Atkins* did not rest solely on this tentative conclusion. Rather, the Court's independent moral judgment was dispositive. The Court observed that mentally retarded persons suffer from major cognitive and behavioral [*593] deficits, *i.e.*, "subaverage intellectual functioning" and "significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before

age 18." [****72] *Id.*, at 318, 153 L. Ed. 2d 335, 122 S. Ct. 2242. "Because of their impairments, [such persons] by definition . . . have diminished capacities to understand and process information, to communicate, to abstract from mistakes [***42] and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." *Ibid.* We concluded that these deficits called into serious doubt whether the execution of mentally retarded offenders would measurably contribute to the principal penological goals that capital punishment is intended to serve--retribution and deterrence. *Id.*, at 319-321, 153 L. Ed. 2d 335, 122 S. Ct. 2242. Mentally retarded offenders' impairments so diminish their personal moral culpability that it is highly unlikely that such offenders could ever deserve the ultimate punishment, even in cases of capital murder. *Id.*, at 319, 153 L. Ed. 2d 335, 122 S. Ct. 2242. And these same impairments made it very improbable that the threat of the death penalty would deter mentally retarded persons from committing capital crimes. [****73] *Id.*, at 319-320, 153 L. Ed. 2d 335, 122 S. Ct. 2242. Having concluded that capital punishment of the mentally retarded is inconsistent with the *Eighth Amendment*, the Court "[le]ft to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." *Id.*, at 317, 153 L. Ed. 2d 335, 122 S. Ct. 2242 (quoting *Ford v. Wainwright*, 477 U.S. 399, 416-417, 91 L. Ed. 2d 335, 106 S. Ct. 2595 (1986)).

II

A

Although the general principles that guide our *Eighth Amendment* jurisprudence afford some common ground, I part ways with the Court in applying them to the case before us. As a preliminary matter, I take issue with the Court's failure to reprove, or even to acknowledge, the Supreme Court of Missouri's unabashed refusal to follow our [*594] controlling decision in *Stanford*. The lower court concluded that, despite *Stanford's* clear holding and historical recency, our decision was no longer binding authority because it was premised on what the court deemed an obsolete assessment of contemporary values. Quite apart from the merits of the constitutional question, this was clear error.

[****74] Because the *Eighth Amendment* "draw[s] its meaning from . . . evolving standards of decency," *Trop*, 356 U.S., at 101, 2 L. Ed. 2d 630, 78 S. Ct. 590 (plurality opinion), significant changes in societal mores

over time may require us to reevaluate a prior decision. Nevertheless, it remains "this Court's prerogative alone to overrule one of its precedents." *State Oil Co. v. Khan*, 522 U.S. 3, 20, 139 L. Ed. 2d 199, 118 S. Ct. 275 (1997) (emphasis added). That is so even where subsequent decisions or factual developments may appear to have "significantly undermined" the rationale for our earlier holding. *United States v. Hatter*, 532 U.S. 557, 567, 149 L. Ed. 2d 820, 121 S. Ct. 1782 (2001); see also *State Oil Co.*, *supra*, at 20, 139 L. Ed. 2d 199, 118 S. Ct. 275; *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 104 L. Ed. 2d 526, 109 S. Ct. 1917 (1989). The *Eighth Amendment* provides no exception to this rule. On the contrary, clear, predictable, and uniform constitutional standards are especially desirable in this sphere. By affirming the lower court's judgment without so [**1210] much as a slap on the [****75] hand, today's decision threatens to invite frequent and disruptive reassessments of our *Eighth Amendment* precedents.

[***43] B

In determining whether the juvenile death penalty comports with contemporary standards of decency, our inquiry begins with the "clearest and most reliable objective evidence of contemporary values"--the actions of the Nation's legislatures. *Penry*, *supra*, at 331, 106 L. Ed. 2d 256, 109 S. Ct. 2934. As the Court emphasizes, the overall number of jurisdictions that currently disallow the execution of under-18 offenders is the same as the number that forbade the execution of mentally retarded offenders when *Atkins* was decided.

[*595] *Ante*, at 564, 161 L. Ed. 2d, at 18-19. At present, 12 States and the District of Columbia do not have the death penalty, while an additional 18 States and the Federal Government authorize capital punishment but prohibit the execution of under-18 offenders. See *ante*, at 580-581, 161 L. Ed. 2d, at 30 (Appendix A). And here, as in *Atkins*, only a very small fraction of the States that permit capital punishment of offenders within the relevant class has actually carried out such an execution [****76] in recent history: Six States have executed under-18 offenders in the 16 years since *Stanford*, while five States had executed mentally retarded offenders in the 13 years prior to *Atkins*. See *Atkins*, 536 U.S., at 316, 153 L. Ed. 2d 335, 122 S. Ct. 2242; V. Streib, *The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes, January 1, 1973-December 31, 2004*, No. 76, pp 15-23 (2005), available at <http://www.law.onu.edu/faculty/streib/documents/JuvDeathDec2004.pdf> (last updated Jan. 31, 2005) (as visited

Feb. 25, 2005, and available in Clerk of Court's case file) (hereinafter Streib). In these respects, the objective evidence in this case is, indeed, "similar, and in some respects parallel to," the evidence upon which we relied in *Atkins*. [Ante, at 564, 161 L. Ed. 2d, at 18.](#)

While the similarities between the two cases are undeniable, the objective evidence of national consensus is marginally weaker here. Most importantly, in *Atkins* there was significant evidence of *opposition* to the execution of the mentally retarded, but there was virtually no countervailing evidence of affirmative legislative support for this practice. [****77] Cf. [Thompson, 487 U.S., at 849, 101 L. Ed. 2d 702, 108 S. Ct. 2687](#) (O'Connor, J., concurring in judgment) (attributing significance to the fact that "no legislature in this country has affirmatively and unequivocally endorsed" capital punishment of 15-year-old offenders). The States that permitted such executions did so only because they had not enacted any prohibitory legislation. Here, by contrast, at least seven States have current statutes that specifically set 16 or 17 as the minimum age at which [*596] commission of a capital crime can expose the offender to the death penalty. See [ante, at 579-580, 161 L. Ed. 2d, at 29 \(Appendix A\).](#) * Five of these seven States presently have one [****44] or more juvenile offenders [**1211] on death row (six if respondent is included in the count), see Streib 24-31, and four of them have executed at least one under-18 offender in the past 15 years, see *id.*, at 15-23. In all, there are currently over 70 juvenile offenders on death row in 12 different States (13 including respondent). See *id.*, at 11, 24-31. This evidence suggests some measure of continuing public support for the availability of the death penalty for [****78] 17-year-old capital murderers.

*In 12 other States that have capital punishment, under-18 offenders can be subject to the death penalty as a result of transfer statutes that permit such offenders to be tried as adults for certain serious crimes. See [ante, at 579-580, 161 L. Ed. 2d, at 29 \(Appendix A\).](#) As I observed in [Thompson v. Oklahoma, 487 U.S. 815, 850-852, 101 L. Ed. 2d 702, 108 S. Ct. 2687 \(1988\)](#) (opinion concurring in judgment): "There are many reasons, having nothing whatsoever to do with capital punishment, that might motivate a legislature to provide as a general matter for some [minors] to be channeled into the adult criminal justice process." Accordingly, while these 12 States clearly cannot be counted as *opposing* capital punishment of under-18 offenders, the fact that they permit such punishment through this indirect mechanism does not necessarily show affirmative and unequivocal legislative support for the practice. See *ibid.*

[****79] Moreover, the Court in *Atkins* made clear that it was "not so much the number of [States forbidding execution of the mentally retarded] that [was] significant, but the consistency of the direction of change." [536 U.S., at 315, 153 L. Ed. 2d 335, 122 S. Ct. 2242.](#) In contrast to the trend in *Atkins*, the States have not moved uniformly toward abolishing the juvenile death penalty. Instead, since our decision in *Stanford*, two States have expressly reaffirmed their support for this practice by enacting statutes setting 16 as the minimum age for capital punishment. See [Mo. Rev. Stat. § 565.020.2](#) (2000); [Va. Code Ann. § 18.2-10\(a\)](#) (Lexis 2004). Furthermore, as the Court emphasized in *Atkins* itself, [536 U.S., at 315, n. 18, 153 L. Ed. 2d 335, 122 S. Ct. 2242,](#) the pace of legislative action in this context has been considerably slower than it was with regard to capital punishment of the mentally retarded. [*597] In the 13 years between our decisions in *Penry* and *Atkins*, no fewer than 16 States banned the execution of mentally retarded offenders. See [****80] [Atkins, supra, at 314-315, 153 L. Ed. 2d 335, 122 S. Ct. 2242.](#) By comparison, since our decision 16 years ago in *Stanford*, only four States that previously permitted the execution of under-18 offenders, plus the Federal Government, have legislatively reversed course, and one additional State's high court has construed the State's death penalty statute not to apply to under-18 offenders, see [State v. Furman, 122 Wn. 2d 440, 458, 858 P.2d 1092, 1103 \(1993\)](#) (en banc). The slower pace of change is no doubt partially attributable, as the Court says, to the fact that 12 States had already imposed a minimum age of 18 when *Stanford* was decided. See [ante, at 566-567, 161 L. Ed. 2d, at 20.](#) Nevertheless, the extraordinary wave of legislative action leading up to our decision in *Atkins* provided strong evidence that the country truly had set itself against capital punishment of the mentally retarded. Here, by contrast, the halting pace of change gives reason for pause.

To the extent that the objective evidence supporting today's decision is similar to that in *Atkins*, this merely highlights the fact that such evidence is not dispositive in either [****81] of the two cases. After all, as the Court today confirms, [ante, at 563, 574-575, 161 L. Ed. 2d, at 18, 24-25,](#) the Constitution requires that "'in the end our own judgment . . . be brought to bear'" in deciding whether the *Eighth Amendment* forbids a particular punishment, [Atkins, supra, at 312, 153 L. Ed. 2d 335, 122 S. Ct. 2242](#) (quoting [Coker, 433 U.S., at 597, 53 L. Ed. 2d 982, 97 S. Ct. 2861](#) (plurality opinion)). This judgment is not merely a rubber stamp on the tally of legislative and jury actions. Rather, it is

an integral part of the [***45] *Eighth Amendment* inquiry--and one that is entitled to independent weight in reaching our ultimate decision.

Here, as in *Atkins*, the objective evidence of a national consensus is weaker than in most prior cases in which the Court has struck down a particular punishment under the *Eighth Amendment*. See *Coker, supra, at 595-596, 53 L. Ed. 2d 982, 97 S. Ct. 2861* (plurality opinion) (striking down death penalty for rape of an adult [*598] woman, where only one jurisdiction authorized such punishment); [****82] *Enmund, 458 U.S., at 792, 73 L. Ed. 2d 1140, 102 S. Ct. 3368* (striking down death penalty for certain crimes of aiding and abetting felony-murder, where only eight jurisdictions authorized such punishment); *Ford v. Wainwright, 477 U.S., at 408, 91 L. Ed. 2d 335, 106 [**1212] S.Ct. 2595* (striking down capital punishment of the insane, where no jurisdiction permitted this practice). In my view, the objective evidence of national consensus, standing alone, was insufficient to dictate the Court's holding in *Atkins*. Rather, the compelling moral proportionality argument against capital punishment of mentally retarded offenders played a *decisive* role in persuading the Court that the practice was inconsistent with the *Eighth Amendment*. Indeed, the force of the proportionality argument in *Atkins* significantly bolstered the Court's confidence that the objective evidence in that case did, in fact, herald the emergence of a genuine national consensus. Here, by contrast, the proportionality argument against the juvenile death penalty is so flawed that it can be given little, if any, analytical weight--it proves too weak to resolve the lingering ambiguities in the [****83] objective evidence of legislative consensus or to justify the Court's categorical rule.

C

Seventeen-year-old murderers must be categorically exempted from capital punishment, the Court says, because they "cannot with reliability be classified among the worst offenders." *Ante, at 569, 161 L. Ed. 2d, at 21.* That conclusion is premised on three perceived differences between "adults," who have already reached their 18th birthdays, and "juveniles," who have not. See *ante, at 569-570, 161 L. Ed. 2d, at 21-22.* First, juveniles lack maturity and responsibility and are more reckless than adults. Second, juveniles are more vulnerable to outside influences because they have less control over their surroundings. And third, a juvenile's character is not as fully formed as that of an adult. Based on these characteristics, the Court determines

that 17-year-old capital murderers are not as [*599] blameworthy as adults guilty of similar crimes; that 17-year-olds are less likely than adults to be deterred by the prospect of a death sentence; and that it is difficult to conclude that a 17-year-old who commits even the most heinous of crimes is "irretrievably depraved." [****84] *Ante, at 570-572, 161 L. Ed. 2d, at 22-23.* The Court suggests that "a rare case might arise in which a juvenile offender has sufficient psychological maturity, and at the same time demonstrates sufficient depravity, to merit a sentence of death." *Ante, at 572, 161 L. Ed. 2d, at 23.* However, the Court argues that a categorical age-based prohibition is justified as a prophylactic rule because "[t]he differences between juvenile and adult offenders are too marked and well [***46] understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability." *Ante, at 572-573, 161 L. Ed. 2d, at 24.*

It is beyond cavil that juveniles as a class are generally less mature, less responsible, and less fully formed than adults, and that these differences bear on juveniles' comparative moral culpability. See, e.g., *Johnson v. Texas, 509 U.S. 350, 367, 125 L. Ed. 2d 290, 113 S. Ct. 2658 (1993)* ("There is no dispute that a defendant's youth is a relevant mitigating circumstance"); [****85] *id., at 376, 125 L. Ed. 2d 290, 113 S. Ct. 2658* (O'Connor, J., dissenting) ("[T]he vicissitudes of youth bear directly on the young offender's culpability and responsibility for the crime"); *Eddings, 455 U.S., at 115-116, 71 L. Ed. 2d 1, 102 S. Ct. 869* ("Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults"). But even accepting this premise, the Court's proportionality argument fails to support its categorical rule.

First, the Court adduces no evidence whatsoever in support of its sweeping conclusion, see *ante, at 572, 161 L. Ed. 2d, at 23,* that it is only in "rare" cases, if ever, that 17-year-old murderers are sufficiently mature and act with sufficient depravity to warrant the death penalty. The fact that juveniles are [**1213] generally *less* culpable for their misconduct than adults does not necessarily mean that a 17-year-old murderer cannot be *sufficiently* culpable to merit the death penalty. At most, the [*600] Court's argument suggests that the average 17-year-old murderer is not as culpable as the average adult murderer. But an especially [****86] depraved juvenile offender may nevertheless be just as culpable as many adult offenders considered bad enough to deserve the death penalty. Similarly, the fact that the availability of the death penalty may be *less* likely to

deter a juvenile from committing a capital crime does not imply that this threat cannot *effectively* deter some 17-year-olds from such an act. Surely there is an age below which no offender, no matter what his crime, can be deemed to have the cognitive or emotional maturity necessary to warrant the death penalty. But at least at the margins between adolescence and adulthood--and especially for 17-year-olds such as respondent--the relevant differences between "adults" and "juveniles" appear to be a matter of degree, rather than of kind. It follows that a legislature may reasonably conclude that at least *some* 17-year-olds can act with sufficient moral culpability, and can be sufficiently deterred by the threat of execution, that capital punishment may be warranted in an appropriate case.

Indeed, this appears to be just such a case. Christopher Simmons' murder of Shirley Crook was premeditated, wanton, and cruel in the extreme. Well before he committed [****87] this crime, Simmons declared that he wanted to kill someone. On several occasions, he discussed with two friends (ages 15 and 16) his plan to burglarize a house and to murder the victim by tying the victim up and pushing him from a bridge. Simmons said they could "get away with it" because they were minors. Brief for Petitioner 3. In accord with this plan, Simmons and his 15-year-old accomplice broke into Mrs. Crook's home in the middle of the night, forced her from her bed, bound her, [***47] and drove her to a state park. There, they walked her to a railroad trestle spanning a river, "hog-tied" her with electrical cable, bound her face completely with duct tape, and pushed her, still alive, from the trestle. She drowned in the water below. *Id.*, at 4. One can [*601] scarcely imagine the terror that this woman must have suffered throughout the ordeal leading to her death. Whatever can be said about the comparative moral culpability of 17-year-olds as a general matter, Simmons' actions unquestionably reflect "a consciousness materially more "depraved" than that of . . . the average murderer." [****88] [Atkins, 536 U.S., at 319, 153 L. Ed. 2d 335, 122 S. Ct. 2242](#) (quoting [Godfrey v. Georgia, 446 U.S. 420, 433, 64 L. Ed. 2d 398, 100 S. Ct. 1759 \(1980\)](#)). And Simmons' prediction that he could murder with impunity because he had not yet turned 18--though inaccurate--suggests that he *did* take into account the perceived risk of punishment in deciding whether to commit the crime. Based on this evidence, the sentencing jury certainly had reasonable grounds for concluding that, despite Simmons' youth, he "ha[d] sufficient psychological maturity" when he committed this horrific murder, and "at the same time demonstrate[d] sufficient depravity, to merit a sentence

of death." [Ante, at 572, 161 L. Ed. 2d, at 23.](#)

The Court's proportionality argument suffers from a second and closely related defect: It fails to establish that the differences in maturity between 17-year-olds and young "adults" are both universal enough and significant enough to justify a bright-line prophylactic rule against capital punishment of the former. The Court's analysis is premised on differences *in the aggregate* between juveniles and adults, which frequently do not hold true when [****89] comparing individuals. Although it may [**1214] be that many 17-year-old murderers lack sufficient maturity to deserve the death penalty, some juvenile murderers may be quite mature. Chronological age is not an unflinching measure of psychological development, and common experience suggests that many 17-year-olds are more mature than the average young "adult." In short, the class of offenders exempted from capital punishment by today's decision is too broad and too diverse to warrant a categorical prohibition. Indeed, the age-based line drawn by the Court is indefensibly arbitrary--it quite likely will protect a number of offenders who are mature enough to [*602] deserve the death penalty and may well leave vulnerable many who are not.

For purposes of proportionality analysis, 17-year-olds as a class are qualitatively and materially different from the mentally retarded. "Mentally retarded" offenders, as we understood that category in *Atkins*, are *defined* by precisely the characteristics which render death an excessive punishment. A mentally retarded person is, "by definition," one whose cognitive and behavioral capacities have been proved to fall below a certain minimum. [****90] See [Atkins, 536 U.S., at 318, 153 L. Ed. 2d 335, 122 S. Ct. 2242](#); see also [id., at 308, n. 3, 153 L. Ed. 2d 335, 122 S. Ct. 2242](#) (discussing characteristics of mental retardation); [id., at 317, and n. 22, 153 L. Ed. 2d 335, 122 S. Ct. 2242](#) (leaving to the States the development of mechanisms to determine which offenders fall within the class exempt from capital punishment). Accordingly, for purposes of our decision [***48] in *Atkins*, the mentally retarded are not merely *less* blameworthy for their misconduct or *less* likely to be deterred by the death penalty than others. Rather, a mentally retarded offender is one whose demonstrated impairments make it so highly unlikely that he is culpable enough to deserve the death penalty or that he could have been deterred by the threat of death, that execution is not a defensible punishment. There is no such inherent or accurate fit between an offender's chronological age and the personal limitations which the Court believes make capital punishment excessive for

17-year-old murderers. Moreover, it defies common sense to suggest that 17-year-olds as a class are somehow equivalent to mentally retarded persons with [****91] regard to culpability or susceptibility to deterrence. Seventeen-year-olds may, on average, be less mature than adults, but that lesser maturity simply cannot be equated with the major, lifelong impairments suffered by the mentally retarded.

The proportionality issues raised by the Court clearly implicate *Eighth Amendment* concerns. But these concerns may properly be addressed not by means of an arbitrary, categorical age-based rule, but rather through individualized [*603] sentencing in which juries are required to give appropriate mitigating weight to the defendant's immaturity, his susceptibility to outside pressures, his cognizance of the consequences of his actions, and so forth. In that way the constitutional response can be tailored to the specific problem it is meant to remedy. The *Eighth Amendment* guards against the execution of those who are "insufficient[ly] culpab[le]," see [ante, at 573, 161 L. Ed. 2d, at 24](#), in significant part, by requiring sentencing that "reflect[s] a reasoned *moral* response to the defendant's background, character, and crime." [****92] [California v. Brown, 479 U.S. 538, 545, 93 L. Ed. 2d 934, 107 S. Ct. 837 \(1987\)](#) (O'Connor, J., concurring). Accordingly, the sentencer in a capital case must be permitted to give full effect to all constitutionally relevant mitigating evidence. See [Tennard v. Dretke, 542 U.S. 274, 283-285, 159 L. Ed. 2d 384, 124 S. Ct. 2562 \(2004\)](#); [Lockett v. Ohio, 438 U.S. 586, 604, 57 L. Ed. 2d 973, 98 S. Ct. 2954 \(1978\)](#) (plurality opinion). A [**1215] defendant's youth or immaturity is, of course, a paradigmatic example of such evidence. See [Eddings, 455 U.S., at 115-116, 71 L. Ed. 2d 1, 102 S. Ct. 869](#).

Although the prosecutor's apparent attempt to use respondent's youth as an aggravating circumstance in this case is troubling, that conduct was never challenged with specificity in the lower courts and is not directly at issue here. As the Court itself suggests, such "overreaching" would best be addressed, if at all, through a more narrowly tailored remedy. See [ante, at 573, 161 L. Ed. 2d, at 24](#). The Court argues that sentencing juries cannot accurately evaluate a youthful offender's maturity or give appropriate weight to the mitigating characteristics [****93] related to youth. But, again, the Court presents no real evidence--and the record appears to contain none--supporting this claim. Perhaps more importantly, the Court fails to explain why this duty should be so different from, or so much more difficult than, that of assessing and giving proper effect

to any other qualitative capital sentencing factor. I would not be so quick to conclude that the constitutional safeguards, the sentencing juries, and the trial [***49] judges upon [*604] which we place so much reliance in all capital cases are inadequate in this narrow context.

D

I turn, finally, to the Court's discussion of foreign and international law. Without question, there has been a global trend in recent years towards abolishing capital punishment for under-18 offenders. Very few, if any, countries other than the United States now permit this practice in law or in fact. See [ante, at 576-577, 161 L. Ed. 2d, at 22-23](#). While acknowledging that the actions and views of other countries do not dictate the outcome of our *Eighth Amendment* inquiry, the Court asserts that "the overwhelming weight of international opinion against the juvenile death penalty . . . [****94] does provide respected and significant confirmation for [its] own conclusions." [Ante, at 578, 161 L. Ed. 2d, at 27](#). Because I do not believe that a genuine *national* consensus against the juvenile death penalty has yet developed, and because I do not believe the Court's moral proportionality argument justifies a categorical, age-based constitutional rule, I can assign no such *confirmatory* role to the international consensus described by the Court. In short, the evidence of an international consensus does not alter my determination that the *Eighth Amendment* does not, at this time, forbid capital punishment of 17-year-old murderers in all cases.

Nevertheless, I disagree with Justice Scalia's contention, [post, at 622-628, 161 L. Ed. 2d, at 59-64](#) (dissenting opinion), that foreign and international law have no place in our *Eighth Amendment* jurisprudence. Over the course of nearly half a century, the Court has consistently referred to foreign and international law as relevant to its assessment of evolving standards of decency. See [****95] [Atkins, supra, at 317, n. 21, 153 L. Ed. 2d 335, 122 S. Ct. 2242](#); [Thompson, 487 U.S., at 830-831, and n. 31, 101 L. Ed. 2d 702, 108 S. Ct. 2687](#) (plurality opinion); [Enmund, 458 U.S., at 796-797, n. 22, 73 L. Ed. 2d 1140, 102 S. Ct. 3368](#); [Coker, 433 U.S., at 596, n. 10, 53 L. Ed. 2d 982, 97 S. Ct. 2861](#) (plurality opinion); [Trop, 356 U.S., at 102-103, 2 L. Ed. 2d 630, 78 S. Ct. 590](#) (plurality opinion). This inquiry reflects the special character of the *Eighth Amendment*, [*605] which, as the Court has long held, draws its meaning directly from the maturing values of civilized society. Obviously, American law is distinctive in many respects, not least where the specific provisions

of our Constitution and the history of its exposition so dictate. Cf. [post, at 624-625, 161 L. Ed. 2d, at 61-62](#) (Scalia, J., dissenting) (discussing distinctively American rules of law related to the *Fourth Amendment* and the *Establishment Clause*). But this Nation's evolving understanding of human dignity certainly **[**1216]** is neither wholly isolated from, nor inherently at odds with, the values prevailing in other countries. On the contrary, we should not be surprised **[****96]** to find congruence between domestic and international values, especially where the international community has reached clear agreement--expressed in international law or in the domestic laws of individual countries--that a particular form of punishment is inconsistent with fundamental human rights. At least, the existence of an international consensus of this nature can serve to confirm the reasonableness of a consonant and genuine **[**50]** American consensus. The instant case presents no such domestic consensus, however, and the recent emergence of an otherwise global consensus does not alter that basic fact.

* * *

In determining whether the *Eighth Amendment* permits capital punishment of a particular offense or class of offenders, we must look to whether such punishment is consistent with contemporary standards of decency. We are obligated to weigh both the objective evidence of societal values and our own judgment as to whether death is an excessive sanction in the context at hand. In the instant case, the objective evidence is inconclusive; standing alone, it does not demonstrate that our society has repudiated capital punishment of 17-year-old offenders in all cases. **[****97]** Rather, the actions of the Nation's legislatures suggest that, although a clear and durable national consensus against this practice may in time **[*606]** emerge, that day has yet to arrive. By acting so soon after our decision in *Stanford*, the Court both pre-empts the democratic debate through which genuine consensus might develop and simultaneously runs a considerable risk of inviting lower court reassessments of our *Eighth Amendment* precedents.

To be sure, the objective evidence supporting today's decision is similar to (though marginally weaker than) the evidence before the Court in *Atkins*. But *Atkins* could not have been decided as it was based solely on such evidence. Rather, the compelling proportionality argument against capital punishment of the mentally retarded played a decisive role in the Court's *Eighth Amendment* ruling. Moreover, the constitutional rule adopted in *Atkins* was tailored to this proportionality

argument: It exempted from capital punishment a defined group of offenders whose proven impairments rendered it highly unlikely, and perhaps impossible, that they could act with the degree of culpability necessary to deserve death. And *Atkins* **[****98]** left to the States the development of mechanisms to determine which individual offenders fell within this class.

In the instant case, by contrast, the moral proportionality arguments against the juvenile death penalty fail to support the rule the Court adopts today. There is no question that "the chronological age of a minor is itself a relevant mitigating factor of great weight," [Eddings, 455 U.S., at 116, 71 L. Ed. 2d 1, 102 S. Ct. 869](#), and that sentencing juries must be given an opportunity carefully to consider a defendant's age and maturity in deciding whether to assess the death penalty. But the mitigating characteristics associated with youth do not justify an absolute age limit. A legislature can reasonably conclude, as many have, that some 17-year-old murderers are mature enough to deserve the death penalty in an appropriate case. And nothing in the record before us suggests that sentencing juries are so unable accurately to assess a 17-year-old defendant's **[*607]** maturity, or so incapable of giving proper weight to youth as a mitigating factor, that the *Eighth Amendment* requires the bright-line rule imposed today. In the end, the Court's flawed proportionality **[****99]** argument simply **[**1217]** cannot bear the weight the Court would place upon it.

Reasonable minds can differ as to the minimum age at which commission of a serious crime should expose **[****51]** the defendant to the death penalty, if at all. Many jurisdictions have abolished capital punishment altogether, while many others have determined that even the most heinous crime, if committed before the age of 18, should not be punishable by death. Indeed, were my office that of a legislator, rather than a judge, then I, too, would be inclined to support legislation setting a minimum age of 18 in this context. But a significant number of States, including Missouri, have decided to make the death penalty potentially available for 17-year-old capital murderers such as respondent. Without a clearer showing that a genuine national consensus forbids the execution of such offenders, this Court should not substitute its own "inevitably subjective judgment" on how best to resolve this difficult moral question for the judgments of the Nation's democratically elected legislatures. See **[****100]** [Thompson, 487 U.S., at 854, 101 L. Ed. 2d 702, 108 S. Ct. 2687](#) (O'Connor, J., concurring in judgment). I respectfully dissent.

Justice **Scalia**, with whom The **Chief Justice** and Justice **Thomas** join, dissenting.

In urging approval of a constitution that gave life-tenured judges the power to nullify laws enacted by the people's representatives, Alexander Hamilton assured the citizens of New York that there was little risk in this, since "[t]he judiciary . . . ha[s] neither FORCE nor WILL but merely judgment." The Federalist No. 78, p 465 (C. Rossiter ed. 1961). But Hamilton had in mind a traditional judiciary, "bound down by strict rules and precedents which serve to define [*608] and point out their duty in every particular case that comes before them." *Id.*, at 471. Bound down, indeed. What a mockery today's opinion makes of Hamilton's expectation, announcing the Court's conclusion that the meaning of our Constitution has changed over the past 15 years--not, mind you, that this Court's decision 15 years ago was *wrong*, but that the Constitution *has changed*. The Court reaches this implausible result by purporting to advert, not to the [****101] original meaning of the *Eighth Amendment*, but to "the evolving standards of decency," ante, at 561, 161 L. Ed. 2d, at 16 (internal quotation marks omitted), of our national society. It then finds, on the flimsiest of grounds, that a national consensus which could not be perceived in our people's laws barely 15 years ago now solidly exists. Worse still, the Court says in so many words that what our people's laws say about the issue does not, in the last analysis, matter: "[I]n the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the *Eighth Amendment*." Ante, at 563, 161 L. Ed. 2d, at 18 (internal quotation marks omitted). The Court thus proclaims itself sole arbiter of our Nation's moral standards--and in the course of discharging that awesome responsibility purports to take guidance from the views of foreign courts and legislatures. Because I do not believe that the meaning of our *Eighth Amendment*, any more than the meaning of other provisions of our Constitution, should be determined by the subjective views of five Members of this Court and like-minded foreigners, I dissent.

I

[****102] In determining that capital punishment [***52] of offenders who committed murder before age 18 is "cruel and unusual" under the *Eighth Amendment*, the Court first considers, in accordance with our modern (though in my view mistaken) jurisprudence, whether there is a "national consensus," *ibid.* (internal quotation marks omitted), [**1218] that laws allowing such [*609] executions contravene our modern "standards

of decency," ¹ *Trop v. Dulles*, 356 U.S. 86, 101, 2 L. Ed. 2d 630, 78 S. Ct. 590 (1958). We have held that this determination should be based on "objective indicia that reflect the public attitude toward a given sanction"--namely, "statutes passed by society's elected representatives." *Stanford v. Kentucky*, 492 U.S. 361, 370, 106 L. Ed. 2d 306, 109 S. Ct. 2969 (1989) (internal quotation marks omitted). As in *Atkins v. Virginia*, 536 U.S. 304, 312, 153 L. Ed. 2d 335, 122 S. Ct. 2242 (2002), the Court dutifully recites this test and claims halfheartedly that a national consensus has emerged since our decision in *Stanford*, because 18 States--or 47% of States that permit capital punishment--now have legislation prohibiting the execution [****103] of offenders under 18, and because all of 4 States have adopted such legislation since *Stanford*. See ante, at 565, 161 L. Ed. 2d, at 19.

[****104] Words have no meaning if the views of less than 50% of death penalty States can constitute a national consensus. See *Atkins, supra*, at 342-345, 153 L. Ed. 2d 335, 122 S. Ct. 2242 (Scalia, J., dissenting). Our previous cases have required overwhelming opposition to a challenged practice, generally over a long period of time. In *Coker v. Georgia*, 433 U.S. 584, 595-596, 53 L. Ed. 2d 982, 97 S. Ct. 2861 (1977), a plurality concluded the *Eighth Amendment* prohibited capital punishment for rape of an adult woman where only one jurisdiction authorized such punishment. The plurality also observed that "[a]t no time in the last 50 years ha[d] a majority of [*610] States authorized death as a punishment for rape." *Id.*, at 593, 53 L. Ed. 2d 982, 97 S. Ct. 2861. In *Ford v. Wainwright*, 477 U.S. 399, 408, 91 L. Ed. 2d 335, 106 S. Ct. 2595 (1986), we held execution of the insane

¹The Court ignores entirely the threshold inquiry in determining whether a particular punishment complies with the *Eighth Amendment*: whether it is one of the "modes or acts of punishment that had been considered cruel and unusual at the time that the *Bill of Rights* was adopted." *Ford v. Wainwright*, 477 U.S. 399, 405, 91 L. Ed. 2d 335, 106 S. Ct. 2595 (1986). As we have noted in prior cases, the evidence is unusually clear that the *Eighth Amendment* was not originally understood to prohibit capital punishment for 16- and 17-year-old offenders. See *Stanford v. Kentucky*, 492 U.S. 361, 368, 106 L. Ed. 2d 306, 109 S. Ct. 2969 (1989). At the time the *Eighth Amendment* was adopted, the death penalty could theoretically be imposed for the crime of a 7-year-old, though there was a rebuttable presumption of incapacity to commit a capital (or other) felony until the age of 14. See *ibid.* (citing 4 W. Blackstone, Commentaries *23-*24; 1 M. Hale, Pleas of the Crown 24-29 (1800)).

unconstitutional, tracing the roots of this prohibition to the common law and noting that "no State in the union permits the execution of the insane." In **[****105]** [Enmund v. Florida, 458 U.S. 782, 792, 73 L. Ed. 2d 1140, 102 S. Ct. 3368 \(1982\)](#), we invalidated capital punishment imposed for participation in a robbery in which an accomplice committed murder, because 78% of all death penalty States prohibited this punishment. Even there we expressed some hesitation, because the legislative judgment was "neither 'wholly unanimous among state legislatures,' . . . nor as compelling as the legislative judgments considered in *Coker*." *Id.*, at 793, 73 **[***53]** L. Ed. 2d 1140, 102 S. Ct. 3368. By contrast, agreement among 42% of death penalty States in *Stanford*, which the Court appears to believe was correctly decided at the time, [ante](#), at 574, 161 L. Ed. 2d, at 24-25, was insufficient to show a national consensus. See [Stanford, supra](#), at 372, 106 L. Ed. 2d 306, 109 S. Ct. 2969.

In an attempt to keep afloat its implausible assertion of national consensus, the Court throws overboard a proposition well established in our *Eighth Amendment* jurisprudence. "It should be observed," the Court says, "that the *Stanford* Court **[**1219]** should have considered those States that had abandoned the death penalty altogether **[****106]** as part of the consensus against the juvenile death penalty . . . ; a State's decision to bar the death penalty altogether of necessity demonstrates a judgment that the death penalty is inappropriate for all offenders, including juveniles." [Ante](#), at 574, 161 L. Ed. 2d, at 25. The insinuation that the Court's new method of counting contradicts only "the *Stanford* Court" is misleading. None of our cases dealing with an alleged constitutional limitation upon the death penalty has counted, as States supporting a consensus in favor of that limitation, States that have eliminated the death penalty entirely. See [Ford, supra](#), at 408, n. 2, 91 L. Ed. 335, 106 S. Ct. 2595; [Enmund, supra](#), at 789, 73 L. Ed. 2d 1140, 102 S. Ct. 3368; [Coker, supra](#), at 594, 53 L. Ed. 2d 982, 97 S. Ct. 2861. And with good reason. Consulting States that bar the death penalty concerning the necessity of making an exception to the penalty **[*611]** for offenders under 18 is rather like including old-order Amishmen in a consumer-preference poll on the electric car. Of course they don't like it, but that sheds no light whatever on the point at issue. That 12 States favor **[****107]** no executions says something about consensus against the death penalty, but nothing--absolutely nothing--about consensus that offenders under 18 deserve special immunity from such a penalty. In repealing the death penalty, those 12 States considered *none* of the

factors that the Court puts forth as determinative of the issue before us today--lower culpability of the young, inherent recklessness, lack of capacity for considered judgment, etc. What might be relevant, perhaps, is how many of those States permit 16- and 17-year-old offenders to be treated as adults with respect to noncapital offenses. (They all do; ² **[****108]** indeed, some even *require* that juveniles as young as 14 be tried as adults if they are charged with murder. ³) The attempt by the Court to turn its remarkable minority consensus into a faux majority by counting Amishmen is an act of nomological desperation.

[*54]** Recognizing that its national-consensus argument was weak compared with our earlier cases, the *Atkins* Court found additional support in the fact that 16 States had prohibited execution of mentally retarded individuals since **[*612]** [Penry v. Lynaugh, 492 U.S. 302, 106 L. Ed. 2d 256, 109 S. Ct. 2934 \(1989\)](#). [Atkins, 536 U.S., at 314-316, 153 L. Ed. 2d 335, 109 S. Ct. 2242](#). Indeed, the *Atkins* Court distinguished *Stanford* on that very ground, explaining that "[a]lthough we decided *Stanford* on the same day as *Penry*, apparently *only two* state legislatures have raised the threshold age for imposition of the death penalty." [536 U.S., at 315, n. 18, 153 L. Ed. 2d 335, 122 S. Ct. 2242](#) (emphasis added). Now, the Court says a legislative change in four States is "significant" enough to trigger a constitutional prohibition. ⁴ **[****109]** [Ante](#), at 566, 161

² See [Alaska Stat. § 47.12.030](#) (Lexis 2002); [Haw. Rev. Stat. § 571-22](#) (1999); [Iowa Code § 232.45](#) (2003); [Me. Rev. Stat. Ann., Tit. 15, § 3101\(4\)](#) (West 2003); [Mass. Gen. Laws Ann., ch. 119, § 74](#) (West 2003); [Mich. Comp. Laws Ann. § 764.27](#) (West 2000); [Minn. Stat. § 260B.125](#) (2004); [N. D. Cent. Code § 27-20-34](#) (Lexis Supp 2003); [R. I. Gen. Laws § 14-1-7](#) (Lexis 2002); Vt. Stat. Ann., Tit. 33, § 5516 (Lexis 2001); W. Va. Code § 49-5-10 (Lexis 2004); [Wis. Stat. § 938.18](#) (2003-2004); see also National Center for Juvenile Justice, *Trying and Sentencing Juveniles as Adults: An Analysis of State Transfer and Blended Sentencing Laws 1* (Oct. 2003). The District of Columbia is the only jurisdiction without a death penalty that specifically exempts under-18 offenders from its harshest sanction--life imprisonment without parole. See [D. C. Code § 22-2104](#) (West 2001).

³ See [Mass. Gen. Laws Ann., ch. 119, § 74](#) (West 2003); [N. D. Cent. Code § 27-20-34](#) (Lexis Supp. 2003); W. Va. Code § 49-5-10 (Lexis 2004).

⁴ As the Court notes, Washington State's decision to prohibit executions of offenders under 18 was made by a judicial, not legislative, decision. [State v. Furman, 122 Wn. 2d 440, 459,](#)

L. Ed. 2d, at 19. It is amazing to [****1220**] think that this subtle shift in numbers can take the issue entirely off the table for legislative debate.

I also doubt whether many of the legislators who voted to change the laws in those four States would have done so if they had known their decision would (by the pronouncement of this Court) be rendered irreversible. After all, legislative support for capital punishment, in any form, has surged [******110**] and ebbed throughout our Nation's history. As Justice O'Connor has explained:

"The history of the death penalty instructs that there is danger in inferring a settled societal consensus from statistics like those relied on in this case. In 1846, Michigan became the first State to abolish the death penalty In succeeding decades, other American States continued the trend towards abolition Later, and particularly after World War II, there ensued a steady and dramatic decline in executions In the 1950's and 1960's, more States abolished or radically restricted capital punishment, and executions ceased completely for several years beginning in 1968. . . .

[***613**] "In 1972, when this Court heard arguments on the constitutionality of the death penalty, such statistics might have suggested that the practice had become a relic, implicitly rejected by a new societal consensus. . . . We now know that any inference of a societal consensus rejecting the death penalty would have been mistaken. But had this Court then declared the existence of such a consensus, and outlawed capital punishment, legislatures would very likely not have been able to revive it. [******111**] The mistaken premise of the decision would have been frozen into constitutional law, making it difficult to refute and even more difficult to reject." Thompson v. Oklahoma, 487 U.S. 815, 854-855, 101 L. Ed. 2d 702, 108 S. Ct. 2687 (1988) (opinion concurring in judgment).

Relying on such narrow margins is especially inappropriate in light of the fact that a number of legislatures and voters have expressly affirmed their support for capital punishment [*****55**] of 16- and 17-year-old offenders since *Stanford*. Though the Court is

858 P.2d 1092, 1103 (1993), construed the State's death penalty statute--which did not set any age limit--to apply only to persons over 18. The opinion found that construction necessary to avoid what it considered constitutional difficulties, and did not purport to reflect popular sentiment. It is irrelevant to the question of changed national consensus.

correct that no State has lowered its death penalty age, both the Missouri and Virginia Legislatures--which, at the time of *Stanford*, had no minimum age requirement--expressly established 16 as the minimum. Mo. Rev. Stat. § 565.020.2 (2000); Va. Code Ann. § 18.2-10(a) (Lexis 2004). The people of Arizona ⁵ [******112**] and Florida ⁶ have [***614**] done the same by ballot initiative. [****1221**] Thus, even States that have not executed an under-18 offender in recent years unquestionably favor the possibility of capital punishment in some circumstances.

The Court's reliance on the infrequency of executions for under-18 murderers, ante, at 564-565, 567, 161 L. Ed. 2d, at 18-19, 20, credits an argument that this Court considered and explicitly rejected in *Stanford*. That infrequency is explained, we accurately said, both by "the undisputed fact that a far smaller percentage [******113**] of capital crimes are committed by persons under 18 than over 18," 492 U.S., at 374, 106 L. Ed. 2d 306, 109 S. Ct. 2969, and by the fact that juries are required at sentencing to consider the offender's youth as a mitigating factor, see Eddings v. Oklahoma, 455 U.S. 104, 115-116, 71 L. Ed. 2d 1, 102 S. Ct. 869 (1982). Thus, "it is not only possible, but overwhelmingly probable, that the very considerations which induce [respondent] and [his] supporters to

⁵ In 1996, Arizona's Ballot Proposition 102 exposed under-18 murderers to the death penalty by automatically transferring them out of juvenile courts. The statute implementing the proposition required the county attorney to "bring a criminal prosecution against a juvenile in the same manner as an adult if the juvenile is fifteen, sixteen or seventeen years of age and is accused of . . . first degree murder." Ariz. Rev. Stat. Ann. § 13-501 (West 2001). The Arizona Supreme Court has added to this scheme a constitutional requirement that there be an individualized assessment of the juvenile's maturity at the time of the offense. See State v. Davolt, 207 Ariz. 191, 214-216, 84 P. 3d 456, 479-481 (2004).

⁶ Florida voters approved an amendment to the State Constitution, which changed the wording from "cruel or unusual" to "cruel and unusual," Fla. Const., Art. I, § 17 (2003). See Commentary to 1998 Amendment, 25B Fla. Stat. Ann., p 180 (West 2004). This was a response to a Florida Supreme Court ruling that "cruel or unusual" excluded the death penalty for a defendant who committed murder when he was younger than 17. See Brennan v. State, 754 So. 2d 1, 5 (1999). By adopting the federal constitutional language, Florida voters effectively adopted our decision in Stanford v. Kentucky, 492 U.S. 361, 106 L. Ed. 2d 306, 109 S. Ct. 2969 (1989). See Weaver, Word May Allow Execution of 16-Year-Olds, Miami Herald, Nov. 7, 2002, p 7B.

believe that death should *never* be imposed on offenders under 18 cause prosecutors and juries to believe that it should *rarely* be imposed." [Stanford, supra, at 374, 106 L. Ed. 2d 306, 109 S. Ct. 2969.](#)

It is, furthermore, unclear that executions of the relevant age group have decreased since we decided *Stanford*. Between 1990 and 2003, 123 of 3,599 death sentences, or 3.4%, were given to individuals who committed crimes before reaching age 18. V. Streib, *The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes, January 1, 1973-September 30, 2004*, No. 75, p 9 (Table 3) (last updated Oct. 5, 2004), <http://www.law.onu.edu/faculty/streib/documents/JuvDeathSept302004.pdf> (all [****114] Internet materials as visited Jan. 12, 2005, and available in Clerk of Court's case file) (hereinafter *Juvenile Death Penalty Today*). [**615] By contrast, only 2.1% of those sentenced to death between 1982 and 1988 committed [***56] the crimes when they were under 18. See [Stanford, supra, at 373, 106 L. Ed. 2d 306, 109 S. Ct. 2969](#) (citing V. Streib, *Imposition of Death Sentences for Juvenile Offenses, January 1, 1982, Through April 1, 1989*, p 2 (paper for Cleveland-Marshall College of Law, April 5, 1989)). As for actual executions of under-18 offenders, they constituted 2.4% of the total executions since 1973. *Juvenile Death Penalty Today* 4. In *Stanford*, we noted that only 2% of the executions between 1642 and 1986 were of under-18 offenders and found that that lower number did not demonstrate a national consensus against the penalty. [492 U.S., at 373-374, 106 L. Ed. 2d 306, 109 S. Ct. 2969](#) (citing V. Streib, *Death Penalty for Juveniles* 55, 57 (1987)). Thus, the numbers of under-18 offenders subjected to the death penalty, though low compared with adults, have either held steady or slightly increased since *Stanford*. These statistics in no way support [****115] the action the Court takes today.

II

Of course, the real force driving today's decision is not the actions of four state legislatures, but the Court's "own judgment" that murderers younger than 18 can never be as morally culpable as older counterparts. [Ante, at 563, 161 L. Ed. 2d, at 18](#) (quoting [Atkins, 536 U.S., at 312, 153 L. Ed. 335, 122 S. Ct. 2242](#) (in turn quoting [Coker, 433 U.S., at 597, 53 L. Ed. 2d 982, 97 S. Ct. 2861](#) (plurality opinion))). The Court claims that this usurpation of the role of moral arbiter is simply a "retur[n] to the rul[e] established in decisions predating *Stanford*," [ante, at 563, 161 L. Ed. 2d, at 18](#). That supposed [**1222] rule--which is reflected solely in

dicta and never once in a *holding* that purports to supplant the consensus of the American people with the Justices' views⁷ --was repudiated in *Stanford* for the very good reason [**616] that it has no foundation in law or logic. If the *Eighth Amendment* set forth an ordinary rule of law, it would indeed be the role of this Court to say what the law is. But the Court having pronounced that the *Eighth Amendment* is an ever-changing reflection of [****116] "the evolving standards of decency" of our society, it makes no sense for the Justices then to *prescribe* those standards rather than discern them from the practices of our people. On the evolving-standards hypothesis, the only legitimate function of this Court is to identify a moral consensus of the American people. By what conceivable warrant can nine lawyers presume to be the authoritative conscience of the Nation?⁸

[****117] The reason for insistence on legislative primacy is obvious and fundamental: "[I]n a democratic society [***57] legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people." [Gregg v. Georgia, 428 U.S. 153, 175-176, 49 L. Ed. 2d 859, 96 S. Ct. 2909 \(1976\)](#) (joint opinion of Stewart, Powell, and Stevens, JJ.) (quoting [Furman v. Georgia, 408 U.S. 238, 383, 33 L. Ed. 2d 346, 92 S. Ct. 2726 \(1972\)](#) (Burger, C. J., dissenting)). For a similar reason we have, in our determination of society's moral standards, consulted the practices of sentencing juries: Juries "maintain a link between contemporary community values and the penal system" that this Court cannot claim for itself. [Gregg, supra, at 181, 49 L. Ed. 2d 859, 96 S. Ct. 2909](#) (quoting [Witherspoon v. Illinois, 391 U.S. 510, 519, n. 15, 20 L.](#)

⁷ See, e.g., [Enmund v. Florida, 458 U.S. 782, 801, 73 L. Ed. 2d 1140, 102 S. Ct. 3368 \(1982\)](#) ("[W]e have no reason to disagree with th[e] judgment [of the state legislatures] for purposes of construing and applying the *Eighth Amendment*"); [Coker v. Georgia, 433 U.S. 584, 597, 53 L. Ed. 2d 982, 97 S. Ct. 2861 \(1977\)](#) (plurality opinion) ("[T]he legislative rejection of capital punishment for rape strongly confirms our own judgment").

⁸ Justice O'Connor agrees with our analysis that no national consensus exists here, [ante, at 594-598, 161 L. Ed. 2d, at 43-45](#) (dissenting opinion). She is nonetheless prepared (like the majority) to override the judgment of America's legislatures if it contradicts her own assessment of "moral proportionality," [ante, at 598, 161 L. Ed. 2d, at 45](#). She dissents here only because it does not. The votes in today's case demonstrate that the offending of selected lawyers' moral sentiments is not a predictable basis for law--much less a democratic one.

[Ed. 2d 776, 88 S. Ct. 1770 \(1968\)](#)).

Today's opinion provides a perfect example of why judges are ill equipped to make the type of legislative judgments the Court insists on making here. To support its opinion that States should be prohibited from imposing the death [*617] penalty on anyone who [****118] committed murder before age 18, the Court looks to scientific and sociological studies, picking and choosing those that support its position. It never explains why those particular studies are methodologically sound; none was ever entered into evidence or tested in an adversarial proceeding. As The Chief Justice has explained:

"[M]ethodological and other errors can affect the reliability and validity of estimates about the opinions and attitudes of a population derived from various sampling techniques. Everything from variations in the survey methodology, such as the choice of the target population, the sampling design used, the questions asked, and the statistical analyses used to interpret the data can skew the results." [Atkins, supra, at 326-327, 153 L. Ed. 2d 335, 122 S. Ct. 2242](#) (dissenting opinion) (citing R. Groves, *Survey Errors and Survey* [**1223] Costs (1989); 1 C. Turner & E. Martin, *Surveying Subjective Phenomena* (1984)).

In other words, all the Court has done today, to borrow from another context, is to look over the heads of the crowd and pick out its friends. Cf. [****119] [Conroy v. Aniskoff, 507 U.S. 511, 519, 123 L. Ed. 2d 229, 113 S. Ct. 1562 \(1993\)](#) (Scalia, J., concurring in judgment).

We need not look far to find studies contradicting the Court's conclusions. As petitioner points out, the American Psychological Association (APA), which claims in this case that scientific evidence shows persons under 18 lack the ability to take moral responsibility for their decisions, has previously taken precisely the opposite position before this very Court. In its brief in [Hodgson v. Minnesota, 497 U.S. 417, 111 L. Ed. 2d 344, 110 S. Ct. 2926 \(1990\)](#), the APA found a "rich body of research" showing that juveniles are mature enough to decide whether to obtain an abortion without parental involvement. Brief for APA as *Amicus Curiae*, O. T. 1989, No. 88-805 etc., p 18. The APA brief, citing psychology treatises and studies too numerous to list here, asserted: "[B]y middle adolescence (age 14-15) young people develop abilities similar to adults in reasoning [*618] about moral dilemmas, understanding social rules and laws, [and]

reasoning about interpersonal relationships and interpersonal problems." *Id.*, at 19-20 [****120] (citations omitted). Given the nuances of scientific methodology and conflicting views, courts--which [****58] can only consider the limited evidence on the record before them--are ill equipped to determine which view of science is the right one. Legislatures "are better qualified to weigh and 'evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts.'" [McCleskey v. Kemp, 481 U.S. 279, 319, 95 L. Ed. 2d 262, 107 S. Ct. 1756 \(1987\)](#) (quoting [Gregg, supra, at 186, 49 L. Ed. 2d 859, 96 S. Ct. 2909](#)).

Even putting aside questions of methodology, the studies cited by the Court offer scant support for a categorical prohibition of the death penalty for murderers under 18. At most, these studies conclude that, *on average*, or *in most cases*, persons under 18 are unable to take moral responsibility for their actions. Not one of the cited studies opines that all individuals under 18 are unable to appreciate the nature of their crimes.

Moreover, the cited studies describe only adolescents who engage in risky or antisocial behavior, as many young people do. Murder, however, [****121] is more than just risky or antisocial behavior. It is entirely consistent to believe that young people often act impetuously and lack judgment, but, at the same time, to believe that those who commit premeditated murder are--at least sometimes--just as culpable as adults. Christopher Simmons, who was only seven months shy of his 18th birthday when he murdered Shirley Crook, described to his friends *beforehand*--"[i]n chilling, callous terms," as the Court puts it, [ante, at 556, 161 L. Ed. 2d, at 13](#)--the murder he planned to commit. He then broke into the home of an innocent woman, bound her with duct tape and electrical wire, and threw her off a bridge alive and conscious. [Ante, at 556-557, 161 L. Ed. 2d, at 13](#). In their *amici* brief, the States of Alabama, Delaware, Oklahoma, Texas, Utah, and Virginia offer additional examples [*619] of murders committed by individuals under 18 that involve truly monstrous acts. In Alabama, two 17-year-olds, one 16-year-old, and one 19-year-old picked up a female hitchhiker, threw bottles at her, and kicked and stomped her for approximately 30 minutes until she died. They then sexually assaulted her lifeless body and, when [****122] they were finished, [**1224] threw her body off a cliff. They later returned to the crime scene to mutilate her corpse. See Brief for Alabama et al. as *Amici Curiae* 9-10; see also [Loggins v. State, 771 So. 2d 1070, 1074-1075 \(Ala.](#)

[Crim. App. 1999](#)); [Duncan v. State, 827 So. 2d 838, 840-841 \(Ala. Crim. App. 1999\)](#). Other examples in the brief are equally shocking. Though these cases are assuredly the exception rather than the rule, the studies the Court cites in no way justify a constitutional imperative that prevents legislatures and juries from treating exceptional cases in an exceptional way--by determining that some murders are not just the acts of happy-go-lucky teenagers, but heinous crimes deserving of death.

That "almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent," [ante, at 569, 161 L. Ed. 2d, at 22](#), is patently irrelevant--and is yet another resurrection of an argument that this Court gave a decent burial in *Stanford*. (What kind of Equal Justice under Law is it that--without so much as a "Sorry about that"--gives **[***59]** as the basis for sparing one person **[****123]** from execution arguments *explicitly rejected* in refusing to spare another?) As we explained in [Stanford, 492 U.S., at 374, 106 L. Ed. 2d 306, 109 S. Ct. 2969](#), it is "absurd to think that one must be mature enough to drive carefully, to drink responsibly, or to vote intelligently, in order to be mature enough to understand that murdering another human being is profoundly wrong, and to conform one's conduct to that most minimal of all civilized standards." Serving on a jury or entering into marriage also involve decisions far more sophisticated than the simple decision not to take another's life.

[*620] Moreover, the age statutes the Court lists "set the appropriate ages for the operation of a system that makes its determinations in gross, and that does not conduct individualized maturity tests." *Ibid.* The criminal justice system, by contrast, provides for individualized consideration of each defendant. In capital cases, this Court requires the sentencer to make an individualized determination, which includes weighing aggravating factors and mitigating factors, such as youth. See **[****124]** [Eddings, 455 U.S., at 115-117, 71 L. Ed. 2d 1, 102 S. Ct. 869](#). In other contexts where individualized consideration is provided, we have recognized that at least some minors will be mature enough to make difficult decisions that involve moral considerations. For instance, we have struck down abortion statutes that do not allow minors deemed mature by courts to bypass parental notification provisions. See, e.g., [Bellotti v. Baird, 443 U.S. 622, 643-644, 61 L. Ed. 2d 797, 99 S. Ct. 3035 \(1979\)](#) (opinion of Powell, J.); [Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52, 74-75, 49 L. Ed. 2d 788,](#)

[96 S. Ct. 2831 \(1976\)](#). It is hard to see why this context should be any different. Whether to obtain an abortion is surely a much more complex decision for a young person than whether to kill an innocent person in cold blood.

The Court concludes, however, [ante, at 572-573, 161 L. Ed. 2d, at 23-24](#), that juries cannot be trusted with the delicate task of weighing a defendant's youth along with the other mitigating and aggravating factors of his crime. This startling conclusion undermines the very foundations of our capital sentencing system, which entrusts **[****125]** juries with "mak[ing] the difficult and uniquely human judgments that defy codification and that 'buil[d] discretion, equity, and flexibility into a legal system.'" [McCleskey, supra, at 311, 95 L. Ed. 2d 262, 107 S. Ct. 1756](#) (quoting H. Kalven & H. Zeisel, *The American Jury* 498 (1966)). The Court says, [ante, at 573, 161 L. Ed. 2d, at 23-24](#), that juries will be unable to appreciate the significance of a defendant's youth when faced with details of a brutal crime. This assertion is based on no evidence; to the contrary, the Court itself acknowledges **[**1225]** that the execution of under-18 offenders is "infrequent" even in the States "without **[*621]** a formal prohibition on executing juveniles," [ante, at 564, 161 L. Ed. 2d, at 18](#), suggesting that juries take seriously their responsibility to weigh youth as a mitigating factor.

Nor does the Court suggest a stopping point for its reasoning. If juries cannot make appropriate determinations in cases involving murderers under 18, in what other kinds of cases will the Court find jurors deficient? We have already held that no jury may consider whether a mentally **[***60]** deficient defendant can receive **[****126]** the death penalty, irrespective of his crime. See [Atkins, 536 U.S., at 321, 153 L. Ed. 2d 335, 122 S. Ct. 2242](#). Why not take other mitigating factors, such as considerations of childhood abuse or poverty, away from juries as well? Surely jurors "overpower[ed]" by "the brutality or cold-blooded nature" of a crime, [ante, at 573, 161 L. Ed. 2d, at 24](#), could not adequately weigh these mitigating factors either.

The Court's contention that the goals of retribution and deterrence are not served by executing murderers under 18 is also transparently false. The argument that "[r]etribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished," [ante, at 571, 161 L. Ed. 2d, at 23](#), is simply an extension of the earlier, false generalization that youth *always* defeats culpability. The Court claims that "juveniles will be less susceptible to

deterrence," [ante, at 572, 161 L. Ed. 2d, at 23](#), because "[t]he likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent," *ibid.* [****127] (quoting [Thompson, 487 U.S., at 837, 101 L. Ed. 2d 702, 108 S. Ct. 2687](#)). The Court unsurprisingly finds no support for this astounding proposition, save its own case law. The facts of this very case show the proposition to be false. Before committing the crime, Simmons encouraged his friends to join him by assuring them that they could "get away with it" because they were minors. [State ex rel. Simmons v. Roper, 112 S.W.3d 397, 419 \(Mo. 2003\)](#) (Price, J., dissenting). This fact may have influenced the jury's decision to impose capital punishment despite Simmons' age. [*622] Because the Court refuses to entertain the possibility that its own unsubstantiated generalization about juveniles could be wrong, it ignores this evidence entirely.

III

Though the views of our own citizens are essentially irrelevant to the Court's decision today, the views of other countries and the so-called international community take center stage.

The Court begins by noting that "Article 37 of the United Nations Convention on the Rights of the Child, [1577 U. N. T. S. 3, [28 I. L. M. 1448, 1468-1470](#), entered into force Sept. 2, 1990,] which every country in the world has ratified [****128] *save for the United States and Somalia*, contains an express prohibition on capital punishment for crimes committed by juveniles under 18." [Ante, at 576, 161 L. Ed. 2d, at 26](#) (emphasis added). The Court also discusses the International Covenant on Civil and Political Rights (ICCPR), December 19, 1966, 999 U. N. T. S. 175, [ante, at 567, 576, 161 L. Ed. 2d, at 20, 26](#), which the Senate ratified only subject to a reservation that reads:

"The United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age." Senate Committee on Foreign Relations, International [**1226] Covenant on Civil and Political Rights, S. Exec. Rep. No. 102-23, p. 11 (1992).

[***61] Unless the Court has added to its arsenal the power to join and ratify treaties on behalf of the United States, I cannot see how this evidence favors, rather than refutes, its position. That the Senate and the President--those actors our Constitution [****129] empowers to enter into treaties, see Art. II, § 2 --have declined to join and ratify treaties prohibiting [*623] execution of under-18 offenders can only suggest that *our country* has either not reached a national consensus on the question, or has reached a consensus contrary to what the Court announces. That the reservation to the ICCPR was made in 1992 does not suggest otherwise, since the reservation still remains in place today. It is also worth noting that, in addition to barring the execution of under-18 offenders, the United Nations Convention on the Rights of the Child prohibits punishing them with life in prison without the possibility of release. If we are truly going to get in line with the international community, then the Court's reassurance that the death penalty is really not needed, since "the punishment of life imprisonment without the possibility of parole is itself a severe sanction," [ante, at 572, 161 L. Ed. 2d, at 23](#), gives little comfort.

It is interesting that whereas the Court is not content to accept what the States of our Federal Union say, but insists on inquiring into what they *do* (specifically, whether they in fact *apply* [****130] the juvenile death penalty that their laws allow), the Court is quite willing to believe that every foreign nation--of whatever tyrannical political makeup and with however subservient or incompetent a court system--in fact *adheres* to a rule of no death penalty for offenders under 18. Nor does the Court inquire into how many of the countries that have the death penalty, but have forsworn (on paper at least) imposing that penalty on offenders under 18, have what no State of this country can constitutionally have: a *mandatory* death penalty for certain crimes, with no possibility of mitigation by the sentencing authority, for youth or any other reason. I suspect it is most of them. See, e.g., R. Simon & D. Blaskovich, *A Comparative Analysis of Capital Punishment: Statutes, Policies, Frequencies, and Public Attitudes the World Over* 25, 26, 29 (2002). To forbid the death penalty for juveniles under such a system may be a good idea, but it says nothing about our system, in which the sentencing authority, typically a jury, always can, and almost [*624] always does, withhold the death penalty from an under-18 offender except, after considering all the circumstances, in [****131] the rare cases where it is warranted. The foreign authorities, in other words, do not even speak to the issue before us here.

More fundamentally, however, the basic premise of the Court's argument--that American law should conform to the laws of the rest of the world--ought to be rejected out of hand. In fact the Court itself does not believe it. In many significant respects the laws of most other countries differ from our law--including not only such explicit provisions of our Constitution as the right to jury trial and grand jury indictment, but even many interpretations of the Constitution prescribed by this Court itself. The Court-pronounced exclusionary rule, for example, is distinctively American. When we adopted that rule in [Mapp v. Ohio, 367 U.S. 643, 655, 6 L. Ed. 2d 1081, 81 S. Ct. 1684, 86 Ohio Law Abs. 513 \(1961\)](#), it was "unique to American [***62] jurisprudence." [Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 415, 29 L. Ed. 2d 619, 91 S. Ct. 1999 \(1971\)](#) (Burger, C. J., dissenting). Since then a categorical exclusionary rule has been "universally rejected" by other countries, including those with rules prohibiting illegal searches [****132] and police misconduct, [**1227] despite the fact that none of these countries "appears to have any alternative form of discipline for police that is effective in preventing search violations." Bradley, [Mapp Goes Abroad, 52 Case W. Res. L. Rev. 375, 399-400 \(2001\)](#). England, for example, rarely excludes evidence found during an illegal search or seizure and has only recently begun excluding evidence from illegally obtained confessions. See C. Slobogin, *Criminal Procedure: Regulation of Police Investigation* 550 (3d ed. 2002). Canada rarely excludes evidence and will only do so if admission will "bring the administration of justice into disrepute." *Id.*, at 550-551 (internal quotation marks omitted). The European Court of Human Rights has held that introduction of illegally seized evidence does not violate the "fair trial" requirement in Article 6, § 1, of the European Convention on [**625] Human Rights. See Slobogin, *supra*, at 551; Bradley, [supra](#), at 377-378.

The Court has been oblivious to the views of other countries when deciding how to interpret our Constitution's requirement that "Congress shall make no law respecting an establishment of religion. [****133] . . ." *Amdt. 1*. Most other countries--including those committed to religious neutrality--do not insist on the degree of separation between church and state that this Court requires. For example, whereas "we have recognized special *Establishment Clause* dangers where the government makes direct money payments to sectarian institutions," [Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 842, 132 L. Ed. 2d 700, 115 S. Ct. 2510 \(1995\)](#) (citing cases), countries such as the Netherlands, Germany, and Australia allow

direct government funding of religious schools on the ground that "the state can only be truly neutral between secular and religious perspectives if it does not dominate the provision of so key a service as education, and makes it possible for people to exercise their right of religious expression within the context of public funding." S. Monsma & J. Soper, *The Challenge of Pluralism: Church and State in Five Democracies* 207 (1997); see also *id.*, at 67, 103, 176. England permits the teaching of religion in state schools. *Id.*, at 142. Even in France, which is considered "America's only rival in strictness of church-state separation," "[t]he [****134] practice of contracting for educational services provided by Catholic schools is very widespread." C. Glenn, *The Ambiguous Embrace: Government and Faith-Based Schools and Social Agencies* 110 (2000).

And let us not forget the Court's abortion jurisprudence, which makes us one of only six countries that allow abortion on demand until the point of viability. See Larsen, *Importing Constitutional Norms from a "Wider Civilization": Lawrence and the Rehnquist Court's Use of Foreign and International Law in Domestic Constitutional Interpretation*, [65 Ohio St. L. J. 1283, 1320 \(2004\)](#); Center for Reproductive [**626] Rights, *The World's Abortion Laws* (June 2004), http://www.reproductiverights.org/pub_fac_abortion_law_s.html. [***63] Though the Government and *amici* in cases following [Roe v. Wade, 410 U.S. 113, 35 L. Ed. 2d 147, 93 S. Ct. 705 \(1973\)](#), urged the Court to follow the international community's lead, these arguments fell on deaf ears. See McCrudden, *A Part of the Main? The Physician-Assisted Suicide Cases and Comparative Law Methodology in the United States Supreme Court*, in *Law at the End of Life: The Supreme Court and Assisted Suicide* 125, 129-130 (C. [****135] Schneider ed. 2000).

The Court's special reliance on the laws of the United Kingdom is perhaps the most indefensible part of its opinion. It is of course true that we share a common history with the United Kingdom, and that we often consult English sources when [**1228] asked to discern the meaning of a constitutional text written against the backdrop of 18th-century English law and legal thought. If we applied that approach today, our task would be an easy one. As we explained in [Harmelin v. Michigan, 501 U.S. 957, 973-974, 115 L. Ed. 2d 836, 111 S. Ct. 2680 \(1991\)](#), the "Cruell and Unusuall Punishments" provision of the English Declaration of Rights was originally meant to describe those punishments "out of [the Judges'] Power"--that is, those punishments that

were not authorized by common law or statute, but that were nonetheless administered by the Crown or the Crown's judges. Under that reasoning, the death penalty for under-18 offenders would easily survive this challenge. The Court has, however--I think wrongly--long rejected a purely originalist approach to our *Eighth Amendment*, and that is certainly not the approach the Court takes today. Instead, the [****136] Court undertakes the majestic task of determining (and thereby prescribing) our Nation's *current* standards of decency. It is beyond comprehension why we should look, for that purpose, to a country that has developed, in the centuries since the Revolutionary War--and with increasing speed since the United Kingdom's recent submission to the jurisprudence of European courts dominated by continental [*627] jurists--a legal, political, and social culture quite different from our own. If we took the Court's directive seriously, we would also consider relaxing our double jeopardy prohibition, since the British Law Commission recently published a report that would significantly extend the rights of the prosecution to appeal cases where an acquittal was the result of a judge's ruling that was legally incorrect. See Law Commission, *Double Jeopardy and Prosecution Appeals*, LAW COM No. 267, Cm 5048, p 6, P 1.19 (Mar. 2001); J. Spencer, *The English System in European Criminal Procedures* 142, 204, and n 239 (M. Delmas-Marty & J. Spencer eds. 2002). We would also curtail our right to jury trial in criminal cases since, despite the jury system's deep roots in our shared common law, [****137] England now permits all but the most serious offenders to be tried by magistrates without a jury. See D. Feldman, *England and Wales*, in *Criminal Procedure: A Worldwide Study* 91, 114-115 (C. Bradley ed. 1999).

The Court should either profess its willingness to reconsider all these matters in light of the views of foreigners, or else it should cease putting forth foreigners' views as part of the *reasoned basis* of its decisions. To invoke alien law when it agrees with one's own thinking, and ignore [***64] it otherwise, is not reasoned decisionmaking, but sophistry.⁹

⁹ Justice O'Connor asserts that the *Eighth Amendment* has a "special character," in that it "draws its meaning directly from the maturing values of civilized society." [Ante, at 604-605, 161 L. Ed. 2d, at 49](#). Nothing in the text reflects such a distinctive character--and we have certainly applied the "maturing values" rationale to give brave new meaning to other provisions of the Constitution, such as the *Due Process Clause* and the *Equal Protection Clause*. See, e.g., [Lawrence v. Texas, 539 U.S. 558, 571-573, 156 L. Ed. 2d 508, 123 S.](#)

[****138] [**1229] [*628] The Court responds that "[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." [Ante, at 578, 161 L. Ed. 2d, at 27](#). To begin with, I do not believe that approval by "other nations and peoples" should buttress our commitment to American principles any more than (what should logically follow) disapproval by "other nations and peoples" should weaken that commitment. More importantly, however, the Court's statement flatly misdescribes what is going on here. Foreign sources are cited today, *not* to underscore our "fidelity" to the Constitution, our "pride in its origins," and "our own [American] heritage." To the contrary, they are cited *to set aside* the centuries-old American practice--a practice still engaged in by a large majority of the relevant States--of letting a jury of 12 citizens decide whether, in the particular case, youth should be the basis for withholding the death penalty. What these foreign sources "affirm, [****139] " rather than repudiate, is the Justices' own notion of how the world ought to be, and their diktat that it shall be so henceforth in America. The Court's parting attempt to downplay the significance of its extensive discussion of foreign law is unconvincing. "Acknowledgment" of foreign approval has no place in the legal opinion of this Court *unless it is part of the basis for the Court's judgment*--which is surely what it parades as today.

IV

[Ct. 2472 \(2003\); United States v. Virginia, 518 U.S. 515, 532-534, 135 L. Ed. 2d 735, 116 S. Ct. 2264 \(1996\); Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 847-850, 120 L. Ed. 2d 674, 112 S. Ct. 2791 \(1992\)](#). Justice O'Connor asserts that an international consensus can at least "serve to confirm the reasonableness of a consonant and genuine American consensus." [Ante, at 605, 161 L. Ed. 2d, at 49-50](#). Surely not unless it can also demonstrate the *unreasonableness* of such a consensus. Either America's principles are its own, or they follow the world; one cannot have it both ways. Finally, Justice O'Connor finds it unnecessary to consult foreign law in the present case because there is "no . . . domestic consensus" to be confirmed. *Ibid.* But since she believes that the Justices can announce their own requirements of "moral proportionality" despite the absence of consensus, why would foreign law not be relevant to *that* judgment? If foreign law is powerful enough to supplant the judgment of the American people, surely it is powerful enough to change a personal assessment of moral proportionality.

To add insult to injury, the Court affirms the Missouri Supreme Court without even admonishing that court for its [*629] flagrant disregard of our precedent in *Stanford*. Until today, we have always held that "it is this Court's prerogative alone to overrule one of its precedents." [State Oil Co. v. Khan, 522 U.S. 3, 20, 139 L. Ed. 2d 199, 118 S. Ct. 275 \(1997\)](#). That has been true even where "changes in judicial doctrine" ha[ve] significantly undermined" our prior holding, [United States v. Hatter, 532 U.S. 557, 567, 149 L. Ed. 2d 820, 121 S. Ct. 1782 \(2001\)](#) (quoting [****140] [Hatter v. United \[***65\] States, 64 F.3d 647, 650 \(CA Fed. 1995\)](#)), and even where our prior holding "appears to rest on reasons rejected in some other line of decisions," [Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484, 104 L. Ed. 2d 526, 109 S. Ct. 1917 \(1989\)](#). Today, however, the Court silently approves a state-court decision that blatantly rejected controlling precedent.

One must admit that the Missouri Supreme Court's action, and this Court's indulgent reaction, are, in a way, understandable. In a system based upon constitutional and statutory text democratically adopted, the concept of "law" ordinarily signifies that particular words have a fixed meaning. Such law does not change, and this Court's pronouncement of it therefore remains authoritative until (confessing our prior error) we overrule. The Court has purported to make of the *Eighth Amendment*, however, a mirror of the passing and changing sentiment of American society regarding penology. The lower courts can look into that mirror as well as we can; and what we saw 15 years ago bears no necessary relationship to what they see today. Since they are not looking at the [****141] same text, but at a different [**1230] scene, why should our earlier decision control their judgment?

However sound philosophically, this is no way to run a legal system. We must disregard the new reality that, to the extent our *Eighth Amendment* decisions constitute something more than a show of hands on the current Justices' current personal views about penology, they purport to be nothing more than a snapshot of American public opinion at a particular point in time (with the timeframes now shortened to a mere 15 years). We must treat these decisions [*630] just as though they represented *real* law, *real* prescriptions democratically adopted by the American people, as conclusively (rather than sequentially) construed by this Court. Allowing lower courts to reinterpret the *Eighth Amendment* whenever they decide enough time has passed for a new snapshot leaves this Court's decisions without any

force--especially since the "evolution" of our *Eighth Amendment* is no longer determined by objective criteria. To allow lower courts to behave as we do, "updating" the *Eighth Amendment* as needed, destroys stability and makes our case law an unreliable basis for the designing [****142] of laws by citizens and their representatives, and for action by public officials. The result will be to crown arbitrariness with chaos.

References

[21A Am Jur 2d, Criminal Law §§ 958, 959](#)

USCS, *Constitution, Amendments* 8, 14

L Ed Digest, Criminal Law § 93.3; Evidence § 980

L Ed Index, Capital Offenses and Punishment

Annotation References

Validity of death penalty, under Federal Constitution, as affected by consideration of aggravating or mitigating circumstances. [111 L. Ed. 2d 947](#).

Supreme Court's views on constitutionality of death penalty and procedures under which it is imposed or carried out. [90 L. Ed. 2d 1001](#).

Federal constitutional guarantee against cruel and unusual punishment--Supreme Court cases. [33 L. Ed. 2d 932](#).

Comment note.--What provisions of the *Federal Constitution's Bill of Rights* are applicable to the states. [18 L. Ed. 2d 1388, 23 L. Ed. 2d 985](#).

Propriety of imposing capital punishment on mentally retarded individuals. [20 A.L.R.5th 177 \[****143\]](#) .

Comment note.--Mental or emotional condition as diminished responsibility for crime. [22 A.L.R.3d 1228](#).

Table1 ([Return to related document text](#))

Alabama	Ala. Code § 13A-6-2(c) (West 2004) (no express minimum age)
Arizona	Ariz. Rev. Stat. Ann. § 13-703(A) (West Supp. 2004) (same)
Arkansas	Ark. Code Ann. § 5-4-615 (Michie 1997) (same)
Delaware	Del. Code Ann., Tit. 11 (Lexis 1995) (same)
Florida	Fla. Stat. § 985.225(1) (2003) (same)
Georgia	Ga. Code Ann. § 17-9-3 (Lexis 2004) (same)
Idaho	Idaho Code § 18-4004 (Michie 2004) (same)
Kentucky	Ky. Rev. Stat. Ann. § 640.040(1) (Lexis 1999) (minimum age of 16)
Louisiana	La. Stat. Ann. § 14:30(C) (West Supp. 2005) (no express minimum age)
Mississippi	Miss. Code Ann. § 97-3-21 (Lexis 2000) (same)
Missouri	Mo. Rev. Stat. Ann. § 565.020 (2000) (minimum age of 16)
Nevada	Nev. Rev. Stat. § 176.025 (2003) (minimum age of 16)
New Hampshire	N. H. Rev. Stat. Ann. § 630:1(V) (West 1996) (minimum age of 17)
North Carolina	N. C. Gen. Stat. § 14-17 (Lexis 2003) (minimum age of 17, except that those under 17 who commit murder while serving a prison sentence for a previous murder may receive the death penalty)
Oklahoma	Okla. Stat. Ann., Tit. 21, § 701.10 (West 2002) (no express minimum age)
Pennsylvania	18 Pa. Cons. Stat. § 1102 (2002) (same)
South Carolina	S. C. Code Ann. § 16-3-20 (West Supp. 2004 and main ed.) (same)
Texas	Tex. Penal Code Ann. § 8.07(c) (West Supp. 2004-2005) (minimum age of 17)
Utah	Utah Code Ann. § 76-3-206(1) (Lexis 2003) (no express minimum age)
Virginia	Va. Code Ann. § 18.2-10(a) (Lexis Supp. 2003) (minimum age of 16)

Table1 ([Return to related document text](#))**Table2** ([Return to related document text](#))

California	Cal. Penal Code Ann. § 190.5 (West 1999)
Colorado	Colo. Rev. Stat. § 18-1.4-102(1)(a) (Lexis 2004)
Connecticut	Conn. Gen. Stat. § 53a-46a(h) (2005)
Illinois	Ill. Comp. Stat., ch. 720, § 5/9-1(b) (West Supp. 2003)
Indiana	Ind. Code Ann. § 35-50-2-3 (2004)
Kansas	Kan. Stat. Ann. § 21-4622 (1995)
Maryland	Md. Crim. Law Code Ann. § 2-202(b)(2)(i) (Lexis 2002)
Montana	Mont. Code Ann. § 45-5-102 (2003)
Nebraska	Neb. Rev. Stat. § 28-105.01(1) (Supp. 2004)
New Jersey	N. J. Stat. Ann. § 2C:11-3(g) (West Supp. 2003)
New Mexico	N. M. Stat. Ann. § 31-18-14(A) (2000)
New York	N. Y. Penal Law Ann. § 125.27 (West 2004)
Ohio	Ohio Rev. Code Ann. § 2929.02(A) (Lexis 2003)
Oregon	Ore. Rev. Stat. §§ 161.620, 137.707(2) (2003)

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South Dakota	S. D. Codified Laws § 23A-27A-42 (West 2004)
Tennessee	Tenn. Code Ann. § 37-1-134(a)(1) (1996)
Washington	Minimum age of 18 established by judicial decision. State v Furman, 122 Wash. 2d 440, 858 P.2d 1092 (1993)
Wyoming	Wyo. Stat. § 6-2-101(b) (Lexis Supp. 2004)

Table2 ([Return to related document text](#))

Table3 ([Return to related document text](#))

Alaska
Hawaii
Iowa
Maine
Massachusetts
Michigan
Minnesota
North Dakota
Rhode Island
Vermont
West Virginia
Wisconsin

Table3 ([Return to related document text](#))

Table4 ([Return to related document text](#))

STATE	A	STATUTE
	GE	
Alabama	18	Ala. Const., Amdt. No. 579
Alaska	18	Alaska Const., Art. V, § 1; Alaska Stat. § 15-05-010 (Lexis 2004)
Arizona	18	Ariz. Const., Art. VII, § 2; Ariz. Rev. Stat. § 16-101 (West 2001)
Arkansas	18	Ark. Code Ann. § 9-25-101 (Lexis 2002)
California	18	Cal. Const., Art. 2, § 2
Colorado	18	Colo. Rev. Stat. § 1-2-101 (Lexis 2004)
Connecticut	18	Conn. Const., Art. 6, § 1; Conn. Gen. Stat. § 9-12 (2005)
Delaware	18	Del. Code Ann., Tit. 15, § 1701 (Michie Supp. 2004)
District of Columbia	18	D. C. Code § 1-1001.02(2)(B) (West Supp. 2004)
Florida	18	Fla. Stat. ch. 97.041 (2003)
Georgia	18	Ga. Const., Art. 2, § 1, P 2; Ga. Code Ann. § 21-2-216 (Lexis 2003)
Hawaii	18	Haw. Const., Art. II, § 1; Haw. Rev. Stat. § 11-12
Idaho	18	Idaho Code § 34-402 (Michie 2001)
Illinois	18	Ill. Const., Art. III, § 1; Ill. Comp.

STATE	A GE	STATUTE
		Stat., ch. 10, § 5/3-1 (West 2002)
Indiana	18	Ind. Code Ann. § 3-7-13-1 (Lexis 1997)
Iowa	18	Iowa Code § 48A.5 (2003)
Kansas	18	Kan. Const., Art. 5, § 1
Kentucky	18	Ky. Const. § 145
Louisiana	18	La. Const., Art. I, § 10; La. Rev. Stat. Ann. § 18:101 (West 2004)
Maine	18	Me. Const., Art. II, § 1 (West Supp. 2004); Me. Rev. Stat. Ann., Tit. 21-A, §§ 111, 111-A (West 1993 and Supp. 2004)
Maryland	18	Md. Elec. Law Code Ann. § 3-102 (Lexis 2002)
Massachusetts	18	Mass. Gen. Laws Ann., ch. 51, § 1 (West Supp. 2005)
Michigan	18	Mich. Comp. Laws Ann. § 168.492 (West 1989)
Minnesota	18	Minn. Stat. § 201.014(1)(a) (2002)
Mississippi	18	Miss. Const., Art. 12, § 241
Missouri	18	Mo. Const., Art. VIII, § 2
Montana	18	Mont. Const., Art. IV, § 2; Mont. Code Ann. § 13-1-111 (2003)
Nebraska	18	Neb. Const., Art. VI, § 1; Neb. Rev. Stat. § 32-110 (2004)
Nevada	18	Nev. Rev. Stat. § 293.485 (2003)
New Hampshire	18	N. H. Const., Pt. 1, Art. 11
New Jersey	18	N. J. Const., Art. II, § 1, P 3
New Mexico	18	[no provision other than U. S. Const., Amdt. XXVI]
New York	18	N. Y. Elec. Law Ann. § 5-102 (West 1998)
North Carolina	18	N. C. Gen. Stat. Ann. § 163-55 (Lexis 2003)
North Dakota	18	N. D. Const., Art. II, § 1
Ohio	18	Ohio Const., Art. V, § 1 Ohio Rev. Code Ann. § 3503.01 (Anderson 1996)
Oklahoma	18	Okla. Const., Art. III, § 1
Oregon	18	Ore. Const., Art. II, § 2
Pennsylvania	18	25 Pa. Cons. Stat. Ann. § 2811 (1994)
Rhode Island	18	R. I. Gen. Laws § 17-1-3 (Lexis 2003)
South Carolina	18	S. C. Code Ann. § 7-5-610 (West Supp. 2003)
South Dakota	18	S. D. Const., Art. VII, § 2; S. D. Codified Laws Ann. § 12-3-1 (West 2004)
Tennessee	18	Tenn. Code Ann. § 2-2-102 (2003)
Texas	18	Tex. Elec. Code Ann. § 11.002 (West 2003)
Utah	18	Utah Const., Art. IV, § 2 Utah Code Ann. § 20A-2-101 (2002)
Vermont	18	Vt. Stat. Ann., Tit. 17, § 2121 (Lexis 2002)
Virginia	18	Va. Const., Art. II, § 1
Washington	18	Wash. Const., Art. VI, § 1
West Virginia	18	W. Va. Code § 3-1-3 (Lexis 2002)
Wisconsin	18	Wis. Const., Art. III, § 1; Wis. Stat. § 6.02 (West 2004)
Wyoming	18	Wyo. Stat. Ann. §§ 22-1-102, 22-3-102 (Lexis Supp. 2004)

Table4 ([Return to related document text](#))

Table5 ([Return to related document text](#))

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STATE	AGE	STATUTE
Alabama	19	Ala. Code § 12-16-60(a)(1) (West 1995)
Alaska	18	Alaska Stat. § 09.20.010(a)(3) (Lexis 2004)
Arizona	18	Ariz. Rev. Stat. § 21-301(D) (West 2002)
Arkansas	18	Ark. Code Ann. §§ 16-31-101, 16-32-302 (Lexis Supp. 2003)
California	18	Cal. Civ. Proc. § 203(a)(2) (West Supp. 2004)
Colorado	18	Colo. Rev. Stat. § 13-71- 105(2)(a) (Lexis 2004)
Connecticut	18	Conn. Gen. Stat. § 51-217(a) (2005)
Delaware	18	Del. Code Ann., Tit. 10, § 4509(b)(2) (Michie 1999)
District of Columbia	18	D. C. Code § 11-1906(b)(1)(C) (West 2001)
Florida	18	Fla. Stat. § 40.01 (2003)
Georgia	18	Ga. Code Ann. §§ 15-12-60, 15- 12-163 (Lexis 2001)
Hawaii	18	Haw. Rev. Stat. § 612-4(a)(1) (Supp. 2004)
Idaho	18	Idaho Code § 2-209(2)(a) (Michie 2003)
Illinois	18	Ill. Comp. Stat., ch. 705, § 305/2 (West 2002)
Indiana	18	Ind. Code § 33-28-4-8 (2004)
Iowa	18	Iowa Code § 607A.4(1)(a) (2003)
Kansas	18	Kan. Stat. Ann. § 43-156 (2000) (jurors must be qualified to be electors); Kan. Const., Art. 5, § 1 (person must be 18 to be qualified elector)
Kentucky	18	Ky. Rev. Stat. Ann. § 29A.080(2)(a) (Lexis Supp. 2004)
Louisiana	18	La. Code Crim. Proc. Ann., Art. 401(A)(2) (West 2003)
Maine	18	Me. Rev. Stat. Ann., Tit. 14, § 1211 (West 1980)
Maryland	18	Md. Cts. & Jud. Proc. Code Ann. § 8-104 (Lexis 2002)
Massachusetts	18	Mass. Gen. Laws. Ann., ch. 234, § 1 (West 2000) (jurors must be qualified to vote); ch. 51, § 1 (West Supp. 2005) (person must be 18 to vote)
Michigan	18	Mich. Comp. Laws Ann. § 600.1307a(1)(a) (West Supp. 2004)
Minnesota	18	Minn. Dist. Ct. Rule 808(b)(2)

STATE	AGE	STATUTE
		(2004)
Mississippi	21	Miss. Code Ann. § 13-5-1 (Lexis 2002)
Missouri	21	Mo. Rev. Stat. § 494.425(1) (2000)
Montana	18	Mont. Code Ann. § 3-15-301 (2003)
Nebraska	19	Neb. Rev. Stat. § 25-1601 (Supp. 2004)
Nevada	18	Nev. Rev. Stat. § 6.010 (2003) (juror must be qualified elector); § 293.485 (person must be 18 to vote)
New Hampshire	18	N. H. Rev. Stat. Ann. § 500-A:7-a(l) (Lexis Supp. 2004)
New Jersey	18	N. J. Stat. Ann. § 2B:20-1(a) (West 2004 Pamphlet)
New Mexico	18	N. M. Stat. Ann. § 38-5-1 (1998)
New York	18	N. Y. Jud. Law Ann. § 510(2) (West 2003)
North Carolina	18	N. C. Gen. Stat. Ann. § 9-3 (Lexis 2003)
North Dakota	18	N. D. Cent. Code § 27-09.1-08(2)(b) (Lexis Supp. 2003)
Ohio	18	Ohio Rev. Code Ann. § 2313.42 (Anderson 2001)
Oklahoma	18	Okla. Stat. Ann., Tit. 38, § 28 (West Supp. 2005)
Rhode Island	18	R. I. Gen. Laws § 9-9-1.1(a)(2) (Lexis Supp. 2005)
South Carolina	18	S. C. Code Ann. § 14-7-130 (West Supp. 2004)
South Dakota	18	S. D. Codified Laws § 16-13-10 (2004)
Tennessee	18	Tenn. Code Ann. § 22-1-101 (1994)
Texas	18	Tex. Govt. Code Ann. § 62.102(1) (West 1998)
Utah	18	Utah Code Ann. § 78-46-7(1)(b) (Lexis 2002)
Vermont	18	Vt. Stat. Ann., Tit. 4, § 962(a)(1) (Lexis 1999) (jurors must have attained age of majority); Tit. 1, § 173 (Lexis 2003) (age of majority is 18)
Virginia	18	Va. Code Ann. § 8.01-337 (Lexis 2000)
Washington	18	Wash. Rev. Code Ann. § 2.36.070 (West 2004)
West Virginia	18	W. Va. Code § 52-1-8(b)(1) (Lexis 2000)
Wisconsin	18	Wis. Stat. § 756.02 (West 2001)
Wyoming	18	Wyo. Stat. Ann. § 1-11-101 (Lexis 2003) (jurors

543 U.S. 551, *630; 125 S. Ct. 1183, **1230; 161 L. Ed. 2d 1, ***65; 2005 U.S. LEXIS 2200, ****143

STATE**AGE****STATUTE**

must be adults); § 14-1-101
(person becomes an adult at 18)

Table5 ([Return to related document text](#))**Table6** ([Return to related document text](#))**STATE****AGE****STATUTE**

Alabama	18	Ala. Code § 30-1-5 (West Supp. 2004)
Alaska	18	Alaska Stat. §§ 25.05.011, 25.05.171 (Lexis 2004)
Arizona	18	Ariz. Rev. Stat. Ann. § 25-102 (West Supp. 2004)
Arkansas	18	Ark. Code Ann. §§ 9-11-102, 9-11-208 (Lexis 2002)
California	18	Cal. Fam. Code Ann. § 301 (West 2004)
Colorado	18	Colo. Rev. Stat. Ann. § 14-2-106 (Lexis 2004)
Connecticut	18	Conn. Gen. Stat. § 46b-30 (2005)
Delaware	18	Del. Code Ann., Tit. 13, § 123 (Lexis 1999)
District of Columbia	18	D. C. Code § 46-411 (West 2001)
Florida	18	Fla. Stat. §§ 741.04, 741.0405 (2003)
Georgia	16	Ga. Code Ann. §§ 19-3-2, 19-3-37 (Lexis 2004) (those under 18 must obtain parental consent unless female applicant is pregnant or both applicants are parents of a living child, in which case minimum age to marry without consent is 16)
Hawaii	18	Haw. Rev. Stat. § 572-2 (1993)
Idaho	18	Idaho Code § 32-202 (Michie 1996)
Illinois	18	Ill. Comp. Stat., ch. 750, § 5/203 (West 2002)
Indiana	18	Ind. Code Ann. §§ 31-11-1-4, 31-11-1-5, 31-11-2-1, 31-11-2-3 (2004)
Iowa	18	Iowa Code § 595.2 (2003)
Kansas	18	Kan. Stat. Ann. § 23-106 (Supp. 2003)
Kentucky	18	Ky. Rev. Stat. Ann. §§ 402.020, 402.210 (Lexis 1999)
Louisiana	18	La. Children's Code Ann., Arts. 1545, 1547 (West 2004) (minors may not marry without consent); La. Civ. Code Ann.,

STATE	AGE	STATUTE
		Art. 29 (West 1999) (age of majority is 18)
Maine	18	Me. Rev. Stat. Ann., Tit. 19-A, § 652 (West 1998 and Supp. 2004)
Maryland	16	Md. Fam. Law Code Ann. § 2-301 (Lexis 2004) (those under 18 must obtain parental consent unless female applicant can present proof of pregnancy or a child, in which case minimum age to marry without consent is 16)
Massachusetts	18	Mass. Gen. Laws Ann., ch. 207, §§ 7, 24, 25 (West 1998)
Michigan	18	Mich. Comp. Laws Ann. § 551.103 (West 2005)
Minnesota	18	Minn. Stat. § 517.02 (2004)
Mississippi	15/17	Miss. Code Ann. § 93-1-5 (Lexis 2004) (female applicants must be 15; male applicants must be 17)
Missouri	18	Mo. Rev. Stat. § 451.090 (2000)
Montana	18	Mont. Code Ann. §§ 40-1-202, 40-1-213 (2003)
Nebraska	19	Neb. Rev. Stat. § 42-105 (2004) (minors must have parental consent to marry); § 43-2101 (defining "minor" as a person under 19)
Nevada	18	Nev. Rev. Stat. § 122.020 (2003)
New Hampshire	18	N. H. Rev. Stat. Ann. § 457:5 (West 1992)
New Jersey	18	N. J. Stat. Ann. § 37:1-6 (West 2002)
New Mexico	18	N. M. Stat. Ann. § 40-1-6 (1999)
New York	18	N.Y. Dom. Rel. Law Ann. § 15 (West Supp. 2005)
North Carolina	18	N. C. Gen. Stat. Ann. § 51-2 (Lexis 2003)
North Dakota	18	N. D. Cent. Code § 14-03-02 (Lexis 2004)
Ohio	18	Ohio Rev. Code Ann. § 3101.01 (2003)
Oklahoma	18	Okla. Stat. Ann., Tit. 43, § 3 (West Supp. 2005)
Oregon	18	Ore. Rev. Stat. § 106.060 (2003)
Pennsylvania	18	23 Pa. Cons. Stat. § 1304 (1997)
Rhode Island	18	R. I. Gen. Laws § 15-2-11 (Supp. 2004)
South Carolina	18	S. C. Code Ann. § 20-1-250 (West Supp. 2004)
South Dakota	18	S. D. Codified Laws § 25-1-9 (West 2004)

543 U.S. 551, *630; 125 S. Ct. 1183, **1230; 161 L. Ed. 2d 1, ***65; 2005 U.S. LEXIS 2200, ****143

STATE	AGE	STATUTE
Tennessee	18	Tenn. Code Ann. § 36-3-106 (1996)
Texas	18	Tex. Fam. Code Ann. §§ 2.101-2.103 (West 1998)
Utah	18	Utah Code Ann. § 30-1-9 (Lexis Supp. 2004)
Vermont	18	Vt. Stat. Ann., Tit. 18, § 5142 (Lexis 2000)
Virginia	18	Va. Code Ann. §§ 20-45.1, 20-48, 20-49 (Lexis 2004)
Washington	18	Wash. Rev. Code Ann. § 26.04.210 (West 2005)
West Virginia	18	W. Va. Code § 48-2-301 (Lexis 2004)
Wisconsin	18	Wis. Stat. § 765.02 (2001)
Wyoming	18	Wyo. Stat. Ann. § 20-1-102 (Lexis 2003)

Table6 ([Return to related document text](#))

End of Document

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

On December 10, 2018, I served the:

- **Notice of Complete Test Claim, Schedule for Comments, and Notice of Tentative Hearing Date issued December 10, 2018**
- **Test Claim filed by the County of San Diego on June 29, 2018**

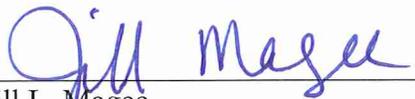
Youth Offender Parole Hearings, 17-TC-29

Penal Code Sections 3041, 3046, 3051, and 4801; Statutes 2013, Chapter 312 (SB 260) and Statutes 2017, Chapters 675 and 684 (AB 1308 and SB 394);

County of San Diego, Claimant

by making it available on the Commission's website and providing notice of how to locate it to the email addresses provided on the attached mailing list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on December 10, 2018 at Sacramento, California.



Jill L. Magee

Commission on State Mandates

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COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 12/10/18

Claim Number: 17-TC-29

Matter: Youth Offender Parole Hearings

Claimant: County of San Diego

TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.3.)

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OFFICE OF THE COUNTY COUNSEL

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MARY C. WICKHAM
County Counsel

January 9, 2019

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Heather Halsey
Executive Director
Commission on State Mandates
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Sacramento, CA 95814

Re: 17-TC-29, Youth Offender Parole Hearings

Dear Ms. Halsey:

The County of Los Angeles supports the County of San Diego's request to adopt a new test claim regarding costs associated with implementing youth offender parole hearings under Senate Bills 260, 261, and 394. These bills create a new parole mechanism which requires youth related factors to be presented at the time of sentencing.

Senate Bill 260 requires the Board of Parole Hearings to conduct youth offender parole hearings to consider the release of offenders who committed specified crimes prior to age 18. The Legislature subsequently expanded this new parole mechanism to offenders younger than age 23 and later extended the age to 25. (SB 261 and SB 394 respectively.)

Prior to the passage of these bills, the United States Supreme Court recognized that juveniles are constitutionally different than adults and placed the following limitations on juvenile sentencing: (1) no individual can be sentenced to death for a crime committed as a juvenile (*Roper v. Simmons* (2005) 543 U.S. 551), (2) no juvenile who commits a non-homicide offense may be sentenced to life without parole (*Graham v. Florida* (2010) 560 U.S. 48.), and (3) no juvenile who commits a homicide offense may be subjected to an automatic sentence of life without parole (*Miller v. Alabama* (2012) 567 U.S. 460). The California Supreme Court has also precluded sentencing a juvenile for a non-homicide offense to a term of years that falls outside the offender's natural life expectancy. (*People v. Caballero* (2012) 55 Cal.4th 262).

In *People v. Franklin* (2016) 63 Cal.4th 261, the California Supreme Court held that SB 260 contemplates that information regarding a youthful offender's characteristics and circumstances at the time of the offense will be available at the time of the parole hearing to facilitate consideration by the California Board of Parole Hearings. The court indicated that assembling "such information about the individual before the crime is typically a task more easily done at or near the time of the offense rather than decades later when memories have faded, records may have been lost or destroyed, or family members may have relocated or passed away." *Id.* at 283, 284. Penal Code section 3051 subd. (f)(1) provides that any psychological evaluation and risk assessment instrument used by the board in assessing growth and maturity shall take into consideration any subsequent growth and increased maturity of the individual. Consideration of subsequent growth and increased maturity necessitates the availability of information about the offender when he or she was a youth.

Both the U.S. and California Supreme Courts have recognized that juveniles lack maturity and have an underdeveloped sense of responsibility, which often results in impetuous and ill-considered actions and decisions. Furthermore, the courts also recognized that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. Finally, the character of a juvenile is not as well formed as that of an adult and there is potential for growth and maturity. (See *Miller* at 567 U.S. at p. 471)

In response to these cases the California legislature passed SB 260, 261, and 394, and created the youth offender parole process. The Legislature recognized that youthfulness both lessens a person's moral culpability and enhances the prospect of an individual becoming a contributing member of society. Therefore, the Legislature has mandated that youth offender parole hearings provide an opportunity to obtain release. Further, the California Board of Parole Hearings must give great weight to the diminished culpability of youthful offenders, the hallmark features of youth and any subsequent growth and increased maturity. (Penal Code § 4801, subd. (c)). The Legislature not only provided youth offenders younger than age 18 with a mechanism by which to seek parole from lengthy sentences, but also expanded this mechanism to young adults between 18 and 25 years of age.

Prior to the passage of SB 260, 261, and 394, attorneys were not required to present youth related factors at the time of sentencing. Now, the Legislature has created a new youth offender parole process, mandating a higher level of service by requiring defense counsel to present youth related factors at sentencing hearings. The Legislature seeks to ensure that the California Board of Parole Hearings receives an accurate record of the offender's characteristics and

Heather Halsey
January 9, 2019
Page 3

circumstances at the time of the offense to later afford the offender with a fair parole hearing.

In light of the significant costs associated with this state mandate to ensure that parole hearings provide youth offenders with an opportunity for release, the County of Los Angeles, on behalf of the Los Angeles County Public Defender's Office, hereby collectively request that the Commission adopt the County of San Diego's test claim.

Very truly yours,

MARY C. WICKHAM
County Counsel

By 
LUCIA GONZALEZ
Senior Deputy County Counsel
Government Services Division

LG:lal

- c: Ricardo Garcia
Los Angeles County Public Defender
- c: John Naimo
Los Angeles County Auditor-Controller

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

On January 10, 2019, I served the:

- **Interested Party's (County of Los Angeles's) Comments on the Test Claim filed January 9, 2019**

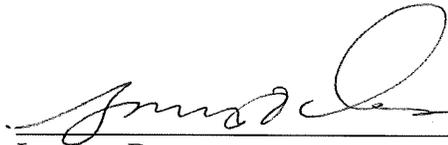
Youth Offender Parole Hearings, 17-TC-29

Penal Code Sections 3041, 3046, 3051, and 4801; Statutes 2013, Chapter 312 (SB 260) and Statutes 2017, Chapters 675 and 684 (AB 1308 and SB 394);

County of San Diego, Claimant

by making it available on the Commission's website and providing notice of how to locate it to the email addresses provided on the attached mailing list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on January 10, 2019 at Sacramento, California.



Lorenzo Duran
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COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 1/9/19

Claim Number: 17-TC-29

Matter: Youth Offender Parole Hearings

Claimant: County of San Diego

TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

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RECEIVED
March 13, 2019
Commission on
State Mandates

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LATE FILING
Exhibit C

March 13, 2019

Ms. Heather Halsey
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Response to Test Claim 17-TC-29, Youth Offender Parole Hearings

Dear Ms. Halsey:

The Department of Finance (Finance) has reviewed Test Claim 17-TC-29 submitted to the Commission on State Mandates (Commission) by the County of San Diego (County). The Test Claim alleges state-mandated, reimbursable costs associated with Chapter 312, Statutes of 2013 (SB 260), Chapter 471, Statutes of 2015 (SB 261), and Chapter 684, Statutes of 2017 (SB 394).

Finance asserts the Claimant's alleged costs were incurred as a result of court-made law. The Commission should therefore reject this Test Claim in its entirety pursuant Government Code section 17556(b).

Examination of the Test Claim should first consider two relevant United States Supreme Court rulings that preceded SB 260, SB 261, and SB 394. In *Graham v. Florida* 560 U.S. 48 (2010) the Court ruled it is unconstitutional to sentence juveniles to life without the possibility of parole (LWOP) for non-homicide offenses. In *Miller v. Alabama* 567 U.S. 460 (2012) the Court ruled it is unconstitutional to impose a mandatory LWOP sentence on a juvenile who commits homicide.

Subsequent to these rulings, in 2012 the California Supreme Court decided *People v. Caballero* (2012) 55 Cal.4th 262, where the defendant was appealing his prison sentence of 110 years-to-life for three attempted murders he committed as a juvenile. The Court ruled the sentence was equivalent to LWOP in violation of the *Graham* ruling, because the defendant was ineligible for parole for 110 years. The Court ruled the defendant must receive a resentencing that would consider matters including, but not limited to, his age when he committed his crimes, whether he was a direct perpetrator or an aider or abettor, and his physical and mental development. The Court stated in a footnote to its ruling that "(w)e urge the Legislature to enact legislation establishing a parole eligibility mechanism that provides a defendant serving a de facto life sentence without possibility of parole for nonhomicide crimes that he or she committed as a juvenile with the opportunity to obtain release on a showing of rehabilitation and maturity."

In response, the state enacted SB 260 in 2013. This bill amended Penal Code sections 3041, 3046, and 4801, and added Penal Code section 3501 to establish the following youth offender parole hearing eligibility timelines for persons sentenced for crimes committed as juveniles:

- During the 15th year, if the person is serving a determinate sentence.

- During the 20th year, if the person is serving a sentence less than 25-years-to-life.
- During the 25th year, if the person is serving a sentence of 25-years-to-life.

SB 260 did not apply to persons serving an LWOP sentence.

SB 260 states in Penal Code section 4801(c) that when the Board of Parole Hearings considers the parole suitability of persons covered by the bill's provisions, "...the board...shall give great weight to the diminished culpability of youth as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law."

The state enacted SB 261 in 2015, which amended Penal Code sections 3501 and 4801 to extend eligibility for youth offender parole hearings to persons who committed their controlling offense before the age of 23. The state then enacted SB 394 in 2017, which amended Penal Code section 3501 to extend eligibility for youth offender parole hearings to persons sentenced to LWOP for a controlling offense committed before the age of 18, after they have served 25 years of their sentence. In 2017 the state also enacted AB 1308 (Chapter 675, Statute of 2017), which amended Penal Code section 3501 to extend eligibility for youth offender parole hearings to persons who committed their controlling offense before the age of 26. We note Claimant ascribes certain costs associated with AB 1308 to SB 394 (i.e. the \$6,344 allegedly incurred in relation to a youth offender parole hearing held for Defendant Five, who was 23 when he committed his controlling offense, as stated in Section 6 of the Test Claim.)

In 2016 the California Supreme Court decided the case *People v. Franklin* (2016) 63 Cal.4th 261. The defendant was sentenced, pursuant to mandatory sentencing guidelines, to a prison term of 50-years-to-life for a murder he committed when 16 years old. The defendant's sentence was handed down in 2011, prior to the statutes at issue in this Test Claim. The defendant appealed, claiming that his sentence was equivalent to LWOP in violation of *Miller* because he was ineligible for parole for 50 years.

In *Franklin* the Court ruled that SB 260 mooted the defendant's constitutional challenge, because he is eligible for parole after serving 25 years and is therefore not serving a de facto life sentence. The Court stated that "Penal Code sections 3051 and 4801 – recently enacted by the Legislature to bring juvenile sentencing in conformity with *Miller*, *Graham*, and *Caballero* – moot Franklin's constitutional claim."

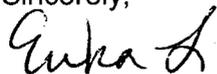
The Court also observed in *Franklin* that SB 260 requires the Board of Parole Hearings to "give great weight to the diminished culpability of youth as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner" during their hearings. The Court therefore remanded the matter to the trial court "for a determination of whether Franklin was afforded sufficient opportunity to make a record of information relevant to his eventual youth offender parole hearing."

As a consequence of *Franklin*, offenders eligible for youth offender parole hearings under SB 260, SB 261, and SB 394 must now be provided a "*Franklin* hearing", if they were not allowed by the trial court to put evidence on the record concerning the influence of youth-related factors that will eventually be considered by the Board of Parole Hearings.

This Test Claim seeks reimbursement of \$27,811.94 in costs allegedly incurred by the San Diego County Office of the Public Defender in 2016-17 and 2017-18 to prepare for and attend *Franklin* hearings for five offenders.

The cases and the statutory text make clear that SB 260, SB 261, and SB 394 create a youth offender parole hearing mechanism for certain individuals to affirm what the courts had declared to be existing law. Because Claimant's alleged costs were incurred as a result of court-made law, the Commission should reject this Test Claim in its entirety pursuant Government Code section 17556(b). This provision states that the Commission shall not find costs mandated by the state for a statute "that has been declared existing law or regulation by action of the courts. This subdivision applies regardless of whether the action of the courts occurred prior to or after the date on which the statute or executive order was enacted or issued."

Sincerely,

A handwritten signature in black ink, appearing to read "Erika Li", written in a cursive style.

ERIKA LI

Program Budget Manager

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

On March 15, 2019, I served the:

- **Finance's Late Comments on the Test Claim filed March 13, 2019**
- **Notice of Change of Representation filed March 12, 2019**

Youth Offender Parole Hearings, 17-TC-29

Penal Code Sections 3041, 3046, 3051, and 4801; Statutes 2013, Chapter 312 (SB 260) and Statutes 2017, Chapters 675 and 684 (AB 1308 and SB 394);
County of San Diego, Claimant

by making it available on the Commission's website and providing notice of how to locate it to the email addresses provided on the attached mailing list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on March 15, 2019 at Sacramento, California.



Jill L. Magee
Commission on State Mandates
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COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 3/13/19

Claim Number: 17-TC-29

Matter: Youth Offender Parole Hearings

Claimant: County of San Diego

TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.3.)

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March 25, 2019

Ms. Stephanie Karnavas
County of San Diego
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San Diego, CA 92101

Ms. Erika Li
Department of Finance
915 L Street, 10th Floor
Sacramento, CA 95814

And Parties, Interested Parties, and Interested Persons (See Mailing List)

Re: Draft Proposed Decision, Schedule for Comments, and Notice of Hearing

Youth Offender Parole Hearings, 17-TC-29

Penal Code Sections 3041, 3046, 3051, and 4801; Statutes 2013, Chapter 312 (SB 260);
Statutes 2015, Chapter 471 (SB 261); Statutes 2017, Chapter 675 (AB 1308); Statutes
2017, Chapter 684 (SB 394)
County of San Diego, Claimant

Dear Ms. Karnavas and Ms. Li:

The Draft Proposed Decision for the above-captioned matter is enclosed for your review and comment.

Written Comments

Written comments may be filed on the Draft Proposed Decision by **April 15, 2019**. Please note that all representations of fact submitted to the Commission must be signed under penalty of perjury by persons who are authorized and competent to do so and must be based upon the declarant's personal knowledge, information, or belief. (Cal. Code Regs., tit. 2, § 1187.5.) Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding unless it would be admissible over an objection in civil actions. (Cal. Code Regs., tit. 2, § 1187.5.) The Commission's ultimate findings of fact must be supported by substantial evidence in the record.¹

You are advised that comments filed with the Commission on State Mandates (Commission) are required to be simultaneously served on the other interested parties on the mailing list, and to be accompanied by a proof of service. However, this requirement may also be satisfied by electronically filing your documents. Refer to http://www.csm.ca.gov/dropbox_procedures.php on the Commission's website for electronic filing instructions. (Cal. Code Regs., tit. 2, § 1181.3.)

If you would like to request an extension of time to file comments, please note that a request for extension will also require a request for postponement. Please refer to section 1187.9 of the Commission's regulations.

¹ Government Code section 17559(b), which provides that a claimant or the state may commence a proceeding in accordance with the provisions of section 1094.5 of the Code of Civil Procedure to set aside a decision of the Commission on the ground that the Commission's decision is not supported by substantial evidence in the record.

Ms. Karnavas and Ms. Li

March 25, 2019

Page 2

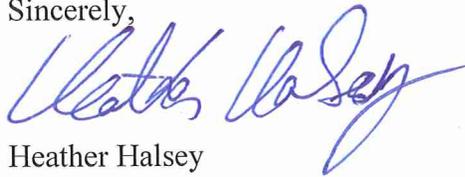
Hearing

This matter is set for hearing on **Friday, May 24, 2019** at 10:00 a.m., State Capitol, Room 447, Sacramento, California. The Proposed Decision will be issued on or about May 10, 2019.

Please notify Commission staff not later than the Wednesday prior to the hearing that you or a witness you are bringing plan to testify and please specify the names of the people who will be speaking for inclusion on the witness list. Staff will no longer be sending reminder emails. Therefore, the last communication from Commission staff is the Proposed Decision which will be issued approximately 2 weeks prior to the hearing and it is incumbent upon the participants to let Commission staff know if they wish to testify or bring witnesses.

If you would like to request postponement of the hearing, please refer to section 1187.9(b) of the Commission's regulations.

Sincerely,



Heather Halsey
Executive Director

ITEM ____
TEST CLAIM
DRAFT PROPOSED DECISION

Penal Code Sections 3041, 3046, 3051, and 4801

Statutes 2013, Chapter 312 (SB 260); Statutes 2015, Chapter 471 (SB 261);
Statutes 2017, Chapter 675 (AB 1308); Statutes 2017, Chapter 684 (SB 394)

Youth Offender Parole Hearings

17-TC-29

County of San Diego, Claimant

EXECUTIVE SUMMARY

Overview

This Test Claim alleges that Penal Code sections 3041, 3046, 3051, and 4801, as added and amended by Statutes 2013, chapter 312; Statutes 2015, chapter 471; Statutes 2017, chapter 675; and Statutes 2017, chapter 684, impose a reimbursable state-mandated program on counties.¹ The test claim statutes require that the state Board of Parole Hearings (BPH) conduct a new type of parole hearing, a Youth Offender Parole Hearing (YOPH), to review the suitability for parole of prisoners who were 25 or younger at the time of their controlling offense, or who were sentenced to life in prison without the possibility of parole for an offense committed when they were under 18, with specified exceptions.

The claimant does not identify any increased costs associated with the YOPH, but seeks reimbursement for costs associated with presenting evidence regarding the influence of youth-related factors at the sentencing hearings of criminal defendants eligible for eventual YOPH review, in anticipation of YOPHs many years in the future. The claimant asserts that the test claim statutes impose such costs on both county defense counsel and prosecutors.

¹ A bill with the same provisions, Statutes 2017, chapter 675 (AB 1308) was also enacted on October 11, 2017, but was “chaptered out” by Statutes 2017, chapter 684 (SB 394) – since SB 394 was chaptered later than AB 1308, it is the controlling legislation, pursuant to Government Code section 9605(b), which provides: “In the absence of any express provision to the contrary in the statute that is enacted last, it shall be conclusively presumed that the statute which is enacted last is intended to prevail over statutes that are enacted earlier at the same session and, in the absence of any express provision to the contrary in the statute that has a higher chapter number, it shall be presumed that a statute that has a higher chapter number was intended by the Legislature to prevail over a statute that is enacted at the same session but has a lower chapter number.”

Staff finds that the test claim statutes do not impose a reimbursable state-mandated program on local agencies, and recommends that the Commission deny this test claim.

Procedural History

Statutes 2013, chapter 312 (SB 260), was enacted on September 16, 2013, and became effective on January 1, 2014. Statutes 2015, chapter 471 (SB 261), enacted on October 3, 2015, and became effective on January 1, 2016. Statutes 2017, chapter 675 (AB 1308) was chaptered out on October 11, 2017, and did not become effective. Statutes 2017, chapter 684 (SB 394), was enacted on October 11, 2017, and became effective on January 1, 2018.

The claimant filed the Test Claim on June 29, 2018. The claimant alleged that it first incurred costs under the test claim statutes on July 11, 2016, for a sentencing hearing involving a criminal defendant who would be eligible for a YOPH in the future. The County of Los Angeles, an interested party, filed comments on the Test Claim on January 9, 2019. The Department of Finance (Finance) filed late comments on the Test Claim on March 13, 2019. BPH did not file comments on the Test Claim. Commission staff issued the Draft Proposed Decision on March 25, 2019.²

Commission Responsibilities

Under article XIII B, section 6 of the California Constitution, local agencies and school districts are entitled to reimbursement for the costs of state-mandated new programs or higher levels of service. In order for local government to be eligible for reimbursement, one or more similarly situated local agencies or school districts must file a test claim with the Commission. “Test claim” means the first claim filed with the Commission alleging that a particular statute or executive order imposes costs mandated by the state. Test claims function similarly to class actions and all members of the class have the opportunity to participate in the test claim process and all are bound by the final decision of the Commission for purposes of that test claim.

The Commission is the quasi-judicial body vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6 of the California Constitution and not apply it as an “equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities.”³

Claims

The following chart provides a brief summary of the claims and issues raised and staff’s recommendation.

Issue	Description	Staff Recommendation
Was the Test Claim timely filed?	Government Code section 17551(c) states: “test claims shall be filed not later than 12 months following the effective date of a statute or executive	<i>Timely filed</i> – Though the courts have upheld the shortening of periods of limitation and making the changed period applicable to

² Exhibit D, Draft Proposed Decision.

³ *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1281, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

Issue	Description	Staff Recommendation
	<p>order, or within 12 months of incurring costs as a result of a statute or executive order, whichever is later.”⁴</p> <p>Section 1183.1(c) of the Commission’s regulations, effective April 1, 2018, defines “12 months” as 365 days.⁵</p> <p>Prior to April 1, 2018, former section 1183.1(c) of the Commission’s regulations provided that the “within 12 months” specified in Government Code section 17551(c) meant “by June 30 of the fiscal year following the fiscal year in which increased costs were first incurred by the test claimant.”⁶</p> <p>The statute with the earliest effective date pled in this Test Claim, became effective on January 1, 2014. The claimant filed this Test Claim on June 29, 2018, and alleges that it first incurred increased costs as a result of the test claim statutes on July 11, 2016.⁷</p>	<p>pending proceedings, they have required that a reasonable time be made available for an affected party to avail itself of its remedy before the statute (here regulation) takes effect.⁸</p> <p>The current regulation, effective April 1, 2018, cannot be applied retroactively to bar the Test Claim, since the Test Claim would then be time barred immediately upon the April 1, 2018 effective date of the regulation and thus claimant would not be allowed a reasonable time to avail itself of the remedy of provided in the mandate determination process, as required by law. The Commission’s regulations as they existed prior to the April 1, 2018 amendment therefore must apply.</p> <p>Therefore, since the deadline to file the Test Claim under the former regulation is by June 30 of the fiscal year following fiscal year 2016-2017, or by June 30, 2018, this Test Claim filed on June 29, 2018 was timely filed.</p>

⁴ Government Code, section 17551(c).

⁵ California Code of Regulations, title 2, section 1183.1(c), Register 2018, No. 18 (eff. April 1, 2018).

⁶ California Code of Regulations, title 2, former section 1183.1(c).

⁷ Exhibit A, Test Claim, pages 22; 30-34 (Declaration of John O’Connell summarizing actual costs for fiscal years 2016-2017 and 2017-2018 and stating that costs were first incurred July 11, 2016).

⁸ *Rosefield Packing Co. v. Superior Court* (1935) 4 Cal.2d 120, 122-125.

Issue	Description	Staff Recommendation
<p>Do the test claim statutes impose a reimbursable state-mandated program on local agencies under article XIII B, section 6 of the California Constitution?</p>	<p>The test claim statutes require that BPH conduct YOPHs to review the suitability for parole of any prisoner who was 25 or younger at the time of their controlling offense, or who was sentenced to life in prison without the possibility of parole for an offense committed when they were under 18, with specified exceptions. The test claim statutes also require that BPH meet with prison inmates, including those eligible for consideration at a YOPH, during the sixth year prior to their minimum eligible parole release date. At this meeting, referred to as a consultation, BPH is required to provide inmates with information about the parole hearing process, factors relevant to their suitability or unsuitability for parole, and individualized recommendations regarding their conduct and behavior.</p> <p>The claimant does not identify any costs associated with the YOPH, but seeks reimbursement for costs associated for defense counsel and prosecutors to present evidence regarding the influence of youth-related factors at the sentencing hearings of criminal defendants</p>	<p><i>Deny</i> – The test claim statutes do not impose any state-mandated activities on local agencies, but only upon the state BPH.</p> <p>In addition, any new activities or costs incurred by local agencies for the sentencing hearings are mandated by the courts and not the test claim statutes and, thus, there are no costs mandated by the state. Article XIII B, section 9(b) of the California Constitution expressly prohibits subvention for “appropriations required to comply with mandates of the courts or the federal government which, without discretion, require an expenditure for additional services or which unavoidably make the provision of existing services more costly.” And Government Code section 17556(b) specifically prohibits a finding of costs mandated by the state when the test claim statute “affirmed for the state a mandate that has been declared existing law or regulation by action of the courts.” In this case, all the evidence in the record indicates that the new expenses allegedly incurred by the claimant are costs imposed by the courts.⁹ In the wake of the <i>Franklin</i>¹⁰ and <i>Perez</i>¹¹</p>

⁹ See *Graham v. Florida* (2010) 560 U.S. 48; *Miller v. Alabama* (2012) 567 U.S. 460, and; *People v. Caballero* (2012) 55 Cal.4th 262.

¹⁰ *People v. Franklin* (2016) 63 Cal.4th 261.

¹¹ *People v. Perez* (2016) 3 Cal.App.5th 612.

Issue	Description	Staff Recommendation
	eligible for eventual YOPH review, in anticipation of YOPHs many years in the future.	decisions, both prosecution and defense counsel are effectively required to make a record of “factors, including youth-related factors, relevant to the eventual [YOPH] determination” at all sentencing hearings involving offenders eligible for future YOPH review. ¹² However, this requirement to make a record at sentencing hearings for YOPH eligible offenders does not stem from the language of the test claim statute, but rather, from “mandates of the courts” as contemplated by article XIII B, section 9(b). <i>Franklin</i> and <i>Perez</i> are court decisions interpreting the law– they are not statutes or executive orders. Thus, the claimant’s costs incurred as a result of those decisions are not subject to reimbursement

Staff Analysis

A. This Test Claim Was Timely Filed.

Government Code section 17551(c) states: “test claims shall be filed not later than 12 months following the effective date of a statute or executive order, or within 12 months of incurring costs as a result of a statute or executive order, whichever is later.”¹³

Section 1183.1(c) of the Commission’s regulations, effective April 1, 2018, defines “12 months” as 365 days.¹⁴

Prior to April 1, 2018, former section 1183.1(c) of the Commission’s regulations provided that the “within 12 months” as specified in Government Code section 17551(c) meant “by June 30 of

¹² *People v. Franklin* (2016) 63 Cal.4th 261, 286.

¹³ Government Code, section 17551(c).

¹⁴ California Code of Regulations, title 2, section 1183.1(c), Register 2018, No. 18 (eff. April 1, 2018).

the fiscal year following the fiscal year in which increased costs were first incurred by the test claimant.”¹⁵

Though the courts have upheld the shortening of periods of limitation and making the changed period applicable to pending proceedings, they have required that a reasonable time be made available for an affected party to avail itself of its remedy before the statute (here regulation) takes effect.¹⁶

The statute with the earliest effective date pled in this Test Claim, became effective on January 1, 2014.¹⁷ Claimant filed this Test Claim on June 29, 2018, and alleges that it first incurred increased costs as a result of the test claim statutes on July 11, 2016.¹⁸

The regulation in effect when the claimant filed this Test Claim on June 29, 2018, would have barred this Test Claim immediately upon the regulation’s April 1, 2018 effective date, since the date 365 days from the date of first incurring costs in this case had already passed nearly nine months earlier. Under the current regulation, the Test Claim would have had to be filed by July 11, 2017 (within 12 months of first incurring increased costs on July 11, 2016) to be timely.

Staff finds that the current regulation, effective April 1, 2018, cannot be applied retroactively to bar the Test Claim, as this would not allow claimant a reasonable time to avail itself of the remedy provided in the mandate determination process, as required by law.¹⁹ The Commission’s prior regulation must therefore apply in this case. Since the deadline to file the Test Claim under the former regulation was by June 30 of the fiscal year following fiscal year 2016-2017, or by June 30, 2018, this Test Claim filed on June 29, 2018 was timely filed.

Accordingly, staff finds that the Test Claim was timely filed.

B. The Test Claim Statutes Do Not Impose a Reimbursable State-Mandated Program on Local Agencies.

The test claim statutes require that the state Board of Parole Hearings (BPH) conduct a new type of parole hearing, a Youth Offender Parole Hearing (YOPH), for reviewing the suitability for parole of any prisoner who was 25 or younger at the time of their controlling offense, or who was sentenced to life in prison without the possibility of parole for an offense committed when they were under 18. The test claim statutes also require that BPH meet with prison inmates, including those eligible for consideration at a YOPH, during the sixth year prior to their minimum eligible parole release date. At this meeting, referred to as a consultation, BPH is required to provide inmates with information about the parole hearing process, factors relevant to their suitability or unsuitability for parole, and individualized recommendations regarding their conduct and behavior. The test claim statutes further exclude inmates sentenced pursuant to

¹⁵ California Code of Regulations, title 2, former section 1183.1(c).

¹⁶ *Rosefield Packing Co. v. Superior Court* (1935) 4 Cal.2d 120, 122-125.

¹⁷ Statutes 2013, chapter 312.

¹⁸ Exhibit A, Test Claim, pages 22; 30-34 (Declaration of John O’Connell summarizing actual costs for fiscal years 2016-2017 and 2017-2018 and stating that costs were first incurred July 11, 2016).

¹⁹ *Rosefield Packing Co. v. Superior Court* (1935) 4 Cal.2d 120, 122-125.

certain specific provisions of the Penal Code from eligibility for a YOPH and the consultation process described above. The goal of the test claim statutes is “to provide a judicial mechanism for reconsidering the sentences of adults who served a significant amount of time in state prison for the conviction of crimes they committed as children.”²⁰

The claimant does not identify any costs associated with the YOPH, but seeks reimbursement for costs associated with presenting evidence regarding the influence of youth-related factors at the sentencing hearings of criminal defendants eligible for eventual YOPH review, in anticipation of YOPHs many years in the future. The claimant asserts that the test claim statutes impose such costs on both county defense counsel and prosecutors.²¹ Prior to the enactment of the test claim statutes, claimant contends, the influence of youth-related factors was not a consideration at sentencing hearings, as YOPHs were not contemplated, and offenders were often subject to mandatory sentences with limited discretion on the part of the judge.²²

Staff finds that the test claim statutes do not impose any state-mandated activities on local agencies, but only upon the state BPH.

In addition, any new activities or costs incurred by local agencies for the sentencing hearings are mandated by the courts and, thus, there are no costs mandated by the state. Article XIII B, section 9(b) of the California Constitution expressly prohibits subvention for “appropriations required to comply with mandates of the courts or the federal government which, without discretion, require an expenditure for additional services or which unavoidably make the provision of existing services more costly.” And Government Code section 17556(b) specifically prohibits a finding of costs mandated by the state when the test claim statute “affirmed for the state a mandate that has been declared existing law or regulation by action of the courts.” In this case, all the evidence in the record indicates that the new expenses allegedly incurred by the claimant are, as a matter of law, costs imposed by the courts.²³

In the wake of the *Franklin*²⁴ and *Perez*²⁵ decisions, both prosecution and defense counsel are now effectively required to make a record of “factors, including youth-related factors, relevant to the eventual [YOPH] determination”²⁶ at all sentencing hearings involving offenders eligible for future YOPH review. However, this requirement to make a record at sentencing hearings for YOPH eligible offenders does not stem from the language of the test claim statute, but rather, from the exact type of “mandates from the courts” contemplated by article XIII B, section 9(b).

²⁰ Exhibit X, Senate Committee on Public Safety Analysis of SB 260, April 9, 2013, http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201320140SB260 (accessed on January 16, 2019), page 4.

²¹ Exhibit A, Test Claim, page 13.

²² Exhibit A, Test Claim, page 22.

²³ See *Graham v. Florida* (2010) 560 U.S. 48, *Miller v. Alabama* (2012) 567 U.S. 460, and *People v. Caballero* (2012) 55 Cal.4th 262.

²⁴ *People v. Franklin* (2016) 63 Cal.4th 261.

²⁵ *People v. Perez* (2016) 3 Cal.App.5th 612.

²⁶ *People v. Franklin* (2016) 63 Cal.4th 261, 286.

Franklin and *Perez* are court decisions interpreting the U. S. Constitution – they are not statutes or executive orders. Thus, the claimant’s costs incurred as a result of those decisions are not subject to reimbursement.

Conclusion

Based on the forgoing analysis, staff finds that the test claim statutes do not impose a reimbursable state-mandated program on local agencies within the meaning of article XIII B, section 6 of the California Constitution.

Staff Recommendation

Staff recommends that the Commission adopt the Proposed Decision to deny the Test Claim and authorize staff to make any technical, non-substantive changes to the Proposed Decision following the hearing.

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE TEST CLAIM

Penal Code Sections 3041, 3046, 3051, and 4801; Statutes 2013, Chapter 312 (SB 260); Statutes 2015, Chapter 471 (SB 261); Statutes 2017, Chapter 675 (AB 1308); Statutes 2017, Chapter 684 (SB 394)

Filed on June 29, 2018

County of San Diego, Claimant

Case No.: 17-TC-29

Youth Offender Parole Hearings

DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7.

(Adopted May 24, 2019)

DECISION

The Commission in State Mandates (Commission) heard and decided this Test Claim during a regularly scheduled hearing on May 24, 2019. [Witness list will be included in the adopted Decision.]

The law applicable to the Commission’s determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code sections 17500 et seq., and related case law.

The Commission [adopted/modified] the Proposed Decision to [approve/partially approve/deny] the Test Claim by a vote of [vote will be included in the adopted Decision], as follows:

Member	Vote
Lee Adams, County Supervisor	
Keely Bosler, Director of the Department of Finance, Chairperson	
Mark Hariri, Representative of the State Treasurer	
Jeannie Lee, Representative of the Director of the Office of Planning and Research	
Sarah Olsen, Public Member	
Carmen Ramirez, City Council Member	
Yvette Stowers, Representative of the State Controller, Vice Chairperson	

Summary of the Findings

The test claim statutes require that the state Board of Parole Hearings (BPH) conduct a new type of parole hearing, a Youth Offender Parole Hearing (YOPH) to review the suitability for parole of any prisoner who was 25 or younger at the time of their controlling offense, or who was sentenced to life in prison without the possibility of parole for an offense committed when they were under 18, with specified exceptions. The test claim statutes also require that BPH meet with prison inmates, including those eligible for consideration at a YOPH, during the sixth year prior to their minimum eligible parole release date, with specified exceptions. At this meeting, referred to as a consultation, BPH is required to provide inmates with information about the parole hearing process, factors relevant to their suitability or unsuitability for parole, and individualized recommendations regarding their conduct and behavior. The goal of the test claim statutes is “to provide a judicial mechanism for reconsidering the sentences of adults who served a significant amount of time in state prison for the conviction of crimes they committed as children.”²⁷

The claimant does not identify any costs associated with the YOPH, but seeks reimbursement for costs associated with presenting evidence regarding the influence of youth-related factors at the sentencing hearings of criminal defendants eligible for eventual YOPH review, in anticipation of YOPHs many years in the future. The claimant asserts that the test claim statutes impose such costs on both county defense counsel and prosecutors. Prior to the enactment of the test claim statutes, the influence of youth-related factors was not a consideration at sentencing hearings, as YOPHs were not contemplated, and offenders were often subject to mandatory sentences with limited discretion on the part of the judge.

The Commission finds that this Test Claim was timely filed.

The Commission further finds that reimbursement is not required under article XIII B, section 6 of the California Constitution. The test claim statutes do not impose any state-mandated activities on local agencies, but only upon the state BPH.

In addition, any new activities or costs incurred by local agencies for the sentencing hearings are mandated by the courts and, thus, there are no costs mandated by the state. Article XIII B, section 9(b) of the California Constitution expressly prohibits subvention for “appropriations required to comply with mandates of the courts or the federal government which, without discretion, require an expenditure for additional services or which unavoidably make the provision of existing services more costly.” And Government Code section 17556(b) specifically prohibits a finding of costs mandated by the state when the test claim statute “affirmed for the state a mandate that has been declared existing law or regulation by action of the courts. In this case, all the evidence in the record indicates that the new expenses allegedly

²⁷ Exhibit X, Senate Committee on Public Safety Analysis of SB 260, April 9, 2013, http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201320140SB260 (accessed on January 16, 2019), page 4.

incurred by the claimant are costs imposed by the courts.²⁸ In the wake of the *Franklin*²⁹ and *Perez*³⁰ decisions, both prosecution and defense counsel are now effectively required to make a record of “factors, including youth-related factors, relevant to the eventual [YOPH] determination”³¹ at all sentencing hearings involving offenders eligible for future YOPH review. However, this requirement to make a record at sentencing hearings for YOPH eligible offenders does not stem from the language of the test claim statute, but rather, from a mandate of the courts as contemplated by article XIII B, section 9(b). *Franklin* and *Perez* are court decisions interpreting the law – they are not statutes or executive orders. Thus, the claimant’s costs incurred as a result of those decisions are not subject to reimbursement.

Accordingly, the Commission denies this Test Claim.

COMMISSION FINDINGS

I. Chronology

- 01/01/2014 Effective date of Statutes 2013, chapter 312, adding Penal Code section 3051 and amending Penal Code sections 3041, 3046, and 4801.
- 01/01/2016 Effective date of Statutes 2015, chapter 471, amending Penal Code sections 3051 and 4801.
- 01/01/2018 Effective date of Statutes 2017, chapter 684, amending Penal Code sections 3051 and 4801.³²
- 06/29/2018 The claimant filed the Test Claim.³³
- 01/08/2019 The Department of Finance (Finance) requested an extension of time to file comments on the Test Claim, which was approved for good cause but limited to a period of 30 days.
- 01/09/2019 The County of Los Angeles filed comments on the Test Claim.³⁴
- 03/13/2019 Finance filed late comments on the Test Claim.³⁵

²⁸ See *Graham v. Florida* (2010) 560 U.S. 48, *Miller v. Alabama* (2012) 567 U.S. 460, and *People v. Caballero* (2012) 55 Cal.4th 262.

²⁹ *People v. Franklin* (2016) 63 Cal.4th 261.

³⁰ *People v. Perez* (2016) 3 Cal.App.5th 612.

³¹ *People v. Franklin* (2016) 63 Cal.4th 261, 286.

³² Statutes 2017, chapters 675 (AB 1308) and 684 (SB 394) both amended sections 3051 and 4801 of the Penal Code in the same manner, but, pursuant to Government Code section 9605(b), chapter 684 is the controlling legislation, due to being chaptered subsequent to chapter 675 – i.e., AB 1308 was “chaptered out” by SB 394.

³³ Exhibit A, Test Claim.

³⁴ Exhibit B, Interested Party’s (County of Los Angeles’s) Comments on the Test Claim.

³⁵ Exhibit C, Finance’s Late Comments on the Test Claim.

03/25/2019 Commission staff issued the Draft Proposed Decision.³⁶

II. Background

This Test Claim alleges that Penal Code sections 3041, 3046, 3051, and 4801, as added and amended by Statutes 2013, chapter 312; Statutes 2015, chapter 471; and Statutes 2017, chapter 684, impose a reimbursable state-mandated program on counties.

Generally, the test claim statutes require the state Board of Parole Hearings (BPH) to conduct a new type of parole hearing, a Youth Offender Parole Hearing (YOPH), for reviewing the suitability for parole of any prisoner who was 25 or younger at the time of their controlling offense, or who was sentenced to life in prison without the possibility of parole for an offense committed when the individual was under 18. The test claim statutes also require that BPH meet with prison inmates, including those eligible for consideration at a YOPH, during the sixth year prior to their minimum eligible parole release date. At this meeting, referred to as a consultation, BPH is required to provide inmates with information about the parole hearing process, factors relevant to their suitability or unsuitability for parole, and individualized recommendations regarding their conduct and behavior. The test claim statutes exclude inmates sentenced pursuant to the state's Three Strikes Law or One Strike Law (for certain sex offenses) from eligibility for a YOPH and the consultation process described above. The statutes also exclude from eligibility for a YOPH, inmates who committed an additional crime involving malice aforethought (such as murder) after reaching age 26, and those inmates who commit an additional crime for which a new life sentence was imposed after reaching age 26.

The goal of the test claim statutes is “to provide a judicial mechanism for reconsidering the sentences of adults who served a significant amount of time in state prison for the conviction of crimes they committed as children.”³⁷ This mechanism “ensures that youth offenders will face severe punishment for their crimes, but it also gives them hope and the chance to work toward the possibility of parole.”³⁸ The Legislature stated its intent:

The purpose of this act is to establish a parole eligibility mechanism that provides a person serving a sentence for crimes that he or she committed as a juvenile the opportunity to obtain release when he or she has shown that he or she has been rehabilitated and gained maturity. . . . It is the intent of the Legislature to create a process by which growth and maturity of youthful offenders can be assessed and a meaningful opportunity for release established.³⁹

³⁶ Exhibit D, Draft Proposed Decision.

³⁷ Exhibit X, Senate Committee on Public Safety Analysis of SB 260, April 9, 2013, http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201320140SB260 (accessed on January 16, 2019), page 4.

³⁸ Exhibit X, Senate Rules Committee Analysis of SB 394, September 15, 2017, http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180SB394 (accessed on January 16, 2019), page 6.

³⁹ Statutes 2013, chapter 312 (SB 260), section 1.

The claimant seeks reimbursement for costs it alleges were incurred by county public defenders and prosecutors “as a result” of the test claim statutes.⁴⁰ The claimant does not identify any costs associated with the YOPH, but alleges costs incurred to defend and prosecute the youth offender at the sentencing hearing, in which the court considers the mitigating circumstances attendant in the youth’s crime and life so that it can impose a time when the youth offender will be able to seek a YOPH.⁴¹

A. The History of Juvenile Sentencing in California.

Under common law, any person aged 14 or older who was convicted of a crime was liable as an adult.⁴² Those younger than seven were not subject to criminal prosecution.⁴³ For children between the ages of 7 and 14, the prosecution bore the burden to prove beyond a reasonable doubt that the child had the mental capacity to discern between good and evil.⁴⁴ In April 1850, the new California Legislature enacted statutes to the effect that a child under the age of 14 could not be punished for a crime, but could be found to have a sound mind manifesting a criminal intent if the child knew the distinction between good and evil.⁴⁵ However, a report by the California Prison Committee in 1859 showed that there were over 300 boys in San Quentin State Prison, some as young as 12, and that there were 600 children confined in adult jails statewide.⁴⁶

During this time, no separate court existed in California for the processing of juvenile offenders, although several reform schools were constructed in an unsuccessful attempt to prevent juveniles

⁴⁰ Exhibit A, Test Claim, page 13.

⁴¹ Exhibit A, Test Claim, pages 20-23.

⁴² Exhibit X, Charles E. Springer, Vice-Chief Justice, Supreme Court of Nevada, U. S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention, “Justice for Juveniles” (1986), <https://www.ncjrs.gov/pdffiles1/Digitization/103137NCJRS.pdf> (accessed on February 6, 2019), pages 18-20; also see 4 Blackstone, Commentaries chapter II, pages 21-25.

⁴³ Exhibit X, Charles E. Springer, Vice-Chief Justice, Supreme Court of Nevada, U. S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention, “Justice for Juveniles” (1986), <https://www.ncjrs.gov/pdffiles1/Digitization/103137NCJRS.pdf> (accessed on February 6, 2019), pages 18-20; also see 4 Blackstone, Commentaries, chapter II, pages 21-25.

⁴⁴ Exhibit X, Charles E. Springer, Vice-Chief Justice, Supreme Court of Nevada, U. S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention, “Justice for Juveniles” (1986), <https://www.ncjrs.gov/pdffiles1/Digitization/103137NCJRS.pdf> (accessed on February 6, 2019), pages 18-20; also see 4 Blackstone, Commentaries, chapter II, pages 21-25.

⁴⁵ Statutes 1850, chapter 99, sections 3-4. See also Exhibit X, Diane Nunn & Christine Cleary, Judicial Council of California, Administrative Office of the Courts, Journal of the Center for Families, Children & the Courts, Volume 5, “From the Mexican California Frontier to Arnold-Kennick – Highlights in the Evolution of the California Juvenile Court, 1850-1961” (2004), <http://www.courts.ca.gov/documents/JournalVol5.pdf> (accessed on February 1, 2019), page 4.

⁴⁶ Exhibit X, Macallair, *The San Francisco Industrial School and the Origins of Juvenile Justice in California: A Glance at the Great Reformation* (2003), 7 U. C. Davis Journal of Juvenile Law & Policy, issue 1, https://jjlp.law.ucdavis.edu/archives/vol-7-no-1/SF_Industrial.pdf (accessed on February 1, 2019), page 24.

from being housed in adult prisons.⁴⁷ In response to juvenile court statutes passed in Colorado, Illinois, and Washington D. C., California passed its own juvenile court law in 1903.⁴⁸ The 1903 act applied to children under the age of 16 who were not already inmates at any prison or reform school, and who violated any state or local law.⁴⁹ It required counties having more than one judge to designate a judge to hear all juvenile cases under the act, with such proceedings to be closed to the public.⁵⁰ Children under 16 who were arrested would be brought before a police judge or justice of the peace, who could allow the child to remain at home, assign them a probation officer, commit them to a reform school, or have a guardian appointed, though any order removing the child from the home would be certified to the designated juvenile case judge for hearing.⁵¹ No child under 12 could be committed to a jail, prison, or police station.⁵² A child

⁴⁷ Exhibit X, Diane Nunn & Christine Cleary, Judicial Council of California, Administrative Office of the Courts, Journal of the Center for Families, Children & the Courts, Volume 5, “From the Mexican California Frontier to Arnold-Kennick – Highlights in the Evolution of the California Juvenile Court, 1850-1961” (2004), <http://www.courts.ca.gov/documents/JournalVol5.pdf> (accessed on February 1, 2019), pages 6-10.

⁴⁸ Statutes 1903, chapter 43; see also Exhibit X, Diane Nunn & Christine Cleary, Judicial Council of California, Administrative Office of the Courts, Journal of the Center for Families, Children & the Courts, Volume 5, “From the Mexican California Frontier to Arnold-Kennick – Highlights in the Evolution of the California Juvenile Court, 1850-1961” (2004), <http://www.courts.ca.gov/documents/JournalVol5.pdf> (accessed on February 1, 2019), pages 10-13.

⁴⁹ Statutes 1903, chapter 43, section 1; see also Exhibit X, Diane Nunn & Christine Cleary, Judicial Council of California, Administrative Office of the Courts, Journal of the Center for Families, Children & the Courts, Volume 5, “From the Mexican California Frontier to Arnold-Kennick – Highlights in the Evolution of the California Juvenile Court, 1850-1961” (2004), <http://www.courts.ca.gov/documents/JournalVol5.pdf> (accessed on February 1, 2019), page 13.

⁵⁰ Statutes 1903, chapter 43, section 2; see also Exhibit X, Diane Nunn & Christine Cleary, Judicial Council of California, Administrative Office of the Courts, Journal of the Center for Families, Children & the Courts, Volume 5, “From the Mexican California Frontier to Arnold-Kennick – Highlights in the Evolution of the California Juvenile Court, 1850-1961” (2004), <http://www.courts.ca.gov/documents/JournalVol5.pdf> (accessed on February 1, 2019), page 13.

⁵¹ Statutes 1903, chapter 43, sections 7-8; see also Exhibit X, Diane Nunn & Christine Cleary, Judicial Council of California, Administrative Office of the Courts, Journal of the Center for Families, Children & the Courts, Volume 5, “From the Mexican California Frontier to Arnold-Kennick – Highlights in the Evolution of the California Juvenile Court, 1850-1961” (2004), <http://www.courts.ca.gov/documents/JournalVol5.pdf> (accessed on February 1, 2019), page 13.

⁵² Statutes 1903, chapter 43, section 9; see also Exhibit X, Diane Nunn & Christine Cleary, Judicial Council of California, Administrative Office of the Courts, Journal of the Center for Families, Children & the Courts, Volume 5, “From the Mexican California Frontier to Arnold-Kennick – Highlights in the Evolution of the California Juvenile Court, 1850-1961” (2004), <http://www.courts.ca.gov/documents/JournalVol5.pdf> (accessed on February 1, 2019), page 13.

12 or older, but under 16 could be sentenced to a jail or prison where adults were confined, but could not be housed with adult inmates, or meet or be in the presence or sight of adult inmates.⁵³

In 1909, the law was amended to include all children under the age of 18.⁵⁴ However, there were provisions allowing for a child under 18 to be prosecuted as an adult if the court found, after a hearing, to be unfit to be dealt with under the juvenile court law, as well as allowing a person over 18 but under 20 to be prosecuted as a juvenile if the court found this appropriate after a hearing.⁵⁵ A child under 14 charged with a felony could not be sentenced to adult prison unless they had first been sent to a state school and proven to be incorrigible.⁵⁶ Statutes 1911, chapter 133 amended the law to extended these protections to all persons under 21 not currently an inmate in a state institution.⁵⁷

The Juvenile Court Law of 1915 repealed the 1909 act and the 1911 amendments thereto.⁵⁸ It applied to any person under 21, and made special provisions for determining whether offenders under 18 could be transferred to adult court, and for when offenders over 18 but under 21 could be treated as juvenile or regular offenders, allowing such offenders to request a trial in regular court, as juvenile court trials did not include the right to a trial by jury.⁵⁹ A child under 16 could, after conviction, (but not before) be sentenced to a jail or prison where adults were confined, but could not be housed with adult inmates, or meet or be in the presence or sight of adult inmates,

⁵³ Statutes 1903, chapter 43, section 9; see also Exhibit X, Diane Nunn & Christine Cleary, Judicial Council of California, Administrative Office of the Courts, Journal of the Center for Families, Children & the Courts, Volume 5, “From the Mexican California Frontier to Arnold-Kennick – Highlights in the Evolution of the California Juvenile Court, 1850-1961” (2004), <http://www.courts.ca.gov/documents/JournalVol5.pdf> (accessed on February 1, 2019), page 13.

⁵⁴ Statutes 1909, chapter 133, section 1; see also Exhibit X, Diane Nunn & Christine Cleary, Judicial Council of California, Administrative Office of the Courts, Journal of the Center for Families, Children & the Courts, Volume 5, “From the Mexican California Frontier to Arnold-Kennick – Highlights in the Evolution of the California Juvenile Court, 1850-1961” (2004), <http://www.courts.ca.gov/documents/JournalVol5.pdf> (accessed on February 1, 2019), page 14.

⁵⁵ Statutes 1909, chapter 133, sections 17-18.

⁵⁶ Statutes 1909, chapter 133, section 20; see also Exhibit X, Diane Nunn & Christine Cleary, Judicial Council of California, Administrative Office of the Courts, Journal of the Center for Families, Children & the Courts, Volume 5, “From the Mexican California Frontier to Arnold-Kennick – Highlights in the Evolution of the California Juvenile Court, 1850-1961” (2004), <http://www.courts.ca.gov/documents/JournalVol5.pdf> (accessed on February 1, 2019), page 14.

⁵⁷ Statutes 1911, chapter 369, section 1.

⁵⁸ Statutes 1915, chapter 631.

⁵⁹ Statutes 1915, chapter 631, sections 6-8; see also Exhibit X, Diane Nunn & Christine Cleary, Judicial Council of California, Administrative Office of the Courts, Journal of the Center for Families, Children & the Courts, Volume 5, “From the Mexican California Frontier to Arnold-Kennick – Highlights in the Evolution of the California Juvenile Court, 1850-1961” (2004), <http://www.courts.ca.gov/documents/JournalVol5.pdf> (accessed on February 1, 2019), pages 16-17.

and any person sentenced to a reform school or other institution other than a state prison could be returned to court and committed to state prison upon a finding of incorrigibility.⁶⁰

In 1937, the California Legislature enacted the Welfare and Institutions Code, which provided, among other things, for a new juvenile court law.⁶¹ It applied to all persons under 21, and established detention homes and forestry camps as alternative facilities to the state schools for housing juvenile offenders; however, in other respects it was similar to the Juvenile Court Law of 1915.⁶²

The Youth Correction Authority Act, enacted in 1941, added sections 1700 to 1783 to the Welfare and Institutions Code, and established what would become, in 1942, the California Youth Authority (CYA), and ultimately, the contemporary Division of Juvenile Justice (DJJ).⁶³ The 1941 Act allowed for offenders under 23 at the time of their apprehension to be committed to CYA facilities, as opposed to state prisons, unless sentenced to very long or short terms (death, life imprisonment, or not more than 90 days incarceration).⁶⁴ All offenders committed to the CYA by a juvenile court had to be discharged after either two years or reaching the age of 21, whichever was later.⁶⁵ Misdemeanor offenders committed to CYA had to be discharged after two years or upon turning 23, whichever was later.⁶⁶ Felons committed to CYA had to be discharged by the age of 25.⁶⁷ However, if any person committed to CYA was due to be discharged before the maximum term of incarceration allowed for their commitment offense, and

⁶⁰ Statutes 1915, chapter 631, sections 10 and 14.

⁶¹ Statutes 1937, chapter 369, sections 550-911.

⁶² Statutes 1937, chapter 369, sections 550-911; see also Exhibit X, Diane Nunn & Christine Cleary, Judicial Council of California, Administrative Office of the Courts, Journal of the Center for Families, Children & the Courts, Volume 5, “From the Mexican California Frontier to Arnold-Kennick – Highlights in the Evolution of the California Juvenile Court, 1850-1961” (2004), <http://www.courts.ca.gov/documents/JournalVol5.pdf> (accessed on February 1, 2019), page 19.

⁶³ Statutes 1941, chapter 937; see also Exhibit X, Diane Nunn & Christine Cleary, Judicial Council of California, Administrative Office of the Courts, Journal of the Center for Families, Children & the Courts, Volume 5, “From the Mexican California Frontier to Arnold-Kennick – Highlights in the Evolution of the California Juvenile Court, 1850-1961” (2004), <http://www.courts.ca.gov/documents/JournalVol5.pdf> (accessed on February 1, 2019), page 21; and Exhibit X, “The History of the Division of Juvenile Justice,” https://www.cdcr.ca.gov/Juvenile_Justice/DJJ_History/index.html (accessed on February 7, 2019), pages 2-8.

⁶⁴ Statutes 1941, chapter 937, page 2526.

⁶⁵ Statutes 1941, chapter 937, page 2531.

⁶⁶ Statutes 1941, chapter 937, page 2531.

⁶⁷ Statutes 1941, chapter 937, page 2532.

if the CYA believed the person was still dangerous, the CYA could go to court and seek to have the person committed to state prison for such maximum term, less the time spent at CYA.⁶⁸

In 1961, a new Juvenile Court Law was passed, codified at Welfare and Institutions Code sections 500-914, and became popularly known as the Arnold-Kennick Juvenile Court Law, which is the basis for current juvenile justice laws in California.⁶⁹ It prohibited detaining persons under 18 “in any jail or lockup” unless charged with a felony, and if so detained, contact with adults detained in the same facility was forbidden.⁷⁰ It categorically prohibited committing anyone under 16 to a state prison.⁷¹ It provided that anyone under 21 could be prosecuted as a juvenile, upon a finding of suitability by the juvenile court.⁷² In felony cases, the juvenile court had the power, for those 16 or older at the time of the offense, to determine whether the offender was more properly subject to prosecution in juvenile court, and, if the offender was found “not a fit and proper subject” for juvenile court, to direct the district attorney to prosecute the offender as an adult “under general law.”⁷³ Lastly, juvenile offenders were given expanded notice rights, the right to counsel, and the right to proof of the allegations against them by a preponderance of the evidence.⁷⁴ This was later changed to a proof beyond a reasonable doubt standard, by the ruling of the United States Supreme Court.⁷⁵

⁶⁸ Statutes 1941, chapter 937, pages 2532-2533.

⁶⁹ Statutes 1961, chapter 1616; see also Exhibit X, Diane Nunn & Christine Cleary, Judicial Council of California, Administrative Office of the Courts, Journal of the Center for Families, Children & the Courts, Volume 5, “From the Mexican California Frontier to Arnold-Kennick – Highlights in the Evolution of the California Juvenile Court, 1850-1961” (2004), <http://www.courts.ca.gov/documents/JournalVol5.pdf> (accessed on February 1, 2019), pages 25-26.

⁷⁰ Statutes 1961, chapter 1616, page 3461.

⁷¹ Statutes 1961, chapter 1616, page 3462.

⁷² Statutes 1961, chapter 1616, page 3472.

⁷³ Statutes 1961, chapter 1616, page 3485.

⁷⁴ Statutes 1961, chapter 1616, pages 3466-3482; see also Exhibit X, Diane Nunn & Christine Cleary, Judicial Council of California, Administrative Office of the Courts, Journal of the Center for Families, Children & the Courts, Volume 5, “From the Mexican California Frontier to Arnold-Kennick – Highlights in the Evolution of the California Juvenile Court, 1850-1961” (2004), <http://www.courts.ca.gov/documents/JournalVol5.pdf> (accessed on February 1, 2019), pages 25-26.

⁷⁵ *In re Winship* (1970) 397 U.S. 358. Before the Arnold-Kennick Juvenile Court Law, the juvenile court basically had essentially “unbridled discretion” to adjudicate a minor as a ward of the state, as the proceedings were not considered adversarial; rather, the state was proceeding as *parens patriae* (Latin for “parent of the country”), as a minor had rights not to liberty, but to custody, and state intervention did not require due process, as the state was merely providing the custody to which the minor was entitled, and which the parents had failed to provide. This did not deprive the minor of rights, for minors, who could be compelled, among other things, to go to school and to obey their parents, had no rights. (*In re Gault* (1967) 387 U.S. 1, 15-21.)

B. Juvenile Sentencing Statutes in Effect in California Immediately Prior to the Enactment of the Test Claim Statutes.

Immediately prior to the enactment of the test claim statutes,⁷⁶ juvenile offenders were processed pursuant to Welfare and Institutions Code section 602(a), which provided that anyone under 18 who committed a crime fell within the jurisdiction of the juvenile court and could be adjudged a ward thereof, unless they were 14 or older and were charged with special circumstances murder or specified sex offenses, in which case they had to be prosecuted “under the general law, in a court of criminal jurisdiction” (i.e., as adults).⁷⁷ Additionally, pursuant to Welfare and Institutions Code section 707(d)(1), prosecutors could “direct file” charges in adult criminal court (bypassing the juvenile court altogether) against juveniles 16 or older if they were accused of one of the 30 felonies described in Welfare and Institutions Code section 707(b), such as rape, robbery, child molestation, assault with a firearm, murder, attempted murder, and voluntary manslaughter.⁷⁸ Lastly, prosecutors could direct file against juveniles 14 or older for crimes or circumstances specified in Welfare and Institutions Code section 707(d)(2), such as personal use of a firearm during the commission of a felony, gang related offenses, or hate crimes.⁷⁹ As a result, numerous offenders were sentenced to terms in state prison for crimes committed when they were under 18. There were approximately 5,700 such persons incarcerated in state prisons as of August 14, 2013.⁸⁰

C. The United States and California Supreme Court Decisions that Directly Led to the Enactment of the Test Claim Statutes.

Prior to the enactment of the test claim statutes, a series of rulings from the United States and California Supreme Courts found that imposition of the harshest penalties on offenders who were juveniles at the time of the offense, without considering such offenders’ youth and attendant characteristics, violated the Constitution’s Eighth Amendment prohibition against cruel and unusual punishment.⁸¹ The courts further found that, a sentencing court must consider all mitigating circumstances attendant in the juvenile’s crime and life, including but not limited to his or her chronological age at the time of the crime, whether the juvenile offender was a direct perpetrator or an aider and abettor, and his or her physical and mental development, so that it can impose a time when the juvenile offender will be able to seek parole from the parole board.⁸²

⁷⁶ Statutes 2013, chapter 312, effective January 1, 2014 (SB 260).

⁷⁷ Former Welfare and Institutions Code section 602.

⁷⁸ Former Welfare and Institutions Code sections 707(a), 707(b), and 707(d)(1).

⁷⁹ Former Welfare and Institutions Code section 707(d)(2).

⁸⁰ Exhibit X, Assembly Committee on Appropriations – Analysis of SB 260, August 13, 2013, http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201320140SB260 (accessed on January 16, 2019), page 2.

⁸¹ *Roper v. Simmons* (2005) 543 U.S. 551; *Graham v. Florida* (2010) 560 U.S. 48; *Miller v. Alabama* (2012) 567 U.S. 460; *People v. Caballero* (2012) 55 Cal.4th 262.

⁸² *Graham v. Florida* (2010) 560 U.S. 48; *Miller v. Alabama* (2012) 567 U.S. 460; *People v. Caballero* (2012) 55 Cal.4th 262; *Montgomery v. Louisiana* (2016) 577 U.S. ___, 136 S.Ct. 718.

In *Roper v. Simmons*, the U. S. Supreme Court held that imposition of the death penalty on offenders who were under 18 (i.e., juveniles) at the time of committing their capital offenses violated the U. S. Constitution’s Eighth Amendment prohibition against cruel and unusual punishment.⁸³ The Court reasoned that any conclusion that a juvenile falls among the worst offenders is suspect:

The susceptibility of juveniles to immature and irresponsible behavior means “their irresponsible conduct is not as morally reprehensible as that of an adult.” (Citation.) Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment. (Citation.) The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed. Indeed, “[t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuosity and recklessness that may dominate in younger years can subside.”⁸⁴

In *Graham v. Florida*, the U.S. Supreme Court ruled that imposing a life sentence without the possibility of parole on a juvenile offender who had not committed a homicide violated the Eighth Amendment prohibition against cruel and unusual punishment.⁸⁵ The Court explained that *Roper* had established that “because juveniles have lessened culpability they are less deserving of the most severe punishments.”⁸⁶ The Court continued that “developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence.”⁸⁷ The Court further reasoned “[h]ere, in light of juvenile nonhomicide offenders’ diminished moral responsibility, any limited deterrent effect provided by life without parole is not enough to justify the sentence.”⁸⁸ The Court held that “An offender’s age is relevant to the Eighth Amendment, and criminal procedure laws that fail to take defendants’ youthfulness into account at all would be flawed.”⁸⁹

The Court concluded that

⁸³ *Roper v. Simmons* (2005) 543 U.S. 551; 568, 578-579.

⁸⁴ *Roper v. Simmons* (2005) 543 U.S. 551, 570.

⁸⁵ *Graham v. Florida* (2010) 560 U.S. 48, 74-75.

⁸⁶ *Graham v. Florida* (2010) 560 U.S. 48, 68.

⁸⁷ *Graham v. Florida* (2010) 560 U.S. 48, 68.

⁸⁸ *Graham v. Florida* (2010) 560 U.S. 48, 72.

⁸⁹ *Graham v. Florida* (2010) 560 U.S. 48, 76.

A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What the State must do, however, is give defendants like Graham *some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation*. It is for the State, in the first instance, to explore the means and mechanisms for compliance. It bears emphasis, however, that while the Eighth Amendment prohibits a State from imposing a life without parole sentence on a juvenile nonhomicide offender, it does not require the State to release that offender during his natural life. Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives. The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. *It does prohibit States from making the judgment at the outset that those offenders never will be fit to reenter society.*⁹⁰

Then, in *Miller v. Alabama*, the Court held that a mandatory life without parole sentence for a person who was under 18 at the time of their crime violated the Eighth Amendment prohibition on cruel and unusual punishment.⁹¹ The defendants in *Miller* had been sentenced to life imprisonment without the possibility of parole (LWOP) after being convicted of murder, and given the nature of the conviction, the sentencing judges had no discretion to impose any other penalty.⁹² The Court explained that “Such a scheme prevents those meting out punishment from considering a juvenile’s lessened culpability and greater capacity for change. . . .”⁹³ The Court continued that the characteristics that make juveniles less culpable than adults – “their immaturity, recklessness and impetuosity – make them less likely to consider potential punishment.”⁹⁴ The Court reasoned that “the mandatory penalty schemes at issue here prevent the sentence from taking account of these central considerations. . . .[I]mposition of a State’s most severe penalties on juvenile offenders cannot proceed as though they were not children.”⁹⁵

The Court concluded as follows:

Mandatory life without parole for a juvenile *precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences*. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and

⁹⁰ *Graham v. Florida* (2010) 560 U.S. 48, 75 (emphasis added).

⁹¹ *Miller v. Alabama* (2012) 567 U.S. 460, 465.

⁹² *Miller v. Alabama* (2012) 567 U.S. 460, 465-469.

⁹³ *Miller v. Alabama* (2012) 567 U.S. 460, 465.

⁹⁴ *Miller v. Alabama* (2012) 567 U.S. 460, 472.

⁹⁵ *Miller v. Alabama* (2012) 567 U.S. 460, 474.

convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. (Citations.) And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.⁹⁶

After the U.S. Supreme Court’s decisions in *Graham* and *Miller*, the California Supreme Court held, in *People v. Caballero*, that the imposition on a 16 year old defendant of a sentence of life imprisonment with a minimum of 110 years before parole eligibility, for a nonhomicide offense (attempted murder with firearm and gang enhancements), violated the U. S. Supreme Court’s ruling in *Graham*.⁹⁷ The Court stated as follows:

[W]e conclude that sentencing a juvenile offender for a nonhomicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender's natural life expectancy constitutes cruel and unusual punishment in violation of the Eighth Amendment. Although proper authorities may later determine that youths should remain incarcerated for their natural lives, *the state may not deprive them at sentencing of a meaningful opportunity to demonstrate their rehabilitation and fitness to reenter society in the future.* Under *Graham's* nonhomicide ruling, *the sentencing court must consider all mitigating circumstances attendant in the juvenile's crime and life, including but not limited to his or her chronological age at the time of the crime, whether the juvenile offender was a direct perpetrator or an aider and abettor, and his or her physical and mental development, so that it can impose a time when the juvenile offender will be able to seek parole from the parole board. The Board of Parole Hearings will then determine whether the juvenile offender must be released from prison “based on demonstrated maturity and rehabilitation.”* (Citation.) Defendants who were sentenced for crimes they committed as juveniles who seek to modify life without parole or equivalent de facto sentences already imposed may file petitions for writs of habeas corpus in the trial court in order to allow the court to weigh the mitigating evidence in determining the extent of incarceration required before parole hearings. *Because every case will be different, we will not provide trial courts with a precise timeframe for setting these future parole hearings in a nonhomicide case. However, the sentence must not violate the defendant's Eighth Amendment rights and must provide him or her a “meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation”* under *Graham's* mandate.⁹⁸

On January 27, 2016, the U. S. Supreme Court issued its decision in *Montgomery v. Louisiana*.⁹⁹ The Court ruled that its decision in *Miller* (prohibiting mandatory life without the possibility parole sentences for offenders under 18) was retroactive, ordering the state of Louisiana to

⁹⁶ *Miller v. Alabama* (2012) 567 U.S. 460, 477-478 (emphasis added).

⁹⁷ *People v. Caballero* (2012) 55 Cal.4th 262, 265.

⁹⁸ *People v. Caballero* (2012) 55 Cal.4th 262, 268-269 (emphasis added).

⁹⁹ *Montgomery v. Louisiana* (2016) 577 U.S. ___, 136 S.Ct. 718.

review for parole suitability the case of an inmate who had been given such a sentence at the age of 17, for a crime committed in 1963.¹⁰⁰ The court added as follows:

Giving *Miller* retroactive effect, moreover, does not require States to relitigate sentences, let alone convictions, in every case where a juvenile offender received mandatory life without parole. *A State may remedy a Miller violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them.* See, e.g., Wyo. Stat. Ann. § 6–10–301(c) (2013) (juvenile homicide offenders eligible for parole after 25 years). Allowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment.

Extending parole eligibility to juvenile offenders does not impose an onerous burden on the States, nor does it disturb the finality of state convictions. Those prisoners who have shown an inability to reform will continue to serve life sentences. The opportunity for release will be afforded to those who demonstrate the truth of *Miller's* central intuition—that children who commit even heinous crimes are capable of change.¹⁰¹

On June 17, 2016, the California Supreme Court issued its decision in *People v. Franklin*.¹⁰² This case involved a defendant, Franklin, who committed a murder at the age of 17, where the trial court at sentencing had no discretion other than to impose two consecutive 25 years to life sentences, for a total sentence of 50 years to life.¹⁰³ The court ruled that this violated *Miller*, reasoning

We now hold that just as *Graham* applies to sentences that are the “functional equivalent of a life without parole sentence” (Citation), so too does *Miller* apply to such functionally equivalent sentences. As we noted in *Caballero*, *Miller* “extended *Graham's* reasoning” to homicide offenses, observing that “none of what [*Graham*] said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific.” (Citation.) Because sentences that are the functional equivalent of LWOP implicate *Graham's* reasoning (Citation), and because “‘*Graham's* reasoning implicates any life-without-parole sentence imposed on a juvenile’ ” whether for a homicide or nonhomicide offense (citation), a sentence that is the functional equivalent of LWOP under *Caballero* is subject to the strictures of *Miller* just as it is subject to the rule of *Graham*. In short, a juvenile may not be sentenced to the functional equivalent of LWOP for a homicide offense without the protections outlined in *Miller*.¹⁰⁴

¹⁰⁰ *Montgomery v. Louisiana* (2016) 577 U.S. ___, 136 S.Ct. 718; 725-726, 734-736.

¹⁰¹ *Montgomery v. Louisiana* (2016) 577 U.S. ___, 136 S.Ct. 718, 736 (emphasis added).

¹⁰² *People v. Franklin* (2016) 63 Cal.4th 261.

¹⁰³ *People v. Franklin* (2016) 63 Cal.4th 261, 268.

¹⁰⁴ *People v. Franklin* (2016) 63 Cal.4th 261, 276.

The court cited *Montgomery* in support of its holding that “the law categorially prohibits the imposition of certain penalties, including mandatory LWOP, on juvenile offenders.”¹⁰⁵ The court remanded the matter to the trial court for a determination of whether Franklin was afforded sufficient opportunity at his sentencing to make a record of the type of information that may describe the diminished culpability of juveniles, the hallmarks of youth, etc., which would be relevant to his future YOPH.¹⁰⁶ The court reasoned that the goal of any proceeding to make such a record

[I]s to provide an opportunity for the parties to make an accurate record of the juvenile offender’s characteristics and circumstances at the time of the offense so that the [BPH], years later, may properly discharge its obligation to ‘give great weight to’ youth related factors ([section 4801(c)]) in determining whether the offender is ‘fit to rejoin society’ despite having committed a serious crime ‘while he was a child in the eyes of the law.’ (Citation.)¹⁰⁷

The Court clarified that if Franklin were to be granted such a proceeding, the trial court

[M]ay receive submissions and, if appropriate, testimony pursuant to procedures set forth in [Penal Code] section 1204 and rule 4.437 of the California Rules of Court, and subject to the rules of evidence. Franklin may place on the record any documents, evaluations, or testimony (subject to cross-examination) that may be relevant at his eventual youth offender parole hearing, and the prosecution likewise may put on the record any evidence that demonstrates the juvenile offender's culpability or cognitive maturity, or otherwise bears on the influence of youth-related factors.¹⁰⁸

D. The Test Claim Statutes

1. Statutes 2013, chapter 312 was enacted to require the state Board of Parole Hearings (BPH) to conduct Youth Offender Parole Hearings (YOPHs) to consider the suitability of release on parole for those individuals who are eligible for a YOPH and committed their controlling offense before reaching age 18.

In response to the above rulings by the courts in *Graham*, *Miller*, and *Caballero*, the Legislature enacted Statutes 2013, chapter 312 specifically citing to *Graham*, *Miller*, and *Caballero*, stating that, in accordance with those decisions,

The Legislature recognizes that youthfulness both lessens a juvenile's moral culpability and enhances the prospect that, as a youth matures into an adult and neurological development occurs, these individuals can become contributing members of society. The purpose of this act is to establish a parole eligibility mechanism that provides a person serving a sentence for crimes that he or she committed as a juvenile the opportunity to obtain release when he or she has

¹⁰⁵ *People v. Franklin* (2016) 63 Cal.4th 261, 283.

¹⁰⁶ *People v. Franklin* (2016) 63 Cal.4th 261, 284.

¹⁰⁷ *People v. Franklin* (2016) 63 Cal.4th 261, 284.

¹⁰⁸ *People v. Franklin* (2016) 63 Cal.4th 261, 284.

shown that he or she has been rehabilitated and gained maturity. . . . It is the intent of the Legislature to create a process by which growth and maturity of youthful offenders can be assessed and a meaningful opportunity for release established.¹⁰⁹

Statutes 2013, chapter 312 added section 3051 and amended sections 3041, 3046, and 4801 of the Penal Code, creating YOPHs for inmates who committed their controlling offense before reaching age 18. Statutes 2013, chapter 312 required the parole of inmates found suitable for parole at a YOPH, notwithstanding consecutive life sentences or minimum terms before parole eligibility. The statute also required the state BPH, while reviewing suitability for parole at a YOPH, to give great weight to the diminished culpability of juveniles, the hallmarks of youth, and any growth or maturity displayed by the prisoner.¹¹⁰

a. Amendments to Penal Code section 3041

The amendments to section 3041 changed how the state BPH met with inmates serving life sentences with a possibility of parole. Previously, BPH met with such inmates during their third year of incarceration, to review their files, make recommendations, and document activities or conduct relevant to granting or withholding postconviction credit.¹¹¹ The amendment changed the meeting (now called a consultation) to the sixth year before the inmate's minimum eligible parole release date,¹¹² and required much more individualized recommendations to the inmate regarding suitability for parole and behavior that would indicate the same.

Statutes 2013, chapter 312 amended Penal Code section 3041(a) as follows (in strikeout and underline):

- (a) In the case of any inmate sentenced pursuant to any law, other than Chapter 4.5 (commencing with Section 1170¹¹³) of Title 7 of Part 2, the Board of Parole Hearings shall meet with each inmate during the ~~third year of incarceration~~ sixth year prior to the inmate's minimum eligible parole release date for the purposes of reviewing and documenting the inmate's file, ~~making recommendations,~~ activities and conduct pertinent to both parole eligibility and to the granting or withholding of postconviction credit. During this

¹⁰⁹ Statutes 2013, chapter 312, section 1.

¹¹⁰ The terms “inmate” and “prisoner” are interchangeable; for purposes of this Decision, whichever term is being used in the statute under discussion will be used.

¹¹¹ Pursuant to Penal Code section 2930 et seq., certain inmates are eligible to receive good conduct credits reducing their sentence by up to one-third; however, such credits can be taken away for misconduct inside the prison.

¹¹² The minimum eligible parole release date, in the case of inmates serving a life sentence with no other specific term of years, is seven years; in the case of inmates serving a life sentence with a specific term of years, e.g., 25 to life, the minimum eligible parole release date occurs after 25 years of incarceration, i.e., after serving the specific term of years. (Pen. Code, § 3046.)

¹¹³ Inmates sentenced to Penal Code section 1170 have determinate sentences, i.e., a sentence for a fixed term of years, such as 12 years in prison, and are released on parole at the end of their sentences, without the need for a parole hearing in front of the BPH.

consultation, the board shall provide the inmate information about the parole hearing process, legal factors relevant to his or her suitability or unsuitability for parole, and individualized recommendations for the inmate regarding his or her work assignments, rehabilitative programs, and institutional behavior. Within 30 days following the consultation, the board shall issue its positive and negative findings and recommendations to the inmate in writing. One year prior to the inmate's minimum eligible parole release date a panel of two or more commissioners or deputy commissioners shall again meet with the inmate and shall normally set a parole release date as provided in Section 3041.5. No more than one member of the panel shall be a deputy commissioner. In the event of a tie vote, the matter shall be referred for an en banc review of the record that was before the panel that rendered the tie vote. Upon en banc review, the board shall vote to either grant or deny parole and render a statement of decision. The en banc review shall be conducted pursuant to subdivision (e). The release date shall be set in a manner that will provide uniform terms for offenses of similar gravity and magnitude with respect to their threat to the public, and that will comply with the sentencing rules that the Judicial Council may issue and any sentencing information relevant to the setting of parole release dates. The board shall establish criteria for the setting of parole release dates and in doing so shall consider the number of victims of the crime for which the inmate was sentenced and other factors in mitigation or aggravation of the crime. At least one commissioner of the panel shall have been present at the last preceding meeting, unless it is not feasible to do so or where the last preceding meeting was the initial meeting. Any person on the hearing panel may request review of any decision regarding parole for an en banc hearing by the board. In case of a review, a majority vote in favor of parole by the board members participating in an en banc review is required to grant parole to any inmate.

b. Amendments to Penal Code section 3046

The amendments to section 3046 required that a prisoner found suitable for parole at a YOPH actually be granted parole, despite provisions elsewhere in that section requiring that inmates sentenced to a term of years to life sentence (e.g., 50 years to life) or to consecutive life sentences, serve their term of years or a minimum of seven years for each consecutive life sentence.¹¹⁴ Statutes 2013, chapter 312 amended section 3046 as follows (in underline):

- (a) No prisoner imprisoned under a life sentence may be paroled until he or she has served the greater of the following:
 - (1) A term of at least seven calendar years.

¹¹⁴ For example, three consecutive life sentences would require a minimum of 21 years in prison (7+7+7) before eligibility for parole; or, two consecutive 25 years to life sentences would require a minimum of 50 years in prison before eligibility for parole (25+25).

- (2) A term as established pursuant to any other provision of law that establishes a minimum term or minimum period of confinement under a life sentence before eligibility for parole.
- (b) If two or more life sentences are ordered to run consecutively to each other pursuant to Section 669, no prisoner so imprisoned may be paroled until he or she has served the term specified in subdivision (a) on each of the life sentences that are ordered to run consecutively.
- (c) Notwithstanding subdivisions (a) and (b), a prisoner found suitable for parole pursuant to a youth offender parole hearing as described in Section 3051 shall be paroled regardless of the manner in which the board set release dates pursuant to subdivision (a) of Section 3041, subject to subdivision (b) of Section 3041 and Sections 3041.1 and 3041.2, as applicable.
- (d) The Board of Prison Terms¹¹⁵ shall, in considering a parole for a prisoner, consider all statements and recommendations which may have been submitted by the judge, district attorney, and sheriff, pursuant to Section 1203.01, or in response to notices given under Section 3042, and recommendations of other persons interested in the granting or denying of the parole. The board shall enter on its order granting or denying parole to these prisoners, the fact that the statements and recommendations have been considered by it.

c. Addition of Penal Code section 3051

Statutes 2013, chapter 312 added section 3051 to the Penal Code, establishing the YOPH as a hearing conducted by the state BPH to review the suitability for parole of prisoners who were under 18 at the time of their controlling offense (i.e., juvenile offenders). “Controlling offense” is defined as the offense or enhancement for which the longest term of imprisonment was imposed. Section 3051 requires that juvenile offenders sentenced to a determinate sentence (i.e., a fixed term, such as 20 years) receive a YOPH by the BPH during their 15th year of incarceration, unless previously released. Juvenile offenders sentenced to a life term of less than 25 years to life are required to have a YOPH before the BPH during their 20th year of incarceration. Juvenile offenders sentenced to 25 years to life are required to have a YOPH during their 25th year of incarceration.¹¹⁶ At a YOPH, the BPH is required to give great weight to, among other things, the diminished culpability of juveniles and the hallmark features of youth, when considering a prisoner’s suitability for parole. Section 3051 also specifically

¹¹⁵ As of July 1, 2005, the Board of Prison Terms was abolished, and was replaced by the BPH, and any references to the Board of Prison Terms refer to the BPH. (Pen. Code, § 5075(a).)

¹¹⁶ This applies to juvenile offenders who are sentenced to a term greater than 25 years to life; for example, a juvenile offender sentenced to 32 years to life would have the right, under section 3051, to receive a YOPH after 25 years of incarceration. (*People v. Garcia* (2017) 7 Cal.App.5th 941, 949-951.)

excludes juvenile offenders convicted under the Three Strikes Law¹¹⁷ or the One Strike Law,¹¹⁸ or those who have committed very grave offenses after turning 18, from being given YOPHs. Lastly, it requires the state BPH to complete all YOPHs for prisoners eligible for them as of January 1, 2014, by July 1, 2015.

Penal Code section 3051 reads

(a)(1) A youth offender parole hearing is a hearing by the Board of Parole Hearings for the purpose of reviewing the parole suitability of any prisoner who was under 18 years of age at the time of his or her controlling offense.

(2) For the purposes of this section, the following definitions shall apply:

(A) “Incarceration” means detention in a city or county jail, a local juvenile facility, a mental health facility, a Division of Juvenile Justice facility, or a Department of Corrections and Rehabilitation facility.

(B) “Controlling offense” means the offense or enhancement for which any sentencing court imposed the longest term of imprisonment.

(b)(1) A person who was convicted of a controlling offense that was committed before the person had attained 18 years of age and for which the sentence is a determinate sentence shall be eligible for release on parole at a youth offender parole hearing by the board during his or her 15th year of incarceration, unless previously released pursuant to other statutory provisions.

(2) A person who was convicted of a controlling offense that was committed before the person had attained 18 years of age and for which the sentence is a life term of less than 25 years to life shall be eligible for release on parole by the board during his or her 20th year of incarceration at a youth offender parole hearing, unless previously released or entitled to an earlier parole consideration hearing pursuant to other statutory provisions.

(3) A person who was convicted of a controlling offense that was committed before the person had attained 18 years of age and for which the sentence is a life term of 25 years to life shall be eligible for release on parole by the board during his or her 25th year of incarceration at a youth offender parole hearing, unless previously released or entitled to an earlier parole consideration hearing pursuant to other statutory provisions.

¹¹⁷ As provided for in both Penal Code sections 1170.12 and 667, the Three Strikes law provides that a person convicted for the third time of a serious felony, as defined in Penal Code section 1192.7, or a violent felony, as defined in Penal Code section 667.5, shall serve a minimum of 25 years to life in state prison.

¹¹⁸ As provided for in Penal Code section 667.61, the One Strike Law provides that a person convicted of certain sex offenses under certain circumstances shall receive a 15 years to life, 25 years to life, or LWOP sentence, depending on the specifics of the crime and the circumstances – even if the person has no prior criminal record.

- (c) An individual subject to this section shall meet with the board pursuant to subdivision (a) of Section 3041.
- (d) The board shall conduct a youth offender parole hearing to consider release. At the youth offender parole hearing, the board shall release the individual on parole as provided in Section 3041, except that the board shall act in accordance with subdivision (c) of Section 4801.
- (e) The youth offender parole hearing to consider release shall provide for a meaningful opportunity to obtain release. The board shall review and, as necessary, revise existing regulations and adopt new regulations regarding determinations of suitability made pursuant to this section, subdivision (c) of Section 4801, and other related topics, consistent with relevant case law, in order to provide that meaningful opportunity for release.
- (f)(1) In assessing growth and maturity, psychological evaluations and risk assessment instruments, if used by the board, shall be administered by licensed psychologists employed by the board and shall take into consideration the diminished culpability of juveniles as compared to that of adults, the hallmark features of youth, and any subsequent growth and increased maturity of the individual.
- (2) Family members, friends, school personnel, faith leaders, and representatives from community-based organizations with knowledge about the individual before the crime or his or her growth and maturity since the time of the crime may submit statements for review by the board.
- (3) Nothing in this section is intended to alter the rights of victims at parole hearings.
- (g) If parole is not granted, the board shall set the time for a subsequent youth offender parole hearing in accordance with paragraph (3) of subdivision (b) of Section 3041.5. In exercising its discretion pursuant to paragraph (4) of subdivision (b) and subdivision (d) of Section 3041.5, the board shall consider the factors in subdivision (c) of Section 4801. No subsequent youth offender parole hearing shall be necessary if the offender is released pursuant to other statutory provisions prior to the date of the subsequent hearing.
- (h) This section shall not apply to cases in which sentencing occurs pursuant to Section 1170.12, subdivisions (b) to (i), inclusive, of Section 667, or Section 667.61, or in which an individual was sentenced to life in prison without the possibility of parole. This section shall not apply to an individual to whom this section would otherwise apply, but who, subsequent to attaining 18 years of age, commits an additional crime for which malice aforethought is a necessary element of the crime or for which the individual is sentenced to life in prison.
- (i) The board shall complete all youth offender parole hearings for individuals who become entitled to have their parole suitability considered at a youth offender parole hearing on the effective date of this section by July 1, 2015.

d. Amendments to Penal Code section 4801

Statutes 2013, chapter 312 amended section 4801 to require the BPH, during a prisoner's YOPH, to give great weight to the diminished capacity of juveniles, the hallmark features of youth, and subsequent growth and maturation of the prisoner, consistent with decisional law. The statute amended section 4801, as relevant to this claim, by adding subdivision (c) as follows:

- (c) When a prisoner committed his or her controlling offense, as defined in subdivision (a) of Section 3051, prior to attaining 18 years of age, the board, in reviewing a prisoner's suitability for parole pursuant to Section 3041.5, shall give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law.

2. Statutes 2015, chapter 471 expanded YOPH eligibility to individuals who were under the age of 23 at the time of their controlling offense, and set deadlines for the BPH to complete such hearings.

Statutes 2015, chapter 471 further amended sections 3051 and 4801 of the Penal Code. Penal Code section 3051 was amended to expand YOPH eligibility to prisoners who were under 23 at the time of their controlling offenses. In addition, section 3051 was amended to require the BPH to complete all YOPHs for individuals who were sentenced to *indeterminate life terms* and who are eligible for a YOPH as of January 1, 2016, by July 1, 2017. Section 3051, as amended, also required the BPH to complete all YOPHs for those individuals who were sentenced to *determinate* terms and who became entitled to a YOPH as of January 1, 2016, by July 1, 2021, and to complete all consultations of these individuals before July 1, 2017.

Statutes 2015, chapter 471 also made similar changes to Penal Code section 4801 to provide that prisoners who were under 23 at the time of their controlling offenses were eligible for YOPHs, with no changes to the special considerations the BPH was expected to give great weight to at such hearings.

3. Statutes 2017, chapter 684 expanded YOPH eligibility to individuals who were 25 or younger at the time of their controlling offense and to individuals sentenced to life without the possibility of parole (LWOP) for a controlling offense committed while under the age of 18, and set deadlines for the BPH to complete such hearings.

Statutes 2017, chapter 684 was enacted to comply with the U. S. Supreme Court's 2016 decision in *Montgomery*.¹¹⁹ Statutes 2017, chapter 684 amended Penal Code sections 3051 and 4801, allowing prisoners with the possibility of parole who committed their controlling offenses at the age of 25 or younger to qualify for YOPHs, and granting those who had been sentenced to LWOP for a controlling offense committed while under the age of 18 to receive a YOPH during their 25th year of incarceration. It set new deadlines for the BPH to complete the YOPHs for persons entitled thereto on the effective date of the statute (January 1, 2018) by January 1, 2020

¹¹⁹ Exhibit X, Assembly Committee on Public Safety – Analysis of SB 394, June 26, 2017, http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180SB394 (accessed on January 16, 2019), pages 4-5.

(for individuals sentenced to indeterminate life terms) and January 1, 2022 (for individuals sentenced to determinate terms), and for completion of YOPHs for qualifying LWOP prisoners by July 1, 2020.

III. Positions of the Parties and Interested Parties

A. County of San Diego

The claimant alleges that the test claim statutes resulted in reimbursable increased costs mandated by the state. The claimant asserts that “as a result” of Statutes 2013, chapter 312; Statutes 2015, chapter 471; and Statutes 2017, chapter 684, and the decisions interpreting and applying that legislation in *Franklin*¹²⁰ and *People v. Perez*,¹²¹ defense counsel and prosecutors are now required to provide newly mandated services and incur newly mandated costs as detailed below in preparation of and appearance at a YOPH-eligible individual’s sentencing hearing:¹²²

- (1) Preparation and presentation of evidence by counsel including evaluations and testimony regarding an individual’s cognitive culpability, cognitive maturity, or that bears on the influence of youth related factors at the sentencing hearing (Penal Code §§ 3051(a), (b), (e), and (f); and 4801(c));
- (2) Retention and utilization of investigators to: (a) locate and gather relevant evidence, including but not limited to, interviews with anyone that can provide mitigating information about the defendant, including family, friends, teachers, and anyone else that knows the defendant; and (b) gather records of the defendant, including school, hospital, employment, juvenile, and other relevant persona [*sic*] records (Penal Code §§ 3051(a), (b), (e), and (f); and 4801(c));
- (3) Retention and utilization of experts to evaluate the offender and prepare reports for presentation at the sentencing hearing (Penal Code §§ 3051(a), (b), (e), and (f); and 4801(c));
- (4) Attendance by the district attorney’s office and indigent defense counsel at the sentencing hearing (Penal Code §§ 3051(a), (b), (e), and (f); and 4801(c)); and
- (5) Participation of counsel in training to be able to competently represent their clients at the sentencing hearing (Penal Code §§ 3051(a), (b), (e), and (f); and 4801(c)).¹²³

Although the claimant does not appear at YOPHs, it contends that its activities regarding the conduct of sentencing hearings for new offenders who may one day qualify for YOPHs, constitute state-mandated activities that are unique to local government and carry out a state policy.¹²⁴ The claimant argues that it is eligible to receive subvention as follows:

¹²⁰ *People v. Franklin* (2016) 63 Cal.4th 261.

¹²¹ *People v. Perez* (2016) 3 Cal.App.5th 612.

¹²² Exhibit A, Test Claim, page 13.

¹²³ Exhibit A, Test Claim, pages 21-22.

¹²⁴ Exhibit A, Test Claim, pages 23-24.

Prior to SB 260, 261, and 394, and the decisions of the courts in *Franklin* and *Perez*,¹²⁵ California defense attorneys were not mandated to present evidence, evaluations, or testimony regarding the influence of youth-related factors at sentencing hearings for use at a subsequent Youth Offender Parole Hearing many years in the future. Such information was unlikely to have any impact on the sentence imposed, given the existence of mandatory sentences for many of the crimes and judges' limited discretion with regard to certain enhancements. Because there was no effort to gather and present this information, defense attorneys expended a minimal amount of time to prepare for and to attend the sentencing hearings.

For the same reasons as defense attorneys, California prosecutors presented no information and incurred no costs, other than the cost of attending sentencing hearings.

In contrast to defense attorneys and prosecutors, Probation Departments were responsible for investigating and compiling information to be considered by the sentencing judge and, as a result, did incur costs. Probation officers gathered and provided information concerning the facts surrounding the offense, victim restitution requests and impact statements, the defendant's education, military, and employment history, the defendant's medical, psychiatric and substance abuse history, and the defendant's criminal and delinquent history. (See Pen. Code, § 1203, Cal. Rules of Court, Rules 4.411-4.433.) Such information was typically gathered by interviewing the defendant, without attempting to gather information from other sources. However, this effort to gather information did not include any investigation or reporting on the circumstances of the defendant's youth and is therefore distinguishable from the effort required by the mandate.

As a result of the statutory changes, youth offenders now must be granted an opportunity to present evidence, evaluations, and testimony regarding the influence of youth-related factors at the sentencing hearing. Defense attorneys must perform the activities described . . . above, which will result in costs not previously incurred. In addition, prosecutors will be required to prepare for the hearings, which will also result in costs not previously incurred.¹²⁶

The claimant further argues the "enhanced *Franklin* sentencing hearings" allegedly required by the test claim statute cost, on average, between \$5,500 and \$12,750 each, and that statewide costs for such hearings "will exceed \$2,750,000 per year and may be as high as \$6,375,000 per year."¹²⁷ The claimant alleges that "total increased costs to comply with SB 260 and 261 in Fiscal Year 2016-17 totaled at least \$10,763."¹²⁸ The claimant further alleges that for fiscal year

¹²⁵ *People v. Franklin* (2016) 63 Cal.4th 261; *People v. Perez* (2016) 3 Cal.App.5th 612.

¹²⁶ Exhibit A, Test Claim, pages 24-25.

¹²⁷ Exhibit A, Test Claim, page 26.

¹²⁸ Exhibit A, Test Claim, page 21.

2017-2018, it “incurred at least \$10,705 in increased costs to comply with SB 260 and 261. Claimant also incurred at least \$6,344 in increased costs to comply with SB 394.”¹²⁹

B. Department of Finance

Finance filed late comments on the Test Claim on March 13, 2019.¹³⁰ Finance argues that the claimant’s expenses have been incurred as a result of court-made law, and thus the Test Claim should be rejected pursuant to Government Code section 17556(b).¹³¹ Finance contends that the United States Supreme Court’s decisions in *Graham v. Florida*¹³² and *Miller v. Alabama*¹³³ led to the California Supreme Court’s decision in *People v. Caballero*,¹³⁴ which urged the Legislature to establish a mechanism for parole eligibility for juvenile offenders serving de facto life sentences without the possibility of parole, so that they would have the opportunity to be released upon a showing of rehabilitation.¹³⁵ Finance asserts that Statutes 2013, chapter 312 was enacted in response to the *Caballero* decision, establishing the YOPH process, but not applicable to persons serving a life sentence without the possibility of parole.¹³⁶

Finance continues that Statutes 2015, chapter 471 and Statutes 2017, chapter 684 extended eligibility for YOPHs, and that as a consequence of the California Supreme Court’s decision in *People v. Franklin*,¹³⁷ offenders who are eligible for future YOPHs pursuant to the three test

¹²⁹ Exhibit A, Test Claim, page 21.

¹³⁰ Exhibit C, Finance’s Late Comments on the Test Claim. The late filing of comments in this case has resulted in a delay in the issuance of the Draft Proposed Decision in this matter, since the comments came in just two days before the Draft would normally be issued for comment and more than a month after the due date on the approved request for extension, which was limited to February 11, 2019. In addition, it has negatively impacted the timely processing of other matters pending before the Commission. As a result of the shortened time before hearing, there can be no approval of a request for extension of time to comment on the Draft Proposed Decision that does not also include a request for postponement of hearing. Under the Commission’s regulations, written comments shall be filed within 30 days of the notice of complete filing. (Cal.Code Regs., tit. 2, 1183.2.) However, written testimony received at least 15 days in advance of the hearing [i.e. late filings], shall be included in the Commission’s meeting binders. (Cal.Code Regs., tit. 2, § 1187.6.) Several claimants have asserted, in a number of matters, that late comments should not be considered in Draft Proposed Decisions, but given that late filings, up to 15 days before hearing, shall be included in the Commission’s meeting binders and that the same testimony may be submitted at hearing, staff is including these comments in the analysis to ease the decision making process for the Commission Members.

¹³¹ Exhibit C, Finance’s Late Comments on the Test Claim, page 1.

¹³² *Graham v. Florida* (2010) 560 U.S. 48.

¹³³ *Miller v. Alabama* (2012) 567 U.S. 460.

¹³⁴ *People v. Caballero* (2012) 55 Cal.4th 262.

¹³⁵ Exhibit C, Finance’s Late Comments on the Test Claim, page 1.

¹³⁶ Exhibit C, Finance’s Late Comments on the Test Claim, pages 1-2.

¹³⁷ *People v. Franklin* (2016) 63 Cal.4th 261.

claim statutes must now receive “*Franklin* hearings” if their trial courts did not allow them to present evidence of youth-related factors that would eventually be considered by the BPH.¹³⁸ Finance notes the amount of the costs allegedly incurred by the claimant in fiscal years 2016-2017 and 2017-2018 for the conduct of five *Franklin* hearings.¹³⁹ Finance argues that the language of these cases and statutes clearly indicates that YOPHs were created as a mechanism “to affirm what the courts had declared to be existing law.”¹⁴⁰ Finance concludes that since claimant’s costs were incurred as a result of court-made law, the Commission should reject the Test Claim in its entirety pursuant to Government Code section 17556(b).¹⁴¹

C. Board of Parole Hearings

No comments have been filed by BPH.

D. County of Los Angeles

The County of Los Angeles, an interested party under the Commission’s regulations,¹⁴² filed comments on the Test Claim on January 9, 2019.¹⁴³ The County of Los Angeles argues that the California Supreme Court’s ruling in *Franklin*, indicating that assembling the type of information about a person who would ultimately appear at a YOPH is more easily done near the time of the offense, rather than decades later.¹⁴⁴ The County of Los Angeles concludes

Prior to the passage of SB 260, 261, and 394, attorneys were not required to present youth related factors at the time of sentencing. Now, the Legislature has created a new youth offender parole process, mandating a higher level of service by requiring defense counsel to present youth related factors at sentencing hearings. The Legislature seeks to ensure that the California Board of Parole Hearings receives an accurate record of the offender’s characteristics and circumstances at the time of the offense to later afford the offender with a fair parole hearing.

In light of the significant costs associated with this state mandate to ensure that parole hearings provide youth offenders with an opportunity for release, the County of Los Angeles, on behalf of the Los Angeles County Public Defender’s Office, hereby collectively request that the Commission adopt the County of San Diego’s test claim.¹⁴⁵

¹³⁸ Exhibit C, Finance’s Late Comments on the Test Claim, page 2.

¹³⁹ Exhibit C, Finance’s Late Comments on the Test Claim, page 2.

¹⁴⁰ Exhibit C, Finance’s Late Comments on the Test Claim, page 2.

¹⁴¹ Exhibit C, Finance’s Late Comments on the Test Claim, page 2.

¹⁴² California Code of Regulations, title 2, section 1181.2(i).

¹⁴³ Exhibit B, Interested Party’s (County of Los Angeles’s) Comments on the Test Claim.

¹⁴⁴ Exhibit B, Interested Party’s (County of Los Angeles’s) Comments on the Test Claim, page 2.

¹⁴⁵ Exhibit B, Interested Party’s (County of Los Angeles’s) Comments on the Test Claim, pages 2-3.

IV. Discussion

Article XIII B, section 6 of the California Constitution provides in relevant part the following:

Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such programs or increased level of service...

The purpose of article XIII B, section 6 is to “preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are ‘ill equipped’ to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose.”¹⁴⁶ Thus, the subvention requirement of section 6 is “directed to state-mandated increases in the services provided by [local government] ...”¹⁴⁷

Reimbursement under article XIII B, section 6 is required when the following elements are met:

1. A state statute or executive order requires or “mandates” local agencies or school districts to perform an activity.¹⁴⁸
2. The mandated activity constitutes a “program” that either:
 - a. Carries out the governmental function of providing a service to the public; or
 - b. Imposes unique requirements on local agencies or school districts and does not apply generally to all residents and entities in the state.¹⁴⁹
3. The mandated activity is new when compared with the legal requirements in effect immediately before the enactment of the test claim statute or executive order and it increases the level of service provided to the public.¹⁵⁰
4. The mandated activity results in the local agency or school district incurring increased costs, within the meaning of section 17514. Increased costs, however, are not reimbursable if an exception identified in Government Code section 17556 applies to the activity.¹⁵¹

The Commission is vested with the exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6 of the California

¹⁴⁶ *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.

¹⁴⁷ *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

¹⁴⁸ *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874.

¹⁴⁹ *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874-875 (reaffirming the test set out in *County of Los Angeles* (1987) 43 Cal.3d 46, 56).

¹⁵⁰ *San Diego Unified School Dist.* (2004) 33 Cal.4th 859, 874-875, 878; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal3d 830, 835.

¹⁵¹ *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284; Government Code sections 17514 and 17556.

Constitution.¹⁵² The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.¹⁵³ In making its decisions, the Commission must strictly construe article XIII B, section 6 of the California Constitution, and not apply it as an “equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities.”¹⁵⁴

A. This Test Claim Was Timely Filed.

Government Code section 17551(c) provides that a test claim must be filed “not later than 12 months after the effective date of the statute or executive order, or within 12 months of incurring increased costs as a result of a statute or executive order, whichever is later.”

Section 1183.1(c) of the Commission’s regulations, effective April 1, 2018, defines “12 months” as 365 days.¹⁵⁵

Prior to April 1, 2018, former section 1183.1(c) of the Commission’s regulations provided that the “within 12 months” as specified in Government Code section 17551(c) meant “by June 30 of the fiscal year following the fiscal year in which increased costs were first incurred by the test claimant.”¹⁵⁶

The statute with the earliest effective date pled in this Test Claim, became effective on January 1, 2014.¹⁵⁷ The claimant filed this Test Claim on June 29, 2018, and alleges that it first incurred increased costs as a result of the test claim statutes on July 11, 2016.¹⁵⁸

The regulation in effect when the claimant filed this Test Claim on June 29, 2018, would have barred this Test Claim immediately upon the regulation’s April 1, 2018 effective date, since the date 365 days from the date of first incurring costs in this case had already passed nearly nine months earlier. Under the current regulation, the Test Claim would have had to be filed by July 11, 2017 (within 365 days of first incurring increased costs on July 11, 2016) to be timely.

It is established precedent that a plaintiff or party has no vested right in any particular statute of limitations or time for the commencement of an action, and that the Legislature may shorten a

¹⁵² *Kinlaw v. State of California* (1991) 53 Cal.3d 482, 487.

¹⁵³ *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 109.

¹⁵⁴ *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1280 [citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817].

¹⁵⁵ California Code of Regulations, title 2, section 1183.1(c), Register 2018, No. 18 (eff. April 1, 2018).

¹⁵⁶ California Code of Regulations, title 2, former section 1183.1(c).

¹⁵⁷ Statutes 2013, chapter 312.

¹⁵⁸ Exhibit A, Test Claim, pages 22; 30-34 (Declaration of John O’Connell summarizing actual costs for fiscal years 2016-2017 and 2017-2018 and stating that costs were first incurred July 11, 2016).

statute of limitations.¹⁵⁹ However, “a statute is presumed to be prospective only and will not be applied retroactively unless such intention clearly appears in the language of the statute itself.”¹⁶⁰ Furthermore, “a statute shortening period of limitations cannot be applied retroactively to wipe out an accrued cause of action that is not barred by then then applicable statute of limitations.”¹⁶¹ To avoid the unconstitutional effect of retroactive application, the statute of limitations must be applied prospectively to such causes of action. Even when applied prospectively, the claimant must be allowed a reasonable time within which to proceed with his cause of action.¹⁶² “If the time left to file suit is reasonable, no such constitutional violation occurs, and the statute is applied as enacted. If no time is left, or only an unreasonably short time remains, then the statute cannot be applied at all.”¹⁶³ Thus, though the courts have upheld the shortening of periods of limitation and making the changed period applicable to pending proceedings, they have required that a reasonable time be made available for an affected party to avail itself of its remedy before the statute (here regulation) takes effect.¹⁶⁴

In the instant case, the April 1, 2018 amendment to section 1183.1 of the Commission’s regulations would have instantly terminated the claimant’s ability to file a test claim. Nothing in the language of section 1183.1(c) gives any indication of an intent to apply the amendment’s new statute of limitations retroactively. Moreover, “a statute shortening period of limitations cannot be applied retroactively to wipe out an accrued cause of action that is not barred by then then applicable statute of limitations.”¹⁶⁵ Thus, the 2018 amendment to section 1183.1 cannot be applied to this Test Claim as this would not allow claimant a reasonable time to avail itself of the remedy of provided in the mandate determination process, as required by law.¹⁶⁶ The Commission’s prior regulation must therefore apply. Therefore, since the deadline to file the Test Claim under the former regulation was by June 30 of the fiscal year following fiscal year 2016-2017, or by June 30, 2018, this Test Claim filed on June 29, 2018 was timely filed pursuant to Government Code section 17551(c) and former section 1183.1 of the Commission’s regulations.

¹⁵⁹ *Krusesky v. Baugh* (1982) 138 Cal.App.3d 562, 566; *Liptak v. Diane Apartments, Inc.* (1980) 109 Cal.App.3d 762, 773.

¹⁶⁰ *Krusesky v. Baugh* (1982) 138 Cal.App.3d 562, 566.

¹⁶¹ *Niagra Fire Ins. Co. v. Cole* (1965) 235 Cal.App.2d 40, 42-43.

¹⁶² *Niagra Fire Ins. Co. v. Cole* (1965) 235 Cal.App.2d 40, 42-43; *Rosefield Packing Co. v. Superior Court* (1935) 4 Cal.2d 120, 121-125.

¹⁶³ *Aronson v. Superior Court* (1987) 191 Cal.App.3d 294, 297.

¹⁶⁴ *Rosefield Packing Co. v. Superior Court* (1935) 4 Cal.2d 120, 122-125.

¹⁶⁵ *Niagra Fire Ins. Co. v. Cole* (1965) 235 Cal.App.2d 40, 42-43.

¹⁶⁶ *Rosefield Packing Co. v. Superior Court* (1935) 4 Cal.2d 120, 122-125.

B. The Test Claim Statutes Do Not Impose a Reimbursable State-Mandated Program on Local Agencies.

1. The plain language of the test claim statutes impose requirements on the state BPH, but do not impose a state-mandated program on local agencies.

The claimant asserts that the test claim statutes impose a state-mandated program under article XIII B, section 6 since the statutes (as interpreted by the *Franklin* and *Perez* cases) result in the claimant incurring increased costs, to both public defenders and prosecutors, at the sentencing hearings of youthful offenders, during which evidence, evaluations or testimony may be presented to the court, to make a record for the youthful offender’s YOPH many years in the future.¹⁶⁷

The test claim statutes, however, do not impose a state-mandated program on local agencies.

Reimbursement under article XIII B, section 6 is limited. Local agencies are not entitled to reimbursement for all increased costs resulting from legislative enactments, “but only those costs mandated by a new program or an increased level of service *imposed upon them by the State.*”¹⁶⁸ Costs that are mandated by the state are “ordered” or “commanded” by the state, making the local agency compelled to comply.¹⁶⁹

In this case, the plain language of sections 3041, 3046, 3051, and 4801 of the Penal Code, as added and amended by the test claim statutes, do not impose *any* requirements on local agencies; rather all responsibilities created by these sections are assigned to the BPH – a state agency. Nothing in any of these sections expressly directs or requires local agencies to perform any activities. Indeed, the language of Statutes 2013, chapter 312, Statutes 2015, chapter 471, and Statutes 2017, chapter 684 does not make a single reference to any local agency – only to the BPH. Additional evidence that these laws were not intended to apply to local agencies is found in the Legislative Counsel’s Digests for all three statutes, which reference the BPH only, and not any local agencies.¹⁷⁰

Furthermore, it is the BPH that is required to provide state-appointed counsel to inmates at YOPHs – not the local agency.¹⁷¹ The Legislature noted this during its deliberations on Statutes

¹⁶⁷ Exhibit A, Test Claim, pages 21-22.

¹⁶⁸ *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1816, emphasis added; see also, *Lucia Mar Unified School District v. State of California* (1988) 44 Cal.3d 830, 835; *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, 735.

¹⁶⁹ *Long Beach Unified School District v. State of California* (1990) 225 Cal.App.3d 155, 174. See also, *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, 742 (actions taken without any legal or practical compulsion from the state, do not trigger a state mandate).

¹⁷⁰ Legislative Counsel’s Digest of Senate Bill 260 (2013-2014 Reg. Sess.); Legislative Counsel’s Digest of Senate Bill 261 (2015-2016 Reg. Sess.); Legislative Counsel’s Digest of Senate Bill 394 (2017-2018 Reg. Sess.).

¹⁷¹ Penal Code section 3041.7; California Code of Regulations, title 15, section 2256(c).

2013, chapter 312.¹⁷² Lastly, it must be noted that the claimant nowhere asserts that it provides counsel during YOPHs.

The Commission therefore finds that the test claim statutes do not impose any state-mandated activities on the claimant or any other local agencies.

2. Any new activities or costs incurred by local agencies for the sentencing hearings are mandated by the courts and, thus, there are no costs mandated by the state under article XIII B, section 6 and Government Code section 17556(b).

The claimant asserts that due to the *Franklin*¹⁷³ and *Perez* decisions¹⁷⁴ interpreting the test claim statutes, it is now required to provide services and incurs costs that are “newly mandated.”¹⁷⁵ The claimant refers to its allegedly newly mandated activities at sentencings for offenders who are eligible for future YOPH consideration as *Franklin* hearings,¹⁷⁶ and this nomenclature will be employed here.

The Commission finds that any new activities or costs incurred by local agencies at the *Franklin* sentencing hearings are costs imposed by the courts, and not costs mandated by the state. As explained below, reimbursement under article XIII B, section 6 is not required under these circumstances.

Article XIII B, section 6 is part of a comprehensive scheme adopted by the voters “to protect residents from excessive taxation and government spending,” and must be interpreted in light of its textual and historical context.¹⁷⁷ In 1978, the voters adopted Proposition 13, adding article XIII A to the California Constitution to limit the power of state and local government to adopt and levy new taxes. The next year, the voters adopted Proposition 4 to add article XIII B to the California Constitution, which imposes a complementary appropriations limit, beginning in fiscal year 1980-1981, on the rate of growth in government spending. Article XIII B subjects each state and local governmental entity's “appropriations subject to limitation” to a limit equal to the entity's appropriations in the prior year, adjusted for changes in population and the cost of living.¹⁷⁸ ““Appropriations subject to limitation”” include “any authorization to expend during a fiscal year the proceeds of taxes levied by or for that entity and the proceeds of state subventions to that entity”¹⁷⁹ The voters specifically excluded some categories of appropriations from the

¹⁷² Exhibit X, Senate Committee on Appropriations – Analysis of SB 261, May 28, 2015, http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160SB261 (accessed on January 16, 2019), page 3.

¹⁷³ *People v. Franklin* (2016) 63 Cal.4th 261

¹⁷⁴ *People v. Perez* (2016) 3 Cal.App.5th 612

¹⁷⁵ Exhibit A, Test Claim, page 13.

¹⁷⁶ Exhibit A, Test Claim, page 26.

¹⁷⁷ *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 80-81; *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 486.

¹⁷⁸ Article XIII B, sections 1, 8(e), (f).

¹⁷⁹ Article XIII B, section 8(b).

spending limit, however. Article XIII B, section 9(b), for example, permits appropriations beyond the limit for “[a]ppropriations required to comply with mandates of the courts or the federal government, which without discretion, require an expenditure for additional services or which unavoidably make the provision of existing services more costly.” Such expenditures are not considered to be an exercise of the local agency's discretionary spending authority and, therefore, are not limited by the Constitution.

The voters included section 6 in article XIII B, recognizing that articles XIII A and XIII B severely restrict the taxing and spending powers of local government. “Its purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are ‘ill-equipped’ to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose.”¹⁸⁰ The courts have explained the purpose as follows:

Subvention principles are part of a more comprehensive political scheme. The basic purpose of the scheme as a whole was to limit the taxing and spending powers of government. The taxing and spending powers of local agencies were to be “frozen” at existing levels with adjustments only for inflation and population growth. Since local agencies are subject to having costs imposed upon them by other governmental entities, the scheme provides relief in that event. *If the costs are imposed by the federal government or the courts, then the costs are not included in the local government’s taxing and spending limitations. If the costs are imposed by the state then the state must provide a subvention to reimburse the local agency.*¹⁸¹

Several courts have recognized that reimbursement under article XIII B, section 6 is not required when the expenditure of local costs is excluded from the constitutional spending limit in article XIII B, section 9, including those costs incurred to comply with a federal mandate, because those costs are not shifted by the state.¹⁸² Such expenditures are not “costs mandated by the state.” Local agencies are not entitled to the benefit of an exemption from the spending limit *and* reimbursement under article XIII B, section 6. Article XIII B, section 9, as relevant to this claim, specifically excludes from the subvention requirement “appropriations required *to comply with mandates of the courts* or the federal government which, without discretion, require an expenditure for additional services or which unavoidably make the provision of existing services more costly.” (Emphasis added.)

In this case, all the evidence in the record indicates that the new expenses allegedly incurred by the claimant are costs imposed by the courts. As discussed previously, the California Supreme Court in *Franklin* remanded Franklin’s case to the trial court to determine if he had been

¹⁸⁰ *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.

¹⁸¹ *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1595 (emphasis added).

¹⁸² *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 70-71; *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1581; *County of Los Angeles v. Commission on State Mandates* (2007) 150 Cal.App.4th 898, 907.

afforded sufficient opportunity to make a record relevant to his eventual YOPH.¹⁸³ The court reasoned that the goal of such proceedings was to provide the opportunity for the parties to make an accurate record of the juvenile offender’s characteristics and circumstances at the time of the offense, so that the BPH could give great weight to youth-related factors at a YOPH many years later.¹⁸⁴ Although *Franklin* did not explicitly state that such a proceeding was now mandatory at all sentencing hearings for YOPH eligible offenders, dictum of the California Supreme Court is entitled to great weight where the issue was carefully considered and should not be disregarded without a compelling reason.¹⁸⁵

In the *Perez* decision, defendant Perez was sentenced to 86 years to life in prison for attempted premeditated murder with a firearm enhancement, for a crime committed when he was 20.¹⁸⁶ The Court of Appeal held that although this sentence did not constitute an Eighth Amendment violation, one of the test claim statutes, Statutes 2015, chapter 471, made Perez eligible for a YOPH during his 25th year of incarceration.¹⁸⁷ The court also reasoned that since Perez was sentenced in October 2014, before Statutes 2015, chapter 471 extended YOPH eligibility to offenders under 23, he had not been afforded to make a record of his characteristics and circumstances at the time of the offense, in contemplation of a future YOPH.¹⁸⁸ Citing *Franklin*, the court remanded the matter to the trial court for the limited purposes of allowing both Perez and the prosecution to make such a record.¹⁸⁹

In the wake of the *Franklin* and *Perez* decisions, both prosecution and defense counsel are now effectively required to make such a record of “factors, including youth-related factors, relevant to the eventual [YOPH] determination” at all sentencing hearings involving offenders eligible for future YOPH review. The failure to do so would likely result in a flood of cases being remanded to the trial court, either after direct appeal, or by writ of habeas corpus, in order for such a record to be made. The claimant notes that a case currently pending before the California Supreme Court is considering the issue of whether “‘youth offenders’ whose convictions are already final and who are currently incarcerated, are entitled to a hearing before the trial court to preserve evidence for use at a future [YOPH], as ordered in *Franklin*.”¹⁹⁰ Although not citable, the appellate court decision under review held that “the relief afforded by *Franklin*” (i.e., a hearing before the sentencing court to make a record for an eventual YOPH) “is available by both direct

¹⁸³ *People v. Franklin* (2016) 63 Cal.4th 261, 284.

¹⁸⁴ *People v. Franklin* (2016) 63 Cal.4th 261, 284.

¹⁸⁵ *Kyle v. Carmon* (1999) 71 Cal.App.4th 901, 912, fn. 10; *California Coastal Commission v. Office of Administrative Law* (1989) 210 Cal.App.3d 758, 763.

¹⁸⁶ *People v. Perez* (2016) 3 Cal.App.5th 612, 615-616.

¹⁸⁷ *People v. Perez* (2016) 3 Cal.App.5th 612, 618.

¹⁸⁸ *People v. Perez* (2016) 3 Cal.App.5th 612, 619-620.

¹⁸⁹ *People v. Perez* (2016) 3 Cal.App.5th 612, 619-620.

¹⁹⁰ Exhibit A, Test Claim, page 13, fn. 3. The case under review is *In re Cook* (2017) 7 Cal.App.5th 393, which is not citable per the California Rules of Court, rule 8.1115(e)(1), except for potentially persuasive value. The California Supreme granted habeas corpus review on April 12, 2017, S240153.

review and petition for writ of habeas corpus.”¹⁹¹ The court further opined that “*Franklin* thus holds that a defendant has the right at the time of sentencing to present evidence and make a record of information that may be relevant at the eventual [YOPH].”¹⁹² Moreover, established precedent holds that convicted defendants may obtain relief via habeas corpus when California or U.S. Supreme Court decisions retroactively expand their rights regarding sentencing.¹⁹³

However, this requirement to make a record at sentencing hearings for YOPH eligible offenders does not stem from the language of the test claim statutes, but rather, from a mandate of the courts as contemplated by article XIII B, section 9(b). *Franklin* and *Perez* are court decisions interpreting the law– they are not statutes or executive orders.¹⁹⁴ Thus, the claimant’s costs incurred as a result of those decisions are not subject to reimbursement.

This conclusion is supported by the timing of the claimant’s filing of the Test Claim. Statutes 2013, chapter 312 became effective on January 1, 2014, and Statutes 2015, chapter 471 became effective on January 1, 2016. Statutes 2017, chapter 684 became effective on January 1, 2018. As of March 31, 2015, the BPH had completed 534 YOPHs.¹⁹⁵ Yet, the claimant did not file its Test Claim until June 29, 2018 –12 days after the issuance of the *Franklin*¹⁹⁶ decision, despite the fact that YOPHs had continued to be held the entire time, pursuant to the test claim statute. This evidences that the Test Claim is not filed in response to the test claim statutes, but rather to

¹⁹¹ *In re Cook* (2017) 7 Cal.App.5th 393, 395 [currently pending review in the California Supreme Court, Case No. S240153].

¹⁹² *In re Cook* (2017) 7 Cal.App.5th 393, 399 [currently pending review in the California Supreme Court, Case No. S240153].

¹⁹³ See *In re Cortez* (1971) 6 Cal.3d 78 [new California Supreme Court decision justified relief via writ of habeas corpus], and *In re Johnson* (1970) 3 Cal.3d 404 [new U.S. Supreme Court decision entitled prisoner to habeas corpus relief].

¹⁹⁴ Government Code section 17516 defines an executive order as an order, plan, requirement, rule, or regulation issued by the Governor, an officer or official serving at the Governor’s pleasure, or an agency, department, board or commission of state government.

¹⁹⁵ Exhibit X, Senate Committee on Appropriations – Analysis of SB 261, as amended May 28, 2015, http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160SB261 (accessed on January 16, 2019), page 3.

¹⁹⁶ Exhibit A, Test Claim; *People v. Franklin* (2016) 63 Cal.4th 261.

various court orders. Statutes 2013, chapter 312 was passed in anticipation of the writs of habeas corpus expected from prisoners after the *Graham*,¹⁹⁷ *Miller*,¹⁹⁸ and *Caballero*¹⁹⁹ decisions.²⁰⁰

Statutes 2015, chapter 417 considered those same decisions when it extended YOPH eligibility to offenders who were under 23 at the time of their crimes.²⁰¹ Statutes 2017, chapter 684 considered those decisions, as well as *Montgomery*²⁰² and *Franklin*,²⁰³ in extending YOPH eligibility to juvenile offenders who had been sentenced to LWOP.²⁰⁴ Furthermore, the Test Claim seeks reimbursement for “*Franklin* hearings” (as opposed to YOPHs, which the claimant has no involvement with) and argues that costs and activities have been imposed on it by the test claim statute “as interpreted by the courts.”²⁰⁵ This is precisely the type of exclusion from subvention that is intended by article XIII B, section 9(b).

Therefore, the Commission finds that any new activities or expenses regarding *Franklin* hearings are not mandates of the state, but rather they are mandates of the courts, which, without discretion, require an expenditure for additional services or which unavoidably make the provision of existing services more costly and which are specifically excluded from the subvention requirement of the Constitution.

Furthermore, Government Code section 17556(b) specifically prohibits a finding of costs mandated by the state when the test claim statute “affirmed for the state a mandate that has been declared existing law or regulation by action of the courts. This subdivision applies regardless of whether the action of the courts occurred prior to or after the date on which the statute . . . was enacted or issued.”²⁰⁶ Accordingly, these court actions occurred both prior to and during the

¹⁹⁷ *Graham v. Florida* (2010) 560 U.S. 48.

¹⁹⁸ *Miller v. Alabama* (2012) 567 U.S. 460.

¹⁹⁹ *People v. Caballero* (2012) 55 Cal.4th 262.

²⁰⁰ Exhibit X, Senate Rules Committee – Analysis of SB 260, as amended September 6, 2013, http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201320140SB260 (accessed on January 16, 2019), page 6.

²⁰¹ Exhibit X, Assembly Committee on Public Safety Analysis of SB 261, as amended June 29, 2015, http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160SB261 (accessed on January 16, 2019), pages 2-3.

²⁰² *Montgomery v. Louisiana* (2016) 577 U.S. ___, 136 S.Ct. 718.

²⁰³ *People v. Franklin* (2016) 63 Cal.4th 261.

²⁰⁴ Exhibit X, Assembly Committee on Public Safety – Analysis of SB 394, as amended June 26, 2017, http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180SB394 (accessed on January 16, 2019), pages 2-5.

²⁰⁵ Exhibit A, Test Claim, page 26.

²⁰⁶ Government Code, section 17556(b).

enactment of the test claim statutes and declared existing law, with the test claim statutes ultimately affirming the courts' interpretation of the law.

Accordingly, the Commission finds that the costs incurred by the claimant are not mandated by the state, but by the courts, and therefore are not eligible for reimbursement pursuant to article XIII B, section 9 of the California Constitution and Government Code section 17556(b).

V. Conclusion

Based on the foregoing analysis, the Commission denies this Test Claim and finds that the test claim statutes do not impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

On March 25, 2019, I served the:

- **Draft Proposed Decision, Schedule for Comments, and Notice of Hearing issued March 25, 2019**

Youth Offender Parole Hearings, 17-TC-29

Penal Code Sections 3041, 3046, 3051, and 4801; Statutes 2013, Chapter 312 (SB 260); Statutes 2015, Chapter 471 (SB 261); Statutes 2017, Chapter 675 (AB 1308); Statutes 2017, Chapter 684 (SB 394)

County of San Diego, Claimant

by making it available on the Commission's website and providing notice of how to locate it to the email addresses provided on the attached mailing list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on March 25, 2019 at Sacramento, California.



Jill L. Magee

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COMMISSION ON STATE MANDATES

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Matter: Youth Offender Parole Hearings

Claimant: County of San Diego

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April 4, 2019

Via Drop Box

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RE: Comments in Response to the Commission's Draft Proposed Decision, and the Department of Finance's March 13, 2019 Response to Test Claim 17-TC-29

Youth Offender Parole Hearings, 17-TC-29

Penal Code Sections 3041, 3046, 3051, and 4801; Statutes 2013, Chapter 312 (SB 260); Statutes 2015, Chapter 471 (SB 261); Statutes 2017, Chapter 675 (AB 1308); Statutes 2017, Chapter 684 (SB 394)

County of San Diego, Claimant

Dear Ms. Halsey:

The Claimants provide the following comments in response to the Commission's Draft Proposed Decision and the Department of Finance's ("DOF") March 13, 2019 Response to Test Claim 17-TC-29:

The Test Claim Statutes Impose State Mandated Activities on the Claimants

In its draft decision, the Commission contends that the test claim statutes do not impose any requirements on local agencies, but rather claims that all responsibilities created by the statutes are assigned to the Board of Parole Hearings ("BPH").

The Commission's position ignores the California Supreme Court's *interpretation of the statutes* as articulated in *People v. Franklin*, which indicates an offender must be given the opportunity to "make an accurate record of the juvenile offender's characteristics and circumstances *at the time of the offense* so that the Board [of Parole Hearings], *years later, may properly discharge its obligation* to 'give great weight to' youth-related factors (§ 4801, subd. (c)) in determining whether the offender is 'fit to rejoin society' . . ."¹ The Court explained:

¹ *People v. Franklin*, 63 Cal. 4th 261, 284 (2016).

In directing the Board to “give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner” (§ 4801, subd. (c)), *the statutes also contemplate that information regarding the juvenile offender's characteristics and circumstances at the time of the offense will be available at a youth offender parole hearing to facilitate the Board's consideration.* For example, section 3051, subdivision (f)(2) provides that “[f]amily members, friends, school personnel, faith leaders, and representatives from community-based organizations with knowledge about the individual before the crime ... may submit statements for review by the board.” Assembling such statements “about the individual before the crime” is typically a task more easily done at or near the time of the juvenile's offense rather than decades later when memories have faded, records may have been lost or destroyed, or family or community members may have relocated or passed away. (*Ibid.*) In addition, section 3051, subdivision (f)(1) provides that any “psychological evaluations and risk assessment instruments” used by the Board in assessing growth and maturity “shall take into consideration ... any subsequent growth and increased maturity of the individual.” *Consideration of “subsequent growth and increased maturity” implies the availability of information about the offender when he was a juvenile.* (*Ibid.*)²

In short, *Franklin* makes clear that the BPH *could not discharge its obligations* under the test claim statutes without imposing the newly mandated activities on the Claimants. While the Commission rightly notes that the BPH is required to provide state-appointed counsel to inmates at youth offender parole hearings, it does not claim that state-appointed counsel would handle the presentation of youth-related factors at the hearing in the trial court at or around the time of sentencing. Rather, it is undisputed that responsibility for work-up and the presentation of evidence at those hearings lies squarely with county prosecutors and defense counsel.³

In its draft decision, the Commission also concludes that the “requirement to make a record at sentencing hearings for YOPH eligible offenders does not stem from the language of the test claim statutes, but rather from a mandate of the courts.”

California Government Code section 17556 states, in relevant part:

The commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency or school district, if, after a hearing, the commission finds any one of the following:

* * *

(b) The statute or executive order affirmed for the *state a mandate that has been declared existing law or regulation by action of the courts.* This subdivision applies regardless of whether the action of the courts occurred prior to or after the date on which the statute or executive order was enacted or issued.

² *Id.* at 283-84 (emphasis added).

³ *Id.* at 284.

The *Franklin* Court's determination that an offender be given an opportunity, in the trial court, to make a record of information that will be relevant to the offender's eventual YOPH, was not the Court's "declaration" of existing law – it was the Court's *interpretation of the statutes* enacted by the Legislature. In other words, the origin of the obligations imposed on the Claimants is the test claim statutes, not some independent judicial declaration of the law.

No Case Supports the Extension of Constitutional Protections Awarded to Juveniles to Offenders Between the Ages of 18 and 25

Citing United States Supreme Court cases *Graham v. Florida*⁴ and *Miller v. Alabama*,⁵ and the opinion of the California Supreme Court in *People v. Caballero*,⁶ the DOF asserts that that "SB 260, SB 261, and SB 394 create a youth offender parole hearing mechanism for certain individuals to affirm what the courts had declared to be existing law."

As an initial matter, none of these cases required the California Legislature to enact the youth offender parole statutes at issue in this claim. The Legislature could have, alternatively, developed a new sentencing scheme for juvenile offenders that addressed the constitutional issues articulated by these cases.

More important, however, the DOF fails to address the fact none of these cases, or any other cited by the DOF or the Commission, extend any special protections to offenders over the age of 18. By extending the YOPH statutes and the attendant "*Franklin* hearing" necessary for the BPH to comply with its obligations under those statutes to offenders between the ages of 18 and 25, the California Legislature imposes costs on Claimants that exceed any obligations that might be argued to arise from the cases pertaining to the sentencing of juveniles.

Respectfully submitted,

THOMAS E. MONTGOMERY, County Counsel

By



STEPHANIE KARNAVAS, Senior Deputy

14-90097

⁴ *Graham v. Florida*, 560 U.S. 48 (2010).

⁵ *Miller v. Alabama*, 567 U.S. 460 (2012).

⁶ *People v. Caballero*, 55 Cal. 4th 262 (2012).

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

On May 16, 2019, I served the:

- **Interested Party's (County of Los Angeles's) Late Comments on the Draft Proposed Decision filed May 16, 2019**
- **Claimant's Rebuttal Comments and Comments on the Draft Proposed Decision filed May 15, 2019**

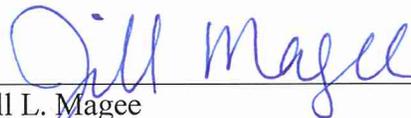
Youth Offender Parole Hearings, 17-TC-29

Penal Code Sections 3041, 3046, 3051, and 4801; Statutes 2013, Chapter 312 (SB 260); Statutes 2015, Chapter 471 (SB 261); Statutes 2017, Chapter 675 (AB 1308); Statutes 2017, Chapter 684 (SB 394)

County of San Diego, Claimant

By making it available on the Commission's website and providing notice of how to locate it to the email addresses provided on the attached mailing list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on May 16, 2019 at Sacramento, California.



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COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 3/22/19

Claim Number: 17-TC-29

Matter: Youth Offender Parole Hearings

Claimant: County of San Diego

TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.3.)

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**Re: County of Los Angeles in Support of County of San Diego's
Response to Draft Proposed Decision
Youth Offender Parole Test Claim 17-TC-29**

Dear Ms. Halsey:

The County of Los Angeles requests that the Commission consider our letter in support of the San Diego's County's response to its Draft Proposed Decision. The Legislature has created a new program known as a youthful offender parole hearing that compels local agencies to provide a higher level of service in order to comply with State statutes. Local agencies are entitled to reimbursement under Article XIII B Section 6 of the California Constitution for the costs of State-mandated new programs or higher levels of service. In the instant case, SB 260, 261 and 394 created a new program and required that the State Board of Parole Hearings conduct a new type of parole hearing, a youthful offender parole hearing, for reviewing the suitability for parole of any eligible prisoner who was 25 or younger at the time of their controlling offense. These test claim statutes requires the Board of Parole Hearings to "give great weight" to youth related factors, however, the statutes were silent as to who would investigate and present these youth related factors.

The *California Supreme Court in People v. Franklin* (2016) 63 Cal. 4th 261, held that SB 260 contemplates that information regarding a youthful offender's characteristics and circumstances at the time of the offense will be available at the time of the parole hearing to facilitate consideration by the California Board of Parole Hearings. The court further noted that assembling

statements from family members, friends, and others as mentioned in Penal Code §3051(f)(2) is typically "a task more easily done at or near the time of the ...offense rather than decades later when memories have faded, records may have been lost or destroyed, or family or community members may have relocated or passed away." *Id.* at 283 The court also stated that while Penal Code §3051(f)(1) allows for the use of psychological evaluations and risk assessments, consideration of subsequent growth and maturity warrants the availability of information about the offense at or near the time of the offense. *Id.* at 284 The Franklin court explained that a trial court may hold a proceeding whereby documents, evaluations, or testimony may be presented so that the Board years later can properly discharge its obligation to give great weight to youth-related factors. As a result, the costs associated with investigating and presenting youth-related factors at the trial court for later consideration at a youthful offender parole hearing derives from a reimbursable State mandate.

In determining whether a mandate exists we first must look to Section 6 of Article XIII B of the California Constitution and the plain language of the Test Claim statutes for its purpose and intent. The concern which prompted the inclusion of section 6 of Article XIII B was the perceived attempt by the State to enact legislation or adopt administrative orders creating programs to be administered by local agencies, thereby transferring to those agencies the fiscal responsibility for providing services which the State believed should be extended to the public. *County of Los Angeles v. State of California*, (1987) 43 Cal. App. 3d 46. Given this stated purpose, courts have been willing to extend and broaden the scope of mandates beyond what is expressly written. In *Long Beach Unified School District. v. State of California*, the court expanded mandates to include executive orders. The court examined the increased financial burdens being shifted to local government, not the form in which those burdens appeared. *Long Beach Unified School District. v. State of California*, (1990) 225 Cal. App. 3d 155.

In the instant case, the stated purpose of the test claim statutes is to "create a process by which growth and maturity of youthful offenders can be assessed and a meaningful opportunity for release established."¹ Although the test claim statutes require the Parole Board to consider youth-related factors, the statutes do not state who is responsible for collecting and investigating these factors so that they can later be presented at a hearing. The Commission contends that there is no mandate because the test claim statutes do not expressly impose any requirement upon local government. Clearly, the Legislature contemplated that

¹ Statutes 2013, chapter 312, section 1.

someone would gather the information in Penal Code Sections 3051(f)(1) and (f)(2) at or near the time of the offense so that a proper assessment can be made as to the individual's growth and maturity decades later. The Proposed Decision ignores the practical realities of the parole process. The Board of Parole's duty to "give great weight" to youthful factors is impossible to execute if no one is responsible for investigating and presenting those factors at or near the time of the offense. The Commission's proposed decision naturally implies that State appointed counsel, not the local agency, would provide youthful factors to the Board. However, it is evident that a State parole attorney is not appointed until a decade or more after the time of the offense and sentencing. If the intent of the Legislature is to create a process by which growth and maturity of youthful offenders can be assessed and a meaningful opportunity for release be established, the Commission's proposed decision would defeat the stated purpose of the statute.

In *People v. Franklin* (2016) 63 Cal.4th 261, the California Supreme Court stated that the (test claim) statutes "contemplate that information regarding the ...offender's characteristics and circumstances at the time of the offense (emphasis added) will be available at a youth offender parole hearing to facilitate the Board's consideration." The court further noted that "assembling statements from family members, friends, and others as mentioned in Penal Code §3051(f)(2) is typically a task more easily done at or near the time of the...offense rather than decades later when memories have faded, records may have been lost or destroyed, or family, or community members may have relocated or passed away." *Id.* The Franklin court explained that a trial court may hold a proceeding whereby documents, evaluations or testimony may be presented so that the Board years later can properly discharge its statutory obligation to give great weight to youth-related factors. From a practical standpoint, the State-appointed attorney, who is appointed many years later, would not be in a position to present such information. On page 40 of its Draft Proposed Decision, the Commission conceded that prosecution and defense counsel are now effectively required to make such a record of "factors, including youth-related factors, relevant to the eventual [YOPH] determination."² It is evident from the Franklin decision that the source of the requirement to provide a thorough and meaningful youthful parole offender hearing comes from the statutes themselves which contemplate local agency involvement at the sentencing stage.

² Commission on State Mandates Draft Proposed Decision, Youth Offender Parole Hearings, 17-TC-29, Letter dated March 25, 2019.

Heather Halsey
May 15, 2019
Page 4

In order to effectuate the legislative purpose of these youth offender parole hearings, the local agency is required to investigate and present evidence of youthful factors at the trial court. Years later the State appointed attorney will be in a position to utilize the information preserved in the record and provide evidence of growth and maturity for the Board's consideration. Respectfully, the Commission's analysis results in a quagmire where the State creates a youthful offender parole process to consider factors that must be collected at the time of the offense, but no one is required to collect these factors. In the end, local agencies will be required to comply with the program by assuring that youthful factors are collected at or near the time of sentencing – a task they were not required to do prior to this legislation. This increased financial burden being shifted to local government is exactly that which the Constitution prohibits – State legislation that creates a program that will be administered by local agencies. The County of Los Angeles joins the County of San Diego and respectfully requests that the Commission reconsider its Draft Proposed Decision in light of the aforementioned.

Very truly yours,

MARY C. WICKHAM
County Counsel

By 
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LG:lal

cc: Hasmik Yaghobyan, Auditor Controller
Randall Loughlin, Auditor Controller
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DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

On May 16, 2019, I served the:

- **Interested Party's (County of Los Angeles's) Late Comments on the Draft Proposed Decision filed May 16, 2019**
- **Claimant's Rebuttal Comments and Comments on the Draft Proposed Decision filed May 15, 2019**

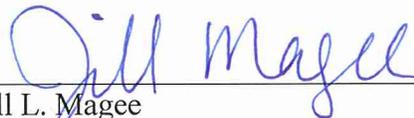
Youth Offender Parole Hearings, 17-TC-29

Penal Code Sections 3041, 3046, 3051, and 4801; Statutes 2013, Chapter 312 (SB 260); Statutes 2015, Chapter 471 (SB 261); Statutes 2017, Chapter 675 (AB 1308); Statutes 2017, Chapter 684 (SB 394)

County of San Diego, Claimant

By making it available on the Commission's website and providing notice of how to locate it to the email addresses provided on the attached mailing list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on May 16, 2019 at Sacramento, California.



Jill L. Magee

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COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 3/22/19

Claim Number: 17-TC-29

Matter: Youth Offender Parole Hearings

Claimant: County of San Diego

TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.3.)

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SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair
2013-2014 Regular Session

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SB 260 (Hancock)
As Amended April 4 2013
Hearing date: April 9, 2013
Penal Code
MK:dl

SENTENCING

HISTORY

Source: Human Rights Watch
Youth Law Center
The Friends Committee
USC School of Law Post Conviction Clinic

Prior Legislation: SB 9 (Yee) – Ch. 828, Stats. 2012
SB 399 (Yee) – 2010, failed on Assembly floor
SB 999 (Yee) – 2008, died on Senate floor
SB 1223 (Kuehl) – 2004, died on Assembly Suspense

Support: A Place Called Home; American Civil Liberties Union (ACLU); American Friends Service Committee; American Probation and Parole Association; Amnesty International; Advancement Project; Bar Association of San Francisco; Berkeley Organizing Congregations for Action; Black Organizing Project; Boys and Girls Club of San Gabriel Valley; California Catholic Conference; California Church IMPACT; California Coalition for Women Prisoners; California Public Defenders Association (CPDA); Californians United for a Responsible Budget (CURB); Campaign for the Fair Sentencing of Youth; Campaign for Youth Justice; Center on Juvenile and Criminal Justice; Children’s Defense Fund; Day One; Disability Rights Education & Defense Fund; Dolores Mission Catholic Church; Everychild Foundation; Equal Justice Society; Healing Justice Coalition; Human Rights Advocates; Jesuits of the California Province; Just Detention International; Justice Not Jails; Justice Now; Juvenile Law Center; Law Office of Donald R. Hammond; Legal Services for Children; Legal Service for Prisoners with Children; Los Angeles Community Action Network; Loyola Law School Center for Juvenile Law and Policy; Mexican American

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Legal Defense and Education Fund (MALDEF); National Center for Lesbian Rights; National Center for Youth Law; National Juvenile Justice Network; National Partnership for Juvenile Services; Office of Restorative Justice of the Archdiocese of Los Angeles; Pacific Juvenile Defender Center; Public Council – Children’s Right’s Project; Prison Law Office; Religious Sisters of Charity; Santa Clara University; Service Employees International Union (SEIU) Local 1000; Sisters of Mercy US Province; Sisters of the Company of Mary; St. Mark’s United Methodist Church; Taxpayers for Improving Public Safety; The W. Haywood Burns Institute; University of San Francisco Center for Law and Global Justice; University of Southern California Post-Conviction Justice Project; University Synagogue; Violence Prevention Coalition of Greater LA; The Women’s Foundation of California; Yolo County Office of Education; Yolo County Public Defender’s Office; Youth Justice Coalition; 500 individuals

Opposition: California District Attorneys Association

KEY ISSUE

SHOULD THERE BE A PROCESS FOR A PERSON WHO IS SERVING A SENTENCE FOR A CRIME HE OR SHE COMMITTED BEFORE HE OR SHE WAS 18 YEARS OF AGE TO PETITION FOR A RESENTENCING AFTER SERVING 10 YEARS OF THE SENTENCE IF CERTAIN CRITERIA ARE MET?

PURPOSE

The purpose of this bill is to allow a person sentenced for a crime that was committed before he or she was 18 to petition for a resentencing if certain criteria are met.

Existing law provides that minors age 14 and older can be subject to prosecution in adult criminal court depending upon their alleged offense and their criminal offense history. (Welfare and Institutions Code ("WIC") §§ 602(b); 707) Current law contains three discrete mechanisms for remanding minors to adult criminal court for prosecution:

- Statutory or legislative waiver requires that minors 14 years of age or older who are alleged to have committed specified murder and sex offenses be prosecuted in adult criminal court (i.e., the juvenile court has no jurisdiction over these cases) (WIC § 602 (a).);
- Prosecutorial waiver gives prosecutors the discretion to file cases against minors 14 and older, depending upon their age, alleged offense and offense history, in juvenile or adult criminal court (WIC § 707 (d).); and

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- Judicial waiver gives courts the discretion to evaluate whether a minor is unfit for juvenile court based on specified criteria and applicable rebuttable presumptions. (WIC § 707 (a), (b) and (c).)

Existing law provides that if a prosecution is commenced against a minor as a criminal case as a "direct file" case – that is, through either statutory waiver or prosecutorial waiver – and the minor is convicted of a "direct file" offense, the minor is required to be sentenced as an adult. (Penal Code § 1170.17 (a).) Minors who have been convicted in criminal court of lesser offenses for which they still would have been eligible for transfer to adult court may be able to seek a juvenile disposition instead of a criminal sentence through a post-conviction fitness proceeding. (Penal Code § 1170.17 (b) and (c).) Minors who are convicted in adult criminal court of offenses for which they would not have been eligible for adult court prosecution had a petition first been filed in juvenile court are subject to a juvenile disposition. (Penal Code §§ 1170.17 (d); 1170.19.)

Existing law provides that, these post-conviction proceedings are not available to minors who are convicted after they have been remanded to criminal court from the juvenile court pursuant to Welfare and Institutions Code Section 707 (a) or (c).

Existing law provides, with some exceptions, that when a defendant who was under 18 years of age at the time of the commission of the offense for which the defendant was sentenced to imprisonment for life without the possibility of parole has served at least 15 years of that sentence, the defendant may submit to the sentencing court a petition for recall and resentencing and sets forth the requirements for filing and granting such a petition. (Penal Code § 1170 (d) (2).)

This bill provides notwithstanding any law, upon motion and after 60 days' notice to the prosecution, the sentencing court shall hold a hearing to review the sentence of a person who was under 18 years of age at the time of the offense and was prosecuted as an adult, after the person has served 10 years in prison.

This bill provides that after reviewing the sentence, if the person meets the eligibility criteria, the judge can do any of the following:

- Suspend or stay all or a portion of the sentence.
- Reduce the sentence to any sentence that could lawfully have been ordered at the time of the original judgment
- Both reduce and suspend all or a portion of the sentence.

This bill provides that in reviewing the sentence the court may consider, in conjunction with any other evidence the court deems relevant:

- The person's record of serious disciplinary offenses;
- Whether the person has performed acts that tend to indicate rehabilitation or the potential capacity for rehabilitation;
- The defendant's use of self-study for self-improvement;
- The defendant's statement describing his or her remorse and work towards rehabilitation;
- The person's youth at the time of the crime, including his or her immaturity, impulsiveness;
- Failure to appreciate risks and consequence;
- Family and home environment;
- Intellectual functioning, mental disorder or disabilities;
- The circumstances of the offense, including the extent of participation in the offense and the way familial and peer pressures may have affected him or her;
- Whether the person might have been charged and convicted of a lesser offense if not for the lesser abilities of youth, including an inability to effectively deal with police officers or prosecutors or a limited capacity to fully understand proceeding to assist his or her attorney.

This bill provides that the court shall identify on the record the criteria relied on and shall provide a statement of reasons for adopting those criteria. The court shall state why the defendant does or does not satisfy the criteria.

This bill provides that victims, or victim family members if the victim is deceased, shall be notified of the resentencing hearing and shall retain their rights to participate in the hearing.

This bill provides that each person granted review pursuant to this section shall only be entitled to an additional review in the event of a change in circumstances that is proven by a preponderance of the evidence in a petition filed with the sentencing court.

This bill provides that it does not apply to a person who was sentenced for: first degree murder with special circumstances; under three strikes; under provisions increasing the penalty for priors or multiple convictions; or, has a sentence of life imprisonment without the possibility of parole.

This bill provides that it is the intent of the Legislature to provide a judicial mechanism for reconsidering the sentences of adults who served a significant amount of time in state prison for the conviction of crimes they committed as children.

RECEIVERSHIP/OVERCROWDING CRISIS AGGRAVATION

For the last several years, severe overcrowding in California's prisons has been the focus of evolving and expensive litigation relating to conditions of confinement. On May 23, 2011, the United States Supreme Court ordered California to reduce its prison population to 137.5 percent of design capacity within two years from the date of its ruling, subject to the right of the state to seek modifications in appropriate circumstances.

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Beginning in early 2007, Senate leadership initiated a policy to hold legislative proposals which could further aggravate the prison overcrowding crisis through new or expanded felony prosecutions. Under the resulting policy known as “ROCA” (which stands for “Receivership/Overcrowding Crisis Aggravation”), the Committee held measures which created a new felony, expanded the scope or penalty of an existing felony, or otherwise increased the application of a felony in a manner which could exacerbate the prison overcrowding crisis. Under these principles, ROCA was applied as a content-neutral, provisional measure necessary to ensure that the Legislature did not erode progress towards reducing prison overcrowding by passing legislation which would increase the prison population. ROCA necessitated many hard and difficult decisions for the Committee.

In January of 2013, just over a year after the enactment of the historic Public Safety Realignment Act of 2011, the State of California filed court documents seeking to vacate or modify the federal court order to reduce the state’s prison population to 137.5 percent of design capacity. The State submitted in part that the, “. . . population in the State’s 33 prisons has been reduced by over 24,000 inmates since October 2011 when public safety realignment went into effect, by more than 36,000 inmates compared to the 2008 population . . . , and by nearly 42,000 inmates since 2006” Plaintiffs, who oppose the state’s motion, argue in part that, “California prisons, which currently average 150% of capacity, and reach as high as 185% of capacity at one prison, continue to deliver health care that is constitutionally deficient.”

In an order dated January 29, 2013, the federal court granted the state a six-month extension to achieve the 137.5 % prisoner population cap by December 31st of this year.

The ongoing litigation indicates that prison capacity and related issues concerning conditions of confinement remain unsettled. However, in light of the real gains in reducing the prison population that have been made, although even greater reductions are required by the court, the Committee will review each ROCA bill with more flexible consideration. The following questions will inform this consideration:

- whether a measure erodes realignment;
- whether a measure addresses a crime which is directly dangerous to the physical safety of others for which there is no other reasonably appropriate sanction;
- whether a bill corrects a constitutional infirmity or legislative drafting error; whether a measure proposes penalties which are proportionate, and cannot be achieved through any other reasonably appropriate remedy; and
- whether a bill addresses a major area of public safety or criminal activity for which there is no other reasonable, appropriate remedy.

COMMENTS

1. Need for This Bill

According to the author:

Piecemeal changes to California law since the 1990s have removed many safeguards and points for review that once existed for youth charged with crimes. Currently, over 6,500 young people in California prisons were under the age of 18 at the time of their crime and prosecuted as adults – many are transferred to the adult criminal justice system without careful consideration of their amenability to rehabilitate and demonstrate remorse. The current system provides no viable mechanism for reviewing a case after a young person has served a substantial period of incarceration and can show maturity and improvement.

Existing sentencing laws do not distinguish youth from adults, however, recent court decisions are moving in this direction. The US Supreme Court recently held unconstitutional mandatory life without parole sentences for people under the age of 18, and required courts to consider the youthfulness of defendants facing that sentence (*Miller v. Alabama* (2012)). The California Supreme Court recently ruled in *People v. Caballero* (2012) that a sentence exceeding the life expectancy of a juvenile is the equivalent of life without parole, and unconstitutional in non-homicide cases. Specifically, the California Supreme Court called for legislative action to establish a review process for cases with lengthy sentences.

Recent scientific evidence on adolescent development and neuroscience show that certain areas of the brain, particularly those that affect judgment and decision-making, do not fully develop until the early 20's. The US Supreme Court stated in its 2005 *Roper v. Simmons* decision, “[t]he reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character.” Moreover, the fact that young adults are still developing means that they are uniquely situated for personal growth and rehabilitation.

In the wake of the US and the California Supreme Courts' decisions and consistent with neuroscientific research, SB 260 establishes a comprehensive judicial review process to evaluate cases involving extreme sentences for juveniles. SB 260 holds young people responsible for the crimes they committed and creates a system in which they must demonstrate remorse and rehabilitation to merit any possible sentence reduction as determined by the court.

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2. Review of Sentence for Crime Committed While a Minor

Last year SB 9 (Yee) was signed into law. That bill provides that a person who was sentenced to life without parole who committed the offense when he or she was under the age of 18 can under specified circumstances seek a review of the sentence after he or she served 15 years in prison.

This bill provides a resentencing for adults who were sentenced as juveniles and received long sentences that were not life without parole and so do not fall within SB 9. Under this bill, a person who committed their offense before he or she was 18 can seek a review of his or her sentence in the sentencing court after serving 10 years. The bill specifies that the court may consider a number of things relating to the rehabilitation or prospect for rehabilitation of the defendant, the circumstances at the time of the incident including the defendant's participation in the crime and mental abilities at that time and other factors relating to the defendant's maturity level at the time and their ability to rehabilitate. If the court determines that it is appropriate the court may reduce, suspend or stay all or a portion of the sentence. When making a change in the sentence the court shall state on the record what criteria the court relied on and why and provide a statement why the defendant does or does not meet the criteria. If relief is not granted, a defendant cannot seek another review until a change in circumstances is proven by a preponderance of the evidence in a petition filed with the sentencing court.

The bill specifically states that the victim, or his or her family, shall be notified of the hearing and have a right to participate.

This bill explicitly excludes people sentenced to life without parole; people sentenced under three strikes; or those sentenced under Penal Code 1170.12 because of priors or multiple offenses.

3. Life or Effectively Life Sentences for Juveniles

In *Graham v. Florida* (2010) 130 S.Ct. 2011, 176 L.Ed.2d 825 the Supreme Court held that it is cruel and unusual punishment to sentence a juvenile to life without the possibility of parole for a non-homicide case. The Court found that the rareness of such a sentence showed:

A national consensus has developed against a life without parole sentence for one who was a juvenile when the non-homicide crime was committed. Although the sentence is permitted in many states, it is currently being served by only 123 persons, and the majority of those persons are in Florida. These numbers demonstrate that the sentence is rare enough to be considered cruel and unusual. (130 S.Ct. 2026, 176 L.Ed.2d 841.) Although international practice is in no way controlling, it is worth noting that the United States is the only country that imposes life without parole sentences on juvenile non-homicide offenders. (130 S.Ct. 2033, 176 L.Ed.2d 849.)

The consensus alone is not determinative. The culpability of the offender is also an important consideration. As *Roper v. Simmons* (2005) 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1, supra, §500, recognized, juveniles are less deserving of the most severe punishment. Compared to adults, juveniles have a lack of maturity and an underdeveloped sense of responsibility; they are more vulnerable to negative influences and outside pressures, and their characters are not as well formed. Yet a juvenile, punished at a young age, will generally serve more years in prison than an adult who receives a life term. (130 S.Ct. 2028, 176 L.Ed.2d 843.) The goals of retribution, deterrence, and rehabilitation are not advanced or sufficiently justified by so harsh a sentence. (130 S.Ct. 2028, 2029, 176 L.Ed.2d 843, 844.)

... Nevertheless, the state is not required to guarantee eventual freedom for a juvenile convicted of a non-homicide crime. What it must do is give such defendants "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." (130 S.Ct. 2030, L.Ed.2d 846.) Defendant's sentence, as it stands, would guarantee that he will die in prison without such an opportunity, no matter what he might do to demonstrate that he is fit to rejoin society. (130 S.Ct. 2032, 176 L.Ed.2d 848.) (See *People v. Mendez* (2010) 188 C.A.4th 47, 62, 114 C.R.3d 870 [under rationale of *Graham*, juvenile's sentence in non-homicide case to term of years that, after allowance for conduct reductions, would exceed his life expectancy, is de facto life without parole sentence and unconstitutional]; 124 Harv. L. Rev. 209 [Graham].) (3 Witkin Cal. Crim. Law Punishment § 511)

The Supreme Court again looked at the issue of juveniles sentenced to life without parole in *Miller v. Alabama* (2012) 132 S. Ct. 2455 and found that a mandatory life without parole sentence for a juvenile in a homicide was also cruel and unusual punishment.

Graham also likened life-without-parole sentences for juveniles to the death penalty. That decision recognized that life-without-parole sentences "share some characteristics with death sentences that are shared by no other sentences." 560 U.S., at ___, 130 S. Ct. 2011, 176 L. Ed. 2d 825. And it treated life without parole for juveniles like this Court's cases treat the death penalty, imposing a categorical bar on its imposition for non-homicide offenses. By likening life-without-parole sentences for juveniles to the death penalty, *Graham* makes relevant this Court's cases demanding individualized sentencing in capital cases. In particular, those cases have emphasized that sentencers must be able to consider the mitigating qualities of youth. In light of *Graham's* reasoning, these decisions also show the flaws of imposing mandatory life-without-parole sentences on juvenile homicide offenders. Pp. ___ - ___, 132 S. Ct. 2455, 2459 (U.S. 2012).

Relying on *Miller*, the California Supreme Court in *People v. Caballero* found that in a non-homicide case a sentence of 110 years imposed on a juvenile is the legal equivalent of life without parole. (*People v. Caballero* (2012) 55 Cal 4th 262)

Consistent with the high court's holding in *Graham*, supra, 560 U.S. ____ [130 S. Ct. 2011], we conclude that sentencing a juvenile offender for a non-homicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender's natural life expectancy constitutes cruel and unusual punishment in violation of the Eighth Amendment. Although proper authorities may later determine that youths should remain incarcerated for their natural lives, the state may not deprive them at sentencing of a meaningful opportunity to demonstrate their rehabilitation and fitness to reenter society in the future. Under *Graham*'s non-homicide ruling, the sentencing court must consider all mitigating circumstances attendant in the juvenile's crime and life, including but not limited to his or her chronological age at the time of the crime, whether the juvenile offender was a direct perpetrator or an aider and abettor, and his or her physical and mental development, so that it can impose a time when the juvenile offender will be able to seek parole from the parole board. The Board of Parole Hearings will then determine whether the juvenile offender must be released from prison "based on demonstrated maturity and rehabilitation." (560 U.S. at p. ____ [130 S. Ct. at p. 2030].) Defendants who were sentenced for crimes they committed as juveniles who seek to modify life without parole or equivalent de facto sentences already imposed may file petitions for writs of habeas corpus in the trial court in order to allow the court to weigh the mitigating evidence in determining the extent of incarceration required before parole hearings. Because every case will be different, we will not provide trial courts with a precise timeframe for setting these future parole hearings in a non-homicide case. However, the sentence must not violate the defendant's Eighth Amendment rights and must provide him or her a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" under *Graham*'s mandate. (*People v. Caballero*, 55 Cal. 4th 262, 268-269 (Cal. 2012).)

The California 4th District Court of Appeal applied the reasoning from *Miller* and *Caballero* to a homicide case where the defendant was sentenced to 196 years:

Satterwhite claims his sentence of 196 years to life should be reversed, and the matter should be remanded for further proceedings, in light of the United States Supreme Court's recent decision in *Miller*, supra, 567 U.S. ____ [132 S.Ct. 2455], which held that, in homicide cases, the prohibition of cruel and unusual punishment set forth in the Eighth Amendment to the federal Constitution prohibits the imposition of a mandatory sentence of life without the possibility of parole on a juvenile offender. (*Miller*, 567 U.S. at p. ____ [132 S.Ct. at p. 2469]; see *People v. Caballero* (2012) 55 Cal.4th 262, 268, fn. 4 [145 Cal. Rptr. 3d 286, 282 P.3d 291 v. *Caballero* (2012) 55 Cal.4th 262, 268, fn. 4 [145 Cal. Rptr. 3d 286, 282 P.3d 291]

(More)

(Caballero.) We agree. (People v. Thomas, 211 Cal. App. 4th 987, 1013-1014 (Cal. App. 4th Dist. 2012).)

After *Caballero*, it is clear that more prisoners with long sentenced they received for a crime committed before they were 18 will bring writs of habeas corpus on the basis of cruel and unusual punishment. This will lead courts to look at them on a case by case basis. This bill instead would set up a standard process for the courts to look to in dealing with these cases.

4. Support

The supporters agree that juveniles who commit crimes should be punished, but they also argue, that as science has shown and the courts are recognizing, their minds and judgment is not the same as adults and that should be considered. They also point to the fact that young people have a great capacity for rehabilitation. For example the Center for Juvenile Law and Policy at Loyola Law School states:

Youth who commit crimes should be held accountable. However, when California sentences someone under the age of 18 to an adult prions sentence, it disregards the human capacity for rehabilitation and ignores the very real physical and psychological differences between youth and adults. Punishment should reflect the capacity of young people to change and mature.

Human Rights Watch notes that this is a modest and narrowly focused piece of legislation that if passed:

[W]ill protect public safety, in that only those who merit resentencing will be resentenced. District Attorneys will have input at every step of the process: they will still be able to argue at the time of sentencing for a youth offender to be sentenced to an adult sentence as permitted by current law. District Attorneys will also be in court at a resentencing hearing and have the opportunity to argue that the original sentence remain intact if they believe that is appropriate. Victims' family members will also be able to be present at the hearing.

5. Opposition

The California District Attorneys Association opposes this bill stating:

We have many concerns with this bill, and paramount among them is the fact that this bill will potentially result in the early release of many serious offenders. SB 260 gives courts near limitless authority to suspend or reduce sentences based on criteria that may have already been considered or that are irrelevant to a sentencing decision. Offenders who are deserving of the very long custodial sentences they have received can petition under this bill after only serving 10 years. This

(More)

represents a severe risk to public safety and is insulting to victims who were promised justice through meaningful incarceration.

While the bill describes criteria that can be used by the court to make a determination under this bill, the only requirement is that whatever criteria are used is noted on the record. This is hardly a safeguard against courts that exhibit contempt for sentences that may be required by law. Additionally, there is no effective limit on the number of petitions for resentencing that an offender may file.

6. Similar Legislation

AB 1276 (Bloom) is in Assembly Public Safety Committee. It requires a person who was convicted of a non-homicide offense that was committed before the person had attained 18 years of age to be given a meaningful opportunity for parole or other form of supervised release after having served 25 years in state prison.

Date of Hearing: August 14, 2013

ASSEMBLY COMMITTEE ON APPROPRIATIONS

Mike Gatto, Chair

SB 260 (Hancock) – As Amended: August 12, 2013

Policy Committee: Public Safety

Vote: 5-2

Urgency: No State Mandated Local Program: No

Reimbursable:

SUMMARY

This bill provides that a person committed to the California Department of Corrections and Rehabilitation (CDCR) who was under the age of 18 at the time of the offense shall be considered for parole after serving 15 to 25 years in prison, as specified. Subsequent parole hearings would be set according to current law. This bill states legislative intent to (a) create a process by which the growth and maturity of youthful offenders can be assessed, and (b) establish a meaningful opportunity for release. Specifically, this bill:

- 1) Requires the Board of Parole Hearings (BPH) to hold a special "youth parole hearing" for every inmate who was under the age of 18 at the time of his or her offense as follows:
 - a) For a determinately-sentenced offender, the hearing shall be held in the 15th year of confinement.
 - b) For offenders sentenced to 15/20 years-to-life, the hearing shall be held in the 20th year.
 - c) For offenders sentenced to 25 years-to-life, the hearing shall be held in the 25th year.
- 2) Requires that six years prior to eligibility for parole under this scheme, an inmate shall meet with a BPH representative to review the inmate's file and receive written recommendations regarding parole suitability.
- 3) Requires CDCR to review and rewrite regulations regarding youthful offender parole suitability consistent with relevant case law requiring a meaningful opportunity for release.
- 4) Does not apply to persons sentenced under three strikes or persons sentenced to life-without-possibility-of-parole (LWOP).
- 5) Provides if parole is not granted under these provisions, the board shall set a time for a subsequent hearing pursuant to current law, using its statutory discretion to advance the hearing, giving "great weight to the diminished culpability of juveniles" pursuant to case law.
- 6) Requires BPH to complete all hearings required for offenders who become eligible for hearings on the effective date of this legislation, by July 1, 2015.

FISCAL EFFECT

- 1) Significant one-time GF costs to the Board of Prison Hearings (BPH), likely in excess of \$2 million by July 1, 2015, to hold additional parole hearings. As this bill requires BPH to hold

a hearing by July 1, 2015 for every determinately-sentenced offender who has served more than 15 years for an offense committed before the offender turned 18, and for indeterminately-sentenced inmates who have served 15, 20 or 25 years, as specified, the cost of an additional 1,000 hearings would be in the range of \$2.5 million, assuming a BPH estimate of \$2,500 per hearing.

Annual hearing costs thereafter would likely be in the hundreds of thousands of dollars.

- 2) One time GF costs in the range of \$150,000 to review and re-write regulations, pursuant to specified litigation.
- 3) The above costs would be offset to an unknown degree by state trial court GF savings as a result of an accompanying reduction in writs of Habeas Corpus, by which inmates challenge convictions and/or sentences.
- 4) Potentially significant annual out-year GF savings to the extent inmates are actually paroled earlier following the required hearings. For example, for every 10 inmates per year who are actually paroled as a result of this bill and end up serving 20 rather than 30 years, the annual net savings will exceed \$1.5 million in 10 years (assuming a marginal per capita savings of \$25,000 per inmate, and a per capita parole cost of \$10,000).

There are about 5,700 inmates serving time in CDCR facilities who were sentenced when they were under the age of 18. Of these:

- 1,469 will have served at least 15 years by January 1, 2014.
- 729 will have served at least 20 years by January 1, 2014.
- 335 will have served at least 25 years by January 1, 2014.
- 70 are 2nd Strikers
- 2 are 3rd Strikers
- 286 are serving LWOP

COMMENTS

- 1) Rationale. Current law allows an inmate who was under 18 at the time of an offense that resulted in a term of life-*without*-the-possibility-of parole (LWOP) (first-degree murder) to petition the court for resentencing after 15 years. This bill addresses the situation, the subject of *People v Caballero*, in which a youth is sentenced to life-*with*-the-possibility of parole, which may serve as a *de facto* life sentence.

According to the author, "Existing sentencing laws do not distinguish youth from adults, however, recent court decisions are moving in this direction. The US Supreme Court recently held unconstitutional mandatory life without parole sentences for people under the age of 18, and required courts to consider the youthfulness of defendants facing that sentence (*Miller v. Alabama* (2012)). The California Supreme Court recently ruled in *People v. Caballero* (2012) that a sentence exceeding the life expectancy of a juvenile is the equivalent of life without parole, and unconstitutional in nonhomicide cases. Specifically, the California Supreme Court called for legislative action to establish a review process for cases with lengthy sentences.

"Recent scientific evidence on adolescent development and neuroscience show that certain areas of the brain, particularly those that affect judgment and decision-making, do not fully develop until the early 20's. The US Supreme Court stated in its 2005 *Roper v. Simmons* decision, '[t]he reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character.' Moreover, the fact that young adults are still developing means that they are uniquely situated for personal growth and rehabilitation."

- 2) Recent Case Law. (See Assembly Public Safety Committee analysis for a full review.) In 2010, the U.S. Supreme Court ruled it unconstitutional to sentence a youth who did not commit homicide to a sentence of life without the possibility of parole (*Graham v. Florida*). The Court discussed the differences between juvenile and adult offenders and reasserted its findings from *Roper v. Simmons* (2005) that juveniles have lessened culpability than adults due to those differences. The Court stated that "life without parole is an especially harsh punishment for a juvenile," noting that a juvenile offender "will on average serve more years and a greater percentage of his life in prison than an adult offender."

The court stressed, however, that "while the Eighth Amendment forbids a State from imposing a life without parole sentence on a juvenile nonhomicide offender, it does not require the State to release that offender during his natural life. Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives."

In *Caballero*, the California Supreme Court ruled that sentencing a juvenile offender for a non-homicide offense to a term with a parole eligibility date that falls outside the offender's life expectancy constitutes cruel and unusual punishment. Relying on the reasoning in *Graham*, the Court found that while the juvenile did not receive LWOP, the trial court's sentence effectively deprives the defendant of any "realistic opportunity to obtain release" from prison, resulting in *de facto* LWOP and thus violating the Eighth Amendment.

The court stated that defendants unconstitutionally sentenced to LWOP, or *de facto* LWOP, may file a petition for a writ of habeas corpus to allow the court to determine the appropriate length of imprisonment.

This bill creates a statutory parole process by which youthful offenders are assured of parole review pursuant to recent court decisions.

- 3) Related Legislation/Alternative Approach. AB 1276 (Bloom) posed a different approach to the *Caballero* de facto life term issue. AB 1276, sponsored by the L.A. D.A.'s Office, provides that a person who was convicted of a non-homicide offense committed before the age of 18 years is eligible for parole after serving 20 years in prison. Subsequent parole hearings would be set according to current law.

AB 1276 has stalled in Senate Public Safety in favor of SB 260, though the L.A. D.A.'s Office opposes SB 260, and expresses concerns with the 15-year hearing provisions now in SB 260 for determinately-sentenced offenders, which moves SB 260 further from AB 1276 and the de facto life term case law that was the impetus for both bills. The L.A. D.A.'s Office contends determinately-sentenced offenders should serve at least 20 years before parole consideration, and indeterminately-sentences offenders at least 25 years, unless they have a

lower minimum parole consideration date. (The CA District Attorneys' Association opposes both proposals.)

- 4) SB 9 (Yee), Statutes of 2012 addressed the 2010 *Graham* ruling that youthful offenders could not be sentenced to life-without-the-possibility-of-parole (LWOP) by statutorily authorizing an inmate who was under 18 years of age at the time of committing an offense for which the prisoner was sentenced to LWOP to submit a petition for recall and resentencing to the sentencing court after serving 15 years of that sentence.
- 5) Support includes a lengthy list of organizations, including Human Rights Watch, the Youth Justice Coalition, the ACLU, CA Attorneys for Criminal Justice, CA Public Defenders Association, CA Teachers Association, Youth Law Center, L.A. Sheriff's Office, and the Prison Law Office.

According to the Friends Committee on Legislation of California, "Federal law and recent course cases increasingly recognize that minors are physically and psychologically different than adults. In *Roper v. Simmons* (2005), the U.S. Supreme Court recognized a large body of scientific and sociological research pointing to the diminished culpability of youth as well as their capacity for rehabilitation. For the most part, California law still fails to distinguish these very real differences. People who cannot vote, serve on juries, or legally purchase alcohol or tobacco are nevertheless considered as culpable as adults when convicted of certain crimes.

"While society wants young people who commit crimes to be punished, rehabilitation, redemption and the belief in second chances reflect our nation's core values. SB 260 will require the Board of Parole Hearings to consider objective criteria consistent with the California Supreme Court's ruling in *People v. Caballero* and the U.S. Supreme Court in *Miller v. Alabama* and *Graham v. Florida* in determining whether to grant parole. Youth will be held accountable while creating incentives for their rehabilitation."

- 6) Opposition. The California District Attorney's Office (CDAA) states, "We have many concerns with this bill, and paramount among them is the fact that this bill will potentially result in the early release of many serious offenders. . . . This represents a severe risk to public safety and is insulting to victims who were promised justice through meaningful incarceration.

"For reference, CDAA is opposed to this bill for many of the same reasons that it opposed SB 9 last year and its predecessors in prior years. There are many safeguards and opportunities to argue for lesser sentences, appeal convictions, and seek executive clemency. SB 260 gives serious offenders yet another chance to avoid deserved punishment."

Analysis Prepared by: Geoff Long / APPR. / (916) 319-2081

SENATE RULES COMMITTEE

SB 260

Office of Senate Floor Analyses
1020 N Street, Suite 524
(916) 651-1520 Fax: (916) 327-4478

UNFINISHED BUSINESS

Bill No: SB 260
Author: Hancock (D), et al.
Amended: 9/3/13
Vote: 21

SENATE PUBLIC SAFETY COMMITTEE: 4-2, 4/9/13

AYES: Hancock, De León, Liu, Steinberg
NOES: Anderson, Knight
NO VOTE RECORDED: Block

SENATE APPROPRIATIONS COMMITTEE: 6-0, 5/23/13

AYES: De León, Walters, Hill, Lara, Padilla, Steinberg
NO VOTE RECORDED: Gaines

SENATE FLOOR: 27-11, 5/28/13

AYES: Beall, Calderon, Cannella, Corbett, De León, DeSaulnier, Emmerson,
Evans, Hancock, Hernandez, Hill, Hueso, Jackson, Lara, Leno, Lieu, Liu,
Monning, Padilla, Pavley, Price, Roth, Steinberg, Walters, Wolk, Wright, Yee
NOES: Anderson, Berryhill, Block, Correa, Fuller, Gaines, Huff, Knight, Nielsen,
Torres, Wyland
NO VOTE RECORDED: Galgiani, Vacancy

ASSEMBLY FLOOR: Not available

SUBJECT: Youth opportunity review hearings

SOURCE: Friends Committee on Legislation of California
Human Rights Watch
USC School of Law Post Conviction Clinic
Youth Justice Coalition
Youth Law Center

CONTINUED

DIGEST: This bill establishes a parole process for persons sentenced to prison for crimes committed before attaining 18 years of age.

Assembly Amendments revise and recast with the same intent as it left the Senate but make considerable changes, most notably, to the parole process now going through the Board of Parole Hearings (BPH) for a prisoner who at the time of their conviction was under the age of 18.

ANALYSIS:

Existing law:

1. Provides that minors age 14 and older can be subject to prosecution in adult criminal court depending upon their alleged offense and their criminal offense history.
2. Provides that a minor within the jurisdiction of the juvenile delinquency court may be sentenced to the Department of Juvenile Facilities or tried as an adult, as specified, if he/she has been charged with one of the following: murder; arson, as specified; robbery; rape with force, violence, or threat of great bodily harm; sodomy by force, violence, duress, menace, or threat of great bodily harm; a lewd or lascivious act on a person under the age of 14; oral copulation by force, violence, duress, menace, or threat of great bodily harm; forcible sexual penetration, as specified; kidnapping for ransom; kidnapping for purposes of robbery; kidnapping with bodily harm; attempted murder; assault with a firearm or destructive device; assault by any means of force likely to produce great bodily injury; discharge of a firearm into an inhabited or occupied building; a specified violent crime against a person over the age of 60; use of a firearm in a crime, as specified; a felony offense in which the minor personally used a weapon specified in existing law; a felony offense of intimidating or dissuading a witness; manufacturing, compounding, or selling one-half ounce or more of a salt or solution of a depressant listed as a controlled substance; a violent felony or gang crime, as specified; escape, by the use of force or violence, from a county juvenile hall, home, ranch, camp, or forestry camp, as specified, if great bodily injury is intentionally inflicted upon an employee of the juvenile facility during the commission of the escape; torture; aggravated mayhem; carjacking, while armed with a dangerous or deadly weapon; kidnapping for purposes of sexual assault; kidnapping during the

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commission of a carjacking; discharging a firearm into a vehicle, as specified, or; voluntary manslaughter.

3. Specifies if prosecution is commenced against a minor as a criminal case as a “direct file” case, which does not require a prior fitness hearing in juvenile court, and the minor is convicted of a “direct file” offense, the minor is required to be sentenced as an adult.
4. Provides, with some exceptions, that when a defendant who was under 18 years of age at the time of the commission of the offense for which the defendant was sentenced to imprisonment for life without the possibility of parole has served at least 15 years of that sentence, the defendant may submit to the sentencing court a petition for recall and resentencing and sets forth the requirements for filing and granting such a petition.
5. Requires BPH to consider the views and interests of the victim when scheduling parole rehearings, and provides that the denial period between rehearings shall be 15, 10, 7, 5 or 3 years as specified. An inmate may request BPH to exercise discretion to advance a set hearing to an earlier date, by submitting a written request to BPH which sets forth new information or a change in circumstances. The BPH has the sole discretion to determine whether to grant or deny a request. An inmate is allowed to make one written request during each three year period following a summary denial or decision of BPH.
6. Requires BPH to meet with each inmate, except as specified, during his/her third year of incarceration for the purpose of reviewing his/her file, making recommendations, and documenting activities and conduct pertinent to granting or withholding post-conviction credit.

This bill:

1. Establishes a youth offender parole hearing which is a hearing by BPH for the purpose of reviewing the parole suitability of any prisoner who was under 18 years of age at the time of his/her controlling offense.
2. Defines “incarceration” as detention in a city or county jail, a local juvenile facility, a mental health facility, a Division of Juvenile Justice facility, or a California Department of Corrections and Rehabilitation facility.

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3. Defines “controlling offense as the offense or enhancement for which any sentencing court imposed the longest term of imprisonment.
4. Provides the following parole mechanism for a person who was convicted of a controlling offense that was committed before the person had attained 18 years of age:
 - A. If the sentence is a determinate sentence, the person shall be eligible for release on parole at a youth offender parole hearing during his/her 15th year of incarceration, unless previously released pursuant to other statutory provisions.
 - B. If the sentence is a life term of less than 25 years to life, the person shall be eligible for release on parole during his/her 20th year of incarceration at a youth offender parole hearing, unless previously released or entitled to an earlier parole consideration hearing pursuant to other statutory provisions.
 - C. If the sentence is a life term of 25 years to life, the person shall be eligible for release on parole during his/her 25th year of incarceration at a youth offender parole hearing, unless previously released or entitled to an earlier parole consideration hearing pursuant to other statutory provisions.
5. Specifies that the youth offender parole hearing to consider release shall provide for a meaningful opportunity to obtain release.
6. Mandates BPH to review and, as necessary, revise existing regulations and adopt new regulations regarding determinations of suitability made pursuant to the provisions of this bill, and other related topics, consistent with relevant case law, in order to provide that meaningful opportunity for release.
7. Provides in assessing growth and maturity, if BPH uses psychological evaluations and risk assessment instruments, those evaluations and instruments shall be administered by licensed psychologists employed by BPH and shall take into consideration the diminished culpability of juveniles as compared to that of adults, the hallmark features of youth, and any subsequent growth and increased maturity of the individual.
8. States that, family members, friends, school personnel, faith leaders, and representatives from community-based organizations with knowledge about the

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individual before the crime or his/her growth and maturity since the time of the crime may submit statements for review by BPH.

9. Clarifies that nothing in this bill is intended to alter the rights of victims at parole hearings.
10. States, if parole is not granted, BPH shall set the time for the subsequent youth offender parole hearing in accordance with existing provisions of law, and in exercising its discretion BPH shall consider the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law.
11. Excludes persons sentenced under the “Three Strikes” law, the “One-Strike” sex law, or sentenced to life in prison without the possibility of parole.
12. Makes ineligible a person to whom the provisions of this bill would otherwise apply, but who, subsequent to attaining 18 years of age, commits an additional crime for which the person is sentenced to life in prison or commits murder, as specified.
13. Sets a deadline of July 1, 2015, for BPH to complete all youth offender parole hearings for individuals who become entitled to have their parole suitability considered at a youth offender parole hearing on the effective date of this bill.
14. Requires BPH in reviewing a prisoner’s parole suitability at a youth offender parole hearing, to give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law.
15. Requires BPH to meet with each inmate during the sixth year prior to the inmate’s minimum eligible parole release date for the purposes of reviewing and documenting the inmate’s activities and conduct pertinent to both parole eligibility and to the granting or withholding of post-conviction credit.
16. Specifies during this consultation, BPH shall provide the inmate information about the parole hearing process, legal factors relevant to his/her suitability or unsuitability for parole, and individualized recommendations for the inmate

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regarding his/her work assignments, rehabilitative programs, and institutional behavior.

17. Requires BPH, within 30 days following the consultation, to issue its positive and negative findings and recommendations to the inmate in writing.
18. States notwithstanding provisions of law requiring specified minimum terms to be served on life sentences before being paroled, a prisoner found suitable for parole pursuant to a youth offender parole hearing shall be paroled regardless of the manner in which BPH sets release dates.
19. Makes various legislative declarations and findings related to youthful offenders.

Background

In *People v. Caballero* (2012) 55 Cal.4th 262, the California Supreme Court held that a determinate sentence that exceeds the expected lifetime (in this case 110 years to life) of the juvenile defendant violates the Eighth Amendment because it effectively denies a juvenile any opportunity to demonstrate rehabilitation. The Court relied on the U.S. Supreme Court's opinions in *Graham v. Florida* (2010) 130 S.Ct. 2011 and *Miller v. Alabama* (2012) 132 S.Ct. 2455, holding that no legitimate penological interest justifies a life without parole sentence for juvenile offenders in non-homicide cases, and that such a sentence violates the Eighth Amendment's prohibition on cruel and unusual punishment.

In its conclusion, the Court states, "Defendants who were sentenced for crimes they committed as juveniles who seek to modify life without parole or equivalent defacto sentences already imposed may file petitions for a writ of habeas corpus in the trial court in order to allow the court to weigh the mitigating evidence in determining the extent of incarceration required before parole hearings."

In light of *People v. Caballero*, it is anticipated that an increased number of inmates serving extended prison terms who were convicted as minors may bring writs of habeas corpus on the basis of cruel and unusual punishment. This bill would serve to establish an alternative process for the review of such cases, as well as for additional cases meeting the eligibility criteria specified in this measure.

CONTINUED

Prior/Similar Legislation

SB 9 (Yee, Chapter 828, Statutes of 2012) provides that a person who was sentenced to life without parole who committed the offense when he/she was under the age of 18 can under specified circumstances seek a review of the sentence after he/she served 15 years in prison.

FISCAL EFFECT: Appropriation: No Fiscal Com.: Yes Local: No

According to the Assembly Appropriations Committee:

- Significant one-time General Fund (GF) costs to BPH, likely in excess of \$2 million by July 1, 2015, to hold additional parole hearings. As this bill requires BPH to hold a hearing by July 1, 2015 for every determinately-sentenced offender who has served more than 15 years for an offense committed before the offender turned 18, and for indeterminately-sentenced inmates who have served 15, 20 or 25 years, as specified, the cost of an additional 1,000 hearings will be in the range of \$2.5 million, assuming a BPH estimate of \$2,500 per hearing.

Annual hearing costs thereafter would likely be in the hundreds of thousands of dollars.

- One time GF costs in the range of \$150,000 to review and re-write regulations, pursuant to specified litigation.
- The above costs will be offset to an unknown degree by state trial court GF savings as a result of an accompanying reduction in writs of Habeas Corpus, by which inmates challenge convictions and/or sentences.
- Potentially significant annual out-year GF savings to the extent inmates are actually paroled earlier following the required hearings. For example, for every 10 inmates per year who are actually paroled as a result of this bill and end up serving 20 rather than 30 years, the annual net savings will exceed \$1.5 million in 10 years (assuming a marginal per capita savings of \$25,000 per inmate, and a per capita parole cost of \$10,000).

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SUPPORT: (Verified 9/6/13)

Friends Committee on Legislation of California (co-source)
Human Rights Watch (co-source)
USC School of Law Post Conviction Clinic (co-source)
Youth Justice Coalition (co-source)
Youth Law Center (co-source)
A Place Called Home
Advancement Project
All of Us or None
All Saints Church Foster Care Project
American Civil Liberties Union
American Friends Service Committee
American Probation and Parole Association
Americans for Tax Reform President, Grover G. Norquist
Amnesty International
Bar Association of San Francisco
Berkeley Organizing Congregations for Action
Black Organizing Project
Boys and Girls Club of San Gabriel Valley
California Attorneys for Criminal Justice
California Catholic Conference, Inc.
California Church IMPACT
California Coalition for Women Prisoners
California Coalition for Youth
California Communities United Institute
California Families to Abolish Solitary Confinement
California Fund for Youth Organizing
California Public Defenders Association
California Teachers Association
Californians for Safety and Justice
Californians United for a Responsible Budget
Campaign for the Fair Sentencing of Youth
Campaign for Youth Justice
Center on Juvenile and Criminal Justice
Children's Defense Fund
City and County of San Francisco, District Attorney George Gascón
City of San Diego, Chief of Police William Lansdowne
County of Los Angeles, Sheriff Leroy D. Baca

CONTINUED

Day One

Disability Rights California
Disability Rights Education & Defense Fund
Dolores Mission Catholic Church
East Bay Children's Law Offices
Equal Justice Society
Everychild Foundation
Former Republican Leader of the California Assembly Pat Nolan
Former Speaker of the U.S. House of Representatives Newt Gingrich
Friends Outside
Healing Justice Coalition
Human Rights Advocates
Jesuits of the California Province
Just Detention International
Justice Fellowship
Justice Not Jails
Justice Now
Juvenile Law Center
Law Office of Donald R. Hammond
Legal Service for Prisoners with Children
Legal Services for Children
Life Support Alliance
Los Angeles Community Action Network
Loyola Law School Center for Juvenile Law and Policy
Mexican American Legal Defense and Education Fund
National Center for Lesbian Rights
National Center for Youth Law
National Juvenile Justice Network
National Partnership for Juvenile Services
Office of Restorative Justice of the Archdiocese of Los Angeles
Pacific Juvenile Defender Center
Prison Law Office
Public Council - Children's Right's Project
Religious Sisters of Charity
Saint Francis Xavier Catholic Church
Saint Mark's United Methodist Church
Santa Clara University
Service Employees International Union Local 1000
Sisters of Mercy U.S. Province

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Sisters of the Company of Mary
Tax Payers for Improving Public Safety
The W. Haywood Burns Institute
The Women's Foundation of California
University of San Francisco Center for Law and Global Justice
University Synagogue
Violence Prevention Coalition of Greater Los Angeles
Yolo County Office of Education
Yolo County Public Defender's Office

OPPOSITION: (Verified 9/6/13)

Anaheim Police Officers Association
Association for Los Angeles Deputy Sheriffs
Association of Orange County Deputy Sheriffs
California Coalition of Law Enforcement Associations
California District Attorneys Association
California Fraternal Order of Police
California Narcotics Officers Association
California Police Chiefs Association
Crime Victims Action Alliance
Crime Victims United
Long Beach Police Officers Association
Los Angeles County District Attorney Jackie Lacey
Los Angeles County Probation Officers Union-AFSME- Local 685
Los Angeles Police Protective League
Los Angeles Professional Peace Officers Association
Riverside Sheriffs Association
Sacramento Deputy Sheriffs Association
Santa Ana Police Officers Association
Southern California Alliance of Law Enforcement

ARGUMENTS IN SUPPORT: According to the author's office:

Piecemeal changes to California law since the 1990s have removed many safeguards and points for review that once existed for youth charged with crimes. Currently, over 6,500 young people in California prisons were under the age of 18 at the time of their crime and prosecuted as adults - many are transferred to the adult criminal justice system without careful

CONTINUED

consideration of their amenability to rehabilitate and demonstrate remorse. The current system provides no viable mechanism for reviewing a case after a young person has served a substantial period of incarceration and can show maturity and improvement.

Existing sentencing laws do not distinguish youth from adults, however, recent court decisions are moving in this direction. The U.S. Supreme Court recently held unconstitutional mandatory life without parole sentences for people under the age of 18, and required courts to consider the youthfulness of defendants facing that sentence (*Miller v. Alabama* (2012)). The California Supreme Court recently ruled in *People v. Caballero* (2012) that a sentence exceeding the life expectancy of a juvenile is the equivalent of life without parole, and unconstitutional in nonhomicide cases. Specifically, the California Supreme Court called for legislative action to establish a review process for cases with lengthy sentences.

Recent scientific evidence on adolescent development and neuroscience show that certain areas of the brain, particularly those that affect judgment and decision-making, do not fully develop until the early 20's. The U.S. Supreme Court stated in its 2005 *Roper v. Simmons* decision, the reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. Moreover, the fact that young adults are still developing means that they are uniquely situated for personal growth and rehabilitation.

SB 260 holds young people responsible for the crimes they committed and creates a parole mechanism in which they must demonstrate remorse and rehabilitation to merit any possible release on parole as determined by BPH.

ARGUMENTS IN OPPOSITION: The Los Angeles County District Attorney's Office states:

We agree that persons who commit crimes before the age of 18 should have a meaningful opportunity to petition for parole based upon demonstrated maturity and rehabilitation. Unfortunately, the recent amendments to SB 260 could have the unintended consequence of releasing dangerous offenders into the community.

CONTINUED

As currently drafted, SB 260 tips the scales toward release of the offender by creating a new standard that requires the parole board to give “great weight” to the “diminished culpability of juveniles as compared to adults, the hallmark features of youth and any subsequent growth and maturity of the prisoner in accordance with relevant case law.

Significantly, “great weight” is expressly given to no other factor, not even the number of victims the prisoner killed or injured, the egregious nature of the offense or the prisoner’s threat to public safety. This is of particular concern in murder, rape and gang cases. Moreover, by giving “great weight” solely to youthfulness factors, SB 260 arguably creates a presumption that the offender who committed a crime as juvenile should be released at the minimum eligible parole date.

Even if the courts do not hold that there is a presumption in favor of release, SB 260 would tip the scales in favor of release by elevating the age at the time of the offense, and subsequent growth and maturity, to be more important than any aggravating factor. This is a clear threat to public safety.

JG:ej 9/6/13 Senate Floor Analyses

SUPPORT/OPPOSITION: SEE ABOVE

**** **END** ****

SENATE COMMITTEE ON APPROPRIATIONS

Senator Ricardo Lara, Chair
2015 - 2016 Regular Session

SB 261 (Hancock) - Youth offender parole hearings

Version: March 24, 2015

Policy Vote: PUB. S. 5 - 2

Urgency: No

Mandate: No

Hearing Date: May 28, 2015

Consultant: Jolie Onodera

SUSPENSE FILE. AS AMENDED.

Bill Summary: SB 261 would expand the youth offender parole process to include persons who committed their crimes before attaining the age of 23, as specified. This bill requires the Board of Parole Hearings (BPH) to complete all parole hearings for eligible individuals as of the effective date of this measure by July 1, 2017.

Fiscal Impact (as approved May 28, 2015):

- Immediately eligible caseload: Significant one-time costs to the BPH of \$1.3 million (General Fund) to complete risk assessments and conduct parole hearings for 800 inmates estimated to be eligible upon the bill's effective date.
- Future caseload: Significant future annual costs, likely in the hundreds of thousands of dollars or greater (General Fund), to conduct hearings for inmates as they become eligible. The magnitude of costs would be dependent upon the rate at which BPH conducts hearings, as there is no timeframe mandated for prospectively eligible inmates. The CDCR estimates an additional 5,600 inmates would be added to the BPH's hearing calendar over the next several years. An additional 3,000 inmates are estimated to be within the BPH's hearing cycle currently and would be eligible to request to advance their next hearing date, as specified.
- Regulations: One-time costs of about \$100,000 to review and re-write regulations.
- Reduced writs: Potential offset to an unknown degree by state trial court savings as a result of an accompanying reduction in writs of Habeas Corpus, by which inmates challenge convictions and/or sentences.
- Future incarceration savings: Potential cost savings of \$0.2 to \$0.5 million (General Fund) for every 20 to 50 inmates released or sentences reduced. Savings would grow as the years they otherwise would have served compound. Over ten years, the savings could increase to \$2 to \$5 million assuming the inmates would have served ten additional years. Minor offsetting increase in parole costs.

Background: Existing law creates the youth offender parole hearing, which is administered by the Board of Parole Hearings (BPH) for the purpose of reviewing the parole suitability of any inmate who was under 18 years of age at the time of his or her controlling offense. (Penal Code (PC) § 3051.)

Existing law provides that the timing for the youth offender parole hearing is dependent on the sentence: if the controlling offense was a determinate sentence, the offender shall be eligible for release after 15 years; if the controlling offense was a life term less than 25 years, the person is eligible for release after 20 years; and, if the controlling offense was 25 years or more, the person is eligible for release after 25 years. (PC § 3051(b).)

Existing law provides that if the youth offender is found suitable for parole at the youthful offender parole hearing, then the youth offender shall be released on parole. (PC § 3051 (e).)

According to the CDCR *April 2015 Status and Benchmark Report to the Three-Judge Court*.

The State continues to implement Senate Bill 260 (2013), which allows inmates whose crimes were committed as minors to appear before the Board of Parole Hearings (the Board) to demonstrate their suitability for release after serving at least fifteen years of their sentence. From January 1, 2014 through March 31, 2015, the Board held 534 youth offender hearings, resulting in 158 grants, 328 denials, 46 stipulations to unsuitability, and 2 split votes that required referral to the full Board for further consideration. An additional 225 were scheduled during this time period, but were waived, postponed, continued, or cancelled. All available inmates who were immediately eligible for a hearing when the law took effect on January 1, 2014, have had a hearing date or have one scheduled on or before July 1, 2015, as required by the terms of Senate Bill 260. In addition, nearly all youth offenders who received a grant prior to January 1, 2014, have reached their minimum eligible parole dates and have been processed for release from their life term by the Board.

Proposed Law: This bill would extend the existing parole process for persons sentenced to prison for crimes committed before attaining 18 years of age, to persons sentenced to prison for crimes committed before attaining 23 years of age, as specified. This bill provides that those eligible for a youthful offender parole hearing on the effective date of this bill shall have their hearing by July 1, 2017.

Prior Legislation: SB 260 (Hancock) Chapter 312/2013 established a parole process for persons sentenced to prison for crimes committed before attaining 18 years of age.

AB 1276 (Bloom) Chapter 590/2014 requires the CDCR to conduct a youth offender Institutional Classification Committee (ICC) review at reception to provide special classification consideration for every youth offender.

SB 9 (Yee) Chapter 828/2012 authorizes a person who was under 18 years of age at the time of committing an offense for which the person was sentenced to LWOP to submit a petition for recall and re-sentencing to the sentencing court, as specified.

SB 1223 (Kuehl) 2004 would have authorized a court to review and suspend or reduce the sentence of a person convicted as a minor in adult criminal court and sentenced to state prison after the person has either served 10 years in prison or attained the age of 25. This bill was held on the Suspense File of the Assembly Appropriations Committee.

Staff Comments: The CDCR has indicated one-time near term costs of approximately \$4.6 million assuming approximately 800 inmates would immediately be eligible for a parole hearing. The CDCR estimates that an additional 5,600 inmates would be added to the BPH's hearing calendar over the next several years. The BPH would be required to give these inmates a consultation about five years prior to their initial parole hearing. An additional 3,000 inmates are estimated to already be within the BPH's hearing cycle

and would be eligible to request to advance their next hearing date based on the requirement for the BPH to give “great weight” to the factors of youth, their growth and maturity since the crime.

Components of the one-time \$4.6 million cost for the 800 immediately eligible inmates:

Risk Assessments: The BPH would need to complete 800 comprehensive risk assessments for the backlog of hearings over the course of eight months at an estimated cost of \$2.7 million.

Interpreters: Minor costs of less than \$40,000 to provide this service for a small percentage of the 800 hearings.

Transcripts: At an average cost of \$570 per hearing, and assuming 10 percent of the 800 cases will be postponed or continued, transcription services would cost approximately \$400,000.

State-appointed counsel: The BPH is required to provide each inmate with counsel. State-appointed attorneys receive \$400 per hearing. For 800 hearings, the cost would be \$320,000.

Commissioners and Deputy Commissioners: To handle an additional 100 hearings per month, it is estimated the BPH would require additional resources at a cost of about \$1.1 million.

Attorney III: To dedicate one staff, for six months, to review each possible youth offender scheduled for a hearing for eligibility as a youth offender and to respond to inmate counsel on individual cases in which the inmate’s status as a youth offender is in question. In many cases, determining eligibility requires the BPH to obtain birth certificates and additional court sentencing documents. The BPH would, therefore, request funding for six months to handle this additional workload at a cost of \$85,000.

CDCR indicates this bill would create substantial ongoing workload due to the increase in consultations the BPH would be required to conduct and additional hearings added to the BPH hearing calendar in the future as a result. Other ongoing costs would include increases in processing inmate petitions to advance hearing dates, conducting administrative reviews to advance hearing dates, and correctional counselor duties for parole hearings. Finally, the BPH and CDCR indicate the need to modify existing automation systems to process offenders under the provisions of this bill. While the total costs could not be quantified at the time of this analysis, they would likely be substantial.

The costs of this measure would be offset in whole or in part by potentially significant future costs savings to the extent a number of offenders are granted parole and released as a result of this measure, resulting in reduced incarceration costs that otherwise would have been incurred under existing law.

Author amendments (as adopted May 28, 2015):

- Extend the time period within which parole hearings may be completed for individuals sentenced to determinate terms to July 1, 2021.

- Require BPH to conduct the consultation by July 1, 2017, for all individuals sentenced to determinate terms and who become entitled to have their parole suitability considered at a youth offender parole hearing.

-- END --

Date of Hearing: June 30, 2015
Counsel: Stella Choe

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Bill Quirk, Chair

SB 261 (Hancock) – As Amended June 1, 2015

SUMMARY: Expands the youth offender parole process, a parole process for persons sentenced to lengthy prison terms for crimes committed before attaining 18 years of age, to include those who have committed their crimes before attaining the age of 23. Specifically, **this bill:**

- 1) Provides that those with indeterminate sentences who are eligible for a youth offender parole hearing on the effective date of this bill shall have their hearing by July 1, 2017.
- 2) States that those with determinate sentences who are eligible for a youth offender parole hearing on the effective date of this bill shall have their hearing by July 1, 2021, and shall have their consultation with the Board of Parole (BPH) before July 1, 2017.

EXISTING LAW:

- 1) Establishes a youth offender parole hearing which is a hearing by BPH for the purpose of reviewing the parole suitability of any prisoner who was under 18 years of age at the time of his or her controlling offense. (Pen. Code, § 3051.)
- 2) Provides the following parole mechanism for a person who was convicted of a controlling offense that was committed before the person had attained 18 years of age:
 - a) If the controlling offense was a determinate sentence the offender shall be eligible for release after 15 years;
 - b) If the controlling offense was a life term less than 25 years then the person is eligible for release after 20 years; and,
 - c) If the controlling offense was a life term of 25 years to life then the person is eligible for release after 25 years. (Pen. Code, § 3051, subd. (b).)
- 3) Sets a deadline of July 1, 2015, for BPH to complete all youth offender parole hearings for individuals who become entitled to have their parole suitability considered at a youth offender parole hearing on the effective date of the statute that established youth offender parole hearings. (Pen. Code, § 3051, subd. (i).)
- 4) Provides that in reviewing a prisoner's suitability for parole in a youthful offender parole hearing, the BPH shall give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law. (Penal Code § 4801 (c).)

FISCAL EFFECT: Unknown.

COMMENTS:

- 1) **Author's Statement:** According to the author, "Much like the existing youth offender process, SB 261 holds young people accountable and responsible for what they did. They must serve a minimum of 15 to 25 years in prison depending on their offense, and must demonstrate remorse, maturity, and rehabilitation to be suitable for parole.

"This reflects science, law, and common sense. Recent neurological research shows that cognitive brain development continues well beyond age 18 and into early adulthood. For boys and young men in particular, this process continues into the mid-20s. The parts of the brain that are still developing during this process affect judgment and decision-making, and are highly relevant to criminal behavior and culpability. Recent US Supreme Court cases including *Roper v. Simmons*, *Graham v. Florida*, and *Miller v. Alabama* recognize the neurological difference between youth and adults. The fact that youth are still developing makes them especially capable of personal development and growth.

"The State of California recognizes this as well. State law provides youth with foster care services until age 21. It extends Division of Juvenile Justice jurisdiction until age 23. It also provides special opportunities for youth in our state prison system through age 25.

"To be clear: SB 261 is by no means a 'free ticket' for release. There is no mandate to a reduced sentence or release on parole, only the opportunity for a parole hearing after serving at least 15 to 25 years in state prison. Even after that period there is no guarantee for a grant of parole. The Board still has to examine each inmate's suitability for parole, the criteria for which this bill does not change.

"SB 261 will give young adults in our prisons hope and incentive to improve their lives."

- 2) **Review of Case Law: Juvenile Sentencing:** In 2010, the United States Supreme Court ruled that it is unconstitutional to sentence a youth who did not commit homicide to a sentence of life without the possibility of parole (LWOP). (*Graham v. Florida* (2010) 130 S.Ct. 2011.) The Court discussed the fundamental differences between a juvenile and adult offender and reasserted its earlier findings from *Roper v. Simmons* (2005) 543 U.S. 551, that juveniles have lessened culpability than adults due to those differences. The Court stated that "life without parole is an especially harsh punishment for a juvenile," noting that a juvenile offender "will on average serve more years and a greater percentage of his life in prison than an adult offender." (*Graham, supra*, 130 S.Ct. at 2016.) However, the Court stressed that "while the Eighth Amendment forbids a State from imposing a life without parole sentence on a juvenile nonhomicide offender, it does not require the State to release that offender during his natural life. Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives. The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. It does forbid States from making the judgment at the outset that those offenders never will be fit to reenter society." (*Id.* at pg. 2031.)

In 2012, the California Supreme Court ruled that sentencing a juvenile offender for a non-homicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender's natural life expectancy constitutes cruel and unusual punishment in violation of the Eighth Amendment. (*People v. Caballero* (2012) 55 Cal. 4th 262, 268.) The Court stated that "the state may not deprive [juveniles] at sentencing of a meaningful opportunity to demonstrate their rehabilitation and fitness to reenter society in the future." (*Ibid.*) Citing *Graham, supra*, the Court stated "the sentencing court must consider all mitigating circumstances attendant in the juvenile's crime and life, including but not limited to his or her chronological age at the time of the crime, whether the juvenile offender was a direct perpetrator or an aider and abettor, and his or her physical and mental development, so that it can impose a time when the juvenile offender will be able to seek parole from the parole board." (*Id.* at pp. 268-269.) In *Caballero*, the defendant was convicted of three counts of attempted murder and received a sentence of 110-years-to-life. Relying on the reasoning in the *Graham* case, the Court found that while the juvenile did not receive a sentence of LWOP, trial court's sentence effectively deprives the defendant of any "realistic opportunity to obtain release" from prison during his or her expected lifetime, thus the sentence is a de facto LWOP sentence and violates the Eighth Amendment's prohibition against cruel and unusual punishment. (*Id.* at pg. 268.)

The court in *Caballero, supra*, advised that "[d]efendants who were sentenced for crimes they committed as juveniles who seek to modify life without parole or equivalent de facto sentences already imposed may file petitions for writs of habeas corpus in the trial court in order to allow the court to weigh the mitigating evidence in determining the extent of incarceration required before parole hearings." (*Id.* at p. 269.) The Court did not provide a precise timeframe for setting these future parole hearings, but stressed that "the sentence must not violate the defendant's Eighth Amendment rights and must provide [the defendant with] a 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation' under *Graham's* mandate." (*Ibid.*)

While the court in *Caballero* pointed out that these inmates may file petitions for writs of habeas corpus in the trial court, the court also urged the Legislature to establish a parole eligibility mechanism for an individual sentenced to a de facto life term for crimes committed as a juvenile. SB 260 (Hancock), Chapter 312, Statutes of 2013, established a parole process for inmates who were sentenced to lengthy prison terms for crimes committed when they were under the age of 18, rather than requiring the inmate to file a writ of habeas corpus and appear before the trial court for resentencing.

This bill seeks to expand those eligible for a youth offender parole hearing to those whose committing offense occurred before they reached the age of 23. The rationale, as expressed by the author and supporters of this bill, is that research shows that cognitive brain development continues well beyond age 18 and into early adulthood. The parts of the brain that are still developing during this process affect judgment and decision-making, and are highly relevant to criminal behavior and culpability. (See Johnson, et al., *Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy*, Journal of Adolescent Health (Sept. 2009); National Institute of Mental Health, *The Teen Brain: Still Under Construction* (2011).)

- 3) **Youth Offender Parole Hearings Status Update:** According to the State's most recent status report on measures being taken to reduce the prison population pursuant to the three-

judge panel's February 10, 2014 order:

"The State continues to implement Senate Bill 260 (2013), which allows inmates whose crimes were committed as minors to appear before the Board of Parole Hearings (the Board) to demonstrate their suitability for release after serving at least fifteen years of their sentence. From January 1, 2014 through May 31, 2015, the Board held 664 youth offender hearings, resulting in 189 grants, 410 denials, 63 stipulations to unsuitability, and 2 split votes that required referral to the full Board for further consideration. An additional 318 were scheduled during this time period, but were waived, postponed, continued, or cancelled. All available inmates who were immediately eligible for a hearing when the law took effect on January 1, 2014 have had a hearing date or have one scheduled on or before July 1, 2015, as required by the terms of Senate Bill 260. In addition, all youth offenders who received a grant prior to January 1, 2014, have reached their minimum eligible parole dates and have been processed for release from their life term by the Board." (Defendants' April 2015 Status Report In Response to February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown.*)

- 4) **Argument in Support:** According to the *Anti-Recidivism Coalition* (ARC), a sponsor of this bill, "In 2013, the Governor signed SB 260 recognizing that young people are different from adults and deserve a special consideration in the parole process. This law codified California Penal Code §3051, providing individuals who were under the age of 18 at the time of their crime and have served between 15 and 25 years in prison, the opportunity to demonstrate accountability and rehabilitation to the parole board. This law was based on the research and evidence that the brain is still developing into early adulthood, particularly in the regions of the brain affecting judgment, emotion regulation, decision-making, and long-term consequences. While pointing out the vulnerabilities that stem from this developmental stage, SB 260 also points out the unique opportunity for personal growth and rehabilitation. SB 261 makes this same recognition, while also noting that young adults are still developing neurologically and emotionally past the age of 18.

"With the passage of SB 260, motivation to focus on rehabilitation is incentivized. The ARC communicates with over 500 inmates currently incarcerated and receives calls and letters daily about the impact of this legislation. One inmate wrote, 'I never thought this bill was real until I met you guys. There are always rumors about different bills in here, but no one ever believes it. This bill has given so many of us hope for the first time since being here.' Another ARC Member, currently home on SB 260, also explains the increased safety caused by this bill, 'you don't understand—this bill spread hope to people who had lost all. You had guys who were dropping out of gangs and enrolling into school, because now they had something to work toward.' SB 260 increases motivation to focus on rehabilitation and gives individuals a meaningful chance at parole.

"The California Department of Corrections and Rehabilitation (CDCR) estimates there are just over 16,000 people who were between 18-22 years old at the time of their crimes and sentenced to prison terms of 15 years or more. This bill has the potential to affect a much larger population, while continuing to move toward a system of rehabilitation. There is no question that people who commit crimes should be held accountable, but punishment should also reflect an individual's capacity for personal growth and maturity. To do otherwise disregards the potential for young adults to change and the dramatic

physical and psychological differences between young people and older adults."

- 5) **Argument in Opposition:** According to the *California District Attorneys Association*, "Two years ago, we opposed SB 260 (Chapter 312, Statutes of 2013), which established the youth offender parole process for individuals who were under 18 years of age at the time of their controlling offense. We renew our opposition to this bill, which seeks to expand that process to anyone under 23 at the time of their offense.

"The California Supreme Court ruled in *People v. Caballero* (2012) 55 Cal.4th 262, 282 that a juvenile offender sentenced to a de facto term of like imprisonment must be afforded a 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.' The court additionally urged the Legislature to 'enact legislation establishing a parole mechanism that provides a defendant serving a de facto life sentence without the possibility of parole for nonhomicide crimes that he or she committed as a juvenile with the opportunity to obtain release on a showing of rehabilitation and maturity.

"The key phrase in that opinion is 'committed as a juvenile.' All of the major existing case law on juveniles who receive long sentences (*Miller v. Alabama*, 567 U.S. ___ (2012); *Graham v. Florida*, 560 U.S. ___ (2010); and *Caballero* itself) involves individuals who were under 18 at the time of their offense, and received a lengthy prison sentence. We are unaware of any case law under which courts have considered someone a juvenile for an offense committed after they turned 18, but before they reached 23 years of age."

6) **Prior Legislation:**

- a) SB 260 (Hancock), Chapter 312, Statutes of 2013, established a youth offender parole hearing which is a hearing by BPH for the purpose of reviewing the parole suitability of any prisoner who was under 18 years of age at the time of his/her controlling offense.
- b) SB 9 (Yee), Chapter 828, Statutes of 2012, authorizes a prisoner who was under 18 years of age at the time of committing an offense for which the prisoner was sentenced to LWOP to submit a petition for recall and resentencing to the sentencing court, and to the prosecuting agency, as specified.
- c) SB 399 (Yee), of the 2009-10 Legislative Session, was substantially similar to SB 9. SB 399 failed passage on Assembly Floor.
- d) SB 999 (Yee), of the 2007-08 Legislative Session, would have eliminated the LWOP sentence thus making the sentence for first-degree murder with special circumstances by a defendant under 18 years of age 25-years-to-life. SB 999 failed passage on Senate Floor.
- e) SB 1223 (Kuehl), of the 2003-04 Legislative Session, would have authorized a court to review the sentence of a person convicted as a minor in adult criminal court and sentenced to state prison after the person has either served 10 years or attained the age of 25. SB 1223 failed passage in Assembly Appropriations Committee.

REGISTERED SUPPORT / OPPOSITION:

Support

Ant-Recidivism Coalition (Sponsor)
Human Rights Watch (Sponsor)
Friends Committee on Legislation of California (Co-Sponsor)
Youth Justice Coalition (Co-Sponsor)
Alliance for Boys and Men of Color
American Civil Liberties Union of California
California Attorneys for Criminal Justice
California Catholic Conference, Inc.
Californians for Safety and Justice
California Public Defenders Association
Center on Juvenile and Criminal Justice
Children's Defense Fund – California
Drug Policy Alliance
Everychild Foundation
Islamic Shura Council of Southern California
Justice Not Jails
Kehillat Israel Synagogue
Legal Services for Prisoners with Children
Life Support Alliance
Los Angeles Regional Reentry Partnership
National Association of Social Workers – California Chapter
National Center for Youth Law
National Council on Crime and Delinquency
Newt Gingrich, Former Speaker of the U.S. House of Representatives
PolicyLink
Prison Law Office
Project Kinship
Public Counsel
Revolutionary Releasing
Root & Rebound
San Francisco District Attorney's Office
Violence Prevention Coalition of Greater Los Angeles
Youth ALIVE!
Youth Law Center

Opposition

California District Attorneys' Association
Crime Victims Action Alliance
San Diego District Attorney's Office

Analysis Prepared by: Stella Choe / PUB. S. / (916) 319-3744

Date of Hearing: June 27, 2017
Counsel: Cheryl Anderson

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Reginald Byron Jones-Sawyer, Sr., Chair

SB 394 (Lara) – As Amended May 26, 2017

SUMMARY: Makes a person who was convicted of a controlling offense that was committed before the person had attained 18 years of age and for which a life sentence without the possibility of parole (LWOP) has been imposed eligible for a youth offender parole hearing during his or her 25th year of incarceration. Specifically, **this bill:**

- 1) Provides that a defendant who was convicted of a controlling offense that was committed before he or she had attained 18 years of age and for which the sentence is LWOP shall be eligible for release on parole by the board during his or her 25th year of incarceration at a youth offender parole hearing unless previously released or entitled to an earlier parole consideration hearing pursuant to other statutory provisions.
- 2) Clarifies that youth offender parole does not apply to those sentenced to LWOP for a controlling offense that was committed after the person had attained 18 years of age.
- 3) Sets a deadline of July 1, 2020, for the Board of Parole Hearings (BPH) to complete all youth offender parole hearings for individuals who were sentenced to LWOP and who are or will be entitled to have their parole suitability considered at a youth offender parole hearing before July 1, 2020.

EXISTING LAW:

- 1) Provides, with some exceptions, that when a defendant who was under 18 years of age at the time of the commission of the offense for which the defendant was sentenced to imprisonment for LWOP has served at least 15 years of that sentence, the defendant may submit to the sentencing court a petition for recall and resentencing and sets forth the requirements for filing and granting such a petition. (Pen. Code, § 1170, subd. (d)(2).)
- 2) Provides for a youth offender parole hearing which is a hearing by the board for the purpose of reviewing the parole suitability of any prisoner who was under 23 years of age at the time of his or her controlling offense. (Pen. Code, § 3051.)
- 3) Defines “controlling offense” as the offense or enhancement for which any sentencing court imposed the longest term of imprisonment. (Pen. Code, § 3051, subd. (a)(2)(B).)
- 4) Provides the following parole mechanism for a person who was convicted of a controlling offense that was committed before the person had attained 23 years of age:
 - a) If the controlling offense was a determinate sentence the offender is eligible for release during his or 15th year of incarceration;

- b) If the controlling offense was a life term less than 25 years to life then the person is eligible for release during his or her 20th year of incarceration; and,
 - c) If the controlling offense was a life term of 25 years to life then the person is eligible for release during his or her 25th year of incarceration. (Pen. Code, § 3051, subd. (b).)
- 5) Provides that if the youth offender is found suitable for parole at the youthful offender parole hearing then the youth offender shall be released on parole. (Pen. Code, § 3051, subd. (d).)
 - 6) Provides that in reviewing a prisoner's suitability for parole in a youth offender parole hearing, the board shall give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law. (Pen. Code, §§ 3051, subd. (d) & 4801, subd. (c).)
 - 7) Excludes from the youthful offender parole provisions an individual to whom this section would otherwise apply, but who, subsequent to attaining 23 years of age, commits an additional crime for which malice aforethought is a necessary element of the crime or for which the individual is sentenced to life in prison. (Pen. Code § 3051, subd. (h).) The youth offender parole provisions also do not apply to inmates who were sentenced under the three strikes law or the one strike sex crimes law, or who were sentenced to LWOP. (*Ibid.*)
 - 8) Sets a deadline of July 1, 2015, for BPH to complete all youth offender parole hearings for individuals who become entitled to have their parole suitability considered at a youth offender parole hearing prior to the effective date of the statute that established youth offender parole hearings. (Pen. Code, § 3051, subd. (i)(1).)
 - 9) Provides that those with indeterminate sentences who are eligible for a youth offender parole hearing on the effective date of the statute that raised the eligibility cut off from 18 to 23 years or age shall have their hearing by July 1, 2017. (Pen. Code § 3051, subd. (i)(2).)
 - 10) Provides that those with determinate sentences who are eligible for a youth offender parole hearing on the effective date of the statute that raised the eligibility cut off from 18 to 23 years or age shall have their hearing by July 1, 2021, and shall have their consultation, as specified, with BPH before July 1, 2017. (Pen. Code § 3051, subd. (i)(3).)

FISCAL EFFECT: Unknown

COMMENTS:

- 1) **Author's Statement:** According to the author, "California law permits youth under the age of 18 to be sentenced to life in prison without the possibility of parole. The U.S. is the only country in the world to impose this sentence on children. In *Miller v. Alabama* (2012), the U.S. Supreme Court ruled that the Eighth Amendment's prohibition against cruel and unusual punishment forbids the mandatory sentencing of life in prison without the possibility of parole for juvenile offenders. Last year in *Montgomery v. Louisiana* (2016), the U.S. Supreme Court held that the *Miller* ruling applies retroactively.

“SB 394 will remedy the now unconstitutional juvenile sentences of life without the possibility of parole. The bill would allow the approximate 300 juveniles with LWOP cases to be eligible for an initial parole hearing after 25 years of incarceration. There would be no guarantee of parole, only an opportunity for the person to work hard and try to earn the chance for parole.”

- 2) **Evolution of the Law Regarding Lengthy Sentences for Juveniles -- United States and California Supreme Court Decisions:** In 2010, the United States Supreme Court ruled that it is unconstitutional to sentence a youth who did not commit homicide to LWOP. (*Graham v. Florida* (2010) 540 U.S. 48 [130 S.Ct. 2011] (*Graham*)). The Court discussed the fundamental differences between a juvenile and adult offender and reasserted its earlier findings from *Roper v. Simmons* (2005) 543 U.S. 551, that juveniles have lessened culpability than adults due to those differences. The Court stated that “life without parole is an especially harsh punishment for a juvenile,” noting that a juvenile offender “will on average serve more years and a greater percentage of his life in prison than an adult offender.” (*Graham v. Florida, supra*, 540 U.S. at pp. 48-51.)

In *Miller v. Alabama* (2012) 567 U.S. 460 [132 S.Ct. 2455] (*Miller*), the United States Supreme Court further held the Eighth Amendment forbids a state from *mandating* the imposition of an LWOP sentence on a juvenile homicide offender. (*Id.* at p. ____ [132 S.Ct. at p. 2469].) The court concluded: “Although we do not foreclose a sentencer’s ability to [impose an LWOP sentence on a juvenile] in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.” (*Id.* at p. ____ [132 S.Ct. at p. 2469].)

Consistent with these decisions, in *People v. Caballero* (2012) 55 Cal.4th 262 (*Caballero*), the California Supreme Court ruled that sentencing a juvenile offender for a non-homicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender’s natural life expectancy – i.e., the functional equivalent of an LWOP sentence – constitutes cruel and unusual punishment in violation of the Eighth Amendment. (*Id.* at p. 268.) A juvenile offender must be provided a “meaningful opportunity to demonstrate their rehabilitation and fitness to reenter society in the future.” (*Ibid.*)

The Court in *Caballero* advised that “[d]efendants who were sentenced for crimes they committed as juveniles who seek to modify life without parole or equivalent de facto sentences already imposed may file petitions for writs of habeas corpus in the trial court in order to allow the court to weigh the mitigating evidence in determining the extent of incarceration required before parole hearings.” (*People v. Caballero, supra*, 55 Cal.4th at p. 269.) The Court did not provide a precise timeframe for setting these future parole hearings, but stressed that “the sentence must not violate the defendant’s Eighth Amendment rights and must provide [the defendant with] a ‘meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation’ under *Graham’s* mandate.” (*Ibid.*)

While the court in *Caballero* pointed out that these inmates may file petitions for writs of habeas corpus in the trial court, the court also urged the Legislature to establish a parole eligibility mechanism for an individual sentenced to a de facto life term for crimes committed as a juvenile. (*People v. Caballero, supra*, 55 Cal.4th at p. 269, fn. 5.)

- 3) **Youth Offender Parole Provisions in Accordance with United States and California Supreme Court Decisions:** In accordance with the decisions of the United States Supreme Court in *Graham v. Florida*, *supra*, 560 U.S. 48, and *Miller v. Alabama*, *supra*, ___ U.S. ___ [132 S.Ct. 2455], and the California Supreme Court's urging in *People v. Caballero*, *supra*, 55 Cal.4th 262, SB 260 (Hancock), Chapter 312, Statutes of 2013, established a parole eligibility mechanism for individuals sentenced to lengthy determinate or life terms for crimes committed when they were juveniles. (Pen. Code, § 3051.) Under the youth offender parole process created by SB 260, the person has an opportunity for a parole hearing after having served 15, 20, or 25 years of incarceration depending on their controlling offense. (Pen. Code, § 3051.) SB 261 (Hancock), Chapter 471, Statutes of 2015, expanded those eligible for a youth offender parole hearing to those whose controlling offense occurred before they reached the age of 23. (Pen. Code, § 3051.)

In *People v. Franklin* (2016) 63 Cal.4th 261, the California Supreme Court held the enactment of Penal Code section 3051 satisfies the requirement of *Miller-Caballero* that a defendant who was a minor at the time of an offense have a reasonable opportunity to gain release during his or her natural lifetime because it requires that the defendant receive a parole hearing during his 25th year of incarceration. (See also *In re Kirchner* (2017) 2 Cal.5th 1040, 1049, fn. 4.)

As relevant here, the youth offender parole provisions expressly exclude a defendant who has been sentenced to LWOP. (*In re Kirchner*, *supra*, 2 Cal.5th at p. 1049, fn. 4.)

- 4) **Recall and Resentencing Provisions for Juveniles Sentenced to LWOP:** SB 9 (Yee) Chapter 828, Statutes of 2012, created a recall and resentencing process for juveniles sentenced to LWOP. It provides that a defendant who was under 18 years of age at the time of the offense, and who was sentenced to LWOP, may submit a petition for recall and resentencing after having served at least 15 years of the sentence, except as specified.¹ A court must find by a preponderance of the evidence that statements in the petition are true and can then hold a resentencing hearing. (Pen. Code, § 1170, subd. (d)(2).) If the petition is denied, the person is given additional chances for resentencing after 20 and then 24 years of incarceration. (Pen. Code, § 1170, subd. (d)(2)(H).) The recall and resentencing provision is retroactive. (Pen. Code, § 1170, subd. (d)(2)(J).)

The recall and resentencing provision of SB 9 as codified in Penal Code section 1170, subdivision (d)(2), has been found to be an inadequate remedy for a *Miller* violation. (*In re Kirchner*, *supra*, 2 Cal.5th at pp. 1049-1052 [Section 1170, subd. (d)(2), which provides an avenue for juvenile offenders serving LWOP terms to seek resentencing, does not provide an adequate remedy at law for *Miller* error; the inquiry under § 1170, subd. (d)(2), is not designed to address *Miller* error, and will not necessarily provide a defendant with the lawful sentence that *Miller* requires.]

- 5) **Need for this Bill:** In *Montgomery v. Louisiana* (2016) ___ U.S. ___ [136 S.Ct. 718] (*Montgomery*), the United States Supreme Court held that *Miller* announced a substantive

¹ A person is not eligible for recall and resentencing if it was pled and proved that he or she tortured the victim or the victim was a public safety official, another law enforcement, or a firefighter. (Pen. Code, § 1170, subd. (d)(2)(ii); *In re Kirchner*, *supra*, 2 Cal.5th at p. 1049.)

rule of constitutional law that applies retroactively. (*Id.* at p. 736.) The decision noted that giving *Miller* retroactive effect would not be too burdensome because states could simply give affected prisoners parole hearings, explaining, “Giving *Miller* retroactive effect, moreover, does not require States to relitigate sentences, let alone convictions, in every case where a juvenile offender received mandatory life without parole. A State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them. See, e.g., Wyo. Stat. Ann. § 6-10-301(c) (2013) (juvenile homicide offenders eligible for parole after 25 years). Allowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment.” (*Montgomery v. Louisiana, supra*, ___ U.S. at p. ___ [136 S.Ct. at p. 736].)

SB 394 applies the youth offender parole process to juveniles sentenced to LWOP who were under 18 years of age at the time of the controlling offense. This bill provides that they become eligible for a parole hearing after having served 25 years of incarceration. This is in line with the United States Supreme Court’s suggestion of parole consideration as a remedy for a *Miller* violation. (*Montgomery v. Louisiana, supra*, ___ U.S. at p. ___ [136 S.Ct. at p. 736].)

6) Arguments in Support:

- a) According to the *Anti-Recidivism Coalition*, this bill, “The United States is the only country in the world that imposes life without parole on youth under the age of 18. We support SB 394 because we believe the US should comply with international human rights laws and norms. In the United States, there are more than 2,500 youth who have been sentenced to life without parole; here in California there are at least 300. In the rest of the world combined, there are none. This extreme punishment is a violation of international law and fundamental human rights.

“Punishment should be proportionate to culpability –it must reflect the capacity of young people to change and mature, and it should promote rehabilitation. Youth who commit crimes should be held accountable. However, when California condemns a young person to a life behind bars, it disregards the human capacity for rehabilitation, the enhanced ability of young people to grow and change, and the very real physical and psychological differences between children and adults. Senate Bill 394 ensures that youth offenders will face severe punishment for their crimes, but it also gives them hope and the chance to work toward the possibility of parole.

“California’s use of life without parole sentences for youth is particularly unjust. Racial disparities in the imposition of this sentence are among the worst in the country. In California, African American youth are sentenced to life without parole at a rate that is 18 times that of white youth. In this state, in 56% of the cases in which a youth is sentenced to life without parole had an adult codefendant, the adult got a lesser sentence than the youth. Finally, in 45% of California cases surveyed, youth sentenced to life without parole did not physically commit a murder, but instead were convicted of their role under the felony murder rule or aiding and abetting law.”

b) The *Pacific Juvenile Defender Center*, a Co-sponsor of this bill, notes: “SB 394 is not a ‘get out of jail free’ card. It requires that the person serve 25 years in prison before even becoming eligible for parole. In other words, a 17 year-old would be 42 years old before becoming qualified for a hearing. Even then, the Parole Board might well decide that they still pose a danger to the public and should not be released. This will remain an astoundingly long sentence for a teenager, but having the SB 394 provision for eventual parole hearings will give young people some hope and incentive to work toward release. As the Supreme Court observed, “The juvenile should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential. (*Graham v. Florida* (2010) 560 US 48, 79) SB 394 would provide that opportunity.”

7) **Argument in Opposition:** According to the *California District Attorneys Association*, “It seems neither right, nor proportional, to make juveniles sentenced to LWOP eligible for parole in the 25th year of incarceration, when juveniles and youth sentenced to the lesser term of 25 years to life, are eligible for parole at the same time – in the 25th year.”

“SB 394 also fails to take into account that a juvenile sentenced to LWOP in the last few years may have already had a *Miller/Montgomery* compliant hearing. If they have, and the court still chose LWOP after considering the appropriate factors, we do not believe the defendant should be eligible for parole.”

8) **Related Legislation:** AB 1308 (Stone) would expand the youth offender parole process, a parole process for persons sentenced to lengthy prison terms for crimes committed before attaining 23 years of age, to include those who committed their crimes when they were 25 years of age or younger. AB 1308 has been referred to the Senate Committee on Public Safety.

9) **Prior Legislation:**

a) SB 261 (Hancock), Chapter 471, Statutes of 2015, expanded the youth offender parole process, a parole process for persons sentenced to lengthy prison terms for crimes committed before attaining 18 years of age, to include those who have committed their crimes before attaining the age of 23

b) SB 260 (Hancock), Chapter 312, Statutes of 2013, established a youth offender parole hearing which is a hearing by BPH for the purpose of reviewing the parole suitability of a prisoner who was under 18 years of age at the time of his/her controlling offense.

c) SB 9 (Yee), Chapter 828, Statutes of 2012, authorized a prisoner who was under 18 years of age at the time of committing an offense for which the prisoner was sentenced to LWOP to submit a petition for recall and resentencing to the sentencing court, and to the prosecuting agency, as specified.

d) SB 399 (Yee), of the 2009-2010 Legislative Session, would have authorized a prisoner who was under 18 years of age at the time of committing an offense for which the prisoner was sentenced to LWOP to submit a petition for recall and resentencing to the sentencing court, and to the prosecuting agency, as specified. SB 399 failed passage in the Assembly.

REGISTERED SUPPORT / OPPOSITION:

Support

Anti-Recidivism Coalition (Co-sponsor)
#cut50 (Co-sponsor)
Human Rights Watch (Co-sponsor)
National Center for Youth Law (Co-sponsor)
Pacific Juvenile Defender Center (Co-sponsor)
Youth Justice Coalition (Co-sponsor)
All Saints Church Foster Care Project
American Civil Liberties Union
American Friends Service Committee
Asian Law Alliance
California Attorneys for Criminal Justice
California Catholic Conference
California Coalition for Youth
California Public Defenders Association
Campaign for the Fair Sentencing of Youth
Center on Juvenile and Criminal Justice
Children's Defense Fund-California
Courage Campaign
Equal Justice Society
Fair Chance Project
Felony Murder Elimination Project
Friends Committee on Legislation
Healing Dialogue and Action
National Association of Social Workers
Silicon Valley De-Bug
USC Gould School of Law
W. Haywood Burns Institute
Young Women's Freedom Center

2 Private Individuals

Opposition

California District Attorneys Association
San Diego County District Attorney

Analysis Prepared by: Cheryl Anderson / PUB. S. / (916) 319-3744

UNFINISHED BUSINESS

Bill No: SB 394
Author: Lara (D) and Mitchell (D), et al.
Amended: 8/31/17
Vote: 21

SENATE PUBLIC SAFETY COMMITTEE: 5-2, 3/21/17
AYES: Skinner, Bradford, Jackson, Mitchell, Wiener
NOES: Anderson, Stone

SENATE APPROPRIATIONS COMMITTEE: 5-2, 5/25/17
AYES: Lara, Beall, Bradford, Hill, Wiener
NOES: Bates, Nielsen

SENATE FLOOR: 28-12, 5/31/17
AYES: Allen, Atkins, Beall, Bradford, Cannella, De León, Dodd, Galgiani,
Hernandez, Hertzberg, Hill, Hueso, Jackson, Lara, Leyva, McGuire, Mendoza,
Mitchell, Monning, Newman, Pan, Portantino, Roth, Skinner, Stern,
Wieckowski, Wiener, Wilk
NOES: Anderson, Bates, Berryhill, Fuller, Gaines, Glazer, Moorlach, Morrell,
Nguyen, Nielsen, Stone, Vidak

ASSEMBLY FLOOR: 43-22, 9/15/17
(ROLL CALL NOT AVAILABLE)

SUBJECT: Parole: youth offender parole hearings

SOURCE: Anti-Recidivism Coalition
Fair Chance Project
Human Rights Watch
National Center for Youth Law
Pacific Juvenile Defender Center
Youth Justice Coalition
#cut50

DIGEST: This bill makes a person convicted of offense before he or she was 18 years of age for which a life sentence without the possibility of parole was imposed eligible for parole under a youth parole hearing after his or her 25th year of incarceration.

Assembly Amendments add double-jointing amendments to address potential chaptering issues.

ANALYSIS:

Existing law:

- 1) Provides, with some exceptions, that when a defendant who was under 18 years of age at the time of the commission of the offense for which the defendant was sentenced to imprisonment for life without the possibility of parole has served at least 15 years of that sentence, the defendant may submit to the sentencing court a petition for recall and resentencing and sets forth the requirements for filing and granting such a petition. (Penal Code § 1170 (d) (2).)
- 2) Creates the youth offender parole hearing which is a hearing by the Board of Parole Hearings (BPH) for the purpose of reviewing the parole suitability of any prisoner who was under 23 years of age at the time of his or her controlling offense. (Penal Code § 3051)
- 3) Provides that the timing for the youth offender parole hearing depends on the sentence: if the controlling offense was a determinate sentence the offender shall be eligible for release after 15 years; if the controlling offense was a life term less than 25 years then the person is eligible for release after 20 years; and, if the controlling offense was 25 years or more then the person is eligible for release after 25 years. (Penal Code § 3051 (b).)
- 4) Provides that if the youth offender is found suitable for parole at the youthful offender parole hearing then the youth offender shall be released on parole. (Penal Code § 3051 (e).)
- 5) Provides that in reviewing a prisoner's suitability for parole in a youthful offender parole hearing, the BPH shall give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law. (Penal Code § 4801 (c).)

This bill:

- 1) Provides that a person who was convicted of a controlling offense that was committed before the person had attained 18 years of age and for which the sentence is life without the possibility of parole shall be eligible for release on parole by the board during his or her 25th year of incarceration at a youth offender parole hearing unless previously released or entitled to an earlier parole consideration hearing pursuant to other statutory provisions.
- 2) Clarifies that it does not apply to those with a life without parole sentence who were older than 18 at the time of his or her controlling offense.
- 3) Gives the BPH until July 1, 2020, to give a hearing to those sentenced to life without parole as juveniles and who are or will be entitled to a hearing on or before July 1, 2020.

Comments

According to the author:

California law permits youth under the age of 18 to be sentenced to life in prison without the possibility of parole (LWOP). The US is the only country in the world to use this sentence for children. In *Miller v. Alabama* (2012), the U.S. Supreme Court ruled that the Eighth Amendment's prohibition against cruel and unusual punishment forbids the mandatory sentencing of life in prison without the possibility of parole for juvenile offenders. The Court held that sentencing courts are required to consider the constitutional differences between children and adults at sentencing.

This year in *Montgomery v. Louisiana* (2016), the U.S. Supreme Court ruled that Miller's prohibition on juvenile LWOP sentences applies retroactively and that every person serving such a sentence is entitled to a new sentencing hearing or an opportunity for release on parole.

The U.S. Supreme Court offered two options for states to come into compliance with the ruling. The first, a resentencing hearing, which is time-consuming, expensive, and subject to extended appeals. The second option is to provide effected individuals the possibility of parole, citing Wyoming's law as an example. In Wyoming, juveniles sentenced to LWOP get a parole hearing after 22 years of incarceration. Other states, too, have chosen mandatory minimums or outright eliminated the juvenile LWOP sentence. In total, now 22 states have

limited the use of LWOP for juveniles. More states are exploring changes to their laws in light of the recent *Montgomery* decision.

Existing law in California reflects both state and federal court opinions requiring resentencing hearings, and legislation passed in several years ago (SB 9, 2012) provided multiple chances for resentencing at 15, 20, and 24 years of incarceration. Each of these hearings can potentially result in appeals. Important note, courts have ruled the SB 9 process does not bring California into compliance with the *Montgomery* decision. SB 394 seeks to remedy the now unconstitutional juvenile sentences of life without the possibility of parole.

This bill would provide the roughly 300 individuals who are impacted by the court ruling are eligible for a Youth Offender Parole hearing and will bring California into compliance with federal law and eliminate the need for potentially multiple resentencing hearings and litigation.

Important to note, the possibility of parole does not mean release. The Supreme Court noted in *Montgomery*, “A State may remedy [this] violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them... Those prisoners who have shown an inability to reform will continue to serve life sentences.

FISCAL EFFECT: Appropriation: No Fiscal Com.: Yes Local: No

According to the Assembly Appropriations Committee, minimal fiscal impact to BPH. Between January 1, 2018, and July 1, 2020, BHP estimates up to 40 additional hearings for comparison, in 2016 BHP scheduled more than 4,700 hearings. The Division of Parole will have minimal fiscal impact if any of the 40 hearings result in release on Parole. However, any additional parole costs will be more than offset by corresponding cost savings due to a reduction in inmate population. The projected annual per capita savings for this population is approximately \$75,000.

SUPPORT: (Verified 9/14/17)

Anti-Recidivism Coalition (co-source)
Fair Chance Project (co-source)
Human Rights Watch (co-source)
National Center for Youth Law (co-source)
Pacific Juvenile Defender Center (co-source)
Youth Justice Coalition (co-source)
#cut50 (co-source)

Alliance for Boys and Men of Color
American Civil Liberties Union
Asian Law Alliance
California Attorneys for Criminal Justice
California Catholic Conference
California Public Defenders Association
Campaign for the Fair Sentencing of Youth
Center on Juvenile and Criminal Justice
Children's Defense Fund-California
Community Coalition
Courage Campaign
Felony Murder Elimination Project
Friends Committee on Legislation of California
John Burton Advocates for Youth
Juvenile Law Center
Legal Services for Prisoners with Children
Prison Law Office
Silicon Valley De-Bug
USC Gould School of Law, Post-Conviction Project
The Sentencing Project
The W. Haywood Burns Institute
Numerous individuals

OPPOSITION: (Verified 9/14/17)

California District Attorneys Association
San Diego County District Attorney

ARGUMENTS IN SUPPORT: In support, the National Center for Youth Law states:

The United States is the only country in the world that imposes life without parole on youth under the age of 18. We support SB 394 because we believe the US should comply with international human rights laws and norms. In the United States, there are more than 2,500 youth who have been sentenced to life without parole; here in California there are at least 300. In the rest of the world combined, there are none. This extreme punishment is a violation of international law and fundamental human rights.

Punishment should be proportionate to culpability –it must reflect the capacity of young people to change and mature, and it should promote rehabilitation.

Youth who commit crimes should be held accountable. However, when California condemns a young person to a life behind bars, it disregards the human capacity for rehabilitation, the enhanced ability of young people to grow and change, and the very real physical and psychological differences between children and adults. Senate Bill 394 ensures that youth offenders will face severe punishment for their crimes, but it also gives them hope and the chance to work toward the possibility of parole.

California's use of life without parole sentences for youth is particularly unjust. Racial disparities in the imposition of this sentence are among the worst in the country. In California, African American youth are sentenced to life without parole at a rate that is 18 times that of white youth. In this state, in 56% of the cases in which a youth is sentenced to life without parole had an adult codefendant, the adult got a lesser sentence than the youth. Finally, in 45% of California cases surveyed, youth sentenced to life without parole did not physically commit a murder, but instead were convicted of their role under the felony murder rule or aiding and abetting law.

ARGUMENTS IN OPPOSITION: According to the California District Attorneys Association:

It is important to note that the *Miller* court did not bar LWOP sentences for juveniles, but said that given the diminished culpability and heightened capacity for change of juveniles, “we think the appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.” (Miller, 132 S.C. at 2469). And, “[a]lthough we do not foreclose a sentencer’s ability to make that judgment [LWOP] in homicide cases, we require it to take into account how children are different, and how differences counsel against irrevocably sentencing them to a lifetime in prison.” (Id.)

It seems neither right, nor proportional, to make juveniles sentenced to LWOP eligible for parole in the 25th year of incarceration, when juveniles and youth sentenced to the lesser term of 25 years to life, are eligible for parole at the same time –in the 25th year.

SB 394 also fails to take into account that juvenile sentenced to LWOP in the last few years may have already had a *Miller/Montgomery* compliant hearing. If

they have, and the court still chose LWOP after considering the appropriate factors, we do not believe the defendant should be eligible for parole.

Prepared by: Mary Kennedy / PUB. S. /
9/15/17 18:07:07

****** END ******

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California
Department of Corrections
and Rehabilitation



The History of the Division of Juvenile Justice

1850

California became a state. There were no correctional facilities for juveniles. Some consideration was given to the need for a reform school at that time, but none was authorized. Serious cases, about 300 boys under the age of 20, were sent to the state prisons at San Quentin (Marin County) and Folsom (Sacramento County), between 1850 and 1860. This included 12, 13, and 14-year-old boys.

1859

The San Francisco Industrial School was founded on May 5, 1859 by an act of the state Legislature. The school opened with a total of 48 boys and girls, ranging from 3-18 years of age and a staff of six. It was run by a private board. Management could accept children from parents and police, as well as the courts. The program consisted of six hours per day of school (classroom) and four hours per day work. Trade training was added later. Releases were obtained by (1) discharge, (2) indenture, and (3) leave of absence, very similar to present day probation and/or parole.

1860

The State Reform School for boys in Marysville was authorized and opened in 1861. Ages ranged from 8-18 years.

1868

The State Reform School for Boys at Marysville closed due to lack of commitments. Twenty-eight boys were transferred to the San Francisco Industrial School. The State donated \$10,000 to the San Francisco Industrial School and agreed to pay \$15 in gold coin per month for each child of the school. During this year, girls in the Industrial School were transferred to the Magdalen Asylum in San Francisco.

1870

The Legislature permitted commitment to the San Francisco Industrial School from the counties of Santa Clara, San Mateo, and Alameda.

1872

The first "Probation Law" was enacted (Section 1203 Penal Code).

1876

The training ship Jamestown was transferred from the U.S. Navy to the City of San Francisco to supplement the

San Francisco Industrial School. The ship was to provide training in seamanship and navigation for boys of eligible age. After six months, an examination was given and successful trainees were eligible for employment as seamen on regular merchant ships.

1879

The training ship was returned to the Navy due to mismanagement and a hue and cry that the Jamestown was a training ship for criminals.

1890

The Legislature enacted a law establishing two State reform schools. Both were part of the Division of Institutions, and both had trade training and academic classes. Commitments were made from Police Courts, Justice Courts, and Courts of Session for a specialized period of time or minority. These schools were: (1) Whittier State Reformatory (now Fred C. Nelles School in Whittier) and (2) the Preston School of Industry in Lone (Amador County).

1891

The Whittier State Reformatory for Boys and Girls opened with an enrollment of 300 youth.

1892

The San Francisco Industrial School closed, and the Preston School of Industry opened

1903

The Legislature enacted law establishing juvenile courts.

1907

All wards under 18 were transferred out of San Quentin by legislative decree.

1909

County juvenile halls were established

1913

Ventura School for Girls was established and girls transferred from Whittier State Reformatory to Ventura.

1929

First statewide supervision began -- a Probation Office was created, under the State Department of Social Welfare.

1935

The Legislature authorized County Boards of Supervisors to establish forestry camps for delinquent youths.

1941

The Youth Corrections Authority Act was adopted by the California Legislature. The law:

1. Created a three-person commission appointed by the governor and confirmed by the Senate
2. Mandated acceptance of all commitments under 23 years of age,

- including those from juvenile court
- 3. Added a section on delinquency prevention
- 4. Authorized no authority over existing state institutions
- 5. Appropriated \$100,000 to run the Authority for two years

The Whittier School for Boys was renamed the Fred C. Nelles School in honor of the man who served as the facility's superintendent from 1912 to 1927.

1942

Preston School of Industry, Ventura School for Girls, and the Fred C. Nelles School for Boys were separated from the Division of Institutions and became part of the California Youth Authority (CYA).

The first ward committed under the Youth Corrections Authority Act--YA No. 00001 -- arrived at the new Youth Authority Unit, a diagnostic facility. The ward was transferred from San Quentin Prison, where he had been sent at age 14 after being convicted for second-degree murder. A "lifer," he had shot an uncle during a quarrel over ranch chores.

The Youth Authority moved toward establishing camps, and a unit -- Delinquency Prevention Services -- was established.

1943

Karl Holton was named first director.

The Governor transferred management of state reformatories -- Preston, Nelles, and Ventura -- to the Youth Corrections Authority. Total wards in institutions, 1,080; total wards on parole, 1,625; staff, 517.

The State Probation Office turned over responsibility for delinquency prevention to the Youth Corrections Authority. The word "corrections" was dropped from title; hence, California Youth Authority (CYA).

Fifty boys transferred from county jails to the Calaveras Big Trees Park where they built a 100-bed capacity camp. The Youth Authority acquired property and buildings formerly used by the Knights of Pythias Old Peoples' Home. Boys from Preston and the Calaveras Camp cleaned and renovated the grounds and buildings, and the Los Guillicos School for Girls was established in Sonoma County.

1944

The CYA entered into a contract with the military for the establishment of two camps -- one at Benicia Arsenal and the other at the Stockton Ordnance Depot -- each with a population of 150 boys.

1945

The first boys arrived at Fricot Ranch School in Calaveras County. By fall of 1945, 100 boys and a full complement of staff were at the school. The 1,090-acre estate was leased with an option to purchase for \$60,000 and that option was exercised in 1946.

Many youthful offenders in detention homes, jail, and two army camps were awaiting commitment to the Youth Authority. Army camps were closed after the war and the growing need for facilities became a crisis.

The Division of Parole was created and the parole staff consolidated.

The need was apparent for an older boy institution, and the Legislature authorized the California Vocational Institution at Lancaster (an old Army/Air Force Base).

A state subsidy was given to counties for establishment of juvenile homes, ranches, and camps for juvenile court wards. The subsidy was administered by the CYA. Pine Grove Camp was established in Amador County.

1947

Camp Ben Lomond opened in Santa Cruz County.

The first wards arrived at the El Paso de Robles School for Boys (San Luis Obispo County) on September 30 (old Army/Air Base -- 200 acres and 40 barrack buildings -- purchased for \$8,000).

1948

Governor Earl Warren called the first Statewide Youth Conference in Sacramento in January. An estimated 2,200 people attended, including 200 high school and college youths

1952

Heman G. Stark was named director and served until 1968. His tenure remains the longest of any CYA director.

1953

The CYA was given departmental status.

1954

Northern and Southern Reception Centers opened, in Sacramento and Norwalk, respectively.

1956

Mt. Bullion Camp opened in Mariposa County.

1960

The Youth Training School opened in San Bernardino County.

1961

The CYA was placed under the newly formed Youth and Adult Corrections Agency.

Washington Ridge Camp opened in Nevada County.

1962

Ventura School for Girls moved from its Ventura location to Camarillo

1963

The state's Juvenile Court Law was modified.

1964

A reception center and clinic was established at the Ventura School for Girls, and the girls at the Southern

Reception Center and Clinic in Norwalk were transferred to Ventura.

1965

Northern California Youth Center (NCYC) opened near Stockton (San Joaquin County).

1966

O. H. Close School for Boys opened at NCYC.

1968

Allen Breed was named director.

Karl Holton School for Boys opened at NCYC.

An administrative reorganization plan was implemented, establishing North and South Divisions.

Facilities were constructed at Pine Grove and Ben Lomond Camps.

1969

The CYA, along with the Department of Corrections, was placed within the Human Relations Agency (which became the Health and Welfare Agency).

1970

A change in the law meant fewer female commitments, so Ventura School for Girls became co-educational.

1971

DeWitt Nelson School opened at NCYC.

Los Guillicos became co-educational with boys from Fricot Ranch.

Fricot Ranch was closed due to declining ward population.

Oak Glen Camp opened in San Bernardino County.

1972

El Paso de Robles School closed due to declining commitments.

1974

El Paso de Robles School reopened, as commitments began to rise again.

1976

Pearl West was named director, the first woman to hold the position.

1979

Fenner Canyon Camp opened in Los Angeles County.

1980

The CYA became part of the newly formed Youth and Adult Correctional Agency.

The Legislature removed the state's young offender paroling authority, the Youth Authority Board, from the CYA and renamed it the Youthful Offender Parole Board (YOPB). The director had also served as chairman of the board. Antonio C. Amador was selected to chair the "new" YOPB.

1981

Antonio C. Amador, former Los Angeles Police Protective League President was named director, the first Hispanic to hold the position.

1983

James Rowland, Chief Probation Officer of Fresno County, was named director and introduced the concept of involving crime victims in youth correctional programs.

1984

"Impact of Crime on Victims" curriculum was implemented and was introduced in each institution and camp in the CYA. This was a pioneering effort that has since been shared with other states and localities across the country.

The department adopted a policy of employment readiness as a major goal for wards and began reorganizing its Vocational Educational Program to make training more relevant with available jobs.

1985

Free Venture, a program involving public/private partnerships for ward employment, began. The CYA agreed to provide space to private sector businesses which meet certain criteria. In turn, the businesses hire and train wards who earn prevailing wages for real jobs. Wards who earn these jobs then become taxpayers. Also, percentages of their earnings go to victim restitution, room and board, a trust fund and a savings account. Trans World Airlines became the first Free Venture partner, instituting a project at Ventura School.

El Centro Training Center opened as a short-term Institutions and Camps (I&C) Branch facility in Imperial County.

1987

C. A. Terhune, a 30-year veteran of the CYA, was named director.

1989

El Centro Drug Program for Girls opened.

1990

Ventura School opened a camp program and instituted the department's first female fire fighting crew.

Oak Glen Camp was closed due to budget concerns.

Fenner Canyon Camp was transferred to CDC.

El Centro closed as an I&C facility and reopened as the Southern California Drug Treatment Center operated by the Parole Services Branch.

1991

B. T. Collins, a Vietnam War hero who lost an arm and a leg in that conflict, was appointed director in March and resigned in August, when he was asked to run for the State Assembly by the Governor.

William B. Kolender, former Police Chief of San Diego was appointed director.

N. A. Chaderjian School opened, a 600-bed institution at NCYC, increasing the number of training schools at that site to four. Chaderjian was secretary of the Youth and Adult Correctional Agency at the time of his untimely death in 1988.

Fred C. Nelles School celebrated its Centennial.

1992

The CYA's first boot camp program (30 beds) opened at Preston School. It was named LEAD (Leadership, Esteem, Ability and Discipline) and served as a model for other juvenile boot camps in the country.

Preston School of Industry celebrated its Centennial.

1993

The second LEAD (Boot Camp) Program (30 beds) opened at Fred C. Nelles School.

The First Superintendent of Education position was created, and the department began a reorganization of the Education Program.

The Youth Authority Training Center opened at the NCYC complex.

1994

Karl Holton School was converted to the Karl Holton Drug and Alcohol Abuse Treatment Center (DAATC), (now known as Karl Holton Youth Correctional Drug and Alcohol Treatment Facility), devoted entirely to programming wards with substance use and abuse problems. The CYA thus became the first youthful offender agency in the country to devote an entire major institution for that purpose.

1995

Craig L. Brown, undersecretary of the Youth and Adult Correctional Agency, was named director

1996

Francisco J. Alarcon, Chief Deputy Director, was appointed director.

1997

CYA Institutions and Camps were changed to include "Youth Correctional"

1999

Gregorio S. Zermeno, Superintendent at the De Witt Nelson Correctional Facility, was appointed director in March.

2000

Jerry L. Harper, former Undersheriff of the Los Angeles Sheriff's Department, was appointed director in March.

2003

Karl Holton Drug and Alcohol Abuse Treatment Center in Stockton closed in September. The facility first opened in 1968.

Walter Allen III was appointed director by Governor Arnold Schwarzenegger. Mr. Allen was the Assistant Chief for the California Department of Justice, Bureau of Narcotics Enforcement.

2004

February, the Northern Youth Correctional Reception Center and Clinic in Sacramento closed. The reception center-clinic first opened in 1956.

February, the Ventura Youth Correctional Facility in Camarillo returned to a females-only facility. Male youths are housed at the S. Carraway Public Service and Fire Center.

June, the CYA closed the Fred C. Nelles Youth Correctional Facility in Whittier. This was CYA's oldest facility spanning more than 100 years. The last youth left the facility on May 27, 2004.

June, the CYA closed its operation of Mt. Bullion Youth Conservation Camp in Mariposa County.

November, Farrell v. Allen Consent Decree filed with the court. This action was brought by a taxpayer, Margaret Farrell, against Walter Allen III, Director of the California Youth Authority.

2005

In a reorganization of the California corrections agencies, the CYA became the Division of Juvenile Justice (DJJ) within the Department of Corrections and Rehabilitation.

March, Education Services Remedial Plan filed with the court.

May, Sexual Behavior Treatment Program Remedial Plan filed with the court.

June, Bernard Warner was appointed as Chief Deputy Secretary for the DJJ.

2006

June, Health Care Services Remedial Plan filed with the court.

July, Beginning of FY 2006/2007, funding to implement remedial plans is provided for the first time.

July, Safety and Welfare Remedial Plan filed with the court.

August, Mental Health Remedial Plan filed with the court.

2007

June, Health Care Services Remedial Plan filed with the court.

Legislation (SB 81 and AB 191) require most youthful offenders to be committed to county facilities, reserving those

convicted of the most serious felonies and having the most severe treatment needs for DJJ. Previously adopted financial incentives for counties and the legislative changes reduce DJJ's population from a peak of approximately 10,000 a decade earlier to approximately 1,700.

2008

July 31, El Paso de Robles and De Witt Nelson Youth Correctional Facilities closed.

2009

In October, David Murphy, a 20 year veteran school administrator, is named DJJ's Superintendent of Education, fulfilling a significant requirement of the Farrell reform plan for Education.

2010

In February, the Heman G. Stark Youth Correctional Facility in Chino, originally known as the Youth Training School and subsequently named for the agency's longest serving director, is closed after 50 years as a juvenile facility and begins a transformation into an adult prison. DJJ continues to operate five facilities and two fire camps.

In March, DJJ adopts a new staffing model that adapts to a smaller population but also provides uniform treatment for all DJJ youth to administer reforms required by the Farrell plans. Consolidation of staff and facilities results in staff reductions of approximately 400 positions and estimated savings of \$30-40 million.

In February, DJJ reports to the Alameda Superior Court that is has complied with 82 percent of more than 8,000 policy and program changes required by the Farrell reform plans

2011

Rachel Rios is named Deputy Secretary of Juvenile Justice (Acting)

In February, counties begin to assume parole supervision of juvenile offenders, under the Public Safety and Rehabilitation Act of 2010. The Juvenile Parole Board continues to determine when a youth is sufficiently rehabilitated to warrant release, but county courts and probation officials establish and enforce conditions of supervision.

The Preston Youth Correctional Facility in Lone is closed in June. Opened as the Preston School of Industry in 1894, it was the state's second facility built specifically to house juvenile offenders.

The Southern Youth Correctional Reception Center and Clinic in Norwalk (Los Angeles County) is closed in December.

Due to a declining number of youth eligible for fire-fighting duty, DJJ consolidates its juvenile fire crews to Pine Grove, vacating the S. Carraway Public Service and Fire Protection Center in Camarillo (Ventura County).

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CHAPTER II.

OF THE PERSONS CAPABLE OF COMMITTING CRIMES.

Having in the preceding chapter considered in general the nature of crimes and punishments, we are led next, in the order of our distribution, to inquire what persons are or are not *capable* of committing crimes; or, which is all one, who are exempted from the censures of the law upon the commission of those acts which, in other persons, would be severely punished. In the process of which inquiry, we must have recourse to particular and special exceptions; for the general rule is, that no person shall be excused from punishment for disobedience to the laws of his country, excepting such as are expressly defined and exempted by the laws themselves.

All the several pleas and excuses which protect the committer of a forbidden act from the punishment which is otherwise annexed thereto may be reduced to this single consideration, the want or defect of *will*. An involuntary act, as it has no claim to merit, so neither can it induce any guilt: the concurrence of the will, when it has its choice either to do or to avoid the fact in question, being the only thing * that renders human actions either praiseworthy or culpable.

*21]

Indeed, to make a complete crime cognizable by human laws, there must be both a will and an act. For, though, *in foro conscientiae*, a fixed design or will to do an unlawful act is almost as heinous as the commission of it, yet, as no temporal tribunal can search the heart or fathom the intentions of the mind, otherwise than as they are demonstrated by outward actions, it therefore cannot punish for what it cannot know. For which reason, in all temporal jurisdictions, an *overt* act, or some open evidence of an intended crime, is necessary, in order to demonstrate the depravity of the will, before the man is liable to punishment. And, as a vicious will without a vicious act is no civil crime, so, on the other hand, an unwarrantable act without a vicious will is no crime at all. So that, to constitute a crime against human laws, there must be first, a vicious will; and, secondly, an unlawful act consequent upon such vicious will.

Now, there are three cases in which the will does not join with the act 1. Where there is a defect of understanding. For where there is no discernment there is no choice, and where there is no choice there can be no act of the will, which is nothing else but a determination of one's choice to do or to abstain from a particular action: he, therefore, that has no understanding can have no will to guide his conduct. 2. Where there is understanding and will sufficient residing in the party, but not called forth or exerted at the time of the action done; which is the case of all offences committed by chance or ignorance. Here the will sits neuter, and neither concurs with the act nor disagrees to it. 3. Where the action is constrained by some outward force and violence. Here the will counteracts the deed, and is so far from concurring with, that it loathes and disagrees to, what the man is obliged to perform. It will be the business of the present chapter briefly to consider all the several species of defect in will, as they

fall under some one or other of these general heads: as infancy, idiocy, lunacy, and intoxication, which fall under the first class; misfortune and ignorance, which * may be referred to the second; and compulsion or necessity, which may properly rank in the third.

*22]

I. First we will consider the case of *infancy*, or nonage, which is a defect of the understanding. Infants under the age of discretion ought not to be punished by any criminal prosecution whatever. *(a)* What the age of discretion is, in various nations, is matter of some variety. The civil law distinguished the age of minors, or those under twenty-five years old, into three stages: *infantia*, from the birth till seven years of age; *pueritia*, from seven to fourteen; and *pubertas*, from fourteen upwards. The period of *pueritia*, or childhood, was again subdivided into two equal parts: from seven to ten and a half was *ætas infantie proxima*; from ten and a half to fourteen was *ætas pubertati proxima*. During the first stage of infancy and the next half-stage of childhood, *infantie proxima*, they were not punishable for any crime. *(b)* During the other half-stage of childhood, approaching to puberty, from ten and a half to fourteen, they were indeed punishable, if found to be *doli capaces*, or capable of mischief, but with many mitigations, and not with the utmost rigour of the law. *(c)* During the last stage, (at the age of puberty, and afterwards,) minors were liable to be punished, as well capitally as otherwise.

The law of England does in some cases privilege an infant under the age of twenty-one, as to common misdemeanours, so as to escape fine, imprisonment, and the like: and particularly in cases of omission, as not repairing a bridge, or a highway, and other similar offences; *(d)* for, not having the command of his fortune till twenty-one, he wants the capacity to do those things which the law requires. But where there is any notorious breach of the peace, a riot, battery, or the like, (which infants, when full grown, are at least as liable as others to commit,) for these an infant, above * the age of fourteen, is equally liable to suffer as a person of the full age of twenty-one.

[*23

With regard to capital crimes, the law is still more minute and circumspect; distinguishing with greater nicety the several degrees of age and discretion. By the antient Saxon law, the age of twelve years was established for the age of possible discretion, when first the understanding might open; *(e)* and from thence till the offender was fourteen it was *ætas pubertati proxima*, in which he might or might not be guilty of a crime, according to his natural capacity or incapacity. This was the dubious stage of discretion: but under twelve it was held that he could not be guilty in will, neither after fourteen could he be supposed innocent, of any capital crime which he in fact committed. But by the law, as it now stands, and has stood at least ever since the time of Edward the Third, the capacity of doing ill, or contracting guilt, is not so much measured by years and days as by the strength of the delinquent's understanding and judgment. For one lad of eleven years old may have as much cunning as another of fourteen; and in these cases our maxim is, that "*malitia supplet ætatem*." Under seven years of age, indeed, an infant cannot be guilty of felony, *(f)* for then a felonious discretion is almost an impossibility in nature; but at eight years old he may be guilty of felony. *(g)* Also, under fourteen, though an infant shall be *prima facie* adjudged to be *doli incapax*, yet if it appear to the court and jury that he was *doli*

capax, and could discern between good and evil, he may be convicted and suffer death. Thus a girl of thirteen has been burned for killing her mistress: and one boy of ten, and another of nine years old, who had killed their companions, have been sentenced to death, and he of ten years actually hanged; because it appeared, upon their trials, that the one hid himself, and the other hid the body he had killed, which hiding manifested a consciousness of guilt, and a discretion * to discern between good and evil.^(h) And there was an instance [*24] in the last century where a boy of eight years old was tried at Abingdon for firing two barns; and, it appearing that he had malice, revenge, and cunning, he was found guilty, condemned, and hanged accordingly.⁽ⁱ⁾ Thus, also, in very modern times, a boy of ten years old was convicted on his own confession of murdering his bedfellow, there appearing in his whole behaviour plain tokens of a mischievous discretion; and, as the sparing this boy merely on account of his tender years might be of dangerous consequence to the public by propagating a notion that children might commit such atrocious crimes with impunity, it was unanimously agreed by all the judges that he was a proper subject of capital punishment.^(j) But, in all such cases, the evidence of that malice which is to supply age ought to be strong and clear beyond all doubt and contradiction.1

II. The second case of a deficiency in will, which excuses from the guilt of crimes, arises also from a defective or vitiated understanding, viz., in an *idiot* or a *lunatic*. For the rule of law as to the latter, which may easily be adapted also to the former, is, that "*furiosus furore solum punitur.*" In criminal cases, therefore, idiots and lunatics are not chargeable for their own acts, if committed when under these incapacities: no, not even for treason itself.^(k)2 Also, if a man in his sound memory commits a capital offence, and before arraignment for it he becomes mad, he ought not to be arraigned for it, because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried; for how can he make his defence? If, after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced; and if after judgment he becomes of nonsane memory, execution shall be stayed: for peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged * something in stay of judgment or execution.^(l) Indeed, in the [*25] bloody reign of Henry the Eighth a statute was made,^(m) which enacted that if a person, being *compos mentis*, should commit high treason, and after fall into madness, he might be tried in his absence, and should suffer death, as if he were of perfect memory. But this savage and inhuman law was repealed by the statute 1 & 2 Ph. & M. c. 10. For, as is observed by Sir Edward Coke,⁽ⁿ⁾ "the execution of an offender is for example, *ut pœna ad paucos, metus ad omnes perveniat*: but so it is not when a madman is executed; but should be a miserable spectacle, both against law, and of extreme inhumanity and cruelty, and can be no example to others." But if there be any doubt whether the party be *compos* or not, this shall be tried by a jury.3 And if he be so found, a total idiocy, or absolute insanity, excuses from the guilt, and of course from the punishment, of any criminal action committed under such deprivation of the senses: but, if a lunatic hath lucid intervals of understanding, he shall answer for what he does in those intervals, as if he had no deficiency.^(o)4 Yet, in the case of absolute madmen, as they are not answerable for their actions, they should not be permitted the liberty of acting, unless under proper control; and, in particular, they

The San Francisco Industrial School and the Origins of Juvenile Justice in California: A Glance at the Great Reformation

DANIEL MACALLAIR*

Introduction

On April 15, 1858, the California Legislature passed the Industrial School Act. The Act created the first institution for neglected and delinquent youths on the West Coast.¹ Hailed as an enlightened response to the surging numbers of “idle and vicious” youths wandering the streets of San Francisco, the institution’s purpose was “the detention, management, reformation, education, and maintenance of such children as shall be committed or surrendered thereto”² Modeled on the earlier houses of refuge established in New York, Boston, and Philadelphia during the 1820’s, the San Francisco Industrial School was the inaugural and most significant nineteenth century event in the establishment of California’s juvenile justice system.³

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¹ Industrial School Act, ch. 209, 1858 Cal. Stat. 166.

² *Id.*

³ *See generally* ROBERT MENNEL, THORNS & THISTLES: JUVENILE DELINQUENTS IN THE UNITED STATES 1892-1940, at 32-77 (1973) (describing the development of juvenile institutions including the New York, Philadelphia, and Boston Houses of Refuge); ROBERT PICKETT, HOUSE OF REFUGE: ORIGINS OF JUVENILE REFORM IN N.Y. STATE 1815-1857, at 21-50 (1969) (describing the origins of the New York House of

The model established by the Industrial School's east coast predecessors was the penitentiary model.⁴ The penitentiary model sought to remove children from urban streets and confine them in an institution which would teach them proper work habits. Although promoted as sanctuaries from vice and indolence, institutions such as the San Francisco Industrial School quickly degenerated into corrupt and brutal warehouses for unwanted children. Periodic public outcry did little to alter the harsh realities of institutional life.⁵ Growing disillusionment with the bitter realities of institutional life led to other forms of state sanctioned intervention, such as the privately administered probation and foster care systems.⁶ Yet it was the San Francisco Industrial School that provided the foundation for California's present-day juvenile justice system.

This article examines the Industrial School's controversial thirty-three year history and the development of juvenile justice laws, policies, and practices in California. Part I examines the influence earlier institutions had on the Industrial School. Part II details the social conditions that prompted the institution's founding, the theories, processes, and precedents that led to the school's founding, and the problems that soon emerged after its opening. Part III reviews attempts to reform the school by abolishing its private charter and reestablishing it as a public institution. Other reforms discussed in this section include the removal of girls from the Industrial School and the establishment of the first girls only institution in California. Part IV looks at the legal challenges that confronted the school during its middle years and the

Refuge); Sanford Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187 (1970) (discussing the development of the reform schools in Illinois, New York and Boston).

⁴ See STEVEN L. SCHLOSSMAN, LOVE AND THE AMERICAN DELINQUENT: THE THEORY AND PRACTICE OF PROGRESSIVE JUVENILE JUSTICE 1825-1920, at 9-17 (1977).

⁵ ALDEN D. MILLER & LLOYD E. OHLIN, DELINQUENCY AND COMMUNITY: CREATING OPPORTUNITIES AND CONTROLS 14 (1985).

⁶ See MENNEL, *supra* note 3, at 32-77; STEPHEN O'CONNOR, ORPHAN TRAINS: THE STORY OF CHARLES LORING BRACE AND THE CHILDREN HE SAVED AND FAILED 312-15 (2001).

juvenile jurisprudence that developed as a result. Alternative forms of child welfare intervention that evolved in response to the Industrial School are covered in Part V. Lastly, Part VI deals with the Industrial School's final years and its legacy.

I. The Industrial School's Historical Roots

Following the gold rush, San Francisco's leaders feared that the growing juvenile population would increase the city's already existing social problems.⁷ In searching for an effective way to deal with this potential problem, the city's leaders looked to the houses of refuge established in New York, Pennsylvania and Massachusetts as their guide for establishing the San Francisco Industrial School. Civic leaders of the east coast cities adopted the penitentiary model for their houses of refuge. This model sought to reform youths by isolating them in institutions. A house of refuge was to be the youths' escape from the corruption of the outside world. As such, refuges were portrayed to be as vital to a delinquent's education as the public school. The ideal of refuge and reform, however, was never achieved in these earlier models. Even so, the refuge system was the accepted model for reform when San Francisco looked to address its own growing juvenile population.

A. The Industrial School's Eastern Origins

The New York House of Refuge was the first institution in the United States established for neglected, vagrant, and delinquent youths.⁸ It was founded in 1825 by a group of prominent protestant civic and religious leaders who formed the Society for the Reformation of Juvenile Delinquency ("SRJD").⁹ The SRJD believed that the growing numbers of poor and destitute immigrant children who wandered city streets were destined for a life of poverty.

⁷ See *infra* Part II.A.

⁸ SCHLOSSMAN, *supra* note 4, at 22-32.

⁹ *Id.*

The SRJD viewed the peril of these children as a direct result of morally inferior parents and justified their rescue as a moral crusade to promote the public good.¹⁰ The earlier children could be rescued from their unfortunate circumstances, the better for all.¹¹ Additionally, because the SRJD's efforts were couched as benign intervention, no distinction was necessary between poverty and criminality, as they were inextricably linked.¹² Thus, both delinquent and impoverished children were able to receive the House of Refuge's intended benefits.

The SRJD believed that isolation from corrupting influences and penitence for wrongdoing was a necessary element of reformation.¹³ The penitentiary model, established in Pennsylvania thirty-six years earlier, was developed as a humane alternative to a system of criminal sanctions and corporal punishment.¹⁴ The penitentiary system also provided the benefits of isolation and penitence that the SRJD sought to access for the benefit of wayward youth. Consequently, the SRJD adopted the penitentiary system model for its new juvenile institution.¹⁵

When the SRJD published a "Report on the Penitentiary System in the United States" in 1822,¹⁶ confidence in the adult penitentiary system was waning.¹⁷ Instead of places of reformation and repentance, penitentiaries

¹⁰ *Id.*

¹¹ *Id.* The House of Refuge was envisioned as a place where boys "under a certain age, who become subject to the notice of our Police, either as vagrants, or houseless, or charged with petty crimes, may be received, judiciously classed according to their degrees of depravity or innocence, put to work at such employments as will tend to encourage industry and ingenuity." *Id.* at 9-17.

¹² Fox, *supra* note 3, at 1196-1201.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ The SRJD was known as the Society for the Prevention of Pauperism at the time of this report. SOC'Y FOR THE PREVENTION OF PAUPERISM, REPORT ON THE PENITENTIARY SYSTEM IN THE UNITED STATES 61 (photo. reprint 1974) (1822); Fox, *supra* note 3, at 1195.

¹⁷ *Id.*

were places of brutality and corruption. In reaffirming their commitment to the penitentiary ideal, the report's authors urged that separate facilities be built for children.¹⁸ Historian Sanford Fox classified the SRJD's advocacy of the classical penitentiary model as a "retrenchment in correctional practices," where youth would be subject to a "course of discipline, severe and unchanging."¹⁹

In the penitentiary model's highly regimented structure, youths would learn proper work habits, through "constant employment in branches of industry."²⁰ The institution was also to offer instruction in the elementary branches of education and the careful inculcation of religious and moral principles.²¹ The opening of the New York House of Refuge in 1825 fulfilled this goal. Within two years, similar institutions were established in Boston and Philadelphia.²²

The east coast institutions were predominantly viewed as preventive.²³ As a result, most committed youths were non-delinquents with no criminal record.²⁴ Commitments were indeterminate and release was subject to the discretion of institutional managers. It was not uncommon for homeless and destitute youths to remain in the institutions for much of their adolescence.²⁵ When they were released, it was either to a parent or relative, or they were apprenticed to a local farmer, craftsman, or artisan.²⁶ The more hardened and recalcitrant boys were indentured to merchant ships and put to sea.²⁷

The first institutions also coupled the penitentiary model with the congregate system. In the congregate system youths lived in large fortress-like buildings with three to four

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² MENNEL, *supra* note 3, at 4.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 13-31; SCHLOSSMAN, *supra* note 4, at 18-32.

floors of individual cells or large dormitories.²⁸ The youths' daily routine was long and laborious with little variation. The primary emphasis was on inculcating work habits and subservience to authority through a strict code of discipline and punishment.²⁹ The creed of discipline was expressed in a resolution at a convention of refuge managers in the 1850's, where it was declared, "The first requisite from all inmates should be a strict obedience to the rules of the institution."³⁰ In the event inmates failed to adhere to institution rules, "severe punishment" including food deprivation and, in extreme cases, corporal punishment would be administered.³¹

B. Public Schools and *Parens Patriae*

To avoid unfavorable identification with the penitentiary system, refuges quickly sought to identify themselves as extensions of the public school.³² The emerging

²⁸ James Gillespie Lief, *A History of the Internal Organization of the State Reform School for Boys at Westborough, Mass.* (1988) (unpublished Ph.D. dissertation, Harvard University) (on file with author and the Harvard University Library). The period of the reform school was from 1846-1974. *Id.*

²⁹ See MENNEL, *supra* note 3, at 19; Superintendent's Report on Discipline in the Boston House of Refuge (1841), *reprinted in* CHILDREN AND YOUTH IN AMERICA: A DOCUMENTARY HISTORY 1600-1865, at 688-89 (Robert H. Bremner ed., 1970) [hereinafter CHILDREN AND YOUTH IN AMERICA I]; Lief, *supra* note 28.

³⁰ DAVID J. ROTHMAN, *THE DISCOVERY OF THE ASYLUM* 231 (1971).

³¹ *Id.* These institutional control methods over a predominately non-delinquent and involuntarily confined population also represented an extension of poor-law policy. *Id.* Traditional poor laws were based on the forced removal of poor and vagrant people from the streets to be housed in institutional settings. *Id.* Under prevailing poor laws, admission to almshouses for adults was voluntary. MICHAEL KATZ, *IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA* 21-25 (1986). Almshouse living conditions were severe and most adult residents were free to leave. *Id.* Freedom to leave, however, was not a liberty extended to institutionalized non-delinquent children. Fox, *supra* note 3, at 1187-95.

³² To identify themselves as schools, the refuges gradually adopted the generic name reform school, and later, industrial schools. Although the congregate design remained dominant, institutions sought to incorporate longer hours of education to simulate the emerging public school curricula. SCHLOSSMAN, *supra* note 4, at 31-38.

public school movement during the mid 1800's accelerated the refuge movement. Many refuge advocates were also leaders in the public school movement and viewed free education as an essential element in socializing children and promoting respect for the established social order.³³ The public education movement advocated mandatory school attendance, which necessitated coercive state powers. This mandatory education was a further step towards extending state control over all children.³⁴

As an asserted extension of the public school, the refuges invoked *parens patriae* to confine children. Under the *parens patriae* doctrine, constitutional due process rights guaranteed to adult criminal defendants were considered unnecessary for children because the state was acting in the child's best interest.³⁵ Youths could be institutionalized on the recommendations of any individual in authority, including police, public officials, and parents.³⁶

The classification of refuges and reformatories as schools was confirmed by the Pennsylvania Supreme Court in *Ex parte Crouse*.³⁷ A fourteen-year-old girl, Mary Ann Crouse, had been sent to the Philadelphia House of Refuge by her mother for incorrigibility.³⁸ Her father attempted to have her released but was rebuffed by institutional managers. He then filed a writ of habeas corpus claiming that Mary Ann's confinement was unconstitutional because she had not committed a crime and was not given due process protections.³⁹

In a landmark holding, the court affirmed the institution's right to invoke *parens patriae* and assume the role

³³ *Id.* at 10 (discussing the public school movement).

³⁴ *Id.*

³⁵ *Id.*

³⁶ Industrial School Act, ch. 209, § 10, 1858 Cal. Stat. 166, 169; SCHLOSSMAN, *supra* note 4, at 8-11; Fox, *supra* note 3, at 1192-93.

³⁷ *Ex parte Crouse*, 4 Whart. 9, *11 (Pa. 1838); JOHN R. SUTTON, STUBBORN CHILDREN: CONTROLLING DELINQUENCY IN THE UNITED STATES 1640-1981, at 68-73 (1988).

³⁸ *Id.*

³⁹ *Id.*

of parent when the natural parents were determined unequal to the task.⁴⁰ The court noted, “The infant has been snatched from a course of which must have ended in confirmed depravity; and, not only is the restraint of her person lawful, but it would be an act of extreme cruelty to release her from it.”⁴¹ Consequently, Mary Ann Crouse’s confinement was justified because it was for her reformation and not for her punishment.⁴²

Crouse was among the most significant cases in juvenile justice history. By refusing to consider the institution’s realities, the Pennsylvania Supreme Court established a legal doctrine that allowed courts to evaluate a statute based solely on its intent rather than its practice.⁴³ The early statutes all defined the involuntary indeterminate confinement of children as reformatory and in their best interests. *Crouse* simply reaffirmed this principle and became the foundation for the juvenile justice system that endured for the subsequent 130 years.⁴⁴

C. Developments in the 1840’s and 1850’s

The expectation of well-ordered institutions populated by grateful, docile, and malleable children never materialized. Instead, institutionalized youth frequently rebelled against unwanted confinement.⁴⁵ Such rebellions led to assaults, escapes, and riots.⁴⁶ In response, frustrated administrators often resorted to abusive and brutal measures to maintain order and control. During the 1830’s and 1840’s, a number of scandals and investigations led many to conclude that the congregate institutional model was a failure.⁴⁷ The growing skepticism of the system led to administrative and philosophical shifts. New innovations focused on the ideal

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Fox, *supra* note 3, at 1204-06.

⁴⁵ Lief, *supra* note 28, at 12.

⁴⁶ *Id.*

⁴⁷ SCHLOSSMAN, *supra* note 4, at 35.

that a family environment was best for nurturing children. This ideal eventuated in the development of the cottage and placing-out systems.⁴⁸

The cottage system sought to create a family-like atmosphere and was an institution-based alternative to the congregate system's impersonal structure.⁴⁹ Under the cottage system, institutions were divided into semi-autonomous living units where house parents presided over as many as thirty youths.⁵⁰ Each unit lived and worked together and only occasionally had contact with youths from other cottages.⁵¹ Youths were assigned to units with designated house parents based on each child's age and personal characteristics.⁵²

The placing-out system was initiated by the Children's Aid Society in New York beginning in 1853.⁵³ The system was based on the belief that America's family farms offered the best hope of rescuing the city's street youth from poverty and neglectful parents.⁵⁴ Children's Aid Society founder, Charles Loring Brace, enthusiastically embraced the placing-out system as a better approach to treating children: "If enough families can be found to serve as reformatory institutions, is it not the best and most practical and economical method of reforming these children?"⁵⁵ Under the placing-out system, children were rounded up, boarded on trains, and sent to Western states.⁵⁶ Along the way, the trains stopped at the various towns to allow townspeople to inspect the children and decide whether to accept them into their homes. Farm families were given preference. Society workers sought to sever the children's ties to their natural families by ensuring that the children were not able to

⁴⁸ MENNEL, *supra* note 3, at 32-39; O'CONNOR *supra* note 6, at xiv-xi; Fox *supra* note 3, at 1207-09.

⁴⁹ MENNEL, *supra* note 3, at 32-39; Fox *supra* note 3, at 1207-09.

⁵⁰ SCHLOSSMAN, *supra* note 4, at 37-42.

⁵¹ *Id.*

⁵² *Id.*

⁵³ MENNEL, *supra* note 3, at 32-39.

⁵⁴ *Id.*

⁵⁵ *Id.* at 39 (quoting Charles Loring Brace).

⁵⁶ *Id.*

maintain contact with parents or relatives.⁵⁷ During the sixty years following the creation of the placing-out system, over 50,000 children were sent west.⁵⁸

The cottage and placing-out systems expanded the range of methods employed by preventive agencies and institutions in controlling children. Yet, for economic reasons, the congregate system remained the nation's dominant approach to the treatment of poor, abandoned and delinquent children, despite the growing disillusionment with institutional treatment.

II. The San Francisco Industrial School

The San Francisco Industrial School was opened in 1859 with great optimism and fanfare. The opening of the Industrial School was followed a year later by the founding of another reformatory in Marysville. The state reformatory at Marysville, strongly opposed by Industrial School supporters, did not survive long. The Industrial School remained the only reform school in the state for delinquent and homeless youths. However, shortly after its opening, the school came under severe criticism for operating more like a prison than a school or reformatory. Visitors to the facility were shocked by the absence of adequate training facilities and the harsh daily regimen of manual labor to which young inmates were subjected. Investigations later revealed mismanagement and physical abuse of inmates. These scandals greatly damaged the school's reputation.

A. *Vice and Villainy in the Gold Rush City*

The discovery of gold at Sutters Mill, California, in 1847, initiated one of the greatest peacetime migrations in

⁵⁷ *Id.*

⁵⁸ *Id.*

history.⁵⁹ Thousands of fortune-seekers heading to the California gold fields streamed into San Francisco by sea and land. The city was transformed from a quiet hamlet to a large urban center.⁶⁰ The quest for easy riches combined with rapid urbanization created an atmosphere of unbridled avarice and corruption.⁶¹

In this unsavory environment, San Francisco quickly developed a reputation for lawlessness and disorder. Initially, most of the new arrivals were young males between ages eighteen and thirty-five who drifted back and forth from the gold fields.⁶² During their stay, these men would frequent the city's many saloons, gambling houses, and brothels, particularly along the notorious waterfront.⁶³ Later on, the new arrivals that settled in the city coalesced into roving street gangs who beat and robbed with impunity.⁶⁴ With a weak political system and few adequate stabilizing social structures, rampant crime seemed pervasive and unstoppable.⁶⁵

However, this lawlessness and disorder could not last. During the gold rush San Francisco became a financial and commercial center with a prosperous merchant class and an expanding middle class.⁶⁶ Fearing a threat to the city's prosperity, local business leaders organized the famous committees of vigilance in 1851 and 1856 to rid the city of its criminal population.⁶⁷ These committees carried out summary

⁵⁹ OSCAR LEWIS, *SAN FRANCISCO: MISSION TO METROPOLIS* 58-78 (1980); ROGER W. LOTCHIN, *SAN FRANCISCO 1846-1856: FROM HAMLET TO CITY* 3-30 (1974).

⁶⁰ *See* LEWIS, *supra* note 59, at 20-76.

⁶¹ *See id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ KEVIN J. MULLEN, *LET JUSTICE BE DONE: CRIME AND POLITICS IN EARLY SAN FRANCISCO*, at xvi (1989) (noting that between 1850 and 1856, San Francisco averaged 230 murders a year); *City Police: A Historical Sketch of the San Francisco Police Department*, *DAILY ALTA CAL.*, Jan. 10, 1881, at 1.

⁶⁶ LEWIS, *supra* note 59, at 20-76.

⁶⁷ *Id.*

arrests, banishments, and executions.⁶⁸ The first committee of vigilance was short lived, but the merchant organizers of the second committee used it as a vehicle to form the People's Party and gain control of the city's government.⁶⁹ The party succeeded in electing a secession of mayors drawn from the city's merchant class. The new officials' goals were the promotion of a favorable business climate, restricting government spending, and maintaining law and order.⁷⁰

The city's leaders also recognized the need to address the growing number of vagrant and destitute children.⁷¹ Civic leaders concluded that society was "to a great extent responsible to itself for the amount of evil they may do in the future, as well as morally responsible to the children themselves."⁷² Throughout the post gold rush era, the city's juvenile population grew rapidly.⁷³ A census taken in 1860 by the San Francisco Board of Education found 12,116 children under the age of fifteen.⁷⁴ By 1867 this number swelled to 34,710—a 300% increase.⁷⁵ The city's leaders feared that many of these children would inevitably threaten the social order by forming a permanent pauper class.⁷⁶

Seeking a solution to this potential menace, the city's leaders looked to the house of refuge model established in New York thirty years earlier. In arguing for a San Francisco house of refuge, Colonel J.B. Crockett,⁷⁷ described the plight

⁶⁸ *Id.*

⁶⁹ WILLIAM F. HEINTZ, *SAN FRANCISCO MAYORS: 1850-1880*, at 43-55 (1975).

⁷⁰ *Id.*

⁷¹ Untitled article, *DAILY DRAMATIC CHRON.* (San Francisco), Dec. 4, 1856, at 1.

⁷² *Id.*

⁷³ LEWIS, *supra* note 59, at 114.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ THOMAS J. BERNARD, *THE CYCLE OF JUVENILE JUSTICE* 60 (1992) (indicating that paupers were considered "undeserving poor people," whose destitute condition resulted from their corrupt and vice-ridden nature).

⁷⁷ Crockett delivered the opening address at the Industrial School's inauguration. *Inauguration of the Industrial School*, *DAILY BULL.* (San Francisco), May 17, 1859, at 1. His speech was an excellent explanation

of California immigrant children and the urgent need for California to follow the example of New York, Massachusetts, and Pennsylvania in establishing the Industrial School.⁷⁸ Crockett described the journey to California as long and arduous: “Many families arrive here sick and destitute, and in their struggle with poverty and disease, their children are utterly neglected and left to shift for themselves.”⁷⁹ As a result of these social conditions, destitute children “ramble the streets and fall into bad company and quickly become thieves and vagabonds.”⁸⁰ Crockett expressed the prevailing sentiment among institutional proponents that these children must be restrained from “evil associations” and “vicious indulgences” and “by considerate kindness, must be weaned from their ill practices.”⁸¹

B. The House of Refuge Movement Comes to California

In its early years, the houses of refuge were widely hailed as a great and enlightened reform by founders and visiting notables. During their trip through the United States in 1833, Alexis de Tocqueville, and Gustave de Beaumont noted that the houses of refuge offered a means for children who “have fallen into a state so bordering on crime, that they would become infallibly guilty were they to retain their liberty.”⁸² Others writing favorable comments included author Charles Dickens and social reformer Dorthea Dix.⁸³

of the theoretical foundations of the school. Prior to moving to San Francisco, Colonel Crockett championed the passage of a reform school while a member of the Missouri legislature in 1851. *Id.* Colonel Crockett recalled, “[I]n reviewing my past life, no one act of it affords me more alloyed satisfaction than that derived from the consciousness that I have contributed even in so humble a manner, to the founding of such an institution.” *Id.*

⁷⁸ BERNARD, *supra* note 76, at 60.

⁷⁹ *Inauguration of the Industrial School*, *supra* note 77, at 1.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² GUSTAVE DE BEAUMONT & ALEXIS DE TOCQUEVILLE, ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION IN FRANCE 111 (1833).

⁸³ *Id.*

Following her visit, Dorthea Dix found the New York House of Refuge “a blessing to its inmates and to society.”⁸⁴

A surge in institution building during the 1830’s and 1840’s signified a pervasive acceptance of the refuge or reform school model. Refuge and reform school managers began to assemble at yearly national conferences. These gatherings helped spread knowledge of refuge and reform schools and led to the establishment of uniform standards and practices that further propelled institutional expansion.⁸⁵ The first children’s institutions on the west coast were established in 1851 and 1852 with the founding of the Protestant and Catholic orphanages.⁸⁶ Since orphanages did not provide for the care of impoverished or neglected children, houses of refuge emerged to fill the gap.

The first action towards establishing a San Francisco house of refuge was the designation of a “house of refuge” lot by the Board of Supervisors in the early 1850’s.⁸⁷ Since no funding was allocated, serious planning did not begin until 1855.⁸⁸ Efforts to initiate construction were immediately stalled in 1855 and 1856 following passage of two charters by city voters.⁸⁹ After the charters were passed, city tax receipts plummeted, forcing drastic cuts in public services.⁹⁰ With the city’s finances in dire straits, money for charitable endeavors was scarce. However, house of refuge plans were revived when the state legislature intervened and passed the Industrial School Act in 1858.⁹¹

⁸⁴ MENNEL, *supra* note 3, at 23 (quoting Dorthea Dix).

⁸⁵ *Id.* at 30; Proceedings of the First Convention of Managers and Superintendents of Houses of Refuge and Schools of Reform (1857) reprinted in CHILDREN AND YOUTH IN AMERICA I, *supra* note 29, at 16-46.

⁸⁶ *Inauguration of the Industrial School*, *supra* note 77, at 1.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ LOTCHIN, *supra* note 59, at 245.

⁹⁰ *Id.*

⁹¹ PICKETT, *supra* note 3, at 50-67; Negley K. Teeters, *The Early Days of the Philadelphia House of Refuge*, in 27 PENNSYLVANIA HISTORY 165-87 (1960). In the legislation, the term “house of refuge” was substituted in favor of industrial school. PICKETT, *supra* note 3, at 67-103; *The*

Under the act, San Francisco was to support the privately chartered institution with an initial construction allocation of \$20,000 and a subsequent monthly allocation of \$1,000 contingent upon \$10,000 in matching private donations.⁹² The legislation also designated a corporate governing structure that required a president and vice president elected by a twelve-member board of managers.⁹³ The act vested the Industrial School's Board of Managers with the power to assume "all the rights of parents or guardians to keep, control, educate, employ, indenture, or discharge" any child committed or surrendered to the school's superintendent.⁹⁴ The Board of Managers was required to manage the institution in an economical way and to maintain "strict discipline and comprised of private citizens elected by school sponsors."⁹⁵ School sponsors were individuals who contributed a minimum of \$10 a year or purchased a lifetime membership for \$100.⁹⁶ To ensure the participation of local officials, the act mandated that three members of the San Francisco Board of Supervisors serve as *ex officio* Industrial School Board members.⁹⁷

Industrial School of San Francisco, 4 HUTCHINGS CAL. MAG. 58-61 (1859).

⁹² As part of the effort to raise the necessary \$10,000 in donations, shipping merchant and former Vigilance Committee executive member, Frederick A Woodworth, raised over \$2,000. *The House of Refuge Meeting*, DAILY ALTA CAL., June 3, 1858, at 1. A month later, Woodworth was elected to the Industrial School's first Board of Managers where he later served as Vice President. *Id.*

⁹³ *Id.*

⁹⁴ Industrial School Act, ch. 209, § 6 1858 Cal. Stat. 166, 167-68.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ Beginning with the privately chartered and publicly subsidized New York House of Refuge, a variety of administrative models evolved. MENNEL, *supra* note 3, at 49. These models included the privately-chartered and privately-funded organization, and the privately-chartered and publicly-supported organization. *Id.* Eventually, most states abandoned the privately-chartered institutional model in favor of the publicly-run and publicly-financed institution as a result of continuing problems of mismanagement and inadequate funding. *Id.*

The first election of the Industrial School's Board was held on June 7, 1858.⁹⁸ Following the election, construction began with the adoption of plans for a three-story building with thick walls and two massive wings.⁹⁹ Due to insufficient funds, only one wing was initially built. The wing consisted of three floors of sixteen "five feet six inches by seven feet six inches . . . little brick cells."¹⁰⁰ The cells on the second and third tier level opened onto a metal walkway protected by iron railings. Each cell was furnished with a metal bed that "folded snugly up against the wall in the day time."¹⁰¹ The tiers connected to a washroom and water closet (toilets) that were accessed by staircases at each end.¹⁰² The far end of the first floor wing contained a dining room and pantry while the end of the second floor wing contained a hospital ward.¹⁰³ The bottom floor of the corridor connecting the wing to the main building on opposite ends consisted of a classroom and workroom.¹⁰⁴ The central building's bottom floor contained the staff dining room, kitchen, and servants' rooms.¹⁰⁵ The second and third stories functioned as living quarters for the superintendent and other resident officers.¹⁰⁶

On May 18, 1859, political leaders, the Industrial School Board of Managers, clergy members, city officers, and

⁹⁸ *The House of Refuge Meeting*, *supra* note 92, at 1. Thomas H. Shelby, a prominent businessman and future mayor, was elected as the school's first president. *Id.* During the proceedings, controversy erupted when a delegate protested the absence of German, Irish, French, and Jewish names on the ballot and the dominance of "front street merchants." *Id.* The dominance of the protestant business elite in the formation of nineteenth century reform schools is widely acknowledged by historians. MENNEL, *supra* note 3, at 3-12; PICKETT, *supra* note 3, at 21-34. After a spirited debate the proceedings continued with the election of the remaining board members. MENNEL, *supra* note 3, at 3-12.

⁹⁹ SPECIFICATIONS FOR THE INDUSTRIAL SCHOOL BUILDING OF SAN FRANCISCO 1-15 (1858) (on file at the Bancroft Library, University of California at Berkeley).

¹⁰⁰ *The Industrial School of San Francisco*, *supra* note 91, at 5.

¹⁰¹ *Opening of the House of Refuge*, DAILY ALTA CAL., May 17, 1858, at 1.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

private citizens gathered at the Industrial School for an inaugural ceremony.¹⁰⁷ In his address, Colonel Crockett delivered a sweeping oratory on the importance of such institutions as “another important step on the road to onward progress” by providing means of controlling San Francisco’s “large class of feeble, helpless, thoughtless, guileless children” who without responsible parents will inevitably grow to be adult criminals.¹⁰⁸

C. The Early Years

In its first year, sixty boys and five girls were admitted to the school. Of this group nine were committed for petit larceny, two for vagrancy, and one for grand larceny.¹⁰⁹ The remaining youths were committed for the non-criminal offense of “leading an idle and dissolute life.”¹¹⁰ This all-encompassing designation meant the child was considered to be without guidance or direction because of parental neglect. As a result, nineteenth century houses of refuge lodged primarily non-delinquent youths.¹¹¹ The Industrial School’s commitments were indeterminate, allowing the acceptance of children or youth up to the age of eighteen.¹¹²

Commitments typically reflected California’s immigration patterns and included children from all over the country.¹¹³ During the periodic economic downturns that gripped San Francisco during the 1850’s and 1860’s when

¹⁰⁷ *Inauguration of the Industrial School*, *supra* note 77, at 1.

¹⁰⁸ *Id.*

¹⁰⁹ S.F. MUN. REPORTS, REPORT ON THE INDUSTRIAL SCHOOL DEPARTMENT 18 (1860) (on file at the San Francisco Public Library) [hereinafter S.F. MUN. REPORTS, 1860].

¹¹⁰ *Id.*

¹¹¹ Fox, *supra* note 3, at 1187-91.

¹¹² It was not unusual for youth as old as nineteen or twenty to be housed in the facility if they were successful in convincing a judge that they were under eighteen. In some instances, former inmates were arrested after release and simply shipped back to the institution even though they had reached the age of majority. THE INDUSTRIAL SCHOOL INVESTIGATION 2-14 (1872) (testimony of J.C. Morrill) (on file at the Bancroft Library, University of California at Berkeley).

¹¹³ S.F. MUN. REPORTS, 1860, *supra* note 109, at 18.

anti-Chinese sentiment ran high, Chinese youth represented the largest institutional ethnic group.¹¹⁴ Unlike many other institutions, the Industrial School did not segregate by race.¹¹⁵ Throughout its history, Chinese and Black youth comprised a segment of the institution's population.¹¹⁶ Although there is no information regarding differential treatment, this policy led one member of the Board of Supervisors to comment to the superintendent that he was disturbed "to see these poor unfortunate children obliged to sit at the same table with Negroes and Chinamen!"¹¹⁷ The superintendent simply responded that all the children "had to be fed" and the policy remained unchanged.¹¹⁸

Of the sixty-five youth admitted into the school in 1859, the average age was twelve, with two children under the age of five and twenty-six over the age of fifteen.¹¹⁹ The majority of children were born outside California. New Yorkers accounted for thirteen and "foreigners" accounted for twenty-three of the youths.¹²⁰ Children under the age of five were typically committed for "leading an idle and dissolute life."¹²¹ Youths committed to the Industrial School were believed to be lacking in moral and spiritual virtue. Only hard work and rigorous instruction could reverse such characteristics. To promote proper habits, institution

¹¹⁴ S.F. MUN. REPORTS, REPORT ON THE INDUSTRIAL SCHOOL DEPARTMENT 187 (1865) (on file at the San Francisco Public Library) [hereinafter S.F. MUN. REPORTS, 1865]; see RAND RICHARDS, HISTORIC SAN FRANCISCO 108-10 (1991).

¹¹⁵ MENNEL, *supra* note 3, at 17; Letter from Nathaniel C. Hart to Stephen Allen (Dec. 17, 1834) (on file with the New York Historical Society), reprinted in CHILDREN AND YOUTH IN AMERICA I, *supra* note 29, at 687.

¹¹⁶ J.L. Morrill, With A Glance at the Great Reformation and its Results 2 (1872) (unpublished manuscript, on file at the Bancroft Library, University of California at Berkeley).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ S.F. MUN. REPORTS, 1860, *supra* note 109, at 18.

¹²⁰ *Id.* at 78.

¹²¹ See S.F. MUN. REPORTS, REPORT ON THE INDUSTRIAL SCHOOL DEPARTMENT (1860-1870) [hereinafter S.F. MUN. REPORTS, 1860-1870] (all reports on file at the San Francisco Public Library).

managers endeavored to structure a regimen that would promote docility and industry.¹²²

Most nineteenth century youth reform schools were expected to achieve a level of self-sufficiency. As a result, they depended on their commitments to provide inmate labor. This reliance on inmate labor typically resulted in less emphasis and fewer resources devoted to the development of academic and vocational training—ostensibly a reform school’s primary purpose.¹²³ In the case of the Industrial School, young inmates in the early years spent most of the day assigned to the cultivation of the school’s 100 acres.¹²⁴ The sale of surplus goods was considered vital to offsetting the school’s maintenance costs.¹²⁵ To facilitate the shipping of Industrial School surplus produce to markets in San Jose and San Francisco, the school’s managers negotiated with the San Francisco-San Jose Railroad for a rail stop less than 100 yards from the school’s main entrance.¹²⁶ In exchange for the right of passage over Industrial School lands, the railroad granted “free conveyance of all supplies” and the free passage for all those “connected with the school’s governance” for twenty-five years.¹²⁷

Despite the plaudits expressed by proponents, early institution visitors were struck by the absence of educational and vocational facilities.¹²⁸ Although the industrial school’s

¹²² *The Industrial School*, DAILY ALTA CAL., Dec. 30, 1859, at 1 [hereinafter *The Industrial School*, Dec. 1859].

¹²³ S.F. MUN. REPORTS, REPORT ON THE INDUSTRIAL SCHOOL DEPARTMENT 265 (1875) (on file at the San Francisco Public Library); S.F. MUN. REPORTS, 1865, *supra* note 114, at 256; *Industrial School Matters*, DAILY ALTA CAL., Jan. 18, 1871, at 1 [hereinafter *Industrial School Matters*, Jan. 1871].

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ The school was first expected to cultivate sufficient produce to meet its own needs. *Id.*

¹²⁷ *Industrial School Anniversary Celebration*, DAILY ALTA CAL., May 17, 1863, at 1.

¹²⁸ Visitors were also repelled by the unbearable stench that emanated from the water closets at the end of each hall of the inmate’s living quarters. Due to poor design and inadequate ventilation, the scent of bodily waste permeated the cell blocks, causing one reporter to comment, “[I]n passing

purpose was to teach a marketable skill, no appropriate facilities for such training existed.¹²⁹ At the time of its opening, the school consisted of one schoolroom and one teacher with a barrel and plywood serving as a desk. To begin the school day, inmates carried benches and tables from the dining room to the schoolroom.¹³⁰ Instead of benefiting from well-furnished classrooms and workshops, boys toiled most of the day “digging down and wheeling away the earth from the bank in the rear of the building.”¹³¹

One commentator described the school’s daily routine as beginning at 5:30 a.m., when the youths were awakened.¹³² Youths were given breakfast and immediately afterwards were taken outside to work with a “pick and shovel in grading the hill in the back of the building.”¹³³ At noon, dinner was served, and from 1:30 p.m. to 2:30 p.m., they performed the same grueling work routine as in the morning.¹³⁴ From 3:00 p.m. until 5:30 p.m., the youths attended school.¹³⁵ Supper was served at 6:00 p.m., and at 7:00 p.m., they again went to school until 8:30 p.m.¹³⁶ Bedtime was at 9:00 p.m.¹³⁷ The rigors of the daily schedule and dearth of adequate facilities immediately exposed the school to severe criticism.¹³⁸

from the lower story to the school apartments above, the stench is absolutely intolerable.” *The Industrial School of San Francisco*, *supra* note 91, at 58-61.

¹²⁹ *Industrial School Anniversary Celebration*, *supra* note 127, at 1.

¹³⁰ *The Industrial School*, Dec. 1859, *supra* note 122, at 1.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *The Industrial School of San Francisco*, *supra* note 91, at 58-61.

¹³⁸ One visiting journalist expressed the following concerns:

How is it possible that, with such a routine of daily employment, they can possibly be improved in morals, and which is the great and laudable aim of the founders of the institution? There is no gymnasium; no workshop; no suitable play-ground, so that now they are all huddled together in the basement story, in front of their cells,

Industrial School activities were conducted along the congregate system. Under the congregate system, youths were marched to and from each activity and rules of conduct were strictly enforced. In the dining hall they ate in long rows with everyone facing in one direction.¹³⁹ To visitors, “the iron-barred windows, and the little brick cells with small iron gratings in the doors” created a prison-like environment.¹⁴⁰ This strict regimen and prison-like configuration led local observers to question the veracity of school proponent’s claims that the Industrial School would benefit youth.¹⁴¹

With only forty-eight individual cells at the time of its opening, the Industrial School quickly confronted a space shortage. When funding was secured in 1863, the School was expanded and refurbished with the addition of a second wing—increasing capacity by two thirds.¹⁴² To accommodate more inmates, the second wing adopted dormitory living units that slept up to 150, so the boys would “be in full view of the officers on duty.”¹⁴³ According to Industrial School Board President, J.P. Buckley, “The benefits arising from this change alone will be great—preventing secret practices and not inuring the inmates to a life in an iron-barred cell as at the

during the little time allowed them for leisure. Indeed they are made to feel by far too much that they are juvenile prisoners, rather than boys and girls who are placed there by a generous public, for their physical, mental, and moral improvement

Id.

¹³⁹ *Id.*

¹⁴⁰ One critic at the time concluded:

The antiquated and exploded idea of “ruling with a rod of iron” seems, unfortunately to have found its way into this institution; and all the angel arts and elevating tendencies of such agencies as taste, refinement, physical and mental amusement, mechanical conception and employment, and a thousand other progressive influences, with all their happy effects, are as, yet, excluded.

Id.

¹⁴¹ *Id.*

¹⁴² *Industrial School Anniversary Celebration, supra* note 127, at 1.

¹⁴³ *Id.*

present—the greater of whom have never committed a crime.”¹⁴⁴ The “objectionable cells” of the existing south wing were eliminated, save for a few, which were kept to confine “incorrigible” children.¹⁴⁵

As in the case of other houses of refuge and reformatories, the Industrial School’s managers were perplexed by the high rate of runaways.¹⁴⁶ Rather than compliantly accept their confinement, youths took every opportunity to escape and make their way back to the city. According to many accounts, escape for many Industrial School youths became a preoccupation.¹⁴⁷ Escapes were particularly common when the boys were laboring outside on the school grounds, where there was nothing to stop them from running. Frequent escapes created consternation within the administration, as they threatened to undermine the school’s reputation and legitimacy.¹⁴⁸ A loss of reputation was serious since it imperiled the school’s ability to generate private donations needed to supplement its government allocation.

The administration responded to these escapes by denying the inmates access to shoes and socks except when they were sick and requiring the wearing of “conspicuous

¹⁴⁴ *Id.*

¹⁴⁵ S.F. MUN. REPORTS, REPORT ON THE INDUSTRIAL SCHOOL DEPARTMENT (1864) (on file at the San Francisco Public Library) [hereinafter S.F. MUN. REPORTS, 1864]. Isolation has been a primary method for imposing disciplinary control since the earliest institutions. Superintendent’s Report on Discipline in the Boston House of Refuge, *supra* note 29, at 688-89. At the time there were still no facilities for workshops or provisions for adequate employment. To eliminate idle time and improve discipline, daily military drill was instituted in 1865. *Id.* Youths were equipped with wooden guns, which were manufactured at the Industrial School “at little cost.” *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ “One little rogue, not over 10 years of age, with the aid of a common hair comb alone, sawed off a brick from the side of his door; another with a similar implement had industriously dug deep grooves in the wall adjoining his cell.” *The Industrial School*, Dec. 1859, *supra* note 122, at 1.

¹⁴⁸ S.F. MUN. REPORTS, REPORT ON THE INDUSTRIAL SCHOOL DEPARTMENT 188-89 (1862) (on file at the San Francisco Public Library) [hereinafter S.F. MUN. REPORTS, 1862].

garb” of gray cloth.¹⁴⁹ When these measures proved inadequate a twelve-foot fence was erected in 1860, “forming a square of four hundred feet about the building.”¹⁵⁰ With erection of the fence, the boys were allowed outside on more occasions for work details, although escapes continued to occur. Furthermore, when inmates escaped, school officials instituted the practice of distributing wanted posters statewide with full personal descriptions and resident addresses.¹⁵¹ Discipline was strict and was maintained through solitary confinement on bread and water, “with the time and quantity being gauged according to the culprit.”¹⁵² In other instances, flogging was used. Because such measures were standard practice, little concern was raised except when stories of excessive harshness and arbitrary enforcement began to filter out.

Plans for releasing youths followed a traditional refuge model and included release to an apprenticeship or relative.¹⁵³

¹⁴⁹ *Legislators at the Industrial School*, DAILY ALTA CAL., Dec. 29, 1867, at 1.

¹⁵⁰ *The Industrial School*, Dec. 1859, *supra* note 122, at 1.

¹⁵¹ The following are two examples:

\$20 Reward! Ran away from the Industrial School, John Smith. Age, 9 years; height, 4 feet 11/2 inches; complexion fair; eyes, blue; hair, light brown. General appearance: Large head; high forehead; firm, close-set lips; small scar over left eye; bright and intelligent looking. Father dead. Mother living at 49 Blank Street.

Escaped yesterday: Tom Brown; 16 years old; dark complexion; black hair; rather coarse features; low forehead; squints with one eye; chews tobacco, and swears terribly. Had on a white shirt, and a good suit of clothes. Father in State Prison; mother dead. General appearance, decidedly bad. Took with him a gold watch and chain. A liberal reward, and all expenses paid for his apprehension. Address, Industrial School Department.

Morrill, *supra* note 116, at 2.

¹⁵² *The Industrial School*, DAILY ALTA CAL., May 17, 1859, at 1 [hereinafter *Industrial School*, May 1859].

¹⁵³ S.F. MUN. REPORTS, 1860-1870, *supra* note 121. Even so, records show that Industrial School apprenticeships were rare and most youths were returned to their parent or guardian. *Id.*

The Industrial School also attempted to make use of the city's maritime industry by indenturing its older, more recalcitrant youth to sea captains. This was a common practice among reformatories throughout the nation.¹⁵⁴ Because the school could not segregate by age, this practice was viewed as a convenient means of dislodging the older youths and ensuring a younger more tractable population.¹⁵⁵

D. The Marysville Challenge

While San Francisco citizens were developing plans for a privately chartered Industrial School, plans for a state-administered reform school were being initiated in the state legislature.¹⁵⁶ The impetus for another reform school resulted from concern over the lack of institutional options for youths residing outside of San Francisco. This need was documented in a report by the California Prison Committee showing the presence of over 300 boys at San Quentin State Prison, some as young as age twelve and another 600 children confined in adult jails throughout the state.¹⁵⁷ In response, legislation was approved in 1859 to establish a new reform school about thirty miles north of Sacramento in the town of Marysville.¹⁵⁸

The Marysville Reform School opened on December 31, 1861.¹⁵⁹ During the first year thirty-three boys were committed to the facility.¹⁶⁰ However, because of its remote location and inadequate transportation, the school was

¹⁵⁴ CHILDREN AND YOUTH IN AMERICA: A DOCUMENTARY HISTORY 1866-1932, at 39-41 (Robert H. Bremner ed., 1971) [hereinafter CHILDREN AND YOUTH IN AMERICA II]; MENNEL, *supra* note 3, at 1.

¹⁵⁵ CHILDREN AND YOUTH IN AMERICA II, *supra* note 154, at 39-41; MENNEL, *supra* note 3, at 1.

¹⁵⁶ California Youth Authority, The History of Juvenile Detention in California and the Origins of the California Youth Authority 1850-1980 (1981) (unpublished manuscript, on file with the California Youth Authority in Sacramento, CA).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

practically inaccessible in the winter months.¹⁶¹ Along with its locational difficulties, the school faced fierce opposition from San Francisco Industrial School supporters.¹⁶² At the time the Marysville facility was established, the San Francisco Industrial School was the subject of scrutiny due to unfavorable publicity about the institution's management and the small number of inmates.¹⁶³ The Industrial School's Board feared that the adverse notoriety, along with the emergence of a new institution, could jeopardize the school's existence.¹⁶⁴

In response, the Industrial School Board appointed a special committee in 1862 to pressure the state legislature to amend the Industrial School Act and allow commitments of youths from throughout California.¹⁶⁵ In a letter to the legislature the committee asserted "that one reform school is ample for the wants of California"¹⁶⁶ The committee advocated for the immediate transfer of all the Marysville Reform School residents to the San Francisco Industrial School.¹⁶⁷

Fortunately for Industrial School proponents, the Marysville Reform School never achieved viability. Its remote location and lack of adequate transportation resulted in a cost that exceeded \$230 a year per youth compared to the \$145 per capita yearly costs at the Industrial School.¹⁶⁸ Along with its excessive costs, the Marysville Reform School's support was further eroded by allegations of abusive

¹⁶¹ *Id.* In his report to the legislature, school Superintendent Gorham lamented, "This school would be constantly filled with boys requiring its discipline, were it not for a single obstacle, viz: the lack of provision for payment of officers of the law for transportation of boys to this place." *Id.*

¹⁶² S.F. MUN. REPORTS, 1862, *supra* note 148, at 187-97. Maintaining enrollment was a prerequisite for survival, and competition among nineteenth century reform schools and orphanages was often intense. MENNEL, *supra* note 3, at 58-59.

¹⁶³ S.F. MUN. REPORTS, 1860, *supra* note 109, at 193.

¹⁶⁴ *Id.* at 195.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

conditions and mismanagement.¹⁶⁹ Typical of congregate institutions, the facility held youths of various ages and development with no capacity to segregate. As a result, staff were unable to prevent older inmates from victimizing the younger inmates. An 1865 superintendent's report to the Board of Trustees noted "with very great concern the pernicious influences of the larger boys"¹⁷⁰ The frustration and the inability to maintain control inevitably resulted in staff abuses that soon became public—dealing the institution a fatal blow.¹⁷¹

Amid soaring costs and growing controversy, the Marysville Reform School was closed in 1868 by legislative decree.¹⁷² Marysville's remaining youths were transferred to the Industrial School.¹⁷³ Industrial School supporters saw the closure as a victory, and it was twenty years before another state-run reform school was established in California.¹⁷⁴ The next time, however, it was at the expense of the Industrial School.

E. Escapes, Scandals, and Brutality

With the closing of the Marysville Reform School, the Industrial School became the state's only institution for destitute and delinquent children. However, the school was soon swirled in controversy as allegations of staff brutality began to spread. Two grand jury investigations looked into these allegations during the late 1860's.¹⁷⁵ Publicity from these investigations undermined the school's reputation as a place of reform.

The allegations leading to the 1868 grand jury investigation accused Superintendent Joseph Wood, head teacher Captain Joseph C. Morrill, and other school staff of

¹⁶⁹ Untitled article, MARYSVILLE DAILY APPEAL, Nov. 22, 1867, at 3.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ California Youth Authority, *supra* note 156, at 13.

¹⁷⁴ *Id.*; S.F. MUN. REPORTS, 1862, *supra* note 148, at 193-98.

¹⁷⁵ *Reform Schools—The Industrial School of this City—Faults of Discipline*, DAILY BULL., July 14, 1869, at 1.

“barbarous” treatment of inmates.¹⁷⁶ Witnesses charged that in some instances the treatment was so severe that youths were driven to suicide.¹⁷⁷ A grand jury investigation documented over fourteen cases where youths were subjected to close confinement on bread and water or severe beatings and floggings.¹⁷⁸ In some cases, youths were subjected to over 100 lashes.¹⁷⁹ In one instance, a boy¹⁸⁰ was flogged so badly that “shreds of his shirt stuck to the wounds on his back, and the shirt glued to the body by the blood.”¹⁸¹ In another instance, a boy was beaten so severely that he became depressed and committed suicide a few days later.¹⁸²

During the 1868 investigation, a delegation conducting an inspection of the isolation cells discovered five boys, whose ages ranged from fifteen to nineteen, “shut up in close, dark, damp cells, with nothing to sleep on but the asphaltum floor.”¹⁸³ The cell doors were covered to prevent any light from penetrating and inmates were maintained on a diet of bread and water.¹⁸⁴ When one of the cell doors was opened for the grand jury inspectors, a “boy was brought out a living skeleton, his face was blanched, he reeled, and blinked his eyes like a bat in the sunshine.”¹⁸⁵ Though the boy had been locked in the cell for two weeks, one commentator noted “that *a week’s* confinement in that hole of utter darkness and breathing stench would make an idiot of an adult.”¹⁸⁶

It was not unusual for inmates to rebel against such treatment by yelling, pounding, and destroying furniture. Usually, this had the effect of worsening their treatment and

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ The boy was Benjamin Napthaly. *Id.* See *infra* note 201 and accompanying text.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* (emphasis added).

extending their periods of solitary confinement.¹⁸⁷ In some instances, youths who continued to rebel were “bucked and gagged.”¹⁸⁸ Gagging involved forcing a “stout, short stick” to the back of the youth’s throat that was “held in place by cords tied around the neck.”¹⁸⁹ Then the youth was bucked with a “stout stick” placed over the arms and under the knees with hands manacled securely. A youth “bucked and gagged” had to sit doubled up or rolled over on his side. According to accounts, “In either position, the pain after a short time is almost indescribable.”¹⁹⁰ Often youths were left in this position for a night.

In addition to charges of brutality, Colonel Wood was also implicated in the sexual abuse of girl inmates and the embezzlement of school funds.¹⁹¹ During the investigation, girls in the institution reported that Colonel Wood would let them do anything as long as they did not tell “certain things.”¹⁹² These allegations led to calls for the girls’ immediate separation from the male-run institution.¹⁹³ Following the investigation and public outcry, Colonel Woods was forced to resign and immediately left the city. Although Captain Morrill was temporarily elevated to the superintendent’s job, he, too, was dismissed within a few months.¹⁹⁴ As a result of the scandals, it was said that a hundred men from Sacramento were ready to come to San

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ EDWARD BOSQUI, MEMOIRS OF EDWARD BOSQUI 108 (1952); *Tenth Anniversary of the Industrial School*, DAILY ALTA CAL., May 18, 1869, at 1. It was common for girls to be subjected to sexual exploitation by institution staff during this era. O’CONNOR, *supra* note 6, at 126-30. In the rare instances when such scandals were made public, they were typically only obliquely referenced without details. *Id.* In instances where the exploitation involved allegations against “respectable” community members, efforts were made to blame the incident on the “sluttiness” of young female victims. *Id.*

¹⁹⁴ *Tenth Anniversary of the Industrial School*, *supra* note 193, at 1.

Francisco, tear down the Industrial School buildings and hang the superintendent.¹⁹⁵

In 1872, Captain Morrill wrote a response to the public condemnation of him and the school insisting that the problems were the result of external forces that were beyond school management's control.¹⁹⁶ In his testimonial, Captain Morrill asserted that the institution was not capable of fulfilling its role as a place of reformation.¹⁹⁷ Due to the inability to segregate according to age, many of the younger, less sophisticated inmates learned their first lessons in crime within the institution.¹⁹⁸ Morrill asserted that strict discipline was necessary to protect the younger boys and ensure the orderly running of the institution.¹⁹⁹ He attributed the public condemnation of his actions to publicity-seeking politicians and sensation-driven newspapers.²⁰⁰ One former inmate, Benjamin Naphthaly, who became a reporter with the *San Francisco Chronicle*, was singled out by Morrill and his defenders for exploiting the situation for personal gain.²⁰¹

The public humiliations to which he was subjected embittered Morrill long after his tenure. Believing he had administered the school responsibly, he felt unjustly condemned. He claimed many of the wrongs for which he was accused were actually committed by former superintendents and that he was the victim of unfair media attack:

The unthinking public were made to believe that I was accountable, in some way or other, for every fault charged against the institution. . . [Old wrongs] were rehashed and served up .

¹⁹⁵ Morrill, *supra* note 116, at 2.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* It was not unusual for children as young as two years old to be housed alongside adults over the age of eighteen sentenced by judges who viewed the Industrial School as a preferred alternative to the adult penitentiary. *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*; BOSQUI, *supra* note 193, at 109-10.

. . . as proofs positive that I was a heartless monster, a sort of ghoul, whose greatest delight was in the writhings and tortures of unfortunate and helpless children! . . . I . . . who knew no higher happiness than childhood's unbought love and confidence—I accused of cruelty to children!²⁰²

The publicity that surrounded these investigations permanently damaged the school's reputation and further undermined its financial stability.

III. Reorganization And Reform

In the 1870's efforts were made to reorganize the Industrial School to restore public confidence. The school's Board took great cares to select a new superintendent. During this time, the city also recognized the need for a separate girls facility. This led to the creation of the Magdalan Asylum—the first institution for wayward and delinquent girls on the West Coast. Despite the attempts at reform, the school continued to suffer from poor management, inadequate funding and media scrutiny. In an attempt to save it from financial collapse, the Industrial School's private charter was abolished and responsibility for managing the institution was transferred to the city.

A. Financial Trouble and Reorganization

Following the revelations of abuse and mismanagement, the School's Board sought to revitalize the School's reputation by seeking a superintendent with an impeccable record. With Captain Joseph C. Morrill's dismissal, John C. Pelton was appointed superintendent with the task of salvaging the school and restoring its flagging reputation.²⁰³ Pelton, a member of the Industrial School

²⁰² Morrill, *supra* note 116, at 7-8.

²⁰³ S.F. MUN. REPORTS, REPORT ON THE INDUSTRIAL SCHOOL DEPARTMENT 373 (1870) (on file at the San Francisco Public Library) [hereinafter S.F. MUN. REPORTS, 1870].

Board, was considered the father of California's public school system.²⁰⁴ Pelton addressed the school's issue of brutality by inaugurating a system of "kindness" that was intended "to appeal to the better feelings of the boys."²⁰⁵ Prior to Pelton's administration, Catholic religious instruction was not welcomed at the Industrial School. After his appointment religious instruction was opened to Catholic and all Protestant denominations.²⁰⁶

When Pelton assumed the superintendent's position, the institution's finances were in disarray. Unfortunately, in Pelton's zeal to improve the school's institutional conditions, he proved a poor financial manager by substantially worsening the school's debt.²⁰⁷ In 1869, the school was approximately \$20,000 in debt and yearly costs were rapidly rising. Initially, when confronted by a hostile press, Pelton claimed that the rising costs were due to increased enrollments. But it was soon revealed that the institution's population had actually declined.²⁰⁸ Even so, the cost of food and clothing increased significantly between 1869 and 1870.²⁰⁹

Local newspapers noted that the school's yearly expenses were almost twice as much as that of the local

²⁰⁴ *Sketch of the Origin and Early Progress of the Free School System in California*, 4 HUTCHENS CAL. MAG. 29 (1859) [hereinafter *Early Progress*]. According to historians it was common for public school officials to serve on reform school boards in the nineteenth century. SCHLOSSMAN, *supra* note 4, at 10.

²⁰⁵ S.F. MUN. REPORTS, REPORT ON THE INDUSTRIAL SCHOOL DEPARTMENT 373 (1870) (on file at the San Francisco Public Library) [hereinafter S.F. MUN. REPORTS, 1870].

²⁰⁶ *Id.*

²⁰⁷ *Industrial School Matters*, Jan. 1871, *supra* note 123, at 1.

²⁰⁸ *Id.*

²⁰⁹

	1869	1870
Groceries and Provisions	\$ 8,570.96	\$ 10,007.85
Clothing	\$ 1,559.03	\$ 5,815.45
Furniture	\$ 2,267.79	\$ 2,460.91
Salaries	\$ 12,941.17	\$ 15,003.66
Miscellaneous	\$ 2,867.03	\$ 5,065.53
Total	\$ 28,205.98	\$ 38,353.40

The Industrial School, DAILY ALTA CAL., Dec. 12, 1870 at 1.

orphan asylums.²¹⁰ Superintendent Pelton responded by comparing the institution's cost to local colleges, but he was vilified for making such a "preposterous comparison."²¹¹ As a result of these revelations, the school's budget was severely restricted by the Board with only necessary purchases allowed.²¹² No funds were available for building maintenance or expansion, and Pelton's efforts to improve instructional facilities ceased.²¹³

B. Abolishment of the Private Charter

Dwindling public support from scandals and financial mismanagement permanently crippled the school's viability as a privately chartered public charity. In 1874, Pelton was replaced by David C. Woods.²¹⁴ By this time a change of administration was insufficient to reverse the school's fortunes. The School's Board was embroiled in internecine squabbles, and there was no means for meeting the school's mounting debt.²¹⁵ The situation forced the Board to conclude that the school's "debt and future support must be assumed as a public burden, or else it will collapse of its own weight."²¹⁶ After fifteen years as a privately chartered institution, it was now clear that the Industrial School could no longer survive as a private entity.

While unanimity existed on the need to dissolve the private charter, a debate persisted on whether to transfer responsibility for the school's administration to the state or the city. Since San Francisco was considered the "grand rendezvous for vagabonds from every county," some officials feared that turning it over to the state would absolve the city of the school's debt and force the state to assume full financial

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ *The Industrial School*, DAILY ALTA CAL., Feb. 20, 1871 at 1.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

responsibility.²¹⁷ Arguments favoring local control centered on the value of the school's prized property and the likelihood that the city would provide better management.²¹⁸ Another suggestion was for a joint state-county administered institution, with the city appointing two-thirds of the managing board.²¹⁹ Proponents of joint management believed that allowing the state to appoint one-third of the board would ensure continued financial support from the state.²²⁰

Ultimately, the argument for local control prevailed. In February 1872, the Industrial School's Board passed a resolution dissolving "the present system of management, and for the surrender of the entire institution to the Board of Supervisors as representing the City and County of San Francisco."²²¹ With the resolution's passage, management of the Industrial School was transferred to the city in April 1872, and California's experiment in privately chartered reform schools ended.²²²

The Industrial School's transfer to the city improved its financial base and produced a momentary degree of optimism. Needed repairs to the building structure were initiated and additional farm supplies and livestock were purchased.²²³ Later, an education department was created to restructure and provide more emphasis on academics.²²⁴ Despite these changes, the school continued to labor under limited resources, poor management, and public distrust.

C. The Magdalan Asylum and the Treatment of Girls

As part of the Industrial School's reforms, girls committed to the school were moved to a separate facility.

²¹⁷ *The Industrial School: The Proposed Change in its System of Management*, DAILY ALTA CAL., Feb. 12, 1872, at 1.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² S.F. MUN. REPORTS, REPORT ON THE INDUSTRIAL SCHOOL DEPARTMENT 408 (1873) (on file at the San Francisco Public Library).

²²³ *Id.*

²²⁴ *Id.*

The care and treatment of abandoned, abused, and delinquent girls in the nineteenth century reflected the prevailing societal ambivalence towards females in general. Although they were the products of the same desperate and destitute conditions as boys, girls were usually little more than an afterthought among institution managers. Initially, girls and boys were housed in separate units of the same institutions.²²⁵ However, when commingling proved unworkable due to inadequate facilities and sexual exploitation, separate institutions were developed.²²⁶

Reform school training in the nineteenth century was even less accessible for girls than for boys.²²⁷ This reflected the widespread belief that females were not physically or intellectually suited for jobs in the mainstream economy.²²⁸ As a result, most reform school girls spent their days assigned to domestic chores such as laundry, house cleaning, sewing, and meal preparation.²²⁹ These tasks, especially laundering and sewing, were used to generate income for the institution.²³⁰

When the Industrial School opened, few special provisions for girls were considered. Girls were housed in cells on one of the institution's three tiers.²³¹ While boys were primarily engaged in manual labor, girls were assigned "to the domestic duties and arrangements."²³² Following the scandals of 1868, immediate efforts were made by the Industrial School's Board to remove the girls from the institution. According to Board member Edward Bosqui, "at the first meeting of the board of managers we unanimously determined to remove the girls from under the same roof with the boys, and reported necessity of doing so to save all those concerned

²²⁵ BOSQUI, *supra* note 193, at 108.

²²⁶ *Id.*

²²⁷ MEDA CHESNEY-LIND & RANDALL G. SHELDEN, *GIRLS, DELINQUENCY, AND JUVENILE JUSTICE* 125-38 (1998).

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ S.F. MUN. REPORTS, 1870, *supra* note 205, at 373.

²³² *Id.*

from the current scandal and reproach incident to such a system.”²³³ With this determination, the San Francisco Board of Supervisors passed legislation authorizing the Industrial School management to contract with the Sisters of Mercy to house the Industrial School girls in the Magdalan Asylum.²³⁴ Although the girls remained the responsibility of the Industrial School superintendent, the Sisters of Mercy agreed to house, clothe, feed, and train the girls for \$15 a month.²³⁵

With the signing of the contract, sixty-three Industrial School girls were immediately transferred to the Asylum.²³⁶ The Industrial School girls represented a unique challenge to the sisters, since they were involuntary court commitments “under terms of detention.”²³⁷ To accommodate these “refractory [girls] . . . most of whom were more sinned against by neglect and bad environment than sinners themselves,” a

²³³ BOSQUI, *supra* note 193, at 108.

²³⁴ SISTER MARY AURELIA MCARDLE, CALIFORNIA’S PIONEER SISTER OF MERCY 95 (1954) (describing the founding of the Sisters of Mercy and the Magdalan Asylum). The Sisters of Mercy was a Catholic order of nuns with a mission of humanitarian service. *Id.* In 1859, the sisters established the Magdalan Asylum in San Francisco as a shelter for former prostitutes who were “poor, wretched, brokenhearted victims of crime and credulity.” *Id.* Admission to the institution was voluntary, and the “penitent magdalans” were free to leave. *Id.*

²³⁵ The decision to contract with a Catholic agency was particularly unusual for nineteenth century juvenile justice policy given the high degree of anti-Catholic sentiment among institution proponents. The promotion of juvenile institutions during the century was predominately carried out by Protestant civic leaders who sought to imbue youths with Protestant ethic. MENNEL, *supra* note 3, at 63-64. In this instance, the city’s decision to contract with a Catholic order, suggests a degree of desperation. In addition, the Protestant denominations were often criticized throughout the history of the industrial school for failing to take an active role in the spiritual needs of institutionalized youth. BOSQUI, *supra* note 193, at 109; MENNEL, *supra* note 3, at 63; PICKETT, *supra* note 3, at 182-83; Randall Shelden, *Juvenile Justice in Historical Perspective*, in REFORMING JUVENILE JUSTICE: REASONS AND STRATEGIES FOR THE 21ST CENTURY 7-39 (Dan Macallair & Vincent Schiraldi eds., 1998); ARCHIVES OF THE SISTERS OF MERCY, 2 SCRIPT ANNALS 1 (various dates) (on file at the Sisters of Mercy Convent, Burlingame, Cal.).

²³⁶ ARCHIVES OF THE SISTERS OF MERCY, *supra* note 235, at 25.

²³⁷ *Id.*

new wing was added to the Magdalan facility.²³⁸ Like the Industrial School, the Magdalan Asylum adopted the traditional congregate institutional model.²³⁹ The living units were dormitories with beds lined in rows along a corridor with the head of one against the foot of another.²⁴⁰ One sister was assigned to sleep in each dormitory.²⁴¹ The girls were awakened at “half past five in the summer and six o’clock in the winter.”²⁴² Bedtime was at 9:00 p.m. As in the Industrial School, the day was divided between school and work. Dinners were served in a large dining room on two long tables that sat sixty each.²⁴³

Training at the Magdalan Asylum involved long hours of sewing in the facility’s workshop.²⁴⁴ The Magdalan Asylum was dependent on inmate labor particularly after 1876 when the Asylum lost its state appropriation due to legislation barring state aid to religious organizations.²⁴⁵ Initially, the Asylum was dependent on charitable donations and proceeds from the sale of “needlework.”²⁴⁶ Later, a sewing workshop was installed where the girls manufactured household linen, ladies wearing apparel, and embroidery work.²⁴⁷

Typical of institutionalized populations, the Industrial School girls were disruptive and unresponsive to their involuntary confinement. Fearing that their rebelliousness would infect the Magdalans, the sisters established separate living quarters and play grounds for the “industrials” so they could not commingle with the Magdalans.²⁴⁸ Furthermore, the

²³⁸ *Id.*

²³⁹ *Id.* at 95.

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.* (comparing the Magdalans home with the branch jail).

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.* In one instance in 1884, the Industrial School girls rioted after a sister tried to stop one from passing a note through a wall. *Id.* When the sister took hold of the girl’s arm, the other girls became enraged and began shouting. *Id.* They then broke open the gate that separated them from the

institution was under constant siege by gangs of male “ruffians.” These young men and boys frequently attempted to gain access to the grounds in the rear of the building in order to cavort with the young women.²⁴⁹ In response, the sisters were forced to install a signal line directly to the local police station.²⁵⁰

As the difficulty in managing an involuntary and rebellious population became evident, the sisters adopted traditional reformatory disciplinary practices. Such practices included the use of isolation cells and food deprivation.²⁵¹ The isolation cells were installed on the urging of local authorities and were located in the basement of the institution.²⁵² The cells had large iron doors and locks “as big as a football.”²⁵³

Nineteenth century attitudes towards reform school girls was summed up by Hastings Hart of the Russell Sage Foundation in 1910, when he asserted the girls are “giddy and easily influenced” and that they needed to be kept safe.²⁵⁴ Training for girls should prepare them to support themselves or be a more efficient housewife and mother.²⁵⁵ The concern with protecting a young girl’s virtue and innocence was reflected in commitment patterns by the San Francisco Police Courts.²⁵⁶ A much larger percentage of girls than boys were

Magdalans “and continued shouting and demanding their liberty.” *Id.* At that moment a police officer arrived and attempted to intervene; however, this only enraged the girls further, as they began pelting him with stones. *Id.* More officers eventually arrived, and the riot was stopped. *Id.*

²⁴⁹ Neil Hitt, *An Old Building Razed, and a Story of Sin and Mercy is Unfolded*, S.F. CHRON., 1939, in ARCHIVES OF THE SISTERS OF MERCY, *supra* note 235.

²⁵⁰ *Id.*

²⁵¹ *Id.* Following the 1884 riot “the leaders were punished by fasting and close confinement in dark cells.” *Id.*

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ HASTINGS H. HART, PREVENTIVE TREATMENT OF NEGLECTED CHILDREN 70-72 (1910).

²⁵⁵ *Id.*

²⁵⁶ Under commitment procedures, girls continued to be committed to the Industrial School. The girls were then placed in the Magdalan Asylum by the Industrial School superintendent who remained responsible for their

committed to the Industrial School for leading an idle and dissolute life, using vulgar language or drunkenness, or were surrendered by parents or guardians.²⁵⁷ In 1906, the Magdalan Asylum was renamed Saint Catherine Training School and remained the primary San Francisco institution for wayward girls until 1934.²⁵⁸

IV. New Legal Procedures and Jurisprudence

The Industrial School ushered in a new era of jurisprudence by giving local police court judges sweeping jurisdiction over a range of child welfare and delinquency issues. Police courts were established for the enforcement of local ordinances. As they had been in other states, these sweeping powers were challenged and the question of whether California's children had due process rights when being committed to the Industrial School found its way to the California Supreme Court. The deciding legal arguments focused on whether the Industrial School constituted a prison or a school and the state's moral duty to invoke *parens patriae*.

well being. S.F. MUN. REPORTS, REPORT ON THE INDUSTRIAL SCHOOL DEPARTMENT 97 (1884) (on file at the San Francisco Public Library).

²⁵⁷ The following chart compares the reasons for commitment to the Industrial School for boys and girls in 1884:

	Boys	Girls
Leading an idle and dissolute life	40	38
Petit larceny	38	1
Misdemeanor, vulgar language, drunkenness, etc.	15	13
Surrendered by parents and guardians as unmanageable	1	16
Malicious mischief	3	0
Attempt to pick pockets	1	0
Total	98	68

Id.

²⁵⁸ MCARDLE, *supra* note 234, at 97.

A. Police Courts and Legal Procedures

Throughout the Industrial School's history, police courts accounted for over ninety percent of its commitments. Although typically not courts of record, nineteenth century police courts were responsible for regulating and enforcing local regulations and statutes. Examples of such laws were those against vagrancy, "disorderly persons" and a broad range of misdemeanor offenses.²⁵⁹

In San Francisco, the police judge was the primary arbiter of Industrial School commitments.²⁶⁰ Under the city's Municipal Corporation Act, a police judge could sentence an offender under eighteen years of age to the Industrial School for up to six months.²⁶¹ In instances where the person was under age fourteen "and has done an act, which if done by a person of full age would warrant a conviction of the crime of misdemeanor," the police judge could also impose a six-month commitment.²⁶² No provision existed for the sentencing of youths convicted of felonies to the Industrial School.²⁶³ Youths convicted of felonies continued to be committed to the adult jail.²⁶⁴

²⁵⁹ CURTIS HILLYER, PRACTICE AND FORMS FOR JUSTICES OF OTHER INFERIOR COURTS IN THE WESTERN STATES 21-23 (1912).

²⁶⁰ *Id.* at 160.

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ The San Francisco's Municipal Corporation Act stated:

Upon application of the mayor, or any member of the supervisors, or any three citizens, charging that any child under eighteen years of age lives an idle and dissolute life, and that his parents are dead, or, if living, do, from drunkenness or other vices or causes, neglect to provide any suitable employment, or exercise salutary control over such child, the said court or judges have power to examine the matter, and upon being satisfied of the truth of such charges, may sentence such child to the industrial school; but that no person can be so sentenced for a longer period than until he arrives at the age of eighteen years.

Id.

Ironically, the Municipal Corporation Act provided greater discretion to police judges in non-delinquent matters. Police courts were limited to sentencing delinquent youths to six months in the Industrial School.²⁶⁵ However, youths who were the victims of parental neglect or considered on the path to later criminality were subject to indeterminate confinement up to their eighteenth birthday.²⁶⁶ These non-delinquent commitments represented the majority of police court commitments during the Industrial School's early years.²⁶⁷ In later years, as the Industrial School became viewed more as a penal institution, police courts shifted their emphasis to short term periods of confinement for low-level offenses.²⁶⁸

The decision on a youth's commitment usually involved an informal hearing with few due process protections. Such informal court procedures gave the city's police court broad discretion over children's lives. Consequently, the police courts were the primary vehicle for institutionalizing non-delinquent youths in the Industrial School.²⁶⁹ The police court's informal procedures and expansive judicial powers was the model for California's future juvenile court.

B. Legal Challenges and Precedents

The practice of confining non-criminal youths in reform schools was first successfully challenged in 1870. In *People ex rel. O'Connell v. Turner*,²⁷⁰ the Illinois Supreme Court examined the legality of fourteen-year-old Daniel O'Connell's indeterminate commitment to the Chicago Reform School. Daniel was committed for the non-delinquent offense of vagrancy—a situation almost identical to *Crouse*.²⁷¹ In a stunning repudiation of reform school practice, the court ruled that a youth cannot be arrested and confined based on

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *People ex rel. O'Connell v. Turner*, 55 Ill. 280, 281 (1870).

²⁷¹ *Ex parte Crouse*, 4 Whart. 9, *1 (Pa. 1838).

simple misfortune or parental neglect.²⁷² Similarly, children who were “only guilty of misfortune” could not be deprived of their liberty.²⁷³ Thus, after examining circumstances in the Chicago Reform School the court determined that its prison-like conditions rendered commitments without due process unconstitutional.²⁷⁴

According to the court, “Destitution of proper parental care, ignorance, idleness and vice, are misfortunes, not crimes.”²⁷⁵ In contrast to *Crouse*, the *O’Connell* court equated confinement in the Chicago Reform School with imprisonment: “This boy is deprived of a father’s care; bereft of home influence; has no freedom of action; is committed for an uncertain time; is branded as a prisoner; made subject to the will of others, and thus feels that he is a slave.”²⁷⁶ Subsequently, the court ordered Daniel’s release to his father, and within a year the school closed.²⁷⁷

In 1872, a youth of Chinese ancestry named Ah Peen was committed to the San Francisco Industrial School for leading an idle and dissolute life.²⁷⁸ Seizing on the *O’Connell* precedent, San Francisco attorney Frederick H. Adams filed a writ of habeas corpus on behalf of the sixteen-year-old “Mongolian” youth. Adams challenged the constitutionality of California’s Industrial School Act since it allowed the same practice condemned in *O’Connell*.²⁷⁹ According to Adams, the Industrial School Act gave a police judge arbitrary power to sentence a youth to the Industrial School for “ten, fifteen, or twenty years” without “hearing any evidence against the minor.”²⁸⁰ Except for the police judge or the Industrial School’s superintendent, no other state official, including the

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ Fox, *supra* note 3, at 1220.

²⁷⁸ *The Industrial School Matters*, DAILY ALTA CAL., Feb. 18, 1871, at 1.

²⁷⁹ *Id.*

²⁸⁰ *Id.*

governor, could order the youth's release.²⁸¹ Once confined, "inmates were attired in uniform and shorn."²⁸² Although the Industrial School was not designated a prison, Adams noted, "According to the statute of 1858, if a child attempts an escape he is guilty of a misdemeanor as if he were in the County Jail."²⁸³

Adams characterized the power of police court judges to render summary judgments as "ridiculous" given its blatant disregard for constitutional guarantees of due process. He asserted that constitutional rights applied to "infants" just as it applied to adults: "The law was unconstitutional, inasmuch as it conflicts with Section 1, Article 3, of the Constitution. . . . The basest criminal has a right to plead, and it is claimed that an infant possesses the same right."²⁸⁴ The right of trial by jury, Adams argued, is secured to everyone.²⁸⁵

San Francisco District Attorney Daniel J. Murphy, countered with arguments from *Crouse* by defining children as a separate class who were not subject to constitutional protections. Since California's Industrial School Act was modeled on Pennsylvania's statute, Murphy argued that the court should adopt the reasoning of the Pennsylvania Supreme Court in *Crouse* and uphold the Act's constitutionality. Furthermore, Murphy claimed that the Industrial School was not a penal institution, "although vicious and incorrigible children are detained there."²⁸⁶ Murphy argued the importance of the state to have the power to intercede into lives of children who are "dissolute or vicious" and "are the victims of parental neglect."²⁸⁷ According to Murphy, "To deny such power would be most horrible to contemplate."²⁸⁸

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Id.*

Murphy also asserted that the constitutional right to a jury trial does not exist for all minor offenses.²⁸⁹ Since there was over 300 years of precedent established by parliaments “authorizing summary convictions of certain classes of persons, such as vagrants etc., there is nothing contradictory about the current statute.”²⁹⁰ Finally, Murphy warned that overturning the Industrial School Act would result in the “wholesale release of the inmates.”²⁹¹

After hearing Adam’s and Murphy’s arguments, the California Supreme Court upheld the constitutionality of the Industrial School Act.²⁹² In doing so, the court adopted the prevailing national opinion on refuges and reform schools as places of reformation and not places of punishment. Instead of examining the realities of confinement as the Illinois Supreme Court had done in *O’Connell*, the California Supreme Court simply accepted the Industrial School Act’s intentions and affirmed its constitutionality.²⁹³ Citing the precedents established by the Pennsylvania Supreme Court in *Crouse* and by the Ohio Supreme Court in *Prescott v. State*,²⁹⁴ the Court concluded:

²⁸⁹ “Every state in the union, since the beginning of their Government, punished for the lesser offences without a jury.” *Id.*

²⁹⁰ *Id.*

²⁹¹

In thirteen of our States statutes have been passed instituting such schools. Will this Court, then, in view of the general establishment of such institutions and their general utility, and the almost universal recognition given them, decide that, after all, these praiseworthy efforts have been for naught? I submit that, in view of the authorities I have read, that the Court will not so decide. To so decide is to at once resist the current enlightened legislation—to run against the best and intelligent thought of the time—and unless the Court is compelled so to do by the most manifest and indubitable reason. I respectfully ask the Court to sustain this Legislative Act and the legality of our Industrial School.

Id.

²⁹² *Ex parte Ah Peen*, 51 Cal. 280, 280-81 (1876).

²⁹³ *Id.*

²⁹⁴ *Id.* at 281 (citing *Prescott v. State* 19 Ohio St. 184 (1869)).

It is obvious that these provisions of the Constitution have no application whatever to the case of this minor child. . . . The purpose in view is not punishment for offenses done, but reformation and training of the child to habits of industry, with a view to his future usefulness when he shall have been reclaimed to society, or shall have attained his majority. . . . The restraint imposed upon him by public authority is in its nature and purpose the same which under other conditions, is habitually imposed by parents, guardians of the person and other exercising supervision and control over the conduct of those who are by reason of infancy, lunacy, or otherwise, incapable of properly controlling themselves.²⁹⁵

As a result of this decision, Ah Peen was ordered recommitted to the Industrial School, and the right of the state to supercede parental rights under *parens patriae* remained California's dominant legal doctrine concerning children.²⁹⁶

V. New Approaches and the Birth of Probation

By the end of the 1870's, disillusionment with the Industrial School spawned an interest in new approaches. In 1873, the San Francisco Boys and Girls Aid Society was established as an alternative to Industrial School commitment. The Boys and Girls Aid Society led the fight for the creation of one of the nation's first probation laws. In 1876, San Francisco city officials attempted to convert an old naval vessel into a nautical training school for Industrial School youth. The training school only lasted a few years, and no such program was ever attempted again in California.

²⁹⁵ *Id.*

²⁹⁶ *Id.*

A. *The Boys and Girls Aid Society and California's First
Probation Act*

In response to growing disenchantment with institutional care along with “increasing hoodlumism,” city leaders created the San Francisco Boys and Girls Aid Society in 1873.²⁹⁷ The organization was founded as a private charity and was modeled on the New York Children’s Aid Society. At the San Francisco Society’s first annual meeting, speakers repeatedly praised the accomplishments of the New York Society.²⁹⁸ According to speaker Irving Scott, the success of the New York Children’s Aid Society was “unprecedented for the prevention of crime,” and therefore a model for California to emulate.²⁹⁹

Turning away from institutional care, the San Francisco Boys and Girls Aid Society emphasized placing out as a preferred alternative.³⁰⁰ Similar to the New York model, the San Francisco Boys and Girls Aid Society adhered to the belief that the best place for a child to be raised was in a nurturing homelike environment in the countryside far removed from urban corruption.³⁰¹ Like its New York counterpart, the society employed agents who went into the city and seized custody of suspected abandoned, vagrant, neglected, or delinquent children.³⁰² The agents operated under the aegis of *parens patriae* and could “take the children despite the protest of the parents.”³⁰³

The children were housed by the Society for an average of six weeks in a facility donated by Charles

²⁹⁷ *Human Waifs: Philanthropic Vigilances Which Projects the Homeless*, THE S.F. DAILY CALL, Dec. 20, 1885, at 1.

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ *Id.* In recalling instances where parents, deemed unworthy, attempted to regain custody of their children, Society superintendent, E.T. Dooley noted, “Within the past two years there have been three or four instances where these kind of people have sought redress from us and the recovery of their children through the courts. Thanks to the integrity of our Judges they have failed every time.” *Id.*

Crocker.³⁰⁴ During this time, the Society endeavored “to fit each for an honest and useful future by the implanting of decent personal habits, better tastes and more wholesome inclinations.”³⁰⁵ At the end of six weeks, the children were placed in a family home. Most of these homes were located far from San Francisco, in surrounding rural counties, including Contra Costa, Alameda, Fresno, San Joaquin, Tulare, and Merced.³⁰⁶ An agent visited the children three times a year once they were placed in the family home.³⁰⁷

The San Francisco Boys and Girls Aid Society became the state’s premier advocate for the non-institutional care of children.³⁰⁸ Under the Society’s leadership, California passed one of the nation’s first probation laws in 1883 that provided “for the probationary treatment of juvenile delinquents.”³⁰⁹ The law allowed a judge to suspend a misdemeanor or felony conviction if the judge had reasonable grounds to believe the youth may be reformed. During this suspension period, the youth was placed in the custody of “any nonsectarian charitable corporation conducted for the purpose of reclaiming criminal minors.”³¹⁰ Youths could be placed in one of these charitable corporations for up to two months, and the judges had the option of extending the period of custody.³¹¹ The judge could direct the county to pay twenty-five dollars a month for board, clothing, and transportation or other expenses.³¹²

California’s Juvenile Probation Act was one of the first comprehensive probation laws in the country.³¹³ The development of special probation services did not evolve in most other states until after the establishment of juvenile

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² Juvenile Probation Act, ch. 91, 1883 Cal. Stat. 377.

³¹³ MENNEL, *supra* note 3, at 114.

courts in the first decade of the twentieth century.³¹⁴ Founded as a response to the Industrial School's failures, the San Francisco Boys and Girls Aid Society pioneered the expansion of non-institutional options for dealing with delinquent and neglected youth. By spearheading the passage of the Probation Act, the Society laid the foundation for today's foster care and probation systems.

B. The U.S.S. Jamestown

The quest for alternatives to institutional confinement of delinquent and neglected youths continued throughout the century. Among the new approaches was the indenturing of youths to merchant ships. This practice was a long established practice among nineteenth century reform schools.³¹⁵ Since its inception, the Industrial School administration had employed it to purge the school of older, more recalcitrant boys.³¹⁶ In 1874, Congress passed an act authorizing the transfer of retired naval vessels to state jurisdictions to encourage the development of "public marine schools."³¹⁷ San Francisco officials immediately petitioned the state legislature to submit an application on the city's behalf.³¹⁸

The enabling legislation was approved on April 3, 1876, and the U.S.S. Jamestown was formally placed under the city's jurisdiction as a branch of the Industrial School.³¹⁹ Initially, the state statute authorized the ship to serve as an

³¹⁴ *Id.*

³¹⁵ The first nautical reform school was established in Massachusetts in 1860 as a branch of the state reform school at Westborough, but the program was abandoned in 1872 due to heavy operating costs, serious disciplinary problems, and a glut of available seaman in the labor market. M.L. Elbridge, *History of the Massachusetts Nautical Reform School*, in CHILDREN AND YOUTH IN AMERICA I, *supra* note 29, at 713; FAILURE OF SCHOOL SHIPS TO DISCIPLINE AND TRAIN MASSACHUSETTS BOARD OF STATE CHARITIES, EIGHTH ANNUAL REPORT (1871) *reprinted in* CHILDREN AND YOUTH IN AMERICA II, *supra* note 154, at 451; Thomas A. McGee, *Training Delinquent Boys Under Sail*, PAC. HISTORIAN, Nov. 1964, at 193-95.

³¹⁶ See S.F. MUN. REPORTS, 1860-1870, *supra* note 121.

³¹⁷ McGee, *supra* note 315, at 193-95.

³¹⁸ *Id.*

³¹⁹ *Id.*

alternative to Industrial School confinement. However, when the city auditor, Monroe Ashbury, became aware that the federal statute specifically prohibited the ship's use as a place of punishment, he refused to pay the ship's expenses.³²⁰ This led the Jamestown commander, Henry Glass, to petition for a writ of mandate to secure payment.³²¹ In 1875, *Glass v. Ashbury* reached the California Supreme Court, where the court held that the city had no authority to accept the vessel because the state law was in clear conflict with the federal statute.³²² Specifically, the court determined that the Industrial School could not be affiliated with the U.S.S. Jamestown, because it was a place of punishment.³²³ Notably, one year later, the California Supreme Court would take the opposite view in *Ex parte Ah Peen*.³²⁴

In response to the ruling in *Glass*, the state legislature amended the law to bring it into compliance with the federal statute. The new law separated the Jamestown from the Industrial School and placed it under the purview of a special "Training Ship Committee" of the San Francisco Board of Supervisors.³²⁵ After the ruling in *Ex parte Ah Peen*, the Jamestown could accept transfers from the Industrial School provided they were not serving a sentence for a "penal violation."³²⁶

In 1876, the Jamestown initiated service as a training ship for San Francisco youths and fifty-seven older boys from the Industrial School were immediately transferred.³²⁷ The program was the first nautical training school on the West Coast. Youths in the program resided on board, where they slept in hammocks.³²⁸ While in port, they woke up at 6:00 a.m. For the first two hours, they prepared breakfast and

³²⁰ *Id.*

³²¹ *Id.*

³²² *Id.*

³²³ *Id.*

³²⁴ 51 Cal. 280, 281 (1876).

³²⁵ McGee, *supra* note 315, at 193-95.

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ *Id.*

performed routine maintenance duty and cleanup. At 9:00 a.m., they attended classes that included lessons in reading, English grammar, arithmetic, writing, and seamanship.³²⁹ Morning exercises concluded at 11:30 a.m. After lunch, afternoon session began and lasted from 1:00 p.m. to 4:00 p.m.³³⁰

In July 1876, the Jamestown set sail for Hawaii on its inaugural voyage with eighty-four youths aboard. The voyage was completed in nineteen days.³³¹ The return voyage was marred by tragedy when Andrew Perritt, an Industrial School youth, fell to his death from a topsail yardarm while practicing sail making.³³² Despite this incident, when the ship arrived in California, Glass sent a letter to the Board of Supervisors proclaiming the voyage a success. In addition, he informed the Board that the boys had been well-behaved and had all returned to the ship after being given liberty.³³³ Over the next three years, the Jamestown made two additional trips to Hawaii.³³⁴

Unfortunately, the training program never achieved the success that city officials had envisioned. One reason for its lack of success was that the ship was dependent on private fee-paying referrals to supplement its city subsidy.³³⁵ Because parents did not want their children commingled with Industrial School youths, private referrals never approached expectations. In instances when parents surrendered their children, the majority of them submitted applications for the boys' discharge only a few months later.³³⁶ This tendency for parents to use the ship as a short-term placement led the administration to impose a minimum two-year required stay to ensure adequate revenues and to maintain a sufficient

³²⁹ *Id.*

³³⁰ *The Training Ship*, DAILY ALTA CAL., Apr. 9, 1876, at 1.

³³¹ *Id.*

³³² *Id.*

³³³ *Id.*

³³⁴ *Id.*

³³⁵ *Id.*

³³⁶ *Id.*

complement of youth.³³⁷ Since the ship served as a public school, administrators could invoke *parens patriae* and forbid parents from reclaiming their children. However, the impact of this involuntary confinement incited public anger and inspired youths to flee.³³⁸ The public reproach was worsened by allegations of abuse and mismanagement.³³⁹

The unfavorable publicity further reduced voluntary commitments and eroded the ship's political support.³⁴⁰ The state legislature attempted to remedy the situation in 1878 by barring Industrial School youths and allowing other counties to make referrals.³⁴¹ Nonetheless, the San Francisco Board of Supervisors remained convinced that parents used the ship primarily as a temporary restraint on their children's delinquent habits at great public expense.³⁴² Amid mounting criticism, soaring costs, and declining referrals the Jamestown experiment was ended in 1879 when the ship was returned to the United States Navy.³⁴³ Although the Industrial School continued to indenture youths to merchant ships, no formal nautical training program for delinquents was again attempted in California.³⁴⁴

VI. The Industrial School's Legacy

The Industrial School's final years were marked by continual controversy and financial hardship that further eroded its credibility. By the end of the 1880's, few people were left to argue the school's merits. When it finally closed, local newspapers hailed the decision as long overdue. Despite its failure and unceremonious closure, the establishment of the San Francisco Industrial School was the defining nineteenth

³³⁷ *Id.*

³³⁸ *Id.*

³³⁹ *Id.*

³⁴⁰ *Id.*

³⁴¹ *Id.*

³⁴² McGee, *supra* note 315, at 200.

³⁴³ *Id.*

³⁴⁴ *Id.* at 201.

century event in the development of California's juvenile justice system.

A. The Industrial School's Final Years

Bruised and battered, the Industrial School crept through the 1870's and 1880's. Despite frequent changes in administration and revisions in the school curriculum, the school remained in disrepair and embroiled in controversy.³⁴⁵ In 1878, the school's disciplinary system came under attack when it was revealed that certain boys received special treatment for rule violations while less favored boys were subjected to severe flogging.³⁴⁶ In an investigation by the Board of Supervisors, assistant teacher Cary testified, "The system of punishment was governed entirely by favoritism."³⁴⁷ Cary recalled boys who escaped from the school not being punished, while others were beaten.³⁴⁸

The investigation also revealed that the boys were regularly served food that was unfit for consumption.³⁴⁹ Edward Twomy, steward of the School, testified that during a six month period, he "never saw fish which was fit to eat. It was rotten. Have seen maggots an inch long in the meat which had been placed on the table. When the meat is not good it is made into a stew."³⁵⁰ School staff testified that the use of rancid meat and fish was "a very frequent occurrence."³⁵¹ The 1878 investigation also included

³⁴⁵ S.F. MUN. REPORTS, REPORT ON THE INDUSTRIAL SCHOOL DEPARTMENT 97-98 (1886) (on file at the San Francisco Public Library).

³⁴⁶ *The Industrial School Investigation*, DAILY ALTA CAL., Feb. 12, 1878, at 1. Under the institution rules, penalties were designated for certain transgressions. *Id.* Normal procedures called for administering two dozen lashes to runaways, ten lashes for attempted runaways, and "four to ten lashes" for minor offenses. *Id.* In one instance "a boy who attempted to set fire to the house got ninety lashes. . . . *Id.*

³⁴⁷ *Id.*

³⁴⁸ *Id.*

³⁴⁹ *Id.*

³⁵⁰ *Id.*

³⁵¹ *Id.*

accusations of incompetence, foul language, and frequent drunkenness against the school's leadership.³⁵²

In 1882, controversy again arose when an altercation occurred between Superintendent John F. McLaughlin and Samuel Carusi, head teacher.³⁵³ Carusi was arrested when he said he would "get even" with McLaughlin.³⁵⁴ Although the matter was trivial, the charges were well publicized in the local papers. The incident dealt another blow to the school's reputation and reaffirmed assumptions of disarray and incompetence.³⁵⁵ Along with the unfavorable attention, the school faced a greater challenge from declining resources and increased expenses. By the 1880's the institution was over twenty years old and in disrepair. Management had to make major structural upgrades because the piping and flooring were deteriorating, and the fence was on the verge of collapse.³⁵⁶ These upgrades came at considerable expense and had to be paid through the school's annual operating budget.³⁵⁷

Added to the many pressures from the outside, the school had to deal with an increasingly restless group of institutionalized youth. The school never achieved its primary goal of providing training in useful trades. Although the school eventually employed a tailor, shoemaker, and carpenter, these individuals provided little in the way of meaningful training and could only accommodate a small number of boys at any given time. In an 1882 "defense" of the Industrial School, a school official explained that the institution's workshops could never be viable because they did not have the proper materials or facilities.³⁵⁸ In addition,

³⁵² *Id.*

³⁵³ *Id.*

³⁵⁴ *Id.*

³⁵⁵ *The Industrial School*, DAILY ALTA CAL., Nov. 23, 1882, at 1.

³⁵⁶ S.F. MUN. REPORTS, REPORT ON THE INDUSTRIAL SCHOOL DEPARTMENT 317 (1880) (on file at the San Francisco Public Library) [hereinafter S.F. MUN. REPORTS, 1880].

³⁵⁷ *Id.*

³⁵⁸ *The Industrial School: A Defense of the Institution by One of its Officers*, DAILY ALTA CAL., Dec. 17, 1882, at 3 [hereinafter *Defense of the Institution*].

Superintendent David Woods reported that all manufacturing materials were purchased through the school's operating budget.³⁵⁹ But the proceeds from the sale of any Industrial School products were returned to the city's general fund.³⁶⁰ Therefore, manufacturing products beyond the institution's daily needs only further depleted its limited resources.³⁶¹ Even in the event that a successful enterprise could be established, political opposition from business interests, fearful of competition, would inevitably force the program to be cancelled.³⁶²

In the absence of proper training facilities, school management struggled to keep the inmates busy. Preventing idleness was further hampered by the propensity of the boys to run away when the opportunity was presented.³⁶³ Because of the boys' propensity to escape, they could rarely be used as farm laborers even under the eye of a hired farmer.³⁶⁴ If the youth were allowed outside the institution walls, they typically tried to escape and staff could do nothing to prevent it.³⁶⁵ One institution official concluded that without armed guards with authority to shoot escapees, as with the adult house of corrections, the Industrial School could not prevent youth from running away.³⁶⁶ Although most Industrial School inmates were committed for misdemeanors and non-delinquent acts, institution staff disdained and feared them. The staff saw them as "reeking with corruption" and "ready to commit any crime in the calendar."³⁶⁷ Institution staff were sure that many of the boys would kill if it meant being able to escape.³⁶⁸

³⁵⁹ S.F. MUN. REPORTS, REPORT ON THE INDUSTRIAL SCHOOL DEPARTMENT 333 (1877) (on file at the San Francisco Public Library) [hereinafter S.F. MUN. REPORTS, 1877].

³⁶⁰ *Id.*

³⁶¹ *Id.*

³⁶² *Defense of the Institution*, *supra* note 358, at 3.

³⁶³ *Id.*

³⁶⁴ *Id.*

³⁶⁵ *Id.*

³⁶⁶ *Id.*

³⁶⁷ *Id.*

³⁶⁸ *Id.*

During the 1880's the school department's curriculum was reorganized to better emulate public school curriculum.³⁶⁹ Under this reorganization school hours were expanded and better educational records were maintained. The school hours were now from 10:00 a.m. to 11:30 a.m., 1:00 p.m. to 3:30 p.m., and 5:15 p.m. to 6:30 p.m.³⁷⁰ Despite a greater emphasis on formal education, inmate scholarship was still not considered a high priority.³⁷¹ As Jon Robinson, Principal Teacher, noted, "it was more desirable to teach the class of boys we have to deal with habits of industry and obedience to law than mere book learning."³⁷²

An area of education that was given special consideration was the institution's band. Started in 1870, the band was a means for enhancing the institution's image, and the institution's superintendents highlighted its activities in their annual reports.³⁷³ The band performed frequent noon concerts in San Francisco's Union Square and at a variety of community and religious events.³⁷⁴ The special emphasis on the band is evident by the presence of a designated staff member who was solely responsible for band training.³⁷⁵ Despite the institution's limited resources, in the 1880's the school administration erected a bandstand in Union Square

³⁶⁹ Following is a summary of the school's curriculum:

Monday: Spelling, Reading, Arithmetic, Writing, and Lessons on Morals and Manners; Tuesday: Spelling, Reading, Intellectual and Written Arithmetic, Grammar, Geography, Writing and Singing; Wednesday: As on Monday; Thursday: As on Tuesday; Friday: Spelling, Reading, Dictation, Composition, Arithmetic, and Lessons on Morals and Manners; Saturday is taken up with house cleaning, bathing, inspection or clothing, etc.; Sunday: Religious exercises from 9 1/2 to 10 1/2 A.M. and from 6 1/4 to 7 1/4 P.M.; Band Exercises: On school days from 10 to 10 1/2 A.M. and from 6 1/4 to 7 1/4 P.M.

S.F. MUN. REPORTS, 1880, *supra* note 356, at 322.

³⁷⁰ *Id.*

³⁷¹ *Id.*

³⁷² S.F. MUN. REPORTS, 1877, *supra* note 359, at 336.

³⁷³ *Id.*

³⁷⁴ *Id.*

³⁷⁵ *Id.*

with institution funds.³⁷⁶ By the end of the 1880's, the band reflected the school's declining fortunes. The instruments were in disrepair and the school's population was changing as youths were being committed for short fixed sentences rather than indeterminate stays.³⁷⁷

The advent of the Boys and Girls Aid Society and the passage of California's Probation Act, coincided with a change in commitment patterns to the Industrial School. In contrast to its early years, during the 1880's a growing percentage of boys were committed for criminal law violations.³⁷⁸ Although these were low level misdemeanor offenses, they represent a distinct shift from earlier commitment patterns.³⁷⁹ Police judges were more likely to impose short-term sentences for criminal behavior, and no longer viewed the institution as a preventive measure for non-delinquent youth. This shift reflected the school's tainted

³⁷⁶ *Id.*

³⁷⁷ *Id.* at 322.

³⁷⁸ *Id.*

³⁷⁹ The following chart compares the Industrial School male commitment offenses for 1865 and 1885 period:

	1865	1885
Leading an Idle life	7	
Leading an Idle and Dissolute Life	59	64
Burglary	1	2
Forgery		
Grand Larceny		
Attempt to Commit Grand Larceny		
Attempt to Commit Petit Larceny	1	
Petit Larceny	16	33
Surrendered	2	
Vagrancy		
Attempt at Petit Larceny		
Assault		
Unmanageable		
Battery		
Malicious Mischief		
Misdemeanor	1	10
For Protection	1	
Total	88	109

S.F. MUN. REPORTS, 1880, *supra* note 356, at 324.

reputation as a place of reformation and of the possible increased role of non-institutional options such as the Boys and Girls Aid Society.³⁸⁰

Along with changes in commitment offenses and sentencing patterns, the institution superintendent complained of special treatment for boys with “influential” contacts who were having their sentences recalled after a short time.³⁸¹ In the face of these trends, institution officials argued desperately for a return to longer indeterminate sentences.³⁸² Unfortunately, by this time the school had little credibility. Years of well-publicized scandal were compounded by the school’s high recidivism rate—a failure rate that was continually lamented throughout the 1870’s and 1880’s.³⁸³ To make matters worse, San Francisco media continued to criticize the institution’s legitimacy.³⁸⁴

B. *The Industrial School Closes Its Doors*

In 1892, after a tumultuous thirty-three years, the San Francisco Industrial School was ordered closed.³⁸⁵ The building was converted to a women’s prison and staff were dismissed.³⁸⁶ The youths were transferred to two new state-

³⁸⁰ *Child-Saving Charities in this Big Town*, S.F. MORNING CALL, May 28, 1893, at 18.

³⁸¹ S.F. MUN. REPORT, REPORT ON THE INDUSTRIAL SCHOOL DEPARTMENT 503 (1882) (on file at the San Francisco Public Library).

³⁸² *Id.*

³⁸³ *Id.* Commenting on the high recidivism rate, Industrial School superintendent M.A. Smith insisted, “[T]his cannot be charged against the institution. They nearly all come from evil associations or wretched localities, and when released is it to be wondered at all that they should, in many cases, resume their former associations and become part of the people by whom they are surrounded.” *Id.*

³⁸⁴ *Id.*

³⁸⁵ *Wiped Out at Last: The Industrial School Has Passed into History*, S.F. MORNING CALL, Nov. 24, 1891, at 1.

³⁸⁶ Along with its banner headline, the *San Francisco Morning Call* noted, “The Industrial School Committee submitted an elaborate report at the meeting of the Board of Supervisors, announcing the practical abolishment of that institution.” *Id.* The report contained a brief history of the institution since its founding. Since 1872, it had cost the city considerably more than a million dollars and had utterly failed to accomplish the objects

administered reformatories in Ione and Whittier, California.³⁸⁷ These two institutions, the Whittier State Reform School and Preston School Industry, continue to operate as part of the present-day California Youth Authority.³⁸⁸

Conclusion

The Industrial School reflected the nineteenth century belief that institutional segregation was a salutary response to addressing a child's exposure to parental neglect and urban vice. However, in attempting to reform the budding delinquent, the Industrial School reflected the same realities that plagued similar institutions. Structurally incapable of acting as a surrogate parent, institutional systems inevitably degenerated into coercive, impersonal, and abusive environments that bred despondency and disaffection. In the Industrial School's congregate structure, order could only be maintained by enforcing rigid adherence to organizational authority.³⁸⁹ In addition, despite the rhetoric of Industrial School proponents, the youths remanded to its care were viewed as products of an inferior class who were incapable of benefiting from anything other than elementary training.³⁹⁰

The school's mission was further compromised by the need to achieve a level of financial self-sufficiency. This prerequisite was a common ingredient of nineteenth century institutions. The result was insufficient resources and an inability to provide all but the most rudimentary training. Despite the lack of resources, managers struggled to promote the institution's survival through optimistic pronouncements or by minimizing problems.

Ironically, the failings of the refuge and reform school systems were well recognized by the time the Industrial

for which it was established. *Id.* The judicial department long since denounced it as a "nursery of crime." *Id.*

³⁸⁷ California Youth Authority, *supra* note 156, at 24-36.

³⁸⁸ *Id.*

³⁸⁹ ROTHMAN, *supra* note 30, at 231.

³⁹⁰ BOSQUI, *supra* note 193, at 108.

School was established. In 1848, Elijah Devoe, former assistant superintendent at the New York House of Refuge, wrote an incisive critique of the congregate institutional system, in which he concluded that the system was an abject failure that could never achieve its stated goals.³⁹¹ These

³⁹¹ In his report, Devoe questioned whether children were happy in the refuge:

No treatment, however kind or generous, will serve to make children contented in the Refuge after a certain period has elapsed. A wall is around them. Every moment they are under strict surveillance. The severity of discipline to which every boy, however well disposed is subject—the unceasing and unvaried repetition of duties, fare and employment—breed disgust which degenerates into melancholy and despair. When from careless or purposed neglect, a boy has been suffered to remain longer in the House than the average time in such cases, he grows restless and unhappy—a state of feeling succeeded by that kind of sickness of the heart which comes from “hope deferred.” He mopes about, and takes no part nor interest in the sports of the playground. When hope flies, nature relaxes in a degree her firm hold.

Are children happy in the Refuge? There is scarcely any conceivable position in life that would render human beings entirely and uninterruptedly wretched Although to children, life in the Refuge is dark and stormy, still, in general they know how to avail themselves of all facilities that afford present enjoyment; and do not fail to bask in those rays of sunshine which occasionally light up and warm their dreary path. But, nothing short of excessive ignorance can entertain for a moment the idea that the inmates of the Refuge are contented. In summer, they are about fourteen hours under orders daily. On parade, at table, at their work, and in school, they are not allowed to converse. They rise at five o’clock in summer—are hurried into the yard—hurried into the dining room—hurried at their work and at their studies. For every trifling commission or omission which it is deemed wrong to do or to omit to do, they are “cut” with the rattan. Every day they experience a series of painful excitements. The endurance of the whip, or loss of a meal—deprivation of play or solitary cell. On every hand their walk is bounded; while Restriction and Constraint are their most intimate companions. Are they contented? upon the principles of

revelations about earlier institutions did not discourage Industrial School proponents. Even when the Industrial School exhibited the same failings as its east coast predecessors, faith in the institutional system remained dominant in California long after the Industrial School's passing.

The Industrial School represented the refuge and reform school movement's great contradiction. While purporting to exist for the charitable reformation of wayward children, its overriding purpose was the removal of the undesirables from public view. The city's powerful business class feared the presence of destitute children on the streets and promoted the institution's development. Once the children were committed to the institution, the public rarely took an interest in them unless a scandal arose. A scandal brought about investigations and public condemnations. However, as soon as the issue faded from the public spotlight, the old patterns of institutional mis-management quickly reemerged. The fear of wayward children freely wandering the streets overwhelmed altruistic tendencies and allowed reform schools to continue despite their obvious failures.

Just as in other states, characterizing the Industrial School as an extension of the state's emerging public school system provided the necessary legal justifications to confine non-delinquent children without due process protections. By placing the decision-making power in the hands of the police courts, the Industrial School Act also provided the foundation for California's future juvenile court. Police courts were not bound by due process requirements because the Industrial School was not a prison but a place of reformation. Police courts, acting under *parens patriae*, could exercise absolute control over delinquent and non-delinquent youth, and no other state official had the authority to grant clemency or counter a police judge's decision.

life. The functions of the body are performed with less energy

Elijah Devoe, *The Refuge System, or Prison Discipline Applied to Juvenile Delinquents* (1848), reprinted in CHILDREN AND YOUTH IN AMERICA I, *supra* note 29, at 24-28.

In response to the Industrial School's periodic scandals, new approaches emerged to deal with delinquent and neglected youth without institutionalizing them. These new approaches included the enactment of one of the nation's first probation acts. This act laid the foundation for the state's future system of probation supervision and foster care. In the absence of other options, the institution-based system embodied by the Industrial School remains dominant in California up to the present day.³⁹² As the inaugural event in California's juvenile justice system, the Industrial School was directly responsible for laying the legal and structural foundation that eventually evolved into a separate juvenile court, probation services, and congregate correctional institutions.

³⁹² *40 Years of Service to California (1941-81)*, 34 CAL. YOUTH AUTHORITY Q., 20-35 (1982).



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The *Journal of the Center for Families, Children & the Courts* is a periodical dedicated to publishing a full spectrum of viewpoints on issues regarding children, families, and the interplay between these parties and the courts. Focusing on issues of national importance, the journal encourages a dialogue for improving judicial policy in California.



JOURNAL

JOURNAL OF THE CENTER FOR FAMILIES, CHILDREN & THE COURTS

VOLUME 5 ❖ 2004



JUDICIAL COUNCIL OF CALIFORNIA ❖ ADMINISTRATIVE OFFICE OF THE COURTS



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The *Journal of the Center for Families, Children & the Courts* (ISSN 1532-0685), formerly the *Journal of the Center for Children and the Courts* (ISSN 1526-4904), is published annually by the Judicial Council of California. The journal is published free of charge with the generous support of the U.S. Department of Health and Human Services. The views expressed are those of the authors and may not represent the view of the journal, the Judicial Council of California, or the funder.

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Journal of the Center for Families, Children & the Courts
Judicial Council of California
455 Golden Gate Avenue, Sixth Floor
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415-865-7739
fax: 415-865-7217
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The journal is also available on the California Courts Web site:
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Printed on recycled and recyclable paper

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Editor's Note

The Judicial Council of California and the Administrative Office of the Courts are pleased to present Volume 5 of the *Journal of the Center for Families, Children & the Courts*.

In this issue we focus on trends and developments in the juvenile court. From its inception in 1926, the Judicial Council signaled its interest in reviewing court procedures involving juveniles in California and, by 1930, had visited juvenile courts in other states and made recommendations for changes to the juvenile justice system to reduce the number of delinquent children in the state. The Judicial Council, in partnership with California's local trial courts and juvenile court judges, continues to demonstrate its dedication and commitment to the best interest of this state's children and families through innovative programming and cutting-edge judicial policy.

The articles in the focus section offer a range of issues meant to encourage a dialogue on how the courts can best serve the children and families who come into the juvenile court system. Leading off, Diane Nunn and Christine Cleary offer a glimpse into California's early treatment

of juveniles and the juvenile court of the past, tracing the key legislation and case law that helped shape the court we know today. Then Barbara Kaban and Judith C. Quinlan discuss children's insufficient understanding of legal

Trends & Developments in the Juvenile Court:
Innovative programming and cutting-edge judicial policy to serve the best interest of California's children and families.

terminology, particularly as it pertains to plea proceedings. They give many suggestions and sample colloquies to enhance children's understanding of legal proceedings. Judge Leonard P. Edwards looks at the shortcomings of the traditional adversarial process in resolving child protection and related family issues and introduces mediation as a viable alternative. He discusses best practices for a successful mediation program. Next, Don Will, Alexa Hirst, and Alison Neustrom introduce current efforts to define data standards for juvenile dependency court and review available sources of information on children in the system. They identify key research and performance issues that a juvenile dependency information system should address. Ana España and Tracy Fried take a close look at the educational challenges facing foster children and discuss systemic impediments to their educational achievement, pointing out the expanding role of the juvenile court in addressing educational issues. Judge James R. Milliken (Ret.) and Gina Rippel follow with a proposal that effective case management and immediate treatment for substance-abusing parents can improve outcomes for children who enter the

dependency system because of their parents' drug and alcohol problems. The San Diego County Dependency Court Recovery Project is presented as a successful, cost-effective model program. Then Davin Youngclarke, Kathleen Dyer Ramos, and Lorraine Granger-Merkle present a systematic review of studies assessing the impact of Court Appointed Special Advocates (CASAs) and suggest that CASA programs may positively influence particular process variables. In the last article focused on trends and developments in the juvenile court, Dr. David E. Arredondo argues that decision-makers must understand the principles of child development in order to fashion developmentally appropriate sanctions for children and youth who come into the juvenile justice system. He offers sanctioning strategies for special juvenile offender populations, including girls, the mentally ill, and transgenerationally involved youth.

We have reserved the Issues Forum in this volume for a discussion on juveniles and the death penalty. Though the U.S. Supreme Court recently issued its decision barring the death penalty for offenders who were under the age of 18 when their crimes were committed, debate on the issue has not abated. After providing a brief background on both the state and Supreme Court cases, we have reprinted the entire oral argument before the U.S. Supreme Court in the case of *Roper v. Simmons*, in the hope of further delineating the issues and contributing to an ongoing healthy debate on this very important matter.

In our Perspectives section we include the remarks by Judge Leonard P. Edwards upon receiving the 2004 William H. Rehnquist Award for Judicial Excellence in the Great Hall of the U.S. Supreme Court. He shares his thoughts on the juvenile court and the children and families it serves. And we are pleased to include in this volume a selection of poems and artwork that were submitted to our 2003 Children's Art and Poetry Contest by children and youth with experiences in the California court system. The contest was part of the celebration of the 100th anniversary of the creation of California's juvenile courts.

Finally, with this volume we bid a fond farewell to Corby Sturges, journal editor since Volume 2, who continued to work with us on this volume after his move to another country. We are so grateful to have had the opportunity to work with Corby—a brilliant editor, wonderful person, great new dad, and master of the *Bluebook*. We wish him all the best in this new chapter of his life.

We hope that the journal is meeting its goals of publishing a full spectrum of viewpoints and encouraging productive scholarly discussions on issues concerning children and families in the court system. As always, we welcome your comments and suggestions on ways we can improve this publication to better meet your needs.

—Chris Cleary

Contributors

DAVID E. ARREDONDO, M.D., is the medical director of EMQ Children and Family Services and founding director of the Office of Child Development, Neuropsychiatry, and Mental Health, an affiliate of the National Council of Juvenile and Family Court Judges. He conducts research reviews on a broad range of topics and provides consultations and training to professionals and programs across the country. Arredondo's primary focus is the transferring of knowledge of early childhood brain development, the effects of trauma, and current thinking about children's mental health to practitioners in various disciplines. He is a graduate of Harvard College and Harvard Medical School.

CHRISTINE CLEARY is the journal's editor in chief. Before coming to the AOC Center for Families, Children & the Courts, she spent many years as an attorney in private practice doing civil litigation and juvenile dependency appellate work. One of her dependency cases, *In re Precious J.*, 50 Cal. Rptr. 2d 385 (Cal. Ct. App. 1996), resulted in the reversal of a judgment terminating an incarcerated mother's parental rights because the social services agency failed to provide reasonable reunification services. More recently Cleary was the managing attorney at the Child Care Law Center in San Francisco.

HON. LEONARD P. EDWARDS was appointed to the Superior Court of California, County of Santa Clara, in 1981 and has spent the majority of his judicial career on the juvenile court bench. He currently serves as supervising judge of the juvenile dependency court. Judge Edwards is the 2003–2004 Judicial Council of California Jurist of the Year and the recipient of the 2004 William H. Rehnquist Award for Judicial Excellence sponsored by the National Center for State Courts. He is a past president of the National Council of Juvenile and Family Court Judges and a past member of the Judicial Council of California. He and his wife, Professor Inger Sagatun-Edwards, are co-authors of *Child Abuse and the Legal System* (Wadsworth 1995).

ANA ESPAÑA is supervising attorney of the San Diego County Public Defender's dependency section. She has represented children in dependency proceedings for more than 20 years. España is active on both state and local levels on behalf of foster youth. She is a member of the Judicial Council's Family and Juvenile Law Advisory Committee, the California State Bar Committee on the Delivery of Legal Services, the board of directors of the California CASA Association, and the San Diego Juvenile Court Policy Group, Rules Committee, and Education Task Force.

TRACY FRIED, M.S.W., focuses on instituting systemic change to improve educational outcomes for underserved youth. In 2000, she developed the San Diego County Office of Education's Foster Youth Services program. Fried was a recipient of the 2004 Golden Bell award sponsored by the California School Board Association and has been recognized in a White House Task Force Report on Disadvantaged Youth and numerous other national and state publications for her work in the Foster Youth Services program. She received her master's degree from the University of Southern California in 1994.

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ALEXA HIRST is a master's degree candidate in public policy at Harvard University's John F. Kennedy School of Government and is a consultant with the Center for Applied Research, a management consulting firm in Philadelphia. Before returning to graduate school, she was a senior research analyst at the AOC Center for Families, Children & the Courts, where she specialized in studies of topics such as domestic violence and case complexity in California's juvenile and family courts. Until 2001, she worked on evaluations of problem-solving courts at the Urban Institute in Washington, D.C. Hirst received her bachelor's degree in psychology from Harvard College in 1997.

BARBARA KABAN, J.D., M.B.A., M.ED., is deputy director of the Children's Law Center in Lynn, Massachusetts. A recipient of a 1998 Soros Justice Fellowship, she graduated *magna cum laude* from Boston College Law School and received an M.B.A. from Boston University and an M.Ed. in educational psychology from Harvard University. She provides direct representation to children and youth in delinquency and educational matters. Kaban is also a member of the criminal appellate panel and has argued before the Appeals and Supreme Judicial Courts. She regularly lectures on effective advocacy practices in juvenile delinquency cases. Her publications include *When Police Question Children: Are Protections Adequate?* (with Ann E. Tobey, 1 J. CENTER CHILDREN & CTS. 151 [1999]) and *An Overview of Disposition Process in Delinquency Cases* (with Francine Sherman, in JUVENILE LAW BASICS 205 [Debra S. Krup ed., Mass. Continuing Legal Educ., 1999]).

Contributors, continued

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ALISON NEUSTROM, PH.D., is the director of Quality Assurance and Strategic Planning with the Louisiana Department of Social Services. Neustrom previously served as a postdoctoral fellow in the University of California at Berkeley's School of Social Welfare and worked as a research analyst at the AOC Center for Families, Children & the Courts. She received a master's degree in social work and a doctorate in sociology from Louisiana State University. Her research interests include social stratification and evaluation of policies affecting poverty, families, and children.

DIANE NUNN is the director of the AOC Center for Families, Children & the Courts. Prior to joining the AOC in 1986, she was an attorney in private practice with special interests in family and criminal law and domestic violence prevention and intervention. Nunn also worked in the Los Angeles County court system as a court program administrator and a juvenile court referee. Before becoming an attorney, she taught children in elementary and middle schools, special education programs, and county probation camp facilities. Nunn has been recognized by the National Association of Counsel for Children, the California CASA Association, and the Judicial Council of California for her outstanding advocacy and leadership on behalf of children and families.

JUDITH C. QUINLAN was a research coordinator in the Law and Psychiatry Program at the University of Massachusetts Medical School during the development of her article co-authored with Barbara Kaban. While at the Law and Psychiatry Program, she provided research and technical assistance to users of a mental health screening instrument for youths in the juvenile justice system, and she researched clinical forensic mental health services to juvenile courts and service delivery systems for juveniles in justice settings. She has authored several articles and a book chapter on the mental health needs of youths involved with the juvenile justice system. She currently works as a data analyst. She graduated *summa cum laude* from Clark University in 2000 with a B.A. in psychology.

KATHLEEN DYER RAMOS, PH.D., received her doctorate in human development from the University of Missouri-Columbia.

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GINA RIPPEL, J.D., M.S.W., concurrently earned her degrees at California Western School of Law and San Diego State University in 2002. During her graduate work, Rippel interned at the San Diego County Health and Human Services Agency and the Superior Court of San Diego County's juvenile court, studying the impact of substance abuse on families in the juvenile dependency system and the importance of immediate and consistent treatment programs in achieving beneficial outcomes for children and families. After passing the bar in 2002, she worked for the San Diego County Counsel in the appellate division of the child dependency unit. Rippel is currently a prosecutor in the domestic violence unit of the San Diego Office of the City Attorney.

DON WILL, a supervising research analyst at the AOC Center for Families, Children & the Courts, has participated in numerous research studies related to court-based child custody mediation, assistance to self-represented litigants, and juvenile dependency. He received his A.B. from the University of California at Berkeley and, before coming to the CFCC, was a research analyst at the Tuberculosis Control Branch, California Department of Health Services.

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TRENDS &
DEVELOPMENTS
IN THE JUVENILE
COURT



DEVELOPMENTS

Illustration, page 1:

“BEGINNING AND END”

I named my peace “beginning and end.” It says how I was scared in the beginning and how I came through in the end. My mom had to go to court to see if she was getting us back. We sat in the back and my mom had to sit in the front. They threw different statements at her. She would listen. At the end we left the room. She came out later and told us that we couldn’t go home with her. I was sad. We got placed with our Foster Mom in guardianship. It is a good placement for us. And we still see our mom sometimes. Now I am not as scared or sad or frustrated about what will happen.

ASHLEY L.

Age 13

2003 Children’s Art & Poetry Contest

From the Mexican California Frontier to Arnold-Kennick

Highlights in the Evolution of the California Juvenile Court, 1850–1961

Steeped in the traditions of English common law, *enriquecida con* (enriched with) Mexican civil jurisprudence, and wrapped in Old West stubborn individuality, California’s legal system evolved its own unique concept of justice. Nowhere is that uniqueness better demonstrated than in the evolution of the treatment of children in the California courts. This article traces the development of California’s juvenile law reform from the mid-19th century to the mid-20th, highlighting key legislation and case law critical to the shaping of modern juvenile dependency and delinquency jurisprudence.

PRE-JUVENILE COURT ERA

There was no legal system for protecting abused children in 1850, when the California Supreme Court issued a writ of habeas corpus to bring “five females, one of whom was the ‘Queen of the Bay,’ about 14 years of age, and the others, who were ‘daughters of chiefs,’” before the court to determine whether Captain Snow of the schooner *Jupiter* had any right to detain the five girls, whom he had kidnapped from the Marquesas Islands and “treated with great cruelty” as they made their way to the port of San Francisco.¹ The girls were so anxious to escape the abuse they jumped overboard, only to be rescued from drowning by their abusers, who continued to hold them in captivity.² Snow did not even pretend to have a legal right to detain the girls, so the court discharged them from his custody, and they were eventually returned to their own country.³ There is no indication that Snow faced any charges for the egregious harm he imposed on the girls, nor is there evidence that the girls were given any protection other than removal from Snow’s custody.

In fact, mid-19th-century California did not have much of a formal legal system at all, much less a juvenile court system. Unlike other states that had established governments prior to their admission into the union, California formed a government in the middle of the great political and legal chaos that followed the Mexican War and the discovery of gold—first adopting a Constitution in fall 1849,⁴ then entering statehood a year later with a fledgling government and a patchwork of legal customs and traditions influenced by Spanish colonialists, Mexican *alcaldes* (local judges), American expatriates

DIANE NUNN

CHRISTINE CLEARY

Center for Families, Children & the Courts

This article traces the threads of juvenile law reform from the mid-19th century, when chaos reigned on the Mexican California frontier, to the mid-20th century at the point when California passed the Arnold-Kennick Juvenile Court Law, presaging the revolutionary reforms ushered in by the U.S. Supreme Court’s decision in *In re Gault*. It highlights key legislation and case law critical to the shaping of modern juvenile dependency and delinquency jurisprudence while attempting to place developments in context with the politics and public sentiment of the time.

The authors thank and acknowledge the dedicated juvenile court judges and other court personnel in California whose extraordinary work and commitment to the children of this state have moved California from a past where children’s

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best interests were not always considered to a present where excellence, innovation, and active concern for children have transformed the juvenile court into a continuing source of pride to those of us who work in the court system. The authors also thank Angus Macfarlane, a retired San Francisco probation officer, who generously shared his unpublished "History of California's Juvenile Court" with us. It was his meticulous research that uncovered most of the vintage newspaper articles and illustrations that we used in this article, and he freely offered his time and thoughts whenever we had questions. ■

with common law or civil law backgrounds, and miners with their own traditions of "mining camp" law.⁵

But the judicial system adopted in California's first Constitution most closely resembled that of Mexico—the Supreme and appellate courts corresponding to the Mexican Tribunal Superior and Courts of the Second Instance, superior courts corresponding to the Mexican Courts of the First Instance, and municipal courts corresponding to the Mexican *alcalde* courts.⁶ That theoretical structure actually gave way to a simple system of *alcalde* justice at the community level in sparsely populated California.⁷ Each village (*pueblo*) elected an *alcalde*, generally the most respected person in the community, who functioned as the local judge and mayor.⁸ The administration of justice was "paternalistic and benevolently dictatorial": the *alcalde* could rule as he saw fit, "unfettered by substantive standards (legal rules) for the resolution of conflicts."⁹ It was a popular system, offering "a locally controlled justice system with extremely easy access," unburdened by legal technicalities.¹⁰ That system of community-oriented paternalism would make its mark on the legal treatment of children in California.

It would be another half century before the juvenile court movement took root and began to spread in the United States, eventually reaching California. Meanwhile, California was grappling with the effects of the Gold Rush: exponential overall population growth; small towns that lost much of their adult male populations to the lure of the mines; disorganized community life "hardly conducive to a stable family life and the raising of children."¹¹ In its first legislative session, held in San Jose from December 15, 1849, to April 22, 1850, California's new Legislature passed a host of statutes to bring some order to the chaos,¹² among them acts authorizing the Clerk of the Supreme Court to rent a courtroom in San Francisco,¹³ defining the rights of husband and wife,¹⁴ and adopting the Common Law of England as the rule of decision in all California courts.¹⁵ In those few months the Legislature covered most of the critical issues facing the young state but failed to produce any laws directly focused on its children. Its "Act concerning Crimes and Punishments," however, did establish that a child under the age of 14 "shall not be found guilty of any crime"¹⁶ but could be found to have the sound mind necessary to manifest an intention to commit a crime if that child "knew the distinction between good and evil."¹⁷ In September 1850, after that first legislative session, California was formally admitted into the Union.¹⁸

DEVELOPMENT OF POLICY ON DEPENDENT CHILDREN

Concern was growing for children arriving in California whose parents had died on the rigorous trip west, leaving them without care and support.¹⁹ On February 21, 1851, the San Francisco Orphan Asylum opened its doors, becoming the first organized charity on the West Coast.²⁰ Several other orphanages were established in the ensuing decades.²¹

In 1870, California passed its first adoption law, modeled on New York's law.²² Before its enactment adoptive parents were forced to use a fictitious apprenticeship to secure children, which, when applied to babies, was characterized as "absurd and repulsive" by the code commissioners who drafted the adoption provisions.²³ Adoption as a proceeding was unknown in common law but had been recognized under the civil law of Rome and was a rite practiced by Native Americans.²⁴ And the alcalde courts in early California kept busy with "guardianship problems" that were often resolved with what in effect were "private adoptions."²⁵ For example, an alcalde might draft documents for an illegitimate child's mother who wished to renounce her parental rights to another woman or to a couple.²⁶ It is likely that a desire for a more regular procedure in matters of guardianship and adoption than the informal and paternalistic involvement of the local alcalde influenced California's lawmakers to enact one of this nation's first adoption laws, despite the absence of adoption proceedings under the common law.²⁷

The child welfare movement began on the East Coast and found its way to California in 1874 with the establishment of the Boys and Girls Aid Society in San Francisco.²⁸ The society cared for neglected, dependent, and delinquent children and worked informally to encourage compliance with the compulsory education law of 1874.²⁹ It also advocated legislation affecting children, successfully promoting



a bill in 1878³⁰ that made it unlawful to jail children under 16, and then gaining passage of a statute in 1883³¹ that allowed police and the courts to put juvenile offenders under supervised probation.³²

Around this same time activists in California tackled the problem of direct intervention on behalf of abused and neglected children;

the public and religious organizations that received and cared for these children did not actively intervene on their behalf but only assumed care after they had been legally placed in institutional custody.³³ No mechanism at that time provided for direct intervention between a child and his or her parent or caretaker when that child was being abused; but in New York in early 1874, Elbridge Gerry, attorney for Henry Bergh, founder of the Society for the Prevention of Cruelty to Animals (SPCA), had successfully secured a writ of habeas corpus on behalf of a child who was severely beaten by her step-

mother.³⁴ The court had placed the child with the Sheltering Arms, an institution for homeless children, and eventually approved of her placement in a foster home.³⁵

This action led to the formation of the Society for the Prevention of Cruelty to Children (SPCC) by Gerry and Bergh, drawing on their experience with protecting animals at the SPCA.³⁶ The president of the San Francisco SPCA, eager to test this approach in the California courts, intervened on behalf of 3-year-old Harry Sebastian, who had been taken in by a circus performer and forced to perform in a bareback riding act after his impoverished mother was persuaded to sign over custody of the child.³⁷

After overwhelming evidence of cruelty and abuse was presented to the court, Harry was remanded to the custody of his birth father, who had been making every effort to reunite with the child.³⁸ Shortly thereafter, in late 1876, San Francisco's own SPCC was incorporated and shared offices with the SPCA.³⁹

On March 30, 1878, under pressure from children's advocacy groups, the Legislature passed two bills to protect children.⁴⁰ The first, "An Act for the protection of children, and to prevent and punish certain wrongs to children," made it a misdemeanor to allow any child under age 16 to enter or "remain in any saloon or place of entertainment where any spirituous liquors, or wines, or intoxicating or malt liquors are sold, exchanged, or given away, or at places of amusement known as dance-houses and concert saloons, unless accompanied by a parent or guardian."⁴¹ It also provided for punishment of anyone "having the care, custody, or control" of any child under 16 who allowed the child to beg.⁴² The bill gave the court authority to order a child to "an orphan asylum, society for the prevention of cruelty to children, charitable or other institution" if that child was (1) found begging, (2) found wandering with no apparent home or caretaker, (3) found destitute because he or she was an orphan or had a "vicious parent" who was incarcerated, or (4) found frequenting the company of thieves, prostitutes, houses of prostitution, "dance-houses," "concert saloons," theaters, or other such establishments without a parent or guardian.⁴³ And, finally, the act prohibited imprisonment of any child under 16.⁴⁴ The other bill passed that same day, "An Act relating to children," made it a crime to sell, apprentice, or otherwise allow a child to perform, beg, or engage in any "obscene, indecent, or immoral purpose."⁴⁵ Again the court was given the authority to commit to an orphan asylum or another appropriate placement any child whose caretaker was convicted under the act.⁴⁶ These bills seemed to reinforce the paternalistic, *parens patriae* approach typical of the small-town alcalde: the court was given wide discretion to fashion a solution for each individual abused, neglected, or delinquent child.

DEVELOPMENT OF POLICY ON DELINQUENT CHILDREN

There is ample evidence that the years between 1850 and 1860 were chaotic, rowdy, and dangerous in California—for children and adults alike. Attempts by the Legislature to rein in the Wild West atmosphere included

- an act establishing Judges of the Plains, who attended "all rodeos or gathering of cattle" to settle disputes about the ownership of "any horse, mule, jack, jenny, or horned cattle";⁴⁷
- an act setting the age of majority of males and females—males at 21 years, and females at 18 years;⁴⁸
- an act prohibiting "barbarous and noisy amusements on the Christian Sabbath";⁴⁹
- an act providing "for the better observance of the Sabbath," requiring businesses to close on Sunday;⁵⁰ and
- an act protecting female children under 17 years from being "procure[d]," caused, or employed to dance, promenade, or otherwise exhibit themselves "for hire, drink, or gain, in any drinking saloon, dance celler [sic], ball room, public garden, public highway, or in any place whatsoever (theaters excepted) where two or more persons [were] assembled together."⁵¹

In 1858 there was enough of a problem with children under 18 "leading an idle or immoral life" that the Legislature established the San Francisco Industrial School to detain, manage, reform, educate, and maintain the children committed to its care.⁵² Under the act, children could be committed to the Industrial School if they were "vagrants, living an idle or dissolute life"; if they were convicted of any crime or misdemeanor; or, in the case of children under 14, if after trial it appeared that "such child has done an act which, if done by a person of full age, would warrant a conviction of the crime or misdemeanor charged."⁵³ It was up to the discretion of the police judge⁵⁴ or court of sessions⁵⁵ to determine whether commitment

to the Industrial School was more “suitable” than the punishment authorized by law⁵⁶—at that time juveniles were often jailed with adult offenders.⁵⁷

Two years later the Legislature, responding to public sentiment against putting juveniles in adult prisons, authorized the building of a state reform school in Marysville.⁵⁸ But the school did not last long because San Franciscans were not willing to send their children there and there were no funds to transport children from other parts of the state.⁵⁹ The result was that the more-serious juvenile offenders continued to be housed in prisons with adults.⁶⁰ Between 1850 and 1860 more than 300 children under age 20 served time in state prisons, and by 1886 there were 184 prisoners under 21 years old.⁶¹ Meanwhile, the San Francisco Industrial School was increasingly housing more-serious juvenile offenders, though it was unable to accommodate more than a small share of the state’s total, and was taking on more of a correctional role, eventually becoming unsuitable for less-serious juvenile offenders.⁶² Despite this, children who were not serious offenders continued to be ordered to the Industrial School because there just were no other options.

WAYWARD SARAH

A Little Girl Who Stayed Out Late at Nights

Sarah Feeley, an auburn-haired miss of 13 summers, was consigned to the Industrial School by Judge Hornblower yesterday. Sarah’s mother and the arresting officer testified that the girl had a mania for hanging around the doors of cheap theaters at night when she should be in bed. She was not depraved, but it was considered a wise step to have her placed in some institution where the danger of contact with bad companions would be avoided until she made up her mind to become tractable.

Sarah wept bitterly as she was led away from the courtroom to be sent to the school, and she was assured that the length of her stay there would depend altogether on her own behavior.⁶³

Sarah’s situation was typical of girls committed to the Industrial School—the largest percentage of girls were committed to the institution for leading an idle and dissolute life or were “unmanageable” and surrendered by their parents or guardians.⁶⁴ By this

time girls committed to the Industrial School were housed in a separate facility, the Magdalan Asylum, operated by the Sisters of Mercy.⁶⁵

The problem of how to manage youthful offenders continued to plague local authorities. A look at the media from that time highlights the problems. These stories ran in the *San Francisco Chronicle*:

A BOY STABBER

A Young Hoodlum Makes Use of a Knife

John Murphy, a thirteen-year-old hoodlum, who spends half his time in the clutches of the police, stabbed a boy in the Everett House yesterday during a quarrel. The knife penetrated the boy’s back, inflicting an ugly although not dangerous wound. Young Murphy fled, but was soon afterward caught by a policeman and locked up in the City Prison charged with assault with intent to commit murder.⁶⁶

YOUTHFUL DEPRAVITY

A Miss of Fourteen Shocks Old Police Officers

Ida O’Rourke is a chipper little creature of 14 years or less, with a pert look in her eye that captivates the boys, of whom she is very fond. Ida dresses neatly, the feather in her hat is very red and the heels of her shoes high and polished, and it requires considerable financial engineering on the part of Ida’s parents, who own a candy store on Sixth Street, to keep the daughter in style. Of late Ida has been ungrateful, stayed out late at night, and as the last alternative her mother caused her arrest as a vagrant. Ida was decoyed into the southern police station yesterday afternoon by the officer who had the warrant, and when she saw her freedom was at an end she stamped, raved and tore her hair and said naughty things that shocked even the oldest officers. Sargeant [sic] Falls, turning to a reporter who was an observer, said: “For eight years I heard tough people take on, but this fourteen-year-old girl is the liveliest specimen of humanity I ever saw.”

Ida will be taken to the Police Court this morning and will probably be sent to the House of Correction.⁶⁷

A public still dissatisfied with the treatment of delinquent, homeless, and impoverished children

forced the Legislature to take steps to address their plight.⁶⁸ By 1881 more than 50,000 children were not “reached” by the regular public schools.⁶⁹ This was a significant number, considering that in 1880 California’s total population of school-age children was less than 250,000.⁷⁰ In 1884, a legislative commission urged the establishment of a state reform school in Whittier and an industrial school in Preston.⁷¹ It took five years for the Legislature to act on the recommendations of the commission. On March 11, 1889, the Senate and Assembly passed two acts concerning children—one to establish the Preston School of Industry,⁷² and one to establish a State Reform School for juvenile offenders in Los Angeles County.⁷³

Preston School of Industry Established

The Legislature appropriated \$160,000 for the Preston School to purchase land (of at least 100 acres but no more than 300 acres); to build, furnish, and supply the school; and to cover all of the school’s expenses.⁷⁴ Governance of the school was vested in the State Board of Prison Directors, which was authorized in the legislation to use convict labor and supplies from the Folsom and San Quentin Prisons to build the school.⁷⁵ But convicts were not allowed to mingle with any of the boys committed to the school.⁷⁶ Nor could children committed to the school be clothed in “convict stripes”; while at the school, they were to be clothed in military uniforms and subject to daily military drills.⁷⁷ The school was to provide a course of study comparable to that offered in the public schools, with an ultimate goal of qualifying children who had been committed to the school “for honorable and profitable employment after their release from the institution.”⁷⁸ Boys could be committed to the school if they were under 18, over 8, and had been found guilty of an offense punishable by a fine, imprisonment, or both, if the court or magistrate thought the child “would be a fit subject for commitment.”⁷⁹ The board had the authority to conditionally dismiss a child from the school by binding him over “by articles of indenture” to any “suitable” person who agreed to take on his education and

instruct him in an art or a trade.⁸⁰ A boy who was deemed “incorrigible” could be removed from the school, returned to the court that committed him, and possibly sent to state prison.⁸¹

Whittier State Reform School Established

The appropriation to establish a reform school was \$200,000, to purchase land (no less than 40 and no more than 160 acres) and to build, equip, and maintain the school and its grounds.⁸² Unlike the Preston School, the reform school was to be built to accommodate both boys and girls, though ensuring “the absolute exclusion of all communication of any kind or character between the sexes.”⁸³ It was to care for children between 10 and 16 who had been convicted of any crime that, if committed by an adult, would have been punishable by imprisonment in the county jail or penitentiary.⁸⁴ The court was mandated to commit children to the reform school in lieu of the penitentiary (except in capital cases) but had discretion to choose between the school and county jail.⁸⁵ The court also had the option of committing children under 16 directly to the school instead of trying them when that was recommended by the grand jury.⁸⁶ In addition, the court had the discretion, with the consent of the accused, to stop a trial at any stage of the proceedings and commit the child to the school.⁸⁷ Finally, the reform school also was open to children between 10 and 18 who (1) demonstrated “incorrigible and vicious conduct” that rendered control of the child beyond the power of the parent or caretaker; (2) were vagrants or demonstrated incorrigible or vicious conduct and had a parent incapable or unwilling to exercise control of the child; or (3) had a father who was dead, had abandoned the family, was “an habitual drunkard,” or had failed to support the child and the child’s mother or guardian was unable to provide proper care and support.⁸⁸ And, in a foretelling of what was to come in the modern juvenile court, the Legislature granted the right to any child accused of an offense punishable by imprisonment to a private examination and trial “to which only the parties to the case and the parent or guardian of the accused and their attorneys shall be

admitted,” unless the parent, guardian, or legal representative of the child demanded a public trial.⁸⁹

The school was established in Whittier, and in 1893 the Legislature amended the establishment act to officially name it “The Whittier State School.” It changed the ages of children eligible for commitment to between 8 and 18;⁹⁰ it also changed the period of commitment from between one and five years to “a period embracing his or her minority, unless sooner discharged by law.”⁹¹ The act allowed for an “honorable dismissal” when a child at the school was deemed to be “so reformed as to justify his discharge.”⁹² A child could be conditionally dismissed by being indentured to a “suitable person” or returned to his or her parents or another “reputable person” conditioned on “the proper custody, care, education, and moral and industrial training” of the child.⁹³ After the opening of the Preston and Whittier schools, the San Francisco Industrial School closed its doors.⁹⁴

CASE LAW DEVELOPMENT BEFORE THE CREATION OF THE JUVENILE COURT

During the decades between 1870 and 1900 some of the most interesting court cases emerged as California’s youthful judicial system struggled with the question of how to treat children under the law. In 1876, the Supreme Court ruled in *Ex parte Ah Peen*⁹⁵ that a 16-year-old child “leading an idle and dissolute life”⁹⁶ in San Francisco, without parental control—his parents unknown—could be committed to the Industrial School without a jury trial because the purpose was not to punish him for any criminal behavior but to reform and train him “with a view to his future usefulness when he shall have been reclaimed to society, or shall have attained his majority.”⁹⁷ The court emphasized that because Ah Peen’s parents had abandoned him, “the State, as *parens patriae*, has succeeded to his control, and stands *in loco parentis* to him.”⁹⁸ In effect, the State stood in the shoes of his parents and made the kind of decisions that one would expect parents to make for a child who was incapable of properly controlling himself.

By contrast, 20 years later, in 1897, when in *Ex parte Becknell* the Supreme Court reviewed its first

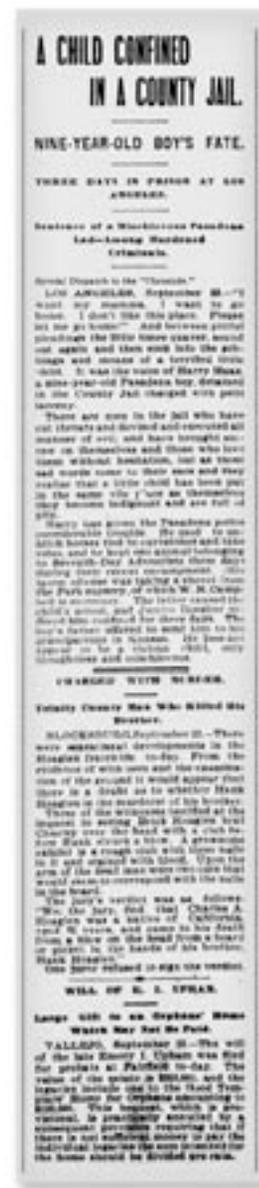
juvenile proceeding where a 13-year-old boy convicted of burglary had been committed to the Whittier State School without a jury trial, it found a violation of the California Constitution’s guarantee of a right to a jury trial.⁹⁹ The court unanimously held that the “boy cannot be imprisoned as a criminal without a trial by jury.”¹⁰⁰ It also ruled against giving guardianship of the boy to the Whittier School in the absence of a finding of parental unfitness.¹⁰¹

Those two cases set the stage for a showdown on the right to a jury trial for juveniles that would not occur for another quarter century, when the California Supreme Court decided that there was no such right in *In re Daedler*.¹⁰² Though the holding in *Daedler* is authority, debate on the issue continues even today.¹⁰³

GROWING NEED FOR JUVENILE COURT

Increased immigration and burgeoning populations in Los Angeles and San Francisco led to a growing problem for police trying to manage recalcitrant children.¹⁰⁴ With inadequate placement facilities and the absence of a funded probation system, judges and attorneys resorted to legal fictions to avoid sending children to prison: district attorneys refused to file charges following the arrest of a youngster, and judges either dismissed cases after they were filed or ordered indefinite continuances to avoid disposition.¹⁰⁵

The inadequacy and ineffectiveness of the legislative steps taken to address the needs of dependent and delinquent children before the turn of the century are amply demonstrated in this *San Francisco Chronicle* article from September 24, 1897:



A CHILD CONFINED IN A COUNTY JAIL

NINE-YEAR-OLD BOY'S FATE

THREE DAYS IN PRISON AT LOS ANGELES

Sentence of a Mischievous Pasadena Lad—Among Hardened Criminals

LOS ANGELES, September 23.—“I want my mamma. I want to go home. I don't like this place. Please let me go home!” And between pitiful pleadings the little tones quaver, sound out again and then sink into the sobbings and moans of a terrified little child. It was the voice of Harry Haas, a nine-year-old Pasadena boy, detained in the County Jail charged with petit larceny.

There are men in the jail who have cut throats and devised and executed all manner of evil, and have brought sorrow on themselves and those who love them without hesitation, but as those sad words come to their ears and they realize that a little child has been put in the same vile place as themselves they become indignant and are full of pity.

Harry has given the Pasadena police considerable trouble. He used to unhitch horses tied to curbstones and take rides, and he kept one animal belonging to Seventh-Day Adventists three days during their recent encampment. His latest offense was taking a shovel from the Park nursery, of which W. N. Campbell is secretary. The latter caused the child's arrest, and Justice Rossiter ordered him confined for three days. The boy's father offered to send him to his grandparents in Kansas. He does not appear to be a vicious child, only thoughtless and mischievous.¹⁰⁶

By the end of the 19th century there was widespread disillusionment with reform schools that did not reform and with dysfunctional systems to protect abused and neglected children.¹⁰⁷ This frustration drove a movement to enact child labor and compulsory education legislation in an attempt to bring the welfare of children to the forefront.¹⁰⁸ But most of the legislation enacted to direct the care and control of children in California before 1900 was primitive and without any means of enforcement.¹⁰⁹ For example, probation was offered as an option to juveniles, but there were no probation supervisors;

and though education was compulsory, there were no attendance officers to enforce the law.¹¹⁰

BIRTH OF THE JUVENILE COURT

The effort to create a juvenile court was just one part of a larger movement at the turn of the century to contend with the problems facing children in that era.¹¹¹ Compulsory education was seen as at least a partial solution to the problems of children laboring in sweatshops and mines and of keeping children off the streets and out of jails and prisons.¹¹² Education was also seen as a cure for social problems ranging from poverty and crime to unemployment, abuse, and neglect.¹¹³ Massachusetts passed the first compulsory education law in 1852, followed by a rush of states accepting that approach to welfare reform in a time of great concern about children.¹¹⁴ California passed its own compulsory education law in 1874.¹¹⁵ By 1930 most states required that children attend school at least until they were 14, and many set the age at 16.¹¹⁶ Other measures seen as justified steps toward ensuring that children enjoyed a childhood and recognizing the special needs and interests of children included raising the age when a person could marry and age-based curbs on access to tobacco, alcohol, and related substances.¹¹⁷

With compulsory education came a focus on truancy; school attendance was seen as a means of protecting children from the “vices, temptations, and distractions of the street.”¹¹⁸ Courts and schools joined to “identify, regulate, and sanction school absence.”¹¹⁹ A need for increased court jurisdiction followed—to struggle with “incorrigibles, run-aways, and recalcitrants ... and the social control of women.”¹²⁰ So truancy predated the juvenile court as a mechanism to control children and hold their parents or caretakers accountable.¹²¹

THE NATIONAL MOVEMENT FOR A JUVENILE COURT

Judge Ben Lindsey in Colorado established the first de facto juvenile court jurisdiction under a state truancy law passed in 1899, just before the enactment

BEN LINDSEY: “THE KID’S JUDGE”

Judge Ben Lindsey is widely known for his work as a founder and champion of the juvenile court in this country but is not generally recognized for the other work he did as a “child policy entrepreneur.”¹ In addition to founding the juvenile court in Denver, Colorado, he established the first juvenile and domestic relations court in the United States and gained passage of a strong child labor law in Colorado.² But his high-profile progressive politics got him ousted from the Colorado juvenile court after he was targeted by the powerfully influential Ku Klux Klan, and he subsequently suffered a politically charged disbarment.³ After relocating to Los Angeles, he temporarily served as an advisor to Cecil B. De Mille on a script dealing with reform schools and took a bit part in a film portraying a juvenile court judge.⁴ He had been admit-



ted to the California Bar and was eventually elected to Los Angeles County’s superior court.⁵ But despite wanting to serve again on the juvenile court, he was never given the opportunity.⁶ This didn’t stop Lindsey—within a few years of his judgeship he drafted and introduced legislation that created the Children’s Court of Conciliation, making it harder for couples to divorce if children were involved.⁷ Under the legislation, the Court of

Conciliation had jurisdiction over a divorce case for 30 days, during which the parties, their attorneys, a mediator, and the judge would attempt to save the marriage.⁸ The court was successful and led to conciliation courts in other counties⁹—supporting the arguable claim that Ben Lindsey pioneered the first family mediation services in California’s court system.

1. See Michael Grossberg, *Changing Conceptions of Child Welfare in the United States, 1820–1935*, in *A CENTURY OF JUVENILE JUSTICE* 19 (Margaret K. Rosenheim et al. eds., Univ. of Chicago Press 2002).

2. CHARLES LARSEN, *THE GOOD FIGHT* 54, 72 (Quadrangle Press 1972).

3. *Id.* at 204–17.

4. *Id.* at 217.

5. *Id.* at 218, 235.

6. *Id.* at 236.

7. *Id.* at 238–39.

8. *Id.* at 240.

9. *Id.* at 241.

of Illinois’ landmark Juvenile Court Act.¹²² After his first year on the bench, Lindsey was frustrated with inadequate appropriations and an ineffectual structure of industrial and reform schools for rehabilitating “incorrigible” children; he saw the options as little more than “junior prisons” and was further frustrated that children often spent months in adult jails before being sentenced to the reform or industrial schools.¹²³ Looking for a viable solution to the problem, Lindsey stumbled onto the School Law of 1899 and saw a creative opportunity when he read:

Every child between the ages of 8 and 14 years, and every child between 14 and 16 years, who cannot read and write the English language or is not engaged in some regular employment, who is an habitual truant from school, or who is in attendance at any

public, private or parochial school and is incorrigible, vicious, or immoral in conduct, or who habitually wanders about the streets and public places during school hours, having no business or lawful occupation, shall be deemed a juvenile disorderly person, and be subject to the provisions of this act.¹²⁴

Lindsey saw the possibility in that statutory language for the court, under the *parens patriae* mantle, to assert jurisdiction over children not as criminals but as wards of the state in need of correction.¹²⁵ He persuaded the district attorney to file all complaints against children under the School Law and started the first informal juvenile court in the nation.¹²⁶

But Illinois is largely credited with passing the first juvenile court law in the country.¹²⁷ The Chicago Women’s Club, with the help of other women,

including activists from the settlement-house movement, drove the legislation. After working years on different child welfare projects, it approached the Chicago Bar Association in 1898, concerned that children were being housed in prisons with dangerous adult inmates.¹²⁸ The bar association drafted legislation for a juvenile court, carefully presenting it so it would not be identified as a “woman’s measure.”¹²⁹ It narrowly passed on April 14, 1899, and went into effect on July 1 of that year.¹³⁰ The new law was rough at best—it had no provisions for private hearings or confidential records and included an unfunded probation system and no detention homes for children.¹³¹ But it did contain important provisions: the right to a jury trial for anyone tried under the act,¹³² designation of a special judge and a special courtroom in each circuit court to handle juvenile matters, notice requirements, authority to appoint probation officers, and a prohibition against jailing children under 12 with adults.¹³³ The act was to be liberally construed to carry out its purpose: “That the care, custody and discipline of a child shall approximate as nearly as may be that which should be given by its parents, and in all cases where it can properly be done, the child be placed in an improved family home and become a member of the family by legal adoption or otherwise.”¹³⁴ During the years it took to shape the character of the juvenile court that we know today, other states came on board with their own juvenile court legislation.

A significant boost to the juvenile court movement came with President Theodore Roosevelt’s endorsement of the concept in his message to Congress on December 6, 1904: “No Christian and civilized community can afford to show a happy-go-lucky lack of concern for the youth of to-day; for, if so, the community will have to pay a terrible penalty of financial burden and social degradation in the tomorrow.”¹³⁵ Congress responded promptly with passage of a juvenile court law for Washington, D.C.¹³⁶

CALIFORNIA’S JUVENILE COURT

The need for a juvenile court in California was evident. Frustration had grown in the courts and the

community. This piece in the *Los Angeles Times* articulated the problem:

BOY CRIMINAL HE PERPLEXES COURT

Another of the boy criminals that the courts don’t know what to do with was taken before Judge Smith yesterday for stealing a bicycle. He is a gawky, dirty-faced little youngster named Frank Fisher, 15 years old. He looks about 10 years. Judge Smith obviously didn’t know what to do with an infant charged with a crime punishable by imprisonment in the penitentiary. He ordered the trial postponed.¹³⁷

California was the seventh state to pass legislation establishing a juvenile court.¹³⁸ The movement for a juvenile court converged in the political, economic, and social center of the state, San Francisco.¹³⁹ The principal architect of the movement was Doctor Dorothea Moore of the California Club. Dr. Moore had been an active participant in the Chicago juvenile court movement, and the California Club was modeled on the Chicago Women’s Club, which had had such a profound influence on Chicago’s juvenile court.¹⁴⁰ Again, as in Chicago, women and women’s organizations—the California Club of San Francisco, settlement-house workers, the State Federation of Women’s Clubs, the Commonwealth Club, the Boys and Girls Aid Society, and others—spearheaded the legislation, joining forces to persuade legislators to pass the bill.¹⁴¹ But when it finally passed in February 1903, it had been greatly weakened by a compromise that left the bill’s probation officers unfunded.¹⁴²

1903 JUVENILE COURT LAW

The legislation was modest—it applied to children under 16, both dependent and delinquent, who were not already inmates at any state or private institution or reform school.¹⁴³ A “dependent child” was defined as any child

found begging, or receiving or gathering alms... , or being in any street, road, or public place for the purpose of so begging, gathering, or receiving alms;...

found wandering and not having any home or any settled place of abode, or proper guardianship, or visible means of subsistence; . . .

found destitute, or whose home, by reason of neglect, cruelty, or depravity on the part of its parents, guardian, or other person in whose care it may be, is an unfit place for such child; . . .

[who] frequents the company of reputed criminals or prostitutes, or [who] is found living or being in any house of prostitution or assignation . . . ;

[who] habitually visits, without parent or guardian, any saloon [or] place of entertainment where any spirituous liquors, or wine, or intoxicating or malt liquors are sold, exchanged, or given away[;]

[who] is incorrigible[;] or

[who] is a persistent truant from school.¹⁴⁴

A “delinquent child” was defined as any child who violated any state or local law.¹⁴⁵ The law applied to all counties in the state, each of which was to designate a judge to hear juvenile cases.¹⁴⁶ Juvenile cases were to be heard at special sessions, and only those who came under the act could be present at the special session.¹⁴⁷ Any California citizen could bring a petition before the superior court on behalf of a dependent child in the county, asking that the court assume jurisdiction over the child.¹⁴⁸ The court would then issue a citation requiring the child and his or her caretaker to appear before the court. If the caretaker failed to appear, the court could initiate contempt-of-court proceedings and issue an arrest warrant.¹⁴⁹ If the court found the child to fit the definition of *dependent* under the act, it had the authority to commit the child to the care of a “reputable citizen” or to an appropriate institution for “such time during its minority as the court may deem fit.”¹⁵⁰ The court also had the authority to appoint probation officers, but they would serve without compensation from the state.¹⁵¹ The probation officer was to conduct any investigation required by the court, to represent the interests of the child when the case was heard, to furnish the court with any information and assistance it required, and to take charge of the child

before and after trial.¹⁵² The probation officer had the discretion to bring the child before the court at any time for any further action deemed appropriate by the court.¹⁵³

When children under 16 were arrested, they were brought before a police judge or justice of the peace, who could continue the hearing, assign a probation officer, and allow the child to remain home subject to visits by the probation officer; or, if the judicial officer deemed it in the best interest of the child, commit the child to an institution, reform school, or suitable family home, or appoint a guardian. If the court ordered the child removed from his or her home, the case was certified and bound over to the superior court for a hearing, just as though the child had been brought in under a dependency petition.¹⁵⁴ The superior court then had a full arsenal of tools available to it, from the “friendly supervision” of a probation officer to commitment of the child to a state reform school or jail, with the exception that no child under 12 could be committed to jail.¹⁵⁵ And when children were sentenced to confinement in an institution with adult inmates, the act made it unlawful to house them in “the same room or yard or enclosure” with the adults or to allow the children to be within the sight or presence of an adult inmate.¹⁵⁶ Finally, records and testimony from juvenile court proceedings were not admissible as evidence against a child in any court proceeding other than those in juvenile court.¹⁵⁷ The law, echoing Illinois’, was to be liberally construed to carry out its purpose: “[t]hat the care, custody, and discipline of a child shall approximate as nearly as may be that which should be given by its parents, and in all cases where it can be properly done, the child be placed in an approved family home, with people of the same religious belief, and become a member of the family by legal adoption or otherwise.”¹⁵⁸

Implementation of the Law

The counties of Los Angeles, Alameda, and San Francisco pioneered implementation of the legislation.¹⁵⁹ Those counties that did not implement the legislation found themselves in a quandary when it

came to handling juvenile crime. An article published in the *San Diego Union* on July 1, 1903, puts it in perspective:

THE NEED OF A JUVENILE COURT
A Case in Which the New Law Will Probably
Have to Be Invoked

The cases of two boys charged with burglary before Judge Anderson yesterday afternoon, brought before the officers of the law the necessity of establishing a juvenile court in this city, as provided by the last legislature. While the boys were caught red-handed, the judge could inflict no punishment and can only send them to the reform school on complaints by their parents.

The reason is that the last legislature passed an act providing that the board of supervisors establish in each county a court for the trial of all youthful offenders. It also prohibits the incarceration [sic] of these youthful offenders in any jail or police station without an order from the juvenile court. These courts have been established in San Francisco and Los Angeles, and the necessity for one here is apparent.

Yesterday Officer Cooley arrested two boys, Tilo Lugo and Arthur Chatrand for entering the store of William Bryant at the foot of D Street during the night, and stealing a quantity of fireworks and fruit. Lugo, the older boy has been up before and is considered incorrigible. He “boosted” the smaller boy through the transom, and together they got away with considerable plunder. On account of the new law, Judge Anderson could do nothing, so he dismissed them with a severe lecture. As the parents of the boys have not made application for committing them to the reform school, nothing can be done in the matter at present.¹⁶⁰

An Era of Amendments

In 1904 the Board of Charities and Corrections recommended that the juvenile court be expanded to all counties in the state.¹⁶¹ Then amendments in 1905 more fully developed the county probation system and provided salaries for probation officers in some counties.¹⁶²

The law was further expanded in 1909, increasing the bases for asserting jurisdiction over minors,

providing for detention homes, providing salaried probation officers, setting specific procedures for committing children to Preston or Whittier, and specifying the superior court of each county as the site of the juvenile court.¹⁶³ New grounds for jurisdiction included

- a child’s persistent refusal to obey “the reasonable and proper order or directions of his parents or guardian”;¹⁶⁴
- a child whose father was dead or had abandoned the family or was “an habitual drunkard” or had failed to provide for the child, and it appeared that the child was destitute and without a suitable home or the means to obtain a living, or that the child was in danger of “being brought up to lead an idle or immoral life”; or where both parents were dead, or the mother, if living, could not provide for the child;¹⁶⁵
- a child who habitually used alcohol, smoked cigarettes, or used opium, cocaine, morphine, or any other similar drug without the direction of a physician.¹⁶⁶

In addition, the expanded law extended the upper age limit of qualifying children from 16 to 18¹⁶⁷ and of children who could be committed to the Preston and Whittier state schools to 21.¹⁶⁸ Salaries were set for all probation officers, ranging from \$5 per month in rural counties with small populations to \$225 per month in densely populated urban counties.¹⁶⁹ The new law heavily relied on the assistance of probation officers to aid the court in making its dispositional decisions.

In no case could a child under age 14 who was charged with a felony be sentenced to the penitentiary unless he or she had first been sent to a state school and proven incorrigible.¹⁷⁰ Nor could a child under 8 or a child who suffered from a contagious disease be committed to a state school.¹⁷¹ The court was required to be “fully satisfied” that any child’s mental and physical condition was such that the minor would be likely to benefit from the “reformatory educational discipline” of the schools.¹⁷²

Significantly, the 1909 legislation included the right to a private hearing in any dependency or delinquency case upon the request of the child or his or her parents or guardian.¹⁷³ The court's order declaring a child a dependent or delinquent could not be deemed a conviction of crime.¹⁷⁴ Every county, or city and county, was mandated to provide and maintain a detention home for dependent and delinquent children—to be conducted as a home, not a penal institution.¹⁷⁵ Further, the legislation included a provision that a child could not be taken from his or her parent or guardian without the parent's or guardian's consent unless the court made a finding that the custodian was incapable, or had failed or neglected to provide properly for the child, or unless the child had been on probation with the parent or guardian and failed to reform, or unless the welfare of the child required removal from the parent's or guardian's custody.¹⁷⁶

Unlike the Illinois statute, none of California's early juvenile laws provided for a jury trial in delinquency cases. But the 1909 Juvenile Court Law had a specific joint jurisdiction provision stating that a jury demand by a defendant between the ages of 18 and 21 who was accused of a felony would be handled by trying the minor in regular criminal court; then, on conviction, with application by and consent of the minor, the juvenile court could receive evidence as to whether the child should be managed as a delinquent and given probation or committed to a state school.¹⁷⁷ If a minor committed to a state institution under those circumstances proved "incorrigible," he or she could be returned to superior court for sentencing to the penitentiary.¹⁷⁸



Dependent and Delinquent Children Treated the Same

Though the juvenile court law addressed both dependent children and delinquent children, there was little difference in the way they were handled under the law. It appears that, from a policy standpoint, the Legislature viewed both categories as posing the same threat or potential threat to the community. As the Supreme Court stated in *Nicholl v. Koster*, "[t]he main purpose of the act [was] to provide for the care and custody of children who ha[d] shown, or who from lack of care [we]re likely to develop, criminal tendencies, in order to have them trained to good habits and correct principles."¹⁷⁹

Thus the early focus of the juvenile court was not on protecting children from their abusive caretakers as much as it was to save them from becoming criminals.¹⁸⁰

Growing Dissatisfaction With the Law

But how did the juvenile law play in the counties? By 1910 there was significant dissatisfaction, at least in San Francisco.¹⁸¹ According to some critics, it was "more difficult, more expensive, more uncertain, and less permanent" to protect dependent children under the new law than it had been under the old guardianship proceedings in probate court.¹⁸² The problem seemed to be that the San Francisco courts frequently invoked the juvenile court law to deal with unfit parents—placing children in temporary commitments while compelling their parents to be moral or to avoid divorce.¹⁸³ The cost of temporarily committing the children increased court costs tenfold in an eight-year period.¹⁸⁴ There were also serious disputes over processing procedures for de-

pendent and delinquent children, over whether parents should be held more accountable, and over state and supplementary aid issues.¹⁸⁵

The statute's validity was challenged in 1912 on the ground that it conflicted with the section of California's Constitution requiring that "[e]very act shall embrace but one subject, which subject shall be expressed in its title."¹⁸⁶ The court upheld the validity of the statute, stating:

Ultimately, of course, the act seeks to prevent ... dependency or delinquency. One method of doing this is to take the child out of the custody of the person who has caused or permitted it to become dependent or delinquent. Another is to punish the person who is responsible for the condition which is sought to be cured. Both methods are directly related to the final purpose of protecting the growing generation from conditions detrimental to its welfare.¹⁸⁷

As more counties implemented the law, discontent grew and by 1914 had reached a critical level.¹⁸⁸ Amendments in 1911¹⁸⁹ and 1913¹⁹⁰ had done very little to quell opposition to the law by judges, probation officers, and others involved in juvenile court work.¹⁹¹ The 1911 amendments had expanded the reach of the legislation to everyone younger than 21 years.¹⁹² That expansion invited a challenge in 1912 by a probation officer in Sacramento against the county auditor for failing to pay her for her services.¹⁹³ The auditor defended the county's refusal to pay in part on the ground that the legislation was unconstitutional because it embraced females over 18 and under 21 as "minor children," while the Civil Code specified that females of 18 were adults.¹⁹⁴ The court responded that the Legislature had the right to classify people according to age for the purpose of dealing with them as dependent or delinquent within the juvenile law: "The road to ruin is as accessible to a female under the age of twenty-one as it is to a male. To accomplish the beneficent objects of the law the state may properly reach out its saving hand to rescue males and females alike who are on the downward path. No sound reason can be sug-

gested why the state may not do this to save a female under the age of twenty-one if it may do so to rescue and save a male of that age."¹⁹⁵

The fact that the Legislature had designated a person as a minor or as an adult was immaterial.¹⁹⁶ The court enthusiastically embraced the purpose of the juvenile law: "These juvenile courts, which are in fact but an extension of the jurisdiction of the superior courts, are the creation of modern philanthropic endeavor, and are designed to and in fact do provide a most excellent means of restraining and reforming wayward persons who, unchecked, may become a menace to society."¹⁹⁷

But displeasure with the legislation continued. There appeared to be an underlying conflict in finding a solution to the problems, with community reformist groups on one side and judges and probation officers on the other.¹⁹⁸ Court officers were particularly wary of having their hands tied by specifically prescribed procedures in juvenile cases.¹⁹⁹ One judge summed up the feeling of court personnel: "I sincerely trust no attempt will be made to prescribe the exact processes that the court should follow in these cases. The legislature should lay down the essentials which are to govern. That ground has generally been covered ... beyond that the legislature should not circumscribe the exercise of judicial authority in these cases."²⁰⁰

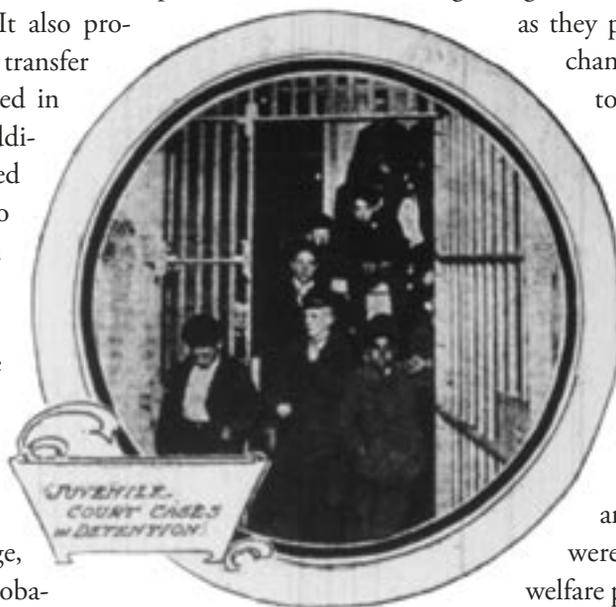
That attitude is understandable given the alcalde-type justice system that had been in place for years. But through the mediation efforts of the Board of Charities and Corrections, all sides finally reached some common ground on desirable juvenile court jurisdiction and procedures, which led in 1915 to the enactment of an overhaul of the Juvenile Court Law. The amended law left many areas "open for differences of interpretation and the growth of divergent practices,"²⁰¹ which may explain why opposition was limited.

1915 JUVENILE COURT LAW

The 1915 Juvenile Court Law maintained the bases of jurisdiction included in 1909 and added a category for "insane, or feeble-minded" children who

could not be properly controlled by their parents or guardians and posed a danger to others.²⁰² By then the Legislature had also established the California School for Girls in Ventura, where all girls housed at the Whittier State School were transferred²⁰³ and where all girls were to be committed under the 1915 law.²⁰⁴ No boys younger than 16 were to be committed to the Preston School of Industry, and no boys over 16 were to be committed to the Whittier State School.²⁰⁵ The law set out specific procedures for handling complicated delinquency cases, with provisions for offenders under age 18 and for offenders who fell between the ages of 18 and 21.²⁰⁶ The court was given jurisdiction over both boys and girls until they were 21 unless the child “reformed” or unless a girl was married with the permission of the court.²⁰⁷ It also provided for the interdistrict transfer

of cases that had been filed in the wrong county.²⁰⁸ In addition, it provided a detailed procedural mechanism to declare children free from their parents’ custody and control; as in modern juvenile jurisprudence, once the court made an order freeing a child from his or her parents’ custody and control, it had no power to set aside, change, or modify the order.²⁰⁹ Probation officers and the probation committee in each county assumed greater responsibilities for supervising children, controlling the detention homes, submitting annual reports, and assisting the court.²¹⁰ And the 1915 Juvenile Court Law provided, for the first time, for the appointment of referees to “hear the testimony of witnesses and certify to the judge of the juvenile court their findings upon the case submitted to them, together with their recommendation as to the judgment or order to be made in the case in question.”²¹¹ The court could then follow the recommendation of the referee, make its



own order, or set aside the findings and order a new hearing.²¹² But the legislation set no qualifications for the referees,²¹³ though it did specify that female referees should be appointed where possible to hear the cases of female minors.²¹⁴ Finally, the legislation included a provision requiring that any girl over age 5 who came under the provisions of the law must be dealt with, as far as possible, in the presence of a woman probation officer or other woman staff person; this also applied to the transportation of female children.²¹⁵

Great Procedural Disparity Among Counties

Except in cases where children were freed from their parents’ custody and control, court officers were given great discretion to handle petitions

as they pleased, as well as to modify, change, and set aside orders, and

to dismiss petitions.²¹⁶ This,

in part, led to a great procedural disparity among counties, particularly between the large urban centers and the small rural counties.²¹⁷ Juvenile courts developed quickly in the three most heavily populated counties—

San Francisco, Los Angeles, and Alameda. These counties were dealing with special child

welfare problems generated in part by high populations of immigrant children facing

adverse living conditions and societal standards of health, housing, school attendance, and parental supervision that often differed from the standards in their countries of origin.²¹⁸ In addition, well-

organized advocacy groups in these urban communities promoted a greater focus on the reform of child protection standards.²¹⁹ By contrast, the small rural counties were dealing with large numbers of dependent children because of scarce family resources and the high-risk occupations—lumbering, mining, dredging—available to men in those areas, who

often perished on the job.²²⁰ The divergent county practices frustrated the Board of Charities and Corrections, which was attempting to build consistent practices grounded in the law.²²¹ In one report the board complained: “Every county in California is a law unto itself in social matters and there is a wide diversity in understanding and administering county problems affecting dependents and delinquents.”²²²

Appellate Courts Attempt to Help Shape the Law

Meanwhile, the state’s appellate courts were attempting to address the diversity of administration through case law. In *People v. Wolff*, a defendant convicted of murder and sentenced to death appealed his conviction in part on the ground that he had been only 16 years old when the crime was committed, claiming that the juvenile court erred when it remanded him to the superior court for a criminal trial: “[A] person under eighteen years of age cannot be prosecuted or punished for the crime of murder and ... can be dealt with only as a ward of the juvenile court.”²²³ In rejecting the claim, the California Supreme Court clarified that a juvenile court judge had the power under the law to remand a case for criminal proceedings if the judge were to conclude that “such person is not a fit subject for further consideration” under the juvenile court law.²²⁴

And the California Supreme Court in *In re Daedler* resolved the unsettled question of a minor’s entitlement to a jury trial in juvenile court proceedings.²²⁵ Daedler, who was found by the juvenile court to have committed a murder when he was 14 and who had been committed to the Preston School of Industry, brought a petition for writ of habeas corpus before the court, claiming that the juvenile court law was unconstitutional because it denied him the right to a jury trial on the charges.²²⁶ The court, relying on its holding in *Ex parte Ah Peen*²²⁷ and rejecting its holding in *Ex parte Becknell*,²²⁸ denied Daedler’s application, stating: “The processes of the Juvenile Court Law are, as we have seen, not penal in character, and hence said minor has no inherent right to a trial by jury in the course of the application of their beneficial and merciful provisions to his case.”²²⁹

But in *In re Edwards* the court reined in the juvenile court, holding that it had no right to withhold the custody of an 8-year-old boy from his parents without a specific finding of abandonment that complied with the statute’s requirement that the child had been “left in the care and custody of another by his parent or parents without any provision for his support ... for the period of one year with intent to abandon said person.”²³⁰ The court held that other findings would have sufficed to justify taking the child from the custody of his parents, but none had been made.²³¹ The child’s mother in this case had “strenuously endeavored by legal means, and by means which were not at all times strictly legal, to gain control of her child that she might exercise parental control over him.”²³²

JUDICIAL COUNCIL ESTABLISHED

When the Judicial Council was created by constitutional amendment in 1926, it launched with great expectations.²³³ Ballot arguments in favor of the amendment explained:

One of the troubles with our court system is that the work of the various courts is not correlated, and nobody is responsible for seeing that the machinery of the courts is working smoothly. When it is discovered that some rule of procedure is not working well it is nobody’s business to see that the evil is corrected. But with a judicial council, whenever anything goes wrong any judge or lawyer or litigant or other citizen will know to whom to make complaint, and it will be the duty of the council to propose a remedy, and if this cannot be done without an amendment to the laws the council will recommend to the legislature any change in the law which it deems necessary.²³⁴

There was little opposition to the amendment, which was approved by “a very large majority” along with other measures favorable to the judiciary.²³⁵ Of course, from its inception the Judicial Council had its hands full with the problems of all courts in the state and did not focus specifically on the juvenile court for many years to come. But almost immediately the Judicial Council began collecting statistics

on all of the state's courts, including the juvenile court.²³⁶ And it began looking around the country to see if systems in other jurisdictions could be adopted in California. By 1930, the Judicial Council had examined an "improved procedure" for domestic relations cases in place in Detroit, where, because of additional court-ordered money being collected for dependent wives and children, "the number of delinquents hailed into court [was] less than otherwise would [have been] the case . . ."²³⁷

1937 JUVENILE COURT LAW

In 1937 the juvenile court law was rolled into the newly created Welfare and Institutions Code, which encompassed the state department of social welfare, the state department of institutions, the juvenile court, orphans, child-care agencies, indigents, the disabled, the mentally ill, the elderly, and oversight of private, county, and state institutions.²³⁸ Though the earlier juvenile court law was repealed, many of the new statutory provisions were "substantially the same" as the 1915 law and were to be "construed as restatements and continuations thereof, and not as new enactments."²³⁹ Some new provisions filled gaps in the earlier statute and some broke new ground, including

- Establishment of a California Bureau of Juvenile Research "for the clinical diagnosis of the inmates of the Whittier State School" and other state institutions, to "carry on research into the causes and consequences of delinquency and mental deficiency, and . . . inquire into social, educational, and psychological problems relating thereto."²⁴⁰
- Creation of a more fully developed mechanism for declaring a child free from the custody and control of his or her parents, including more specified situations where such a declaration would be appropriate: having parents who were "habitually intemperate" for at least one year prior to the filing of a petition; having parents who had been convicted of a felony and imprisoned where the felony was "of such a nature as to prove the unfitness of the parents to have the future custody and control of

the child"; having parents who were found in a divorce action to have committed adultery when "the future welfare of the child [would] be promoted by an order depriving such parents of the control and custody of the child"; or having parents who had been declared "feeble-minded or insane" when the parents would not be capable of properly supporting or controlling the child.²⁴¹

- Establishment of forestry camps as an alternate facility for wards of the juvenile court who were "amenable to discipline other than in close confinement."²⁴² Boys committed to the forestry camps could be required to work on the buildings and grounds, on clearing forest roads for fire prevention or firefighting, on forestation or reforestation of public lands, or making fire trails and fire breaks.²⁴³

Juvenile Court Characterized by Informal Procedures

Juvenile court growth in California remained largely local, varying considerably from community to community, throughout the first half of the 20th century.²⁴⁴ It was characterized by informal procedures and individual accommodations reminiscent of the justice dispensed by the local alcalde in early California. The informal handling of juvenile offenders was a matter of some pride in many counties, particularly in the rural counties, where the local law enforcement and court personnel often knew the child, his or her parents, and a great deal about the family's background.²⁴⁵ Edwin Lemert offers the following explanation of the early informality in juvenile procedures:

Such officials not infrequently are part of a web of reciprocal social and economic relationships that may involve parents, relatives, and friends of youths coming to their attention. The fact that "word gets around" and that law agents have to "live with" or face these people daily inclines them to handle youth gingerly or to be sincerely concerned with keeping the youth and his family from embarrassment and avoidable difficulty. Furthermore, in

some areas the detached residence of sheriffs' deputies more or less requires that they be judges as well as policemen. The sheriff himself, as an elective official, is usually more interested in serving people and keeping peace between them than in making arrests. There are also indications that cultural differences dispose police and probation officers in ranch and agricultural counties to greater tolerance for youthful deviance along certain lines than is true for urban areas. Paradoxically, there is also a tendency for people in these communities to be more punitive than their urban counterparts when they do take formal action, or when certain kinds of offenses are committed.²⁴⁶

Even though California had experienced a half century of juvenile court law and procedure, the informality of the early, alcalde-dominated California justice system was notably evidenced in the juvenile court as late as 1958 in the following examples:

- A 1957 probation survey of 36 responding judges indicated that, in juvenile matters, two-thirds of them customarily relied on prehearing conferences, which were held *ex parte* and *in camera* with the probation officer only—to the exclusion of parents, arresting officers, defense attorney, and school officials.²⁴⁷
- About half of the judges surveyed saw their role in juvenile matters as “talking with and counseling the parents and the child”—the least-mentioned task was ruling on evidence and objections.²⁴⁸
- A 1958 study indicated that judges in 46 counties routinely granted continuances in juvenile matters as a dispositional tool; this was more prevalent in the rural counties.²⁴⁹
- In 1958, no more than 22 judges statewide held statutorily mandated detention hearings prior to detaining youth. And when such a hearing was held, it was often in the presence of the probation officer alone.²⁵⁰

Many judges, particularly in the small counties, embraced the *parens patriae* role and, as one judge explained, acted “like a father who takes immediate

action when his son is in trouble, without undue concern for legalities.”²⁵¹ Others, uncomfortable or uninterested in juvenile proceedings, delegated their responsibilities to probation officers unless the case was very serious or high profile.²⁵² In either case the result was a juvenile court operating informally with an extralegal approach.²⁵³

Little Impact From Judicial Review

Judicial review had very little impact on the uniform development of the California juvenile court in the first half of the 20th century.²⁵⁴ There were several reasons for this:

- The juvenile court was so specialized—in its operational procedures, clientele, and conception—that the effect of an appellate opinion on a juvenile court judge operating under different conditions, with different clientele, was nominal at best.²⁵⁵
- There was an explicit sanctioning of procedural disparities in some of the appellate opinions themselves.²⁵⁶ For example, in *Marr v. Superior Court*, the court was dismissive of a claim that the juvenile court did not have jurisdiction over a child because of a defect in an allegation of the petition, stating, “nicety of procedure is not required in juvenile court matters.”²⁵⁷
- There were very few juvenile court appeals. Between 1906 and 1960 there were only 115, an average of about 2 appeals per year.²⁵⁸
- The appeal process itself was hampered by records so sparse that appellate court officers could not make informed decisions.²⁵⁹
- Only a few of the appellate cases were directly relevant to the organization and operation of the courts.²⁶⁰

But during the decade between 1950 and 1960 some appellate judges indicated concern about the direction of the California juvenile court. In reversing an order to transfer two juvenile court cases from Los Angeles County to Ventura County, the appel-

late court stated: “While proceedings in the juvenile court are for the welfare of boys and girls, still they deprive individuals of liberty. Therefore, the administration of this law must conform to constitutional guarantees of due process of law. From the record in these two cases it is hard to say who testified, who evaluated the testimony, if any, or who made the findings; or whether or not we have here some sort of assembly-line administration of the juvenile court law.”²⁶¹ And in *In re Cardenas Contreras*, the appellate court complained in frustration:

While the juvenile court law provides that adjudication of a minor to be a ward of the court shall not be deemed to be a conviction of crime, nevertheless, for all practical purposes, this is a legal fiction, presenting a challenge to credulity and doing violence to reason. Courts cannot and will not shut their eyes and ears to everyday contemporary happenings. [¶] It is common knowledge that such an adjudication when based upon a charge of committing an act that amounts to a felony, is a blight upon the character of and is a serious impediment to the future of such minor. . . . True, the design of the Juvenile Court Act is intended to be salutary, and every effort should be made to further its legitimate purpose, but never should it be made an instrument for the denial to a minor of a constitutional right or of a guarantee afforded by law to an adult.²⁶²

This appellate grumbling was a harbinger of reform to come. Because the Legislature had responded piecemeal to problems with the juvenile law from 1915 to 1960, the existing law was an unwieldy checkerboard of inconsistencies, duplications, and archaic practices unresponsive to the needs of a more modern, more populated California.²⁶³ To illustrate, between 1941 and 1959, 53 new provisions were added to the law and 149 amendments were passed, but only 20 provisions were repealed.²⁶⁴

ESTABLISHMENT OF THE CALIFORNIA YOUTH AUTHORITY

Among the significant new provisions during those years was the establishment of the California Youth Authority (CYA) in 1941.²⁶⁵ Intended to “protect

society by substituting training and treatment for retributive punishment of young persons found guilty of public offenses,”²⁶⁶ the legislation directed criminal courts to commit youthful offenders to an administrative authority rather than to prison and gave juvenile courts the discretion to do the same.²⁶⁷ Though inspired by the American Law Institute’s model Youth Correction Authority Act, California’s legislation diverged from the model in some meaningful ways that affected the state’s juvenile courts.²⁶⁸ First, commitments under California’s law were not mandatory above a specified age; they were optional under the joint jurisdiction of the juvenile courts and the CYA.²⁶⁹ Second, probation was kept within the local court system rather than converted to a state-controlled system.²⁷⁰ Shortly after the CYA was launched, numerous problems with the Whittier State School for Boys surfaced and were made public, including a serious problem with run-aways, two suicides, and a significant problem with top management turnover.²⁷¹ Public concern led to the transfer of the administration of all three correctional schools (Whittier, Preston, and Ventura) to the CYA in 1942.²⁷² Thus, while the CYA had been formed with the idea of providing individualized treatment to youthful offenders, it was almost immediately saddled with the administration of three institutional albatrosses that quickly seized the bulk of its time and energy.²⁷³

The Youth Authority law withstood a constitutional challenge in 1943, when the Supreme Court held in *In re Herrera* that the law was not unconstitutionally discriminatory even though a minor could remain in custody longer than an adult convicted of the same offense and that an offender under 23 years of age could be committed to the Authority.²⁷⁴ The court reasoned:

The great value in the treatment of youthful offenders lies in its timeliness in striking at the roots of recidivism. Reaching the offender during his formative years, it can be an impressive bulwark against the confirmed criminality that defies rehabilitation, for it is characteristic of youth to be responsive to good influence as it is susceptible to bad. Youth

does not of course end abruptly to be superseded by maturity, and maturity comes more slowly to some than to others. It is a matter of practical necessity, however, and one of legislative discretion, to fix theoretical lines where there are no real ones, and there is no abuse of such discretion when the theoretical lines are not unreasonable.²⁷⁵

1949 ATTEMPT TO REVISE THE JUVENILE COURT LAW

An attempt to revise the juvenile court law in 1949 under the auspices of the Special Crime Study Commission on Juvenile Justice failed, possibly because of a particularly tense political year in Sacramento, together with an inexperienced commission.²⁷⁶ But another likely reason for the failure was the magnitude of the commission's proposal: "to convert the juvenile court into a family court, with district rather than county jurisdiction."²⁷⁷ Among the recommendations of the commission were

- creation of a family and children's court to "provide uniformly competent and socially informed judicial services throughout the State for all cases where the welfare of families, children and youth is the question at issue";²⁷⁸
- a Judicial Council study of the conduct and administration of justice by juvenile courts with recommendations for the improvement of services;²⁷⁹
- denial of bail to minors to "clearly establish the right and responsibility of the judge of the juvenile court to protect the welfare of a minor by detaining or releasing him only under conditions conducive to his welfare and to clarify the law by affirming that there is no right to obtain the release of a minor other than by application to the juvenile court and with the court's approval that said release would be in the interests of the minor's welfare";²⁸⁰
- Judicial Council consideration, in its study of the administration of justice in the juvenile court, of "whether provision should be made for a youth

court with exclusive jurisdiction over persons between the ages of sixteen and twenty" who are charged with a criminal offense;²⁸¹ and

- creation of child-care centers at local schools "to furnish adequate supervision to the children of working mothers."²⁸²

There was strong resistance to the proposal for the creation of a family and children's court, notably from Governor Earl Warren, who feared the plan would lead to fragmentation of the court system.²⁸³ Phil S. Gibson, the Chief Justice of the California Supreme Court and Chair of the Judicial Council, shared his concern.²⁸⁴ So while many of the commission's recommendations reached the Legislature, they arrived not as a unified package but as numerous separate bills, which were dealt with in a piecemeal fashion and continued the pattern of "legislation by amendment."²⁸⁵ One of the resolutions adopted by the Legislature requested that the Judicial Council "undertake a study of the conduct and administration of justice by the juvenile court in this State, and the feasibility and desirability of enlarging the jurisdiction thereof."²⁸⁶ The resolution did not include a request to study the concept of creating a youth court.²⁸⁷ The Judicial Council complied by setting up a standing committee to conduct the study and, in 1954, concluded that, while there was an "urgent need for improvement in the processing, treatment, care and training of juveniles... no fundamental change in the Juvenile Court Law or in its application or administration by the courts appears warranted."²⁸⁸

Notably, a primary focus on the protection of the community as opposed to the protection of the child was still present in 1949. In its final report, the Special Crime Study Commission noted that "in the attempt to rehabilitate and reeducate we must not forget, in our interest in the particular child, the requirement that the community must be protected. Unreasonable chances should not be taken at the expense of the safety or protection of the citizenry."²⁸⁹ And it further cautioned: "We assume, perhaps too readily, that everything can be reached through envi-

ronmental conditions. This is not an entirely sound approach. Natural endowment, that which comes with birth, and its potential capacity for good or evil cannot be entirely disregarded.”²⁹⁰ On the other hand, the commission recognized the need to improve the environmental conditions of children and, in a startling example of prescience, acknowledged the need for “more attention to environmental conditions during early childhood and the period of adolescence.”²⁹¹

INCREASING PRESSURE FOR REFORM

By the late 1950s reform for the juvenile court was in the wind—the court simply had failed to evolve with modern conditions and the need for change was critical. A number of issues particularly concerned policymakers and advocates. The fabric of *parens patriae* was fraying. While the alcalde-type judge, who made decisions without concern for due process, was a specter of the past, significant problems remained. Cases were heard too quickly, too many children were being detained, the media was pouncing on cases and publishing names, and employers, including the armed services, were discriminating against children with juvenile court records.²⁹² Procedural issues—detention policy, juvenile arrest practices, the legal rights of juveniles (especially the right to counsel), and management of the burgeoning number of juvenile traffic offenses—dominated the calls for reform.²⁹³

The question of legal rights for children was a touchstone issue in the battle for reform. There was a movement afoot to address the “arbitrariness” of juvenile judges by challenging the traditional concept of the juvenile court as “a parental surrogate acting in loc[o] parentis, with the nonpunitive objectives of reformation and the inculcation of ‘habits of industry’ advanced as the paramount justification for its expansive jurisdiction and summary procedures.”²⁹⁴ Judicial officers largely conceded that juveniles deserved the right to a hearing and notice of the hearing but denied the need for additional rights—to counsel, to warnings against self-incrimination, to bail, to a jury trial, and to other rights guaranteed in

the Constitution—because of the “benevolent purposes” of the court.²⁹⁵

Then, in 1956, the California Supreme Court weighed in on the issue in *People v. Dotson*, embracing the *parens patriae* doctrine in holding that, while a defendant in a criminal proceeding was entitled to legal representation at every stage of the proceeding, juvenile court proceedings were not criminal in nature, so the fact that a minor was not represented by counsel was not a denial of due process unless the minor was taken advantage of or treated unfairly, resulting in a deprivation of rights.²⁹⁶

One of the first to take up the gauntlet against the juvenile court status quo in California was Robert Fraser, an Orange County attorney who took on representation of a girl held in detention without access to her mother or Fraser because she was considered a material witness against her father in a criminal child molestation case.²⁹⁷ Fraser was finally successful with a petition for writ of habeas corpus, but not until the child had testified against her father.²⁹⁸ Fraser found that the Welfare and Institutions Code included few legal rights for children. Out of concern for the lack of legal rights for children he started appealing cases similar to the first, without good results. Finally he persuaded the Orange County Bar Association to introduce a resolution at the 1958 Conference of State Bar Delegates to amend the juvenile court law to give children the same rights afforded a defendant in a criminal case:²⁹⁹ jury trials, right to counsel, bail, criminal rules of evidence in contested hearings, and proper notice for all proceedings.³⁰⁰ The resolution passed but languished because the State Bar Association failed to act on it.

1957 Governor’s Special Study Commission on Juvenile Justice

Meanwhile, attorneys all over the state were expressing frustration. The juvenile court made them feel that, although they were technically “allowed” in court, they had no real right to be present in juvenile court proceedings. Many also disagreed with the informal, backroom procedural approach that governed juvenile cases.³⁰¹ So when Governor Goodwin J.

Knight appointed a Special Study Commission on Juvenile Justice in 1957 and charged it with exploring the need for a revision of the juvenile court law, there was some enthusiasm for the commission's work.³⁰² Governor Edmund (Pat) Brown renewed the commission appointments when he took office in 1958, and the commission issued its final report in November 1960.³⁰³

The commission found significant problems with the existing juvenile court system: there were no "well-defined, empirically derived standards and norms to guide juvenile court judges, probation, and law enforcement officials in their decision making."³⁰⁴ Instead, juvenile cases were being decided under a wide variety of systems and policies that seemed "to depend more upon the community in which the offense [was] committed than upon the intrinsic merits of the individual case."³⁰⁵ Other problems were cited:

- Basic legal rights were not being uniformly or adequately protected.³⁰⁶
- The relative independent status of juvenile justice agencies led to inconsistencies in philosophy, coordination, and administration.³⁰⁷
- The system of rehabilitative services was ineffective, in part because of a large increase in the number of children in the system.³⁰⁸
- Children were being excessively detained, often when unwarranted.³⁰⁹
- There were numerous inconsistencies and ambiguities within the juvenile court law.³¹⁰

The commission's report made 31 recommendations that, if implemented, were bound to radically change the juvenile court system. Perhaps most important, it recommended three categories for juvenile court jurisdiction: (1) dependent, neglected, or abandoned children; (2) children whose behavior "clearly implies a tendency towards delinquency," such as truants, runaways, and incorrigibles; and (3) children who violate state, local, or federal criminal laws.³¹¹ Giving "dependent" children a category of their own was truly a major change. Before, the

differentiation was merely "implied" in the law by the requirement that neglected children were to be segregated from delinquent children in detention facilities.³¹²

Another revolutionary recommendation was that every juvenile and his or her parents should be advised by the court of their right to counsel and right to the appointment of counsel if indigent.³¹³ In so recommending, the commission commented, "We find no grounds to support the contention that the presence of counsel will destroy the protective philosophy of the juvenile court or seriously alter the informality of the proceedings."³¹⁴

The report's other recommendations included confidential juvenile court proceedings and filings, recording of all stages of the juvenile court hearing, notice to parents of every new petition or supplemental petition, bifurcated hearings, elimination of "double jeopardy" for minors, minimum procedural rules, imposition of minimum qualifications for referees, requirement of detention hearings within 48 hours of detaining a child, placement of probation services under county administration, establishment of a Judicial Council advisory board of juvenile court judges to develop rules of practice and procedure, and provision for statewide and regional conferences for juvenile court judges and referees.³¹⁵

In making its recommendations, the commission relied on a set of principles consistent with the basic juvenile court philosophy, which had widespread public acceptance. Among them were the following:

- The juvenile court should avoid intervening in the parent-child relationship unless there is a sound basis for such action.
- Children and parents have the right to a fair hearing and to the protection of their legal and constitutional rights.
- Children should be protected from unnecessary separation from their parents.
- The juvenile court law should be uniformly applied throughout the state, with clearly defined procedures.

- No child, whether delinquent or dependent, should be taken into custody or detained without reasonable cause.
- The juvenile court should have reasonable assurance that meaningful rehabilitation services will be provided in the cases of dependent or delinquent children.
- The juvenile court must adequately protect the child and the community.
- The juvenile court should work to increase the status of probation departments and to take advantage of the clinical knowledge and skills of treatment specialists.³¹⁶

Finally, the commission proposed a juvenile court law statute.³¹⁷ The commission noted, however, that “there will remain a need to develop further details of practice and procedure. In our opinion, this can best be accomplished by the courts themselves utilizing the rulemaking powers conferred upon the Judicial Council by the Constitution.”³¹⁸

PASSAGE OF THE 1961 ARNOLD-KENNICK JUVENILE COURT LAW

After overcoming significant resistance from probation, judges, police, and others, in part by agreeing to compromises attractive to the various stakeholders,³¹⁹ the commission’s legislation was introduced as Senate Bill 332 in the 1961 legislative session.³²⁰ Legislators felt ambivalent at best and were generally skeptical about the proposed changes.³²¹ But the challenge of gaining support for the bill got a boost from an unexpected quarter when Judge Richard Eaton of the Shasta County court testified before the Senate Judiciary Committee that he expected youngsters who appeared before him to admit to the charges against them. If they did not, his practice was to send them to detention until they were ready to provide the requisite admissions.³²² He also opined that the presumption of innocence in juvenile proceedings “produces a result as absurd as any other presumption of law contrary to fact.”³²³ Dumbfounded senators quickly moved the bill out of committee.³²⁴ It passed

in the Legislature and was signed by the Governor on July 14, 1961.³²⁵ Codified at Welfare and Institutions Code sections 500–945, the new law, which became known as the Arnold-Kennick Juvenile Court Law, took effect on September 15, 1961.³²⁶

The landmark legislation was termed “the earthquake of 1961” by one judge.³²⁷ It dramatically changed the structure of the juvenile courts, probation departments, and even police and sheriff’s departments and public defender’s offices.³²⁸ Suddenly the juvenile court was run like a court rather than like a counseling service or an administrative agency.³²⁹ Minors were afforded important new rights in the statute, including

- significant new notice provisions, for both a minor of 14 and older and his or her parents, at every stage of the proceedings;³³⁰
- the right to be represented at every stage of the proceedings by counsel and, for indigent minors charged with misconduct that would have constituted a felony if committed by an adult, mandatory appointment of counsel;³³¹ and
- the right to proof of the allegations in the petition by a preponderance of legally admissible evidence at a hearing before being held as a dependent or delinquent under the law.³³²

The expanded purpose of the new law was

to secure for each minor under the jurisdiction of the juvenile court such care and guidance, preferably in his own home, as will serve the spiritual, emotional, mental, and physical welfare of the minor and the best interests of the State; to preserve and strengthen the minor’s family ties whenever possible, removing him from the custody of his parents only when his welfare or safety and protection of the public cannot be adequately safeguarded without removal; and, when the minor is removed from his own family, to secure for him custody, care, and discipline as nearly as possible equivalent to that which should have been given by his parents.³³³

An order declaring a minor to be a ward of the juvenile court was not to be deemed a conviction of

a crime, nor could a juvenile court proceeding be deemed a criminal proceeding.³³⁴

So here for the first time we began to see movement toward the “best interest of the child” standard and an easing of the rhetoric of intervention to prevent criminality. Protections had been built into the legislation both for the rights of the children and for their parents, and there was a growing focus on preserving the family relationship wherever possible. A true revolution had begun.³³⁵

All did not eagerly embrace the law, as this article in the *Merced County Star* demonstrates:

Judges Holding Back on New Juvenile Court Law

There was every indication that [two judges] along with the county probation department will not fully abide by the law until challenged by the Supreme Court. [One judge] stated, “We have paid attention to the new law except in felony cases. Eventually we will be challenged”³³⁶

With time those bound by the law adjusted to its requirements, though to this day many local jurisdictions, while conforming to the broad strokes of the law, have marked local proceedings with their own unique stamp, often commensurate with the personality of the judge, the relationship between social services and the court, or other factors that vary from jurisdiction to jurisdiction.

Six years after California passed the Arnold-Kennick law, the U.S. Supreme Court issued its decision in *In re Gault*, holding, largely in line with California’s new legislation, that at the jurisdictional phase of juvenile court proceedings due process compelled (1) adequate notice; (2) advice to the minor and his or her family of the right to counsel, including appointment of counsel if unable to afford to pay for an attorney; and (3) a privilege against self-incrimination and the right to confront and cross-examine witnesses.³³⁷ The Court also suggested that there be a right to appeal, to an adequate record of the proceedings, and to a finding by the court or a statement of reasons for its decision, in an effort to avoid saddling the reviewers on appeal

with the need to reconstruct the record.³³⁸ It further approved of the handling of juveniles separately from adults, of the confidentiality of records, and of the need to avoid stamping a “delinquent” with the stigma of criminality.³³⁹ The Court specifically criticized the juvenile court’s use of the *parens patriae* doctrine in the *Gault* case to “rationalize the exclusion of juveniles from the constitutional scheme,”³⁴⁰ opining that “its meaning is murky and its historic credentials are of dubious relevance.”³⁴¹ And, in a sharper colloquy, the Court stated:

Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure. . . . The absence of substantive standards has not necessarily meant that children receive careful, compassionate, individualized treatment. The absence of procedural rules based upon constitutional principle has not always produced fair, efficient, and effective procedures. Departures from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness.³⁴²

But though *Gault* has been credited with signaling the end of the *parens patriae* approach in delinquency proceedings,³⁴³ the truth is not quite so simple. California’s juvenile courts have continued to struggle with the challenge of maintaining a child-friendly informal atmosphere in the courtroom while ensuring that each child or youth entering the system is accorded every right guaranteed by the state and federal Constitutions. Growing public sentiment against youth violence has led to increasing pressure to more stringently punish youthful offenders. Many are being tried as adults and sentenced to adult prisons for the crimes they have committed. But other detention models and dispositional approaches are being explored. Juvenile court judges—both in the dependency and delinquency courts—still grapple with their dual charge of protecting the community while at the same time acting in the best interest of the children and youth who come before them.

The decades from 1960 to the beginning of the 21st century bristled with exciting reforms in the

juvenile court. New discoveries about child abuse dramatically reshaped the dependency system. There is promise of positive change in the delinquency system based on new research on the adolescent brain. State trial court funding and unification in California have had significant impact on the trial courts, including the juvenile court. And the Judicial Council has increasingly taken an active role in partnering with both the trial and appellate courts to improve the administration of justice for cases involving children. But the four decades from *Gault* to the 21st century are a story for another day.

NOTES

1. *Ex parte* The Queen of the Bay et al., 1 Cal. 157, 157–58 (1850).
2. *Id.* at 158.
3. *Id.*
4. Nathaniel Bennett, *Preface* to 1 REPORTS OF CASES DETERMINED IN THE SUPREME COURT OF THE STATE OF CALIFORNIA, at v, vii (1851).
5. WILLIAM J. PALMER & PAUL P. SELVIN, THE DEVELOPMENT OF LAW IN CALIFORNIA 3–13 (West Publ'g Co. 1983) (1954).
6. *Id.* at 11.
7. *Id.*; see also Bennett, *supra* note 4, at vii.
8. DAVID J. LANGUM, LAW AND COMMUNITY ON THE MEXICAN CALIFORNIA FRONTIER 30, 37–40 (Univ. of Okla. Press 1987).
9. *Id.* at 30.
10. *Id.* at 30–31.
11. EDWIN M. LEMERT, SOCIAL ACTION & LEGAL CHANGE: REVOLUTION WITHIN THE JUVENILE COURT 32 (Aldine Publ'g Co. 1970).
12. See 1850 Cal. Stat. *passim*.
13. Act of Feb. 28, 1850, ch. 22, 1850 Cal. Stat. 76.
14. Act of Apr. 17, 1850, ch. 103, 1850 Cal. Stat. 254 (establishing California's community property system).
15. Act of Apr. 13, 1850, ch. 95, 1850 Cal. Stat. 219 (adopting the common law “so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of the State of California”).
16. Act of Apr. 16, 1850, ch. 99, § 4, 1850 Cal. Stat. 229, 230.
17. *Id.* § 3, 1850 Cal. Stat. at 229.
18. Act of Sept. 9, 1850, ch. 50, 9 Stat. 452 (1850) (admitting California into the Union), *reprinted in* THE CONSTITUTIONS OF CALIFORNIA, THE UNITED STATES, AND RELATED DOCUMENTS, 2001–02 EDITION 93 (Cal. State Senate 2001).
19. Angus Macfarlane, History of California's Juvenile Court, ch. 33, at 7 (n.d.) (unpublished manuscript, on file with the *Journal of the Center for Families, Children & the Courts*).
20. *Id.* The San Francisco Orphan Asylum changed its name to Edgewood in 1944 and has been serving children continuously for 153 years, making it the oldest continuing charity on the West Coast. *Id.* at 8.
21. *Id.* ch. 33, at 7–10, ch. 34, at 1–5.
22. Act of Mar. 31, 1870, ch. 385, 1869–1870 Cal. Stat. 530; see 1 CAL. JUR. *Adoptions* § 2, at 418–19 (1921).
23. 1 CAL. JUR., *supra* note 22, at 419.
24. *Id.*
25. LANGUM, *supra* note 8, at 241. This makes sense because the Mexican judicial system derived from Roman civil law through Spain. *Id.* at 145.
26. *Id.*
27. See Infoplease, *Adoption Trends*, at www.infoplease.com/ipa/A0881281.html (stating that 17 states enacted adoption legislation between 1851 and 1873; by 1929 all states had adoption statutes).
28. LEMERT, *supra* note 11, at 33.
29. *Id.* at 34.
30. Act of Mar. 30, 1878, ch. 520, § 4, 1877–1878 Cal. Stat. 812, 813.
31. Act of Mar. 15, 1883, ch. 91, 1883 Cal. Stat. 377.
32. *Id.*; see also LEMERT, *supra* note 11, at 34.
33. Macfarlane, *supra* note 19, ch. 34, at 3.
34. JOHN E.B. MYERS, A HISTORY OF CHILD PROTECTION IN AMERICA 135 (Xlibris 2004).

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35. *Id.*
36. *Id.*
37. Macfarlane, *supra* note 19, ch. 34, at 4.
38. *Id.* at 3–4.
39. *Id.* at 4.
40. *See id.* at 6–7.
41. Act of Mar. 30, 1878, ch. 520, § 1, 1877–1878 Cal. Stat. 812, 812.
42. *Id.* § 2.
43. *Id.* § 3, 1877–1878 Cal. Stat. at 812–13.
44. *Id.* § 4, 1877–1878 Cal. Stat. at 813.
45. Act of Mar. 30, 1878, ch. 521, 1877–1878 Cal. Stat. 813.
46. *Id.* § 3, 1877–1878 Cal. Stat. at 814.
47. Act of Apr. 25, 1851, ch. 131, 1851 Cal. Stat. 515.
48. Act of May 10, 1854, ch. 39, 1854 Cal. Stat. 44.
49. Act of Mar. 16, 1855, ch. 46, 1855 Cal. Stat. 50.
50. Act of Apr. 10, 1858, ch. 171, 1858 Cal. Stat. 124.
51. Act of Mar. 17, 1860, ch. 119, 1860 Cal. Stat. 86.
52. Act of Apr. 15, 1858, ch. 209, 1858 Cal. Stat. 166.
53. *Id.* § 10, 1858 Cal. Stat. at 169.
54. Police courts were created under the authority of section 8½ of article XI of the California Constitution and derived jurisdiction from city charters—the jurisdiction varied according to the charter provisions. *See* LARRY L. SIPES, COMMITTED TO JUSTICE: THE RISE OF JUDICIAL ADMINISTRATION IN CALIFORNIA 120 (Admin. Office of the Cal. Courts 2002). Police courts had “exclusive jurisdiction” of all misdemeanors punishable by fine or by imprisonment and all violations of city ordinances in cities where there was a police court. *See* Act of Mar. 5, 1901, ch. 81, 1901 Cal. Stat. 95. Appeals from police court decisions were taken to the superior court. *Id.* § 11, 1901 Cal. Stat. at 97.
55. Courts of sessions were established in every county and consisted of the county judge acting as presiding judge and two justices of the peace acting as associate justices. The court of sessions had jurisdiction over all public offenses committed in the county except murder, manslaughter, and arson, which were transferred to the district court. *See* Act of Mar. 11, 1851, ch. 1, §§ 62–63, 66–67, 1851 Cal. Stat. 2, 18–19.
56. Act of Apr. 15, 1858, ch. 209, § 10, 1858 Cal. Stat. at 169.
57. LEMERT, *supra* note 11, at 33.
58. *Id.* at 32–33; Act of Apr. 18, 1860, ch. 234, 1860 Cal. Stat. 200.
59. LEMERT, *supra* note 11, at 32–33.
60. *Id.*
61. *Id.*
62. *Id.* at 33. In 1876, the U.S. Navy transferred the *Jamestown*, a training ship, to the City of San Francisco to supplement the San Francisco Industrial School by providing training in seamanship and navigation for boys of eligible age. But by 1879 the ship was returned to the navy because of mismanagement amid “a hue and cry that the *Jamestown* was a training ship for criminals.” CAL. YOUTH AUTH., ABOUT THE CYA (State of Cal. 2000), at www.cya.ca.gov/About/history.html.
63. *Wayward Sarah*, S.F. CHRON., Sept. 8, 1887, at 4; *see* Macfarlane, *supra* note 19, ch. 36, at 4.
64. Daniel Macallair, *The San Francisco Industrial School and the Origins of Juvenile Justice in California: A Glance at the Great Reformation*, 7 U.C. DAVIS J. JUV. L. & POL’Y 1, 37–38 (Winter 2003).
65. *Id.* at 34–35.
66. *A Boy Stabber*, S.F. CHRON., Jan. 18, 1888, at 3; *see* Macfarlane, *supra* note 19, ch. 36, at 7.
67. *Youthful Depravity*, S.F. CHRON., Feb. 7, 1888, at 3; *see* Macfarlane, *supra* note 19, ch. 36, at 7.
68. Macfarlane, *supra* note 19, ch. 36, at 7.
69. *Id.*
70. 1 Tenth Census of the United States, 1880, pt. 2, at 563. At that time the actual number of children in California between the ages of 5 and 17 was 216,393. *Id.*
71. Macfarlane, *supra* note 19, ch. 36, at 7.
72. Act of Mar. 11, 1889, ch. 103, 1889 Cal. Stat. 100.
73. Act of Mar. 11, 1889, ch. 108, 1889 Cal. Stat. 111.
74. Act of Mar. 11, 1889, ch. 103, §§ 2, 4–6, 1889 Cal. Stat. at 100–01.
75. *Id.* §§ 3, 6, 1889 Cal. Stat. at 101.

76. *Id.* § 8, 1889 Cal. Stat. at 102.
77. *Id.* § 9.
78. *Id.* § 12.
79. *Id.* § 15, 1889 Cal. Stat. at 103.
80. *Id.* § 18, 1889 Cal. Stat. at 104.
81. *Id.* § 19, 1889 Cal. Stat. at 104–05.
82. Act of Mar. 11, 1889, ch. 108, §§ 4–5, 30, 1889 Cal. Stat. 111, 112–13, 120.
83. *Id.* § 14, 1889 Cal. Stat. at 115.
84. *Id.* § 16.
85. *Id.*
86. *Id.* § 17.
87. *Id.* § 18, 1889 Cal. Stat. at 116.
88. *Id.* § 20.
89. Act of Mar. 23, 1893, ch. 222, §§ 15, 1893 Cal. Stat. 328, 332.
90. *Id.* at §§ 1, 9, 1893 Cal. Stat. at 330.
91. *Id.* § 9, 1893 Cal. Stat. at 330.
92. *Id.* § 10.
93. *Id.* § 11, 1893 Cal. Stat. at 331.
94. Macallair, *supra* note 64, at 56.
95. *Ex parte* Ah Peen, 51 Cal. 280 (1876).
96. *Id.*
97. *Id.* at 281.
98. *Id.* (emphasis in original).
99. *Ex parte* Becknell, 51 P. 692, 693 (Cal. 1897).
100. *Id.*
101. *Id.*
102. *In re* Daedler, 228 P. 467 (Cal. 1924).
103. See *In re* Javier A., 206 Cal. Rptr. 386, 395–430 (Cal. Ct. App. 1984) for a lengthy discussion on the debate about the right to a jury trial for juveniles. The case traces the history of the issue from early English common law through modern California juvenile court law.
104. LEMERT, *supra* note 11, at 36.
105. *Id.*
106. *A Child Confined in a County Jail: Nine-Year-Old Boy's Fate*, S.F. CHRON., Sept. 24, 1897, at 4; see Macfarlane, *supra* note 19, ch. 37, at 4.
107. LEMERT, *supra* note 11, at 34–35.
108. *Id.* at 35.
109. *Id.*
110. *Id.*
111. Bernardine Dohrn, *The School, the Child, and the Court*, in A CENTURY OF JUVENILE JUSTICE 267, 267–68 (Margaret K. Rosenheim et al. eds., Univ. of Chicago Press 2002).
112. *Id.*
113. Michael Grossberg, *Changing Conceptions of Child Welfare in the United States, 1820–1935*, in A CENTURY OF JUVENILE JUSTICE, *supra* note 111, at 3, 29.
114. *Id.* at 29.
115. Act of Mar. 28, 1874, ch. 516, 1873–1874 Cal. Stat. 751.
116. Grossberg, *supra* note 113, at 29.
117. *Id.*
118. Dohrn, *supra* note 111, at 270–71.
119. *Id.* at 272.
120. *Id.*
121. *Id.* at 272–73.
122. *Id.* at 272; CHARLES LARSEN, *THE GOOD FIGHT* 28–29 (Quadrangle Press 1972).
123. LARSEN, *supra* note 122, at 28.
124. *Id.* at 28–29.
125. *Id.* at 29.
126. *Id.*
127. David S. Tanenhaus, *The Evolution of Juvenile Courts in the Early Twentieth Century: Beyond the Myth of Immaculate Construction*, in A CENTURY OF JUVENILE JUSTICE, *supra* note 111, at 42.
128. Macfarlane, *supra* note 19, ch. 37, at 3, 8.
129. *Id.* ch. 37, at 8.
130. Tanenhaus, *supra* note 127, at 42.
131. *Id.* at 42–43 (citations omitted).

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132. The Illinois Juvenile Court offered a jury trial to youthful offenders for more than 60 years. The right to a jury trial was eliminated in Illinois with the passage of its Juvenile Court Act of 1966. *See People ex rel. Carey v. White*, 357 N.E.2d 512, 514 (Ill. 1976).
133. Act of Apr. 21, 1899, 1899 Ill. Laws 131, *reprinted in* 2 CHILDREN AND YOUTH IN AMERICA: A DOCUMENTARY HISTORY, 1866–1932, at 506 (Robert H. Bremner ed., Harvard Univ. Press 1971) [hereinafter 2 CHILDREN AND YOUTH IN AMERICA].
134. Act of Apr. 21, 1889, § 21, 1899 Ill. Laws at 137.
135. 2 CHILDREN AND YOUTH IN AMERICA, *supra* note 133, at 357 (quoting *Proceedings of the Conference on the Care of Dependent Children Held at Washington, D.C., January 25, 26, 1909*, S. Doc. No. 60-721, at 17–18 (1909)).
136. *Id.*
137. *Boy Criminal: He Perplexes Court*, L.A. TIMES, May 13, 1903, § 2, at 2; *see Macfarlane, supra* note 19, ch. 38, at 9.
138. I.J. SHAIN & WALTER R. BURKHART, GOVERNOR'S SPECIAL STUDY COMM'N ON JUVENILE JUSTICE, A STUDY OF JUVENILE JUSTICE IN CALIFORNIA 4 (State of Cal. 1960).
139. Macfarlane, *supra* note 19, ch. 41, at 1.
140. *Id.*
141. LEMERT, *supra* note 11, at 37–38.
142. *Id.* at 38. In a 1904 newspaper article on San Francisco's only probation officer, a reporter complained about the unfunded status of probation officers:
- So it goes, day after day and month after month. All the great credit that is due Miss Stebbins for her humanitarian work should be given her. She is the only probation officer in San Francisco; she is not paid by the municipality. The expenses of her department are paid by several philanthropists. Los Angeles, with but little more than one-third of the population of San Francisco, had three probation officers regularly in the employ of the municipality. However, Miss Stebbins does not despair. She goes about her work with unfailing enthusiasm and interest, with a friendly hand here and a kind word there, bringing the breath of hope and ambition and help to many a dark life, waiting for a time to come when the community shall at last appreciate the work that is being done for the regeneration of the criminal elements, and shall afford her the assistants she has earned and needs to carry on her work. (*The Girl Probation Officer of the Juvenile Court*, S.F. CHRON., May 1, 1904 (Magazine), at 4.)
- That same article noted that 1,000 cases came through the San Francisco juvenile court in its first eight months of operation and that 36 of those cases involved girls. *Id.*
143. Act of Feb. 26, 1903, ch. 43, § 1, 1903 Cal. Stat. 44, 44.
144. *Id.*
145. *Id.*
146. *Id.* § 2, 1903 Cal. Stat. at 44–45.
147. *Id.*
148. *Id.* § 3, 1903 Cal. Stat. at 45.
149. *Id.* § 4.
150. *Id.* § 5, 1903 Cal. Stat. at 46.
151. *Id.* § 6.
152. *Id.*
153. *Id.*
154. *Id.* § 7, 1903 Cal. Stat. at 46–47.
155. *Id.* §§ 8–9, 1903 Cal. Stat. at 47.
156. *Id.* § 9, 1903 Cal. Stat. at 47–48.
157. *Id.* § 12, 1903 Cal. Stat. at 48.
158. *Id.* § 13.
159. LEMERT, *supra* note 11, at 38.
160. *The Need of a Juvenile Court*, SAN DIEGO UNION, July 1, 1903, at 6; *see Macfarlane, supra* note 19, ch. 38, at 10.
161. LEMERT, *supra* note 11, at 38.
162. Act of Mar. 22, 1905, ch. 610, §§ 11–15, 1905 Cal. Stat. 806, 810–12.
163. Juvenile Court Law, ch. 133, 1909 Cal. Stat. 213.
164. *Id.* § 1(11).
165. *Id.* § 1(13), 1909 Cal. Stat. at 214.
166. *Id.* § 1(15).
167. *Id.* § 1, 1909 Cal. Stat. at 213.
168. *Id.* § 5, 1909 Cal. Stat. at 216.
169. *Id.* §§ 10–10z, 1909 Cal. Stat. at 217–18.
170. *Id.* § 20, 1909 Cal. Stat. at 223–24.
171. *Id.*, 1909 Cal. Stat. at 224.
172. *Id.*

173. *Id.* § 23.
174. *Id.*
175. *Id.* § 25, 1909 Cal. Stat. at 225.
176. *Id.* § 27, 1909 Cal. Stat. at 226.
177. *Id.* § 18, 1909 Cal. Stat. at 221–22.
178. *Id.*, 1909 Cal. Stat. at 222.
179. Nicholl v. Koster, 108 P. 302, 303 (Cal. 1910).
180. See Marvin Ventrell, *Evolution of the Dependency Component of the Juvenile Court*, 49 JUV. & FAM. CT. J. 17 (Fall 1998).
181. LEMERT, *supra* note 11, at 39.
182. *Id.* (quoting 5 TRANSACTIONS OF THE COMMONWEALTH CLUB OF CALIFORNIA 214 (1910)).
183. *Id.*
184. *Id.*
185. *Id.*
186. *In re* Mabel Maginnis, 121 P. 723, 724 (Cal. 1912).
187. *Id.* at 726.
188. LEMERT, *supra* note 11, at 40.
189. Act of Apr. 5, 1911, ch. 369, 1911 Cal. Stat. 658.
190. Act of June 16, 1913, ch. 673, 1913 Cal. Stat. 1285.
191. LEMERT, *supra* note 11, at 40.
192. Act of Apr. 5, 1911, § 1, 1911 Cal. Stat. at 658.
193. Moore v. Williams, 127 P. 509, 510 (Cal. Ct. App. 1912).
194. *Id.*
195. *Id.* at 513.
196. *Id.*
197. *Id.* at 510.
198. LEMERT, *supra* note 11, at 40.
199. *Id.*
200. *Id.* at 41 (quoting 5 TRANSACTIONS OF THE COMMONWEALTH CLUB OF CALIFORNIA 248 (1910)).
201. *Id.*
202. Juvenile Court Law, § 1(12), 1915 Cal. Stat. 1225, 1226.
203. Act of June 14, 1913, ch. 401, 1913 Cal. Stat. 857. NOTES
204. Juvenile Court Law, § 8(e), 1915 Cal. Stat. at 1232.
205. *Id.*
206. *Id.* §§ 6, 7, 1915 Cal. Stat. at 1229–30.
207. *Id.* § 12, 1915 Cal. Stat. at 1235.
208. *Id.* § 13.
209. *Id.* §§ 1(14), 15–15g, 1915 Cal. Stat. at 1226, 1236–38.
210. *Id.* § 17b, 1915 Cal. Stat. at 1239–40.
211. *Id.* § 19, 1915 Cal. Stat. at 1242.
212. *Id.*
213. It was not until 1971 that candidates for referee positions were required to have been lawyers for at least five years before their appointment. Act of Aug. 19, 1971, ch. 640, § 1, 1971 Cal. Stat. 1258, 1259–60 (amending CAL. WELF. & INST. CODE § 553 (1972)).
214. Juvenile Court Law, § 19, 1915 Cal. Stat. at 1242.
215. *Id.* § 24, 1915 Cal. Stat. at 1248.
216. *Id.* §§ 8–9, 1915 Cal. Stat. at 1231–32.
217. See LEMERT, *supra* note 11, at 42–46.
218. *Id.* at 43.
219. *Id.*
220. *Id.* at 42 (citations omitted).
221. *Id.* at 46.
222. *Id.* (quoting CAL. BD. OF CHARITIES & CORR., NINTH BIENNIAL REPORT 119 (1920)).
223. People v. Wolff, 190 P. 22, 23 (Cal. 1920).
224. *Id.* at 24.
225. *In re* Daedler, 228 P. 467 (Cal. 1924).
226. *Id.* at 468.
227. *Ex parte* Ah Peen, 51 Cal. 280 (1876).
228. *Ex parte* Becknell, 51 P. 692 (Cal. 1897).
229. *Daedler*, 228 P. at 472.
230. *In re* Edwards, 284 P. 916, 920 (Cal. 1930) (citation omitted).
231. *Id.* at 919.
232. *Id.*

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233. SIPES, *supra* note 54, at 28.
234. *Id.*
235. *Id.*; JUDICIAL COUNCIL OF CAL., FIRST REPORT TO THE GOVERNOR AND THE LEGISLATURE 49 (1927), *in* JUDICIAL COUNCIL BIENNIAL REPORTS, 1ST–9TH (1927–1943).
236. JUDICIAL COUNCIL OF CAL., THIRD REPORT TO THE GOVERNOR AND THE LEGISLATURE 25, app. H (1931), *in* JUDICIAL COUNCIL BIENNIAL REPORTS, *supra* note 235.
237. *Id.* at 57.
238. Act of May 25, 1937, ch. 369, 1937 Cal. Stat. 1005.
239. *Id.* § 2.
240. *Id.* §§ 500–509, 1937 Cal. Stat. at 1019–20.
241. *Id.* § 700(c)–(f), 1937 Cal. Stat. at 1031–32.
242. *Id.* §§ 900–911, 1937 Cal. Stat. at 1054–56.
243. *Id.* § 903, 1937 Cal. Stat. at 1054–55.
244. LEMERT, *supra* note 11, at 59.
245. *Id.* at 60 (citations omitted).
246. *Id.* at 61. For example, drinking, fighting, or sexual experimentation may be overlooked, while damaging ranch equipment or stealing cattle could elicit a strong, punitive reaction. *Id.* at 61 n.2 (citation omitted).
247. *Id.* at 73.
248. *Id.*
249. *Id.* at 74.
250. *Id.* at 74–75.
251. *Id.* at 75 (citation omitted).
252. *Id.*
253. *Id.*
254. *Id.* at 78.
255. *Id.*
256. *Id.*
257. *Marr v. Superior Court*, 250 P.2d 739, 742 (Cal. Ct. App. 1952) (citation omitted).
258. LEMERT, *supra* note 11, at 78.
259. *Id.* at 79.
260. *Id.*
261. *In re Alexander*, 313 P.2d 182, 184 (Cal. Ct. App. 1957).
262. *In re Cardenas Contreras*, 241 P.2d 631, 633 (Cal. Ct. App. 1952).
263. LEMERT, *supra* note 11, at 82.
264. *Id.* at 83 n.37.
265. *Id.* at 49; *see* Youth Correction Authority Act, ch. 937, 1941 Cal. Stat. 2522.
266. *Id.* at 49–50 (citing CAL. YOUTH AUTH., REPORT ON CALIFORNIA LAWS RELATING TO YOUTHFUL OFFENDERS 75 (State of Cal. 1965)).
267. *Id.* at 50; *see* Youth Correction Authority Act, §§ 1731.5–1736, 1941 Cal. Stat. at 2526.
268. LEMERT, *supra* note 11, at 50–51.
269. *Id.* at 51.
270. *Id.*
271. *Id.* at 52.
272. *Id.*
273. *Id.* at 52–53.
274. *In re Herrera*, 143 P.2d 345 (Cal. 1943).
275. *Id.* at 348 (citations omitted).
276. LEMERT, *supra* note 11, at 84–85.
277. *Id.* at 85.
278. SPECIAL CRIME STUDY COMM'N ON JUVENILE JUSTICE, FINAL REPORT 13 (State of Cal. 1949) [hereinafter FINAL REPORT].
279. *Id.* at 15.
280. *Id.* at 20.
281. *Id.* at 24. In justifying this recommendation the commission suggested that a “youth court would recognize the wholesome drive of the adolescent to take on the full responsibility of an individual with personal rights and responsibilities without throwing him into the too frequently sordid surroundings and practices of the ordinary criminal courts and without denying to him the training and corrective measures provided for persons under the jurisdiction of the juvenile court.” *Id.*
282. *Id.* at 49.
283. LEMERT, *supra* note 11, at 85.
284. *Id.*

285. LEMERT, *supra* note 11, at 86.
286. JUDICIAL COUNCIL OF CAL., FIFTEENTH BIENNIAL REPORT TO THE GOVERNOR AND THE LEGISLATURE 26 (Dec. 31, 1954) (citing 1949 Cal. Stat. 3289).
287. *Id.*
288. *Id.*
289. FINAL REPORT, *supra* note 278, at 7.
290. *Id.*
291. *Id.* at 7–8.
292. LEMERT, *supra* note 11, at 88.
293. *See generally id.* at 89–106.
294. *Id.* at 98.
295. *Id.*
296. *People v. Dotson*, 299 P.2d 875, 877 (Cal. 1956).
297. LEMERT, *supra* note 11, at 99.
298. *Id.*
299. *Id.* at 99–100.
300. *Id.* at 100.
301. *Id.* at 101.
302. *Id.* at 107–08.
303. *Id.* at 108.
304. GOVERNOR'S SPECIAL STUDY COMM'N ON JUVENILE JUSTICE, REPORT, PART 1: RECOMMENDATIONS FOR CHANGES IN CALIFORNIA'S JUVENILE COURT LAW 12 (Nov. 1960).
305. *Id.*
306. *Id.*
307. *Id.*
308. *Id.*
309. *Id.*
310. *Id.*
311. *Id.* at 18.
312. *Id.* at 19.
313. *Id.* at 26.
314. *Id.* at 27.
315. *Id.* at 23–49.
316. *Id.* at 10–11.
317. *Id.* at 51.
318. *Id.* at 49.
319. LEMERT, *supra* note 11, at 126–42.
320. *Id.* at 151.
321. *Id.* at 153.
322. *Id.* at 153–54.
323. *Id.* at 154 (citation omitted).
324. *Id.* at 154–55.
325. *See* Act of July 14, 1961, ch. 1616, 1961 Cal. Stat. 3459.
326. *Id.*; *see* THE EVOLUTION AND ROLE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION COMMISSIONS 1 (Juvenile Justice & Delinquency Prevention Comm'rs Resource Manual 1991), *available at* www.bdcorr.ca.gov/fsod/jjdp_handbooks/jjdp_handbook_2000/htm_files/jjdp_handbook_evolution_role.htm.
327. LEMERT, *supra* note 11, at 160.
328. *Id.* at 165.
329. *Id.* at 166.
330. Act of July 14, 1961, §§ 554, 627, 630, 633, 637, 658–660, 1961 Cal. Stat. at 3466, 3474–76, 3479. Counsel, on the other hand, did not have the right to be advised of events in the proceedings, but that right was added in 1967 following the *Gault* decision. *See* Act of July 5, 1967, ch. 507, § 1, 1967 Cal. Stat. 1852.
331. Act of July 14, 1961, §§ 633–634, 1961 Cal. Stat. at 3475. The statute did not mention the need for a knowing waiver of the right to counsel, nor did it provide for mandatory appointment of counsel if the minor was charged with misconduct that would have been a misdemeanor if committed by an adult; but the *Gault* case addressed both and led to amendments in 1967 making appointment of counsel mandatory in all delinquency cases “whether he is unable to afford counsel or not unless there is an intelligent waiver of the right to counsel.” Act of Aug. 23, 1967, ch. 1355, §§ 4, 10, 1967 Cal. Stat. 3192, 3193, 3195.
332. Act of July 14, 1961, §§ 700–702, 1961 Cal. Stat. at 3481–82. Questions as to whether constitutionally prohibited, illegally obtained evidence could be used to sustain a finding of delinquency under the statute led to amendments in 1967 requiring that minors be given *Miranda*-type warnings and notice of their right to have counsel and

- NOTES ensuring their privilege against self-incrimination and right to confrontation and cross-examination of witnesses. Act of Aug. 23, 1967, ch. 1355, §§ 1–3, 1967 Cal. Stat. at 3192–93.
333. Act of July 14, 1961, § 502, 1961 Cal. Stat. at 3460.
334. *Id.* § 503.
335. The sixties proved to be a time of great change and turmoil, both on the streets and in the courts and Legislature. While the Legislature was making significant progress in promulgating statutory due process rights for both criminal defendants and juveniles, the Judicial Council was focused on improving the administration of justice in California's courts. When, in 1961, the Judicial Council appointed its first Administrative Director of the Courts, a position created by constitutional amendment, the council quickly moved to establish the Administrative Office of the Courts (AOC), which gave it new power to delegate the responsibility of carrying out the details of policy. SIPES, *supra* note 54, at 76–77. The council finally had the means to effectuate its vision of “simplifying and improving the administration of justice . . .” *Id.*
336. LEMERT, *supra* note 11, at 164 (quoting *Judges Holding Back on New Juvenile Court Law*, MERCED COUNTY STAR, Nov. 11, 1961, page unknown).
337. *In re Gault*, 387 U.S. 1, 13, 33, 41, 55–57 (1967). In its decision, the Court cited both New York's and California's legislation requiring appointment of counsel in juvenile cases. *Id.* at 41.
338. *Id.* at 58.
339. *Id.* at 22–25.
340. *Id.* at 16.
341. *Id.*
342. *Id.* at 18.
343. See Ventrell, *supra* note 180, at 28.

CREDITS

- Page 5: Oct. 20, 1891, Indenture Agreement Between the Boys and Girls Aid Society and Mrs. J. W. Daniels Regarding Elozu Jenkins, to Expire Jan. 9, 1895. BANC MSS C-A 170. Courtesy of The Bancroft Library, University of California, Berkeley.
- Page 9: *A Child Confined in a County Jail*, reproduced by permission of Hearst Communications, Inc., from S.F. CHRON., Sept. 24, 1897, at 4.
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Rethinking a “Knowing, Intelligent, and Voluntary Waiver” in Massachusetts’ Juvenile Courts

It was a typical morning in delinquency court. The halls were crowded with boys, girls, and the adults who accompanied them. Harried attorneys searching for their clients pushed through the crowd. Attorney Jones rushed over to her 13-year-old client and announced, “I have a great deal for you. The district attorney is willing to give you a CWOFF for 12 months with the following conditions: attend school daily without incident, do 40 hours of community service, and pay any restitution owed. Of course, it’s up to you if you want to take the deal. But, as you know, we don’t have a good case for trial. Do you want to take the deal?” The boy looked at his mother, who mumbled, “I don’t want to come back here again and waste another whole day.” The boy nodded yes, and the attorney continued: “I have to explain this form to you—it’s a plea form. In order to take the deal, you have to waive your rights. You’re giving up your right to a trial, understand?” The boy nodded yes. “The judge will ask questions to make sure you understand what you’re doing—that you’re waiving your rights. He’ll ask you if you have had any drugs or alcohol that interfere with your ability to understand what you’re doing today. He’ll also ask you if anyone coerced or threatened you to waive your rights. Just answer the questions, ‘Yes, Your Honor. No, Your Honor.’ Okay, you have to sign this form, which states that you understand the rights you are waiving. Your mother also has to sign. Oh, they’re calling your name; we have to go into court. Just sign quickly—and, remember, you’re agreeing to waive your rights.”

As they walked into court, the boy sheepishly waved to the judge. Attorney Jones hissed, “What are you doing?” The boy replied, “I’m waving my right.”

This example highlights what judges, defense attorneys, and prosecutors already know: that children in juvenile courts are waiving their rights, accepting dispositions, and participating in colloquies they do not understand. Justice requires that children, and the parents or interested adults who theoretically guide them, make reasoned and informed decisions. With courts and legislators increasingly emphasizing accountability and punishment in the juvenile justice system, the stakes for children have never been higher. Ensuring that children understand the implications of the rights they are waiving and the dispositions they are accepting is essential to safeguarding the fundamental fairness of the juvenile court proceeding.

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Justice requires that children make reasoned and informed decisions when waiving their constitutional rights during the tendering of a plea. Yet each day in juvenile courts throughout this country children are waiving their rights, accepting dispositions, and participating in colloquies they do not understand.

This article examines children’s understanding of legal terminology commonly used in Massachusetts’ juvenile court proceedings, particularly during the tendering of a plea.

The authors conducted an empirical study of court-involved children’s understanding of legal terminology. The results of this study indicate that colloquies and waiver forms routinely used in Massachusetts’ juvenile court proceedings are replete with words and phrases that court-involved

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children do not understand. On average, participants in the study did not understand 86 percent of the legal terminology routinely used in plea proceedings in Massachusetts' juvenile courts. Although prior instruction and court experience improved performance, the average rate of correct responses only increased from 2 to 5 out of 36 possible words and phrases. This dismal performance raises serious concerns about the validity of children's juvenile court waivers.

Based on the results of the study, the authors offer suggestions for attorneys and judges who practice in the juvenile justice system. The article concludes with a sample "child-friendly" colloquy intended to enhance children's understanding of plea proceedings and give judges the information they need to certify, with confidence, that a child's plea is knowingly, intelligently, and voluntarily made.

This study was made possible by the generous support of the Gardiner Howland Shaw Foundation. ■

This article examines children's understanding of legal terminology commonly used in Massachusetts' juvenile court proceedings, particularly the terminology used during the tendering of a plea. The first section of the article describes the origin and evolution of juvenile court proceedings and examines the due process requirements for a defendant in Massachusetts, whether adult or child, to waive his or her constitutional rights when tendering a plea. The second section presents the results of a pilot study designed to assess whether children understand the words and phrases commonly used in Massachusetts' juvenile court proceedings and whether experience and instruction improve comprehension. The final section discusses the implications of the research results and suggests modifications for juvenile court procedures and practices.

PLEA PROCEEDINGS IN THE JUVENILE COURT

In 1899, Illinois' Act to Regulate the Treatment and Control of Dependent, Neglected and Delinquent Children established the first juvenile court in the United States.¹ The court was conceived as a nonadversarial forum in which concerned adults would craft dispositions in the best interest of the child. By the end of World War II, all 48 states had juvenile courts based on the "best-interest" model.² This beneficent concept of juvenile court proceedings was premised on the belief that children were less mature, capable, and culpable than adults; it envisioned "a fatherly judge [who] touched the heart and conscience of the erring youth by talking over his problems [and] by [providing] paternal advice and admonition . . ."³ The emphasis was on treatment and rehabilitation rather than punishment; the court theoretically balanced the best interest of the child with that of the state, typically to the detriment of the child's due process rights.⁴

In 1967, the United States Supreme Court noted that this "gentle conception" lacked validity when it addressed the appeal of 15-year-old Gerald Gault's sentence of six years' incarceration on a misdemeanor charge, for which an adult would merely have suffered a fine.⁵ The Court recognized that, under the guise of a benevolent juvenile court, children were suffering a deprivation of liberty without due process of law.⁶ Relying on the Fifth, Sixth, and Fourteenth Amendments of the U.S. Constitution, the Court affirmed children's right to counsel, their right to confront and cross-examine their accusers, and their privilege against self-incrimination.⁷ In 1969, the Court established that allegations of delinquency had to be proved beyond a reasonable doubt.⁸ Although the Court stopped short of granting juveniles the right to a jury trial in delinquency proceedings,⁹ it held that due process and fundamental fairness required the extension of rights and protections enjoyed by adult defendants to juveniles facing delinquency proceedings.¹⁰ When contrasting the *parens patriae*¹¹ philosophy with due process, the Court observed that "the actuality of fairness, impartiality and orderliness—in

short the essentials of due process—may be a more impressive and more therapeutic attitude as far as the juvenile is concerned.”¹²

MASSACHUSETTS’ JUVENILE COURTS

In Massachusetts, children are afforded the full panoply of due process rights and protections enjoyed by adults. Children have the right to a jury trial, and the Massachusetts Rules of Criminal Procedure apply to juvenile court proceedings.¹³ A “child” subject to prosecution in the Massachusetts juvenile courts is defined as an individual between the ages of 7 and 17.¹⁴ In 2003, over 32,000 delinquency complaints were filed against more than 13,000 Massachusetts children.¹⁵ However, 99 percent of their cases were resolved prior to trial by the child’s tendering of a plea.¹⁶

A child’s offer of an admission or guilty plea is a significant step in the Massachusetts juvenile justice process. It represents a decision by the child to forgo a trial and to acknowledge that the violations of law charged against him or her are true. Judges and attorneys recognize that children are often confused and anxious when they come to court. They also recognize that a large number of court-involved children suffer from academic failure, learning disabilities, and mental illness. Yet judges and attorneys routinely certify that children have ostensibly made an informed decision to waive their constitutional rights because they have signed a plea form and provided seemingly appropriate responses during the plea colloquy.

Due process requires that the child defendant make a “knowing, intelligent, and voluntary” waiver of his or her constitutional rights with knowledge of the charge and the possible consequences of the plea.¹⁷ The judge must affirm for the record, by means of an adequate colloquy, that the child participated in and understood the nature and ramifications of the decisions he or she made.¹⁸ The colloquy—a conversational exchange between the judge and the defendant—should not be, but often is, a mechanical performance in which the judge and the child merely recite formulaic words. In a procedurally sound colloquy, the judge should ensure that the

child actually comprehends the process in which he or she is participating.¹⁹ An inadequate colloquy violates constitutional due process requirements and should result in a vacated plea.²⁰

A plea is made “knowingly” and “intelligently” when a child understands the elements of the charges against him and the procedural protections he is forgoing by tendering a plea.²¹ At a minimum, the judge must inform the child that he is waiving the constitutional right to trial, the right to confront his accusers, and the privilege against self-incrimination.²² In addition, the judge or the defense attorney must explain the elements of the charged crime, or the child must admit to the facts constituting the crime.²³

A “voluntary” waiver requires that the child tender the plea free from coercion, inducements, or threats.²⁴ The judge must be satisfied that the child was neither forced to offer a plea nor under the influence of substances that could impair his judgment or affect his ability to participate in the proceedings.²⁵ The judge should also inquire of the child or the attorney whether the child suffers from any mental illness that might impair his ability to participate in the proceeding.²⁶ The law prescribes no particular recitation, but it cautions judges to conduct a “real probe of the defendant’s mind.”²⁷

PREPARING THE CHILD FOR THE PLEA PROCEEDING

The attorney for a child must ensure that the client, despite his or her tender years, fully understands the nature and ramifications of the juvenile court proceedings. The attorney must assume the role of educator as well as advisor when preparing the child for the proceedings and decisions in which the child must participate.

Ideally, a defense attorney meets with the young client in the privacy of the attorney’s office to review the facts of the case and to inform the child and his or her family about the nature of juvenile court proceedings. At a minimum, these discussions should include an explanation of the elements of the charged crime; an assessment of the strengths and weaknesses of both the child’s and the prosecutor’s cases; an explanation

of what happens during a trial, including the roles of participants and the burden of proof; a description of the difference between a jury trial and a “bench” trial; an explanation of possible outcomes ranging from “dismissed” or “not guilty” to commitment to the state juvenile correctional agency; an explanation of waiver forms that must be signed if the child decides to tender a plea and of the colloquy that the court must elicit before accepting a plea; and a description of what probation entails and the possible ramifications of probation violations. In practice, such comprehensive discussions rarely occur.

Typically, overburdened defense attorneys and prosecutors negotiate a plea bargain on the day of a required court appearance. The defense attorney then finds the child in the crowded hallways of the juvenile court and quickly “explains” the “deal” and the plea process to the child and parent. If the child decides to accept the “deal,” both the parent and child sign a waiver of the right to trial and a tender-of-plea form that outlines the terms and conditions of the disposition. The defense attorney briefly describes the colloquy the judge must conduct to affirm for the record that the child is making a “knowing, intelligent, and voluntary” waiver of his or her constitutional rights before accepting the plea.

THE PLEA PROCEEDING

A busy Massachusetts juvenile court may have over 100 cases scheduled on a “delinquency” day.²⁸ Thus, there is intense pressure on all court personnel, including judges and attorneys, to process cases quickly and efficiently. A plea proceeding requires more time than most pretrial hearings because it involves a sequence of events: a reading of the charge, a recitation of the underlying facts surrounding the charge, a plea colloquy conducted by the judge, and oral presentations by the attorneys in support of their recommended dispositions. If all goes smoothly, the proceeding lasts approximately 5 minutes; if there is disagreement over the dispositional terms, the proceeding may last 10 or more.

Typically, the colloquy takes less than 2 minutes. Although there are exceptions, judges generally use

language that mimics the legal words and phrases found in the waiver form. When a child provides a “wrong” answer or is so confused that he or she is unable to respond, judges many times attempt to clarify their statements by repeating the question more slowly or loudly. If that does not work, some judges struggle to find alternative wording for the concepts they are trying to communicate (e.g., using “proof to a moral certainty” as a substitute for “beyond a reasonable doubt”). Others send the child out of the courtroom, admonishing the attorney to “explain things to your client.”

Currently, the tender-of-plea form used in Massachusetts’ juvenile courts mirrors the form used in district court for adults. It is a standard-size sheet of paper with single-spaced text printed on both sides. The juvenile court version substitutes the word *child* for *defendant* and *adjudication* for *guilty*, but there are no differences in the language used to describe the waiver of constitutional and statutory rights. The front page of the form contains identifying information, such as the child’s name and court docket number. Section I of the form contains the child’s tender of plea, including an admission to the charged offenses and proposed dispositional terms. If the prosecutor disagrees with the terms, he or she enters recommendations in the space provided. In Section II, the court indicates acceptance of the child’s tender of plea or, in Section III, the court may reject the child’s dispositional terms and write in terms the court finds acceptable. The child’s attorney, the prosecutor, and the judge must sign the front page of the form.

The reverse side of the Massachusetts form consists of sections containing the child’s waiver of rights, the defense attorney’s certification that the waiver of rights was explained to the child, and the judge’s certification that the child was addressed in open court and made a knowing, intelligent, and voluntary waiver of his or her constitutional and statutory rights. The child and parent or guardian must sign and date the form under the section labeled “Child’s Waiver of Rights.” This section consists of the following:

SECTION IV CHILD’S WAIVER OF RIGHTS (G.L.C. 119, S. 55A) & ALIEN RIGHTS NOTICE (G.L.C 278, S. 29D)

I, the undersigned child, understand and acknowledge that I am voluntarily giving up the right to be tried by a jury or a judge without a jury on these charges.

I have discussed my constitutional and other rights with my attorney and my parents or guardian. I understand that the jury would consist of six or twelve jurors chosen at random from the community, and that I could participate in selecting those jurors, who would determine unanimously whether or not I was delinquent/a youthful offender (*circle one*). I understand that by entering my plea of delinquency/youthful offender (*circle one*) or admission, I will also be giving up my right to confront, cross-examine, and compel the attendance of witnesses; to present evidence in my defense; to remain silent and refuse to testify or provide evidence against myself by asserting my constitutional right against self-incrimination, all with the assistance of my defense attorney; and to be presumed innocent until adjudicated delinquent/youthful offender (*circle one*) by the prosecutor beyond a reasonable doubt.

I am aware of the nature and the elements of the charge or charges to which I am entering my guilty plea or admission. I am also aware of the nature and range of the possible commitment, sentence or sentences.

My plea of delinquency/youthful offender (*circle one*) or admission is not the result of force or threats. It is not the result of assurances or promises, other than any agreed-upon recommendation by the prosecution, as set forth in Section I of this form. I have decided to plead delinquent/youthful offender (*circle one*) or to admit to sufficient facts, voluntarily and freely.

I am not now under the influence of any drug, medication, liquor or other substance nor am I aware of any other factor that would impair my ability to fully understand the constitutional and statutory rights that I am waiving when I plead delinquent/youthful offender (*circle one*).

I understand that if I am not a citizen of the United States, an adjudication of delinquency/youthful offender or admission to sufficient facts for this offense may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization, pursuant to the laws of the United States.

This form purports to inform the child of the constitutional rights being waived and to affirm that the child is doing so knowingly and voluntarily. However, the written waiver cannot substitute for the oral colloquy.²⁹ A signature on a form is just one of several factors that “bespeak the defendant’s intention to consummate the plea bargain.”³⁰ Ultimately, the advisements must be made “on the record, in open court.”³¹

A STUDY OF CHILDREN’S UNDERSTANDING OF THE PLEA PROCEEDING

A growing body of research literature suggests that children differ from adults in their legal decision making because they fail to appreciate the consequences of the decisions they are required to make. Little attention has been paid to another problem

that may influence children’s legal decision making: the terminology adults use when addressing children about court proceedings and the decisions they are required to make. This pilot study gathered empirical data on the understanding of legal terminology by court-involved children, particularly when tendering a plea.

PROCEDURE

To assess children’s understanding of legal terminology, Kaban developed a questionnaire listing 36 words and phrases selected from the Massachusetts tender-of-plea form and colloquies observed in juvenile court proceedings (see Table 1). The questionnaire was administered to 98 children who agreed to participate in the study.

Interviewers orally presented each participant with the words and phrases and asked each to choose one of the following responses: “I don’t know that

word/phrase at all,” “I have seen or heard that word/phrase but don’t know its meaning,” or “I think I know the meaning and it is . . .” If the child chose the last option, he or she was instructed to define the word or phrase only as it related to court proceedings.

Table 1. Words and Phrases in Study Questionnaire

Word	Definition	Difficulty Level
Assurance	Being certain	8
Commitment	Confinement	12
Compel	To force	10
Comply	Obey	16
Convict	Find guilty	6
Counsel	Lawyer	12
Cross-examination	To question carefully	6
Default	Failure to act	10
Deportation	Removing from country	8
Disposition	Arrangement	12
Exceed	Go beyond	8
Exclusion	Shutting out	10
Hearing	Court session	6
Impair	Damage	13
Naturalization	Becoming a citizen	12
Plea*	n/a	8
Pursuant	In accordance	12
Recipient	One who gets	10
Restitution	Payment for loss	12
Right	Legal claim	8
Sentence	Court punishment/jail term	4
Statutory	By law	13
Sufficient	Enough	8
Tender	To offer	13
Trial	A court process	4
Waiver	Release of a right	16
Phrases		
Admit to sufficient facts		
Bail warning		
Beyond a reasonable doubt		
Burden of proof		
Joint recommendation		
Jury trial		
Presumption of innocence		
Proof to a moral certainty		
Surety surrender		
Tender of plea		

* *The Living Word Vocabulary* defines *plea* as “appeal.” Kaban scored responses correct if the child described a “deal” or a “bargain” made between defendant and prosecution that resolved the case.

To assess the accuracy of the children’s responses, Kaban compared their answers to definitions provided in *The Living Word Vocabulary*.³² This compendium of 44,000 words is the product of a nationwide study of 320,000 children in grades 4, 6, 8, 10, 12, and freshman and senior years of college. Each word is followed by one or more brief definitions coupled with an assessment of the definition’s difficulty level. The difficulty level is a determination of the school grade at which a majority of children accurately defined that word. For example, *restitution*, defined as “payment for loss,” is a word defined correctly by a majority of 12th graders. In contrast, *sentence*, defined as “court punishment” or “jail term,” is a word defined correctly by a majority of 4th graders.

Assessing the difficulty level of the phrases proved more difficult. For example, the phrase “beyond a reasonable doubt” contains three words that are at a 6th-grade difficulty level: *beyond*, *reasonable*, and *doubt*. Similarly, “burden of proof” contains words at 6th- and 4th-grade difficulty levels, respectively. Yet both phrases refer to abstract concepts that many adults serving on juries struggle to define. Although we did not assign a specific difficulty level to each phrase, interviewers asked participants in the study to place the phrases on the same continuum and, if they thought they knew the meaning, to define the phrase.

THE “UNINSTRUCTED” GROUP

On randomly selected mornings in September 2001, a trained interviewer³³ approached children waiting in the hallway of a Massachusetts juvenile court. The interviewer asked them to volunteer for a study to determine children’s understanding of court proceedings. Out of 73 children approached, 69 agreed to participate (the “uninstructed” group). The interviewer, a former elementary school teacher who was attending law school, told each child to define the words and phrases only as they related to court proceedings. The interviewer provided no further information other than this instruction. The interviewer read the list of words and phrases out loud, one at a time, and recorded each participant’s oral responses.

The 69 participants were court-involved boys and girls who previously had been arraigned but whose cases had not yet been adjudicated. No information regarding their prior experience with plea proceedings was obtained. Participants ranged in age from 9 to 17, with 74 percent of the group between ages 14 and 16. The mean age was 14.9 years. Sixty-one participants (88 percent) were male, and eight (12 percent) were female. Participants reported they were in grades 3 through 10; 59 percent were in grades 8 through 10. The mean school grade was 8.3. Sixteen percent of the group were African American, 17 percent Asian, 41 percent Caucasian, and 25 percent Hispanic. (See Table 2.)

THE “INSTRUCTED” GROUP

To more closely replicate the instructions that children should receive from their attorneys before participating in a plea colloquy, the study also included a group who received similar instructions before answering the questionnaire.

In winter 2002, Kaban visited a Massachusetts juvenile detention facility for boys detained on serious felony charges. Facility staff introduced her as an attorney who was there to explain court proceedings to them. Kaban instructed the boys as a group regarding court proceedings from arraignment to disposition; the difference between a bench trial and a jury trial; the meaning of “pleading out”; and the legal rights that are waived when a defendant tenders a plea. Kaban also explained that a judge must conduct a colloquy before accepting a plea. Throughout the two one-hour sessions, she encouraged the boys to ask questions. At the end of each session, Kaban explained that she was conducting a study of children’s understanding of court proceedings and asked for volunteers. Out of the 50 boys present during the instructional sessions, 29 agreed to participate (the “instructed” group).³⁴

Like the uninstructed group, these participants were told to define the words and phrases only as they related to court proceedings. The interviewers individually administered the questionnaire to each participant, reading the words and phrases out loud,

one at a time, and recording each participant’s oral responses. Unlike the uninstructed group, who were interviewed in the hallways of the juvenile court, these participants were able to sit down at a table in a quiet corner of the detention facility while completing their questionnaires. In addition, the interviewers asked these participants more detailed questions

Table 2. Demographic Characteristics of Study Groups (N = 98)

	Uninstructed Group (n = 69)		Instructed Group (n = 29)	
	n	%	n	%
Gender				
Boys	61	88.4	29	100
Girls	8	11.6	0	0
Race				
Caucasian	28	40.6	9	31
Hispanic	17	24.6	6	20.7
Asian	12	17.4	1	3.4
African American	11	15.9	13	44.8
Grade in school				
3	1	1.4	0	0
6	2	2.9	1	3.4
7	6	8.7	2	6.9
8	11	15.9	8	27.6
9	17	24.6	9	31.6
10	13	18.8	8	27.6
11	7	10.1	1	3.4
12	5	7.2	0	0
Not in school	6	8.7	0	0
Missing	1	1.4	0	0
Mean grade in school	8.3, <i>sd</i> = 3.06		8.8, <i>sd</i> = 1.14	
Age				
9	1	1.4	0	0
11	1	1.4	0	0
12	2	2.9	0	0
13	7	10.1	0	0
14	15	21.7	3	10.3
15	11	15.9	10	34.5
16	25	36.2	13	44.8
17	7	10.1	3	10.3
Mean age	14.9, <i>sd</i> = 1.56		15.5, <i>sd</i> = .83	

about their prior court experiences. All 29 reported past experience in tendering pleas.

Participants in the instructed group ranged in age from 14 to 17, with 79 percent of the group between ages 15 and 16. Their mean age was 15.5 years, and all 29 participants were male.³⁵ Group members reported that they were in grades 6 through 11; 87 percent were in grades 8 through 10. The mean school grade was 8.8. Forty-five percent were African American, 3 percent Asian, 31 percent Caucasian, and 21 percent Hispanic. (See Table 2.)

Participants in neither group were asked whether they had ever repeated a grade in school or received special education services. An informal survey of the children's ages and reported grades in school suggested that at least 25 percent of each group experienced educational difficulties.

SCORING

All participants in both the uninstructed and the instructed groups received the same questionnaire. To ensure consistent interpretation of the participants' definitions, Kaban scored all responses. If the child reported not knowing the word or phrase at all, he or she received a score of zero; a score of one was given if the child reported having heard or seen the word or phrase before but did not give a definition; and a score of two was given if the child provided a definition. We summed the resulting scores to construct aggregates of the total number of definitions that the children provided, regardless of their accuracy, as well as the total number of *correct* definitions provided.

STUDY FINDINGS

Most participants in this study did not understand the majority of words and phrases presented to them. (See Tables 3 and 4.) On average, members of the uninstructed group provided 10 out of 36 possible definitions. However, they defined an average of only 2 terms correctly—that is, they understood only 5.5 percent of the commonly used legal terms. On average, members of the instructed group

provided 18 definitions but averaged only 5 correct definitions, a mere 14 percent of the commonly used legal terms. A sample of study participants' responses (see Table 5) illustrates the level of misconception and confusion children experience when confronted with commonly used legal terminology.

None of the children in the uninstructed group accurately defined any of the following words or phrases:

<i>burden of proof</i>	<i>pursuant</i>
<i>disposition</i>	<i>tender</i>
<i>joint recommendation</i>	<i>statutory</i>
<i>naturalization</i>	<i>tender of plea</i>
<i>presumption of innocence</i>	<i>waiver</i>
<i>proof to a moral certainty</i>	

Likewise, none of the children in the instructed group correctly defined any of the following words or phrases:

<i>assurance</i>	<i>statutory</i>
<i>disposition</i>	<i>surety surrender</i>
<i>presumption of innocence</i>	<i>tender</i>
<i>proof to a moral certainty</i>	<i>tender of plea</i>
<i>pursuant</i>	

This result is not surprising, given that the difficulty of a majority of the terms was at the 10th-grade level or higher, while the average participant was at the 8th-grade level. (See Tables 1 and 2.) For all participants, the most commonly understood words were *sentence* (4th-grade difficulty level) and *deportation* (8th-grade difficulty level). Thirty-eight percent of the uninstructed group and 69 percent of the instructed group gave correct definitions for *sentence*, while 23 percent of the uninstructed group and 48 percent of the instructed group provided correct definitions for the word *deportation*.

The phrases proved most challenging for all participants in the study. Although children in both groups attempted to define the phrases, their answers were overwhelmingly incorrect. For example, "jury trial" was the phrase most frequently defined in both groups; 51 percent of the uninstructed group and 93 percent of the instructed group reported that

Table 3. Responses to Court-Terminology Survey and Accuracy of Definitions: Uninstructed Group (n = 69)

	Did Not Provide a Definition		Provided a Definition		Definition Was Correct	
	n	%	n	%	n	%
Words						
Assurance	57	83	12	17	3	4
Commitment	31	45	38	55	1	1
Compel	68	99	1	1	1	1
Comply	52	75	17	25	11	16
Convict	24	35	45	65	12	17
Counsel	48	70	21	30	5	7
Cross-examination	49	71	20	29	8	12
Default	44	64	25	36	9	13
Deportation	39	56	30	44	16	23
Disposition	56	81	13	19	0	0
Exceed	62	90	7	10	4	6
Exclusion	57	83	12	17	2	3
Hearing	28	41	41	59	4	6
Impair	58	84	11	16	2	3
Naturalization	59	86	10	14	0	0
Plea	33	48	36	52	4	6
Pursuant	62	90	7	10	0	0
Recipient	61	88	8	12	3	4
Restitution	59	86	10	14	3	4
Right	29	42	40	58	7	10
Sentence	19	28	50	72	26	38
Statutory	53	77	16	23	0	0
Sufficient	54	78	15	22	3	4
Tender	59	86	10	14	0	0
Trial	21	30	48	70	6	9
Waiver	58	84	11	16	0	0
Phrases						
Admit to sufficient facts	46	67	23	33	2	3
Bail warning	42	61	27	39	1	1
Beyond a reasonable doubt	51	74	18	26	1	1
Burden of proof	60	87	9	13	0	0
Joint recommendation	59	86	10	14	0	0
Jury trial	34	49	35	51	10	14
Presumption of innocence	52	75	17	25	0	0
Proof to a moral certainty	65	94	4	6	0	0
Surety surrender	60	87	9	13	1	1
Tender of plea	66	96	3	4	0	0

Table 4. Responses to Court-Terminology Survey and Accuracy of Definitions: Instructed Group (n = 29)

	Did Not Provide a Definition		Provided a Definition		Definition Was Correct	
	n	%	n	%	n	%
Words						
Assurance	13	45	16	55	0	0
Commitment	4	14	25	86	3	10
Compel	25	86	4	14	1	3
Comply	18	62	11	38	7	24
Convict	6	21	23	79	12	41
Counsel	13	45	16	55	2	7
Cross-examination	14	48	15	52	2	7
Default	5	17	24	83	10	34
Deportation	10	34	19	66	14	48
Disposition	15	52	14	48	0	0
Exceed	19	66	10	34	5	17
Exclusion	18	62	11	38	3	10
Hearing	6	21	23	79	7	24
Impair	22	76	7	24	4	14
Naturalization	24	83	5	17	3	10
Plea	2	7	27	93	3	10
Pursuant	20	69	9	31	0	0
Recipient	18	62	11	38	5	17
Restitution	21	72	8	28	4	14
Right	3	10	26	90	2	7
Sentence	1	3	28	97	20	69
Statutory	12	41	17	59	0	0
Sufficient	13	45	16	55	9	31
Tender	23	79	6	21	0	0
Trial	0		29	100	1	3
Waiver	15	52	14	48	3	10
Phrases						
Admit to sufficient facts	14	48	14	48	7	24
Bail warning	13	45	16	55	3	10
Beyond a reasonable doubt	16	55	13	45	6	21
Burden of proof	21	72	8	28	1	3
Joint recommendation	22	76	6	21	2	7
Jury trial	2	7	27	93	10	34
Presumption of innocence	19	66	10	34	0	0
Proof to a moral certainty	26	90	3	10	0	0
Surety surrender	25	86	4	14	0	0
Tender of plea	28	96	1	4	0	0

they knew the meaning of the phrase. Yet only 14 percent of the uninstructed group and 34 percent of the instructed group defined the phrase correctly. As shown by their responses, such as “come to court on date” (age 13) and “go in front of the judge” (age 16), children in the uninstructed group failed to appreciate the difference between a jury trial and pretrial court appearance. Although the instructed group received detailed information about jury trials just prior to the administration of the questionnaire, including that jury decisions must be unanimous and that the burden of proof is beyond a reasonable doubt, most did not retain this information. A typical definition of “jury trial” was “people from the neighborhood come and tell whether you’re guilty or not” (age 15).

DIFFERENCES IN UNDERSTANDING RELATIVE TO AGE, INSTRUCTIONAL STATUS, AND ETHNICITY

We analyzed the data to determine whether participants’ understanding of legal terminology was related to age (16 and older versus 15 and younger), ethnicity (Caucasian, Asian, Hispanic, African American), or instructional status (uninstructed versus instructed). We did not examine gender differences because there were too few girls in the sample.

First, the study focused on age. We hypothesized that older children would exhibit greater understanding of legal terminology than younger children because of their higher educational attainment and longer life experience. Ethnicity was of interest because of recent attention to the overrepresentation of minority children in the juvenile justice system.³⁶ We hypothesized that if minority children were less likely than nonminority children to understand the legal terminology used in juvenile court proceedings, that might adversely affect the decisions they made about their cases and lead to a higher rate of incarceration. Instructional status provided an opportunity to test the assumption that if court-involved children receive instruction from an attorney prior to the plea proceeding, they understand the rights they are waiving and the ramifications of the decisions they are making.

Table 5. Sample Definitions Provided by Study Participants

Admit to sufficient facts

“Admit to something you didn’t do” (age 14)

Beyond a reasonable doubt

“Gut feeling” (age 16)

“When someone is acting suspicious” (age 13)

“Don’t hardly believe yourself” (age 16)

Counsel

“Person who sits in front of the computer” (age 14)

“D.A.” (age 16)

“Probation type” (age 16)

“People who listen to you in court” (age 18)

Cross-examination

“Taking a drug test” (age 16)

“Attorney will talk to you about it” (age 14)

Default

“What it used to be and you change it” (age 15)

“A mistake” (age 16)

Disposition

“Positioned in wrong place” (age 13)

“Not in proper position” (age 16)

“Bad position” (age 16)

Joint recommendation

“You are in trouble with two cases” (age 14)

“Both mother and father spend time with their children a half year each” (age 14)

Plea

“When you want to get it over with so you plead guilty” (age 15)

“Like police” (age 15)

Presumption of innocence

“If your attorney feels you didn’t do it” (age 15)

Pursuant

“When lawyer is really into the case” (age 16)

Restitution

“Time spent somewhere” (age 18)

Right

“To the right direction” (age 14)

“Right about something” (age 14)

Trial

“Go in front of the judge” (offered by four subjects ranging from ages 14 to 16)

Univariate analyses of variance revealed no significant interactions between ethnicity and instructional status; ethnicity and age; instructional status and age; or ethnicity, instructional status, and age. (See Table 6.) Therefore, these variables did not confound the analyses of the interaction between the independent variables (age, ethnicity, and instructional status) and the dependent variables (what participants thought they knew and what they actually knew).

What Children Thought They Knew

First, we assessed what participants *thought* they knew. This was a measure of the total number of definitions provided by participants regardless of accuracy. We analyzed the total number of definitions provided for all the words and phrases with respect to participant age, ethnicity, and instructional status to determine whether differences within and between groups, if any, were statistically significant. Our assessments relied on the analysis of variance, a statistical technique that looks for relationships among variables by analyzing sample means. Following convention, we regarded relationships as meaningful, or statistically significant, if their p values were less than or equal to .05—that is, there was a probability of only 5 percent or less that the covariation was due to chance.

Within the uninstructed group ($n = 69$), age did not affect the total number of definitions provided by

participants. However, among the instructed group ($n = 29$), older children provided significantly more definitions than did younger children ($F = 7.24$, $p = .012$). Overall, the instructed group provided significantly more definitions than the uninstructed group ($F = 16.08$, $p = .000$). The relationship between the total number of definitions provided and ethnicity was also statistically significant ($F = 2.65$, $p = .054$), with the significant differences occurring between Caucasians and Hispanics (mean difference = 6.22, $se = 1.99$, $p = .013$) and Caucasians and Asians (mean difference = 7.57, $se = 2.52$, $p = .013$).³⁷ In both instances, Caucasians provided more definitions than the other ethnic groups.

What Children Actually Knew

Next, we assessed what participants *actually* knew. This was a measure of the number of correct definitions provided by the participants for all the words and phrases. We analyzed this number with respect to participant age, ethnicity, and instructional status to determine whether differences within and between groups, if any, were statistically significant.

The number of correct definitions was significantly different between age groups ($F = 6.38$, $p = .014$), instructional status ($F = 14.85$, $p = .000$), and ethnicities ($F = 3.61$, $p = .017$). Within both groups, older children provided significantly more correct

Table 6. Participants' Total and Correct Responses by Age, Ethnicity, and Instructional Status

	Uninstructed Group ($n = 69$)				Instructed Group ($n = 29$)			
	n	Average No. of Answers Provided	Average No. of Correct Answers	Standard Deviation	n	Average No. of Answers Provided	Average No. of Correct Answers	Standard Deviation
Ethnicity								
African American	11	9.8	1.9	1.57	13	17.6	4.0	3.67
Caucasian	28	13.8	3.6	2.36	9	21.2	7.3	4.71
Hispanic	17	7.6	1.0	1.36	6	14.3	4.2	5.91
Asian	12	7.2	1.6	3.17	1	18.0	6.0	—
Age								
15 and younger	37	9.4	1.8	2.28	13	14.4	3.5	3.67
16 and older	32	11.2	3.1	2.58	16	21.1	6.5	4.86

definitions than younger children. Members of the instructed group provided significantly more correct definitions than members of the uninstructed group. Within the uninstructed group, significant differences existed between Caucasians and Hispanics, with Caucasians providing significantly more correct definitions than Hispanics. Within the instructed group there were no significant differences between ethnic groups in the number of correct definitions provided.

INFLUENCE OF WORD DIFFICULTY LEVEL ON THE RATE OF CORRECT RESPONSES

Finally, we separated the 26 words into subsets by level of difficulty. Fourth- and 6th-grade words were classified as the “easy” words ($n = 5$); 8th- and 10th-grade words, the “moderate” words ($n = 10$); and 12th-grade and post-high school words, the “difficult” words ($n = 11$). To assess whether the results differed depending on the difficulty level of the words, we analyzed the number of correct responses within each subset in conjunction with age, ethnicity, and instructional status.

Easy Words

Participants’ understanding of the easy words differed widely among age groups ($F = 4.60, p = .035$), ethnicities ($F = 4.50, p = .006$), and instructional status ($F = 5.94, p = .017$). Within the entire sample ($N = 98$), older children provided more correct definitions for the easy words than did the younger children. With regard to ethnicity, the significant differences were between Caucasians and Asians (mean difference = $.95, se = .31, p = .014$) and Caucasians and Hispanics (mean difference = $.97, se = .25, p = .001$). In both instances, Caucasians gave more correct definitions for the easy words than did Asians or Hispanics. Overall, the instructed group provided more correct definitions for the easy words than the uninstructed group ($F = 5.94, p = .017$).

Moderate Words

The participants’ understanding of the moderate words was significantly different among age groups

($F = 7.02, p = .01$), ethnicities ($F = 4.34, p = .007$), and instructional status ($F = 17.89, p = .000$). Within the entire sample, older participants provided more correct definitions for the moderate words than did the younger participants. Similarly, the instructed group provided more correct definitions for the moderate words than did the uninstructed group. The largest differences relating to ethnicity existed between Caucasians and African Americans (mean difference = $.95, se = .34, p = .031$). The difference between Caucasians and Hispanics approached statistical significance (mean difference = $.84, se = .34, p = .078$). In both instances, Caucasians gave more correct definitions than did African Americans and Hispanics.

Difficult Words

There were no significant differences in older and younger participants’ understanding of the difficult words. However, participants’ understanding of the difficult words significantly differed among ethnicities ($F = 3.98, p = .011$) and instructional status ($F = 9.58, p = .003$). The significant differences existed between Caucasians and Asians (mean difference = $.71, se = .27, p = .049$) and Caucasians and Hispanics (mean difference = $.60, se = .22, p = .04$). In both instances Caucasians performed significantly better than either Asians or Hispanics. Overall, the instructed group provided more correct definitions for the difficult words than the uninstructed group.

In summary, members of the instructed group and Caucasians in both groups provided significantly more correct responses in all difficulty categories. Older participants provided significantly more correct responses than younger participants for the easy and moderate words. However, the age difference in performance disappeared with the difficult words; they were too hard for even the older participants.

DISCUSSION

The results of this study indicate that colloquies and waiver forms routinely used in Massachusetts’ juvenile courts are replete with words and phrases that court-involved children do not understand. Even

educated participants with prior experience in the court system failed to correctly define 86 percent of the words and phrases presented. However, their inability to provide an accurate definition for a legal term is not the only cause for concern. The data indicate that even when children think they know the meaning of a word, they often mistake it for a similar-sounding word, apply nonlegal definitions, or rely on some portion of the word to trigger associations to a possible, and often incorrect, meaning. These results raise serious concerns about the validity of children's waivers accompanying the tendering of a plea.

Prior to analyzing the data, we hypothesized that older participants would exhibit greater understanding of legal terminology than younger participants because of their more advanced educational status and life experiences. The data for the easy and moderate words supported this hypothesis. The problem, however, is that more than 40 percent of the words routinely used in juvenile court proceedings are the difficult words (12th-grade level or higher); regardless of age, this subset of words exceeded the grasp of all participants. If we consider words with a difficulty level at or higher than 10th grade, almost 60 percent of the words routinely used in juvenile court proceedings exceed the average 8th-grade educational status of study participants. This discrepancy highlights the need to modify the language used in court and on forms to more closely match the educational status and cognitive abilities of court-involved children.

The study also looked at whether minority children are more disadvantaged in the juvenile justice system than Caucasian children in their understanding of words and phrases used in court proceedings. The representation of minority children in the instructed group was noticeably greater than in the uninstructed group. (See Table 2.) This pattern is consistent with statewide data indicating that minority children in Massachusetts are more likely than nonminority children to be detained while their cases are pending.³⁸ In the uninstructed group, Caucasian participants exhibited greater understanding of the

words and phrases than did minority participants. However, with instruction and experience (i.e., the instructed group) minority children are no more and no less disadvantaged than their Caucasian counterparts.

Judges, attorneys, and children all believe that children know more than they actually do about court proceedings and the rights they are waiving during the tendering of a plea. Although the study indicates that experience and instruction improve performance, the instructed group provided only 5 correct definitions out of a possible 36. This dismal lack of comprehension should be a wake-up call for attorneys, judges, and other court personnel who interact with court-involved children. They cannot rely on the child's affirmative response to the question "Do you understand?" when discussing rights the child is waiving or the disposition he or she is accepting. Court-involved children routinely misinterpret the information the adults are trying to impart. Practices and procedures must be modified to ensure that children accurately understand court proceedings and the ramifications of their decisions when tendering pleas.

IMPLICATIONS FOR PRACTICE

Obviously, a defense attorney's hurried explanation delivered just prior to a court appearance in the high-stress environment of the court corridor is not sufficient to ensure that the child fully understands the consequences of his or her legal decisions. In addition, a judge eliciting rote responses to questions that children are not likely to understand elevates form over substance and makes a hollow ritual out of the process of establishing a knowing, intelligent, and voluntary waiver of constitutional and statutory rights.

The need to fulfill statutory and constitutional requirements makes it incumbent on attorneys and judges to adapt their behavior and explanations to the abilities of the children with whom they interact. Attorneys must acknowledge their role as educators and modify the language they use when speaking with children. Their vocabulary should not exceed

an 8th-grade difficulty level. Concepts should be explained more than once and in a variety of ways to ensure comprehension. In addition, attorneys should inquire about, and understand, children’s educational strengths and weaknesses. Many court-involved children suffer from learning disabilities. It is important to know whether a particular child has a reading disability, a receptive language handicap, borderline intelligence, or other deficits that may affect his or her ability to absorb and retain information. That knowledge will assist the attorney when determining the most effective means of communicating with that child. For example, a child with a reading disability may need information delivered orally, whereas a child with a receptive language disability may need to see the information in writing before he or she can process and retain it. If English is not the child’s primary language, or not the language spoken at home, information should be communicated in the other language. Attorneys, like judges, need to probe the child’s understanding rather than accept the affirmative nod or one-word response to the “Do you understand?” inquiry. They should ask the child to explain, in his or her own words, the concepts they are trying to communicate. This will give the attorney an opportunity to identify and clarify points of confusion.

Courts also have a responsibility to assist in the instruction of court-involved children. Throughout the country, trial courts use videos to educate potential jurors about court proceedings. Similarly, the Edmund D. Edelman Children’s Court in the Superior Court of Los Angeles County makes videos available to familiarize children, ranging in age from preschool to high school, with child welfare proceedings. Such practices could be easily replicated in courts hearing delinquency cases. Children and their families spend hours waiting in the halls of juvenile courts for their cases to be called. Videos, available in a variety of languages, could provide information that would augment and reinforce explanations provided by the child’s attorney.

Ultimately, however, it is the judge who must affirm for the record that the child has made a

knowing, intelligent, and voluntary waiver of his or her constitutional rights with knowledge of the charge and the consequences of the plea. Regardless of the attorney’s affirmation or the child’s signature on a court form, it is the judge’s responsibility to ensure that a child understands the decisions he has made and waives his rights intelligently and voluntarily.

In particular, judges should adapt the language they use during the plea colloquy to the abilities of the child. The modified child-friendly colloquy in the appendix to this article recognizes that many court-involved children suffer from academic failure or learning disabilities. Their ability to retrieve information when confronted with open-ended questions is often compromised. Therefore, the proposed colloquy consists of many questions requiring only brief or one-word responses. However, other questions do require the child to explain key concepts in his or her own words. For instances when the child is unable to do so, the proposed colloquy offers sample explanations using vocabulary, whenever possible, in the 4th- to 8th-grade difficulty range. The tone is informal, and the sentence structure communicates one idea at a time. Although a child-friendly colloquy may be more time consuming, it should enhance the child’s understanding of the proceedings and allow judges to certify, with confidence, that the child’s plea is intelligently and voluntarily made.

CONCLUSION

With courts and legislators increasingly emphasizing accountability and punishment in the juvenile justice system, the stakes for children have never been higher. If the system is going to hold children accountable for their waivers of rights and pleas, judges and attorneys must modify the language used in court proceedings to more accurately reflect the cognitive abilities and language skills of court-involved children. The results of this study indicate that colloquies and waiver forms routinely used in Massachusetts’ juvenile court proceedings are replete with words and phrases that court-involved children do not understand. Even educated

and experienced children failed to correctly define 86 percent of the commonly used legal terminology. The data also indicate that even when children think they know the meaning of a word, they often mistake it for a similar-sounding word, apply a nonlegal definition, or rely on some portion of the word to trigger associations to a possible, but often incorrect, meaning. The results of this study raise serious concerns about the validity of children's pleas. It is our hope that it will prompt judges and attorneys to modify practices to ensure the fundamental fairness of the juvenile court plea proceeding.

NOTES

1. Act to Regulate the Treatment and Control of Dependent, Neglected and Delinquent Children, ch. 23, 1899 Ill. Laws 130 (1899). *See also* JOHN C. WATKINS, *THE JUVENILE JUSTICE CENTURY: A SOCIOLEGAL COMMENTARY ON AMERICAN JUVENILE COURTS* 45 (Carolina Acad. Press 1998).
2. WATKINS, *supra* note 1.
3. *In re Gault*, 387 U.S. 1, 26 (1967).
4. *Id.* at 15–16.
5. *Id.* at 26.
6. *Id.* at 49–50.
7. *Id.*
8. *In re Winship*, 397 U.S. 358, 364 (1970).
9. *McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971).
10. *Gault*, 387 U.S. at 49–50.
11. For a discussion on this subject, *see* Helen Cavanaugh Stauts, *Parrens Patriae: The Federal Government's Growing Role of Parent to the Needy*, 2 J. CENTER FOR FAM. CHILD. & CTS., 139–52 (2000).
12. *Gault*, 387 U.S. at 26.
13. *See* MASS. GEN. LAWS ch. 119, §§ 55A, 56; MASS. R.CRIM.P. 1 (“These rules govern the procedure in all criminal proceedings . . . in all delinquency proceedings . . .”).
14. MASS. GEN. LAWS ch. 119, § 52.
15. Massachusetts Court System, Juvenile Court Department, Fiscal Year 2001 Statistics, *available at* www.state.ma.us/courts/courtsandjudges/courts/juvenilecourt/2003stats.html.
16. *Id.*
17. *See* *Boykin v. Alabama*, 395 U.S. 238, 243 (1969); *Commonwealth v. Foster*, 330 N.E.2d 100, 108 (Mass. 1975).
18. *See* *Ciummei v. Commonwealth*, 392 N.E.2d 1186, 1189 (Mass. 1979).
19. *See Foster*, 330 N.E.2d at 160.
20. *See* *Commonwealth v. Andrews*, 728 N.E.2d 327, 330 (Mass. 2000) (plea was invalid owing to lack of discussion or acknowledgment of the elements of the crime charged); *Foster*, 330 N.E.2d at 160 (conviction invalid where record showed no inquiry on questions of voluntariness and understanding); *Commonwealth v. Fernandes*, 459 N.E.2d 787, 791–92 (Mass. 1984) (conviction reversed); *Commonwealth v. DeCologero*, 726 N.E.2d 444, 448 (Mass. App. Ct. 2000) (finding set aside because colloquy was insufficient to establish that plea was intelligently made); *Commonwealth v. Correa*, 686 N.E.2d 213, 217 (Mass. App. Ct. 1997) (colloquy was deficient because of judge's failure to advise defendant on the nature, the elements, or the penalties of the charge). *See also* *In re J.M.*, 769 A.2d 656, 659 (Vt. 2000) (failure of juvenile court to conduct a plea colloquy required a reversal of the finding of delinquency).
21. *Correa*, 686 N.E.2d at 216.
22. *Id.*
23. *Id.*
24. *Commonwealth v. Duest*, 572 N.E.2d 572, 576 (Mass. App. Ct. 1991).
25. *Correa*, 686 N.E.2d at 216.
26. *Id.*
27. *See Fernandes*, 459 N.E.2d 787 at 790; *Commonwealth v. Quinones*, 608 N.E.2d 724, 732 (Mass. 1993).
28. Massachusetts' juvenile courts hear child welfare, Children in Need of Services (CHINS), and delinquency matters. Delinquency cases are usually scheduled on one or two specific days each week.
29. *See* *Commonwealth v. Colon*, 789 N.E.2d 566 (Mass. 2003).
30. *See* *Commonwealth v. Grant*, 689 N.E.2d 1336, 1339 (Mass. 1998).

31. *Commonwealth v. Rodriguez*, 755 N.E.2d 753, 757 (Mass. App. Ct. 2001).
32. EDGAR DALE & JOSEPH O’ROURKE, *THE LIVING WORD VOCABULARY: A 44,000 WORD VOCABULARY INVENTORY* (World Book—Childcraft Int’l 1981).
33. Three interviewers were used in this pilot study. All three were law students; one was a former elementary school teacher. All three had experience working with children and were trained in the administration of the questionnaire by Barbara Kaban.
34. Although this group was smaller than the uninstructed group, the sample size was sufficient to allow for statistical analyses of differences across and between the two groups.
35. We did not have easy access to a facility for girls, and so this portion of the study was limited to boys.
36. For a discussion of this subject, see Judith A. Cox & James Bell, *Addressing Disproportionate Representation of Youth of Color in the Juvenile Justice System*, 3 J. CENTER FOR FAM. CHILD. & CTS. 31–43 (2001).
37. Throughout the study we used Tukey’s Tests to test for differences between Caucasians, African Americans, Hispanics, and Asians. This test is performed in conjunction with a one-way analysis of variance, post hoc, to determine where the differences, if any, lie. It operates with three or more samples and their mean, testing the mean of each population against the mean of every other population.
38. ROBIN DAHLBERG, AM. CIVIL LIBERTIES UNION, *DISPROPORTIONATE MINORITY CONFINEMENT IN MASSACHUSETTS: FAILURES IN ASSESSING AND ADDRESSING THE OVERREPRESENTATION OF MINORITIES IN THE MASSACHUSETTS JUVENILE JUSTICE SYSTEM* (2003).

APPENDIX

“CHILD-FRIENDLY” COLLOQUY

My name is Judge [name]. What's your name?

You are in court because you have been charged with committing a crime. Your lawyer tells me that you want to work out a solution to your case without going to trial. That solution is called a “plea.” Before I accept your plea, I must ask you a few questions to make sure you understand what you are doing today. If you don't understand my questions or anything I say, please tell me. If I don't understand anything you say, I will tell you.

How old are you?

Where were you born?

Do you go to school?

What school do you go to?

What grade are you in?

[Or:] What was the last grade you were in when you went to school?

Who is here with you today?

Was [parent or guardian] present when you talked to your lawyer today?

Did you have enough time to talk to your [parent or guardian] about the decisions you are making today?

Did you have enough time to talk to your lawyer about the decisions you are making today?

Did you take any medicine today? Did you take any medicine yesterday?

[If yes:] What medicine did you take?

Did you use any drugs yesterday or today?

Did you drink alcohol yesterday or today?

[If the answer is yes to any of the three previous questions:]

Does the medicine/drug/alcohol make it hard for you to understand what I am saying to you today?

Please tell me what you have been charged with doing. [If the child does not answer correctly, the judge should explain the charges to the child. The judge should then explain the elements of the charge that the prosecutor would have to prove for the child to be adjudicated delinquent.]

When you offer a plea, you are admitting that you violated the law. When you admit to violating the law, there is a range of consequences that I can impose, from placing you on probation to committing you to the Department of Youth Services.

Do you know what happens when someone is placed on probation?

[If the child answers yes, ask:] Tell me what you think happens when someone is placed on probation.

[If the child does not answer correctly, the judge should provide the following explanation:]

When you are placed on probation, you will have a probation officer who will check up on you. You will also have a set of conditions that you must obey. For example, you may have a curfew—that is a time each night when you must be at home. Another condition may be that you have to go to school every day and not get in trouble when you are in school. The probation officer may come to your house or your school to check up on you. If you do not do what you have agreed to do when on probation, you can be brought into court on a probation violation and you may face more serious consequences.

One of the more serious consequences a child can face is commitment to the Department of Youth Services. Tell me what you think happens when someone is committed to the Department of Youth Services.

[If the child’s explanation is inaccurate, provide the following explanation:]

When you are committed to the Department of Youth Services, you are taken away from your family and placed in the custody of the Department of Youth Services. The Department of Youth Services is commonly called DYS. Have you heard of DYS?

When you are committed to DYS, you are committed to age 18. Once you are committed to DYS, DYS decides which program will best meet your needs. DYS can place you in a program where you can’t go outside unless you are supervised by staff members. Or DYS can place you in a less secure program where you can come and go more freely. DYS decides where you will go and how long you will stay in the program. You will have to live at the program DYS selects, and you may have to stay there for months or even for years. The decision about how long you will stay in the program depends on your behavior once you are there.

Now please tell me in your own words what happens when someone is committed to DYS.

When you offer a plea as you are doing today, you give up certain rights. You give up the right to a trial. Please tell me what you know about a trial. *[Whatever response the child provides probably will not be a full or accurate description of a trial. The judge should then provide the following information.]*

APPENDIX

You can have a trial with only a judge, like myself. Or you can have a trial with a jury. A jury is made up of 6 or 12 grownups who don't know you or anyone involved in the case. You would help your lawyer choose the people on the jury. It is the jury's job to listen to the evidence and decide whether you are guilty or not guilty. You don't have to say anything during the trial if you don't want to. After the jury hears all the evidence, they decide if you are guilty or not guilty. The jury members all have to agree on their decision.

If you decide to have a trial with only a judge, then only one person, the judge, listens to the evidence and decides whether or not you are guilty.

In a trial, the judge or the jury must assume you are innocent. It is the prosecutor's job to prove that you are guilty. The prosecutor must prove you are guilty beyond a reasonable doubt. That means that the judge or the jury, after listening to all the evidence, must be certain you did [*recite elements of the crime*] before they can find you guilty. If they are not certain, they must assume that you are innocent.

When you decide to give up your right to a trial, it means you are giving up several important rights. For example, it means that you won't hear what the witnesses against you would say. It means that your lawyer won't get a chance to question those witnesses. And it also means that you won't get a chance to call your own witnesses to tell your side of what happened. Do you understand that you are giving up these rights?

Do you have any questions for me about a trial?

Do you want to give up your right to a trial today?

Has anyone promised you anything to make you give up your right to a trial?

Has anyone forced you to give up your right to a trial?

Has anyone threatened you to make you give up your right to a trial?

[Judge affirms for the record that the child has made a knowing, intelligent, and voluntary waiver of the right to a trial and signs the waiver portion of the tender-of-plea form.]

Your lawyer wrote down what you are willing to agree to do in order to end your case today. The prosecutor wrote down what [*he/she*] thinks you should do. If I do not agree with what your lawyer has written down, you can change your mind and still have the right to go to trial. Do you understand that?

[To the prosecutor:] Please state the facts of the case.

[To the child:] Did you understand what the prosecutor said?

Is that basically what happened?

After hearing the facts of the case and assuring myself that *[child’s name]* understands what *[he/she]* is doing today, I am going to:

(a) accept the terms and conditions suggested by the child *[or: agreed to by the child and the prosecutor]*. Those terms and conditions include *[recite terms and conditions]*.

[Child’s name], please tell me what you have agreed to do today. *[If child cannot recite all the conditions, repeat any condition that is omitted.]*

If you don’t do everything you agreed to do today, you can be brought back into court and committed to the Department of Youth Services. Do you have any questions about what you have agreed to do?

(b) I do not agree with what your lawyer has suggested you are willing to do to end your case today. I would order the following terms and conditions *[recite terms and conditions]*.

[Child’s name], you don’t have to accept the terms and conditions I would order. You can change your mind and go to trial. Before you make up your mind, I am going to give you a few minutes to talk to your lawyer.

Will you accept what I would order?

[Child’s name], please tell me what you have agreed to do today. *[If child cannot recite all the conditions, repeat any condition that is omitted.]*

If you don’t do everything you agreed to do today, you can be brought back into court and committed to the Department of Youth Services. Do you have any questions about what you have agreed to do?

By agreeing to this plea you are admitting to this court that you did what you were charged with doing. You told me you were not born in the United States *[or: You told me that you were born in the United States, so this probably does not apply to you.]* It is my job to tell you that if you were not born in the United States or are not yet a citizen of the United States, admitting to these facts may mean that you have to leave this country. Or if you leave the United States to visit another country, you may not be able to come back into this country. Or it could mean that you may not be able to become a citizen when you get older. Do you have any questions for me about what I have just told you?

[Name of attorney], are there any other questions that I should ask *[name of child]* to ensure that *[he/she]* fully understands this proceeding?

[Name of child], do you want to ask me anything about what I have said or what you have agreed to do?

Mediation in Child Protection Cases

A petition filed with the child protection court alleges that Mary, a 5-year-old child, needs the court's protection. Mary's mother is addicted to methamphetamine, which prevents her from adequately caring for her daughter: she has been unable to protect Mary from witnessing the ongoing domestic violence that the father has inflicted on her; she refuses to leave the father's home despite offers of assistance; and the home is so dirty that it is unsafe for the child to live there. Both mother and father appear in court and deny the allegations. The court appoints each parent an attorney and appoints Mary an attorney who will also serve as her guardian ad litem. At the first hearing, the court places Mary in the temporary care of her maternal grandparents.

At the next hearing the parents request a trial regarding the truth of the allegations made by the social worker in the petition. The court refers the parties and attorneys to mediation. The parents, the maternal grandparents, the social worker, and the attorneys all participate in the mediation session. A domestic violence victim advocate accompanies the mother. After the mediation session, the parties return to court and some changes are made to the petition. Thereafter, the parties admit to the court that the allegations in the petition are true, thus resolving the jurisdictional issues. They also agree with the dispositional recommendations and the case plan for each parent that was developed in the course of the mediation process.

The court declares the child to be under the protection of the juvenile court, and each parent is ordered to receive family reunification services. Mary is placed with her grandparents. The court sets a review date in the future to monitor Mary's well-being and the progress made by her parents in addressing their separate case plans. The mother's case plan states that she will live separately from the father and will enter a substance abuse treatment program. The father's case plan states that he will participate in a domestic violence intervention program. The court further orders that both Mary and the mother participate in individual counseling.

This example illustrates the use of mediation in child protection (juvenile dependency) cases, a practice that has increased substantially in America's juvenile courts over the past five years. There are several reasons for its growing popularity, but the principal one is that it works: mediation produces agreements that are acceptable to all parties, do not sacrifice child safety, and are more effective and longer lasting than court orders after contested hearings.

HON. LEONARD P. EDWARDS

*Superior Court of California,
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The use of court-based mediation in child protection (juvenile dependency) cases has spread widely over the past five years. As a substitute for contested judicial hearings, mediation produces more effective, longer-lasting agreements that protect child safety on terms acceptable to all the parties. Mediation also offers participants opportunities unavailable in contested hearings. Parents, attorneys, social workers, and others work together, asking and answering questions, airing concerns, and ultimately crafting a resolution of the family's unique problems.

Following an overview of child protection proceedings and their goals, this article describes the legal structure and judicial role in those proceedings, and then details the shortcomings of the traditional adversarial process in resolving child protection and related family issues. The article offers mediation as a salutary alternative to judicial proceedings, discussing mediation's growth and impact on both

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the parties and the court system and recommending best practices for a successful mediation program.

The author wishes to thank Steve Baron, Brendan Cuning, Sharon Bashan, and Jennie Winter for assistance in preparing this article. ■

But mediation accomplishes much more. Unlike a contested hearing, the mediation process offers parents the opportunity to say what is on their minds, air their grievances, and grieve the losses that they have been experiencing. It gives the attorneys a forum in which they can work together to identify and solve problems without pressure from the court process or the hindrance of evidentiary rules. Other family members can participate in the mediation process to help determine the best plan for the child. Mediation offers a context in which to work out the details of a child safety plan and thereby tailor an effective resolution addressing the family's unique needs. It enables everyone to complete the process with a sense of accomplishment—a feeling that their combined efforts have produced something of value for the child and family—as well as a stake in the outcome that they had a hand in creating.

The first sections of this article discuss child protection proceedings, the goals they attempt to accomplish, their legal framework, and the shortcomings of the traditional adversarial process in resolving child protection and related family issues. Next, the article discusses the impact of court-based child protection mediation¹ on both the parties and the court system and recommends best practices for a successful mediation program. This section also describes the growth of mediation from the perspectives of participants in the child protection system. The article concludes by arguing that mediation has the potential to change the environment in which the court system addresses child protection cases to the benefit of all concerned.

CHILD PROTECTION PROCEEDINGS

Child protection proceedings² are state-initiated legal actions undertaken to address the needs of children who have been abused or neglected by their parents or caretakers and who require protection and safe, permanent homes. These proceedings typically are heard in the juvenile or family courts of a court system.³ Federal and state laws govern child protection proceedings. The federal Child Abuse Prevention and Treatment Act of 1974 (CAPTA),⁴ the Adoption Assistance and Child Welfare Act of 1980 (AACWA),⁵ and the Adoption and Safe Families Act of 1997 (ASFA)⁶ establish the federal funding structures for state child protection systems and mandate that those systems seek to protect abused and neglected children, provide services to them and to their families, and establish permanent homes for them in a timely fashion.

State statutes define how state child protection and child welfare agencies shall provide protection for children, deliver preventive services to families in need so that children need not be unnecessarily removed from their homes, and provide services to families whose children have been removed so that the family can be safely reunited. State statutes also establish time frames for the determination of a permanent plan for the child. The permanent plans in both federal and state laws are the return of a child to a parent, adoption, guardianship, or a placement in a permanent, stable home (such as the home of a relative

or a foster or group home). Placement in a foster or group home is the least-favored permanent plan.

Under this statutory structure the state agents (child protection and social workers) have multiple roles. They must protect children; investigate suspected abuse or neglect; provide services to families to prevent removal of the child; prevent further harm to the child; and, if removal is necessary, facilitate reunification or, when required, a permanent placement in a timely fashion. These multiple roles are potentially in conflict with one another and present unique challenges to these state agents.

THE LEGAL STRUCTURE OF CHILD PROTECTION CASES

Both federal and state laws direct that the juvenile court provide oversight for the implementation of child protection laws. With the passage of the AACWA in 1980, the juvenile court gained a significantly greater role in the nation's child protection system. Under the AACWA, as amended, the court must review any action taken by the child protection agency to remove a child from parental care without the parent's consent to ensure that such a removal was necessary to protect the child's welfare.⁷ In addition, the court must determine whether the agency is fulfilling its legal mandates throughout each case from beginning to end. This oversight responsibility requires the court to make findings regarding the adequacy of services provided by the agency to the family. These so-called reasonable efforts findings⁸ must be made throughout the entire case, including (1) when a child is removed, to determine whether the family received adequate preventive services to prevent removal; (2) when a case is reviewed after removal, to determine whether the family received adequate reunification services; and (3) when a permanent plan has been established, to determine whether the agency has taken adequate steps to reach a timely permanent plan.⁹

The judge also has to perform more traditional judicial functions, making factual and legal findings and ensuring that the parties receive due process throughout the court proceedings. In this regard

the judge must make findings regarding notice to all parties, legal representation, trial rights, admissibility and sufficiency of evidence, and the right to appeal the court's decisions.

JUDICIAL PROCEEDINGS IN CHILD PROTECTION CASES

Child protection proceedings are complex, involving numerous parties and attorneys, multiple hearings, and unique legal issues. The parties include the parents, the child, and the agency that has initiated the legal action on the child's behalf.¹⁰ Each of these parties may be represented by an attorney; the child is represented by an attorney, a guardian ad litem, or both.¹¹ Other interested persons may participate in the proceedings, including relatives, foster parents or caretakers, legal guardians, stepparents, boyfriends or girlfriends, de facto (psychological) parents, the child's Court Appointed Special Advocate (CASA), service providers, and representatives from Indian tribes to whom the family is related. Some of these interested persons may have attorneys representing them.

As described in the case history beginning this article, if a child has been removed from parental care, the first hearing is the shelter care or removal hearing.¹² This usually takes place within a few days after the child's removal. At this hearing the judge reads and explains the legal papers (the petition) that have been filed on behalf of the child; reviews the legal process with the parties; ensures that each party, including the child, is represented; determines where the child will live until the next hearing; inquires about possible Indian heritage;¹³ and determines what visitation parents and other family members will have with the child if the court orders removal of the child from parental care.

At the next hearing, the jurisdictional or adjudication hearing, the judge determines whether the statements in the petition are true.¹⁴ It is similar to the trial stage in other legal proceedings. Before the hearing is held, the social worker has usually prepared a report documenting the reasons that the child needs the protection of the court. The parents or guardian may agree with the allegations in the

petition and, after an inquiry by the court regarding legal rights, the court may find that the statements in the petition are true.¹⁵ If the parents disagree with some or all of the allegations, they may ask for a trial, at which the judge hears evidence, including reports and testimony, and then rules whether the allegations are true.

If the petition is found to be true, the case then proceeds to a dispositional hearing, at which the court addresses the plan for the child and parents.¹⁶ The judge decides whether the child will be declared to be under the protection of the juvenile court, whether the child will be removed from the care of one or both of the parents, and, if removed, where the child will be placed. The judge also decides what visitation parents and relatives will have with the child and what services, if any, each parent should complete to address the issues that brought the child to the attention of the court.¹⁷

To oversee the parents' efforts to reunify with their child and the agency's efforts to assist in the reunification process, the court reviews the case every six months or, if necessary, more frequently.¹⁸ At these review hearings the court monitors all aspects of the case, including the parents' progress, the child's well-being, visitation with the parents and other family members, and the agency's efforts to assist the parents and fulfill other court orders.

The law mandates that a child removed from parental care must have a permanent home within one year of removal if possible. But if the child cannot be returned to either parent during that time, the juvenile court must hold a hearing to determine the child's permanent home.¹⁹ The preferred permanent plan is an adoptive home (after termination of parental rights). The next preferred permanent plan is creation of a legal guardianship. If the child cannot be returned to either parent, and adoption and guardianship are not possible, the court may have to place the child in a foster or group home. This is the least preferred permanent plan and requires continued court oversight of the child until a permanent home is identified or until the child becomes an adult.

THE IMPACT OF JUVENILE COURT OVERSIGHT

Juvenile court oversight of child protection cases has both positive and negative aspects. Court oversight has brought standards and accountability to the child protection system. The court now reviews social worker decisions regarding removal and placement of children and services for families according to legal standards, and all parties have a forum in which their complaints can be heard and reviewed. Court oversight of permanency has resulted in increased permanent plans for children, particularly adoptions, and shorter periods of time in foster care in many cases.

On the other hand, court oversight is both expensive and cumbersome. The cost of hiring lawyers and having social workers spend a substantial part of their workday in court is significant. The legal process takes time, and, often, permanency is not achieved in a timely fashion because of legal delays. Furthermore, there has been no appreciable decline in the numbers of children in out-of-home care since the juvenile court assumed oversight responsibility of child protection cases—in fact, the numbers have risen.²⁰

The legal process is also ill suited to address the social and family problems that are the essence of child protection cases. The Anglo-American legal system is founded on the adversarial process, a process that seeks truth from the presentation to the judge of different positions by contesting parties. The adversarial process provides an opportunity for each party to present his or her position to the judge and also for each party to examine the other party and any witnesses regarding their position. During cross-examination, a party (usually through an attorney) can ask questions of witnesses or parties in an effort to demonstrate the weaknesses in their testimony.

But the adversarial process, and cross-examination in particular, can be a brutal and terrifying experience, especially for someone inexperienced in the law. Simply testifying in court is difficult, especially for nonprofessionals. To be asked questions, at times in an aggressive or sarcastic tone, about personal

problems and family matters compounds the difficulty. When the ultimate issues that the court will decide are whether allegations of abuse or neglect are true, whether parents have been performing well in their efforts to reunify with their child, and whether parental rights to a child should be terminated, the court process and cross-examination can be a nightmare. Some commentators argue that the adversarial process seeks neither truth nor the best answer for the parties before the court.²¹

THE ROLE OF THE CHILD WELFARE AGENCY

Until the passage of the AACWA in 1980, the juvenile court was seldom involved in child protection proceedings. In many jurisdictions the juvenile court became involved with a family only if the child welfare agency decided to terminate parental rights. Otherwise, the removal of children, the delivery of service, and the time frame for permanency all remained within the discretion of the agency.

The AACWA significantly changed the goals of the child welfare system, the federal funding of foster care at the state level, and the federal government's expectations of agency operations. It also required child welfare agencies to justify many of their decisions in proceedings before the juvenile court. It is difficult to estimate which branch of government was less pleased with the new relationship created by the AACWA—the agencies or the juvenile court—but the agencies clearly were more profoundly affected.²² Not only were they required to change the ways in which they were conducting their child protection and child welfare operations, but they were also required to justify their actions to another branch of government in a new environment.

The court system presents problems for child protection agencies that they continue to struggle with today. First, in order to participate in court proceedings, they have had to create and maintain staff familiar with the law. This has meant hiring lawyers to present the agency position in court as well as developing legal expertise among the social

worker staff to interpret court orders. Second, to obtain approval for their actions, child protection agencies have been required to learn how legal decisions are made, how evidence must be gathered, and how court procedures dictate the presentation of evidence. Third, they have had to learn about the formality of court proceedings, the power of the judge, and the power that attorneys have to shape court proceedings.

For the line social worker, the formality of court proceedings and the adversarial process have presented the most difficult problems. Nothing in their training prepares social workers for evidence collection, report writing, and direct and cross-examination under the rules of evidence. Many social workers find the court process to be an overly formal setting, demeaning and inhospitable, where the truth is sacrificed for procedural rules and the free exchange of information and ideas is difficult, if not impossible.²³ Some have concluded that, in practice, court proceedings work as a barrier to achieving the goals of the law.²⁴

THE ROLE OF MEDIATION

Even though courts and agencies have struggled for years to implement the federal law, there has been noticeable success in the last 10 years. Those courts that have proven to be the most successful in meeting the mandates have followed identified best practices²⁵ and have developed collaborative relationships with their local child protection agencies.²⁶ Often a lead judge or an agency director has reached out to form a working partnership between the court and agency. On occasion, judicial leadership has resulted in court improvement and better results for the children and families appearing before the court. Under either scenario, these model courts have been able to improve court practices and administrative procedures, introduced model programs—including mediation—and developed positive working relationships among all members of the court system. They have also been successful in reducing the numbers of children under court supervision and the time it takes to place children in permanent homes.²⁷

CHILD PROTECTION MEDIATION

Child protection mediation is a process in which specially trained neutral professionals facilitate the resolution of child abuse and neglect issues by bringing together, in a confidential setting, the family, social workers, attorneys, and others involved in a case.²⁸ The creation and expansion of child protection mediation has been one of the most significant developments in national court improvement efforts. It has had a positive impact on the overwhelming majority of courts that have introduced it and made it a part of the court process.²⁹

At the Superior Court of California, County of Santa Clara, where the author sits as a judge, three juvenile court judicial officers preside over the cases of approximately 3,000 children. Child protection mediation has been practiced in this large urban court for more than 10 years.³⁰ In the Santa Clara juvenile dependency court, all parties and attorneys participate in mediation. Family members, significant friends, and professionals are also invited to participate.

Any case can be referred to mediation at any stage of the proceedings from the initial hearing up to and including the establishment of a permanent plan including termination of parental rights. No cases are excluded in principle from the mediation process. Mediation is based on a very simple premise: a confidential discussion among the parties may lead to positive results. As the director of the Santa Clara County Family Court Services has observed, "It can't do any harm to talk about the case, and it may produce some positive results."³¹ In practice, however, the court does not refer all cases to mediation—only those where difficult issues have been identified and the case may end up in trial.

The Santa Clara County court practices confidential mediation. Except for the reporting of new allegations of child abuse or neglect, all communications in the mediation session are confidential and inadmissible in any subsequent court proceedings. Two mediators, a man and a woman, conduct each mediation. The mediators explain to all parties the mediation process and its goal, which is to come up with a plan that all

the parties, attorneys, social worker, and CASA agree is best for the child and safe for all involved participants. In this sense, the mediation process is goal oriented and not a process seeking agreement for its own sake.

To ensure a high-quality mediation process, Santa Clara County mediators are well-qualified professionals who have undergone extensive training.³² The court sets aside three and a half hours for each mediation session, and the parties may return on two or three occasions to complete the process. Sometimes a case will be set for an entire day if the issues are particularly complex. The court requires all attorneys and parties to attend each session. If the child can make an informed choice, he or she has the right to participate in the mediation process.³³ Otherwise, the attorney-guardian ad litem appears on the child's behalf. The Santa Clara County mediation process is also safe and fair for all participants. Several years ago, Family Court Services staff (mediators) met with leaders from the domestic violence advocacy community to discuss protocols and procedures that would enable victims of domestic violence or intimidation to participate in mediation safely. Local protocols were developed and have now been used for more than five years.³⁴ Child protection mediation in Santa Clara County operates in a manner consistent with national and state guidelines.³⁵

The mediation process at the Santa Clara County court consists of four stages: (1) orientation to the process, (2) fact finding and issue development, (3) problem solving, and (4) agreement/disagreement and closure. Although the mediators expect to hear out each participant fully, when solutions and agreements are being addressed, they consistently ask each party whether the agreement will serve the best interest of the children involved.³⁶

There are several different models of mediation across the country. The key elements that distinguish these models are the participants in the process, the types of cases that qualify for mediation, the aspects of the mediation process that may be disclosed to nonparticipants, the ability of mediators to make recommendations to the juvenile court, the number of participating mediators, and the mediators' degree

of neutrality, including their ability to set goals for the participants. Other factors affecting the quality of a particular mediation program include the mediators' training and experience, the length of each mediation session, the number of sessions before the case returns to court, local practice protocols that ensure a fair and safe mediation process (particularly for participants involved in domestic violence), the required participants, and the time parties must wait before participating in mediation.

Over the past decade best-practice standards have been developed to help provide guidance to new and growing programs. In 1995, the California Juvenile Dependency Court Mediation Association recommended standards of practice for court-connected juvenile dependency mediation. These standards helped the development of more than 20 county-based juvenile dependency mediation programs in California. The Judicial Council of California adopted these practice standards first as a standard of judicial administration and then incorporated them into a rule of court, which became effective January 1, 2004.³⁷

GROWTH OF MEDIATION

Formal mediation in the court system has a relatively short history. Mediation in child protection cases has been used in several court systems, including Miami, Florida, and the state of Connecticut, for almost two decades. California passed the first mandatory mediation statute in child custody cases in 1980.³⁸ Los Angeles, Orange, and Santa Clara Counties have long used mediation,³⁹ yet it was not an accepted best practice until recently. One of the first acknowledgments that alternative dispute resolution techniques, and mediation in particular, were appropriate for child protection cases occurred in 1995 with the publication of the *Resource Guidelines* by the National Council of Juvenile and Family Court Judges (NCJFCJ).⁴⁰

Once mediation became more widely known, it quickly became a recognized best practice. Mediation in child protection proceedings has grown in popularity over the past 10 years and has been implemented in court systems throughout the

country.⁴¹ This occurred for a number of reasons. First, mediation works. Almost all court systems that have implemented mediation report excellent results.⁴² Second, mediation has been carefully evaluated by a number of commentators and court systems.⁴³ For example, in the Santa Clara County court, 75 percent of the cases referred to mediation resulted in complete resolution of all issues, 17 percent resulted in resolution of part of the issues, and only 8 percent did not have resolution of any issue.⁴⁴ Third, there is general satisfaction among all participants in the mediation process,⁴⁵ including both the parents and professionals.⁴⁶

The use of mediation in child protection cases has widespread support. The NCJFCJ's Permanency Planning for Children Department has identified mediation as a best practice.⁴⁷ Mediation has also been involved in many court improvement initiatives in states across the country.⁴⁸ The recognition that mediation is a best practice has resulted in significant national and state interest in the mediation program at the Superior Court of Santa Clara County.⁴⁹ As a part of the Model Courts Project,⁵⁰ the Permanency Planning Department has provided technical assistance to many courts around the country, including site visits to the Santa Clara County court by numerous court teams. The Model Courts Project of the Permanency Planning Department includes 25 courts of varying sizes throughout the nation. At this time, 23 out of 25 courts have implemented a mediation program in child protection cases.⁵¹ Furthermore, several state legislatures have identified mediation as a best practice and encouraged its development in local juvenile court systems.⁵²

MEDIATION'S IMPACT

Child protection mediation is much more than an alternative dispute resolution technique that helps to resolve difficult child protection cases. For the child protection court system in the Santa Clara County court, mediation has profoundly changed the legal culture. It has changed the way in which the participants in the court system approach child protection cases, the way that these participants relate to each

other, and their attitudes toward the resolution of issues. Mediation has revealed some of the deficiencies of the traditional court process, particularly the adversarial process, which can lead to inferior results for children and families. Mediation is now a credible method of addressing child protection issues in the Santa Clara County juvenile court.

The impact of mediation in Santa Clara County was not instantaneous. Many participants in the child protection system had doubts about the efficacy of mediation. Some believed that mediation would sacrifice child safety in the interest of making agreements. Others believed that the court process, with settlement conferences and trials, was a preferable means of resolving these cases. Some attorneys and judicial officers admitted that they did not want to give up their control of the process. Many social workers were fearful of any process that involved attorneys.⁵³

As more parties participated in mediation and the results proved satisfactory to all members of the court system, mediation became firmly established as an important part of the court process. Legendary stories of cases that “could not possibly settle” were frequently discussed, testifying to the effectiveness of the process. In one case, just before the commencement of a scheduled five-day trial, the judge ordered the parties to participate in a mediation session. The attorneys resisted, claiming that the case could not settle. After the mediation, the attorneys returned to the judicial officer and apologized for their earlier resistance. The attorneys were somewhat chagrined to discover that not one of them had understood all the facts in the case. Once all of the facts were revealed during mediation, the case rapidly settled.⁵⁴

As the mediation process compiled more successes over time, the court culture began changing. Attorneys, social workers, and judicial officers began to ask for mediation. Instead of insisting on their position and demanding a trial to vindicate that position, attorneys began to look to the mediation process as a means to identify a solution that would satisfy all parties and produce better, longer-lasting results for everyone.

Not all cases referred to mediation settled, but even for those few that did not, mediation had a positive impact on both the parties and the attorneys. As a result of mediation, the issues that were tried in court were more carefully identified, and the emotional overlay was reduced because the parties already had a full opportunity to express their grievances and concerns. Testimony at trial was more focused and to the point because the mediation process had sharpened the issues for both attorneys and the parties.

The culture change has extended beyond the processing of cases. Personal relationships among attorneys are much more friendly and respectful than before the advent of mediation.⁵⁵ This is understandable. The attorneys regularly participate in mediations together and are able to share in the success of an agreement that is satisfactory for each of their clients. They also have a hand in shaping the final agreement that the family will live by in the months and years to come. Perhaps more significantly, from the perspective of court operations, relations between attorneys and social workers have improved. Mediation enables social workers to engage in problem solving with the other members of the court system. They, too, have more positive experiences working with attorneys to resolve difficult factual issues and design better, more effective case plans and workable visitation arrangements. Instead of the harsh experience of being cross-examined at trial on their efforts, social workers find attorneys in mediation to be respectful of their work.⁵⁶ The mediation process also helps social workers develop better relationships with their clients. The informal atmosphere in the mediation setting fosters better communication between social workers and parents and helps the parents understand the role of the social worker.

Judges in Santa Clara County have found that mediation is helpful from a number of perspectives. First, it resolves most cases with detailed solutions that would be difficult, if not impossible, to reach in the context of a trial. Second, it saves court resources. Third, it helps set a more positive tone in the juvenile court environment, where difficult and emotional issues are addressed on a daily basis. Fourth,

by providing a setting open to questions from any participant, it makes the court process easier to understand for all participants, particularly the parents.⁵⁷ Perhaps most significantly, the parents have expressed their satisfaction with the mediation process. They report that, unlike courtroom proceedings, mediation enables them to be heard and understood, often for the only time in the court process.⁵⁸

CONCLUSION

The past 25 years have seen dramatic changes in the laws regarding child protection, family reunification, and permanent placement. America's juvenile and family courts now oversee and monitor child protection cases from beginning to end. These changes have led to the growth of large child protection court systems, with more judges, staff, attorneys, and guardians ad litem. There have also been significant changes within child protection and social service agencies as they have had to adjust to increased involvement in the court process.

It has become clear since the passage of the AACWA in 1980 that traditional court processes are not ideal for the resolution of family problems. The adversarial process, which involves cross-examination of witnesses, evidentiary rules, and other legal procedures, does not provide an environment conducive to truth finding or to the effective resolution of cases. Moreover, the process is perceived as hostile and uncaring by the parties and leads them to believe that they are not being heard or understood by decision-makers.

Child protection mediation, particularly when it is implemented according to best practices, can provide an opportunity for families and professionals to discuss difficult, emotion-laden issues in a protected setting with professional assistance. In mediation, family members can express their pain and concerns in a manner unavailable in the court process. They can then join with professionals and begin to make decisions about what is best for their children.

Child protection mediation has been successful from all perspectives. It resolves most cases referred by the court, and even those that do not resolve come

back to court in a better posture for trial or further settlement discussions. The resolutions reached in mediation are more detailed and better tailored to the needs of the family and children than decisions that a court might render after a trial. Participants find the mediation process productive and helpful. In addition, mediation has a positive impact on the court environment. Relationships among attorneys, and between attorneys and social workers, have improved because of their participation in mediation. Parents are more satisfied because the process allows them to air their grievances and concerns. Finally, mediation produces better results for children. When all of the adults in their lives, including the professionals who have been assigned to work on their cases, come to an agreement on the best plan for a child, this means that everyone will be working together toward a common goal. Mediation is a significantly positive process for child protection cases, one that has quickly grown to become a national best practice for juvenile courts.

1. Court-based child protection mediation is different from social service-based child welfare mediation, in which the child protection agency meets with the parents and a mediator in an effort to determine a permanent plan for the child. *See* JEANNE ETTER & DIANA ROBERTS, *CHILD WELFARE MEDIATION AS A PERMANENCY TOOL* (TFC Press 1996).
2. A variety of terms are used to refer to child protection proceedings: juvenile dependency, juvenile court, child welfare, and children-in-need-of-protection (CHIPs) proceedings. This article uses the term "child protection proceedings."
3. In this article, the term "juvenile court" is used to refer to the court with oversight responsibility for child protection cases. In some jurisdictions the family court, children's court, or dependency court is designated as the court with the oversight responsibility.
4. Child Abuse Prevention and Treatment Act of 1974 (CAPTA), Pub. L. No. 93-247, 88 Stat. 4 (codified as amended in scattered sections of 42 U.S.C.).

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5. Adoption Assistance and Child Welfare Act of 1980 (AACWA), Pub. L. No. 96-272, 94 Stat. 500 (codified as amended in scattered sections of 42 U.S.C.).
6. Adoption and Safe Families Act of 1997 (ASFA), Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.).
7. See 42 U.S.C. § 672(a)(1) (2000 & Supp. 2004).
8. "Reasonable efforts" is a term of art referring to the quantity and quality of services rendered by the child protection or social service agency in fulfilling the law's requirements. What is considered reasonable in each factual situation will be different. The judge determines whether the agency has met the community's standards for reasonableness. Leonard P. Edwards, *Improving Implementation of the Federal Adoption Assistance and Child Welfare Act of 1980*, 45 JUV. & FAM. CT. J. 3, 6 (1994) [hereinafter *Improving Implementation*]. See 42 U.S.C. § 671(a)(15)(B) (2000 & Supp. 2004) (requiring every state to have a plan providing that *reasonable efforts* shall be made to preserve and reunify the family before placing a child in foster care and to make it possible for a child to safely return home).
9. *Id.* at 4-6.
10. The name of the agency varies in different jurisdictions (e.g., Department of Children's Services, Department of Human Services, Department of Family and Children's Services, Department of Family Services).
11. A guardian ad litem (GAL) is appointed to represent the child's best interest as opposed to the child's desires. CAPTA, *supra* note 4, requires that all children who are the subject of child protection proceedings be represented by a GAL. CAPTA, Pub. L. No. 93-247, § 4(B)(2)(G), 88 Stat. 4, 7 (codified as amended at 42 U.S.C. § 5106a(b)(2)(A)(xiii) (2000 & Supp. 2004)). In some states, an attorney also represents the child or the child's interests. In others, the attorney performs both the attorney and GAL functions. See Leonard P. Edwards, *Improving Juvenile Dependency Courts: Twenty-Three Steps*, 48 JUV. & FAM. CT. J. 1, 7-8 (1997); Leonard P. Edwards & Inger Sagatun, *Who Speaks for the Child?*, 2 U. CHI. L. SCH. ROUNDTABLE 67, 70 (1995).
12. NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES (NCJFCJ), RESOURCE GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE & NEGLECT CASES 29-44 (1995) [hereinafter RESOURCE GUIDELINES]. This book describes in detail each hearing in the court process.
13. Indian Child Welfare Act of 1978 (ICWA), Pub. L. 95-608, 92 Stat. 3069 (codified at 25 U.S.C. §§ 1901-1963 (2000 & Supp. 2004)).
14. RESOURCE GUIDELINES, *supra* note 12, at 45-52. For an example, see the case history beginning this article.
15. This was the result in the case history beginning this article. The resolution resulted from discussions at the mediation session. The changes in the petition language resulted in the removal of allegations with which the parents disagreed. After the changes, there were still sufficient facts to justify state intervention on behalf of the child.
16. RESOURCE GUIDELINES, *supra* note 12, at 53-63.
17. In the case history the parents were given separate case plans with different goals. These were developed in the context of the mediation session, with full input from each parent and the attorneys.
18. RESOURCE GUIDELINES, *supra* note 12, at 65-76.
19. *Id.* at 77-86. See 42 U.S.C. § 675(5)(C) (2000 & Supp. 2004) (requiring a permanency hearing to be held no later than 12 months after a child enters foster care, and not less frequently than every 12 months thereafter).
20. Approximately 250,000 children were in foster care in the early 1980s. Children's Bureau, U.S. Dep't of Health & Human Servs., Population Flow Exhibit 8, Substitute Care Trends 1980-1994 (2001), at www.acf.hhs.gov/programs/cb/dis/vcis/ii08.htm. In 2001 there were almost 550,000. CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., THE AFCARS REPORT 1 (Mar. 2003), at www.acf.hhs.gov/programs/cb/publications/afcars/report8.pdf.
21. "[C]ounsel having objected to a piece of documentary evidence, which appeared to be relevant to the case but inadmissible in law, the judge asked: 'Am I not to hear the truth?,' an enquiry which sounds reasonable enough, but which attracted the somewhat startling answer: 'No, Your Lordship is to hear the evidence.'" PETER MURPHY, MURPHY ON EVIDENCE 1 (Blackstone Press 5th ed. 1995).
22. "There's a lot of tension between CPS and the court. CPS workers are somewhat enraged with the court. They have trouble accepting that the court can't act on 'I want' or 'I feel.' Workers sometimes wind up resentful of the court because it imposes deadlines, requires reports, orders appearances, and they feel overwhelmed. . . .
"[Caseworkers] have a history of poor relationships with the court. When it goes to court everyone reads the caseworker's report and says 'Where's the proof?' When things are dropped in the petition, the workers

say ‘Doesn’t anyone read our reports?’ Caseworkers aren’t thinking about evidence and legal limits.” CTR. FOR POLICY RESEARCH, ALTERNATIVES TO ADJUDICATION IN CHILD ABUSE AND NEGLECT CASES 20 (1992).

23. “Some judges think they know more about each case than the social worker who has handled it. And some agencies routinely frustrate judges by giving out too little information on the cases at hand.” EDNA McCONNELL CLARK FOUND., KEEPING FAMILIES TOGETHER: THE CASE FOR FAMILY PRESERVATION 34 (1985).

24. See, e.g., Leonard P. Edwards & Steve Baron, *Alternatives to Contested Litigation in Child Abuse and Neglect Cases*, 33 FAM. & CONCILIATION CTS. REV. 275 (1995), reprinted in RESOURCE GUIDELINES, *supra* note 12, app. B at 131, 133.

25. Many of these best practices were collected in the RESOURCE GUIDELINES, *supra* note 12. See also Edwards, *Improving Juvenile Dependency Courts*, *supra* note 11.

26. The literature has described some of the courts that have been successful. See generally AM. BAR ASS’N, CTR. ON CHILDREN & THE LAW, ONE COURT THAT WORKS (1993); AM. BAR ASS’N, CTR. ON CHILDREN & THE LAW, A SECOND COURT THAT WORKS (1995); PERMANENCY PLANNING FOR CHILDREN DEP’T, NAT’L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, STATUS REPORT 2002: A SNAPSHOT OF THE CHILD VICTIMS ACT MODEL COURTS PROJECT (2003) [hereinafter NCJFCJ STATUS REPORT]; Edwards, *Improving Implementation*, *supra* note 8.

27. MARY MENTABERRY, U.S. DEP’T OF JUSTICE, MODEL COURTS SERVE ABUSED AND NEGLECTED CHILDREN (1999) (OJJDP Fact Sheet No. 90), available at www.ncjrs.org/txtfiles1/fs-9990.txt.

28. CAL. R. CT. 1405.5(b)(1) (2004). “‘Dependency mediation’ is a confidential process conducted by specially trained, neutral third-party mediators who have no decision-making power. Dependency mediation provides a nonadversarial setting in which a mediator assists the parties in reaching a fully informed and mutually acceptable resolution that focuses on the child’s safety and best interest and the safety of all family members. Dependency mediation is concerned with any and all issues related to child protection.” *Id.* See also ALICE B. OTT, NAT’L RESOURCE CTR. FOR FOSTER CARE & PERMANENCY PLANNING, TOOLS FOR PERMANENCY, TOOL NO. 3: CHILD WELFARE MEDIATION, at www.hunter.cuny.edu/socwork/nrcfcpp/downloads/tools/cwm-tool.pdf. “[P]arties engage in a mutual effort to discover solutions that will maximize the degree to which everyone’s interests are met,

rather than attempting to obtain their objectives by promoting their own positions, rebutting others’ arguments, and threatening to bring their power to bear on each other . . .” *Id.*

29. The benefits of mediation are numerous: (1) there is full or partial agreement in at least 70 percent of the cases, (2) participants strongly believe mediation saves time and money, (3) mediated case plans—with more detailed service and visitation arrangements—are more creative than litigated case plans, (4) participants prefer mediation to litigation, (5) parents find that mediation gives them an opportunity to be heard and understood, and (6) professionals also support mediation, sometimes after initial resistance. JOHN LANDE, NAT’L CTR. FOR STATE COURTS, CHILD PROTECTION MEDIATION, available at www.ncsconline.org/D_ICM/readings/icmerroom_Lande.pdf.

30. For a more comprehensive description of child protection mediation in Santa Clara County, see Leonard P. Edwards et al., *Mediation in Juvenile Dependency Court: Multiple Perspectives*, 53 JUV. & FAM. CT. J. 49 (Fall 2002) [hereinafter *Multiple Perspectives*].

31. *Id.* at 51. Steve Baron is director of Family Court Services in Santa Clara County and the person most responsible for starting child protection mediation in the county. He began mediating child protection cases in 1990 on an experimental basis with cases originating in the author’s juvenile dependency court. In addition, he says, “You can talk about essentially anything as long as the participants are capable of articulating their interests and desires. Talking does not equal agreeing, but talking and listening to one another usually produces constructive results even in the absence of an agreement. Mediation usually results in families experiencing a lowered sense of hostility and alienation and a heightened sense of participation and inclusion as well as a greater sense of understanding of the child’s needs, the workings of the system, and the points of view of the other participants.” *Id.*

32. Minimum experience and training requirements for California dependency mediators are described in Rule 1405.5(e) of the California Rules of Court (2004).

33. *Id.* at 1405.5(d)(2)(B) (2004). “The child has a right to participate in the dependency mediation process accompanied by his or her attorney. If the child makes an informed decision not to participate, then the child’s attorney may participate. If the child is unable to make an informed choice, then the child’s attorney may participate.” *Id.*

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34. For a domestic violence advocate's perspective on child protection mediation in Santa Clara County, see *Multiple Perspectives*, *supra* note 30, at 61.
35. CAL. R. CT. 1405.5 (2004); SUSAN SCHECHTER & JEFFREY L. EDLESON, FAMILY VIOLENCE DEP'T, NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, EFFECTIVE INTERVENTION IN DOMESTIC VIOLENCE AND CHILD MALTREATMENT CASES: GUIDELINES FOR POLICY AND PROCEDURE §§ 23, 48 (1998), available at www.ncjfcj.org/dept/fvd/publications/main.cfm?Action=PUBGET&Filename=eftvintr.pdf.
36. *Multiple Perspectives*, *supra* note 30, at 51. "After everyone feels heard, it is helpful for mediators to keep bringing the participants back to the issue of what is best for the child, i.e., 'How do you think we can resolve this particular issue in a way that is best for the child? ... Please talk about how you think your plan will affect the child Tell us what your concerns are about the child.'" *Id.* This approach is different from some mediation models in which the mediator is seen as entirely neutral and having no stake in the outcome. See Bernard Mayer, *Conflict Resolution in Child Protection and Adoption*, 7 MEDIATION Q. 69 (1985).
37. CAL. R. CT. 1405.5 (2004).
38. 1980 CAL. STAT. 48, § 5, codified as amended at CAL. FAM. CODE § 3160 et seq. (West 2004).
39. The Superior Courts of Los Angeles and Orange Counties first used mediation in child protection cases in, respectively, 1983 and 1987. For a history of the 21 mediation programs in California counties, see JUDICIAL COUNCIL OF CAL., ADMIN. OFFICE OF THE COURTS, COURT-BASED JUVENILE DEPENDENCY MEDIATION IN CALIFORNIA, RESEARCH UPDATE, at 1 (Mar. 2003) [hereinafter RESEARCH UPDATE]. For the growth of child protection mediation in other states, see Gregory Firestone, *Dependency Mediation: Where Do We Go From Here?*, 35 FAM. & CONCILIATION CTS. REV. 223 (1997).
40. The *Resource Guidelines* included a short article on alternative dispute resolution techniques in an appendix. See Edwards & Baron, *supra* note 24.
41. "A majority of jurisdictions have implemented various alternative dispute resolution models." AM. BAR ASS'N, CTR. ON CHILDREN & THE LAW, COURT IMPROVEMENT PROGRESS REPORT: 2003 NATIONAL SUMMARY 25 (2003) [hereinafter COURT IMPROVEMENT PROGRESS REPORT].
42. See, e.g., Lou Trosch et al., *Child Abuse, Neglect, and Dependency Mediation Pilot Project*, 53 JUV. & FAM. CT. J. 67 (Fall 2002); Sharon Townsend et al., *System Change Through Collaboration: Eight Steps for Getting From There to Here*, 53 JUV. & FAM. CT. J. 19 (Fall 2002); RESEARCH UPDATE, *supra* note 39, at 2–3.
43. NANCY THOENNES & JESSICA PEARSON, CTR. FOR POLICY RESEARCH, MEDIATION IN FIVE CALIFORNIA DEPENDENCY COURTS: A CROSS-SITE COMPARISON 11–12 (1995).
44. *Multiple Perspectives*, *supra* note 30, at 52.
45. *Id.*
46. Barbara Davies et al., *A Study of Client Satisfaction With Family Court Counseling in Cases Involving Domestic Violence*, 33 FAM. & CONCILIATION CTS. REV. 324 (1995); Trosch et al., *supra* note 42, at 74.
47. MENTABERRY, *supra* note 27; see also NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, ADOPTION AND PERMANENCY GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE AND NEGLECT CASES 7, 28, 31 (2000) ("Family group conferencing and mediation programs have been incorporated into many Model Court jurisdictions").
48. NCJFCJ STATUS REPORT, *supra* note 26, at 272–75; COURT IMPROVEMENT PROGRESS REPORT, *supra* note 41.
49. See, e.g., Letter from Susan Storcel, director of child protection mediation in the Circuit Court of Cook County, Illinois, to Leonard P. Edwards (Nov. 13, 2003) (on file with author): "Our mediation program was formally launched in February 2001, but it actually was conceived in August 2000, in Santa Clara County, when Judge Bishop, Gina Abbateamarco, and I made a site visit.... The growth of our program is astonishing. In calendar year 2003, we will have received more than 300 referrals compared to 106 in 2002. The program has been embraced by judges, most attorneys in the building, and our Department of Children and Family Services and private social service agencies." See also The Child Protection Mediation Program, Child Protection Division, Circuit Court of Cook County, at www.CAADRS.org/adr/CookChildPro.htm.
50. The Child Victims Act Model Courts Project is funded by the Office of Juvenile Justice and Delinquency Prevention in the U.S Department of Justice. A model court is defined as a "real-time 'laboratory' for implementing and evaluating court improvements. Like change itself, 'Model Court' is more a process than a 'thing.' The Model Courts provide an opportunity for practices, collaborations, innovations, and other systems changes to be pilot-tested and refined as part of ongoing systems change efforts." NCJFCJ STATUS REPORT, *supra* note 26, at 1.
51. *Id.*

52. *See, e.g.*, CAL. WELF. & INST. CODE § 350(a)(2) (West 2004). Each juvenile court is encouraged to develop a dependency mediation program that acts as a problem-solving forum in which all interested persons develop a plan in the best interest of the child that emphasizes family preservation and strengthening. The Legislature finds that mediation of these matters assists the court in resolving conflict and helps the court intervene in a constructive manner in those cases where court intervention is necessary.

53. *Multiple Perspectives*, *supra* note 30, at 56.

54. *Id.* at 51. “Just getting all the key participants together at the same place and time in a structured setting to sit down and, with the help of skilled mediators, systematically talk things through, exchange the most current, accurate, and relevant case information, and clear up misinformation, serves to resolve a lot of problems.” *Id.* (quoting Steve Baron).

55. *Id.* at 58. “Another significant factor in the success of dependency mediation is the cooperative attitude towards mediation that has developed over the years between the various attorney offices.” *Id.* (quoting Mike Clark).

56. *Id.* at 56. “It has been my experience and that of other social workers that mediation can resolve contested issues in a manner satisfactory to all parties even with cases that appear destined for trial. The use of mediation allows all parties, especially the parents, to feel heard and to leave the process with their dignity and self-respect intact. It also goes a long way towards preserving the relationship between the Agency and the parents, which ultimately most benefits the children.” *Id.* (quoting Nicole Gould).

57. *Id.* at 63–64.

58. *Id.* at 59. “I felt so much better about everything after the mediation.” “The mediation was a good thing.” “I think that without the mediation it would be a long time before I could really be civilized with them.” *Id.* (quoting parents); *see also* THE ESSEX COUNTY CHILD WELFARE MEDIATION PROGRAM: EVALUATION RESULTS AND RECOMMENDATIONS, 5 TECHNICAL ASSISTANCE BULL. 41 (Dec. 2001) (“I think they were all willing to work with me and I really appreciated it and also the great concern they showed for my children.” “It was my first mediation and I want to comment on how well I feel they treated me and handled the situation. They were very helpful to me and very nice people.”)

Information Needs in Juvenile Dependency Court

Decisions made in juvenile dependency court¹ have far-reaching effects on the lives of children and families, but empirical information on the experience of children and families in the court is limited. Agencies other than the court—including education, mental health, probation, social services, and correctional agencies—collect data on children in the child welfare and juvenile dependency systems, but their data collection efforts are focused on their own reporting requirements and research needs. For its part, the juvenile court has generally focused its studies on court operations. As a result, the court lacks sufficient information on the effect of its own practices and decisions on the safety, permanency, and well-being of the children under its jurisdiction. This lack of information severely hampers the court's ability to manage its caseload, assess the effectiveness of services, advocate for resources, or provide information to the public.²

A national consensus on the need for information collection and performance measurement in juvenile dependency court is developing. Recent reports from the Pew Commission on Children in Foster Care³ and from a consortium of the National Center for State Courts, the American Bar Association (ABA), and the National Council of Juvenile and Family Court Judges⁴ recommend detailed performance measures based on systematic data collection for dependency court. Research staff and others from the Administrative Office of the Courts (AOC), Center for Families, Children & the Courts (CFCC) prepared this article to assist those involved in defining performance measures and information collection standards for California's juvenile dependency court system. The article reviews the current efforts to define data standards for dependency court, examines the current sources of information available on children in the dependency system, and identifies the key research and performance issues in California that an information system for juvenile dependency must address.⁵

INFORMATION NEEDS IN CALIFORNIA'S JUVENILE DEPENDENCY COURT

There are no national guidelines on collecting data and calculating performance measures for the juvenile dependency court. While the data collection system for child welfare agencies is federally mandated and funded, individual juvenile dependency courts have developed data collection systems and outcome measures on the state or local level. The result is wide disparity in the capabilities of

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The California juvenile dependency court often lacks basic information on the effect of its practices and decisions on the safety, permanency, and well-being of the children under its jurisdiction. Recent performance measures for juvenile dependency court developed by the American Bar Association, the National Center for State Courts, and the National Council of Family and Juvenile Court Judges indicate growing consensus that dependency courts should collect and report data to assess their performance. This article reviews the current efforts to define data standards for dependency court, reviews the current sources of information available on children in dependency, and identifies the key research and performance issues in California that an information system for juvenile dependency must address.

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The authors gratefully acknowledge Michelle Diamond, research analyst, and Iona Mara-Drita, senior research analyst, both of the Center for Families, Children & the Courts, for their assistance in the writing of this article. ■

those systems and definitions of data elements. Recent AOC research projects⁶ indicate that the data collection systems used by many dependency courts

- do not measure the number of children under juvenile court jurisdiction;
- do not measure whether hearings take place within the mandated time frames;
- do not track the placements of children under the court's jurisdiction;
- do not provide data on whether court-based interventions, such as allocating more time to hearings, dependency mediation, or dependency drug court, have an impact on placement outcomes;
- do not provide data on measures related to the need for resources in the juvenile court, including how many children in the state transfer from the dependency system to the delinquency system, how many children under juvenile court jurisdiction have parents who are involved in other family or juvenile court cases or who are incarcerated, and how many children and parents require services in a language other than English; and
- do not use standardized measures for data collection, making it impossible to compare data among courts.

PERFORMANCE MEASURES FOR JUVENILE DEPENDENCY COURTS: A DEVELOPING CONSENSUS

In 1990 the National Center for State Courts published its *Trial Court Performance Standards*, which give guidelines on 5 general and 68 specific performance measures for the courts.⁷ Few of these measures are specific to juvenile court. In 1995 the *Resource Guidelines: Improving Court Practice in Child Abuse and Neglect Cases* was published by the National Council of Juvenile and Family Court Judges.⁸ This document, which has served as the basis for many initiatives to improve juvenile dependency court operations, includes a short statement on information collection:

Court staff should operate a computerized data system capable of spotting cases that have been seriously delayed, and capable of measuring court progress in case flow management. This information system should maintain statistics on the length of time from case filing to case closure. The system should also monitor the length of key steps in the litigations, such as petition to adjudication, petition to disposition, and termination of parental rights petitions to final written findings of fact and conclusions of law.⁹

In 1993 the federal Statewide Automated Child Welfare Information Systems (SACWIS) program began developing national guidelines and providing funding to state child welfare agencies for case management and reporting.¹⁰ These guidelines currently reflect the measures on foster-care placement and other outcomes defined in the Adoption and Safe Families Act (ASFA)¹¹ and in the Child and Family Services Reviews.¹² The development of data collec-

tion standards and performance measures for dependency courts that are coordinated with the federal child welfare standards has proceeded since then. In 2004, the ABA, National Center for State Courts, and National Council of Juvenile and Family Court Judges released *Building a Better Court: Measuring and Improving Court Performance and Judicial Workload in Child Abuse and Neglect Cases*.¹³ This document proposes a range of performance measures that

are based on court operations and linked to the outcomes defined by ASFA (see below). Also in 2004, the Pew Commission on Children in Foster Care recommended that dependency courts adopt those performance measures:

Every dependency court should adopt the court performance measures developed by the nation's leading legal associations and use this information to improve their oversight of children in foster care.¹⁴

COURT PERFORMANCE MEASURES

Source: Reprinted by permission from CTR. ON CHILDREN & THE LAW, AM. BAR ASS'N ET AL., BUILDING A BETTER COURT: MEASURING AND IMPROVING COURT PERFORMANCE AND JUDICIAL WORKLOAD IN CHILD ABUSE AND NEGLECT CASES 9-11 (David & Lucile Packard Found. 2004).

PERFORMANCE MEASURE 1: SAFETY

Goal 1: Children should be safe from abuse and neglect while under court jurisdiction.

Safety Outcomes Are:

- Children are, first and foremost, protected from abuse and neglect.
- No child should be subject to maltreatment while in placement.
- Children are safely maintained in their homes whenever possible and appropriate.

What Courts Should Measure:

1. Percentage of children who do NOT have a subsequent petition of maltreatment filed in court after the initial petition is filed.
2. Percentage of children who are the subject of additional allegations of maltreatment within 12 months after the original petition was closed.

PERFORMANCE MEASURE 2: PERMANENCY

Goal 2: Children should have permanency and stability in their living situations.

Permanency Outcomes Are:

- Children have permanency and stability in their living situations.
- The continuity of family relationships and connections is preserved for children.

What Courts Need to Measure:

1. Percentage of children who reach legal permanency (by reunification, guardianship, adoption, planned permanent living arrangement, or other legal categories that correspond with ASFA) within 6, 12, 18, and 24 months from removal. Specific time lines for this measure should be adapted to jurisdictional time lines.
2. Percentage of children who do not achieve permanency in the foster care system (e.g., court jurisdiction ends because the child reaches the age of majority).
3. Percentage of children who re-enter foster care pursuant to court order within 12 and 24 months of being returned to their families.
4. Percentage of children who return to foster care pursuant to court order within 12 and 24 months of being adopted or placed with an individual or couple who are permanent guardians.
5. Percentage of children who are transferred among one, two, three, or more placements while under court jurisdiction. Where possible, this measure should distinguish placements in and out of a child's own home from multiple placements in a variety of environments.

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COURT PERFORMANCE MEASURES

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PERFORMANCE MEASURE 3: DUE PROCESS

Goal 3: To deal with cases impartially and thoroughly based on evidence brought before the court.

Due Process Outcomes Are:

- Enhancement of due process by deciding cases impartially and thoroughly, based on evidence brought before the court.

What Courts Need to Measure:

1. Percentage of cases in which both parents receive written service of process within the required time standards or where notice of hearing has been waived by parties.
2. Percentage of cases in which there is documentation that notice is given to parties in advance of the next hearing.
3. Percentage of cases in which the court reviews case plans within established time guidelines.
4. Percentage of children receiving legal counsel, guardians ad litem or CASA volunteers in advance of the preliminary protective hearing or equivalent (Percentage within established time guidelines? Percentage within 0–5 days? 6–10 days? More than 10 days?).
5. Percentage of cases where counsel for parents are appointed in advance of the preliminary protective hearing or equivalent (Percentage within established time guidelines? Percentage within 0–5 days? 6–10 days? More than 10 days?).
6. Percentage of cases in which legal counsel for children changes (as well as number of changes in counsel if possible).
7. Percentage of cases where legal counsel for parents changes (as well as number of changes in counsel if possible).
8. Percentage of cases where legal counsel for parents, children, and agencies are present at each hearing.
9. Percentage of children for whom all hearings are heard by one judicial officer (as well as two, three or more judicial officers if that information is available).

PERFORMANCE MEASURE 4: TIMELINESS

Goal 4: To enhance expedition to permanency by minimizing the time from the filing of the petition or protective custody order to permanency.

Timeliness Outcomes Are:

- Expedition of permanency by minimizing the time from the filing of the petition or protective custody order to permanency.

What Courts Need to Measure:

1. Average or median time from filing of the original petition to adjudication.
2. Average or median time from filing of the original petition to disposition.
3. Percentage of cases that are adjudicated within 30, 60, 90 days after the filing of the dependency petition.
4. Percentage of cases that receive a disposition within 10, 30, 60 days after the dependency adjudication.
5. Average or median time from filing of the original petition to permanent placement.
6. Average or median time from filing of the original petition to finalized termination of parental rights.
7. Percentage of cases for which the termination petition is filed within 3, 6, 12, 19 months after the dependency disposition.
8. Percentage of cases that receive a termination order within 30, 90, 120, 180 days after the filing of the termination petition.
9. Percentage of cases for which an adoption petition is filed within 1, 3, 6 months after the termination order.
10. Percentage of cases for which the adoption is finalized within 1, 3, 6, 12 months after the adoption petition.
11. Percentage of hearings (by hearing type) not completed within time frames set forth in statute or court rules. Where possible, the reason(s) for non-completion should also be captured (e.g., party requesting postponement).

PERFORMANCE MEASURE 5: WELL-BEING

[This measure has not yet been defined.]

SOURCES OF INFORMATION ON CHILDREN IN DEPENDENCY

The children under the jurisdiction of the juvenile court are involved with many different agencies, which has led to the fragmentation of data and research in these systems. Based on reports to the AOC Judicial Branch Statistical Information System (JBSIS), the majority of courts collect information on petitions, hearing dates and outcomes, and other events, such as juvenile dependency mediation. The county child welfare agency maintains records and reports on the child's out-of-home placements and the progress of the child's case plan, while local school districts and mental health agencies collect specific information on the educational and mental health services provided to the child or parents. If the child has been in delinquency court, the county probation department or the California Youth Authority maintain key information on the child.

DATA COLLECTION IN THE COURTS

Local courts in California maintain individual case management systems for dependency cases, but the information kept by the systems varies widely and is often not comparable across courts.

At the statewide level, JBSIS provides the courts a framework for data collection and reporting on dependency. Courts report aggregate statistics to JBSIS on measures related to the juvenile court. The measures include, for a given time period, counts of dependency filings and dispositions; numbers of children under the courts' supervision; the length of cases in broad categories of 18 months, three years, five years, and more than five years; and counts, by hearing type, of hearings, mediations, and settlement conferences. JBSIS can collect information on some of the dependency hearing timelines: whether review hearings did or did not take place within 6 months, 12 months, and 18 months, and whether termination-of-reunification-services hearings did or did not take place within 12 months.

All the data elements in JBSIS are "snapshot," or point-in-time, statistics. The statistics are drawn

from individual court case management systems that vary widely in the depth of detail collected. All courts report total filings and dispositions to JBSIS. As of this writing, approximately three-quarters of courts are reporting some of the detailed measures listed above, primarily counts by hearing type, while fewer than 20 percent are reporting timeliness or other measures.¹⁵

Court Statistics Reports

Every year the AOC publishes the *Court Statistics Report*.¹⁶ Nationally, several organizations compile and reanalyze state-level data on case processing. The National Center for State Courts, the Conference of State Court Administrators, the State Justice Institute, and the Bureau of Justice Statistics participate in the Court Statistics Project, which has published several documents describing court case processing, including *State Court Caseload Statistics*¹⁷ and *Examining the Work of State Courts*.¹⁸ The statistics on dependency court reported in these publications are restricted to filings and dispositions.

CHILD WELFARE DATA

Governmental agencies at the federal and state levels are mandated to collect and compile state-level data on child abuse, neglect, foster care, and adoption rates.

Data Reported at the Federal Level

Federal legislation requires that state child welfare agencies comply with several guidelines, called the "SAC-WIS standards,"¹⁹ which specify comprehensive²⁰ data collection and compliance with the Adoption and Foster Care Analysis Reporting System (AFCARS)²¹ and the National Child Abuse and Neglect Data System (NCANDS).²² The requirements specify that agencies collect and report certain case-level data on a semiannual basis. The U.S. Department of Health and Human Services' Administration for Children and Families (ACF) collects the data on child maltreatment for NCANDS and the data on foster care and adoption for AFCARS.

ACF publishes analyses of AFCARS data on its Web site. Its annual report, *Child Welfare Outcomes*,

is based on both AFCARS and NCANDS data.²³ The Children's Bureau also publishes these data in its annual report, *Child Maltreatment*,²⁴ and the Child Welfare League of America organizes and disseminates data (including data from NCANDS and AFCARS) through its National Data Analysis System.²⁵

Data Reported by the State of California

The California Department of Social Services administers the state's child welfare services and reports to AFCARS and NCANDS through its Child Welfare Services/Case Management System (CWS/CMS).²⁶ The system, which has been fully operational since the end of 1997 and meets SACWIS standards, contains child-level data on the status, demographics, and placement history of all foster-care children in the state. Child welfare services in all 58 counties and the California Department of Social Services' Adoption Program district offices enter data into CWS/CMS.

State Child Welfare Data Accessible to the Courts and the Public

A partnership between the California Department of Social Services and the Center for Social Services Research (CSSR) at the University of California at Berkeley has made aggregate data from the CWS/CMS child welfare system accessible to the public and other agencies.²⁷ The Department of Social Services extracts quarterly data from CWS/CMS, and CSSR uses the data to create cohort²⁸ files and make data and research highlights available on a variety of topics, including child abuse referrals, placement indicators by foster-care cohort, adoption trends, caseload flow, and exits from foster care per year. CSSR also reports the Child and Family Service Review performance measures for each county and a revised version of these measures based on cohort files for counties.

The data reported on the CSSR Web site is the most comprehensive source of information for California juvenile courts on the children under their jurisdiction. While CSSR does not report specific court measures such as petition and hearing dates, it

does provide summaries in the form of detailed base-lines and trends on the children under dependency court jurisdiction. Trend tables of this data that are of most interest to the courts have been published by the CFCC in the California Juvenile Statistical Abstract²⁹ and made available to dependency court judicial officers and staff throughout the state.

The Department of Social Services releases its own aggregate quarterly reports of AFCARS data and statistics on foster care, adoptions, out-of-home care, and other programs.³⁰ These data are not longitudinal and do not explicitly include information about the court's role in child welfare.

Research Using Child Welfare Data

Services offered by child welfare agencies have been the subject of considerable research. The Chapin Hall Center for Children at the University of Chicago has explored child welfare issues and has developed a national agenda for child abuse and neglect prevention. Chapin Hall also maintains the Multi-state Foster Care Data Archive, which contains 11 years of foster-care case history data from California, Illinois, Michigan, Missouri, New Jersey, and New York. In addition, Chapin Hall is tracking the histories of over one million children who were placed in state-funded out-of-home care. Chapin Hall publishes analyses of many of these data.³¹

The Urban Institute has published policy analyses of issues such as kinship-care policies,³² child welfare expenditures,³³ and the role of noncustodial fathers in child welfare case management.³⁴ The Annie E. Casey Foundation sponsors initiatives and research in the child welfare field, including self-evaluations of its *Family to Family* Foster Care Initiatives³⁵ and publishes *Kids Count*,³⁶ an annual compilation of child well-being indicators. One study from the Bay Area Social Services Consortium has explored the relationship between child welfare agencies and the courts.³⁷

Little is known about the long-term outcomes for children in the child welfare system, particularly those who age out of the system. The U.S. Department of Health and Human Services' Administration for Children and Families, in conjunction

with the National Data Archive on Child Abuse and Neglect at Cornell University, is conducting the first nationally representative longitudinal study using data collected directly from parents, children, and social service personnel.³⁸ This study, the National Survey of Child and Adolescent Well-Being,³⁹ will follow for several years a group of children who enter the child welfare system to assess their behavioral and social status and to document the services their families need and are given. The Center for Social Services Research, using state child welfare data, has begun to track outcomes for emancipated foster children by linking some administrative data from other state agencies.⁴⁰

Other Data

Independent-Living Services Data. California child welfare agencies are mandated to provide independent living skills training to children 16 or older who will be aging out of the foster-care system.⁴¹ The U.S. General Accounting Office recently published an evaluation of independent living services across the country for which it surveyed 50 states and the District of Columbia about their independent living services and conducted a more in-depth analysis of programs in four states.⁴²

Mental Health Treatment Data. The California Department of Mental Health oversees publicly funded mental health treatment in the state and administers Medi-Cal (Medicaid) funding for mental health services.⁴³ In its Medi-Cal Eligibility Data System, the department tracks the number of children who are eligible for Medi-Cal mental health services because they are disabled, are in the foster-care system, or are recipients of Temporary Aid to Needy Families (TANF). Data are also collected on children in the juvenile justice system who receive services in secure facilities. In addition, since 1998, the department has collected detailed data through the Children and Youth Performance Outcome Measurement System on children with serious, persistent mental illness who have received or will receive 60 or more days of publicly funded services. Courts can use the depart-

ment's published analyses⁴⁴ to track the proportion of children in foster care who are receiving mental health services and the average mental health expenditure per foster-care child.

Educational Services Data. In California, public school districts (including schools for children who are wards of the court) collect various student-level data. The districts then aggregate and report school-level performance indicators to the California Department of Education. In addition to standardized test results, all schools collect data on academic performance, staffing, expenditures, school enrollment, course enrollment, and dropout and graduation rates.⁴⁵ The department also collects detailed student-level data on children in special education programs through the California Special Education Management Information System.⁴⁶ The Department of Education publishes analyses of many of these data, and the RAND Corporation posts many of them on its Web site.⁴⁷ None of these education-related sources provides direct information on children in dependency.

DEFINING A DEPENDENCY INFORMATION SYSTEM IN CALIFORNIA

California's 1997 *Court Improvement Project Report* included this statewide recommendation for dependency courts:

Recommendation 18: F&J [Family and Juvenile Advisory Committee] improvement planning should include as a priority the development of data entry and reporting protocols for dependency actions. All juvenile courts statewide should be able to use automated information systems to collect and analyze standardized, basic information on the dependency caseload. The goal should be a system capable of timely, accurate, coordinated, and useful case identification, tracking, and scheduling. Such systems should ensure appropriate confidentiality of the case records and party identification.⁴⁸

Now that a consensus on national performance measures for juvenile dependency court is developing,

designing information systems and collecting standardized information in California are becoming more feasible. It is worth reviewing the advantages of consistently collecting data and reporting performance measures on every dependency court in the state.

- The performance measures and data required to produce them can provide standard measures, defined and collected in a standardized way by all courts, of cases and hearings in the state. At present no such measures exist, and resource allocations are not directly based on these basic components of court workload.
- Performance measures provide a benchmark to measure progress. Basic guidelines for dependency court were incorporated into the California Standards of Judicial Administration in 1997;⁴⁹ yet there is no system to measure courts' progress in meeting these guidelines.
- Performance measures give the dependency court ownership of its reporting and assessments. While statistical performance measures give a limited picture of a court's or program's effectiveness, making decisions on resources or technical assistance based on data designed and collected by the juvenile court for those purposes is preferable to making those decisions based on data collected for other purposes such as financial records, personnel data, general filings data, or data from other agencies.
- Performance measures alone cannot establish causal relationships between court action and the safety, permanency, and well-being of children in foster care. However, they can be used to assess the broad effects of court interventions and to identify areas where more-focused evaluations may be required.

The authors propose the following recommendations for implementing performance measures in dependency courts based on their research and interviews of court professionals:

1. More nationwide research on the implementation of performance measures and other standardized

data is needed. The performance measures proposed by the ABA and National Center for State Courts have not been systematically tested in the courts. The publications discussed in this article give very little guidance on how the proposed performance measures could be used by the courts and what modifications to the proposed measures might be necessary. Before implementing performance measures on a statewide basis, California dependency courts must pilot the measures and track the experiences of other courts around the country that are piloting the measures.⁵⁰

2. **The information collected by courts should be tied to standardized, statewide statistical reporting.** As courts implement performance measures, JBSIS will need to be revised. Statewide statistical reporting should provide information on a case and cohort level, rather than aggregate statistics for all children in the dependency system.⁵¹
3. **Courts should not duplicate the information collection of the local department of social services.** However, the courts must be able to link information at the child level to the placement information on the same child kept by the county department of social services. Overcoming the barriers to linking court and social services data is the key to the success of the effort to implement standardized information collection in the courts. Few court-based or AOC initiatives to link court and social services data for specific projects have resulted in agreements to share information.⁵²
4. **Courts need to carefully consider which measures should be implemented as part of a case management system and which are more suited to research studies.** The overall cost of tracking information on every case in a management system is usually quite high; moreover, the more complex the case management system the lower the quality of the data in it tends to be. A case management system may be well suited to recording the events in a case, such as hearings. Other proposed measures, such as the percentage of

cases in which both parents receive written service of process, may be extremely resource intensive to capture for every hearing and may be better measured through small random samples of cases taken at periodic intervals.⁵³

5. Any implementation of performance measures must take into account the courts in less-populated counties. Fifty percent of dependency courts in California had fewer than 200 dependency filings in 2003, and 25 percent had fewer than 50 filings.⁵⁴ Courts with relatively few filings experience much greater yearly variation in any given statistical indicator than do larger courts. Any system using performance measures to assess these individual courts must use statistical techniques to account for the volatility of indicators in small courts.

6. Performance measures should be considered within the context of demographic information. Reporting a set of consistent measures for all 58 superior courts in California has many advantages. However, the demographics and environments of the 58 counties are not comparable, so it is important to collect consistent data on the income, race or ethnicity, and language needs of children and families in dependency court and use those variables to conduct additional analysis of the performance measures. Many of these demographic and social variables are already collected through CWS/CMS.

7. Information beyond that proposed by the ABA needs to be collected in California's dependency courts. Issues in dependency court that are not addressed by the proposed nationwide performance measures but will have an impact on the outcomes measured include the following:

Families with multiple cases in juvenile dependency court and other court departments. Families with multiple cases can experience inefficient case processing, duplicate services, difficulty navigating the court system, and conflicting orders. The experiences of these families in dependency court may be very different from those of other

families and may have a significant impact on a court's performance measures. The CFCC's Unified Courts for Families Program Mentor Court Project is currently developing models for identifying and measuring performance outcomes for families with multiple cases.

Children who are or have been involved in delinquency proceedings. The movement of children between the dependency and delinquency systems has a major impact on both the court and the children it supervises; however, these crossover cases have never been systematically identified. The CFCC is currently working with a group of courts to quantify crossover cases and evaluate their processing.

Court interventions used in cases. Court interventions should be identified in every case. Each dependency court oversees a range of interventions for children and parents. Those working in a collaborative-court model⁵⁵ may provide a diverse set of interventions such as youth court, youth violence court, mental health court, juvenile drug court, family drug court, and other programs focused on balanced and restorative justice for families and children in both the delinquency and dependency systems. Juvenile courts may also oversee dependency mediation, a Court Appointed Special Advocate (CASA) program (available in more than one-half of California's counties), family group conferencing, and many other court-connected services. These court interventions need to be systematically identified so that their impact on court performance measures and dependency outcomes can be quantified.

CONCLUSION

Data collection and the use of statistical indicators are not deeply engrained in dependency court culture. However, given adequate resources, a statistical measurement system can be developed in California that is based on the most recent national consensus, incorporates measures of key state initiatives in unified

courts for families and dependency-delinquency crossover cases, and adjusts for the known problems of performance measures, such as accurate measurement in small courts and the imposition of burdensome data collection requirements. A well-designed system of performance measures could give the California juvenile court consistent, statewide information on its impact on the lives of the children under its jurisdiction and foster accountability to the public.

and do not seek to address the many needs of court professionals who work with families in guardianship, mental health, or family court cases.

NOTES

1. The term “juvenile dependency court,” as used here, encompasses court professionals from local juvenile courts in California—including court administrators, judicial officers, court staff, and attorneys—as well as attorneys, analysts, and research staff of the Administrative Office of the Courts.

2. The National Child Welfare Resource on Legal and Judicial Issues of the American Bar Association Center on the Children and the Law provides updated information on state juvenile court projects related to data collection and automation at www.abanet.org/child/cipcatalog/home.html.

3. PEW COMM'N ON CHILDREN IN FOSTER CARE, *FOSTERING THE FUTURE: SAFETY, PERMANENCE AND WELL-BEING FOR CHILDREN IN FOSTER CARE 13* (May 18, 2004) [hereinafter *FOSTERING THE FUTURE*], available at <http://pew-fostercare.org/research/docs/FinalReport.pdf>.

4. CTR. ON CHILDREN & THE LAW, AM. BAR ASS'N ET AL., *BUILDING A BETTER COURT: MEASURING AND IMPROVING COURT PERFORMANCE AND JUDICIAL WORKLOAD IN CHILD ABUSE AND NEGLECT CASES* (David & Lucile Packard Found. 2004) [hereinafter *BUILDING A BETTER COURT*], available at www.ncsconline.org/WC/Publications/Res_CtPerS_TCPS_PackGde4-04Pub.pdf.

5. This article was developed through literature reviews and interviews with juvenile court staff and experts, followed by an analysis of court needs. First, the authors reviewed existing research to locate information gaps and ongoing juvenile court research initiatives around the country. Next, they interviewed juvenile court professionals and CFCC staff who work with California's juvenile courts to identify additional research questions and information needs. Finally, the many research questions identified through the literature review and interviews were narrowed to those most relevant to the work of the courts. The article's findings primarily relate to dependency court

6. Research projects at the AOC that failed to locate consistent data in juvenile dependency courts in California include the Caseload Study for Trial-Level Court-Appointed Dependency Counsel, Interim Report 2003; Court-Based Juvenile Dependency Mediation in California (2002); and the Court Improvement Program Reassessment (forthcoming Summer 2005).

7. NAT'L CTR. FOR STATE COURTS, *TRIAL COURT PERFORMANCE STANDARDS & MEASUREMENT SYSTEM* (2001; modified Jan. 23, 2005), available at www.ncsconline.org/D_Research/TCPS/Contents.htm.

8. VICTIMS OF CHILD ABUSE PROJECT, NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, *RESOURCE GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE & NEGLECT CASES* (Spring 1995), available at www.ncjrs.org/pdffiles/resguid.pdf.

9. *Id.* at 20.

10. For information on SACWIS, see www.acf.hhs.gov/programs/cb/dis/sacwis/about.htm.

11. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified at scattered sections of 42 U.S.C. (2000 & Supp. 2004)).

12. For information on Child and Family Services Reviews, see www.acf.hhs.gov/programs/cb/cwrp/index.htm.

13. *BUILDING A BETTER COURT*, *supra* note 4.

14. *FOSTERING THE FUTURE*, *supra* note 3, at 17.

15. Cal. Admin. Office of the Courts, Judicial Branch Statistical Information System, accessed Mar. 2005.

16. JUDICIAL COUNCIL OF CAL., *2004 COURT STATISTICS REPORT*, available at www.courtinfo.ca.gov/reference/3_stats.htm.

17. COURT STATISTICS PROJECT, *STATE COURT CASELOAD STATISTICS, 2003* (Nat'l Ctr. for State Courts 2004), available at www.ncsconline.org/D_Research/csp/2003_Files/2003_SCCS.html.

18. BRIAN OSTROM ET AL., NAT'L CTR. FOR STATE COURTS, *EXAMINING THE WORK OF STATE COURTS, 2003* (2003), available at www.ncsconline.org/D_Research/csp/2003_Files/2003_Main_Page.html.

19. See *supra* note 10.

20. *Comprehensive*, in this context, means that data collection must include child welfare services, foster-care and adoption assistance, family preservation and support services, and independent living services.

21. For information on AFCARS, see www.acf.hhs.gov/programs/cb/dis/afcars/index.htm. The cited Web page describes AFCARS as follows: “The SACWIS functions as a ‘case management’ system that serves as the electronic case file for children and families served by the States’ child welfare programs. One of the reports that is produced from SACWIS is the AFCARS data sent to ACF. In order to qualify for SACWIS funding, States’ systems must, among other things, meet the AFCARS requirements in 45 CFR 1355.40. States that develop a SACWIS with Federal funding must not collect the AFCARS data from a separate information system once the SACWIS is operational.”

22. The authors were unable to find a single source explaining the National Child Abuse and Neglect Data System (NCANDS). The best description of the system is found in *Child Maltreatment 2000*, CHILDREN’S BUREAU, U.S. DEP’T OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT 2000, available at www.acf.hhs.gov/programs/cb/publications/cm00/index.htm.

23. Child Welfare Outcome reports are available on the Children’s Bureau Web site at www.acf.hhs.gov/programs/cb/publications/cwo.htm.

24. CHILD MALTREATMENT 2000, *supra* note 22.

25. For more information on the National Data Analysis System, see www.cwla.org/ndas.htm.

26. California’s CWS/CMS is described in detail at www.childsworld.ca.gov/ChildWelfa_355.htm.

27. Child Welfare Services (CWS/CMS) reports are available at <http://cssr.berkeley.edu/CWSCMSreports/>.

28. A cohort file contains information on the subgroup of children who entered out-of-home care during a defined period—for example, the first quarter of 2003.

29. The California Juvenile Statistical Abstract, published by the Center for Families, Children & the Courts at www.courtinfo.ca.gov/programs/cfcc/resources/publications/articles.htm#juvenile, makes many of the data sources reviewed in this section accessible to court staff. The full report will be available on the above Web site in summer 2005.

30. Descriptive statistics from CWS/CMS are available at www.dss.cahwnet.gov/research/Children`s_405.htm.

31. For publications from the data set, see www.chapinhall.org/home_new.asp. For more information on the data set, see FRED WULCZYN ET AL., AN UPDATE FROM THE MULTISTATE FOSTER CARE DATA ARCHIVE: FOSTER CARE DYNAMICS 1983–1998 (Chapin Hall 2000), available at www.chapinhall.org/category_editor_new.asp?L2=66.

32. AMY JANTZ ET AL., THE CONTINUING EVOLUTION OF STATE KINSHIP CARE POLICIES (Urban Inst., Dec. 2002), available at www.urban.org/UploadedPDF/310597_state_kinship_care.pdf.

33. URBAN INST., *The Cost of Protecting Vulnerable Children, CARING FOR CHILDREN: FACTS AND PERSPECTIVES* (Nov. 2002), available at www.urban.org/UploadedPDF/310586_FactPerspectives.pdf.

34. FREYA SONENSTEIN ET AL., URBAN INST., STUDY OF FATHERS’ INVOLVEMENT IN PERMANENCY PLANNING AND CHILD WELFARE CASEWORK (U.S. Dep’t of Health & Human Servs., Aug. 2002), available at <http://aspe.hhs.gov/hsp/CW-dads02/>.

35. For more information on the *Family to Family* reform initiative, see www.aecf.org/initiatives/familytofamily/.

36. For more information on *Kids Count*, see www.aecf.org/kidscount/.

37. SARAH CARNOCHAN ET AL., CHILD WELFARE AND THE COURTS: AN EXPLORATORY STUDY OF THE RELATIONSHIP BETWEEN TWO COMPLEX SYSTEMS (Bay Area Soc. Servs. Consortium, U.C. Berkeley, Dec. 2002), at <http://cssr.berkeley.edu/bassc/>.

38. For more information on the survey, see www.ndacan.cornell.edu/NDACAN/AboutNDACAN.html.

39. Admin. on Children, Youth & Families & Cornell Univ., National Survey of Child and Adolescent Well-Being (in progress). For information about the survey’s data set, see 128.253.104.22/NDACAN/Datasets/Abstracts/DatasetAbstract_111.html.

40. BARBARA NEEDELL ET AL., CTR. FOR SOC. SERVS. RESEARCH, YOUTH EMANCIPATING FROM FOSTER CARE IN CALIFORNIA: FINDINGS USING LINKED ADMINISTRATIVE DATA (May 2002), available at <http://cssr.berkeley.edu/childwelfare/researchdetails.asp?name=youth>.

41. CAL. WELF. & INST. CODE §§ 366.21(f), 16501.1(f)(14) (West 2004).

42. HEALTH, EDUC. & HUMAN SERVS. DIV., U.S. GEN. ACCOUNTING OFFICE, FOSTER CARE: EFFECTIVENESS OF INDEPENDENT LIVING SERVICES UNKNOWN, PUB. NO.

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- NOTES GAO/HEHS-00-13 (Nov. 1999), *available at* www.gao.gov/new.items/he00013.pdf.
43. *See* www.dmh.cahwnet.gov.
44. Medi-Cal Specialty Mental Health Services Reports are available at www.dmh.ca.gov/SADA/default.asp.
45. California Department of Education reports are available at www.cde.ca.gov/ds/.
46. *See* California Department of Education Reports, *supra* note 45.
47. *See* <http://ca.rand.org/stats/education/education.html>.
48. NAT'L CTR. FOR STATE COURTS, CALIFORNIA COURT IMPROVEMENT PROJECT REPORT (Apr. 1997), *available at* www.abanet.org/ftp/pub/child/carpt.txt.
49. CAL. STDS. JUD. ADMIN. § 24.5.
50. *See supra* note 2. Permanency by the Numbers: Improving Dependency Caseflow Management Through Data Driven Strategies, a conference presented by the National Center for Adoption Law and Policy at Capital University Law School and the Pew Commission on Fostering Results, Oct. 2004, also provided a venue for information exchange on the development of dependency measures.
51. Information by event gives, for example, a count of the number of hearings resulting in termination of parental rights. Information by case and cohort gives, of all cases filed during a specified time period, the percentage of cases in which parental rights were terminated as of a specified date.
52. *See* BUILDING A BETTER COURT, *supra* note 4, at 20.
53. *Id.* at 53. *Building a Better Court* does not recommend the use of a case management system for collecting all performance-measure data.
54. COURT STATISTICS REPORT, *supra* note 17, at 58.3.
55. The AOC Collaborative Courts Web site, www.courtinfo.ca.gov/programs/collab/, defines collaborative courts.

The Expanding Role of the Juvenile Court in Determining Educational Outcomes for Foster Children

The juvenile court system has not been a good parent. More than 500,000 children nationwide are in foster care.¹ Approximately 20,000 of those children age out of the system every year.² A review of studies tracking the educational outcomes of foster children reveals that these children often have serious academic deficiencies. For example, depending on the research study, 26 to 40 percent of foster children repeat one or more grades, and 30 to 96 percent are below grade level in reading or math.³ High school graduation rates vary between 20 and 63 percent.⁴ By contrast, 84 percent of children in the general population graduate from high school.⁵ Earning a high school diploma makes a real, long-term difference in the lives of disadvantaged children; without it, they leave care poorly equipped to cope with the challenges they will face as young adults living on their own.⁶

Former foster children have expressed dissatisfaction with the educational services they received while in the system. For example, Roberta A., who attended nine different schools while in foster care, remembers being in honors classes before entering the system but ending up with assigned worksheets and busywork below her educational level while attending an alternative education program. Iisha B., who lived in a group home, says she was a 10th grader doing 4th-grade level work. Jeff F., who also lived in a group home, wanted to be a biologist but says he did not get the upper-level science classes he needed. Jennifer M., a former foster youth who had more than 20 placements, says she loved math but believes that her skill level dropped the longer she stayed in the system.⁷

THE CURRENT SYSTEM

Historically, judges, advocates, and placing agencies have paid little attention to the educational services that children in their caseloads receive.⁸ Training on how to advocate in the educational system on behalf of foster children has been virtually nonexistent for social workers, probation officers, and substitute care providers, such as group homes and foster parents.⁹ Few requirements are placed on substitute care providers to ensure proper educational involvement and support for children in their care. And though attorneys

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Children in foster care often face a cadre of challenges that hinder their ability to succeed academically. This article reviews the literature on educational outcomes for foster children and discusses those challenges, arguing that shortcomings in training, advocacy by the courts and related institutions, and systemwide coordination impede educational achievement. The article also reviews new legislative initiatives and the expanding role of the juvenile courts in matters affecting the education of foster children. Using San Diego County as an illustration, it concludes that greater collaboration among the courts, schools, placing agencies, and care providers will help improve educational outcomes for foster children. ■

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representing children may become experts in juvenile court practice, they are often unfamiliar with the protections afforded to children under education laws, such as those supporting school stability or special education.¹⁰ This lack of knowledge is significant in that the educational experiences of most children in foster care are negatively affected by placement changes, and anywhere between 30 and 41 percent of children in foster care receive some sort of special educational services.¹¹

The complete consequences of neglecting the educational needs of foster children are not precisely known because little data in this area are collected or maintained by child welfare systems.¹² As a result, the mandated health and education passport¹³ for children in care generally contains little, if any, educational information.¹⁴

When asked why more attention is not placed on education, child welfare professionals generally respond, "Because education is the school's job."¹⁵ With social workers and advocates focused primarily on family reunification and permanency planning, the educational progress of foster children has simply not received adequate attention.

Multiple changes in placement and the lack of advocacy on behalf of these children take a toll on their chances for academic success. Two case scenarios illustrate some of the obstacles that directly affect the educational progress of foster children:

- Ten-year-old Mary G. was living in a foster home and enrolled in the local public school, where she was assessed for special educational services. It was determined that she qualified for adaptive physical education, resource help, and speech therapy; an Individualized Education Program (IEP)¹⁶ outlining these services was developed for her. Her disabling condition was listed as "learning handicapped." No behavior problems were indicated in the classroom. Two months later, Mary was moved to a group home in a different school district ostensibly because of behavior problems in the foster home. A new IEP was immediately developed, and she was placed in the group home's on-site school.

No services were included. Her disabling condition was also changed to "emotionally disturbed." It was later learned that her prior educational information did not transfer with her, and that the surrogate parent who consented to the reassessment and signed Mary's new IEP had never met her, had never spoken to anyone about her, and had not attended her IEP meeting.

- Seventeen-year-old Ryan D. experienced multiple changes in placement while in foster care. He had attended more than six different high schools. While in his last group home, Ryan was told that he had earned only 12 credits toward graduation, yet 44 were required. Within months he would turn 18 and be removed from his group home. Ryan's behavior in the group home was also problematic. He felt depressed, angry, and hopeless about his future.

EFFECTS OF MULTIPLE PLACEMENT CHANGES ON EDUCATIONAL SUCCESS

Changes in placement that result in multiple school transfers hinder the ability of foster children to succeed academically. In a real way, these children fall through the cracks. When school changes occur, education records do not always transfer in a complete or timely manner; meanwhile the child stays out of school for days or weeks at a time or is placed in inappropriate classes while waiting for the school to receive the records. Sometimes a child will move so often that his or her records are lost or misplaced, causing the child to lose credits or to repeat classes. In some cases, no one formally withdraws the child from the previous school, with the result that the child appears truant and his or her grades are lowered. Some of these children have even been referred to school attendance review boards.¹⁷

In one study, 42 percent of the foster children surveyed indicated that they had experienced delays in school enrollment while in foster care. The delay was often attributed to lost or misplaced school and immunization records. Of those children, more than half

said the delay resulted in nonattendance at school for anywhere from two to four weeks.¹⁸ Another study, administered over a 10-week period, showed that 3 out of 31 group-home children had waited more than 20 days before entering school, and that 10 attended no school at all during the full 10-week study period.¹⁹

School mobility, even without the complications of out-of-home placement, is negatively related to school difficulties. One study shows that, by 4th grade, mobile students are an average of four months behind their classmates on standardized tests and, by 6th grade, are as much as one year behind.²⁰ In another study, students who had changed schools at least six times between 1st and 12th grades were 35 percent more likely to fail a grade than students who didn't move or had moved just a few times during the period.²¹ Multiple changes in school placement during high school can significantly lower the student's chances for graduation.²²

Multiple school transfers can affect foster children's ability to access services available to other children. For example, children who undergo transfers often are not evaluated for or do not access special school services such as 504 plans,²³ special education programs, or gifted and talented programs. By the time teachers begin to identify and respond to specific academic deficits or strengths, the child may have moved to a different school.²⁴

Multiple changes in school placements are also frustrating for children who want to participate in extracurricular school activities. For example, many youth want to play on high school sports teams but end up missing either all or part of the season because of a new placement. Foster children complain about missing school friends and teachers, as well as the difficulty of constantly adjusting to new teachers, classes, and friends.²⁵ Sadly, children in foster care are not often given the opportunity to fulfill their dreams or have a sense of normalcy in their lives.

LACK OF ADVOCACY ON BEHALF OF FOSTER CHILDREN

Inattention to the educational needs of foster children, coupled with a subsequent failure in advocacy

by those involved in their lives, has fostered myriad problems for these children.

As discussed above, the available research reveals that far too many foster children achieve below grade level in reading or math and fail to graduate from high school. It may be true that a child's experience before entering foster care is partly to blame for these educational concerns.²⁶ But this condition also persists because social workers, care providers, attorneys, and other advocates have paid inadequate attention to the child's educational needs and often lack the training to advocate effectively. While a child is in foster care, often no one pays consistent attention to the child's educational development. Children placed in alternative education programs either have no one representing their educational interests or are represented by district-appointed surrogate parents who fail even to meet them or to review their educational records before making decisions for them. Finally, a child's social worker or attorney frequently fails to attend IEP team meetings or other important school conferences.

Children placed in large group homes with associated or on-site schools are often required to attend those schools despite previous successes in regular public school placements.²⁷ These alternative education programs tend to be nonpublic²⁸ or juvenile court schools.²⁹ Youth who attend these types of programs miss out on regular high school experiences and often cannot access the continuum of comprehensive educational services available at the local school campus. Though many group-home children require alternative school settings, many others placed there do not.

Furthermore, a nonpublic school placement is among the most restrictive of educational programs. It is designed to serve children who cannot function in a regular public school environment. Nonpublic schools tend to be separated from the regular public school campus and located either on the grounds of the group home or nearby. Placement in these programs is normally the result of an IEP team decision. But many children who are not eligible for special education services (and thus without IEPs)

or for whom eligibility is debatable end up placed in nonpublic schools.³⁰ In addition, some children who have been found appropriately eligible for special education services are inappropriately placed in nonpublic schools, which may be more restrictive than necessary. Few children enrolled in associated or on-site schools are integrated into the public school for any part of the day.³¹

Few advocates raise concern about the appropriateness of an educational placement. The lack of training and advocacy skills among those involved in the lives of these children compounds the problem of inattention, with the effect that advocacy for children in the system is inadequate overall.

Two complementary changes can markedly improve the situation in California. First, legislative and other initiatives have already taken place and are beginning to change the educational landscape for foster children. Second, some jurisdictions have already seen improved advocacy and interagency coordination among the courts, social services, probation, substitute care providers, and schools. The concluding sections of this article highlight these developments as they occurred in San Diego County and show that they are vital to the provision of appropriate educational services for foster children.

RECENT PUBLIC AND PRIVATE INITIATIVES

Federal, state, and private initiatives begun in the last decade focus on improving educational outcomes for foster children.

ADOPTION AND SAFE FAMILIES ACT

The federal Adoption and Safe Families Act regulations, which took effect March 2000, require states to undergo child and family service reviews. These federal reviews consider seven general outcomes related to child safety, permanency, and well-being in determining a state's overall performance in child protection cases. One outcome to be measured is whether children receive appropriate services to meet their educational needs. States risk losing federal

funds if they are not achieving these outcomes, including meeting the educational needs of children in care.³²

FAMILY TO FAMILY INITIATIVE

The *Family to Family* initiative is rapidly expanding to cities across the country. Designed in 1992 by the Annie E. Casey Foundation and child welfare leaders, the initiative promotes significant reform by urging the development of a family-centered, neighborhood-based foster-care system. Cities participating in the *Family to Family* initiative have committed themselves to the following outcomes:

- fewer children in institutional and congregate care
- shift of resources from congregate and institutional care to family foster care and family-centered services across all child- and family-serving systems
- shortened stays in out-of-home placement
- more planned reunifications
- fewer reentries into care
- fewer placement moves experienced by children in care
- more siblings placed together in the number of children placed away from their own families³³

Success in any of these outcomes should help reduce the mobility of foster-care children among schools and have a corresponding positive effect on educational achievement.

McKINNEY-VENTO HOMELESS ASSISTANCE ACT

The 2001 reauthorization of the McKinney-Vento Act, part of the federal legislation known as "No Child Left Behind," provides significant protections for homeless children and youth.³⁴ One statutory definition of "homeless children and youths" includes those who are "living in emergency or transitional shelters" or "awaiting foster care placement."³⁵ Under this definition, foster children who are initially detained or have been moved and are awaiting

a permanent placement should receive protections under the act. These protections require local school districts to do the following:

- To the extent feasible, permit the child to attend his or her school of origin (school where last enrolled or school attended when permanently housed) until the end of any academic year in which the child moves into permanent housing; or permit the child to enroll in any public school that other students living in the same attendance area are eligible to attend. School placement decisions must be made on the basis of the child's "best interest."³⁶
- Provide or arrange for transportation to and from the school of origin when the school is within the district. When the child moves to a different district, the act requires the new district and the district of origin to agree on a method for sharing transportation, responsibility, and costs.³⁷
- Designate an appropriate staff person as a liaison to assist homeless children. Among other things, the liaison must ensure that homeless students are enrolled in, and have full and equal opportunity to succeed in, schools in the district.³⁸
- Immediately enroll the homeless child. This is required even if the child is unable to produce records normally required for enrollment, such as previous academic records, medical records, proof of residency, or other documentation.³⁹
- Institute a process to promptly resolve disputes. Pending resolution of a dispute about school placement, the district must immediately enroll the child in his or her school of choice.⁴⁰

Recent nonregulatory guidance from the U.S. Department of Education confirms that children who are "awaiting foster care placement" are considered homeless and eligible for McKinney-Vento services. Children who are already in foster care, on the other hand, are not considered homeless under the act. The guidance suggests that school district liaisons confer and coordinate with local public social

service agency providers in determining how best to assist homeless children and youth who are awaiting foster-care placement.⁴¹

CALIFORNIA INITIATIVES

In California, the Legislature contracted with the American Institutes for Research (AIR) for three research reports—issued in 1998,⁴² 2001,⁴³ and 2003⁴⁴—that focused on nonpublic school placements and funding and the policies and procedures affecting the educational placement of group-home children. These reports led to compelling recommendations to the Legislature and state agencies on improving educational outcomes for foster children. Among other things, AIR has recommended that California

- improve its interagency coordination across local education, social services, mental health, and probation agencies as this coordination pertains to the provision of appropriate education services for foster children;⁴⁵
- develop an independent oversight board at the state and county level, focusing on ensuring that the work of those agencies providing education services are meeting the needs of children in foster care;⁴⁶
- develop a statewide data system that can be easily and quickly accessed by group-home and education authorities across the state;⁴⁷
- expand the California Foster Care Ombudsman Office to include educational concerns under its purview;⁴⁸ and
- clearly define roles and unambiguously assign ultimate responsibility for the education of children in foster care to the Department of Education and its county and local agencies.⁴⁹

Some of these recommendations have resulted in legislative change (as described later), but others remain to be addressed.

In addition, the 1998 California Budget Act expanded the Foster Youth Services program (FYS),

an education-based program that provides support to enhance the success of group-home children in school.⁵⁰ The local county office of education or school district operates FYS. One of the core elements of FYS is interagency collaboration. FYS providers work with social workers, probation officers, group-home staff, school staff, and community service agencies to train staff, as well as to influence and support school success. Currently, 53 California counties have FYS coordinators, and the goal is to expand this program to all 58 counties.

Effective January 1, 2004, the Governor of California approved Assembly Bill 490,⁵¹ a far-reaching bill that requires child welfare, probation, schools, and the juvenile courts to work together to improve educational outcomes for children in care. Among other things, the bill mandates the following:

- All pupils in foster care must have a meaningful opportunity to meet the challenging state pupil achievement standards to which all pupils are held.
- County placing agencies must promote educational stability by considering in placement decisions the child's school attendance area.
- A foster child must be permitted to remain in his or her school of origin for the duration of the school year when a placement changes if that is in the child's best interest.
- A comprehensive public school must be considered the first school placement option for foster children.
- Local educational agencies must designate a staff person as a foster-care education liaison to ensure proper placement, transfer, and enrollment in school for foster children.
- The county social worker and probation officer must notify the local educational agency when the child is leaving the school.
- A school district must deliver the child's education information and records to the next educational placement within two days of receiving a transfer request from a county placing agency.

- A foster child must be immediately enrolled in school even if all the typically required school records, immunizations, or school uniforms are not available.
- A foster child not must be penalized for absences resulting from placement changes, court appearances, or related court-ordered activities.

If done effectively, implementation of this bill will have a powerful impact on enhancing the educational outcomes for children in the foster-care system.

The Expanding Role of the Juvenile Court

The California juvenile courts have assumed a greater role in ensuring that the educational needs of foster children are addressed. Effective January 1, 2001, section 24 of the California Standards of Judicial Administration acquired new subsections (g) and (h), which provide guidance to juvenile courts on the educational rights of children. Among other things, they require the juvenile court judge to

- (1) [t]ake responsibility, with the other juvenile court participants at every stage of the child's case, to ensure that the child's educational needs are met... [;]
- (2) [p]rovide oversight of the... agencies to ensure that a child's educational rights are investigated, reported, and monitored... [;]
- (3) [r]equire that court reports, case plans, assessments, and permanency plans... address a child's educational entitlements and how those entitlements are being satisfied, and contain information to assist the court in deciding whether the right of the parent or guardian to make educational decisions for the child should be limited....⁵²

In addition, the Judicial Council of California has adopted rules and forms concerning the education of children in foster care.⁵³ Some juvenile courts have assembled multidisciplinary task forces to focus attention on ways their counties can improve educational outcomes.⁵⁴

Since January 1, 2003, the juvenile courts have been required to appoint a "responsible person" who has the legal authority to make educational decisions for a child when the court has removed this authority from the parents.⁵⁵ Similarly, social service and

probation agencies are required to consider whether or not to limit the authority of the parent or guardian to make education decisions for the child and, if so, whether there is a responsible person available to assume this role.⁵⁶ In most cases, the person to be appointed will likely be the foster parent or relative caretaker. When those persons are not available, juvenile courts should look to appropriate noncustodial relatives, nonrelative extended family members, mentors, and Court Appointed Special Advocates (CASAs). In cases where the court cannot identify a responsible person to advocate for a child and the child may be eligible for special educational services or already has an IEP, the court must then refer the child to the local school district for appointment of a surrogate parent. Recent amendments to California law governing the appointment of district surrogates now require them to meet the child and review the child's educational records.⁵⁷ The Judicial Council of California has promulgated a form to assist the courts with the implementation of these laws.⁵⁸

Developments in San Diego County

Systemic reform begins with the vision and strong support of the juvenile court presiding judge. San Diego County has been fortunate to have not only strong support from the bench but also a powerful working relationship with schools, social services, and probation, as well as with other public and private agencies. This close collaboration has significantly enhanced educational services and outcomes for foster children in this county.

In 1999, the supervising dependency court judge, along with a group of representatives from the children's law office, social services, and schools, raised concern about the education that 80 group-home children were receiving from their on-site nonpublic school. There was concern that the nonpublic school lacked sufficient curriculum, educational materials, and supplies. Textbooks were outdated, computers were old and in disrepair, and there was little in the way of educational software. Some believed the school lacked qualified teachers and aides; there was a reported lack of supervision as well as alleged

inappropriate discipline. Kids were bored, unchallenged, and regularly disruptive in the classroom. For two years, this group worked to improve the nonpublic school. Finally succumbing to pressure, the school closed its doors. With only eight weeks' notice, the local school district took over. School staff painted the classrooms; purchased new furniture, textbooks, computers, and supplies; enhanced the curriculum; recruited skilled, motivated teachers; and opened Alta Vista Academy.

Since that time, students have progressed academically and behaviorally. Several are now attending the local comprehensive public school campus. Many others are moving to lower levels of care, such as foster homes, or are being returned to their parents. The group home reports that the children's behavior has improved significantly. And, finally, district-wide student test results in writing, reading, and math are among the top in the district. Last year the school received the "Golden Bell Award" for excellence from the California School Board Association (CSBA). This annual award recognizes outstanding educational programs around the state. The success of Alta Vista Academy has motivated other school programs around the county to improve their efforts on behalf of foster children.

The presiding judge of the San Diego County juvenile court, along with members of the county's board of supervisors, has also created the San Pasqual Academy, a state-of-the-art residential education program serving foster youth aged 14 to 18. Only youth seeking placement in the academy are considered, and successful candidates are selected after a careful review by the residential provider, social services, and the school. Most of the youth selected are in a plan of long-term foster care in which reunification with family members is no longer an option. Younger siblings of enrolled youth are also carefully considered. The students live in cottages staffed by house parents. The academy's high school has developed an exceptional education program that offers a full array of academic curricula. If the academy does not offer a class requested or needed by a youth, he or she attends the local community college. As part

of the school experience, students are encouraged to participate and become involved in extracurricular activities, such as intramural and interscholastic athletics, student government, cheerleading, drama, and school clubs. All seniors are required to complete a senior portfolio.⁵⁹ Through the San Diego Workforce Partnership,⁶⁰ students are given opportunities to develop work experience both on and off campus. In the academy's third year of operation, over 95 percent of its departing seniors received a high school diploma.

RECOMMENDATIONS FOR REFORM: LESSONS FROM SAN DIEGO COUNTY

Over the past five years the San Diego County juvenile court, working closely with its partners, spearheaded a number of efforts aimed at improving educational outcomes for foster children. Below are examples of what the court has done, or is doing, to encourage and develop collaboration among all those who work to improve the lives of these children. They are offered here to policymakers as recommendations for reform.

- 1. Under the leadership of the juvenile court, create a multidisciplinary education task force to focus exclusively on enhancing education outcomes for foster children in your county.** Involve leaders from your local FYS program (see below), schools, social services, probation, children's attorneys, CASAs, and substitute care providers, as well as current and former foster children, in this effort. As part of the work of the task force, members should visit local educational programs that serve foster children, conduct focus groups with children in those programs, and talk with care providers seeking their views on how to support foster children in education. In San Diego County, all work in the area of education reform is either initiated by or reported to the juvenile court education task force. Making these efforts will help inform task force members on what needs to be done, and what is being done, to enhance education outcomes for foster children in your county.
- 2. Provide systemwide training on education laws and outcomes for foster children, as well as the roles and responsibilities of juvenile court judges and attorneys, placing agencies, substitute care providers, and schools.** Early on in the San Diego County court's efforts, the local Foster Youth Services program hosted a forum, inviting stakeholders to come together to address the educational needs of foster children. The presiding juvenile court judge, county school superintendent, and a member of the local board of supervisors hosted the forum. Over the last few years training has been continually provided across all disciplines to help ensure that system participants understand education laws and the importance of making education a priority. Last year, the presiding judge closed the dependency courts for an afternoon and required attorneys, judges, and others to participate in training related to the education of foster children.
- 3. Work closely with your local FYS program.** The goal of FYS is to improve policies and practices affecting the education of children in group-home care. With the support and involvement of its advisory board, FYS staff has developed an educational database that currently contains more than 8,500 educational records of foster children.⁶¹ The database is Web based and accessible to social services, probation, juvenile courts, attorneys, and substitute care providers. It receives weekly downloads from CWS/CMS to include health, education, and placement information. Unlike the CWS/CMS system, which is closed, the database allows the multiple agencies with responsibilities to specific children secured access to relevant student information. It has also been a mechanism by which the juvenile court informs agencies as to who holds education rights for children in its care. FYS is also acting as an educational liaison for group-home children by communicating with, and linking together, group-home providers, schools, social services, and probation. To support these efforts, a juvenile court order allows these agencies to share educational information with each other.

4. Develop county and court protocols that help ameliorate the effects of changes in school placements. For example, in San Diego County, FYS staff and the advisory board developed an inter-agency agreement between schools, social services, probation, and group homes. Based on current law, the interagency agreement defines the role and responsibilities of each of these agencies. The agreement specifically details how educational information should be obtained and transferred and how schools should be notified of new students placed in group-home care. These protocols help each agency understand not only its own specific duties and tasks but also the duties and tasks of its agency partners. This results in a more comprehensive, efficient, and coordinated effort on behalf of children.

5. Using the law as your framework, work with placing agencies to develop internal policies and procedures that clearly delineate the responsibilities and duties of workers. At a minimum, these policies and procedures should

- a. inform workers of the educational rights of foster children, as well as the workers' responsibility, in appropriate circumstances, to determine whether the educational rights of parents or guardians should be limited and, if so, who should be appointed to assume those rights;
- b. promote school stability whenever possible;
- c. require a complete health and education summary for every child, as well as sufficient education information in each court report;
- d. if a transfer should occur, require that the child be checked out of school and ensure that the old school transfer education records to the new school in a timely manner; and
- e. urge workers to become more involved in advocating on behalf of children in educational settings.

Last year, the San Diego County Health and Human Services Agency (HHSA) distributed a special notice to all its workers, informing them of

laws pertaining to the education of foster children as well as of new, required policies and procedures that support the educational success of children in their caseloads. For example, FYS and HHSA have developed protocols and forms to assist with the proper withdrawal of children from school to prevent the problem of lowered grades when schools are not informed that a child has changed a school placement. An HHSA manager is now requiring that all new applications of children being considered for group-home placement include complete health and education information and that all group-home providers help children with homework and support academic success. And, more recently, HHSA has assigned internal education liaisons in all six regions⁶² of San Diego County to work closely with FYS liaisons and foster-youth school district liaisons so that all liaisons become more informed of school services in their areas and are better able to provide support to social workers.

These activities, along with the development of educational programs such as the San Pasqual and Alta Vista academies, have resulted in better outcomes for San Diego County's foster youth. Indeed, the high school completion rate for foster youth in San Diego County has increased from a low 51 percent in 1998 to nearly 75 percent in 2004.⁶³

Because of the innovations in San Diego County, there are happy endings to the two scenarios described earlier in this article. Mary's attorney intervened and successfully advocated for the revision of her IEP to include appropriate services, including a change from her previous designation as emotionally disturbed, that more accurately reflect her neurological deficits. She was also returned to public school, where she has succeeded academically. Concerned for Ryan's situation, the educational liaison for the local FYS program searched for every bit of high school seat time she could find in his school records and ultimately identified 24 credits. Ryan was immediately enrolled in adult education courses, which he took simultaneously while attending his last high school. He graduated in an emotional ceremony in front of his supporters and peers.

The education of foster children is finally beginning to receive the attention it has long deserved. San Diego County's experience shows the progress possible when juvenile courts take a leadership role in bringing stakeholders together to improve educational outcomes. Visionary and capable leadership, coupled with highly functional collaborative teams, can ensure that all children in foster care have the opportunity to develop the skills necessary to meet the state academic achievement standards to which all students are held. The California court system can become better parents. Its children deserve no less.

NOTES

1. Children's Bureau, U.S. Dep't of Health & Human Servs., National Adoption and Foster Care Statistics, at www.acf.hhs.gov/programs/cb/dis/afcars/publications/afcars.htm.
2. CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., THE AFCARS REPORT (2003), at www.acf.hhs.gov/programs/cb/publications/afcars/report8.pdf.
3. ELISABETH YU ET AL., IMPROVING EDUCATIONAL OUTCOMES FOR YOUTH IN CARE: A NATIONAL COLLABORATION, at vii (Child Welfare League of Am. Press 2002).
4. *Id.*; see also MASON BURLEY & MINA HALPERN, EDUCATIONAL ATTAINMENT OF FOSTER YOUTH: ACHIEVEMENT AND GRADUATION OUTCOMES FOR YOUTH IN STATE CARE 19 (Wash. State Inst. for Pub. Policy 2001), at www.wsipp.wa.gov/rptfiles/FCEDReport.pdf; JANIS AVERY, EDUCATION AND CHILDREN IN FOSTER CARE: FUTURE SUCCESS OR FAILURE? (New Horizons for Learning 2001), at www.newhorizons.org/spneeds/inclusion/collaboration/avery.htm.
5. ERIC C. NEWBURGER & ANDREA E. CURRY, EDUCATIONAL ATTAINMENT IN THE UNITED STATES (UPDATE) (U.S. Census Bureau, Mar. 2000), www.census.gov/prod/2000pubs/p20-536.pdf.
6. See THOMAS PARRISH ET AL., AM. INSTS. FOR RESEARCH, EDUCATION OF FOSTER GROUP HOME CHILDREN, WHOSE RESPONSIBILITY IS IT?: STUDY OF THE EDUCATIONAL PLACEMENT OF CHILDREN RESIDING IN GROUP HOMES (FINAL REPORT) [hereinafter GROUP HOME CHILDREN] 1-4 (2001) (submitted to Cal. Dep't of Educ. 2001), available at www.csef-air.org/publications/related/LCI_final.pdf.
7. Mary Curran-Downey, *How It Looks From Inside Foster Care*, SAN DIEGO UNION-TRIBUNE, Feb. 29, 2000, at B-1.
8. GROUP HOME CHILDREN, *supra* note 6, at 1-1; BURLEY & HALPERN, *supra* note 4, at 1.
9. YU ET AL., *supra* note 3, at 18.
10. See McKinney-Vento Homeless Assistance Act, 42 U.S.C. §§ 11431-11435 (2000 & Supp. 2004) (as amended by the McKinney-Vento Homeless Education Assistance Improvements Act of 2001, Pub. L. No. 107-110, §§ 1031-1034, 115 Stat. 1989 (2002)); Individuals With Disabilities Education Act, 20 U.S.C. §§ 1400-1481 (2000 & Supp. 2004); Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794 (2000); Act of Oct 12, 2003, ch. 862, 2003 Cal. Stat. {___}, available at www.leginfo.ca.gov/pub/03-04/bill/asm/ab_0451-0500/ab_490_bill_20031012_chaptered.pdf.
11. YU ET AL., *supra* note 3, at 5.
12. For example, the mandatory California case management system (CWS/CMS) used by social workers has very few data fields requiring educational information, and those fields are often not completed.
13. All children placed in foster care in California must have a case plan that includes a summary of the health and education information or records of that child. See CAL. WELF. & INST. CODE § 16010 (West 2004).
14. GROUP HOME CHILDREN, *supra* note 6, at 1-3, 3-1, 3-4.
15. *Id.* at 1-7.
16. Under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400-1481 (2000 & Supp. 2004), every state that receives federal education funds is required to prepare an individualized educational program (IEP) for each student who qualifies for special education. The IEP is the central tool used by public schools to ensure that their disabled students receive a free appropriate public education (FAPE). The IEP reports on the child's current education performance and establishes annual and short-term objectives for improving that performance. It also describes any specially designed instruction and services that will enable the child to meet those objectives. *Id.* at § 1414(d). The school district is required to provide the services necessary to enable the child to meet his or her educational objectives. *Id.*
17. J.K. Slater & C.T. Smith, Cal. Dep't of Educ., *Meeting the Educational Needs of Foster Children in California: Strategies for Improving Academic Success* (1993), 27 HASTINGS CONST. L.Q. 4 (2000) (giving figures from a survey of school mobility among California foster-care youth). For the statutory basis of school attendance review boards, see CAL. EDUC. CODE §§ 48320-48324 (West 2004).
18. ADVOCATES FOR CHILDREN OF N.Y., INC., EDUCATIONAL NEGLECT: THE DELIVERY OF EDUCATIONAL

SERVICES TO CHILDREN IN NEW YORK CITY'S FOSTER CARE SYSTEM 36–37 (2000), www.advocatesforchildren.org/pubs/FCrep7-11.doc.

19. GROUP HOME CHILDREN, *supra* note 6, at 1-7.

20. Linda Jacobson, *Moving Targets*, EDUC. WEEK, Apr. 4, 2001, at 32, www.edweek.org/ew/articles/2001/04/04/29mobility.h20.html.

21. David Wood & Neal Halfon, *Impact of Family Relocation on Children's Growth, Development, School Function, and Behavior*, 270 JAMA 1334, 1338 (1993).

22. Russell W. Rumberger & Katherine A. Larson, *Student Mobility and the Increased Risk of High School Dropout*, 107 AM. J. EDUC. 1 (1998); Kathleen McNaught, *Education Advocacy in Child Welfare Cases: Key Issues and Roles*, 21 ABA CHILD L. PRAC. 129, 134 (Nov. 2002); Jacobson, *supra* note 20, at 32–34.

23. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (2000), is a civil rights statute protecting individuals with disabilities from discrimination in programs and activities that receive federal funds. A 504 plan is crafted for a student with substantial mental or physical impairments that limit one or more major life activities. The plan outlines special accommodations to the student's educational program and is designed according to individual need.

24. YU ET AL., *supra* note 3, at 5, 13; CTR. WITHOUT WALLS, *THE EDUCATIONAL NEEDS OF CHILDREN IN FOSTER CARE: THE NEED FOR SYSTEM REFORM* (1998), www.advocatesforchildren.org/pubs/foster.doc.

25. YU ET AL., *supra* note 3, at 13; Jacobson, *supra* note 20, at 32–34; ADVOCATES FOR CHILDREN OF N.Y., INC., *supra* note 18, at 42–43.

26. Jacobson, *supra* note 20, at 32–34.

27. A group home may not require placement of a youth in a nonpublic school that is owned and operated by that group home. CAL. EDUC. CODE § 56366.9 (West 2004).

28. A nonpublic school (NPS) is a private, alternative special education school available to a local educational agency and parents. An NPS contracts with the local education agency to provide programs for youth who generally cannot function in a regular public school. Youth are placed in these programs as a result of an IEP team decision. See CAL. EDUC. CODE §§ 56034, 56366.

29. A juvenile court school is a public alternative school that serves youth in juvenile halls, juvenile ranches, group

homes, and other institutional settings. See CAL. EDUC. CODE §§ 48645–48645.6. NOTES

30. GROUP HOME CHILDREN, *supra* note 6, at 3-26.

31. One explanation for the inappropriate placement of youth in nonpublic schools may be that, until recently, the state fully reimbursed local school districts their educational costs for group-home youth who attend nonpublic schools but offered little additional aid for public school placement of these same youth. In part because of this funding system, school administrators often supported placement in a nonpublic school. Group-home providers also tended to prefer placement in the associated or on-site school, particularly when the provider owned or operated that school. Fortunately, these funding provisions have been modified to eliminate any fiscal incentive to place youth in nonpublic schools. See Act of Aug. 11, 2004, ch. 216, 2004 Cal. Stat. {____}, available at www.leginfo.ca.gov/pub/03-04/bill/sen/sb_1101-1150/sb_1108_bill_20040811_chaptered.pdf.

Although there are many excellent alternative education programs in California, concerns do exist regarding the quality of education some of them provide. One reason for concern is that the state's certification and monitoring processes for nonpublic schools have tended to focus on a program's *facility* and *access* to required curriculum standards but did not generally consider factors concerning the *quality* of the program. Youth complain that some alternative education programs are deficient in educational resources and curriculum. They also complain about the quality of teachers and contend that teachers fail to prepare them for higher education. On September 30, 2004, California Governor Schwarzenegger approved the Act of Sept. 30, 2004, ch. 914, 2004 Cal. Stat. {____}, available at www.leginfo.ca.gov/pub/03-04/bill/asm/ab_1851-1900/ab_1858_bill_20040930_chaptered.pdf. Through its mandates, this act will significantly increase the monitoring and accountability of nonpublic school education by state and local educational agencies.

32. 45 C.F.R. §§ 1355.31–1355.37 (2003); McNaught, *supra* note 22, at 130.

33. Annie E. Casey Found., *Family to Family: Tools for Rebuilding Foster Care*, available at www.aecf.org/initiatives/familytofamily/overview.htm.

34. McKinney-Vento Homeless Education Assistance Improvements Act of 2001, Pub. L. No. 107-110, § 1032, 115 Stat. 1425, 1989 (2002) (codified at 42 U.S.C. §§ 11431–11435 (2000 & Supp. 2004)).

- NOTES
35. *Id.* § 11434a(2). Other definitions of *homeless children and youths* in section 11434a(2) include
- (A) ... individuals who lack a fixed, regular, and adequate nighttime residence ... ; and
 - (B) ...
 - (i) children and youths who are sharing the housing of other persons due to loss of housing, economic hardship, or a similar reason; are living in motels, hotels, trailer parks, or camping grounds due to the lack of alternative accommodations; [or] are abandoned in hospitals ... ;
 - (ii) children and youths who have a primary nighttime residence that is a public or private place not designed for or ordinarily used as a regular sleeping accommodation for human beings ... ;
 - (iii) children and youths who are living in cars, parks, public spaces, abandoned buildings, substandard housing, bus or train stations, or similar settings; and
 - (iv) migratory children ... who qualify as homeless for the purposes of this part because the children are living in circumstances described in clauses (i) through (iii).
36. *Id.* § 11432(g)(3).
37. *Id.* § 11432(g)(1)(J)(iii).
38. *Id.* § 11432(g)(6).
39. *Id.* § 11432(g)(3)(C)(i).
40. *Id.* § 11432(g)(3)(E).
41. The full text of the guidance can be obtained on the Department of Education Web site at www.ed.gov/policy/elsec/guid/list.jhtml.
42. THOMAS PARRISH ET AL., SPECIAL EDUCATION: NON-PUBLIC SCHOOL AND NONPUBLIC AGENCY STUDY (Am. Insts. for Research 1998).
43. GROUP HOME CHILDREN, *supra* note 6.
44. THOMAS PARRISH ET AL., POLICIES, PROCEDURES, AND PRACTICES AFFECTING THE EDUCATION OF CHILDREN RESIDING IN GROUP HOMES (FINAL REPORT) (Am. Insts. for Research 2003) [hereinafter POLICIES, PROCEDURES, AND PRACTICES].
45. GROUP HOME CHILDREN, *supra* note 6, at 5-2.
46. POLICIES, PROCEDURES, AND PRACTICES, *supra* note 44, at VI-6.
47. GROUP HOME CHILDREN, *supra* note 6, at 5-2.
48. POLICIES, PROCEDURES, AND PRACTICES, *supra* note 44, at VI-5.
49. *Id.* at VI-7.
50. See CAL. EDUC. CODE §§ 42920–42925.
51. Act of Oct. 12, 2003, ch. 862, 2003 Cal. Stat. {____}, available at www.leginfo.ca.gov/pub/03-04/bill/asm/ab_0451-0500/ab_490_bill_20031012_chaptered.pdf.
52. CAL. STDS. JUD. ADMIN. § 24(h)(1)–(3).
53. CAL. R. CT. 1456(c), 1499; Judicial Council of Cal. Form JV-535 (*Order Limiting Parent's Right to Make Educational Decisions for the Child and Appointing Responsible Adult as Educational Representative—Juvenile*) (2004); Judicial Council of Cal. Form JV-536 (*Local Educational Agency Response to JV-535—Appointment of Surrogate Parent*) (2004). These rules and forms have been amended to reflect changes in the law.
54. For example, task forces have been formed in Los Angeles, Orange County, and San Diego.
55. CAL. WELF. & INST. CODE § 361 (West 2004).
56. *Id.* §§ 358.1, 366.1, 727.2.
57. CAL. GOV'T CODE § 7579.5 (West 2004).
58. Judicial Council of Cal. Form JV-535 (2004).
59. The senior portfolio includes an extensive written research paper. Students are also required to present their work orally.
60. Created under a Joint Powers Agreement by the City and County of San Diego, the San Diego Workforce Partnership coordinates job training and employment programs. At San Pasqual Academy, the Partnership links with Casey Family Programs, Access, Inc., Junior Achievement, and Creative Learning Systems to create a comprehensive work readiness program. For more information, see www.sandiegowork.com.
61. Approximately 8,000 youth are in the San Diego child dependency system. The information contained in the database also includes delinquency youth who are in foster care.
62. The San Diego Health and Human Services Agency has organized itself into six separate geographical regions; central, north central, north inland, north coastal, south, and east.
63. Jennifer Vigil, *Fostering New Lives*, SAN DIEGO UNION-TRIBUNE, Aug. 16, 2004, available at www.signonsandiego.com/uniontrib/20040816/news_1m16foster.html.

Effective Management of Parental Substance Abuse in Dependency Cases

The primary goal of the child protection and juvenile dependency system is to make sure that each child is placed in a safe, permanent home as quickly as possible. Children often come into the system because of their parents' drug or alcohol addiction. The parents' substance abuse problems must be remedied before children can be reunified with the family. If this goal is not attainable, the court needs to determine that fact early enough in the processing of the case so that the child can actually be adopted while still young enough and psychologically healthy enough to ensure the likelihood of adoption.

Child protection statutes reflect this goal, but parental substance abuse is difficult to treat. A comprehensive management program to assist the court in complying with statutory timelines is essential. Parents must be given a structured approach to overcoming their substance abuse, and courts must be provided specific information about parental compliance with reunification orders. The court can then proceed with timely permanent placement: reunification for children with recovering parents and adoption for children of noncompliant parents.

THE CONNECTION BETWEEN PARENTAL SUBSTANCE ABUSE AND DEPENDENCY

"All children wake up in a world that is not of their own making, but children of alcoholics and other drug-addicted parents wake up in a world that doesn't take care of them."¹ Indisputably child abuse and drug abuse are intertwined: "Children whose parents abuse alcohol and other drugs are nearly three times as likely to be abused, and more than four times as likely to be neglected, than children whose parents are not substance abusers."² According to national surveys, 40 to 80 percent of children who come to the attention of the child welfare system live with a substance-abusing parent.³ To deal with this epidemic, courts must order treatment for all substance-abusing parents.

Parents are entitled to a finite statutory time, usually one year, to remedy their substance abuse problems in order to have their children returned. But courts do not always have accurate information about parental compliance with reunification orders because of ineffective management of these cases,

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Child protection petitions present a particular challenge when there is parental drug and alcohol addiction. The vast majority of juvenile dependency cases involve parental substance abuse. This article argues that the majority of dependency cases involving substance-abusing parents are mismanaged to poor results, often leaving children in foster care until the age of majority. It also discusses the developmentally damaging nature of foster care, the very institution we rely on to alleviate child abuse. And, finally, it proposes that well-managed substance abuse treatment is a pragmatic approach to these problems. Effective assessment and enrollment in treatment coupled with accurate reporting of parental compliance allow courts to ensure permanent placement within the

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one-year federal- and state-mandated time frames. Well-managed dependency cases improve outcomes by increasing the numbers of children both reunified and adopted. The added costs of providing drug treatment and case management are offset by savings from significantly shortened stays in foster care, which can result in both improved outcomes and more effective allocation of resources. ■

which can lead to prolonged foster-care stays for children while courts and social workers attempt to determine whether parents are progressing in sobriety and complying with court orders.

Effectively dealing with this primary problem means that treatment must be regular and organized, with daily-scheduled outpatient sessions, not weekly, voluntary self-help meetings. This presents a serious challenge under the current juvenile dependency system. According to a 1997 Child Welfare League of America survey of state child welfare agencies, 67 percent of the parents whose children were in the child protection system required substance abuse treatment services, but the agencies were able to provide treatment to only 31 percent of the families who needed it.⁴ The survey further revealed that in states where treatment was available, a parent often had to wait a year to receive it.⁵ Parents must be able to access treatment immediately if they are to “get clean and sober” and successfully reunify with their children within statutory time limits. Ordering drug treatment is futile if drug treatment services are not available; in such cases, through no fault of their own, parents are effectively forced to disobey the court order because they cannot find treatment. And, because the unavailability of drug treatment services renders the reunification order ineffective and unenforceable, juvenile courts are, in effect, acting as institutional enablers, unwittingly assisting the parent in prolonging his or her addiction. Ultimately, the greatest harm is to the children in these cases, who continue to bounce from foster home to foster home, waiting for their parents to recover so they can go home. The current system prolongs and reinforces parent-child separations and undermines the dignity and authority of the court.

THE IMPACT OF FOSTER CARE ON A CHILD'S PSYCHOLOGICAL DEVELOPMENT

When a child is removed from his or her parent as a result of abuse or neglect, the child welfare system commonly turns to foster care as a temporary measure to ensure the child's safety. But, often, pre-permanency foster care is far from temporary. Despite the federal statutory timelines allowing up to 18 months for reunification,⁶ in 2002 the average length of time a child remained in foster care was 32 months.⁷

DISRUPTION OF ATTACHMENT TO PRIMARY CAREGIVER

Reducing the amount of time children remain in foster care is critical, because inevitably children left adrift in the system end up with psychological problems caused by these disruptions. Substantive research confirms the developmental importance of the child's psychological attachment to a primary caregiver, “the deep and enduring connection established between a child and caregiver in the first several years of life.”⁸ For children, the primary function of attachment is to provide a safe environment that allows them to grow and develop as differentiated individuals.⁹ A securely attached child has

a strong sense of trust, which will influence his or her future relationships. The early stage of attachment developed through physical contact between caregiver and infant enables the child to later feel capable of becoming autonomous from his or her primary caregiver.¹⁰ The child can explore the environment with confidence because the attachment provides a “secure base” to which the child can return.¹¹ Without this base, a child lacks emotional stability and is not capable of taking the necessary risks for further cognitive and emotional development.¹²

If this attachment is broken, the child may face serious consequences throughout his or her development.¹³ Disrupted attachment for children tends to manifest in antisocial behaviors; aggression; the inability to experience genuine trust, intimacy, and affection; and a lack of empathy and remorse.¹⁴ This constellation of symptoms is considered a factor in the development of criminal behavior in other settings.¹⁵ Research suggests a direct link between a person’s level of empathy and the propensity to commit a crime.¹⁶ Indeed, in 1995, 17 percent of this country’s prison population consisted of former foster children.¹⁷ It can be expected that many of those children suffered from problems characterized by a lack of empathy, resulting from foster-care experiences that were either too lengthy or included too many placement changes.

IMPAIRED ABILITY TO BOND OR CONNECT

Children also require stability and continuity in their care and relationships in order to grow and develop.¹⁸ Foster care, however, is often characterized by frequent moves from placement to placement, which further impair the child’s ability to attach to a caregiver and develop normally.¹⁹ A child placed in a foster home naturally attempts to attach to the foster parent. But if the child experiences a series of broken attachments caused by moves from one placement to another, the child’s attachments become “increasingly shallow and indiscriminate.”²⁰ These children “tend to grow up as persons who lack sustained warmth in their relationships.”²¹

When the juvenile dependency system fails to facilitate a child’s need to form and maintain secure attachments, the child gradually becomes averse to forming attachments with people because he or she expects that these attachments inevitably will be broken.²² This has profound implications when the child leaves the foster-care system with an inability to form bonds and care for others, not just for the developing individual but also for society.

CHILD’S DEVELOPMENTAL STAGE AND TIME IN PLACEMENT

To fully comprehend the developmental impact of foster care on abused and neglected children, those involved in making placement decisions must understand that a child’s perception of time differs from an adult’s.²³

Children do not measure time by a calendar; they have, as Goldstein et al. have noted, “their own built-in time sense, based on the urgency of their instinctual and emotional needs and on the limits of their cognitive capacities.”²⁴ “The younger the child, the shorter the time interval before a leave-taking will be experienced as a permanent loss accompanied by feelings of helplessness, abandonment, and profound deprivation.”²⁵ An infant is not capable of anticipating the future and so has no way of knowing whether he or she has been abandoned when the caregiver is absent.²⁶ “Emotionally and intellectually, an infant or toddler cannot stretch her waiting more than a few days without feeling overwhelmed by the absence of her parents.”²⁷ Only after the infant grows and learns that the caregiver will consistently return from brief absences does he or she become capable of anticipating the future and feel secure during short separations. And as children mature into adolescence, they are better able to tolerate separation from their parents because they have developed a greater capacity to retain memories and anticipate the future.²⁸

It follows, then, that placement decisions need to reflect the child’s sense of time and thereby protect the child’s sense of security. This is most critical when the child is younger than 3 years old.²⁹ It

isn't just federal timelines that dictate how quickly a court needs to determine the child's long-term placement—it is also the need to protect the child's psychological well-being.

AVOIDING OR REDUCING THE USE OF FOSTER CARE

Because pre-permanency foster care may be developmentally damaging to children, it is essential to explore all other alternatives before resorting to the use of foster care. Alternatives include

- thorough searches for relatives and family group conferences to identify appropriate placements within the extended family, and provision of stipends for the child's care during the placement;³⁰
- family preservation programs to strengthen placements within extended families; and
- drug treatment programs that focus on the needs of the entire family and include placement of mothers and children together in secure settings.

All these approaches serve to avoid the negative effects of nonrelative foster placements for children by developing placements within extended families. When programs incorporating these approaches exist in the community, they may provide a viable alternative to nonrelative care.

Substance abuse treatment models that focus on treatment of the entire family do exist, but in small numbers. One of the most promising alternatives to foster care for these families is SHIELDS for Families in Los Angeles. SHIELDS has achieved great success in providing comprehensive services to families dealing with substance abuse. The program targets not only the substance-abusing parent but also other family members affected by the abuse, including drug-exposed infants and other siblings. The success of this program is extremely encouraging.³¹

A critical component of other promising programs is that children of the substance-abusing parent live in the treatment facility with their recovering parent; obviously such placement must be consistent with

a professional risk assessment for child safety. These models are highly beneficial because they allow the family to remain intact during drug treatment, thus promoting healthy parent-child attachment and avoiding the use of foster care. Parents attend parenting and child development classes to learn the skills they need to raise a healthy child. Additionally, the entire family receives structure and services to mitigate the damage of parental substance abuse.

THE SAN DIEGO COUNTY EXPERIENCE—A CASE STUDY

Although foster care is not a preferred placement option, sometimes it is unavoidable. When it is the only viable alternative, the juvenile courts should take steps to minimize the developmental damage caused by out-of-home placement. The experience of the San Diego County dependency court's Recovery Project may offer guidance.

Applying the proposed reforms, San Diego County has virtually eliminated long delays to permanent placement. The increased use of family group conferences,³² thorough family investigations, and intensive, court-monitored drug and alcohol treatment has lessened children's exposure to the psychological trauma of nonrelative care and lengthy placement in long-term foster care.

Prior to April 1998, approximately 80 percent of dependency cases in San Diego County involved alcohol or drug abuse by one or both parents.³³ Immediate and effective treatment was not available for parents, so the court extended deadlines for compliance with reunification plans. As a consequence, rather than providing prompt and definitive intervention, the previous system allowed families to drift for unacceptably long periods, discouraging parental rehabilitation and aggravating parent-child separations. San Diego County also was far from compliant with statutory time frames; statistics indicate it took more than 34 months to close 50 percent of the dependency cases.³⁴ That meant children and adolescents spent years in foster care. More than 50 percent of the children in foster care

had three or more changes in placement, causing them further trauma and psychological problems.³⁵

On April 13, 1998, San Diego County's juvenile court implemented the Dependency Court Recovery Project (DCRP).³⁶ The primary goal of the project was to provide coordinated, comprehensive, and timely drug and alcohol services as a means of facilitating either reunification or permanency planning for families. Central to the project was the concurrent implementation of the Substance Abuse Recovery Management System (SARMS).

SARMS: SUBSTANCE ABUSE RECOVERY MANAGEMENT SYSTEM

SARMS is an extensive case management system operated through the county's contract with an independent nonprofit agency that specializes in drug and alcohol case management. SARMS makes alcohol and drug treatment immediately available to all parents in the dependency system who need these services. The treatment plan, also called the "recovery services plan," is developed by a recovery-specialist caseworker. In each of the dependency departments, a judge is responsible for enforcing the SARMS orders unless and until the parent moves on to dependency drug court. Every two weeks, the judge receives a report indicating compliance with treatment regimens and the results of the last two weeks' drug tests. Every 30 days the court holds hearings to review the parent's progress in treatment.

In the SARMS program parents who relapse or fail to attend treatment as ordered are held in contempt of court for violation of their reunification plans. The first noncompliant event garners a judicial reprimand; subsequent noncompliance may result in a sanction of 24 to 36 hours in custody. These proximally administered, judiciously applied sanctions—consequences for relapse along with positive reinforcement for good behavior in the form of accelerated visitation opportunities with children—substantially increase parental sobriety and the probability of reunification. Those parents who have more than one relapse event are referred to drug court.

DEPENDENCY DRUG COURT

The dependency drug court is designed to help SARMS participants who are having difficulty meeting their substance abuse treatment goals. Reserved for multiple relapses, it provides greater judicial oversight and a supportive group atmosphere in a three-phase program that takes nine months to complete.³⁷ Participation is voluntary and subject to the drug court judge's approval. Participants must make a commitment to follow their treatment plans and appear at the dependency drug court sessions on a regular basis.

The dependency drug court's higher level of court supervision and peer support encourage substance-abusing parents to cooperate more fully with the program. Parents continue in the treatment program specified by their recovery services plan. Court reports, including drug test reports, are then made weekly. Parents receive praise for compliance and tokens for successive periods of continuous sobriety. As in SARMS, failure to comply with drug court orders results in sanctions. Examples of noncompliant events include a "dirty test," an unexcused absence, or failure to comply with SARMS or treatment program activities. But in fact, drug court participants often appear more frequently than their program requires because drug court offers them significant encouragement from each other, as well as from the drug court judge. A social worker is available at the sessions to answer questions about visitation, housing problems, or other issues regarding their reunification plans. A lawyer also attends to answer any legal questions the parents may have and to represent their legal interests, if necessary.³⁸

THE GOOD NEWS FROM SAN DIEGO COUNTY

As of October 2003, after five years of operation, SARMS had 1,253 parents enrolled, and 80 percent of those parents were compliant with their recovery service plans.³⁹ A recent review of the dependency cases of 2,812 children whose parents participated in the SARMS program during the period between April 1998 and July 31, 2002, revealed that the average

amount of time from the assumption of jurisdiction to a permanent placement plan was 16.2 months; the average time from assumption of jurisdiction to reunification was 8.8 months.⁴⁰ This is a significant improvement from the 45.7 months it was taking prior to the implementation of SARMS.⁴¹ These numbers strongly indicate that active court management of the drug and alcohol treatment portion of the reunification plan dramatically shortens pre-permanency foster-care stays.

Improved Child Outcomes

Formal statistics were not kept before the implementation of the Dependency Court Recovery Project, but five years into the project 56 percent of the children studied were reunified with their parents, 24 percent were adopted, and 8 percent were placed in guardianship.⁴² The court used foster care as a permanent placement in only 12 percent of the cases during this time.⁴³ In short, the Dependency Court Recovery Project protected a significant number of children from the psychological damage attributable to prolonged nonrelative foster care. To date, San Diego County has experienced negligible recidivism in the cases where children were reunified with a parent who got clean and sober.⁴⁴

The parents who are able to recover from addiction do so because treatment is available at the outset and alternatives to recovery are removed. When reunification is feasible, it occurs at the earliest possible time; when reunification fails, more children are adopted because permanent placement decisions are made at the earliest possible time. "Reasonable services" are provided in every case; families receive them in a timely manner, and the court has a record of those services. The prognosis for all children in San Diego County's dependency system is improved, and the costs of both long-term and short-term foster care are lowered.

Significant Cost Saving

The Center for Substance Abuse Treatment⁴⁵ (CSAT) contracted for a specific retrospective study of 50 dependency cases processed in the San Diego County juvenile court prior to the institution of the Dependency Court Recovery Project.⁴⁶ These 50

cases were compared to 50 cases processed in the DCRP using intensive case management.⁴⁷ The total cost of foster-care services for the 50 pre-DCRP cases was \$2,730,806.⁴⁸ The total cost of all such similar services for the 50 DCRP cases was \$1,150,384, for a cost saving of \$1,580,502.⁴⁹ This amounted to a 58 percent reduction in foster-care costs for the managed cases as compared to the county's former method of doing business.

LESSONS LEARNED FROM SAN DIEGO COUNTY

Though federal and state legislatures mandate specific time frames in which courts must determine permanent placement for a child, juvenile courts must strive to further reduce the time children remain in unstable, out-of-home placements. Courts can shorten the period each family is under the court's jurisdiction by intensively managing parents' compliance with their reunification plans, especially those of substance-abusing parents.

The experience in the San Diego County program also showed that, to shorten the time a substance-abusing family is under the court's jurisdiction, the court must ensure

- thorough assessments;
- immediate treatment options;
- clear court orders;
- motivational substance abuse case management;
- a compliance reporting system; and
- sanctions for noncompliance.

THOROUGH ASSESSMENTS

Whenever substance abuse is an issue in a dependency case, the court must order a thorough assessment by a trained recovery specialist to be completed within a strict time frame. This enables recovery specialists to prescribe individualized treatment. If the assessment indicates a substance problem, the parent and recovery specialist develop a treatment plan to be

incorporated in the court-ordered reunification plan. The recovery specialist then makes sure the parent is enrolled in treatment. This has the practical effect of connecting the parent with the treatment program.

ENSURING IMMEDIATE TREATMENT OPTIONS—FINANCING THE PROGRAM

As discussed earlier, immediate availability of high-quality drug and alcohol treatment services is essential to limiting the time children spend in foster care. Lack of treatment has historically been the biggest impediment to parental success. Funding for both treatment and case management could be made available through savings generated by decreased stays in foster care. As a recent report released by the Pew Commission on Children in Foster Care noted,

Simply put, current federal funding mechanisms for child welfare encourage an over-reliance on foster care at the expense of other services to keep families safely together and to move children swiftly and safely from foster care to permanent families, whether their birth families or a new adoptive family or legal guardian.⁵⁰

In San Diego County, savings in the local share of foster-care expenditures have exceeded the amounts spent on treatment and case management.⁵¹ Those savings convinced the San Diego County Board of Supervisors, beginning in 1998, to authorize an annual expenditure in excess of \$2 million for case management of substance-abusing parents with children under juvenile court jurisdiction⁵² and another \$2 million annually for treatment.⁵³ This level of funding allowed the court to order more than 1,500 parents per year into the SARMS program.⁵⁴

Consequently, the court could adhere to statutory timelines and shorten average stays in foster care for the children of these parents by more than 50 percent.⁵⁵ This resulted in a saving of more than \$30,000 annually in Title IV-E⁵⁶ money per family from an expenditure of \$3,400 per year for case management and treatment for each parent in the

program.⁵⁷ Average time from detention to permanent placement was under 16 months.⁵⁸

States are required to match federal IV-E dollars for foster care.⁵⁹ In California, over 30 percent of the foster-care match is local county general fund money, with the remainder coming from the state. The \$4-million-plus in total treatment and case management money spent on SARMS was initially and continues to be from a combination of state and local funding sources controlled by the San Diego County Board of Supervisors, which has been willing to appropriate funds for the project because of the savings in foster-care costs and the improved permanent placement outcomes for children. The population of children in post-permanent-placement foster care—children who have not been reunified or adopted—has dropped in San Diego County from 2,500 in 1997 to fewer than 1,800 in 2003.⁶⁰

Ultimately, large sums of federal foster-care money under Title IV-E can be saved with aggressive front-end loading of treatment services in dependency cases for addicted parents. Definitive placement decisions can be made within the one-year federal and state guidelines.⁶¹ Currently, states that reduce their foster-care expenditures lose the federal match associated with the reduction, “even though keeping children out of foster care can require substantial investments in early intervention, treatment, and support once a child leaves foster care.”⁶² The Pew Commission on Children in Foster Care has recommended allowing states to “reinvest” those saved federal dollars in other child welfare services if they safely reduce the use of foster care.⁶³ Our goal should be to convince the U.S. Department of Health and Human Services to accept the commission’s recommendation and offer financial incentives to states so that savings generated by shortened stays in foster care brought about by aggressive case management may be used to fund ongoing drug treatment and management. This would create a “win-win” situation where the courts can both improve outcomes for children and families and reduce the overall foster-care population.

CLEAR COURT ORDERS

A clear court order, written in simple, direct language that parents understand, is necessary for the success of this program. It should direct the parent to stay clean and sober and follow the treatment plan developed with the recovery specialist. It mandates drug testing in conformity with the recovery specialist's directions and explains that contempt proceedings and sanctions will follow noncompliance.

MOTIVATIONAL SUBSTANCE ABUSE CASE MANAGEMENT

A motivational case management approach is essential to maximizing the opportunity for reunification in each case involving parental substance abuse. The case manager acts as a coach to support parents through the treatment process. A systemic rather than a piecemeal approach is necessary. Every case needs this approach to make sure parents are connected to treatment and have an optimal chance for success. Parental substance abuse of epidemic proportions cannot be eradicated by selecting only a portion of the population of addicted parents to receive treatment. A comprehensive approach is required because it is impossible to tell in advance which parents will recover. Often, we are successful with someone who is a "repeat customer." Only an across-the-board mandate for participation by all addicted parents will maximize the number of those who actually succeed in recovery.

COMPLIANCE REPORTING SYSTEM

Timely and accurate reports of the parents' progress in their treatment programs, submitted by the agency providing case management services, are critical. San Diego County, as described earlier, contracts with a nonprofit agency specializing in alcohol and drug treatment to operate the SARMS program. This agency provides case management services for each client and biweekly reports on the parent's progress to the court and Children's Services; objective weekly drug tests are done in every case. The agency is separate from Health and Human Services and Children's Services. Social workers are not responsible for

this aspect of the case. The social worker assigned to each case through Children's Services remains the principal case manager and is responsible for overall case management.

SANCTIONS FOR NONCOMPLIANCE

Further, there must be a simple, well-defined procedure for citing noncompliant parents for contempt of court. Legal counsel representing the government must thoroughly understand how to prove contempt on a declaration of noncompliance by the recovery specialist. A parent must receive immediate consequences for a noncompliant event, and the court must be able to swiftly incarcerate recalcitrant parents. In San Diego County cases where parents "admit" noncompliance, they serve no more than

System of Sanctions Challenged

A San Diego father, Otis J., who had been ordered to participate in the SARMS program as part of his reunification plan, challenged the juvenile court's authority to find him in contempt of the court's reunification order and incarcerate him after he failed to submit proof that he had attended a required 12-step program. In December 2004, the Court of Appeal, Fourth Appellate District, decided the case of *In re Olivia J.*, upholding the power of the juvenile court to sanction noncompliance with drug and alcohol abstinence orders under the court's ordinary contempt powers. The court held that a willful violation of such court orders could be punished by incarceration. But the validity of that holding is in question, as the California Supreme Court accepted the case for review on March 16, 2005.* A decision by the court had not issued at the time of this article's publication.

It is the position of the authors that if parental drug use lengthens dependent children's stays in foster care, the court has a legal obligation to use its authority to elicit compliance with such orders. A court's ability to take that position will be determined by the California Supreme Court.

* *In re Olivia J.*, 108 P.3d 862 (Cal. 2005).

24 to 36 hours in local custody. Without these elements, the program cannot function efficiently or effectively.

Positive reinforcement for good behavior and provision of other supportive services in the form of job readiness and assistance with acquisition of housing and other services are important elements of the recovery plan; indeed, they are arguably more important in recovery than sanctions. This is particularly true as parents have success in maintaining sobriety. In practice, custody time is infrequently used and is necessary only occasionally. Sanctions are analogous to the “timeouts” used for disciplining children.

The sanctions for relapse should be nonjudgmental, brief, and not overly punitive. San Diego County’s juvenile court imposes the following sanctions:

- First noncompliant event: Judicial reprimand
- Second noncompliant event: From three to five days in jail, a monetary fine, or both
- Third noncompliant event: From three to five days in jail and/or an offer of voluntary participation in dependency drug court

If noncompliance is determined at the next 6- or 12-month review hearing, a permanency planning hearing may be scheduled.

The goal of the court is not to punish parents but to make them realize the seriousness of the situation and motivate them to take the steps necessary to reunify with their children. This is an opportunity for the court to establish boundaries with these parents, often a foreign concept to drug abusers and alcoholics. To teach parents that there are consequences for their actions, the sanctions must be immediate and relate to the noncompliant behavior. In San Diego County, a special hearing is set immediately following notification to the juvenile court of the parent’s noncompliance with the treatment plan. After the first finding of noncompliance, the court restates the order in simple and direct terms to ensure that the parent understands the order and the consequences of noncompliance. The court then verbally reprimands the parent for the noncompliant event.

SPECIAL CHALLENGES WITH YOUNG PARENTS

Working with substance-abusing parents differs significantly from working with other populations. Judges must be aware of these differences if they are to effectively reunify families. The court should work with these parents in accordance with their level of development, which recent research tells us lags behind their chronological age.⁶⁴

The authors have seen many parents in dependency cases between the ages of 18 and 25 who finally address the issue of their alcohol or other drug abuse problems only to realize that they do not have the skills necessary to cope with the adult world. While their peers were progressing through normal adolescence—discovering talents, building relationships, taking on responsibility—these young people missed out because substance abuse narrowed their circle of friends, their level of involvement, their emotional and spiritual growth.

It is not effective for a court simply to include in the reunification plan an order requiring the parent to get clean and sober and remain so for six months. The parents need help and encouragement throughout the program because this is likely the first time in their lives that they have assumed responsibility for themselves. Just as teenagers are not developmentally capable of getting clean and staying sober by themselves, substance-abusing parents who are developmentally far behind their peers are likewise incapable of staying clean without support.⁶⁵ By holding such parents responsible for their actions, the judge acts as a person who cares enough to say no when they engage in behavior that endangers their children. Such intensive case management is needed for the parents to become capable of caring for themselves and their children.

If the parent is not serious about dealing with his or her addiction, the court must help the parent get serious. Children should not be left in foster care indefinitely while their parents violate court orders and the court fails to act. The court has the authority and responsibility to change what happens in these children’s lives. Battling addiction is extremely

difficult. To do justice for the families under its jurisdiction, the juvenile court must fulfill its duty to help substance-abusing parents get clean and sober.

PROMISING NEW PROJECT IN BALTIMORE, MARYLAND

A program for early assessment, enrollment in treatment, and case management for addicted parents of children in foster care, similar to San Diego County's Dependency Court Recovery Program, is currently being developed in Baltimore, Maryland.⁶⁶

In Maryland, foster-care funding under Title IV-E is 50 percent state money and 50 percent federal. The Maryland state government has agreed to invest savings in state foster-care expenditures created by shortened stays in foster care in ongoing treatment and case management for at-risk families.⁶⁷

CONCLUSION

Based on current statistics, pre-permanency foster care continues to be utilized across the country as a temporary solution to child abuse and neglect. The national rate of children placed in foster care continues to be unacceptably high. In 2002, roughly 532,000 children were in foster care.⁶⁸ These numbers are particularly disturbing in light of the developmental damage that may result when a child is placed in foster care. Throughout the United States, nonrelative foster care frequently is poorly managed in terms of the length of time children remain in out-of-home placements. It is up to the courts to take an active role in minimizing the use of foster care through judicial management of reunification plans. Cost savings and better outcomes will follow for those jurisdictions that take this step.

Statistics also make it clear that to fulfill the purpose of child dependency systems, juvenile courts must aggressively address the substance abuse issues of the parents who come under their jurisdiction.⁶⁹ An analysis of San Diego County's approach to this problem shows that immediate access to individualized alcohol and drug treatment, in conjunction with strict court management of reunification plans,

promises beneficial outcomes. Courts and policy-makers must seek out and implement modalities that prevent or mitigate the negative effects of temporary and transient foster care. Any reduction in the amount of time it takes to make a permanent placement decision benefits the child by minimizing his or her time in foster care. When time in foster care is minimized, costs of foster care are reduced. Savings in foster-care costs make more funds available for treatment and case management.

The prevalence of parental drug and alcohol addiction and the preliminary success of the SARMS program suggest positive outcomes are possible for children and their families if courts strictly adhere to statutory time frames and enforce compliance with court-ordered reunification plans. The SARMS program and the dependency drug court shorten the length of time children remain in foster care and successfully reunify families. These programs offer a challenging and rewarding means to achieving the primary goal of the juvenile dependency process: to provide a timely and appropriate permanent placement for each child who enters juvenile court supervision. Juvenile courts are responsible for ensuring the safety and well-being of the children in their jurisdictions. They must honor this duty by taking an active role to achieve the ultimate systemic objective of protecting vulnerable children.

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Press 1998), available at www.ncsacw.samhsa.gov/files/RespondingtoAODProblems.pdf.

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11. See *id.* See generally ELIZABETH MEINS, SECURITY OF ATTACHMENT AND THE SOCIAL DEVELOPMENT OF COGNITION (Taylor & Francis Group 1997) (covering how infant-caregiver attachment relates to child development); JOHN BOWLBY, A SECURE BASE: PARENT-CHILD ATTACHMENT AND HEALTHY HUMAN DEVELOPMENT (Basic Books 1989) (series of lectures by a prominent British psychiatrist exploring the nature and importance of early child-caregiver bonds).

12. See generally BOWLBY, *supra* note 11; PAT SABLE, ATTACHMENT AND ADULT PSYCHOTHERAPY 15 (Jason Aronson 2000) (citing Mary D. Salter Ainsworth, *Attachments Beyond Infancy*, 44 AM. PSYCHOLOGIST 709 (1989)); John Bowlby, *Separation Anxiety*, 41 INT'L J. PSYCHOANALYSIS 89 (1969); Robert Karen, *Becoming Attached*, THE ATLANTIC, Feb. 1990, at 35.

13. There are methods to reduce this disruption and preserve the attachment even with the use of foster care. These will be discussed in a later section.

14. LEVY & ORLANS, *supra* note 8, at 3–4.

15. Dave Robinson et al., *A Review of the Literature on Personal/Emotional Need Factors* (Corr. Serv. of Can., Mar. 1998), at www.csc-scc.gc.ca/text/rsrch/reports/r76/r76e_e.shtml.

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17. LEVY & ORLANS, *supra* note 8, at 214.

18. PAUL D. STEINHAEUER, THE LEAST DETRIMENTAL ALTERNATIVE: A SYSTEMATIC GUIDE TO CASE PLANNING AND DECISION MAKING FOR CHILDREN IN CARE 20 (Univ. of Toronto Press 1991).

19. LEVY & ORLANS, *supra* note 8, at 215.

20. JOSEPH GOLDSTEIN ET AL., THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE 19 (Free Press 1996).

21. *Id.*

22. STEINHAEUER, *supra* note 18, at 24.

23. GOLDSTEIN ET AL., *supra* note 20, at 41; see also David E. Arredondo, *Principles of Child Development and Juvenile Justice: Information for Decision-Makers*, 5 J. CENTER FOR FAM. CHILD. & CTS. 131 (2004) (“The reason that a year seems interminably long for a 4-year-old is that a year is, subjectively, one-fourth of his life”).

24. GOLDSTEIN ET AL., *supra* note 20, at 9.

25. *Id.* at 42.

26. *Id.* at 41.

27. *Id.*

28. EVERETT M. RESSLER, UNACCOMPANIED CHILDREN: CARE AND PROTECTION IN WARS, NATURAL DISASTERS, AND REFUGEE MOVEMENTS 175 (Oxford Univ. Press 1988).

29. GOLDSTEIN ET AL., *supra* note 20, at 41.

30. Title IV-E of the Social Security Act offers federal funding for every income-eligible child who is placed in foster care. 42 U.S.C. § 674(a) (2000 & Supp. 2004). And there is a legislative preference for placement with an adult relative over a nonrelated caregiver “provided that the relative caregiver meets all State child protection standards.” *Id.* § 671(a)(19). But foster-care maintenance payments under the federal statutes may be made only to state-licensed foster family homes, impeding the likelihood of placement with a relative. See *id.* § 672(b), (c). Oregon’s non–Title IV-E state-funded foster-care program was challenged on the ground that the state denied foster-care benefits for kinship placements of children who were not eligible for foster-care assistance under Title IV-E. *Lipscomb v. Simmons*, 962 F.2d 1374 (9th Cir. 1992). The 9th Circuit Court of Appeal en banc held that Oregon’s policy of restricting state-only foster-care funds to nonrelatives was rationally related to a legitimate policy decision: “to spend more money per child not placed with relatives while depriving some children of the option of

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- NOTES living with relatives—instead of paying less money per child but enabling more children to live with relatives . . .” *Id.* at 1380. The court concluded that Oregon, “finding itself in an imperfect budgetary environment, believed that it ha[d] allocated its limited resources in the best possible way in order to accomplish the goals of its foster care program.” *Id.* at 1384. However, ensuring stipends to relatives who care for children who otherwise would be in foster care makes good sense and would benefit children.
31. In 1988, 1,200 children born at Martin Luther King Hospital in south-central Los Angeles were drug-exposed. By contrast, in 1994, only 300 children were born exposed to drugs. HEALTH PROJECT, EVALUATION SUMMARY (1997), at <http://healthproject.stanford.edu/koop/shields/evaluation.html> (discussing the SHIELDS for Families Project, which won the 1995 C. Everett Koop Award).
32. See, e.g., Robert Victor Wolf, *Promoting Permanency: Family Group Conferencing at the Manhattan Family Treatment Court*, 4 J. CENTER FOR FAM. CHILD. & CTS. 133 (2003).
33. JAMES R. MILLIKEN, SUPERIOR COURT OF CAL., COUNTY OF SAN DIEGO, THE DEPENDENCY COURT RECOVERY PROJECT: PROJECT SUMMARY AND CURRENT HIGHLIGHTS 1 (Mar. 2001) (on file with the *Journal of the Center for Families, Children & the Courts*).
34. *Id.*
35. *Id.*
36. *Id.* at 2.
37. Each of the three phases is 90 days long. In phase 1, participants must appear in drug court once a week; in phase 2, once every two weeks; and in phase 3, once a month.
38. For example, when the parent first agrees to participate in dependency drug court or when a sanction is ordered for noncompliance.
39. JAMES R. MILLIKEN, SUPERIOR COURT OF CAL., COUNTY OF SAN DIEGO, THE DEPENDENCY COURT RECOVERY PROJECT: JUVENILE DEPENDENCY COURT REFORM 4 (Oct. 2003) (on file with the *Journal of the Center for Families, Children & the Courts*).
40. SUPERIOR COURT OF CAL., COUNTY OF SAN DIEGO, DEPENDENCY COURT RECOVERY PROJECT: SARMS DATA SUMMARY, APRIL 13, 1998, THROUGH July 31, 2002, at 1 (July 2002) (on file with the *Journal of the Center for Families, Children & the Courts*).
41. MILLIKEN, *supra* note 39, at 22.
42. DEPENDENCY COURT RECOVERY PROJECT, *supra* note 40, at 1.
43. *Id.*
44. A future goal of the Dependency Court Recovery Project in San Diego County is to follow up with these families to determine the long-term outcomes of this program.
45. A division of the U.S. Department of Health and Human Services’ Substance Abuse and Mental Health Services Administration (SAMHSA).
46. DAVE CRUMPTON ET AL., NPC RESEARCH, INC., ANALYSIS OF FOSTER CARE COSTS FROM THE FAMILY TREATMENT DRUG COURT RETROSPECTIVE STUDY: SAN DIEGO COUNTY, CALIFORNIA 5 (2003) (on file with the *Journal of the Center for Families, Children & the Courts*).
47. *Id.*
48. *Id.* at 1.
49. *Id.*
50. PEW COMM’N ON CHILDREN IN FOSTER CARE, FOSTERING THE FUTURE: SAFETY, PERMANENCE AND WELL-BEING FOR CHILDREN IN FOSTER CARE 13 (May 18, 2004), available at <http://pewfostercare.org/research/docs/FinalReport.pdf>; see also William C. Vickrey, *A Better Life for Foster Youth*, S.F. CHRON., May 18, 2005, at B9.
51. CRUMPTON ET AL., *supra* note 46, at 1.
52. Interview with Kimberly Bond, Chief Operating Officer, Mental Health Systems, Inc., in San Diego (June 23, 2004).
53. Interview with John Oldenkamp, Project Manager, San Diego County Drug and Alcohol Services, in San Diego (June 24, 2004).
54. Interview with Kimberly Bond, *supra* note 52.
55. NANCY K. YOUNG ET AL., CTR. FOR CHILDREN & FAMILY FUTURES, INC., FAMILY DRUG TREATMENT COURTS: SYNOPSIS OF PROCESS DOCUMENTATION AND RETROSPECTIVE OUTCOME EVALUATION FOR SAN DIEGO SUPERIOR COURT 12 (Oct. 2003) (on file with the *Journal of the Center for Families, Children & the Courts*).
56. Title IV-E of the Social Security Act is a permanently authorized, open-ended federal entitlement program that guarantees reimbursement to the states for a portion of the costs of maintaining children in foster care. See PEW COMM’N ON CHILDREN IN FOSTER CARE, *supra* note 50, at 13. Nationwide federal IV-E foster-care expenditures for fiscal year 2004 were estimated at \$4.8 billion. *Id.*

Title IV of the Social Security Act is administered by the Department of Health and Human Services. The Administration for Public Services, Office of Human Development Services, administers social services under Title IV, Parts B and E. Title IV appears in the United States Code as Title 42, chapter 7, subchapter IV, sections 601–687 (42 U.S.C. §§ 601–687 (2000 & Supp. 2004)). See SocialSecurityOnline, Compilation of the Social Security Laws, n.1, at www.ssa.gov/OP_Home/ssact/title04/0400.htm.

57. CRUMPTON ET AL., *supra* note 46, at 12 (for the \$30,000-per-family annual savings figure); interview with John Oldenkamp, *supra* note 53 (provided the figure that treatment costs were \$2,000 per parent annually); e-mail from Kimberly Bond, Chief Operating Officer, Mental Health Systems, Inc. (June 23, 2004) (provided information that case management costs were \$1,400 per parent annually) (on file with the *Journal of the Center for Families, Children & the Courts*).

58. YOUNG ET AL., *supra* note 55, at 13.

59. 42 U.S.C. § 674 (2000 & Supp. 2004); see also PEW COMM'N ON CHILDREN IN FOSTER CARE, *supra* note 50, at 19.

60. MILLIKEN, *supra* note 39, at 4.

61. See ASFA, § 302, 42 U.S.C. §§ 627(a)(2)(B), 672(d), 675(5)(C) (2000 & Supp. 2004); CAL. WELF. & INST. CODE § 361.5 (West 2004).

62. PEW COMM'N ON CHILDREN IN FOSTER CARE, *supra* note 50, at 25.

63. *Id.*

64. Catherine Seward, *Substance Abuse Disrupts Maturing Process* (2001), at https://64.71.146.119/articles/topics/categories/subabuse/sub_abuse_disrupts.html (on file with the *Journal of the Center for Families, Children & the Courts*).

65. *Id.*

66. The Family Recovery Project is being launched by the Family League of Baltimore City, Inc. At the time this publication went to press, the Family League had issued a request for proposals seeking an entity to provide intensive and time-limited family preservation services to families with children at imminent risk of out-of-home placement. See www.flbcinc.org.

67. Interview with Stephanie Franklin, Family Recovery Program Director, at the Family League of Baltimore City, Inc. (Apr. 13, 2004).

68. CHILDREN'S BUREAU, *supra* note 7.

69. Banks & Boehm, *supra* note 2.

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A Systematic Review of the Impact of Court Appointed Special Advocates

We have celebrated the 100th anniversary of California's juvenile court, and yet we continue to struggle with our system of intervention on behalf of abused and neglected children who have been removed from their homes. For the past 27 years, volunteers working in Court Appointed Special Advocate (CASA) programs have played an important role in helping abused and neglected children get through the dependency process. This article summarizes the findings of 20 studies assessing the impact of CASA programs on (1) the activities of child representatives, (2) the dependency process, and (3) case outcomes and reentry into foster care. It combines and interprets statistical information in an effort to make the information easily accessible to judges, lawyers, social workers, policymakers, child welfare professionals, social scientists, and the general public.

VOLUNTEER ADVOCACY FOR FOSTER CHILDREN

The sheer volume of children in foster care challenges our ability to meet their needs. According to the Adoption and Foster Care Analysis and Reporting System (AFCARS), on September 30, 2001, 542,000 children were in foster care in the United States.¹ That year, 290,000 entered foster care and 263,000 exited.² Half of the children who went home in 2001 had been in care longer than 12 months, 9 percent for more than five years.³

Attorneys and social workers are understandably under strain as they try to advocate for foster children. It is at times difficult for them to meet children's needs because of large workloads or lack of training in child development and the family context. The CASA program provides some relief to this overtaxed system, offering children in the dependency system reliable advocates who have been well trained and are assigned to them for the duration of their cases.

COURT APPOINTED SPECIAL ADVOCATES

The Child Abuse Treatment and Prevention Act (CAPTA) of 1974 formally recognized the importance of providing independent representatives for children in court proceedings by mandating that each child have a guardian ad litem (GAL).⁴ GALs are appointed by the court to represent the best interests of children in abuse and neglect cases. A GAL can be an attorney or a trained

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The federal Child Abuse Treatment and Prevention Act of 1974 mandated that children in dependency proceedings be assigned guardians ad litem to represent their best interests in court. Attorneys often fill this role, but communities increasingly are using trained volunteers, often called Court Appointed Special Advocates or CASA volunteers, who are assigned by the court. This systematic review analyzes the results of all studies to date, both published and unpublished, assessing the impact of CASA programs. Twenty studies of controlled comparisons

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& Lorraine Granger-Merkle

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with objective outcomes are discussed. Available evidence suggests that CASA programs have a favorable impact on some important process indicators. Data regarding the impact of CASA programs on the ultimate outcomes for foster children remain lacking.

The authors would like to acknowledge and thank the Scaife Family Foundation, which funded this project, and Vicky Christianson, librarian at University Medical Center, for her patience, persistence, and invaluable assistance. ■

volunteer who investigates the case, monitors its progress, and represents the child in court. Subsequent reauthorizations have upheld the central principle that children must be represented independently.⁵ The purpose of the guardian ad litem is to obtain a firsthand understanding of the situation and needs of the child and to make recommendations to the court concerning the child's best interests.⁶ By contrast, county workers are asked to try to meet the needs of both victim and perpetrator, which puts them in an inherently conflicted role. They are frequently asked to develop and simultaneously prepare contingent plans for permanent removal of the child from the home and for permanent reunification of the child and original guardian. This is akin to having the same attorney act as both prosecutor and defender on the same case.

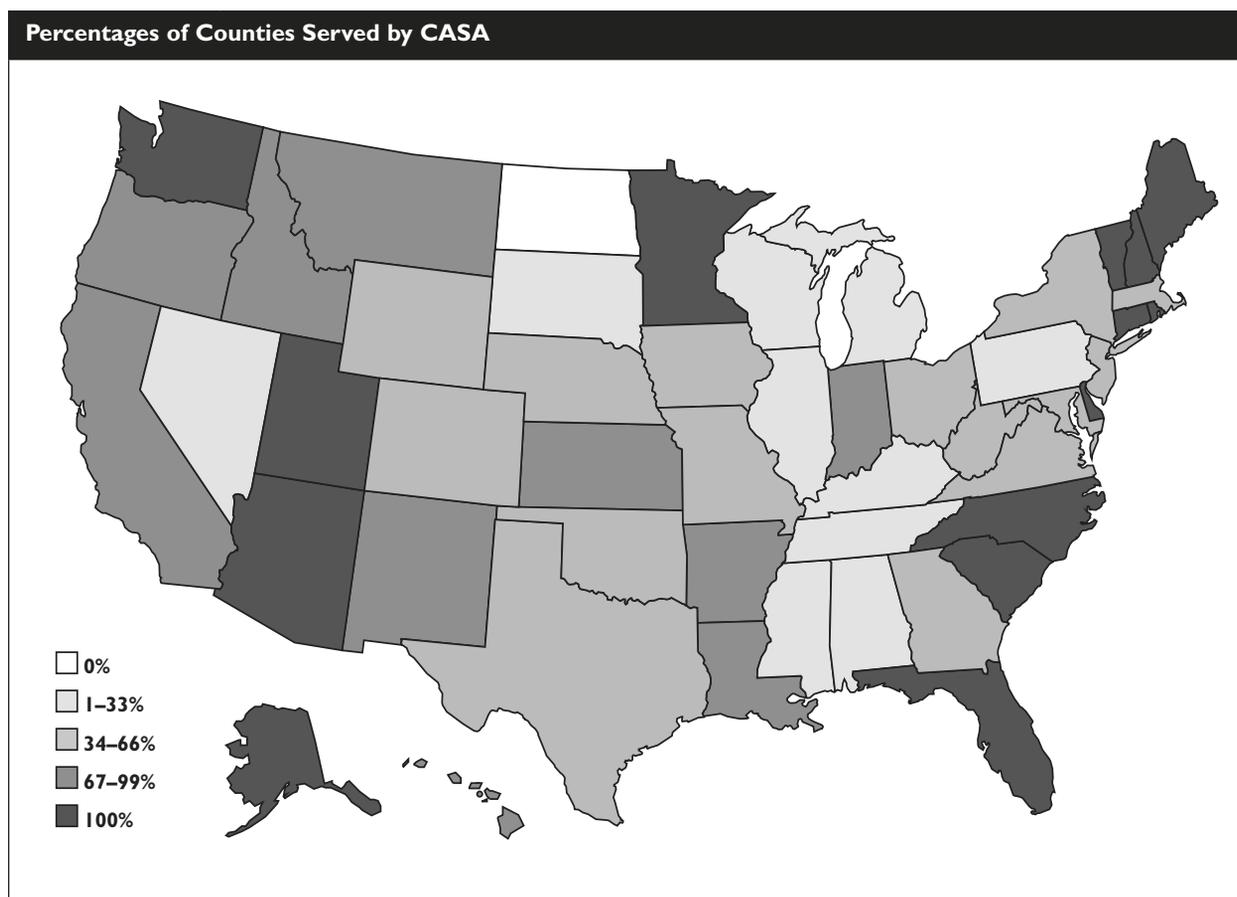
The guardian ad litem's primary duty is to provide independent evaluation and representation of the best interests of the children he or she is appointed to support. The qualifications for guardians ad litem vary widely among the states, however, as do their additional duties and responsibilities in dependency cases. Differences also exist across counties within the same state.

The concept of the CASA volunteer originated with Seattle, Washington, Superior Court Judge David W. Soukup, out of frustration with the lack of available information about the children whose futures he was determining. The core components of Judge Soukup's 1977 pilot program are essentially the same today: a judge appoints carefully selected, well-trained lay volunteers to represent the best interests of children in court. CASA volunteers typically handle just a few cases at a time so they can provide in-depth, firsthand information to judges and referees to assist in sound decision making.

The need for CASA advocacy increased as a result of the Adoption Assistance and Child Welfare Act of 1980, which mandated a greater emphasis on permanent placement,⁷ and the Adoptions and Safe Families Act of 1997, which shortened timelines to encourage the speedy adoption of children for whom reunification or guardianship is not an option.⁸ The U.S. Congress encouraged the further expansion of CASA programs with the Victims of Child Abuse Act of 1990, which states that a "court-appointed special advocate shall be available to every victim of child abuse or neglect in the United States that needs such an advocate."⁹

CASA volunteers are uniquely positioned to advocate for the best interests of children. They are typically assigned just a few cases and are involved for a case's duration. Social workers and attorneys may change, but the CASA volunteer provides support with continuity. Siblings often are assigned to one CASA volunteer, who can then help advocate for the group with coherence and strive to keep siblings together as foster-care placement decisions are made. Moreover, CASA volunteers are focused on the well-being of the children without having to serve the interests of the parents, the county child protective services unit, or the state.

CASA programs have grown considerably over the years. What began as a pilot program with 110 volunteers advocating for 498 children¹⁰ has grown



to 930 CASA programs—at least one in every state plus the District of Columbia and the U.S. Virgin Islands.¹¹ A force of approximately 70,000 volunteers spoke for an estimated 280,000 children in 2002.¹² Though coverage varies from state to state, CASA programs are present in 1,698 (54 percent) of the 3,144 county entities in the contiguous United States, Alaska, Hawaii, and the Virgin Islands.¹³ (See figure.) North Dakota has a state CASA association but no CASA volunteers working with children there, and Puerto Rico has no CASA program.

In part, CAPTA was intended to ensure independent, individual representation and advocacy for abused and neglected children.¹⁴ Revisions to the act specify the CASA volunteer's role in providing the court with detailed information on the child and other duties.¹⁵ Nevertheless, there is still variation among programs in how the CASA volunteer fits into the dependency process.

The design of each particular CASA program depends on local preferences and court rules as well as federal and state statutes.¹⁶ The primary difference among programs is whether the CASA volunteer is also the guardian ad litem or works in conjunction with an attorney who performs the GAL responsibility. The relationship of CASA volunteer to attorney may be as an equal member of a team or as a subordinate member. CASA volunteers may also work alone without a guardian ad litem, but this is rare. Ideally, the pairing of CASA volunteers and attorneys balances the strengths and weaknesses of each. For example, an attorney may have excellent legal skills, and a CASA volunteer is likely to have first-hand knowledge of the child.¹⁷

There are five basic activities that a CASA volunteer may perform. As a fact-finder and investigator, a CASA volunteer conducts a thorough, independent investigation of all the information relevant to the

case. As a courtroom representative, a CASA volunteer reports the facts to the court in written or oral format with associated recommendations. As a case monitor, he or she ensures that all court-ordered services are being provided to the child and promptly notifies the court if they are not. As a mediator and negotiator, a CASA volunteer helps solve problems through collaboration and cooperation to assist in bringing families together. Finally, as a resource broker, a CASA volunteer seeks out and advocates for services that will help establish a strong support network for the child.¹⁸

OTHER MODELS OF VOLUNTEER ADVOCACY

Although CASA programs provide most of the volunteer assistance to foster-care youth and are the subject of this review, two other organizations should be noted: foster-care review boards and citizen review panels. The current study does not include evaluations of these programs.

The Adoption Assistance and Child Welfare Act of 1980 mandated that juvenile and family courts review all cases involving abused or neglected children every six months.¹⁹ Foster-care review boards (FCRB) were created in response to overwhelmed court systems that were unable to handle the resulting increases in caseloads following this legislation.²⁰ FCRB volunteers review cases and have the authority to meet with the involved parties and make recommendations to the court. These meetings often have an informal discussion format, which is less intimidating than a court hearing. At the policy level, information from this process is used to suggest courses of action in dependency cases and also modifications in state legislation and agency policy.²¹

In the 1996 amendment to CAPTA, the federal government mandated the creation of citizen review panels (CRPs) for states seeking funding under CAPTA.²² Each state is to have a minimum of three CRPs to provide citizen oversight in order to ensure that the state is meeting the goal of protecting children from abuse and neglect.²³ CRPs' functions and scope of work are purposefully broad in keeping

with this goal. The panels are composed of individuals who reflect the communities they are working to protect.²⁴ Generally, they monitor compliance with CAPTA and Title IV-E foster-care and adoption programs and evaluate fatalities occurring in foster care, as well as perform any other functions of the child protective service agency as they see fit.²⁵

SYSTEMATIC REVIEW METHODOLOGY

A systematic review uses a rigorous method for identifying all relevant studies on a given topic, without regard for the findings of those studies, and then summarizes the results in an objective manner.

Three previous attempts have been made to summarize existing research on the impact of CASA advocacy. Heuertz²⁶ and Youngclarke²⁷ simply listed findings, providing little interpretation or integration. Litzelfelner attempted to summarize groups of findings but provided little comprehensive interpretation.²⁸ None of these reviews used a standardized methodology to systematically locate both published and unpublished comparative studies in this area.²⁹ The current study both identifies existing research systematically and presents a methodology for mathematically aggregating and interpreting the findings.

SEARCH STRATEGY

We attempted to identify and acquire copies of all published and unpublished original comparative studies conducted since 1977 on the effectiveness of CASA programs and similar trained-volunteer child advocacy programs in the United States.³⁰ Our initial search criteria were broad so we could conduct an especially sensitive search for research in this area. All studies with original data and purporting to be about the effectiveness of volunteer interventions were obtained and examined.

SELECTION CRITERIA

Studies must have met three methodological criteria to be included. They must have presented primary data³¹ rather than summaries of data published

elsewhere or theoretical overviews. In addition, studies must have involved a comparison to a control group of children without volunteer advocates. In other words, each evaluation had to have included a control group. Finally, studies were included if they assessed any objective measures of activities performed on the child's behalf, specific court processes, or child outcomes.³² Subjective assessments were excluded, specifically satisfaction of participants and self-ratings of effectiveness.

METHODS OF REVIEW

We reviewed almost 70 studies, but only 20 met the criteria for inclusion.³³ We evaluated the studies under consideration for methodological quality and appropriateness for inclusion without consideration of their results.

Methodological quality. The best way to comprehensively interpret studies with contradictory findings is to take into account the methodological quality, or level of evidence, of each individual study. Even large studies can produce misleading results when their methodologies are weak. This is especially true in evaluations research that relies on review of records. We used an adaptation of the Levels of Evidence scale developed by the Oxford Centre for Evidence-Based Medicine to rate methodological quality.³⁴ Under this system, the methodological quality of a study is given a rating between level 1 and level 5, with level 1 indicating the highest quality and level 5 the lowest.³⁵

Overall, the quality of the available studies was not ideal. Social services provided in the "real world" are generally difficult to evaluate because they are not typically designed and implemented as research projects. Random assignment to treatment groups (which prevents selection bias, assuring that the groups are similar prior to treatment) and "blind" assessment of outcomes (which prevents measurement bias of outcomes) are not often feasible in existing programs. Such programs are designed primarily to provide services, with evaluation given a lower priority. Even when ideal research strategies are attempted, they

often collapse under the pressure for programs to provide good care to vulnerable children.

Drawing conclusions. For each outcome we describe the findings, statistical significance, and methodological quality of individual studies and calculate weighted summary estimates.³⁶ Then we provide our conclusion about the effect of CASA programs on each of the outcomes after considering all of these factors. Our conclusions are necessarily subjective because the studies are so different that a formal meta-analysis is impossible; therefore, we have provided all information on which these conclusions were based.

In addition to combining data for descriptive purposes, we considered two pieces of information when interpreting contradictory findings: the statistical significance of the original findings and the methodological quality of the studies involved. However, statistical significance in this case cannot be used as a definitive standard against which to measure the importance of the findings because many reports were purely descriptive in nature and included no formal statistical analyses.³⁷ Consequently, the driving force in our conclusions is methodological quality.

The methodological quality of each study is noted for two reasons. First, we attempted to explain contradictory findings by exploring the methods of the studies that produced them. Findings of a study with a higher level of evidence override contradictory findings of a study with a lower level of evidence. Second, methodological bias tends to exaggerate effect sizes, so that a small difference in truth appears quite a bit larger if the study is of poorer quality. Therefore we provide levels of evidence to help interpret the observed effect sizes.

SUMMARY OF THE IMPACT OF CASA PROGRAMS

Twenty studies that examined a total of 6,079 cases met the inclusion criteria listed above. Only eight have been published in indexed journals. The rest are reports submitted to government offices, foundations, or educational institutions.³⁸ Table 1 describes the included

studies; the numbers assigned to the studies listed in the table are referenced in the discussions below.

QUALITY OF STUDIES

Only one study, a randomized controlled trial (1), is rated level 1 on the Levels of Evidence scale. A majority of the studies in this review, 12 observational studies of outcomes in naturally existing groups that are inherently different in important ways, are level 2. Seven studies, at level 4, include some observational

cohort³⁹ studies with serious methodological flaws beyond what is typical of a cohort study. For instance, several of these studies examined only a small proportion of cases in the cohort, and those were chosen in a systematically biased manner, such as allowing the attorneys and CASA volunteers to choose which of their cases to submit for examination. Others relied exclusively on secondary data compiled by foster-care review boards although the accuracy or completeness of the information could not be verified.

Table 1. Reviewed Studies of CASA Programs' Impact

Study	Study Population	Comparison Group	Level of Evidence
1. Shareen Abramson, <i>Use of Court-Appointed Advocates to Assist in Permanency Planning for Minority Children</i> , 70 CHILD WELFARE 477-87 (July-Aug. 1991)	Amicus advocate (n = 60)	Attorney (n = 62)	1
2. SHERRIE S. AITKEN ET AL., CSR, INC., FINAL REPORT ON THE VALIDATION AND EFFECTIVENESS STUDY OF LEGAL REPRESENTATION THROUGH GUARDIAN AD LITEM (1993) (report to the Admin. on Child., Youth & Fams., Dep't of Health & Human Servs.)	CASA (n = 127)	Private attorney (n = 191) Staff attorney (n = 88)	4
3. Cynthia A. Calkins & Murray Millar, <i>The Effectiveness of Court Appointed Special Advocates to Assist in Permanency Planning</i> , 16 CHILD & ADOLESCENT SOC. WORK J. 37-45 (Feb. 1999)	CASA (n = 68)	Attorney (n = 121)	2
4. LARRY CONDELLI, CSR, INC., NATIONAL EVALUATION OF THE IMPACT OF GUARDIANS AD LITEM IN CHILD ABUSE AND NEGLECT JUDICIAL PROCEEDINGS (1988) (report to Nat'l Ctr. of Child Abuse & Neglect for the Admin. of Child., Youth & Fams.)	CASA and attorney (n = 50) CASA only (n = 48)	Private attorney (n = 49) Staff attorney (n = 71) Law student (n = 27)	2
5. Michael Cook, <i>Court Appointed Special Advocates: Administrative Structural Impediments to the Use of the CASA Program by Juvenile Dependency Court Judges</i> (2000) (unpublished Ph.D. dissertation, Univ. of La Verne), available at www.lib.umi.com/dissertations	CASA (n = 45)	Attorney (n = 203)	2
6. Donald N. Duquette & Sarah H. Ramsey, <i>Using Lay Volunteers to Represent Children in Child Protection Court Proceedings</i> , 10 CHILD ABUSE & NEGLECT 293-308 (1986)	Trained private attorney (n = 15) Trained law students (n = 16) Trained lay volunteers (n = 22)	Attorney (n = 38)	2
7. Patrick Leung, <i>Is the Court-Appointed Special Advocate Program Effective? A Longitudinal Analysis of Time Involvement and Case Outcomes</i> , 75 CHILD WELFARE 269-84 (May-June 1995)	CASA (n = 66)	Attorney (n = 107) Attorney, child on CASA waiting list (n = 24)	2
8. Pat Litzelfelner, <i>The Effectiveness of CASAs in Achieving Positive Outcomes for Children</i> , 79 CHILD WELFARE 179-93 (Mar.-Apr. 2000)	CASA (n = 119)	Attorney (n = 81)	2

Table 1. Reviewed Studies of CASA Programs' Impact

Study	Study Population	Comparison Group	Level of Evidence
9. RUTH G. McROY, EAST TEXAS CASA: A PROGRAM EVALUATION (Univ. of Texas at Austin, Apr. 1998)	CASA (n = 11)	Attorney (n = 11)	4
10. RUTH G. McROY & STEPHANIE SMITH, CASA OF TRAVIS COUNTY EVALUATION: FINAL REPORT (Univ. of Texas at Austin, Apr. 1998)	CASA (n = 46)	Attorney (n = 46)	2
11. OREGON GOVERNOR'S TASK FORCE ON JUVENILE JUSTICE, STATE COMM'N ON CHILDREN & FAMILIES, EFFECTIVE ADVOCACY FOR DEPENDENT CHILDREN: A SYSTEMS APPROACH (1994)	CASA only (n = 82) CASA and attorney (n = 44)	Attorney (n = 652) No attorney, no CASA (n = 1,056)	4
12. John Poertner & Allan Press, <i>Who Best Represents the Interests of the Child in Court</i> , 69 CHILD WELFARE 537-49 (Nov.-Dec. 1990)	CASA (n = 60)	Staff attorney (n = 98)	2
13. MICHAEL POWELL & VERNON SPESHOCK, ARIZONA COURT APPOINTED SPECIAL ADVOCATE (CASA) PROGRAM, INTERNAL ASSESSMENT (1996)	CASA (n = 130) CASA (n = all dependent children in county with CASA)	Attorney (n = 179) Attorney (n = all dependent children in county)	4
14. SUSAN M. PROFIET ET AL., CHILD ADVOCATES INC., GUARDIAN AD LITEM PROJECT (1999)	Volunteer GAL and attorney (n = 100)	Attorney only or CASA only (n = 42)	2
15. GENE C. SIEGEL ET AL., NAT'L CTR. FOR JUVENILE JUSTICE, ARIZONA CASA EFFECTIVENESS STUDY (2001) (report to the Arizona Sup. Ct., Admin. Off. of the Cts.)	CASA (n = 139)	GAL (n = 143)	2
16. STEPHANIE SMITH, TEXAS DEP'T OF PROTECTIVE & REGULATORY SERVS., CASA OF TRAVIS COUNTY EVALUATION FINAL REPORT (1993)	CASA (n = 307)	Attorney (n = 306)	4
17. KAREN C. SNYDER ET AL., THE STRATEGY TEAM, LTD., A REPORT TO THE OHIO CHILDREN'S FOUNDATION ON THE EFFECTIVENESS OF THE CASA PROGRAM OF FRANKLIN COUNTY (Ohio Child. Found. 1996)	CASA (n = 30)	Private attorneys (n = 24)	2
18. JANICE S. WAIDE & ROBERT C. HARDER, OFFICE OF JUDICIAL ADMIN. OF TOPEKA, IMPACT OF COURT APPOINTED SPECIAL ADVOCATES AND CITIZEN REVIEW BOARDS ON KANSAS JUVENILE COURTS (1997)	Districts with CASA and/or CRB ^a programs	Districts without	4
	CASA (n = 61)	No CASA or CRB program (n = 277)	
19. Victoria Weisz & Nghi Thai, <i>The Court Appointed Special Advocate (CASA) Program: Bringing Information to Child Abuse and Neglect Cases</i> , 8 CHILD MALTREATMENT 204-10 (Aug. 2003), available at www.sagepub.co.uk/journalIssue.aspx?pid=105487&jiid=6074	CASA (n = 21)	Attorney, child on CASA waiting list (n = 20)	4
20. E. Sue Wert et al., <i>Children in Placement (CIP): A Model for Citizen-Judicial Review</i> , 65 CHILD WELFARE 199-201 (Mar.-Apr. 1986)	CIP ^b program (n = 149)	No CIP program (n = 140)	2
	Post-CIP implementation (n = 117)	Before implementation of CIP (n = 90)	

^aCRB = citizen review board.^bCIP = Children-in-Placement project.

Several reports discuss the difficulty of interpreting findings because of two known confounding variables: CASA volunteers were generally assigned to the most difficult cases (those children whose histories involved the most severe abuse or whose parents have more serious social and psychological problems); and CASA volunteers often were assigned only after a child's case had already been in the system for an inordinate length of time. Even if CASA advocacy is extremely effective, if the children receiving CASA services were in unusually difficult situations to begin with, the effects of the services may not be apparent in the final comparisons. For these reasons, two studies stand out from among these 20 as being more valid than the others: the Calkins (3) and Abramson (1) studies are the only two evaluations that compare two groups of children who were similarly situated at the time they began working with a CASA volunteer.

COMBINED EFFECTS ON OUTCOME VARIABLES

Study outcomes were divided into three categories: activities of children's representatives (attorneys and CASA volunteers), court processes, and child outcomes. First, we examined the activities of the children's representatives to determine whether CASAs are more likely than other representatives to serve functions specified in CAPTA. These activities include collecting information by making contact with the child and family, being present and available during court proceedings, and making information formally available to the court through reports.

Second, we examined court processes—the events that transpired during the time the children's cases were open. Process is represented by four variables. The number of continuances may represent how smoothly the case progressed through the court and is certainly a factor in court costs. Number of services ordered is a process variable⁴⁰ that may help families achieve reunification or prevent future abuse and neglect. Finally, the total number of placements and the child's length of time in the system are important variables that reflect the child's experience and are suspected to predict child well-being in the future.

Third, we identified those outcome variables that represent the child's status at the end of his or her time in care and beyond. This category includes placement at case closure (adoption, reunification, guardianship, long-term foster care) and the rate of reentry into the system. None of the studies examined true child-oriented outcomes, such as the future physical safety or mental health of the children studied.

Activities of Children's Representatives

Two studies estimated the percentage of representatives who made contact with the child during the case (2, 19; both level 4 evidence). Both reported that CASAs were more likely than attorneys to have contact with the child. However, one did not address statistical significance, and the other had such a small sample size that the observed difference did not achieve statistical significance despite a large absolute difference. Another study reported the number of hours of contact between representatives and children (6; level 2 evidence). In this study, lay volunteers had more hours of contact with the child than did attorney guardians ad litem, both in cases dismissed before the preliminary hearings and those that went beyond the preliminary hearing. These differences were statistically significant. See Table 2 for a summary of the activities of children's representatives.

In addition to requiring children's representatives to obtain a firsthand understanding of the child's situation through direct contact, CAPTA specifies that they make recommendations to the court.⁴¹ Being present during court proceedings and providing written or oral reports to the court about the case may accomplish that task. Three studies reported the percentage of court proceedings at which the child's representative was present, and their results are contradictory. One small study of higher quality (17; level 2 evidence) showed that children whose cases were assigned to CASA-guardian ad litem teams were significantly more likely to be represented during proceedings than were children whose cases were assigned only to private attorneys. However, two larger studies with samples drawn from several states nationwide reported the opposite finding

Table 2. Relationship Between CASA Representation and Activities of the Child Representative

Study	Level of Evidence	Contact Child	Hours of Contact	Court Appearance	Mother in Court	Written Reports	Oral Reports
Condelli	2			↓			
Duquette	2		↑				
Snyder	2			↑	↑	↑	
Aitken	4	↑		↓		↑	↔
Weisz	4	↑					
Combined—all (CASA vs. comparison)		92% vs. 44%	7.8 vs. 4.7	50% vs. 82%	42% vs. 24%	77% vs. 21%	71% vs. 77%
Combined—levels 1 and 2		None available	7.8 vs. 4.7	45% vs. 74%	42% vs. 24%	45% vs. 0%	None available
Conclusion		↑	↑	↓	↑	↑	↔

Arrows indicate general direction: ↑ = more; ↓ = less; ↔ = no difference.

(2, 4; levels 2 and 4 evidence). In one study the finding is statistically significant, while in the other statistical significance is not addressed. Both the aggregate of all data and the combined higher-level data suggest that CASA volunteers are less likely to appear in court than attorneys. The reason is unclear to the authors, although one possible explanation is that no states require CASAs to appear in court, though they are highly encouraged to, while some states mandate that attorneys appear. Another possible factor is that CASAs are volunteers, often with job obligations that prevent them from appearing.

Three studies examined the degree to which child representatives made oral or written reports to the court (2, 17, 19). All three found that CASA volunteers were far more likely than attorneys to file written reports. One of these studies also reported that CASA volunteers and attorneys were equally likely to offer an oral report (2; level 4 evidence). In another study, judges reported that more-complete information was presented orally at the judicial hearing when a CASA volunteer was assigned (19; level 4 evidence).

Another way that CASA volunteers can help provide information to the court is to encourage

family involvement. One study (17; level 2 evidence) reported that mothers whose children had CASA volunteers were far more likely to appear in court than mothers of children without CASA volunteers (42 percent versus 24 percent).

Overall, cases assigned to CASA volunteers were more likely to involve direct contact between the child and the child's representative and were more likely to have written reports filed with the court. In addition, mothers of CASA children were more likely to appear in court. While some uncertainty remains, the weight of the data suggests that CASA volunteers were less likely than attorneys to appear in court. These findings seem to suggest that CASA volunteers do fulfill the task of collecting and providing original information to the court even if they do not participate directly in court proceedings.

Dependency Processes

Three studies examined whether the appointment of a CASA volunteer affected the number of continuances during the course of a case (8, 12, 17; all level 2 evidence). None reported any significant differences in the number of continuances between cases with

CASA volunteers and cases without. However, one study (8) reported that, among closed cases only, there were significantly fewer continuances in the CASA group (1.1 versus 2.9; closed cases). While this is an interesting exception, it is not sufficient to override the conclusion that CASA volunteers do not reduce

the number of continuances during a case. See Table 3 for a summary of dependency processes.

Seven studies examined the number of services ordered for children and families (4, 6, 8, 12, 15, 17, 18). Six were level 2 evidence, and one was level 4 evidence. All but one study found a higher number

Table 3. Relationship Between CASA Advocacy and Dependency Processes

Study	Level of Evidence	Continuances	Services Ordered	Placements	Time in System
Calkins	2			↓	↓
Condelli	2		↑	↔	↑
Cook	2				↑
Duquette	2		↑		
Leung	2			↔	
Litzelfelner	2	↔	↑	↓	↔
McRoy & Smith	2			↓	↓
Poertner	2	↔	↑	↔	
Profflet	2				↓
Siegel	2		↑	↔	↔
Snyder	2	↔	↓		
McRoy	4			↑	↑
Oregon	4				↓
Powell	4				↓
Smith	4			↑	↑
Waide	4		↑		↑
Combined—all (CASA vs. comparison)		1.5 vs. 1.7	8.3 vs. 5.2	4.0 vs. 3.8	27.5 vs. 25.4 months
Combined—levels 1 and 2		1.5 vs. 1.7	9.0 vs. 6.9	3.2 vs. 3.5	23.9 vs. 20.0 months
Conclusion		↔	↑	↓	↔

Arrows indicate general direction: ↑ = more; ↓ = less; ↔ = no difference.

of services ordered for cases assigned to CASA volunteers. The exception (17) was unique in that all physical abuse cases were excluded from the study.

One study (4) went a step further, examining the degree to which appropriate services were ordered. Appropriate services are those that matched the requirements of the case plan. For instance, if a child had been removed because the parent had a substance abuse problem, then substance abuse treatment would have been considered an appropriate service. This study reported that 46 percent of appropriate services were ordered in cases with CASA-attorney teams, compared to 32 percent in cases with an attorney only. This was a statistically significant difference.⁴²

Nine studies explored the total number of placements (3, 4, 7–10, 12, 15, 16). The findings are mixed: some investigators found that children with CASA volunteers had fewer placements, some reported essentially no difference, and some reported that children with CASA volunteers had more placements than children without CASA volunteers. Results from only three of these studies are statistically significant: two (3, 10; level 2 evidence) demonstrate a reduction of placements for CASA program children, and one (9; level 4 evidence) demonstrated an increase in placements of children with CASA volunteers. When the data from all studies are combined, the number of placements appears similar. When level 4 evidence is excluded, summary data suggest a slight reduction in number of placements. Despite the small absolute difference, we strongly considered the contribution of the Calkins study (3) in concluding that the use of CASA volunteers does reduce the number of placements. Calkins is important because it is the only one of the studies to control for two important confounders: the children in the CASA and comparison groups were equivalent in terms of the severity of their abuse, and in each case the CASA volunteer or attorney guardian ad litem was assigned within 90 days.

Twelve studies examined children's overall time in the system (3–5, 8–11, 13–16, 18). Again the findings are mixed: some studies report reduced time in the system for children with CASA volunteers, some

show no difference, and others report increased time. Considering all data, there does not appear to be an overall difference. Excluding the five studies with level 4 evidence (9, 11, 13, 16, 18), the children with CASA volunteers were in the system slightly longer. Overall we conclude that there is no consistent difference.

However, one can draw an alternative conclusion by relying exclusively on the methodological strength of the Calkins study, which selected CASA and non-CASA children who were equivalent in the severity of their abuse histories and which explicitly included only those CASA cases where the CASA volunteer had been assigned early in the case. Calkins (level 2 evidence) reported a statistically significant reduction in both the number of placements (3.3 in the CASA group versus 4.6 in the comparison group) and the amount of time in the system (31 months versus 40 months).

Child Status Outcomes

Several studies explored children's final placements. Permanent placement (adoption, reunification, or guardianship) is generally considered a success, but long-term foster care is not. Eleven studies reported the proportion of children who had achieved permanent placement by the end of the study periods (1–4, 6, 8, 10, 12, 14–16).

Seven (1, 2, 8, 12, 14–16) reported the proportion of children adopted. Most of these, one of which is the only randomized trial in the review (1), found that adoption was more likely among CASA-supported children than the non-CASA-supported children. The aggregate data plus the findings of the randomized trial provide convincing evidence that CASA volunteers do increase the probability of adoption. See Table 4 for a summary of child status outcomes.

The increase in adoption does not seem to be reciprocated by decreases in the other categories, confounding intuitive sense. Only 4 of the 11 studies (1, 2, 12, 15) simultaneously examined all four child status endpoints. For example, the Calkins study compared only CASA versus non-CASA reunification percentages and made no mention of adoption, guardianship, or

long-term foster care. Though we cannot make definitive statements about how the other three categories differed, we suspect that the increase in adoption comes from small decreases across the other three categories.

Nine studies suggest that family reunification is equally likely overall for children with CASA advocacy versus those without (1, 2, 3, 6, 9, 12, 14–16). Again the aggregate data and the randomized trial support this conclusion.

The evidence on guardianship (1, 2, 4, 9, 12, 14, 15) was mixed, with the total numbers suggesting that it is equally likely for children with CASA vol-

unteers as without. The randomized trial (1) reported a statistically significant reduction in the proportion of children whose final placement was guardianship, but it is the only study to report this finding.

Seven of the studies describe the proportion of children who failed to achieve permanent placement and remained in long-term foster care (1, 2, 8, 10, 12, 15, 16). The children with CASA volunteers were equally likely as children without CASA volunteers to be in long-term foster care at the end of the study period. However, again, the only randomized trial in the review reported a statistically significant

Table 4. Relationship Between CASA Advocacy and Child Status Outcomes

Study	Level of Evidence	Adoption	Reunification	Guardianship	Foster Care	Reentry
Abramson	1	↑	↔	↓	↓	↓
Calkins	2		↑			
Condelli	2			↔		
Duquette	2		↑			
Litzelfelner	2	↓			↔	
McRoy & Smith	2		↓	↑	↔	
Poertner	2	↑	↓	↔	↓	↓
Proffitt	2	↑	↓	↑		
Siegel	2	↑	↔	↔	↔	
Aitkins	4	↔	↔	↔	↔	
Powell	4					↓
Smith	4	↔	↓		↑	
Combined—all (CASA vs. comparison)		22% vs. 14%	42% vs. 42%	16% vs. 16%	22% vs. 24%	6% vs. 11%
Combined—levels 1 and 2		28% vs. 22%	40% vs. 45%	14% vs. 14%	16% vs. 17%	9% vs. 16%
Conclusion		↑	↔	↔	↔	↓

Arrows indicate general direction: ↑ = more; ↓ = less; ↔ = no difference.

reduction in the number of children in long-term foster care and a very large reduction (13 percent versus 59 percent of case plans) for open cases.

With regard to the likelihood of guardianship and foster care, we concluded that there is no difference between the CASA and non-CASA groups. The combined percentages for all studies and for studies with higher levels of evidence were similar.

Relying principally on the results of the Abramson study (1) allows one to reach other conclusions about the effect of CASA involvement on reductions in guardianship and long-term foster care with a resulting increase in adoption. Because children were randomly assigned to the CASA and non-CASA groups, it is fairly certain that the groups were similar on variables likely to affect final placements, so the differences can be attributed to the effects of the CASA volunteer assignment. None of the other studies can make this assertion.

Three studies examined reentry into the foster-care system after case closure (1, 12, 13). All three (one level 1 evidence, one level 2, and one level 4) reported fewer cases of reentry among children with CASA volunteers during study periods ranging from 18 months to eight years. The risk of reentry in CASA cases is about half that of other foster children. This finding is consistent and the difference is large. Therefore, this may be the most important outcome assessed in this study.

DISCUSSION OF STUDY FINDINGS

This systematic review indicates that children who have CASA support do about as well, and in some important ways better, than those represented solely by an attorney. The results are especially encouraging considering that CASA volunteers tend to be assigned to more complex and difficult cases. Though there is just a small body of available literature with generally poor methodological quality, this review shows promise for determining the measurable impacts of assigning CASA volunteers to dependency cases. The findings are consistent across all three domains examined in this study: activities of the child's repre-

sentative, the dependency process, and child status outcomes.

First, the involvement of a CASA volunteer in a case, compared to advocacy by an attorney alone, appears to improve representation of the child. CASA volunteers are much more likely to have face-to-face contact with the children and their care providers. Perhaps owing to their small caseloads (usually one or two cases), CASA volunteers spend more time working on behalf of the children and are far more likely to file written reports with the court. The continuity of representation and documentation may be important when one considers the high turnover of county social workers and the rotation of private attorneys through the dependency court.

Second, though the results were mixed, it was consistently found that children represented by a CASA advocate had more services ordered and more actually implemented and that they tended to have slightly fewer placements. The combined data suggest a small trend in increased time in the system, but the methodological strength of the Calkins study leads us to believe that there is actually a trend in the opposite direction when CASA volunteers are assigned early in the case. An enticing, yet unreplicated finding by Litzelfelner is that closed CASA cases had fewer continuances within the duration of the case. Considering how frustrating continuances can be, this process variable calls for more study.

Finally, and perhaps the most immediately useful result given the current legislative environment and the number of children in foster care, children with CASA support are more likely to be adopted than those with other representation. This may interest county governments given their adoption targets from the federal government and the funding consequences of not meeting those targets.⁴³ The most profound finding is that children with CASA support appear to be less likely to reenter the foster-care system once their cases are dismissed. The rate of reentry into foster care is consistently reduced by half in these studies.⁴⁴ This finding alone could drive the expansion of CASA programs nationwide to address the nagging problem of more than one-half million children in foster care

and high rates of reentry—AFCARS data indicate that 10.3 percent of children who entered foster care in fiscal year 2000 were reentering the system within 12 months of being discharged.⁴⁵

In interpreting the findings in this review, one should remember that CASA volunteers are often assigned to the more complex and difficult cases where children are more profoundly abused. Three studies explicitly indicated that the cases of children assigned CASA volunteers were more challenging: the children experienced higher rates of institutionalization, more severe abuse, more emergency removals, and more sexual abuse; and they were in the system longer (2, 5, 15). Further, some studies' comparison groups were made up, in part, of children on waiting lists who had been referred to CASA but not yet assigned volunteers. If CASA programs tend to triage referrals and assign volunteers to the most severe cases, that would leave a less-severe residual group from which researchers gathered comparison cases. With these confounders in mind, one could argue that the finding of no difference between groups can actually be interpreted as a positive impact—that the “most severe” cases have been reduced to a “less-severe” status during CASA representation.

The need to determine the measurable impact of CASA advocacy is not merely academic, nor is it simply to satisfy curiosity. Rather, there are immediate and practical applications of knowing how CASA programs work, with whom, when, and under what circumstances. One compelling reason that exemplifies the critical nature of this information lies in the method of assigning volunteers to specific cases. Courts do not have the luxury of giving every child this support, so deciding who gets a CASA volunteer requires some form of triage and is generally based on a broad spectrum of informal formulas. However, there is variation in these formulas, and they are too often based on untested assumptions and subjective experiences. Therefore, this review attempted to synthesize empirical information from a variety of studies on the impact of CASA programs with the explicit goal of improving decisions about the distribution of this limited resource.

The confluence of social science and the legal system does not always provide the right forum for effective exchange of information. Social science and legal practitioners generally read different literature, attend different types of conferences, and are responsible for knowing and using different information. Legal personnel want information that is fast and factual while academics lean toward exhaustive discussions of findings that often interpret results speculatively and tentatively. Systematic reviews like this one may offer a compromise permitting shared expertise in both domains because the reader is presented with information collected from many different studies.

None of these studies measured what we considered to be real well-being outcomes for children, such as quality of life or attainment of academic potential. Most of the outcomes explored here are of arguable relevance to the well-being of children, although many believe that these process events will lead to positive outcomes. Perhaps the only outcome with clear external relevance is reentry into the court system; and, notably, each of the studies that explored reentry reported that children who had been assigned to CASA volunteers were approximately 50 percent less likely to reenter the dependency system.

There are limitations to this review process as well as limitations to the individual studies used.⁴⁶ However, these limitations do not preclude critical appraisal of the literature to understand what the current best evidence is of CASA programs' impact on the lives of children in dependency.

It remains a problem that studies purporting to measure outcomes of CASA advocacy are actually measuring the process of court intervention. Processes, or intermediate outcomes, are easier to measure because these data are typically present in the existing dependency record. Long-term outcomes, directly measuring the well-being of the child, are far more difficult to assess because they usually require additional data collection systems and follow-up. The study of intermediate markers of child well-being significantly limits our ability to make sure-footed conclusions about the relevant impact of these

heterogeneous programs. None of the studies provided direct information about the welfare of children. Some are taking on this challenge. Child Advocates, Inc., is currently completing a five-year longitudinal study comparing children served only by child protective services to children who also received the services of a CASA program and is examining true child outcomes.⁴⁷ Preliminary findings suggest that CASA volunteers positively affect children's self-esteem, their attitudes about the future, and their ability to work with others, as well as help control deviant behavior.⁴⁸ The children's caregivers also appear to benefit in the areas of communication and family rituals.⁴⁹ Patterns of communication and rituals in families are general markers for the overall health of the family system.⁵⁰ Details about the methodology of the study and effect sizes for these findings have not yet been released, but this appears to be the first attempt to assess true child outcomes.

Other researchers have found that negative process events, such as multiple foster-care placements, are associated with increased problems⁵¹ and that these findings are true for adulthood outcomes as well.⁵² In Arizona, the National Center for Juvenile Justice is currently involved in a study that follows children from dependency cases to identify whether CASA advocacy reduces the probability that children become juvenile delinquents.⁵³

We hope that this research and future research will provide much-needed information to help guide judicial decision making. The advantage of integrating empirical relationships into the decision-making process is well documented.⁵⁴ Nevertheless, we still struggle with inadequate empirical evidence and a lack of direct coherent communication between social scientists and the courts.

CONCLUSION

It is encouraging to see that children with CASA support do as well, and in some cases better, than those children who are represented solely by an attorney. Nevertheless, readers should be cautious not to overinterpret the findings of this and other studies.

Examination of the impact of this advocacy remains at the process level and does not yet reveal evidence of indisputably positive outcomes. Although it may be argued that children who have a better process will likely have better outcomes, there is no scientific evidence to prove this assumption.

The findings of this systematic review suggest that particular process variables may be positively influenced by the assignment of a CASA volunteer. Specifically, CASA volunteer assignment might be considered under the following circumstances: when more contact is needed with the child and the family, to increase the chances that the mother appear in court, to provide written reports, to get more services, to reduce number of placements and perhaps time in the dependency system, to increase the likelihood of adoption, and to reduce the odds that the child will reenter foster care once the case is dismissed.

1. CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., THE AFCARS REPORT 1 (2003), at www.acf.hhs.gov/programs/cb/publications/afcars/report8.pdf. (AFCARS stands for Adoption and Foster Care Analysis and Reporting System.)

2. *Id.* at 2–3.

3. *Id.* at 3.

4. Child Abuse Prevention and Treatment Act of 1974 (CAPTA), Pub. L. No. 93-247, § 4(B)(2)(G), 88 Stat. 4, 7 (codified as amended at 42 U.S.C. § 5106a(b)(2)(A)(xiii) (2000 & Supp. 2004)).

5. Child Abuse Prevention, Adoption, and Family Services Act of 1988, Pub. L. No. 100-294, sec. 101, § 8(b)(6), 102 Stat. 102, 111; Child Abuse Prevention and Treatment Act Amendments of 1996, Pub. L. 104-235, § 107(b)(2)(A)(ix), 110 Stat. 3063, 3073; Keeping Children and Families Safe Act of 2003, Pub. L. 108-36, § 114(b)(1)(B)(vii), 117 Stat. 800, 810.

6. 42 U.S.C. § 5106a(b)(2)(A)(xiii).

7. Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (1980) (codified as amended at 42 U.S.C. §§ 670–679b).

NOTES

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8. Adoptions and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C. (2000 & Supp. 2004)).
 9. Victims of Child Abuse Act of 1990, Pub. L. No. 101-647, § 216, 104 Stat. 4789, 4794 (codified at 42 U.S.C. § 13012 (2000 & Supp. 2004)).
 10. Nat'l CASA Ass'n, History of CASA (Aug. 2003), at www.casanet.org/download/ncasa_publications/history-casa.pdf.
 11. Nat'l CASA Ass'n, Frequently Asked Questions About CASA (n.d.), at www.casanet.org/download/ncasa_publications/frequently-asked-questions-about-casa.pdf.
 12. Nat'l CASA Ass'n, National Statistics 2004 (2004), www.casanet.org/download/ncasa_publications/casa-stat-sheet-2-04.pdf (on file with the authors).
 13. Because some programs serve more than one county, we conducted a telephone survey of all state programs to determine how many counties have CASA program resources available to their dependent children.
 14. 42 U.S.C. § 5106a(b)(2)(A)(xiii) (2000 & Supp. 2004).
 15. Child Abuse Prevention and Treatment Act Amendments of 1996, Pub. L. No. 104-235, §§ 103(a)(1)(A), 107, 110 Stat. 3071, 3079.
 16. Michael S. Piraino, *Lay Representation of Abused and Neglected Children: Variations on Court Appointed Special Advocate Programs and Their Relationship to Quality Advocacy*, 1 J. CENTER CHILDREN & CTS. 63, 64 (1999), available at www.courtinfo.ca.gov/programs/cfcc/pdffiles/063-072.pdf.
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 19. Adoption Assistance and Child Welfare Act of 1980 § 101(a)(1), 42 U.S.C. § 675(5)(B) (2000 & Supp. 2004).
 20. Pat Litzelfelner, *The Use of Citizen Review Boards With Juvenile Offender Cases: An Evaluation of the Effectiveness of a Pilot Program*, 52 JUV. & FAM. CT. J. 1 (2001).
 21. See, e.g., CITIZEN'S FOSTER CARE REVIEW BD. PROGRAM, STATE OF MICHIGAN, ANNUAL REPORT (2001) (supporting the authors' statement of the function of the foster-care review boards).
 22. Child Abuse Prevention and Treatment Act Amendments of 1996 § 107(c)(1), 42 U.S.C. 5106a (2000 & Supp. 2004).
 23. See *id.*
 24. See *id.* § 107(c)(2).
 25. See *id.* § 107(c)(4)(A).
 26. LINDA HEUERTZ, NAT'L CASA ASS'N, EVALUATIONS/REVIEWS OF CASA AND GAL PROGRAMS/MODELS WITH PROCESS AND/OR OUTCOME MEASURES (1996), at www.casanet.org/program-management/evaluation/96-eval-study.htm.
 27. Davin Youngclarke, *A Systematic Review of the Literature on the Effectiveness of Court Appointed Special Advocates* (Cal. Court Appointed Special Advocate Ass'n 2002), at www.calcasanet.org/ResourceLibrary/article_SystematicReview.htm.
 28. Pat Litzelfelner, *Court Appointed Special Advocates (CASAs): A Review of Their Effectiveness*, 22 CHILD. LEGAL RTS. J. 1 (2002), available at www.perspectivesonyouth.org/Pages-Archive/CurEditionsPerspectives-Jan-June2003.htm.
 29. Published literature is typically indexed in databases like LexisNexis, Medline, and PsycINFO and is easy to acquire. Unpublished literature or documents of limited circulation pose a problem for social scientists who research, present, and publish on the topic, with the result that good investigations remain unnoticed by those who could benefit from the studies' findings.
 30. We began with the three previously published reviews of CASA program effectiveness. We examined the reference lists of those reviews and obtained the studies to which they referred. Study authors were contacted and asked whether the cited version was the most current, whether they knew of other researchers or other studies we should consider, and whether they personally had conducted any other evaluations of similar advocacy programs.
- The evaluation project manager at the National Court Appointed Special Advocates Association office provided a list of evaluation research of which the association was aware. We also contacted each of the state CASA program

offices to inquire about recent research conducted in that state. In addition, we sent open messages to two listservs (one sponsored by the International Society for the Prevention of Child Abuse and Neglect and the other by the journal *Child Maltreatment*), posting a general request for information about additional outcome studies.

We conducted searches of eight electronic databases of published literature, including Medline, PsycINFO, Academic Index, LexisNexis, Dissertation Abstracts Online, the National Criminal Justice Reference Service, Social Work Abstracts (which indexes documents from 1977 to the present) and the Social Science Index (which indexes documents from 1983 to the present). Each database was searched on the following terms: *Court Appointed Special Advocate*, *CASA*, *guardian ad litem*, *GAL*, and (*child abuse AND child advocacy*).

Each outcome study was carefully scrutinized for reference to other possible outcome studies cited in the text or listed in the references. Many referred to studies in progress or unpublished prior reports. We pursued each vigorously.

31. If any two reports appeared to present the same data (for example, an internal report that was later published in a research journal), they were enumerated as a single study. Published reports were preferred when discrepancies were evaluated.

32. Child outcomes are measured at or after case closure and reflect how things turned out for the child. We included researched advocacy programs if they used trained volunteers (not paid attorneys or social workers) who were assigned to follow particular children through direct relationships and were expected, where possible, to stay with a case through its duration. Children must have been involved in child abuse and neglect proceedings; advocacy for juvenile delinquents was not examined in this review. Most such programs are CASA programs, but studies of non-CASA interventions were included if trained community volunteers were assigned to follow specific cases. These criteria included lay guardians ad litem who are not affiliated with CASA organizations but excluded citizen review panels and foster-care review boards.

33. Of 69 potential outcome studies identified, we located 68, of which 5 were redundant and 43 were excluded for methodological reasons (e.g., absence of a comparison group, qualitative research, perceptions as outcomes, satisfaction surveys). This process yielded a total of 20 separate studies that met our inclusion and exclusion criteria.

34. BOB PHILLIPS ET AL., OXFORD CTR. FOR EVIDENCE-BASED MED., LEVELS OF EVIDENCE (May 2001), at www.cebm.net/downloads/Oxford_CEBM_Levels_5.rtf.

35. *Id.*

36. We calculated point estimates in order to present a quantitative comparison and communicate the magnitude of CASA's impact for descriptive purposes. To accomplish this, we factored in the sample size of each study and produced weighted averages and weighted proportions for the outcomes. No pooled data analyses were possible because many authors did not include the necessary statistical information.

37. We used statistical significance as an indicator of more definitive or convincing findings. However, several studies, particularly the government reports that are designed to be more descriptive than analytic, do not report statistical significance and did not include enough information for the authors to perform secondary statistical tests. Many of the studies were underpowered with small sample sizes, so statistical significance would not be anticipated even if important differences were present.

38. Many evaluations of the effectiveness of programs remain unpublished because they are commissioned by private organizations, foundations, or other institutions interested in the effects of interventions using granted funds but with no interest in publishing. Relying on the results of easily available studies while ignoring these other reports eliminates a large source of relevant data.

39. The *American Heritage Dictionary* defines *cohort* as "3. A generational group as defined in demographics, statistics, or market research..." AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 359 (Houghton Mifflin 4th ed. 2000).

40. Process variables are variables that are measured prior to case closure and reflect the manner in which the case was handled.

41. 42 U.S.C. § 5106a(b)(2)(A)(xiii) (2000 & Supp. 2004).

42. Why such a high percentage of case plan services did not have corresponding court-ordered services for both groups is unclear.

43. Adoptions and Safe Families Act of 1997, Pub. L. No. 105-89, §§ 107, 201, 111 Stat. 2115, 2121-22 (codified as amended at 42 U.S.C. §§ 673b, 675 (2000 & Supp. 2004)). According to 2002 AFCARS information, 129,262 children were waiting for adoption in 2002. Children's Bureau, U.S. Dep't of Health & Human Servs.,

- NOTES FY 1998, 1999, FY 2000, FY 2001, and FY 2002 Foster Care: Children Waiting for Adoption, www.acf.hhs.gov/programs/cb/dis/tables/waiting2002.htm.
44. In all studies this reduction brought the rate below the target (8.6 percent) set by the federal government in the Child and Family Service Reviews. ADMIN. FOR CHILDREN & FAMILIES, U.S. DEPT. OF HEALTH & HUMAN SERVS., INFORMATION MEMORANDUM: UPDATED NATIONAL STANDARDS FOR THE CHILD AND FAMILY SERVICE REVIEWS AND GUIDANCE ON PROGRAM IMPROVEMENT PLANS 4 (Aug. 16, 2001).
45. CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., FOSTER CARE NATIONAL STATISTICS (Mar. 2003), at <http://nccanch.acf.hhs.gov/pubs/factsheets/foster.cfm>.
46. The limitations of this review are largely a consequence of limitations in the individual studies themselves. There also may be unpublished literature that we did not locate. Furthermore, a formal meta-analysis that would have allowed completely objective interpretation was not possible because of the absence of essential statistical information. In addition, the majority of the studies were observational, introducing the strong possibility that children with CASA volunteers were systematically different from children without CASA volunteers in ways likely to affect the outcome of their cases. Additionally, some of these studies followed dependent children over time and were influenced by changes in court processes and concurrent programs. We also observed geographic variance in how CASA programs operate across the country; therefore we cannot distinguish between the effectiveness of the various approaches.
47. Press Release, Child Advocates, Inc., Making a Difference in the Lives of Children: A Five-Year Study of the Effectiveness of Child Advocates, Inc. (n.d.) (on file with the authors).
48. *Id.*
49. *Id.*
50. JOHN GOTTMAN & JOAN DECLAIRE, RAISING AN EMOTIONALLY INTELLIGENT CHILD (Simon & Schuster 1998); EVAN IMBER-BLACK & JANINE ROBERTS, RITUALS FOR OUR TIMES: CELEBRATING, HEALING, AND CHANGING OUR LIVES AND OUR RELATIONSHIPS (Jason Aronson 1998).
51. LEE DORAN & LUCY BERLINER, WASH. STATE INST. FOR PUB. POLICY, PLACEMENT DECISIONS FOR CHILDREN IN LONG-TERM FOSTER CARE: INNOVATIVE PRACTICES AND LITERATURE REVIEW 8 (2001), available at www.wsipp.wa.gov/rptfiles/FCPlacement.pdf.
52. See generally, THOMAS P. McDONALD ET AL., CHILD WELFARE LEAGUE OF AM., ASSESSING THE LONG-TERM EFFECTS OF FOSTER CARE: A RESEARCH SYNTHESIS (1997).
53. Telephone interview with Gene C. Siegel, Nat'l Ctr. for Juvenile Justice (July 14, 2003).
54. See Robyn Dawes et al., *Clinical Versus Actuarial Judgment*, 243 SCIENCE 1668-74 (Mar. 1989).

Principles of Child Development and Juvenile Justice

Information for Decision-Makers

Judges, prosecutors, and public defenders in juvenile delinquency court routinely encounter offenders of both sexes who are psychologically very different from their adult counterparts. Thus, an understanding of the principles of child and adolescent development and a consideration of children's mental health are useful to decision-makers at all levels of the juvenile justice system. Indeed, knowledge of the basic principles of developmental psychology is essential to understanding the requirements of normal neurobiological, psychological, social, and moral development.¹ Yet judges and attorneys can and do serve in delinquency court with little or no training in principles of normal—let alone abnormal—childhood development.

Unfortunately, inappropriate juvenile court sanctions based on the decision-makers' ignorance of child development principles can have negative developmental consequences that frustrate the very purpose of the juvenile court.² Simply put, there is the very real risk that the justice system can do more harm than good to a child who is still in the process of neurobiological, psychological, social, and moral development. And the negative consequences of careless sanctioning may last longer for a child (and for society) than they might for an adult. Thus, decision-makers at all levels of the juvenile justice system would benefit from considering children's mental health informed by the principles of child and adolescent development.

Other than infancy, no stage in human development results in such rapid or dramatic change as adolescence.³ Adolescence is an intense period of rapid development culminating in identity formation⁴ and social integration. These developmental tasks are keenly sensitive to environmental (peer, educational, familial, and social) influence. The teen years are also characterized by a struggle for autonomy from adults, upon whom adolescents nonetheless depend. Rapid neurobiological concomitants accompany these changes and are reflected in cognitive, emotional, and abstract reasoning, as well as changes in moral development.⁵ According to some authorities, adolescence is an "important formative period in which many developmental trajectories become firmly established and increasingly difficult to alter."⁶

Applying the child development considerations discussed in this article to juvenile court decisions should lead to lower detention rates and durations and to less frequent use of interventions whose success is not supported by

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The juvenile justice system exists to protect public safety, prevent youthful offending, and promote positive social development in children and adolescents. This article argues that, to accomplish these goals without harming both children and society, the system's decision-makers must avoid treating the children it faces simply as little adults. Children and adolescents are psychologically very different from adults and even from each other. Decision-makers must understand principles of child development and apply them to tailor developmentally appropriate sanctions. The article explains principles of child development and discusses the various ways children of different developmental stages experience the same sanction. It goes on to describe different sanctions and their effects on children, and then to urge decision-makers to tailor sanctions to

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each offender's individual developmental, emotional, and social circumstances. The article concludes by suggesting sanctioning strategies for special juvenile offender populations: girls, the mentally ill, and transgenerationally involved youth.

The author thanks the following individuals for their invaluable contributions to this article: Ellen Michelson; Hon. Leonard P. Edwards, Superior Court of California, County of Santa Clara; and Kurt Kumli, Supervising Deputy District Attorney, Juvenile Division, Santa Clara County. An earlier version of this article appeared in 14 STAN. L. & POL'Y REV. 13 (2003). Material from that article is used with the permission of the Stanford Law & Policy Review. ■

evidence. These changes will be most pronounced for children with mental disorders or mental retardation and for low- to moderate-level youthful offenders of all genders, races, and ethnicities. The purpose of this article is to help lawyers, judges, and other juvenile justice policymakers and decision-makers prescribe more appropriate, effective, and humane remedies when designing alternative interventions and sanctions for juvenile offenders who are not seriously violent or sociopathic. Because the vast majority of youthful offenders are not dangerous, this group is the focus of this article. And, although they are extremely important, this article does not directly address issues of diminished competence, capacity, and culpability.⁷

The article is organized in three major sections. The first section references principles of child and adolescent development and children's mental health and discusses how they affect social behavior. The second section explains the overarching goals of the juvenile justice system and offers examples demonstrating that certain sanctions are more conducive to a child's positive social development than others. It describes the necessary balance between allowing some latitude for mistakes while providing a clear set of limits and consequences. The section also discusses the inappropriate imposition of particular sanctions and their possible deleterious effects on a child's relationship to society. It notes especially that children of different maturational stages may experience the same sanction differently. The section concludes by proposing more effective sanctioning methods for healthy child development. It argues that decision-makers in the juvenile justice system should focus primarily on the developmental, emotional, and social needs of the *offender*, rather than on the characteristics of the *offense*; in other words, the system should be offender-driven rather than offense-driven. The goal of this approach is to help the decision-maker conceive more clearly the objectives to be attained and to become more knowledgeable and effective in achieving those objectives.

The last section suggests specific sanctioning strategies for various special cases, including those of girls in the juvenile system, incarcerated juveniles with mental health and neurodevelopmental problems (including learning disabilities), disproportionate minority confinement from a child's perspective, and transgenerational offenders and their families.⁸

GENERAL DEVELOPMENTAL CONSIDERATIONS

Both biology and experience determine a child's developmental trajectory. Modern neurobiological understanding of the interdependence and interpenetration of these two dimensions has superseded the historical question of "nature versus nurture." A child's experience affects his or her brain development, and the level of brain development affects how the child experiences his or her environment and processes information.⁹ This mutual causation means that future behaviors in response to a given set of environmental circumstances, cues, or stimuli can be traced to genetic and biological factors

(temperament, biological predilection, vulnerability), as well as other experiences (internal, familial, interpersonal, environmental). Insofar as social behavior is a principal concern of the juvenile justice system, that system should focus on familial and social factors that affect behavior. In this context, social learning theory¹⁰ and developmental neurobiology¹¹ are both relevant for framing issues that inform effective sanctioning of children and adolescents.¹²

Research in developmental neurobiology using magnetic resonance imaging of the brain has demonstrated differences in the way adolescents and adults think and feel and the way they process information before they act. Adolescents tend to process emotionally charged decisions in the limbic system, the part of the brain charged with instinctive (and often impulsive) reactions. Most adults use more of their frontal cortex, the part of the brain responsible for reasoned and thoughtful responses.¹³ This is one reason why adolescents tend to be more intensely emotional, impulsive, and willing to take risks than their adult counterparts. In addition to the large differences between adolescents and adults in the degree to which the frontal cortex is used, there is a large amount of within-group variation among adolescents themselves, such that chronological age is a poor index of neurobiological and emotional maturity.

On the social front, youth who repeatedly appear before the juvenile court typically come from chaotic homes and neighborhoods. These youth have learned that the world can be unpredictable, capricious, threatening, and grossly unfair. Additionally, they have not had the necessary developmental opportunity to internalize consistently benevolent, reliable, and fair adult authority figures. Instead, hostile environments that were not responsive to their need for consistent and reliable caregiving may have determined these young offenders' views of family, neighborhood, and society.¹⁴

Though this does not diminish offenders' responsibility for learning to control their behaviors, it illustrates why it is important for the delinquency court to avoid reenacting the role of an indifferent,

unreliable, unpredictable, unfair, or incompetent authority figure. Children and adolescents need limits, structure, and boundaries to develop normally.¹⁵ From a developmental perspective, interaction with the juvenile justice system is a key opportunity for society to demonstrate its values¹⁶ and to articulate its expectations of its members. To developing youth just beginning to learn what they can expect from social authority, the juvenile justice system represents the social order. If the authority (law enforcement and delinquency court) seems thoughtless, impersonal, or indifferent, youth will experience precisely the opposite of the timely, consistent, and thoughtful responses they need to developmentally internalize personal responsibility for their actions. What vulnerable youth experience from the juvenile justice system will affect how they view authority in general and their beliefs about social authority in particular.

Although children have a developmental need to test limits, they also have an equally important need to encounter predictable structure and boundaries. A balance between punishment and permissiveness—both measured and timely—is essential for effectively intervening with the low- to moderate-level offender, the responsibility for whom has fallen to the legal system.

From a developmental perspective, the predictability and consistency of adult attention and responsiveness are often what is most important. If children learn that their social environment responds inconsistently, they are much more likely to continue behavior in the hope that they will “get away with it this time.” For example, if a child is caught sniffing glue after breaking into a neighbor's house while truant from school and “nothing really happens,” he is more likely to persist in those behaviors and perhaps even escalate the seriousness of his substance abuse, truancy, and delinquency. The message he has received is: “No one really cares about me that much,” which is construed to mean, “So I might as well do whatever I want.”

One reason for this response is that children require attention for brain development just as they require food or sleep. The notion of an attention

requirement or demand has been relatively unrecognized in Western psychology, although it has been known for some time in the psychologies of central Asia.¹⁷ This attention-seeking behavior has its correlates in brain development inasmuch as the developing child requires interaction with other humans to develop the capacity of recognizing facial cues and the nuances of social situations. Teenagers who are attention-deprived are not very discriminating about how they go about getting the attention they need. Children will seek both positive and negative attention to meet their needs. This is the root of much of attention-seeking behavior in normal adolescents; it accounts for some of their more peculiar vagaries in dress, appearance, and behavior.¹⁸ If no attention is forthcoming, they will escalate their demands. For example, if a child is not noticed when he uses mild profanity, he may “raise the stakes” by using more vulgar language to get the attention he needs (and to test his social boundaries). Another example is verbal taunting. If no one intervenes, taunting by an attention-seeking child often escalates into full-scale bullying and sometimes into physical violence.¹⁹ It does not matter to the child what the valence of the attention is; failing to get positive attention, a child will attract negative attention.

STRATEGIC SANCTIONING

Muddled thinking and significant differences of opinion exist today regarding the proper role of the delinquency system.²⁰ The historical polarization of advocates of punishment and those who advocate “rehabilitation” is, for the most part, irrational. As any parent can testify, successfully raising a child requires at least some negative consequences (i.e., punishment) in response to dangerous, antisocial, or otherwise inappropriate behaviors.²¹ Complications arise when youth confuse punishment (to discourage misbehavior) with retribution. Further complications develop when punishment is applied thoughtlessly, unfairly, and disproportionately in a manner that does not foster positive development. Worse yet, it may forestall it.²² Finally, the frequent pres-

ence of biologically based mental illness or mental retardation in a substantial subpopulation of juvenile offenders further confounds effective decision making. Thus, effective sanctioning of juvenile offenders requires clarity of thought and purpose.

The modern decision- and policymaker in the juvenile justice system must first be clear about what sanctioning the offender needs to accomplish.²³ Three important, overlapping goals of the juvenile delinquency system for low- to moderate-level offenders are punishment, prevention of recidivism (to provide for community safety), and deterrence (of other youth from committing the same offense). Another goal, which is often conceptually mixed with these three, is rehabilitation—a term that has effectively lost useful, precise meaning because of its vague definition in popular usage,²⁴ the political associations it acquired through heavy usage over time,²⁵ and its use as a euphemism to denote intermediate sanctions designed to effect one or more of the other goals of the juvenile justice system. For example, a two-year incarceration of a 14-year-old in a state “training” school is often called “rehabilitation.” *Black’s Law Dictionary* defines *rehabilitation* in the context of criminal law as “the process of seeking to improve a criminal’s character and outlook so that he or she can function in society without committing other crimes.”²⁶

Problems arise when this definition of *rehabilitation* is applied to children and adolescents. The rehabilitative process is open to widely different interpretations depending on the philosophy of the decision-maker. For example, prolonged detention of a moderate-level offender is thought by some decision-makers to be rehabilitative because it may improve the offender’s character. Yet modern psychology and psychiatry specifically dispute that a child or adolescent has a fully formed character. For example, a child cannot be diagnosed with an antisocial personality disorder before 18 years of age.²⁷ In other words, the character of the child and adolescent is still in the process of forming. Evidence exists that incarceration, boot camps,²⁸ and the fear of being “scared straight”²⁹ do nothing to improve

the characters of juvenile delinquents, even though all are commonly cited as rehabilitative elements of the juvenile justice system.

If the term is to be used at all, *rehabilitation*—at least in the context of the low-level juvenile offender—should be defined as “the goal of fostering positive social development (healthy personal, social, and moral maturation) of youth.”³⁰

Stated in this way, the goal of rehabilitation is broader than punishing, controlling, or deterring behavior, but it does include the more narrow aim of controlling and delivering consequences that will serve as deterrents to delinquent behaviors, and that will provide for community safety. Given the confusion that currently surrounds the primary purpose of juvenile court law, it is imperative that the reader understand that these goals (positive development versus behavior control/punishment) are *not* in opposition to each other but, rather, are interdependent. This article describes the interdependence between the two goals and explains how an appreciation of the principles of healthy childhood development has a direct bearing on the design of effective sanctions and deterrents for the vast majority of juvenile offenders.

DURATION OF SANCTIONING AND FREQUENCY OF REVIEWS

Many variables play roles in determining effective offender-based sanctioning. Generalization is therefore difficult and risks contradiction in an article advocating individualized decision making. Nevertheless, this article will address two primary components of effective sanctioning: duration of sanctioning and frequency of review. Developmentally appropriate offender-based sanctions usually vary along these dimensions.

The reason that a year seems interminably long for a 4-year-old is that a year is, subjectively, one-fourth of his life. For a 60-year-old man, a year is only one-sixtieth of his life. This subjective perspective is why the years seem to go by more quickly as we get older. The reason this principle is important to understand in the context of sanctions is twofold. First, it has a

direct bearing on the effects of delaying the onset of sanctions vis-à-vis the behavior for which they are to serve as punishment or deterrent. The younger the child, the more quickly the consequences must follow the behavior in order to be effective. Second, the perspective has a direct bearing on setting developmentally appropriate durations of sanctions. It is therefore imperative that decision-makers remember that the younger the child, the longer a given duration of sanction will be subjectively experienced. This is especially important when detention is used. If the duration is too long, the child will invariably feel that the punishment could not possibly match the crime. There is the risk of losing this child, who will externalize his responsibility (e.g., blame his or her lawyer) and feel (consciously or not) that societal authority is capricious and unfair. Patricia Chamberlain aptly describes the roots of this feeling:

Another salient characteristic of adolescents with severe conduct problems is that they invariably have a strong sense that they have been treated unfairly. Whether it has been by their parents, the police, or their teachers, each of them feels victimized in some way. Of course, there are good reasons for this. After reading the case histories of these children, one cannot help but feel sympathetic to their plight. Many of them were raised in families in which there have been serious mental health problems for generations and legacies of abuse, crime, and disrupted relationships have been passed down as part of the family tradition. Attempting to change the life course of these adolescents while treating them in a way they see as fair is a formidable challenge.... That is, an individual will act out in destructive ways to the extent that he or she feels treated unfairly.³¹

If efficacy in sanctioning is the goal, the foremost considerations in tailoring the variables of duration of sanction and frequency of monitoring should be the developmental stage and psychological circumstances of the child. As discussed above, younger children will subjectively experience any given duration of sanction as longer because of how they experience time. In practical terms, this means that three months for a 14-year-old is subjectively much longer

than three months for an adult. This is why effective parents ground their children for weeks, not months, at a time. Imposing a sanction longer than a few days or weeks on a younger child does not usually add anything to deterrence. It is also more difficult to enforce and is more likely to be perceived as grossly unreasonable and unfair, further mitigating the effectiveness of the sanction.³²

Developmentally appropriate *frequency of review*, however, is the other side of this coin. Because younger children experience time as moving more slowly, frequent reviews of their behavior are highly desirable, even necessary. Older children and adolescents do not require such frequent monitoring. Effective parents monitor homework, chores, curfews, and bedtimes daily or weekly until they are assured that the child can monitor these responsibilities on his or her own. Effective therapeutic residential centers or group homes also monitor behaviors on a daily or weekly basis and reward or punish accordingly. Consequences for misbehaviors are sure, consistent, quick, and directly tied to the undesired behavior. On the other hand, the child gets a fresh start with every new day or week.

To be effective in promoting positive development and extinguishing negative behaviors, the juvenile justice system must adopt the same consciousness of developmental appropriateness: as a general rule, the younger the child, the shorter the duration of sanction but the greater the frequency of monitoring. For example, in residential treatment, a youth is not asked to stay in control “forever.” Experience has taught that “one day at a time” works much better. Similarly, frequent reviews give the child support and an excuse to say no to peer pressure. Another example is review of compliance with court orders. It is unreasonable to reprimand a child six months after he or she has stopped complying with an order. The original offense, the rationale for the court order, and the warning and admonitions delivered by the judge have long since faded from the child’s memory. The judge has a record to review; the child does not. If goals (for example, school attendance and performance) have been set, progress toward those

goals should be monitored frequently to make sure the child is on track. To be fair and effective with young people, the juvenile justice system must strive to mark time in accordance with the needs of individual youth at different stages of maturation and not based on a fixed and preset timetable determined by convenience or usual and customary practice. In general, this means that the juvenile justice system must conduct more frequent reviews. In addition, each child would ideally have one judge; in practice, this would mandate a less-frequent rotation of judges.³³

COMMUNITY-BASED SANCTIONS ARE BETTER THAN INSTITUTIONAL ALTERNATIVES

Although acknowledging one’s personal responsibility for an action is often difficult, the youth must accept responsibility for his or her delinquent behaviors. This step corresponds to the developmental goal of encouraging children to control their impulses, to consider the impact of their behaviors on others, and to accept responsibility for their own mistakes without blaming them on others or on circumstance. For a youth who has not yet become desensitized to the threat or imposition of detention, the initial impact of incarceration will be profound. At the same time, the impact of this sanction diminishes dramatically over time as the child becomes desensitized. At a certain point, the child begins to “identify” with some of the more delinquent peers in detention.³⁴ For most teenagers, losing a Friday and a Saturday night to a curfew is sufficient to get their attention and to serve as an effective sanction.³⁵ Paradoxically, months of detention are often counterproductive and can have seriously undesirable side effects, such as gang recruitment. Judges report a frequent refrain from parents that “my child never even *thought* of doing *that* until he was locked up with those other children.”

From a developmental point of view, prolonged detention is also problematic because the child is undergoing developmentally important phases of life in an institutional setting with idiosyncratic demands particular to that setting. Consequently, the child is

adapting to incarceration and an institution, not to the community from which she came and to which she will return. It is imperative that the juvenile justice decision-maker understand that virtually *every effective evidence-based intervention for delinquency occurs in the home and community*. One expert states it simply:

It seems unlikely that institutional treatment, retraining or punishment is effective in decreasing delinquency. It is even possible that there is a harmful effect because of the alienation, stigmatization and “contamination” suffered by those who are incarcerated together with other offenders. Even where treatment gains are observed, it appears that they are lost on return to the community.³⁶

This finding makes perfect sense. Normal child and adolescent development requires an environment that is more, not less, normalized.³⁷ This is one reason why boot camps do not work for the great majority of offenders and may, in fact, worsen their behavior.³⁸

THE PROPORTIONALITY OF SANCTIONS

The developmentally appropriate intensity of sanctions is also very difficult to address with generalizations, for several reasons. First, there are cultural differences in what is considered a reasonable way to treat a child. Not long ago, many Americans believed corporal punishment was a sanction of choice, hence the popular saying “Spare the rod and spoil the child.” Second, individuals experience sanctions differently from one another. For some children, just the thought of detention is terrifying, while for others, a stint in “juvie” is a badge of honor: in fact, home detention or being alone on the weekends is a fate far worse than juvenile hall, where their friends are.³⁹ Third, depending on the degree to which a child has become inured to the system, a given sanction may appear more or less fair to that child and his family. For example, the family of a girl who is in detention for running away, drinking, and intimately associating with older males in stolen cars might

be relieved or, depending on the context, might feel that she is being discriminated against on the basis of her gender.⁴⁰

Inasmuch as the child’s and family’s experience with the court is *itself* a determinant of future attitudes toward social authority, it is imperative that the court be predictably knowledgeable and reasonable in designing sanctions that are offender-based. This requires an understanding of the individual child, as well as his or her family, culture, and social circumstances.

DEVELOPMENTALLY CONSTRUCTIVE SANCTIONS

As many parents and teachers know, designing constructive sanctions is challenging but very worthwhile because it multiplies the developmental, educational, or social yield. Children become more mature, responsible, knowledgeable, or prosocial as a result of their punishment. This is why researching and writing a report on the effects of substance abuse is better than writing “I will not smoke marijuana” a thousand times. Volunteer service at a senior care home is better for a child than picking up highway litter (unless the offense is littering). A youth convicted of driving while intoxicated might be ordered to volunteer in an emergency room. A particularly good example of a constructive sanction for graffiti vandals is ordering them to adopt a piece of property and holding them strictly responsible for maintaining it and keeping it graffiti-free.⁴¹ This type of individualized and nuanced sanction is developmentally constructive because the youth has a chance to experience the sensation of watching out for his assigned property. He learns what it feels like to be at the mercy of vandals and experiences the victimization of having his property vandalized. Furthermore, he learns the inconvenience, cost, time, and labor involved in cleaning up after somebody else who has little regard for the rights of others.

Another example is arranging for a youth to meet his victim. Adolescents, often thoughtless and impulsive, will commit a crime or prank without considering its impact on others. When a human face

is placed on the damage and suffering adolescents have caused, they often feel both regret and remorse. What most of these offenders lack is experience—not the capacity for empathy. Whether they admit it or not, a genuine desire to make things better often arises. The juvenile justice system should take every opportunity to present to youth the human face of victimization.⁴² From a developmental point of view, this is one of the most potent tools in the hands of decision-makers. It teaches empathy, accountability, and compassion while allowing the painful impact of guilt and shame to mold future behavior. It personalizes the system and humanizes society for the children whom the system is trying to socialize.⁴³

DEVELOPMENTALLY COMPETENT PRACTICE PRINCIPLES

The most effective sanctions are those that address the personal, familial, and societal variables that are essential to healthy child development. These sanctions are community-based whenever possible because, as discussed earlier, virtually every effective evidence-based intervention for delinquency occurs in the home and community. These sanctions almost invariably help the low- to moderate-level offender in developing increased personal competence and connectedness to prosocial elements of a larger community. The immediate community perceives them as measured and fair. Effective sanctions provide supervision, encouragement, and support, along with clear, firm, and timely consequences for delinquent behavior. Effective sanctions are also characterized by some of the following features:

1. They focus on the offender, not the offense.

- There is sensitivity to the developmental stage of the offender.
- Juveniles are dealt with in the context of their connectedness with others (parents, siblings, extended family, peers).
- Judicial and supervisory contact with the offender is frequent and reliable.
- Opportunities for the child to externalize responsibility for his or her acts are minimized.

2. They fortify extant strengths, competence, and self-control.

- The individual youth's strengths are identified and mobilized.
- There is recognition of the child's efforts; the child receives encouragement.
- Multiple aspects of the child's life are acknowledged (for example, sanctions may effect education, peer relations, vocational preparedness, and prosocial community relatedness).
- The child's commitment to appropriate education or vocational preparedness is vigorously promoted.
- The youth is given meaningful opportunities to enhance the development of personal competence.

3. They are community-based rather than institutional, building on relationships with the child's family and community whenever possible.

- Family, schools, peer group, and neighborhood risk and need factors are taken into account.
- There are meaningful opportunities to enhance the youth's connectedness to prosocial elements, e.g., neighborhood sports teams.
- Immediate and extended family and community members are used as allies.
- After-school hours are accounted for.
- Time with antisocial peers is minimized.
- The youth is exposed to positive peer environments.
- The youth has genuine opportunities to contribute to family, school, or a prosocial community.

4. They are realistic.

- Incentives to succeed are within the reach of the offender.
- Clear expectations are set, and monitoring is set at a developmentally appropriate frequency.
- There is recognition of the child's efforts; the child receives encouragement.

- There is a developmentally appropriate provision of latitude for mistakes.
5. **They engender respect for the court and its processes.**
- There is an implicit and explicit expectation of respect for the court.
 - There is explicit respect for each youth and his or her family, culture, and community.
 - Humiliation or shaming is not used as a means of motivation (for example, the child is shown respect).
6. **They put a human face on the court process.**
- The judge relates to each child personally.
 - All parties explicitly communicate the message that “the system cares.”
 - The child is encouraged to meet the victims of his or her criminal acts.
 - Empathy for the victims, an apology, and individualized restitution are explicit expectations.

STRATEGIES FOR SPECIAL POPULATIONS

Within the juvenile population there are enormous differences in emotional development between, for instance, a 12-year-old and a 17-year-old. There are also vast differences among children of the same chronological age—for example, among 13-year-old boys. Understanding principles of child development and children’s mental health can help guide the design and implementation of more effective interventions for youth who have committed minor to moderately severe offenses. For example, there is evidence that earlier-maturing girls and later-maturing boys tend to have more problems than adolescents who experience puberty in the typical age range.⁴⁴ The National Research Council’s Forum on Adolescence reports that, compared to girls who physically mature later, early-maturing females are at increased risk for victimization (especially sexual assault), which may contribute to their greater likelihood of problem behaviors.⁴⁵ This section describes four such special populations to highlight the types

of developmental issues that professionals commonly encounter.

GIRLS

Girls make up an increasing proportion of the number of juveniles arrested.⁴⁶ The 1997 violent crime arrest rate for females was 85 percent higher than the 1987 rate.⁴⁷ No single theory for their increasing arrest rates is entirely satisfactory. As with juvenile crime in general, the causes of the increase are many and include developmental,⁴⁸ psychological,⁴⁹ post-traumatic,⁵⁰ sociological,⁵¹ and processing factors.⁵² Compared to boys, girls are (1) more often arrested and tried for status offenses such as running away and curfew violations,⁵³ (2) more likely to be the victims of trauma,⁵⁴ and (3) more affected by apparent increases in the rates of family violence observed in specialized juvenile domestic violence court calendars.⁵⁵ A tragic fact is that many girls run away as a response to family trauma—especially sexual victimization.⁵⁶ Clinical experience makes it clear that we are unlikely to hear about this victimization in usual court processing.⁵⁷ Most often, the trauma will be displayed by out-of-control behavior, substance abuse, running away, extreme promiscuity, and even prostitution.⁵⁸ According to the National Research Council’s Forum on Adolescence,

[t]here is some evidence that, on average, girls experience more distress during adolescence than boys. Some researchers have speculated that, for girls, the transition during puberty brings about greater vulnerability to other environmental stressors. In particular, a growing literature suggests that the early onset of puberty can have an adverse effect on girls’ development. It can affect their physical development (they tend to be shorter and heavier), their behavior (they may have higher rates of conduct disorders), and their emotional development (they tend to have lower self-esteem and higher rates of depression, eating disorders, and suicide). The youngest, most mature children are those at greatest risk for delinquency.⁵⁹

Among the juvenile population, girls are also disproportionately affected by affective (mood) disorders

such as major depression.⁶⁰ Because irritability and problems with impulse control are cardinal features of mood disorders,⁶¹ these symptoms often show up in female offenders.⁶² These circumstances create many difficulties for the decision-maker who may not have many gender-appropriate resources available as alternatives to traditional sanctions.⁶³ Punishment alone is not a good remedy for girls who are already self-destructive. And, from a child psychiatrist's point of view, self-punishment is one of the most difficult and intractable syndromes encountered in victims. It often occurs as an attempt at psychologically mastering an inflicted psychological wound that occurred when the victim was helpless or passive, as in the case with sexual abuse. In simple terms, a girl who has been seriously harmed is more likely to put herself in harm's way. Punishment by the justice system can, of course, exacerbate these self-destructive behaviors.

Another variable that sometimes compounds these problems is a girl's transgenerational involvement with the dependency or criminal system. For example, a girl's mother may have a history of involvement with the dependency court. If her mother has frequently been absent from her upbringing owing to the mother's involvement with the system, a girl is at higher risk for early pregnancy and subpar mothering of her own children. Thus, the stakes for the decision-maker are high; to be effective, he or she must take into account developmental, gender-specific, and mental health considerations to mitigate the potential risk to the girl and, potentially, to her children.⁶⁴

Although few gender-specific alternatives exist, juvenile justice professionals should look for programs that incorporate the following elements:

- teach girls how to build healthy relationships
- teach girls how to deal with emotional, physical, and sexual trauma
- address future risk of victimization
- provide for affect regulation to address the intense, rapid changes in mood that often characterize abused girls

- teach pregnancy prevention or prepare girls for motherhood
- base their programs in the community whenever possible

MENTALLY ILL AND RETARDED JUVENILE OFFENDERS

The juvenile justice system has become a dumping ground for emotionally disturbed juveniles with nowhere else to go.⁶⁵ Thus, decision-makers commonly face children with mental illness and mental retardation. In a recent survey, 86 percent of juvenile and family court judges said they believed that "mentally-ill juveniles were being shunted into the delinquency system."⁶⁶ Seventy percent of judges believed that at least 15 percent of defendants were "mildly or moderately mentally retarded."⁶⁷ Conservative estimates suggest that 20 percent of juvenile detainees have serious biological and genetic mental illnesses.⁶⁸ The rates of less-serious but equally debilitating illness (including posttraumatic stress reactions) are considerably higher—especially in girls.⁶⁹ Although the prevalence of mild and moderate mental retardation is unknown, the author's observation of one specialized court suggests it is very high.⁷⁰ The presence of a serious mental disability has a direct bearing on the imposition of appropriate sanctions (for example, boot camps are contraindicated during serious clinical depression), the use of juvenile beds,⁷¹ and the development of treatment alternatives.⁷² Indeed, 77 percent of juvenile and family court judges said that, given better treatment options, detention rates could be reduced.⁷³ As a practical matter, these better treatment options would be community-based sanctions that strengthen the family, bolster educational performance or vocational preparedness, and address accountability and victim restitution.

Most important, serious mental disability raises serious issues about diminished competence, fairness, and humaneness. Cognitively limited youth often are already taken advantage of by more intelligent yet antisocial youth; it would be even crueler to incarcerate them merely because they are delusional

or hallucinating. The sequelae of criminalizing the child with mental illness are clinically unacceptable. From a medical point of view, they are a violation of a fundamental ethical precept *primum non nocere*—"first do no harm."

With respect to mental illness, an effective juvenile justice system would have the following characteristics:

- aggressively identifies mental health issues by, for example, screening all youth
- seeks appropriate mental health and mental retardation expertise for diagnosis or assessment⁷⁴
- provides treatment in lieu of institutionalization, boot camps, or incarceration for children with serious mental illness
- separates children with mental retardation from their peers with normal intelligence

MINORITY YOUTH

The proportion of minority youth in the juvenile justice system greatly exceeds the proportion of these youth in the general juvenile population.⁷⁵ This disproportionate representation extends to virtually all phases of the delinquency process and intensifies as minority youth become more deeply involved in the juvenile justice system.⁷⁶ This situation continues to worsen despite increased public awareness and efforts to combat it.⁷⁷

There are myriad causes and conditions from which these circumstances arise. Developmental psychologists, parents (of all ethnicities), and concerned citizens view the situation as unacceptable because the very children to whom our society is trying to teach the value of justice perceive our society as grossly unjust. Although minority children are obviously the most deleteriously affected, their plight is not lost on their nonminority peers. The unfairness of "the system" toward people of color has become a widely accepted fact among young people. Popular music and entertainment abound with "jokes" about racial profiling and the system's unequal treatment of minorities. From a child-development point of view, this severely undermines our children's moral

development and their respect for society and social authority. As these children age, their lack of respect turns into cynicism and is accompanied by the belief that injustice, not justice, is the lot of people of color in America. The societal impact of this cynicism on our social fabric is difficult to overestimate.

TRANSGENERATIONAL INVOLVEMENT

Another dimension to the problem of disproportionate minority confinement is the transgenerational involvement of children. Transgenerational involvement is a pattern in which multiple generations of a single family are involved in the justice system. Examples include a 13-year-old boy brought before the court while his father is still in prison or a 12-year-old girl who was taken from her mother by child protective services when she was 6 years old and is now charged with battering one of her foster parents. When encountering a young offender from this background, the decision-maker must carefully consider developmental issues because of the complex and interrelated dynamics between the child, parental authority, and social authority. Transgenerational involvement creates psychosocial dynamics that might lead to an escalation in antisocial reactions rather than to their abatement. A young child is likely to idealize his or her imprisoned parent and unambivalently harbor hatred of anyone whom they perceive to have hurt that parent. An older child is also likely to identify with parental figures, siblings, cousins, and others who have been sanctioned by society. Idealization, identification, empathy, and protectiveness are natural human filial attitudes, desirable and common to us all. From the point of view of the child to be sanctioned, however, they can create complex ambivalence. For example, a child who enters the system from a family with extensive transgenerational involvement may view the process as a rite of passage and a point of (unspoken) family pride. Consequently, careless system interventions may have paradoxical and undesired effects on that child, such as providing him with what he silently desires.

To the transgenerationally involved parental figure, sanctioning of his or her child can be perceived many different ways. Some parents may be indifferent. Others may view the intervention as unwelcome and unfair (perhaps racist or sexist) harassment or be very fearful of involvement with social authority based on their previous personal experiences with that authority (for example, child protective and immigration services). Some parents, such as recovering alcoholics or drug addicts, may be relieved or grateful that someone is stepping in, in the hope that societal intervention will help their children turn their lives around and prevent the unnecessary suffering that they themselves have endured as a result of their addiction.

It is essential that the decision-maker understand the whole spectrum of parental attitudes, which may include mixtures of indifference, antipathy, fear, and hope. These attitudes are part of the context in which the child will perceive the sanction and are therefore a major determinant of its effectiveness or lack thereof.

The decision-maker must also examine his or her own attitudes and biases regarding the relationships of transgenerationally involved parents and children: Does the decision-maker believe (consciously or unconsciously) that criminality is genetically determined and that he or she is providing early detection and incapacitation of children destined to become criminals? Does he or she believe his or her job is to protect one part of society from another? Does he or she believe children should be taken away from criminal parents and neighborhoods to reduce the chance that the child will be raised to become a criminal?⁷⁸ Does he or she assume that parents will interpret his or her interventions as benevolent? Does he or she believe that setting an example with one child will serve as an effective deterrent to other siblings who are also at risk? Although a full discussion of these attitudes is beyond the scope of this article, the decision-maker must ensure that his or her attitude about the incorrigibility of the children of justice-involved parents does not lead to ineffective and inappropriately punitive law enforcement and sanctioning.

CONCLUSION

Primum non nocere—first do no harm—is not an ideal but the lowest threshold to which adequate performance is compared. Once public safety and victim rights have been accounted for, it is reasonable to apply this minimal standard to the juvenile justice system, which intervenes on behalf of the highest-risk, and oftentimes most highly victimized, youth. To meet this threshold, decision-makers need familiarity with the general principles of child development and a reasonable knowledge of the risks and needs presented by each individual offender. The juvenile justice system cannot do this alone.

For the majority of court jurisdictions, meaningful implementation of the principles outlined in this article requires an amount of time, thought, and expertise that far exceeds their current capacity. Many jurisdictions exhibit severe fragmentation of triage, assessment, and service delivery systems with poor communication, little mutual understanding, and often distrust between community agencies competing for the same public dollar. Nevertheless, the developmental principles outlined in this article can serve as a rationale for intense cross-disciplinary training, cooperation, and integrated treatment planning far beyond what currently exists. New models are needed in which departments of probation, mental health, social service, and education work synergistically, instead of at odds with one another. All participants in the juvenile justice system must appreciate the value of fostering positive child development and realize that some current practices can be harmful. Defense attorneys must understand that effective treatment for a child is not synonymous with punishment. In turn, prosecutors and probation officers must understand that effective intervention enhances public safety. Judges need to appreciate the enormous impact they can have if they encourage cooperative, working relationships among all members of the juvenile court system.

In spite of very significant advances in understanding juvenile delinquency, developmental traumatology, neurobiology, and social learning psychology, there is a palpable dearth of information being transmitted to

key players in the juvenile justice system. This is not an insoluble problem. At the very least, decision-makers can be educated about practices and interventions that have a developmental rationale or an evidence base and therefore have a reasonable chance of being successful. This would naturally lead to the elimination of ineffectual practices, which also frequently present unacceptable risks to normative child development and socialization.

NOTES

1. For psychological and neurobiological references and studies linking the origins of consciousness and morality in children to a nurturing environment, see STANLEY I. GREENSPAN & NANCY BRESLAU LEWIS, *BUILDING HEALTHY MINDS: THE SIX EXPERIENCES THAT CREATE INTELLIGENCE AND EMOTIONAL GROWTH IN BABIES AND YOUNG CHILDREN* 85–129 (Perseus 1999); STANLEY I. GREENSPAN & BERYL LIEFF BENDERLY, *THE GROWTH OF THE MIND AND THE ENDANGERED ORIGINS OF INTELLIGENCE* 110–32 (Perseus 1997); ADRIAN RAINE, *THE PSYCHOPATHOLOGY OF CRIME: CRIMINAL BEHAVIOR AS A CLINICAL DISORDER* (Academic Press 1997); David E. Arredondo & Leonard P. Edwards, *Attachment, Bonding, and Reciprocal Connectedness: Limitations of Attachment Theory in the Juvenile and Family Court*, 2 J. CTR. FOR FAM. CHILD. & CTS. 109 (2000); Harry F. Harlow, *Mice, Monkeys, Men, and Motives*, 60 PSYCHOL. REV. 23 (1953); Bruce D. Perry, *Bonding and Attachment in Maltreated Children: Consequences of Emotional Neglect in Childhood*, 4 CHILDTRAUMA ACAD. PARENT & CAREGIVER EDUC. SERIES (2001), www.childtrauma.org/ctamaterials/AttCar4_03_v2.pdf. Neurobiological studies of nonhuman mammals also show the necessity of an attentive and predictably nourishing environment for normal brain development. See David H. Hubel & Torsten N. Wiesel, *Receptive Fields and Functional Architecture in Two Non-striate Visual Areas (18 and 19) of the Cat*, 28 J. NEUROPHYSIOLOGY 229 (1965); Anita M. Turner & William T. Greenough, *Differential Rearing Effects on Rat Visual Cortex Synapses: I. Synaptic and Neuronal Density and Synapses per Neuron*, 329 BRAIN RES. 195 (1985).

2. For example, the perception of gross unfairness or indifference can further alienate children or cause them to lose respect for the social system that the court represents. As any parent can testify, children and adolescents are

preoccupied with the concept of “fairness,” and perceived or real lack of fairness can lead to increased negative behavior.

3. See, e.g., FORUM ON ADOLESCENCE, NAT’L RESEARCH COUNCIL & INST. OF MED., *ADOLESCENT DEVELOPMENT AND THE BIOLOGY OF PUBERTY 1* (Michael D. Kipke ed., Nat’l Acads. Press 1999), <http://books.nap.edu/books/0309065828/html/1.html#pagetop>; Laurence Steinberg & Elizabeth Cauffman, *A Developmental Perspective on Jurisdictional Boundary*, in *THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT* 379 (Jeffrey Fagan & Franklin E. Zimring eds., Univ. of Chicago Press 2000).

4. According to Erik Erikson, “In their search for a new sense of continuity and sameness, adolescents have to refight many of the battles of earlier years, even though to do so they must artificially appoint perfectly well-meaning people to play the roles of adversaries; and they are ever ready to install lasting idols and ideals as guardians of a final identity.” ERIK H. ERIKSON, *CHILDHOOD AND SOCIETY* 261 (W.W. Norton 2d ed. 1963) (1955).

5. According to one panel of child psychologists, “Research conducted with both humans and nonhuman primates suggests that adolescence is a time for carrying out crucial developmental tasks: becoming physically and sexually mature; acquiring skills needed to carry out adult roles; gaining increased autonomy from parents; and realigning social ties with members of both the same and the opposite gender. Studies of such commonalities underscore the critical importance of this part of the life course in establishing social skills. For many social species, such skills are further developed through peer-oriented interactions that are distinct from both earlier child-adult patterns and later adult pairings.” FORUM ON ADOLESCENCE, *supra* note 3, at 1–2.

6. Laurence Steinberg & Robert G. Schwartz, *Developmental Psychology Goes to Court*, in *YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE* 23 (Thomas Grisso & Robert G. Schwartz eds., Univ. of Chicago Press 2000). The authors continue: “[I]t is not an overstatement to say that it is much easier to alter an individual’s life course in adolescence than in adulthood.” *Id.*

7. For excellent collections on these important topics, see *YOUTH ON TRIAL*, *supra* note 6; *THE CHANGING BORDERS OF JUVENILE JUSTICE*, *supra* note 3.

8. “Transgenerationally involved” children are children whose adult family members have been involved in the justice system. The term includes children of parents,

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grandparents, aunts, and uncles who have been arrested, incarcerated, or are currently incarcerated or on parole. It also includes adult relatives' involvement with the dependency court.

9. See, e.g., GREENSPAN & BENDERLY, *supra* note 1, at 264; DANIEL J. SIEGEL, *THE DEVELOPING MIND: TOWARD A NEUROBIOLOGY OF INTERPERSONAL EXPERIENCE* 1–22, 276–82 (Guilford Press 1999); Arredondo & Edwards, *supra* note 1, at 111–14; cf. David H. Hubel, *Effects of Distortion of Sensory Input on the Visual System of Kittens*, 10 *PHYSIOLOGIST* 17 (1967) (studying joint impact of environment and physiology on feline neurobiological development); Hubel & Wiesel, *supra* note 1 (same).

10. See, e.g., ALBERT BANDURA & RICHARD H. WALTERS, *SOCIAL LEARNING AND PERSONALITY DEVELOPMENT* (Holt, Rinehart & Winston 1963); JULIAN B. ROTTER, *SOCIAL LEARNING AND CLINICAL PSYCHOLOGY* (Prentice Hall 1954); Albert Bandura & Frederick J. McDonald, *The Influence of Social Reinforcement and the Behavior of Models in Shaping Children's Moral Judgments*, 67 *J. ABNORMAL & SOC. PSYCHOL.* 274 (1963); Robert Sears, *A Theoretical Framework for Personality and Social Behavior*, 6 *AM. PSYCHOLOGIST* 476 (1951).

11. See, e.g., RAINE, *supra* note 1; SIEGEL, *supra* note 9; Perry, *supra* note 1.

12. Virtually all evidence-based approaches to delinquency include intensive family involvement. Good examples of evidence-based practices include the “wraparound” approach used in Santa Clara County, California; the “multisystemic therapy” developed in rural South Carolina and Columbia, Missouri; and Treatment Foster Care and Functional Family Therapy promulgated in Oregon. Statistically and clinically meaningful studies have shown that evidence-based approaches are effective. As such, they can be described as effective in treating antisocial behaviors (juvenile delinquency) with a reasonable degree of certainty. Historically, most juvenile justice interventions derive their support from anecdotal evidence, which does not withstand the test of follow-up evaluation for effectiveness. Examples of these (non-evidence-based) practices include wilderness programs, shock incarceration, scared-straight programs, and boot camps. See PETER FONAGY ET AL., *WHAT WORKS FOR WHOM? A CRITICAL REVIEW OF TREATMENTS FOR CHILDREN AND ADOLESCENTS* 153–65 (Guilford Press 2002); RICHARD A. MENDEL, *LESS HYPE, MORE HELP: REDUCING JUVENILE CRIME, WHAT WORKS—AND WHAT DOESN'T* 10–11 (*Am. Youth Policy Forum* 2000) (describing Multisystemic Therapy and Functional Family Therapy); EMQ CHILDREN & FAMILY

SERVS., *PROGRAM UPLIFT, WRAPAROUND SERVICE REPORT 3* (2001) (describing the wraparound approach).

13. See PANEL ON JUVENILE CRIME: PREVENTION, TREATMENT & CONTROL, NAT'L RESEARCH COUNCIL & INST. OF MED., *JUVENILE CRIME, JUVENILE JUSTICE* 16 (Joan McCord et al. eds., Nat'l Acad. Press 2001), <http://books.nap.edu/books/0309068428/html/16.html>.

14. See GREENSPAN & BENDERLY, *supra* note 1, at 258–70 (describing effects of violence and deprivation on a young delinquent).

15. See *id.*

16. The irony of relying on the justice system to embody society's values in light of current resource allocation is not lost on the author.

17. It is painful to be deprived of human attention. This is why solitary confinement is used as punishment. There are psychological reasons why attention and reciprocal interaction are required to develop a normal human psyche. See IDRIES SHAH, *LEARNING HOW TO LEARN: PSYCHOLOGY AND SPIRITUALITY IN THE SUFI WAY* 85 (Harper & Row 1983) (“One of the keys to human behavior is the attention factor”); see also Arredondo & Edwards, *supra* note 1, at 111–14 (describing the necessity of reciprocal connectedness, beyond attachment and bonding, for normal brain and social development).

18. Attention-seeking behavior is also noted in infants. Upon casual observation in orphanages where infants are attention-deprived, a visitor will often be greeted with intense demands for attention.

19. This is not a minor problem among American youth. The U.S. Justice Department's Office of Juvenile Justice and Delinquency Prevention estimates that 17 to 23 percent of children from 6th grade and above have been bullied at least weekly. NELS ERICSON, *OJJDP FACT SHEET: ADDRESSING THE PROBLEM OF JUVENILE BULLYING* (June 2001), available at www.ncjrs.org/pdffiles1/ojjdp/fs200127.pdf.

20. See STEVEN M. COX & JOHN J. CONRAD, *JUVENILE JUSTICE: A GUIDE TO PRACTICE AND THEORY* 11 (McGraw-Hill 3d ed. 1991) (“The dispute between legalists and therapists remains unresolved after a century or more of debate”); BARRY KRISBERG & JAMES F. AUSTIN, *REINVENTING JUVENILE JUSTICE* 109 (Sage Publ'ns 1993) (arguing that the juvenile justice system should be more attentive to social inequity); Barry Krisberg & James C. Howell, *The Impact of the Juvenile Justice System and Prospects for Graduated Sanctions in a Comprehensive Strategy, in*

SERIOUS AND VIOLENT JUVENILE OFFENDERS: RISK FACTORS AND SUCCESSFUL INTERVENTIONS 347 (Rolf Loeber & David P. Farrington eds., Sage Publ'ns 1998) (arguing same as applied to serious juvenile offenders).

21. PANEL ON JUVENILE CRIME: PREVENTION, TREATMENT & CONTROL, *supra* note 13, at 78 (“Failure to set clear expectations for children’s behavior, inconsistent discipline, excessively severe or aggressive discipline, and poor monitoring and supervision of children predict later delinquency”).

22. The issue of “potential harm done” is rarely part of a discussion on choosing between sanctioning alternatives. This is especially problematic in the context of child development. Failures during critical windows of this development can have lifelong consequences because of the profound impact of early experience on a child’s worldview. For example, a child who is subjected to a callous environment for a significant duration of time is likely to make generalizations about the rest of the world (i.e., that it is also fundamentally, if not overtly, callous). The principle of *primum non nocere* (first do no harm) is especially important when dealing with children for many reasons, including the enduring impact of childhood experience.

23. A popular and well-grounded conceptualization of the purpose of juvenile probation is termed the “Balanced Approach” or “Balanced and Restorative Justice.” This thoughtful and developmentally sound approach dictates that three goals—community safety, accountability, and competence development—steer decision making. This model does not, however, *explicitly* address the issues of deterrence, societal desire for unadulterated retribution, or the notion of “harm done” by current practices. For a good review of this model approach, see Dennis Maloney et al., *Juvenile Probation: The Balanced Approach*, 39 JUV. & FAM. CT. J. 1–11 (1988).

24. The *American Heritage Dictionary of the English Language* defines *rehabilitate* as “1. To restore to good health or useful life, as through therapy and education. 2. To restore to good condition, operation, or capacity. 3. To reinstate the good name of. 4. To restore the former rank, privileges, or rights of.” AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1471 (Houghton Mifflin 4th ed. 2000).

25. In practice, the use of the term *rehabilitation* is often portrayed as an alternative to punishment or accountability-based sanctioning. This portrayal leads to an unfortunate dichotomization, which further muddles clear thinking on desired outcomes and the purpose of the delinquency court.

26. BLACK’S LAW DICTIONARY 1290 (West Group 7th ed. 1999).

27. AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS—TEXT REVISION (DSM-IV-TR) 704 (4th ed. 2000) (“By definition, Antisocial Personality cannot be diagnosed before age 18”).

28. See MENDEL, *supra* note 12, at 59.

29. See Richard E. Behrman, *The Juvenile Court: Statement of Purpose*, 6 FUTURE CHILD. 33 (1996) (noting the need for prosecutors and defenders to understand social services).

30. This definition helps clarify what, in addition to public safety and victim rights, should be the proper objectives of the delinquency court. It also creates a framework for developing meaningful outcome measures that are quantifiable yet not limited to detected recidivism per se.

31. PATRICIA CHAMBERLAIN, FAMILY CONNECTIONS: A TREATMENT FOSTER CARE MODEL FOR ADOLESCENTS WITH DELINQUENCY 30 (Northwest Media 2d ed. 1998).

32. Physiological tolerance to medication may provide a useful analogy. The dose and duration of administration are critical to the effectiveness of medication. Administration of too much medication for too long can lead to a marked reduction in the medication’s effectiveness or to undesirable side effects.

33. Less frequent rotation of judges is highly desirable for many other reasons, not the least of which is the relative lack of experience engendered by a one- to two-year juvenile rotation. Longer rotations or permanent assignments would allow an interested judge to acquire the training and cultivate the experience necessary for wisdom on the bench.

34. Moreover, there is little information regarding evaluation of the efficacy of detention. According to one critique, “No responsible business concern would operate with as little information regarding its success or failure as do nearly all of our delinquency-prevention and control programs. It is almost possible to count on one hand the number of true experiments in which alternative techniques are compared; the number of systematic, though nonexperimental, evaluations is not a great deal larger. We spend millions of dollars a year in preventive and corrective efforts, with little other than guesswork to tell us whether we are getting the desired effects.” William E. Wright & Michael C. Dixon, *Community Prevention and Treatment of Juvenile Delinquency: A Review of Evaluation Studies*, 14 J. RES. CRIME & DELINQ. 35, 55 (1977)

- NOTES (citing Wheeler S. Cottrell et al., *Juvenile Delinquency: Its Prevention and Control*, in DELINQUENCY AND SOCIAL POLICY 428, 440 (Paul Lerman ed., Praeger 1970)).
35. I am indebted to Kurt Kumli, supervising district attorney of the Santa Clara County Delinquency Court, and Judge Leonard Edwards for this observation.
36. FONAGY ET AL., *supra* note 12.
37. See MENDEL, *supra* note 12, at 17–20; Lawrence W. Sherman et al., *Preventing Crime: What Works, What Doesn't, What's Promising*, NAT'L INST. OF JUSTICE, RES. IN BRIEF 1–13 (July 1998) (summarizing findings of 1997 report to Congress with same title); Carol Sheldrick, *Treatment of Delinquents*, in CHILD AND ADOLESCENT PSYCHIATRY 968 (Michael Rutter et al. eds., Blackwell 3d ed. 1994).
38. Wright & Dixon, *supra* note 34, at 53 (“Empey and Lubeck ... and Empey and Erickson ... reported that, after one- and four-year follow-ups, those youths who had been incarcerated committed more serious crimes when they were returned to their communities than did the youths who had been in the community treatment program”).
39. I am indebted to Kurt Kumli for this observation.
40. See *infra* text accompanying notes 46–64.
41. I am indebted to Kurt Kumli for this example.
42. Fostering such an understanding is the cornerstone of the Balanced and Restorative Justice approach. See *supra* note 23 and accompanying text.
43. Of course, many of the children in the delinquency system have also themselves been victims. Indeed, W.H. Auden reminds us:
- I and the public know
What all schoolchildren learn,
Those to whom evil is done
Do evil in return.
- W.H. AUDEN, *September 1, 1939*, in THE ENGLISH AUDEN: POEMS, ESSAYS, AND DRAMATIC WRITINGS, 1927–1939, at 245 (Edward Mendelson ed., Faber & Faber 1977).
44. FORUM ON ADOLESCENCE, *supra* note 3, at 18. “Indicators of pubertal growth have been observed as early as age 7. These findings suggest that as children experience puberty and other developmental changes at earlier ages, there may be the need to consider how to design and deliver age-appropriate interventions during the middle childhood and preteen years to help them avoid harmful or risky behaviors and develop a health-promoting lifestyle.” *Id.*; see also Julia A. Graber et al., *Is Psychopathology Associated With the Timing of Pubertal Development?*, 36 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 1768 (1997).
45. Daniel J. Flannery et al., *Impact of Pubertal Status, Timing, and Age on Adolescent Sexual Experience and Delinquency*, 8 J. ADOLESCENT RES. 21 (1993), quoted in FORUM ON ADOLESCENCE, *supra* note 3, at 20.
46. HOWARD N. SNYDER & MELISSA SICKMUND, NAT'L CTR. FOR JUVENILE JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 1999 NATIONAL REPORT (Sept. 1999), available at www.ncjrs.org/html/ojjdp/nationalreport99/toc.html.
47. OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, OJJDP STATISTICAL BRIEFING BOOK (Jan. 2002), at ojjdp.ncjrs.org/ojstatbb/html/qa253.html.
48. See, e.g., Cathy Spatz Widom, *Child Abuse, Neglect, and Violent Criminal Behavior*, 27 CRIMINOLOGY 251 (1989).
49. See MEDA CHESNEY-LIND, THE FEMALE OFFENDER: GIRLS, WOMEN, AND CRIME (Sage Publ'ns 1997); see also LESLIE ACOCA & JAMES AUSTIN, THE CRISIS: WOMEN IN PRISON (Nat'l Council on Crime & Delinquency 1996); FAEDRA LAZAR WEISS ET AL., PREVENTION AND PARITY: GIRLS IN JUVENILE JUSTICE (Girls Inc. 1996).
50. Delinquent girls report serious mental health problems, including depression and anxiety, and suicidal thoughts. A 1994 study of delinquent girls revealed that half of those surveyed had considered suicide, and some 64 percent of these girls had thought about it more than once. PANEL ON JUVENILE CRIME: PREVENTION, TREATMENT & CONTROL, *supra* note 13, at 102. See also FRED A ADLER, SISTERS IN CRIME: THE RISE OF THE NEW FEMALE CRIMINAL (McGraw-Hill 1975); Leslie Acoca, *Outside/Inside: The Violation of American Girls at Home, on the Streets, and in the Juvenile Justice System*, 44 CRIME & DELINQ. 561 (1998).
51. See, e.g., CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (Harvard Univ. Press 1982); Peggy C. Giordano et al., *Delinquency, Identity, and Women's Involvement in Relationship Violence*, 37 CRIMINOLOGY 17 (1999).
52. See, e.g., Kimberly Kempf-Leonard & Lisa L. Sample, *Disparity Based on Sex: Is Gender-Specific Treatment Warranted?*, 17 JUST. Q. 89 (2000).
53. PANEL ON JUVENILE CRIME: PREVENTION, TREATMENT & CONTROL, *supra* note 13, at 57–58. Leslie Acoca and Myrna S. Raeder argue that “[t]he process of disproportionately penalizing and detaining girls for status offenses and subsequent violations of valid court orders must

be halted. Instead, effective diversion and intervention options that specifically address girls' needs and engage their families and caretakers should be developed at the community level. Family focused programs that intervene upon family violence, including domestic combat between rebellious girls and their caretakers, should also be implemented at the community level. Further, training that provides accurate and current information on the characteristics and needs of girl offenders and their families and on dispositional alternatives for this population should be immediately delivered to law enforcement, probation officers, juvenile and family court judges, and child welfare professionals." Leslie Acoca & Myrna S. Raeder, *Severing Family Ties: The Plight of Nonviolent Female Offenders and Their Children*, 11 STAN. L. & POL'Y REV. 133, 143 (1999).

54. The vast majority of female detainees have been the victims of sexual or physical abuse. FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES 1998 (1999); see also ACOCA & AUSTIN, *supra* note 49; WEISS ET AL., *supra* note 49; Leslie Acoca, *Investing in Girls: A 21st Century Strategy*, 6 JUV. JUST. 3 (1999); Giordano et al., *supra* note 51.

55. I am indebted to Judge Eugene Hyman of the Superior Court of California, County of Santa Clara, who shared his experience working with a specialized juvenile cohort of domestic and family violence cases.

56. WEISS ET AL., *supra* note 49, at 14–15.

57. Many times victims of sexual abuse (especially chronic abuse) are ambivalent about the perpetrator. Sometimes they are also fearful. It is the common experience of psychotherapists that getting the "whole story" is often difficult because of complex feelings of shame, fear, guilt, and ambivalence.

58. This is an extremely common clinical profile seen by therapists who work with sexually traumatized girls at high risk.

59. FORUM ON ADOLESCENCE, *supra* note 3, at 10 (citations omitted).

60. PANEL ON JUVENILE CRIME: PREVENTION, TREATMENT & CONTROL, *supra* note 13, at 101. In general, women suffer from depression and other mood disorders at rates considerably higher than men, who are more likely to resort to substance abuse to control their moods.

61. AM. PSYCHIATRIC ASS'N, *supra* note 27, at 356; Richard Harrington, *Affective Disorders*, in CHILD AND

ADOLESCENT PSYCHIATRY: MODERN APPROACHES 330–43 (Michael Rutter et al. eds., Blackwell 3d ed. 1994).

NOTES

62. Females often (and more than males) present internalizing disorders, such as anxiety, depression, and eating disorders. Girls may direct pain, anger, self-loathing, and frustration inward as a reaction to sexual, emotional, and physical abuse. This internalization can lead to self-destructive behavior, such as extreme promiscuity, prostitution, and placing themselves in harm's way. See PANEL ON JUVENILE CRIME: PREVENTION, TREATMENT & CONTROL, *supra* note 13, at 101.

63. See OFFICE OF JUVENILE JUSTICE & DELINQUENCY PROGRAMS, U.S. DEP'T OF JUSTICE, GUIDING PRINCIPLES FOR PROMISING FEMALE PROGRAMMING: AN INVENTORY OF BEST PRACTICES (1998), available at www.ojjdp.ncjrs.org/pubs/principles/contents.html.

64. For example, different cultures have different attitudes toward sexual precocity and sexual behavior, including early pregnancy and child rearing. Early puberty poses fewer problems for girls in cultures whose adult women tend to support early maturation. For example, there is limited research suggesting that black girls cope better with early maturation than their white peers. FORUM ON ADOLESCENCE, *supra* note 3, at 29.

65. See, e.g., NAT'L CTR. FOR JUVENILE JUSTICE, DESKTOP GUIDE TO GOOD JUVENILE PROBATION PRACTICE 113 (2002), available at <http://ncjj.servehttp.com/NCJJWebsite/pdf/Chapter11.pdf> (noting that "many observers ... feel that, for fiscal and other reasons, the juvenile justice system has become a kind of dumping ground for emotionally disturbed juveniles who have nowhere else to go"); Joseph J. Cocozza & Kathleen Skowrya, *Youth With Mental Health Disorders: Issues and Emerging Responses*, 7 JUV. JUST. J. 3 (2000); Richard E. Redding, Inst. of Law, Psychiatry & Pub. Policy, *Barriers to Meeting the Mental Health Needs of Offenders in the Juvenile Justice System*, JUVENILE JUSTICE FACT SHEET (Univ. of Va. 2000), available at www.ilppp.virginia.edu/Juvenile_Forensic_Fact_Sheets/BarrMeet.html; Fox Butterfield, *Concern Rising Over Use of Juvenile Prisons to "Warehouse" the Mentally Ill*, N.Y. TIMES, Dec. 5, 2000, at A16.

66. David E. Arredondo, Comm. on Mental Health, Med. & Legal Issues, Nat'l Council of Juvenile & Family Court Judges (2002) (unpublished manuscript, on file with author).

67. *Id.*

- NOTES
68. David E. Arredondo et al., *Juvenile Mental Health Court: Rationale and Protocols*, 52 JUV. & FAM. CT. J. 1, 3 (Fall 2001).
69. Hans Steiner & Erickson Cauffman, *PTSD Among Female Juvenile Offenders*, 37 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 11 (1998); David E. Arredondo, *Massachusetts Youth Screening Instrument—2* (2002) (unpublished manuscript, on file with author).
70. In the author's experience as a consultant to the Juvenile Mental Health Court in Santa Clara County, California, the prevalence of mild to moderate mental retardation approached 35 percent of youth referred. For a description of this court and its protocols, see Arredondo et al., *supra* note 68, at 8–17. Estimates by the Coalition for Juvenile Justice, a federally financed group appointed by the nation's governors, also suggest that 15 to 20 percent of teenagers suffer from a severe, biologically based mental illness. *Id.* at 4.
71. It is an inappropriate, though very common, practice to use juvenile detention facilities to warehouse mentally ill children. See NAT'L CTR. FOR JUVENILE JUSTICE, *supra* note 65; Butterfield, *supra* note 65.
72. Arredondo, *supra* note 66, at 3–4.
73. *Id.*
74. Screening is a quick check for symptoms that may suggest suicidal tendencies or major emotional disturbance. Diagnosis and assessment are more thorough and formal evaluations for the presence of mental illness.
75. Heidi M. Hsia & Donna Hamparian, *Disproportionate Minority Confinement: 1997 Update*, OJJDP JUV. JUST. BULL. 1 (Sept. 1998), available at www.ncjrs.org/pdffiles/1170606.pdf.
76. Carl E. Pope & William Feyerherm, *Minorities and the Juvenile Justice System*, OJJDP RES. SUMMARY 2–3 (July 1995), available at www.ncjrs.org/pdffiles/minor.pdf.
77. In 1985, Caucasian youth between the ages of 10 and the upper age of juvenile court jurisdiction were detained at a rate of 45 per 100,000, while the rates for African-American and Hispanic youth of comparable age were 114 per 100,000 and 73 per 100,000, respectively. By 1995, detention rates for Caucasians had decreased 13 percent to 39 per 100,000. Rates for African Americans had increased 180 percent to 319 per 100,000; rates for Hispanics had increased 145 percent to 179 per 100,000. Madeline Wordes & Sharon M. Jones, *Trends in Juvenile Detention and Steps Toward Reform*, 44 CRIME & DELINQ. 544, 554–55 (1998) (citing U.S. Census Bureau annual one-day counts from 1985 to 1995).
78. RAINE, *supra* note 1, at 243–85.



Time is like
water, it seems
it passes through your
fingers so fast
but slow.

Time is like
Water

So Beautiful, but
so sad & tragic in a way
something comforting & in
another fast & beautiful

So hurtful that
it seems
Dangerous
to have
in your
hands.

By ♡ guadalupe

Illustration, page 145:

“TIME IS LIKE WATER”

I have been in foster care throw out my life. In and out. I stayed until the age of 19. I recently got my High School diploma in June of 2003. I've been working and going to school. I hope to further my education and become someone people recognize for my hardworking and dedication to my life in bettering myself. I moved out, emancipated. And just maturing with everyday thing's in life.

GUADALUPE S.

Age 19

2003 Children's Art & Poetry Contest

Juveniles and the Death Penalty

Exploring the Issues in Roper v. Simmons

On October 13, 2004, the parties in the case of *Roper v. Simmons*¹ argued before the U.S. Supreme Court on the issue of whether the Eighth Amendment to the U.S. Constitution, which bans “cruel and unusual” punishment, bars the execution of juveniles who commit capital crimes.² The Court issued its decision in the case on March 1, 2005, holding that the Eighth Amendment, applicable to the states through the Fourteenth Amendment, forbids the imposition of the death penalty on juveniles who were under the age of 18 when their crimes were committed.³ The Court decision turned on “evolving standards of decency that mark the progress of a maturing society,”⁴ which have determined that imposition of the death penalty on juveniles under 18 is “cruel and unusual”:

As in *Atkins*, the objective indicia of consensus in this case—the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice—provide sufficient evidence that today our society views juveniles, in the words *Atkins* used respecting the mentally retarded, as “categorically less culpable than the average criminal.”⁵

The editors feel that the issues presented by the argument over whether juveniles should be eligible for the death penalty are of such a deep and abiding concern to all of us working in or with the court system as to justify a briefing on the background of the case and a reprinting of the full transcript of the oral argument before the Supreme Court, with the hope of further expanding and refining the national conversation on the issue. The following background on the lower court’s decision, the related Supreme Court decisions, and other issues is meant to give context both to the oral argument and to the Court’s final opinion.

When a Missouri jury convicted Christopher Simmons of first-degree murder for abducting Shirley Crook and throwing her from a bridge to her death when he was 17, it recommended and the judge imposed the death penalty.⁶ On appeal the Supreme Court of Missouri affirmed en banc both the conviction and the sentence of death.⁷ But six years later the Supreme Court of Missouri, again en banc, granted Simmons relief on his petition for writ of habeas corpus, holding that (1) Simmons did not waive by failing to raise at trial his right to a claim that the Eighth Amendment barred the execution of juveniles, and (2) the Eighth Amendment bars the execution of

When the U.S. Supreme Court issued its decision on juveniles and the death penalty, it did not settle the debate over the issue but rather sparked a wider national conversation that shows no intention of fading.

individuals who are under 18 years of age at the time they commit a capital crime.⁸

Missouri petitioned the U.S. Supreme Court for a writ of certiorari, posing two questions for the Court's review:⁹

1. Once this Court holds that a particular punishment is not "cruel and unusual" and thus not barred by the Eighth and Fourteenth Amendments, can a lower court reach a contrary decision based on its own analysis of evolving standards?
2. Is the imposition of the death penalty on a person who commits a murder at age 17 "cruel and unusual" and thus barred by the Eighth and Fourteenth Amendments?

The Court granted certiorari,¹⁰ and the oral argument followed a full briefing of the issues by each party.

In the decision that led to the Supreme Court case, Missouri's high court first reviewed the applicable U.S. Supreme Court case law—these cases are mentioned in the argument and in the Court's opinion. In 1998 the Court held in *Thompson v. Oklahoma* that it was cruel and unusual punishment to execute juveniles who were 15 years or younger at the time they committed a capital offense.¹¹ But a year later the Court refused to extend that holding in *Stanford v. Kentucky*, stating that there was no "national consensus" against the execution of juveniles who were 16 or 17 years old when they committed their crimes.¹² On that same day, in *Penry v. Lynaugh*, it also held that there was no national consensus barring the execution of the mentally retarded.¹³ But 12 years later, in 2002, the Supreme Court held in *Atkins v. Virginia* that a national consensus against executing mentally retarded offenders had emerged.¹⁴

Missouri's high court then applied the reasoning in *Atkins* to the *Simmons* case and found that a national consensus against executing juvenile offenders had, indeed, also developed, justifying its holding that the Eighth and Fourteenth Amendments prohibited juvenile executions.¹⁵ As evidence of the "national consensus" it cited that 18 states now barred juvenile executions, that 12 others now barred all executions,

and that, although no states have lowered the age of execution below 18, 5 states had raised or established the minimum age for execution at 18—and it noted that the imposition of the death penalty on a juvenile had become "truly unusual" in the preceding decade.¹⁶ This put the Missouri Supreme Court in the position of deciding on its own—though applying the U.S. Supreme Court's reasoning—that the Court's holding in *Stanford v. Kentucky* was no longer controlling authority. Counsel for the State of Missouri in his argument strongly challenged the Missouri court for doing this. There is much discussion among the justices and counsel as to whether or not there is a new national consensus against the execution of juveniles. As we now know, the Supreme Court decided, just as it did in *Atkins*, that there is such a consensus.¹⁷ Justice Scalia, in his dissent, lambastes the majority for failing to admonish the Missouri Supreme Court "for its flagrant disregard of our precedent in *Stanford*."¹⁸

Another issue in the oral argument is the position of other countries on the juvenile death penalty. One hundred ninety-two countries have ratified the U.N. Convention on the Rights of the Child, an international human rights treaty, and only two have not: the United States and Somalia.¹⁹ Article 37 of the Convention on the Rights of the Child bans capital punishment for offenses committed by persons younger than 18 years of age.²⁰ The oral argument presents an interesting discussion about whether the position of other countries against executing juveniles should have a bearing on whether continuing to execute juveniles in the United States constitutes "unusual" punishment. Again, we now know that the majority of the Court agreed that the opinion of the international community is relevant but not controlling.²¹

It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime.... The opinion of the world community, while not controlling our outcome, does provide

respected and significant confirmation for our own conclusions.²²

In a scathing dissent, Justice Scalia argued that the opinion of the international community is entirely irrelevant.²³

And, finally, the argument refers to new research on the adolescent brain. Neuroscientific research at the National Institutes of Health has demonstrated that, contrary to prior thinking, the brain changes dramatically during the teenage years. We now know that the adolescent brain is much less developed than once believed—particularly the prefrontal cortex, which provides the advanced cognition allowing abstract thinking, impulse control, prioritization, and anticipation of consequences.²⁴ In fact, the frontal lobe of the brain changes more during adolescence than at any other stage of life and is the last part of the brain to develop—often not until the early twenties.²⁵ So while adolescents may be mature in many other areas, with immature brain circuitry they do not have the ability to reason as well as adults and therefore cannot be as morally culpable when they commit crimes.²⁶ By corollary, they are also much more capable of change and rehabilitation, given that their brains have not fully developed.²⁷

In terms of informing our decisions about how to treat young people in the juvenile justice system, this is blockbusting information. The colloquy among the justices and counsel suggests that the Court was not sure how this new development should affect the case because it was not introduced at trial—in fact, it did not even exist at the time of trial. And, in its decision, the Court acknowledged the new science but did not rely on it.²⁸ —Ed.

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IN THE SUPREME COURT
OF THE UNITED STATES

DONALD P. ROPER,
SUPERINTENDENT, POTOSI
CORRECTIONAL CENTER,
Petitioner

v.

CHRISTOPHER SIMMONS
Respondent

No. 03-633

Washington, D.C.

Wednesday, October 13, 2004

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 a.m.

APPEARANCES:

JAMES R. LAYTON, ESQ., State Solicitor,
Jefferson City, Missouri; on behalf of the
Petitioner.

SETH P. WAXMAN, ESQ., Washington,
D.C.; on behalf of the Respondent.

C O N T E N T S

ORAL ARGUMENT OF

JAMES R. LAYTON, ESQ.
On behalf of the Petitioner

SETH P. WAXMAN, ESQ.
On behalf of the Respondent

REBUTTAL ARGUMENT OF

JAMES R. LAYTON, ESQ.
On behalf of the Petitioner

P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 03-633, Donald Roper v. Christopher Simmons.

Mr. Layton.

ORAL ARGUMENT OF
JAMES R. LAYTON ON BEHALF
OF THE PETITIONER

MR. LAYTON: Mr. Chief Justice, and may it please the Court:

Though bound by *Stanford v. Kentucky*, the Missouri Supreme Court rejected both its holding and its rationale. This Court should stay the course it set in *Stanford*, leaving in the hands of legislators a determination as to the precise minimum age for capital punishment within the realm of *Thompson v. Oklahoma*, and leaving to jurors responsibility for determining the culpability of individual defendants about that minimum age.

The Missouri court justified its departure from *Stanford* on *Atkins v. Virginia*, but the result it reached is quite different from the result in *Stanford*. In that—excuse me—in *Atkins*. In that case, the Court was addressing mental ability, itself a component of culpability. The Court announced a principle based on that characteristic, that is, that the mentally retarded are not to be eligible for capital punishment, but then it left to the States the determination of the standard and the means of implementing that principle.

The Missouri Supreme Court, by contrast, jumped beyond the question of maturity, which is an element of culpability analysis, to the arbitrary distinction of age. It drew a line based purely on age, which is necessarily overinclusive, and then it gave that line constitutional status, thus depriving legislators and juries of the ability to evaluate the maturity of 17-year-old offenders.

JUSTICE SCALIA: Well, we didn't leave it up to the States entirely. I mean, you—you mean the States could adopt any definition of mental retardation they want?

MR. LAYTON: No. The States certainly—

JUSTICE SCALIA: So there's—there's some minimal level of mental retardation. Right?

MR. LAYTON: There is some minimal level.

JUSTICE SCALIA: And isn't that necessarily overinclusive, just as picking any single age is necessarily overinclusive?

MR. LAYTON: No.

JUSTICE SCALIA: Surely there will be some people who—who, although they have that level of mental retardation, with regard to the particular crime in question, are deserving of the death penalty.

MR. LAYTON: I—I don't agree that it would be overinclusive, given the Court's analysis in *Atkins*. The Court said that someone who has that level of mental retardation is simply not sufficiently culpable by definition. That certainly would not be true here. There are 17-year-olds who are equally culpable with those who are 18, 20, 25, or some other age.

JUSTICE GINSBURG: But the age 18 is set even for such things as buying tobacco. The—the dividing line between people who are members of the community, the adult community, is pervasively 18, to vote, to sit on juries, to serve in the military. Why should it be that someone is death-eligible under the age of 18 but not eligible to be an adult member of the community?

MR. LAYTON: I think that legislators would be surprised, when they adopted those statutes, that they were affecting their criminal law. In fact, many of those statutes have individualized determinations, the military being one of them. Seventeen-year-olds can enlist. There is an individualized determination, albeit by parents, not the Government. Seventeen-year-olds may be serving in Iraq today. That—the

other kinds of examples that you cite, for example, tobacco—

JUSTICE GINSBURG: But with parental—they are wards of their parents.

MR. LAYTON: Yes.

JUSTICE GINSBURG: So their parents—the same thing with marriage. A 17-year-old can marry but not without parental consent.

MR. LAYTON: Although in most instances can marry if they go to a court and demonstrate they are sufficiently mature, again contemplating individualized determination, which the Missouri Supreme Court says does not exist as to 17-year-olds with regard to capital punishment.

JUSTICE SCALIA: Why pick—why pick on the death penalty? I mean, if you're going to say that somehow people under 18 are juveniles for all purposes, why—why just pick on the death penalty? Why—why not say they're immune from any criminal penalty?

MR. LAYTON: Well, I—I must assume that if we—if the Court says they are immune from the—from capital punishment that someone will come and say they also must be immune from, for example, life without parole.

JUSTICE SCALIA: I'm sure that—I'm sure that would follow. I—I don't see where there's a logical line.

MR. LAYTON: No. The—the problem with adopting the—the 18-year-old line is that it is essentially arbitrary. It's the kind of line that legislators and not courts adopt.

CHIEF JUSTICE REHNQUIST: But didn't—didn't we adopt a 16-year-old line in our earlier case?

MR. LAYTON: In—in *Thompson*, the Court in a 4-1-4 decision struck a 15-year-old—a 15-year-old execution, and the States have taken, including Missouri through its General Assembly, have taken that to mean that there is a 16-year-old line. And today, in

fact, I think it's true that there is a consensus nationally with regard to the 16-year-old line, not because it has some biological or psychological magic, but because perhaps—

JUSTICE O'CONNOR: Well, but—but there was—it's about the same consensus that existed in the retardation case.

MR. LAYTON: Absolutely, that's true. If you look at the—the—

JUSTICE O'CONNOR: And—and so are we somehow required to at least look at that? I mean, the statistics of how many States have approved 18 years as the line is about the same as those in the retardation case.

MR. LAYTON: The—the Court has kind of three groups of cases with regard to the number of States. On one extreme are *Enmund* and *Coker*, where you have three and eight States. On the other extreme; are *Penry* and *Stanford*, where you have 24 and 34 States. And then there's this middle group, which isn't just *Atkins* and this case. It's also *Tison*, which is also almost exactly the same number.

The Court in *Atkins* had to find a way of distinguishing *Tison*, to the extent the Court relied on that—that counting process, and the—the Court concluded that there was kind of an inexorable trend with regard to the mentally retarded. We don't have that kind of trend here. In—

JUSTICE SOUTER: Well, we—we have a different kind of trend. What do you make—you spoke of a consensus, but what do you make of the fact that over the last, I guess, 10—or 12-year period, the actual imposition of the death penalty for—for those whose crimes were—were under 18 has—has steadily been dropping? I think 10 years ago, there were 13. Last year, I—I think the figures were that there were two. The—the consensus seems to be eroding, and yet as—as the counsel on the other side pointed out, this has been occurring at a time when—when treating juvenile crime seriously has not, in fact,

been eroding at all. What—what are we supposed to make of that?

MR. LAYTON: Well, two things.

Number one is that capital sentences have been dropping for all ages, not just for those under 18. So it—you have to take that into account.

The second is that although the last—

JUSTICE SOUTER: Has—has the—has the rate of attrition been the same?

MR. LAYTON: It is—

JUSTICE SOUTER: Thirteen to two is pretty spectacular.

MR. LAYTON: It is not—

JUSTICE SOUTER: I don't think we've seen that, or maybe we have seen that, for—for death imposition generally. Is that so?

MR. LAYTON: It is certainly greater, but part of the problem is we're dealing with such small numbers for the—the juveniles, those under 18, that the difference of one or two makes a huge difference in how the numbers come out.

But if you look over the last 10 years, in fact, it has gone up and down and currently is in a downtrend, but the downtrend—

JUSTICE SOUTER: Well, it went up once I think, didn't it?

MR. LAYTON: It—it went up once within—since—since *Stanford* and then came back down. Now, whether this—this period in which it comes back down is going to remain that way or whether we'll go back up to where we were 10 years ago I don't know. That's entirely hypothetical to suggest that—that this very recent trend is more dispositive than the trends over the last 10 years.

JUSTICE SOUTER: So—so you're basically—

JUSTICE SCALIA: Of course—

JUSTICE SOUTER: You're—you're basically saying that the—the time is too short, the numbers are too small—

MR. LAYTON: Right.

JUSTICE SOUTER: —to infer anything.

MR. LAYTON: Right, and the time is too short on the legislative side as well. We're only talking about the States that have adopted new legislation having done so, one of them in 1999 and the others simply in 2002 and 2004. If we were to look at the history of—of capital punishment in the United States, there are many times when States have abolished capital punishment and then returned. And Justice—

JUSTICE KENNEDY: You—you were in the midst of telling us why the—there is a consensus now that it's inappropriate to execute anyone under 16, and I—I—you weren't—

MR. LAYTON: No. It—

JUSTICE KENNEDY: You couldn't finish that answer. I want to know it.

MR. LAYTON: Since—since *Stanford*, we have had no executions under 16 even though it is possible to read Justice O'Connor's opinion in that case as allowing a State to adopt a statute that specifically says 15. No one has tried that. Everyone seems to have taken *Thompson* and *Stanford* together to mean there is a 16-year-old line. Two States have adopted 16 by statute.

JUSTICE KENNEDY: And—and so you say there's—there's not so much as a consensus as an understanding of what that decision means.

MR. LAYTON: I—I think that that's right. There are States that have adopted it specifically and others have simply implemented it. If I were a prosecutor today, I—it's hard to imagine that I would—even in a State where I could find a statute saying I could prosecute someone under age 16, that I would try such a thing.

JUSTICE KENNEDY: Let—let me ask you this. I—I don't yet have the—the record showing the full closing argument of—of both sides, but we do have the portion where the prosecutor says, isn't this scary? Can adolescence ever be anything but mitigating?

MR. LAYTON: I—I don't know how it could be anything but mitigating. But we have in that—

JUSTICE KENNEDY: But that's now [sic] how the prosecution presented it to the jury.

MR. LAYTON: In that statement, but—

JUSTICE KENNEDY: He said—he—he almost made it aggravating. Isn't that scary? I don't have the—I don't have the full argument.

MR. LAYTON: No. What—what he's facing is—is 18 pages of transcript that occupied the—the defense counsel's argument. Of those 18 pages, 4 pages are dedicated purely to Mr. Simmons' youth, and throughout the rest of the argument, he uses terms to reinforce that. He refers to him repeatedly as a 17-year-old. He calls him a kid. He does things to reinforce with the jury that he's very young.

So then we come back and in a few pages of rebuttal, we have a couple of words—I shouldn't say that—two sentences in which the prosecutor is trying to respond to that particular lengthy theme and argument.

JUSTICE GINSBURG: It was pretty clear. The—the words in question were: Think about age. Seventeen years old. Isn't that scary? Doesn't that scare you? Mitigating? Quite the contrary I submit. Quite the contrary.

MR. LAYTON: And if we were here because Mr. Simmons said that was improper and the Missouri Supreme Court said that was improper, well, we wouldn't be here. We wouldn't have asked for certiorari. The Court wouldn't have granted it.

JUSTICE GINSBURG: But the question is, can—is—is age, youth inevitably mitigating, and here is a prosecutor giving the answer no, it can be aggravating.

MR. LAYTON: The Missouri statute requires that an instruction be given that says that age is a mitigator, and the—the instruction was given here. And the jury heard argument concerning that particular claim.

JUSTICE SCALIA: Well, what's—what's the—

JUSTICE KENNEDY: Well, that's somewhat—

JUSTICE SCALIA: What is the contrary of—of mitigating? I—I would assume—

MR. LAYTON: Aggravating, but aggravating—

JUSTICE SCALIA: Is it? I—I would assume it's not mitigating.

MR. LAYTON: Well, you're right, Your Honor, because—

JUSTICE SCALIA: Maybe the opposite of mitigating is aggravating, but it—it's perfectly good English to say, mitigating? Quite the contrary—

MR. LAYTON: It is—it is not mitigating.

JUSTICE SCALIA: It's not at all mitigating.

MR. LAYTON: Yes. And—and—

JUSTICE SCALIA: So I don't know why you give that one away.

MR. LAYTON: Certainly "aggravating circumstances" are defined in the Missouri statute, and they were defined in the instructions. So this was not to be considered by the jury as an aggravator.

JUSTICE KENNEDY: Let—let's focus on the word unusual. Forget cruel for the moment, although they're both obviously involved.

We've seen very substantial demonstration that world opinion is—is against this, at least as interpreted by the leaders of the European Union. Does that have a bearing on what's unusual? Suppose it were shown that the United States was one of the very, very few countries that executed juveniles, and that's true. Does that have a bearing on whether or not it's unusual?

MR. LAYTON: No more than if we were one of the very few countries that didn't do this. It would bear on the question of unusual. The decision as to Eighth Amendment should not be based on what happens in the rest of the world. It needs to be based on the mores of—of American society.

JUSTICE SCALIA: Have the countries of the European Union abolished the death penalty by popular vote?

MR. LAYTON: I don't know how they've done that, Your Honor.

JUSTICE SCALIA: I thought they did it by reason of a judgment of a court—

MR. LAYTON: Well, in fact—

JUSTICE SCALIA: —which required all of them to abolish it.

MR. LAYTON: I—I believe that—

JUSTICE SCALIA: And I thought that some of the public opinion polls in—in a number of the countries support the death penalty.

MR. LAYTON: I believe that there are countries in Europe who abolished it because of their membership in the European Union—

JUSTICE KENNEDY: I—I acknowledged that in—in my question. I recognize it is the leadership in many of these countries that objects to it.

But let us—let us assume that it's an accepted practice in most countries of the world not to execute a juvenile for moral reasons. That has no bearing on whether or not what we're doing is unusual?

MR. LAYTON: I—I can't concede that it does because it's unimaginable to me that we would be willing to accept the alternative, the flip side of that argument.

It does seem to me, however, that that goes to a particular—back to the aspect where I began—

JUSTICE BREYER: Is there—is there any on—on that? Is there any indication? I mean, I've never

seen any either way, to tell you the truth, but—that Madison or Jefferson or whoever, when they were writing the Constitution, would have thought what happened elsewhere, let's say, in Britain or in the British—they were a British colony. They did think Blackstone was relevant. Did any—that they would have thought it was totally irrelevant what happened elsewhere in the world to the world unusual. Is there any indication in any debate or any of the ratification conventions?

MR. LAYTON: Nothing that I have seen has suggested that—

JUSTICE BREYER: So if Lincoln—

MR. LAYTON: —one way or the other.

JUSTICE BREYER: —Abraham Lincoln used to study Blackstone and I think he thought that the Founding Fathers studied Blackstone, and all that happened in England was relevant, is there some special reason why what happens abroad would not be relevant here? Relevant.

MR. LAYTON: There's a—

JUSTICE BREYER: I'm not saying "controlling."

MR. LAYTON: There's a special reason why Blackstone would be relevant because that was the law from which they were operating when they put this language into the Constitution.

JUSTICE BREYER: Absolutely, and they, I guess, were looking at English practices, and would they have thought it was wrong to look abroad as a relevant feature?

MR. LAYTON: And—and I don't know the answer to that, Your Honor.

JUSTICE KENNEDY: Do we—do we ever take the position that what we do here should influence what people think elsewhere?

MR. LAYTON: I—I have not seen that overtly in any of the Court's opinions, Your Honor.

JUSTICE SCALIA: You—you think—

JUSTICE KENNEDY: You—you thought that Mr. Jefferson thought that what we did here had no bearing on the rest of the world?

MR. LAYTON: Oh, I—I think Mr. Jefferson thought that. I think many of the Founders thought that they were leading the world, and I have no objection to us leading the world, but Mr. Jefferson's lead of the world was through the legislature not through the courts.

JUSTICE GINSBURG: But did he not also say that to—to lead the world, we would have to show a decent respect for the opinions of mankind?

MR. LAYTON: That—that may well be.

JUSTICE SCALIA: What did John Adams think of the French? (Laughter.)

MR. LAYTON: I read a biography of John Adams recently. I recall that he didn't think highly of them. (Laughter.)

MR. LAYTON: The—Missouri, in order to implement the principle that those who are immature should not be subject to capital punishment, has adopted an approach that, first off, excludes anyone age 16 and under from capital punishment; second, requires certification by the juvenile court for anyone who is 16, but otherwise turns the matter over to the jury and defines it as a statutory mitigator.

The kind of evidence that is discussed in Mr. Simmons' brief at some length could have been applied—could have been presented during the penalty phase of Mr. Simmons' trial. It has been reflected in decisions of this Court as far back as *Eddings*, where there was evidence of mental and emotional development. In *Penry*, there was evidence of mental age and social maturity. And here, in the postconviction proceeding, Mr. Simmons presented such evidence regarding his impulsivity, his susceptibility to peer pressure, and his immaturity. But he didn't present that at trial. There is a mechanism in Missouri for him to do that and he chose not to.

JUSTICE BREYER: Before you go off on this, the one statistic that interested me—and I'd like you

to discuss its relevance really—is if we look back 10 years, I have only three States executing a juvenile: Texas, 11; Virginia, 3; and Oklahoma, 2.

MR. LAYTON: Correct.

JUSTICE BREYER: And those three States account for about 11 percent of the population of the country, 11.3 percent.

Now, if we go back a few more years to Stanford, we get three others in there: Louisiana, 1; Georgia, 1; and Missouri, 1.

MR. LAYTON: And if you go to the convictions rather than the executions, then Alabama goes into that mix.

JUSTICE BREYER: We have a very different number.

MR. LAYTON: Right.

JUSTICE BREYER: So the reason that I thought arguably it's more relevant to look at the convictions is there are a lot of States. Say, New Hampshire, I think, for example—when I was in the First Circuit, there were several States that on the books permitted the death penalty, but nobody ever had ever been executed. And—and that's true across the country. There are a number of States like that. So if we look at the States that actually execute people, it's 10 years, say, 11 percent of the population are in such States. You go back 15 years, and you get these three other States, which raises the percentage.

How—how should I understand that? I'm interested in both sides—

MR. LAYTON: Frankly, we don't know what those numbers mean because we don't know to what extent juveniles are committing capital-level murders. We—and there is no way in current social science to make that determination.

It's interesting that among the three States—two of the three States that are on that list that Justice Breyer mentioned are States in which there is a specific instruction to the jury, or indeed, in Texas, a requirement, that the jury evaluate future dangerousness. That is, the argument that was referred to by

opposing—or that counsel made, the State’s counsel made, the prosecutor made, in the—in the trial here, there’s actually an instruction in some of those States. And that may play into the manner in which this—those States—the reason those States have additional convictions and additional executions.

But Missouri doesn’t have that. We don’t require that the jury find future dangerousness, and although that may come up in the course of a mitigation and aggravation argument in the penalty phase, it isn’t highlighted like it is in those States. And that may be more problematic than the system that Missouri has created.

If the kind of evidence, psychosocial evidence, that is cited in Mr. Simmons’ brief had been presented at the penalty phase, of course there would have been an opportunity to rebut it, to question it. Instead, what we have in this case is the marshaling of untested evidence from various cause groups and some dispassionate observers.

CHIEF JUSTICE REHNQUIST: At what point was this inserted into the record, Mr. Layton?

MR. LAYTON: The—the kind of—well, as to Mr. Simmons specifically, it came in in the postconviction proceeding, and then was also present in the habeas record. In this case, the—the lengthy litany of scientific studies appeared for the first time in his brief in this Court. There were references to a few of them before, but nothing—

CHIEF JUSTICE REHNQUIST: It was never—never tested in the trial court.

MR. LAYTON: Oh, no. Oh, no, because he never made the argument in the trial court during his trial—that scientifically he was too immature to be culpable to the degree that would merit capital punishment.

JUSTICE SOUTER: Well, at least to the extent that he’s simply quoting public sources, you had a chance to quote public sources in—in return.

MR. LAYTON: Absolutely.

JUSTICE SOUTER: So I think you’re—you’re even on that—

MR. LAYTON: Absolutely.

JUSTICE SOUTER: —or at least your opportunity is.

MR. LAYTON: I—and I think the reason that we did that and we cited the difficulties in our reply brief with what he cited is to highlight that the precise age is a legislative question based on legislative-type facts. Legislatures can evaluate this series of studies and then pick what is essentially an arbitrary age. There is no study in anything that Mr. Simmons cites that—that justifies that particular day, 18. They talk about adolescence. They talk about young adolescence, old adolescence. They talk about adolescence continuing until the mid-twenties. Nothing justifies the age of 18. That makes it the kind of fact that a legislature ought to be evaluating, not a court.

JUSTICE SCALIA: Does adolescence as a scientific term—does it always occur on the same day for—for all individuals?

MR. LAYTON: No. The—the studies point out that adolescence is—well, they don’t agree on what adolescence means, and they don’t—and they point out that it begins and ends on different times for different people. So we don’t know what adolescence means in the studies, and we don’t know what it would mean were the Court to base a decision on the—this concept of adolescence.

I’d like to reserve the rest of my time, if there are no other questions.

CHIEF JUSTICE REHNQUIST: Very well, Mr. Layton.

Mr. Waxman, we’ll hear from you.

ORAL ARGUMENT OF SETH P. WAXMAN ON BEHALF OF THE RESPONDENT

MR. WAXMAN: Mr. Chief Justice, and may it please the Court:

Everyone agrees that there is some age below which juveniles can't be subjected to the death penalty. The question here is where our society's evolving standards of decency now draw that line.

Fifteen years ago, this Court found insufficient evidence to justify a bright line at 18, but since *Stanford*, a consensus has evolved and new scientific evidence has emerged, and these developments change the constitutional calculus for much the same reasons the Court found compelling in *Atkins*. As was noted—

JUSTICE SCALIA: Can the constitutional calculus ever move in the other direction? I mean, once we hold that, you know, 16 is the age, if there's new scientific evidence that shows that some people are quite mature at 18 or at—at 17-and-a-half or if—if there is a—a new feeling among the people that youthful murderers are, indeed, a serious problem and—and deterrence is necessary, can we ever go back?

MR. WAXMAN: Well, there is a—

JUSTICE SCALIA: It's sort of a one-way ratchet. Isn't it?

MR. WAXMAN: There is a one-way ratchet here as there is whenever this Court draws a constitutional line; that is, whenever this Court determines that the Constitution preempts the ability of legislatures to make—

CHIEF JUSTICE REHNQUIST: Well, but what—what if a State legislature decides that, sure, the Supreme Court said in the *Simmons* case that you can't execute anybody under 18, but we think there's kind of a tendency the other way, we're going to pass a statute and see what happens in court?

MR. WAXMAN: Well, you could—you could have, I guess, what I refer to as the *Dickerson v. United States* phenomenon. It could come up. But what's—what's really interesting—I think what's—

CHIEF JUSTICE REHNQUIST: Is it—is that a closed book? I mean, granted, you may lose the argu-

ment, but is it a permissible argument that the standards have evolved the other way?

MR. WAXMAN: It—it certainly would be a permissible—permissible argument.

What's—what's notable here, Justice Scalia and Mr. Chief Justice, is how robust this consensus is. We're talking not only about the whole variety of ways in which our society has concluded that 18 is the bright line between childhood and adulthood and that 18 is the line below which we preserve—presume immaturity. But the line with respect to executions, the trend is very robust and it is very deep.

JUSTICE SCALIA: We don't—we don't use 18 for everything. Aren't there States that—that allow adolescents to drive at the age of 16?

MR. WAXMAN: There are nine States that allow adolescents to drive at the age of 16 without their parents' consent. That—driving, of course, is the classic example, but—

JUSTICE SCALIA: With their parents' consent—

CHIEF JUSTICE REHNQUIST: Right.

JUSTICE SCALIA: With their parents' consent, how many?

MR. WAXMAN: To—to—there are 41 States that require parental consent below 18.

JUSTICE SCALIA: But they can drive.

MR. WAXMAN: But they can drive if their parents agree. My—my—

JUSTICE SCALIA: If it's okay with the parents, it's okay with the State.

MR. WAXMAN: My point here is that with respect to the death penalty, we have a substantial consensus within the United States, as it happens, exactly the same lineup as existed in—as existed in—was true in *Atkins*. We have not just a worldwide consensus that represents the better view in Europe. There are 194 countries—

CHIEF JUSTICE REHNQUIST: Well, how does one—how does one determine what is the better view?

MR. WAXMAN: I was—I was referring to the implication that it has often been said that because the European Union thinks something, we should, therefore, presume that the world views it that way. We're now talking about—

CHIEF JUSTICE REHNQUIST: Are you suggesting that we adopt that principle?

MR. WAXMAN: To the contrary. My point is we are not talking about just what a particular European treaty requires. We—the—the eight States that—that theoretically—that have statutes that theoretically permit execution of offenders under 18 are not only alone in this country, they are alone in the world. Every country in the world, including China and Nigeria and Saudi Arabia and the—and the Democratic Republic of the Congo, every one has agreed formally and legislatively to renounce this punishment, and the only country besides the United States that has not is Somalia, which as this Court was reminded yesterday, has no organized government. It is incapable—

JUSTICE SCALIA: They have a lot of customs that we don't have. They don't allow most—almost all of them do not allow—have trial by jury. Should we—and they think it's not only more efficient, it is fairer because juries are, you know, unpredictable and whatnot. Should we yield to the views of the rest of the world?

MR. WAXMAN: Of course not, but this is a—this is a standard which—a constitutional test that looks to evolving standards of moral decency that go to human dignity. And in that regard, it is—it is notable that we are literally alone in the world even though 110 countries in the world permit capital punishment for one purpose—for one crime or another, and yet every one—every one formally renounces it for juvenile offenders.

And, Justice Kennedy, my submission isn't that that that's set—you know, game, set, and match. It's just relevant, and I think it is relevant in terms of the existence of a consensus.

There was reference made by my opponent to the fact that there are four States that set the age at 17 and four States that set the age at 16. No—in terms of movement, no one has suggested that any of those States or any other State has ever lowered the age. In fact, if you look at those particular—those eight States, a number of them legislated an age that represented raising the number over what had previously been permitted. The movement, as this Court addressed, talked about in *Atkins*, has all been in one direction, and it's not as if that movement, in and of itself, answers the question. But where you have the type of consensus that exists here, as it did in *Atkins*, and where you have a scientific community that in *Stanford* was absent—the American Medical Association, the American Psychological Association, the American Psychiatric Association, the major medical and scientific associations, were not able in 1989, based on the evidence, to come to this Court and say there is scientific, empirical validation for requiring that the line be set at 18.

JUSTICE KENNEDY: Well, in fact, the American Psychological Association is not your brief. You're not accountable for inconsistencies there.

But I—I would like your comment. They came to us in *Hodgson v. Minnesota*, as I think the State quite correctly points out, and said that with reference to the age for determining whether the child could have an abortion without parental consent, that adults—that they—that they were risk—that they could assess risk, that they had rational capacity, and they completely flip-flop in this case.

MR. WAXMAN: Well—

JUSTICE KENNEDY: Is that just because of—is that just because of this modern evidence?

MR. WAXMAN: No, no, no. I don't—I think it's—it may be in small part to that, Justice Kennedy, but I

think the main point is that what their brief looked to—what the argument was was our—are adolescents cognitively different than adults? And the answer is, as we—our brief concedes, is generally no.

And what was at issue in the abortion cases was competency to decide. And just as we allow the mentally retarded the ability to decide whether or not to obtain an abortion but not to be subject to a penalty that is reserved for the tiny fraction of murderers that are so depraved that we call them the worst of the worst, here competency to decide here, as with the mentally retarded, isn't the issue.

Christopher Simmons was found, beyond a reasonable doubt, to have committed this offense with the specific intent necessary to do it, just as the mentally retarded can be. The issue in *Hodgson* was cognitive ability to be able to make a competent decision. And so I don't—I didn't represent the APA then and I don't now, but I don't, with respect, think there's an inconsistency.

In fact, the difference here goes to the factors that *Atkins* identified about why overwhelmingly the mentally retarded—and here adolescents—are less morally capable. They are much, much less likely to be sufficiently mature to be among the worst of the worst. And here, even more than with the mentally retarded, the few 16- and 17-year-olds who might, if we could even determine it, be—we could determine were in fact so depraved that they were among the worst of the worst, there is way reliably to identify them and there's no way reliably to exclude them. And it is in this respect that science I think changes.

At the time of *Stanford*, everybody on this Court, of course, knew what all of us as adults intuitively know, which is that adolescents—and—and here we're talking about—I agree that when adolescence starts and when it ends is undefined. But every scientific and medical journal and study acknowledges that 16- and 17-year-olds are the heartland. No one excludes them. And what we know from the science essentially explains and validates the consensus that society has already developed.

JUSTICE SCALIA: If all of this is so clear, why can't the State legislature take it into account?

MR. WAXMAN: Well, one could have said—

JUSTICE SCALIA: I mean, if it's such an overwhelming case that—that we can prescribe it for the whole country, you would expect that the number of States that—that now permit it would not permit it. All you have to do is bring these facts to the attention of the legislature, and they can investigate the accuracy of the studies that the American Psychological Association does or other associations in a manner that we can't. We just have to read whatever you put in front of us.

MR. WAXMAN: Justice Scalia, the number of States that engage in these executions is very small, and if it were all of the States, none of this Court's Eighth Amendment jurisprudence would ever have to come—would ever have to be developed. But—

JUSTICE SCALIA: But that's precisely because the jury considers youthfulness as one of the mitigating factors. It doesn't surprise me that the death penalty for 16- to 18-year-olds is rarely imposed. I would expect it would be. But it—it's a question of whether you leave it to the jury to evaluate the person's youth and take that into account or whether you adopt a hard rule that nobody who is under 18 is—is—has committed such a heinous crime with such intent that he—that he deserves the death penalty.

MR. WAXMAN: Justice—Justice Scalia, there's no doubt—and the jury was instructed—that age is a mitigating factor although, Justice Kennedy, in response to your question, our brief points out prosecutors, in the context of future dangerousness, which is relevant, argue it all the time and jurors intuitively think it all the time.

But the fact that he could have made an individualized mitigating case or argued that he was only—that he was young, as he did, doesn't address the constitutional problem. The constitutional problem is that overwhelmingly 16- and 17-year-olds, for

reasons of the—the developmental reasons relating to their psychosocial character—

CHIEF JUSTICE REHNQUIST: Well, Mr. Waxman, was that in evidence that you referred to from these various associations? Was that introduced at trial?

MR. WAXMAN: The—about the character—

CHIEF JUSTICE REHNQUIST: Yes.

MR. WAXMAN: No. The trial was—I'm making an observation just as in—as in *Atkins*—

CHIEF JUSTICE REHNQUIST: Well, but I—I would think if you want to rely on evidence like that, it ought to be introduced at trial and subject to cross-examination rather than just put in amicus briefs.

MR. WAXMAN: Oh, no, Mr. Chief Justice. I'm not making an argument about the character or maturity of this defendant, which would have been the only thing that would be—

CHIEF JUSTICE REHNQUIST: No. But you're making an argument that science says people this age are simply different, and it seems to me you—if that's to be an argument, it ought to be introduced at trial.

MR. WAXMAN: I—I—it's an argument about what the Constitution prohibits. It's an argument about where a constitutional line should be drawn.

CHIEF JUSTICE REHNQUIST: Well, but you're—you're talking facts basically and facts ordinarily are adduced at trial for cross-examination.

MR. WAXMAN: Well, I am not aware of any instance in which legislative facts, as you will call them—that is, facts that go to where a line should be drawn, whether it's by this Court because the Constitution ought to be so interpreted or a legislation should change—would be properly introduced to a jury that is supposed to accept the law, that has required to accept the law as is given by a judge—

CHIEF JUSTICE REHNQUIST: Well, how about in the—how about in the habeas proceeding?

MR. WAXMAN: In the habeas proceeding, it's—it's—an argument could have been made and, indeed, was made in this case that the line—that under *Atkins* juvenile offenders are the same and—

CHIEF JUSTICE REHNQUIST: Well, was this evidence adduced at the habeas proceeding?

MR. WAXMAN: The habeas—if you're talking about the—the scientific studies—

CHIEF JUSTICE REHNQUIST: Right.

MR. WAXMAN: —in peer-reviewed journals, it was not.

JUSTICE KENNEDY: Well—well, surely at the trial, you could have had a psychiatrist testify to all the things that are in your—in your brief, and in fact the—it would be another argument, but maybe the—maybe the finding was deficient on that ground as well.

MR. WAXMAN: Well, we certainly could have had a psychiatrist argue that in—generally speaking, adolescents are less mature and on a range of psychosocial factors, they—

JUSTICE KENNEDY: Well, he could have cited all the—all the authorities you cite in your brief.

MR. WAXMAN: Right. But, Justice Kennedy, I—I concede that.

The issue for this Court is whether the Constitution requires that as a matter of law, not as a matter of the application of law to a particular defendant, the line has to be drawn this way, and—

JUSTICE KENNEDY: Suppose—suppose that all of the things set forth in your brief were eloquently set forth by a psychiatrist to the jury. Could the jury then weigh these things that you're telling us?

MR. WAXMAN: The jury could have weighed these things, but there is no way, even for a psychiatrist or a psychologist, much less a juror to—to be confident

because of the inherent, documented transiency of the adolescent personality. No psychiatrist and no juror can say with confidence that the crime that was committed by a 16- or 17-year-old, on the average two years ago—and this is the key point—proceeded from enduring qualities of that person’s character as opposed to the transient aspects of youth, and therefore—

CHIEF JUSTICE REHNQUIST: But now, that—that itself is a purported scientific fact, what you just said, and it seems to me if we’re—if we’re to rely on that, it ought to have been tested in the way most facts are.

MR. WAXMAN: What the jury—perhaps I’m not understanding your point.

CHIEF JUSTICE REHNQUIST: Well, you’re—you’re relying on factual—the statement you just made was—was a factual statement about the enduring character, et cetera. Now, if—if we are to take that as a fact, it ought to have been tested somewhere rather than just given to us in a brief.

MR. WAXMAN: Well, the—the—an argument to the jury that regardless of what a psychiatrist or a psychologist would have said about Christopher Simmons, as a group, 16- and 17-year-olds have such labile personalities that it is impossible to know whether they’re—the crime that they committed reflected an enduring character is an argument that could have been made to spare this particular defendant, but it need not have been credited or given dispositive weight, particularly since at sentencing—and this Court has acknowledged this in cases like *Pate v. Robinson* and *Drope v. Illinois*—the jury is evaluating somebody, determining their moral blameworthiness two years later.

JUSTICE KENNEDY: But—but if you’re reluctant to give it dispositive weight in an individual case, then you come in and ask us to give it dispositive weight as a general rule, that seems to me inconsistent.

MR. WAXMAN: Well, no. What I’m—what I’m asking you to do—what I’m suggesting is that the

weight of scientific and medical evidence of which the Court can take judicial notice and should take judicial notice and did take judicial notice in cases like *Atkins* and *Thompson* and *Stanford* explains and validates the consensus that society has drawn. We’re not arguing that the science or what a particular neurobiologist or developmental psychologist says dictates the line of 18. The question is we have a consensus. It’s even more robust than it was in *Atkins*. Looking at proportionality and reliability with respect to that consensus, is there a good, objective, scientific reason to credit the line that society has drawn? And I’m suggesting two things. Number one, that although one could posit that there are 16- and 17-year-olds whose antisocial traits are characterological rather than transient, we know it is impossible—we know this from common sense and it’s been validated by science, of which the Court can take note, that it is impossible to know whether the crime that was committed by a 16- or 17 year-old is a reflection of his true, enduring character or whether it’s a manifestation of traits that are exhibited during adolescence. And—

JUSTICE KENNEDY: Well, suppose—suppose I—I were not convinced about your scientific evidence was conclusive and I don’t identify a clear consensus. Do you lose the case, or can you then make the same argument you just made appealing to some other more fundamental principle that *Stanford* was just wrong?

MR. WAXMAN: Here—no. Well—no. Here’s what I would appeal to. I—there are three relevant factors that this Court has to look at. There’s the determination of consensus. Is there enough of a one or isn’t there? There’s the determination of proportionality, and then there’s the issue identified in *Lockett* and in *Atkins*, which is how reliable is the individualized sentencing process. How reliably—when we’re talking about picking the tiny few who are the worst of the worst, how reliably can we do that? We think that with respect to each of those, we have demonstrated that the Eighth Amendment requires recognizing 18.

But I will take as a posit your hypothetical question that I haven't convinced you on number one, number two, or perhaps individually on all three. This is truly a case, Justice Kennedy, in which the whole is greater than the sum of the parts. Taken together, the fact that it's impossible for a jury to know whether the crime of an adolescent was really the feature of an enduring character, since we know, as in *Atkins*, that many of the characteristics that manifest themselves in mental retardation also affect the inability of adolescents to communicate with their attorneys, to express remorse, that two years later when this person is on trial, physically, emotionally it's not the same person that the jury is looking at and being asked to evaluate—

JUSTICE BREYER: All right. So that—that's—that last point was what I thought the scientific evidence was getting at, that it simply confirmed what common sense suggests, that when you execute a person 15 or sometimes 20 years later, a problem always is that that person isn't the same person who committed the trial in a meaningful sense. And it's specially true of 16- and 17-year-olds who, observation would suggest, have a lot of changing to do because their personality is not fully formed.

Now, I thought that the—the scientific evidence simply corroborated something that every parent already knows, and if it's more than that, I would like to know what more.

MR. WAXMAN: Well, it's—I think it's—it's more than that in a couple of respects. It—it explains, corroborates, and validates what we sort of intuitively know, not just as parents but in adults that—that—who live in a world filled with adolescents. And—and the very fact that science—and I'm not just talking about social science here, but the important neurobiological science that has now shown that these adolescents are—their character is not hard-wired. It's why, for example—here's a—here's an interesting and relevant scientific fact. Psychiatrists under the *DSM*, the *Diagnostic and Statistical Manual*, which is their Bible, are precluded from making a diagnosis of antisocial personality before the age of 18 pre-

cisely because before the age of 18, personality and character are not fixed even with respect to—

JUSTICE SCALIA: Mr. Waxman, I—I thought we punish people, criminals, for what were, not for what they are. I mean, you know, if you have someone who commits a heinous crime and by the time he's brought to trial and convicted, he's come to Jesus, we don't let him off because he's not now what he was then. It seems to me we punish people for what they were.

MR. WAXMAN: We—

JUSTICE SCALIA: And to say that adolescents change, everybody changes, but that doesn't justify eliminating the—the proper punishments that society has determined.

MR. WAXMAN: I think, with respect, Justice Scalia, I'm not—I think that there is an interesting question about—with respect to death, whether that they are and what they will become is totally irrelevant.

But accepting the premise of your question, my point is that science has confirmed what we intuitively know, which is that when the jury gets around to evaluating what the character was that manifested that horrible crime, they can't tell because of the passage of age and because of a number of confounding factors and because psychologists and psychiatrists can't tell themselves whether the crime that occurred two years ago or two weeks ago was the manifestation of an enduring character or transient psychosocial traits that rage in adolescence.

CHIEF JUSTICE REHNQUIST: Is part of your answer based on the length of time between the killing and the trial?

MR. WAXMAN: Only part, Mr. Chief Justice. Part of it is that the jury, of course, is looking at the defendant, and we have laid before the Court peer-reviewed scientific studies that show that they—that people are—frequently equate maturity and psychosocial development with race and with physical appearance. In addition, because the adolescent personality is transient and the lapse of time for trial

is two years, in a very real sense psychosocially as opposed to—in addition to physically, the person that the jury is judging is not the—is not a manifestation of the person who committed the crime.

CHIEF JUSTICE REHNQUIST: Well, what if—what if a State said I see the problem, so we'll bring this person to trial in six weeks?

MR. WAXMAN: Even if it were in six weeks, Mr. Chief Justice, we believe that the process is—is sufficiently—that would just make the youth the same as the mentally retarded, because the mentally retarded have stable personalities and stable characters, and yet, what this Court said in *Atkins* was we have two things to say. One is that overwhelmingly as a group the mentally retarded are unlikely to be among the very worst of the worst, and the very deficits that they have—that you called deficits in reasoning, judgment, and control of their impulses, makes the jury—the process of the jury evaluating the moral culpability, the moral blameworthiness unreliable. And it's on the basis of those two things that we think that the consensus that's otherwise reflected is validated. And here—

JUSTICE KENNEDY: I have—I have one other question I'd like to ask because it's been troubling me and I want your comment.

A number of juveniles run in gangs and a number of the gang members are over 18. If we ruled in your favor and this decision was given wide publicity, wouldn't that make 16-, 17-year-olds subject to being persuaded to be the hitmen for the gangs?

MR. WAXMAN: Well—

JUSTICE KENNEDY: I'm—I'm very concerned about that.

MR. WAXMAN: I—I am also concerned about it, and I—I have thought about this. First of all, if they are enlisted by people over the age of 18 to do that, the—the precise degree of culpability goes to the people who are over 18, and juries ought to consider

whether people who are over the age of 18 have so enlisted them.

But even—but with respect to—

JUSTICE KENNEDY: I'm talking about the deterrent value of the existing rule insofar as the 16- and 17-year-old. If—if we rule against you, then the deterrent remains.

MR. WAXMAN: Well, I think—I think, as with the mentally retarded, or in fact, even more than with the mentally retarded, adolescents—the—the role of deterrence has even less to say, precisely because they weigh risks differently and they don't see the future and they are impulsive and they're subject to peer pressure.

And in fact, if you look at what happened in this case, it's as good an example as any. The State says, well, okay, you know, he—you know, this guy, according to the State's witness, the person who was over 18 and described as the Fagin of this group of juveniles, testified to the court, well, Christopher Simmons says, let's do it because, quote, we can get away with it.

JUSTICE KENNEDY: Well, there were a number—a number of cases in the Alabama amicus brief, which is chilling reading—and I wish that all the people that sign on to the amicus briefs had at least read that before they sign on to them—indicates that often the 17-year-old is the ringleader.

MR. WAXMAN: Well, the 17-year-old may be the ringleader, and even if you posit that Christopher Simmons was the ringleader here, he—he wasn't under any illusions. He wasn't making a statement about being executed. He said, we could get away with it, which speaks volumes about the—the extent to which—this guy was subject to life without parole, which is, Justice Scalia, fundamentally different than death. This Court has said that only when the penalty is death, do you look at the character of the defendant as opposed to the nature of the crime and the act.

But the data shows—and I think this Court has acknowledged—it acknowledged in *Thompson* in

any event—that the—that adolescents like the—the mentally retarded are much less likely to be deterred by the prospect of an uncertain, even if probable, very substantial penalty. The—no mature adult would have thought, as Chris Simmons reportedly said, I can get away with this because I'm 17 years old, when the mandatory punishment for him would have life in prison.

It's—it is not—eliminating the death penalty as an option, which is—which is imposed so rarely as to be more freakish than the death penalty was in *Furman*—three States in the last 10 years, one—

JUSTICE STEVENS: But, of course, the death penalty was not a deterrent for any of the crimes described in the Alabama brief because those are all—crimes all occurred in States which execute people under 18.

MR. WAXMAN: Yes, and I—and I—the—the examples in the Alabama brief are horrifying. But if you look at those examples, the very first one, this is a kid who went on a killing spree, including his father, because he felt he was unjustly deprived use of the family truck. And there—I can go through the other examples, but these are posited as people who a jury could, with a degree of reliability that the Constitution requires, say acted out of a stable, enduring character rather than transient aspects of youth? I think that's a poster child for us.

JUSTICE SCALIA: Whereas if it had been done by an 18-year-old, a jury could have said that.

MR. WAXMAN: Well—

JUSTICE SCALIA: If an 18-year-old did the same thing, you say, well, he's certainly stable.

MR. WAXMAN: May I answer? Briefly.

The line—the science shows what common sense understands which is that development is a continuum, but the line, 18, is one that has been drawn by society.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Waxman.

MR. WAXMAN: Thank you.

CHIEF JUSTICE REHNQUIST: Mr. Layton, you have 8 minutes remaining.

REBUTTAL ARGUMENT OF JAMES R. LAYTON ON BEHALF OF THE PETITIONER

MR. LAYTON: Mr. Simmons, of course, was found by the jury to be the ringleader. And in essence, that creates a contrast with the *Lee Malvo* case, where we had something like what Justice Kennedy referred to, adults influencing a juvenile, and the jury was able to make that distinction in the Virginia *Lee Malvo* case.

JUSTICE STEVENS: May I ask this question, Mr. Layton? This case kind of raises a question about the basic State interests that are involved here, and the State interests that justify the death penalty include deterrence and also retribution.

MR. LAYTON: Yes.

JUSTICE SCALIA: Which, if either, of those do you think is the primary State interest you seek to vindicate today?

MR. LAYTON: I—I think that they are of equal weight in the minds of the legislators in the State of Missouri.

The—Mr. Simmons' counsel comes to the edge of asking this Court to—

JUSTICE STEVENS: May I just ask one further?

MR. LAYTON: Yes.

JUSTICE STEVENS: Is there any evidence that the death penalty for those under 18 or even above has, in fact, had any deterrent value?

MR. LAYTON: From all that I have read, the evidence both directions is inconclusive, Your Honor, and thus, subject to legislators' determination.

Mr. Simmons' counsel comes to the edge of asking the Court to elevate proportionality to be equivalent to—to a consensus. But let me just highlight

two aspects of the non-capital case proportionality jurisprudence of this Court.

Justice Kennedy, in—in *Harmelin*, recently cited by the plurality in *Ewing*, pointed out that two of the considerations in proportionality review in those instances are the primacy of the legislature and the nature of the Federal system. What we should have here is a principle—that is a principle dealing with immaturity, and the States, within the Federal system, should be able to make the determination as to how to implement it.

As pointed out, this Court's jurisprudence in Eighth Amendment areas has proven to be a one-way ratchet, and because of that, the Court has to be very wary of leading rather than reflecting societal norms. Now, there are some States, of course, that have raised the age, the minimum age, for capital punishment, but at least in some instances, such as Missouri, that is a reaction to this Court's jurisprudence—that is, a reaction to *Thompson* and *Stanford*. Other States have left 18 for other purposes, and yet there still is a role by this Court.

Pornography is an example. I am confident that but for this Court's First Amendment jurisprudence, the Missouri General Assembly would adopt a statute that said that pornography should not be allowed at ages much higher than 18 and not because of maturity, but because of their opposition to pornography.

In many of the instances cited by Mr. Simmons, the kind of statutes that he cites, gambling and others, it is a compromise in the legislative arena, not necessarily based on maturity or immaturity, that leads to the selection of the age of 18. Many States have, of course, individualized determinations with regard to those statutes. There was a discussion of driver's licenses. In Missouri, of course, we allow people to drive at age 15. They have to have parental consent, yes, but there also is a test. That is, there is an individualized determination before we do that, and that's what the State requests here.

Mr. Simmons' counsel points out that in *Atkins* the Court took judicial notice of psychosocial evidence, and that's true. The Court did. But remember that what the Court had before it in *Atkins* was not

a proxy for a—a factor that plays into culpability. It was, in fact, the factor itself, that is, mental capacity. And what they want here is not a determination as to the maturity or the capacity of individuals. They want a bright-line test that is based purely on age.

This Court should adopt, as it did in *Atkins*, a principle and leave it to the States to act. That's what the Court did in—

JUSTICE STEVENS: Of course, one—one of the objections in—in *Atkins* was we needed a bright-line test. We'd have difficulty determining which ones are mentally retarded. Here we don't have that problem at all. I guess everybody knows whether or not the defendant is over or under 18.

MR. LAYTON: Well, if that's the bright line. We don't know whether they're mature or immature, and we have to measure that somehow.

JUSTICE STEVENS: But the—but the purpose of a bright-line test is to avoid litigation over the borderline cases, and you just have completely avoided that in this category.

MR. LAYTON: Because the—having a bright-line test means that the individual who murders at age 17, 364 days is treated differently than a more—a less mature individual who is two days older.

JUSTICE STEVENS: But it's an equally arbitrary line if it's 16, 17, or 15.

MR. LAYTON: Yes, it is, and it's an arbitrary line that the legislatures have set because it's a legislative-type determination based on what even Mr. Waxman called legislative facts.

JUSTICE STEVENS: May I ask one—have you read the brief of the former U.S. diplomats in the case?

MR. LAYTON: Yes.

JUSTICE STEVENS: Do you think we should give any credence whatsoever to the arguments they make?

MR. LAYTON: No.

(Laughter.)

JUSTICE STEVENS: The respect of other countries for our country is something we should totally ignore.

MR. LAYTON: That's not for this Court to decide. Congress should consider that. The legislatures should consider that. It's an important consideration, but it is not a consideration under the Eighth Amendment.

JUSTICE STEVENS: We should leave it up to the legislature of the State of Missouri to resolve those questions.

MR. LAYTON: Within the parameters of—of *Thompson* and *Stanford*, yes. Yes. The Missouri Supreme Court—the *Atkins v. Virginia*—in *Atkins v. Virginia*, this Court did not authorize the Missouri Supreme Court to reject *Stanford*.

The Court should refuse to—to sanction such activity by the lower courts and continue the course it set in that decision.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Layton.

The case is submitted.

(Whereupon, at 10:59 a.m., the case in the above-entitled matter was submitted.)

NOTES

1. *Roper v. Simmons*, 125 S. Ct. 1183 (2005).
2. See www.supremecourt.us/oral_arguments/argument_transcripts/03-633.pdf.
3. *Roper v. Simmons*, 125 S. Ct. 1183 (2005).
4. *Id.* at 1190.
5. *Id.* at 1194.
6. *State v. Simmons*, 944 S.W.2d 165, 169–70 (Mo. 1997).
7. *Id.* at 191.
8. *Simmons v. Roper*, 112 S.W.3d 397 (Mo. 2003).
9. Brief for Petitioner Simmons, No. 03-633, 2004 WL 903158 (U.S. 2004).
10. *Roper v. Simmons*, 540 U.S. 1160 (2004).
11. *Thompson v. Oklahoma*, 487 U.S. 815 (1988).
12. *Stanford v. Kentucky*, 492 U.S. 361 (1989).
13. *Penry v. Lynaugh*, 492 U.S. 302 (1989).
14. *Atkins v. Virginia*, 536 U.S. 304 (2002).
15. *Simmons v. Roper*, 112 S.W.3d 397, 399 (Mo. 1997).
16. *Id.*
17. *Roper v. Simmons*, 125 S. Ct. 1183, 1194 (2005).
18. *Id.* at 1229.
19. See Convention on the Rights of the Child at www.unicef.org/crc/introduction.htm.
20. See Convention on the Rights of the Child at www.unicef.org/crc/fulltext.htm.
21. *Roper v. Simmons*, 125 S. Ct. 1183, 1200 (2005).
22. *Id.* (Citations omitted.)
23. *Id.* at 1225–28.
24. JUVENILE JUSTICE CTR., AM. BAR ASS'N, CRUEL AND UNUSUAL PUNISHMENT: THE JUVENILE DEATH PENALTY: ADOLESCENCE, BRAIN DEVELOPMENT, AND LEGAL CULPABILITY 1 (Jan. 2004), available at www.abanet.org/crimjust/juvjus/Adolescence.pdf.
25. *Id.* at 2.
26. *Id.* at 2–3.
27. *Id.*
28. *Roper v. Simmons*, 125 S. Ct. 1183, 1195–96 (2005).



Illustration, page 167:

“I LIKE COURT”

ARLENE

Age 6

2003 Children's Art & Poetry Contest

Remarks of Judge Leonard P. Edwards

at the Presentation of the William H. Rehnquist Award for Judicial Excellence, U.S. Supreme Court, Washington, D.C., November 18, 2004

On November 18, 2004, Judge Leonard P. Edwards of the Superior Court of Santa Clara County received the William H. Rehnquist Award for Judicial Excellence at a ceremony in the Great Hall of the U.S. Supreme Court in Washington, D.C. The award is presented annually by the National Center for State Courts to a state court judge who exemplifies the highest level of judicial excellence, integrity, fairness, and professional ethics. Judge Edwards is the first juvenile court judge to receive the award.

Through Judge Edwards's efforts, the Santa Clara County juvenile dependency court was designated a national model by the National Council of Juvenile and Family Court Judges. This court is one of the most visited in the country: hundreds of legal professionals travel there to observe and learn the model practices that Judge Edwards has implemented, such as dependency court mediation, family group conferencing, direct calendaring, and court coordination. In 1999, Judge Edwards established one of the country's first dependency drug treatment courts, which has been named a Mentor Court by the National Association of Drug Court Professionals.

Judge Edwards also works closely with the Judicial Council and the Administrative Office of the Courts—he is a past member of the council and currently serves on the Family and Juvenile Law Advisory Committee and on this journal's editorial review board. We are pleased to reprint below Judge Edwards's remarks on receiving the Rehnquist Award.—Ed.

This is a historic occasion for me and for all of my colleagues who sit on the juvenile court bench. It is worthy of comment that someone who every day presides over the cases of children should appear in the Great Hall to receive the nation's most prestigious judicial award. How can it be that someone who has devoted his professional life to the well-being of abused and neglected children, to the correction and rehabilitation of youth, and to the rights of victims of violence emerges from all of the more well known judges in our country? After all, the United States Supreme Court has had very little to say about the work that hundreds of my colleagues around the country and I perform. Since the case of *In re Gault*¹ in 1967, there have been fewer than 10 Supreme Court decisions regarding juvenile delinquency issues. There have

HON. LEONARD P. EDWARDS

*Superior Court of California,
County of Santa Clara*

**THERE IS NO GREATER JOY
THAN SEEING A FAMILY
SUCCESSFULLY REUNITED,
TO SEE PARENTS TURN
THEIR LIVES AROUND,
GAIN SELF-ESTEEM,
AND PROUDLY WALK
INTO COURT WITH THE
CONFIDENCE THAT
THEY HAVE BECOME
COMPETENT PARENTS—
AND TO SEE CHILDREN
HAPPILY ACCOMPANYING
THEIR PARENTS.**

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been even fewer decisions regarding the law relating to child abuse and neglect. I cannot ever recall finding references to United States Supreme Court decisions in the legal briefs or arguments presented by attorneys in my court. In a way we juvenile judges have worked in the shadows of the court system.

So it is a unique event that the Supreme Court and the National Center for State Courts are honoring a juvenile court judge. The Rehnquist Award is a clear and powerful statement that a judge working with abused and neglected children and their families is important; that to work with the victims of domestic violence is important; that to convene the community around issues relating to at-risk children and families is important; that to oversee family crises in order to provide good outcomes for children is important. For that is what we in the juvenile court are charged to do. This award will help move the juvenile court out of the shadows of the court system and into the mainstream, where it belongs.

I believe the work of our juvenile and family court judges is critical to the future of our nation. That is a bold claim, but let me explain. Judges in the juvenile court are charged with keeping children safe; restoring families; finding permanency for children; and holding youth, families, and service providers accountable. Every day hundreds of judges make thousands of decisions regarding children in

**I BELIEVE THE WORK OF OUR JUVENILE
AND FAMILY COURT JUDGES IS CRITICAL
TO THE FUTURE OF OUR NATION.**

crisis. We decide whether a child should be removed from parental care, whether a child has committed a delinquent act, whether a child should be committed to the state for correction, whether parental rights should be terminated. When parenting fails, when informal community responses are inadequate,

our juvenile and family courts provide the state's official intervention in the most serious cases involving children and families. We are the legal equivalent of an emergency room in the medical profession. We intervene in crises and figure out the best response on a case-by-case, individualized basis. In addition, we have to get off of the bench and work in the community. We have to convene child- and family-serving agencies, schools, and the community around the problems facing our most vulnerable and troubled children. We have to ask these agencies and the community to work together to support our efforts so that the orders we make on the bench can be fulfilled. We have to be the champions of collaboration.

Many of these roles are not traditional for a judge. Yet for juvenile court judges they are essential if the work of the court is to be successful and if court orders will be carried out. The role of the juvenile court judge is unlike any other. In the traditional judicial role, deciding a legal issue may complete the judge's task; however, in deciding the future of a child or family member, the juvenile court judge must, in addition to making a legal decision, be prepared to take on the role of an administrator, a collaborator, a convener, and an advocate.

Perhaps I can give you an idea of these multiple roles in the context of a typical case. When I removed three children from a young drug-abusing mother last month, at the initial hearing I was able to recommend that she receive a substance abuse assessment available in our courthouse and administered by experts from the drug and alcohol service providers in our community. When her attorney nominated her for our dependency drug treatment court, our drug court team, including representatives from a wide range of service providers, accepted her on the condition that she enter a residential drug treatment facility, engage in substance abuse treatment, and participate in counseling. In the months ahead she will receive services from a social worker, a public health nurse, a housing expert, and a mentor from our Mentor Moms program, which assigns graduates from the drug court to counsel current clients; attend a special parenting class that will bring her and her children together with other mothers, their children, and Head Start and Early Start teachers; and receive other services as needed. All of her children will be represented by an experienced attorney. Moreover, one or more of her children will have a trained volunteer, a Court Appointed Special Advocate, assigned to assist them through this difficult time in their lives. All this has become possible because in my role as a juvenile court judge I have been able to reach out to agencies, service providers, and the community with the request that they work with me and the other members of the court system on behalf of children and families who come before the juvenile court. In essence, I asked for help and they responded to my request. I met with leaders of agencies and service providers, and I convened meetings bringing all members of the drug court team together in order to organize the drug court, to provide expert substance abuse assessors available in the courthouse, and to have the substance abuse treatment community work with the court. These are examples of the nontraditional work of the juvenile court judge. These are the kinds of tasks that my colleagues and I undertake every day as juvenile court judges. These tasks also exemplify the complexities that recovery and rehabilitation involve during the family reunification process in juvenile dependency court.

It is very likely that this mother will reunify safely with her children—the majority in our juvenile court do—but even if she does not, the children will have a permanent home. They will likely be adopted by a family member or a foster family, the same family they have been placed in concurrently during the reunification period.

Each day juvenile court judges hear cases, one by one. Although a single case will obviously make an immense difference for a particular family, it may not seem significant to the entire community. Yet these cases in the aggregate will make a great difference to our society. Last year I did some research with the staff at the National Council of Juvenile and Family Court Judges to determine just how many judicial decisions are made on a daily basis in our nation's juvenile courts. We concluded that there are approximately 30,800 hearings held each working day.

That is, at least 30,800 children and their families come before a judicial officer who will decide as to their status. The child may be a baby or a teen. The case may involve abuse or neglect, children in need of supervision, or delinquency. The hearing may be at the beginning, the middle, or the end of the case. Some may be review hearings to determine whether a plan is working out; others may be much more serious—whether a child is to be removed from her parent's home, whether a youth will be committed to the state for correction, whether parental rights will be terminated. This is the law in action: judge after judge trying to determine what intervention is necessary on behalf of a child in crisis.

You all know about problem-solving courts. Every state judiciary has drug courts, and many are developing mental health courts and other types of courts dedicated to solving challenging issues facing our citizens. The juvenile court is the original problem-solving court. The juvenile court was America's first and most significant contribution to world criminology. Originated as a reform, the juvenile court combines social and legal attributes to serve public interests relating to children and families. It was founded in recognition that children are different from adults and that the law should address children's issues from a perspective that acknowledges those differences. The juvenile court was envisioned as the setting where societal intervention on behalf of children would take place if parenting failed to ensure that children were properly raised. The hallmark of the juvenile court is individualized justice. From the beginnings of the juvenile court over 100 years ago, juvenile court judges have worked with social workers, probation officers, and others to devise individual plans for each child who comes before the court.

All 50 states and the District of Columbia have a juvenile court. All state legislatures have recognized the importance of having a legal institution devoted to the well-being of children. I would like to give you an update on the state of juvenile courts today. The juvenile court is one of the unsung success stories in our country. Our juvenile court judges are doing a good job. This may come as a surprise to some of you. After all, some commentators have criticized the juvenile court. Because of the confidentiality that shrouds much of what happens in the juvenile court, many in the public do not know what happens there. Many in this room are working to make the juvenile court process more transparent. Yet as overcrowded as our courtrooms are, as stressful as the work of these courts is, as difficult as the decisions are that judges have to make every day, our juvenile and family courts have never been stronger or more effective than they are today.

Unfortunately, the nation has a distorted picture of what happens in our juvenile courts. We seem to read only about the tragedies, the children who are killed by their parents or who are lost in foster care or who commit terrible crimes. These sensational news accounts are utterly misleading. Yes, tragedies do happen, but the real news, the good news, is that the juvenile court is a strong, vibrant institution.

Perhaps more significantly, our juvenile courts are making improvements to their operations at a pace never before imagined.

**...THE REAL NEWS, THE GOOD NEWS,
IS THAT THE JUVENILE COURT
IS A STRONG, VIBRANT INSTITUTION.**

Just as drug courts have demonstrated their effectiveness through research and evaluation, so too have our juvenile courts begun to demonstrate excellent results. Even in those jurisdictions where individual juvenile courts are struggling with a lack of resources, they have started the court improvement process. Court practice has improved in every state, principally because of national court improvement efforts by such organizations as the National Council of Juvenile and Family Court Judges and the National Center for State Courts, and because of the support of the federal government (in particular, the Office of Juvenile Justice and Delinquency Prevention) and charitable foundations such as the David and Lucile Packard Foundation, the Pew Charitable Trusts, the Dave Thomas Foundation for Adoption, and the Robert Wood Johnson Foundation. Working with judges and researchers, these organizations have developed what we refer to as best practices for juvenile courts. Improved technology, technical assistance, and a broad array of training opportunities have resulted in courts' learning quickly about what is happening in other courts. Initiatives such as the federal Court Improvement Program and the Model Courts Project of the National Council of Juvenile and Family Court Judges have given courts the opportunity to learn about best practices that other jurisdictions are using. Judicial leadership has made it possible for these courts to make significant improvements in court operations.

Let me give some examples. Ten years ago the National Council of Juvenile and Family Court Judges published a book called the *Resource Guidelines for Abuse & Neglect Cases*.² It carefully outlined the time and judicial resources necessary to operate a successful child protection courtroom. This had never been done before. The *Resource Guidelines* were immediately embraced by the Conference of Chief Justices and the American Bar Association but, more important, became a practice guide for courts across the country. Now, after we have watched court after court aspire to follow the *Resource Guidelines*, we know that best practices result in fewer children coming into foster care and that those who do enter care have fewer placements and reach permanency more quickly.

The better results can be measured. Seven years ago three jurisdictions—New York City, Los Angeles County, and Cook County, Illinois—accounted for approximately 150,000 children in out-of-home care under the supervision of the juvenile court, almost one-third of the national total of children in foster care. All three of these courts are part of the model courts initiative directed by the National Council of Juvenile and Family Court Judges. All three committed to improve practice by reference to the *Resource Guidelines*. All three had strong judicial leadership: Judge Nancy Salyers and Presiding Judge Patricia Martin Bishop in Chicago, Chief Judge Judith

Kaye and Administrative Judge Joseph Lauria in New York City, and Judge Michael Nash in Los Angeles. Today there are fewer than 60,000 children in care in these jurisdictions, a decline of over 60 percent. As a result of the *Resource Guidelines*' best-practices recommendations, fewer children are in out-of-home care and those that do enter care stay there for a shorter period of time.

Another example is Tucson (Pima County), Arizona, also a model court site, under the leadership of Commissioner Stephen Rubin. The National Center for Juvenile Justice recently completed an exhaustive study of juvenile court practice in the Tucson juvenile court after best practices based on the *Resource Guidelines* were implemented. The results were dramatic. Following the guidelines, the Tucson juvenile court reduced the time a child waits for a permanent home, the time a child remains in out-of-home care, and the time it takes to dismiss a child protection case—all by 30 to 60 percent. These results are positive for children, but they also resulted in significant foster-care cost savings to the local, state, and federal governments. The Chief Justice of Arizona and other state leaders were so impressed by the results that they took steps to make every juvenile court in Arizona a model court and to have all of Arizona's juvenile courts implement best practices as described by the *Resource Guidelines*. In Minnesota, under the leadership of Chief Justice Kathleen Blatz, the entire state judiciary has organized a juvenile court project called Through the Eyes of the Child. Chief Justice Blatz has used organizational techniques similar to those of the model courts, has brought together and created teams in each jurisdiction, and set goals for court improvement for each and every county in Minnesota. I have seen the enthusiasm that the Minnesota judges, court administrators, and attorneys have for this project and for their collaboration with children's services administrators and service providers. This is court improvement at its best.

For those of you who have not visited the new Washington, D.C., juvenile court, I urge you to do so. Under the leadership of Chief Judge Rufus King III and Presiding Judge Lee Satterfield, and following the *Resource Guidelines*, our nation's capital (another model court) has adopted best practices that will quickly show positive results for the children who appear in their family court.

At a recent meeting of the model courts here in Washington, D.C., our lead judges and National Council of Juvenile and Family Court Judges staff discussed strategies that would make it possible to expand best practices statewide across the country. We discussed how Arizona, New Jersey, Minnesota, and Georgia are expanding model court practices to the entire state. With our successes over the past few years, we are confident this type of expansion can be accomplished in all states in the next decade. Be prepared for another revolution in juvenile court improvement. Next year the National Council of Juvenile and Family Court Judges will publish resource guidelines for juvenile delinquency cases, addressing best

practices in our nation's juvenile courts. These guidelines should usher in a new national confidence in the juvenile delinquency court and a legislative shift to keep more children in the juvenile court, where they belong, where they will receive individualized justice, where accountability and rehabilitation go hand in hand, and where programs that have been proven successful are utilized by the court and court-serving agencies. The national trend of waiving youth to the criminal court has already started to reverse itself; the delinquency guidelines will accelerate that process. The court improvement efforts that will flow from the guidelines' publication will lead to a fresh look at the juvenile court by judicial leaders, policymakers, and members of the community.

Court improvement successes have led to a new spirit among judges in juvenile and family courts across the nation. More and more judges are choosing the juvenile court as an assignment and as a career. In most court systems the juvenile court is no longer the training ground for other judicial assignments. Many chief justices and presiding judges have taken an interest in the juvenile court and have devoted time and energy to juvenile court improvement. Juvenile and family courts are getting more respect from the judiciary and from the community. We on the juvenile court appreciate this interest and attention because we believe that our work is critical to the well-being of our communities and of our nation. We respectfully ask for more. We ask that juvenile courts be placed in the judicial hierarchy at the highest level of trial court in each of our states. That is what we do in California, where we have one level of trial court, the superior court, and all judicial business including juvenile court matters is conducted at that level. We know that placing the juvenile court on a status equal to that of criminal and civil trial courts has sent a clear message that the judiciary values the work of the juvenile court. Perhaps not surprisingly, more California judges are choosing juvenile court not as a steppingstone to a different assignment but as an important part of their judicial careers. When I first took the juvenile court assignment in 1985, I was the only judge who indicated an interest in remaining there. Now numerous younger colleagues ask me when I am going to retire—they would like my job.

Over the years I've traveled to more than 40 states as a judicial educator. I've seen a new spirit every place I visit. In state after state judicial leaders have shown an increased desire to learn from other states and from organizations with expertise to offer. Judges are asking, How can I do my job better? How can I improve outcomes for the children and families who come before me? This spirit is all it takes to start courts on the path to excellence. A little competitive edge mixed in can accelerate the process. When I tell a court system that the court in a neighboring jurisdiction has made significant improvements in court operations, the quick response is often that "we can do better than they can." For example, when I learned that Administrative Judge Cindy Lederman in Miami, Florida, Sheryl Dicker in New York, and the Zero to Three project in Washington, D.C., had creative

ideas for the care of infants in foster care, I read what they had written, consulted with them, and invited some of them to come to one of our trainings in my home county. My purpose was clear: I wanted to see if they could teach us how to do our jobs better. Based on what we learned, we have made numerous changes in how we deal with infants and their families in our court system.

One message I care deeply about and deliver wherever I go is that children belong in families, preferably their own families, and that congregate care and large detention centers are seldom the best choice for a child. Social science and child development expertise have demonstrated that congregate care is developmentally inappropriate and often harmful to children. This should not be a surprise to anyone who has studied juvenile law because this conclusion reflects the legal principles established in both state and federal law. Over the past 25 years Congress has passed two major pieces of legislation relating to the judicial role in child protection and finding permanent homes for children, the Adoption Assistance

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and Child Welfare Act of 1980³ and the Adoption and Safe Families Act of 1997.⁴ These federal statutes and the state statutes implemented to conform to them govern what we as juvenile court judges do in child abuse and neglect cases. Moreover, it was Congress that passed the Juvenile Justice and Delinquency Prevention Act of 1974,⁵ 30 years ago. Acknowledging the harm that can be done to children by older, hardened criminals, this legislation forbade the placement of children in adult jails and prison. Now we realize that even same-age peers can teach one another about crime while in custody. Nevertheless, juvenile courts throughout our country and in many parts of the world continue to place children in institutions— orphanages, group homes, large youth prisons, and other forms of congregate care. My colleagues often respond that they have no choice.

The good news I have to report is that in many cases we do have a choice. Utilizing modern technology we can and do find family members for children. Did you know that most of us in this room have more than 75 living relatives? This statement is based on Kevin Campbell's work at Catholic Community Services of Western Washington. This statement applies to everyone in this room and, more significantly, every child in foster care. Our job as caretakers and overseers is to find that family and let them know that one of their relatives, a child, a member of their family, needs them. We have the technology today to find families, technology that was not available 10 years ago. Web technology and search engines make this possible. This search is worth our effort because we have learned that just because one or both parents are in jail or prison, we should not assume that other family members are either unavailable or unfit. Many of you have seen the movie *Antwone Fisher* and the remarkable story of a young boy caught in a foster-care system because his father was dead and his mother in prison. What he did not

learn until adulthood was that he had a large and loving extended family that lived very near him while he suffered through a childhood in multiple foster homes. When we in the juvenile court system learn that a child's father has disappeared and his mother is in prison, we must not assume that the child has no relatives or that the relatives are unworthy of consideration. We need to start the search for relatives immediately. I can tell you that Antwone Fisher's story about finding family can be a reality in every community in the country if we start paying more attention to family finding. It is my dream that the expanded use of family finding will literally dry up the foster-care system.

Does family finding work? Will the family respond? In most cases they do. Can families find the solution for the crises facing their children? I believe they can. There is something special about family. I am not a scientist, but child development experts tell me that we have a special relationship with those who carry our DNA. We are more likely to take that extra step and to make sacrifices for the person who is related to us. I have seen the power of family finding both in my own county and in Hawai'i, where they practice Ohana family conferencing. I have been to a family group conference where 25 family members participated, some of whom traveled from other states. They all came for the same reason—the child. They all had something to contribute to the future of that child. They all helped devise a family plan. Large groups of family members ensure good results for a child even when the biological parents are unavailable.

Can we find families? One tactic is to ask about family throughout the entire case. That is what the State of Washington's Legislature mandated two years ago when it passed legislation requiring social workers to ask about extended family at every stage of a child's case. The results have been an almost twofold increase in family placements, from 19 to 37 percent—just from asking. I wouldn't be surprised to see similar legislation introduced in California next year. That is not to say that there are not wonderful foster and adoptive homes for children. It is also not to say that all children must remain with family. But we have been halfhearted in our search for families for children in out-of-home care. We can do much better, and some courts and social service agencies around the country are proving this today. After all, our goal is to find permanent homes for children so we in the public sector can dismiss their cases and let them live normal lives. Family finding, family group conferencing, team decision making, and similar innovations permit us to identify family members, convene them, and permit them to come up with the best plan for each child's future. Then we in the court and social services system can get out of the way. There is nothing more satisfying for a judge than to see a happy ending with a child in a loving home and to dismiss the case. I feel privileged to preside over that type of happy ending almost every day. It is what keeps me coming back to the emotional environment of the juvenile court each morning.

**OF ALL THE WORK I DO, THE
MOST REWARDING IS THE WORK
WITH INDIVIDUAL CHILDREN AND
FAMILIES IN THE COURTROOM.**

Of all the work I do, the most rewarding is the work with individual children and families in the courtroom. When children first come to the attention of the court, they have been beaten, neglected, traumatized, unloved, in need of a stable, loving family. Parents come before the court as drug addicted, victims or perpetrators of violence, with few or no parenting skills, with mental health and maturity challenges, and without support systems. The initial hearings are so sad that people in the room are in tears as they reflect on the tragedy of their lives and the lives of their children. Kleenex boxes line the tables. Juvenile court orders place children in safe, temporary homes, preferably with relatives, and the parents start the difficult

process of reconstructing their lives. They participate in services, many substance-abusing parents (mostly mothers) enter our drug treatment court, some participate in groups focusing on the effects of domestic violence, and many receive mental health services. Most family members participate in substance abuse assessments and treatment plans as well as individual and family counseling. Parenting classes are frequently a part of the plan, including specialized classes, such as Parenting Without Violence. Child advocates will support the child through the process; and an attorney, a guardian ad litem, or both will speak for the child in all court hearings. Specialized services such as wraparound services will enable many children to remain with families rather than go to congregate care.

The court frequently reviews the progress of the parents and children at subsequent hearings, and the structure of our court system ensures that the same judge will preside over all hearings for the same family from beginning to end. Some parents do not participate in services or are unsuccessful in their efforts to safely reunify with their children. These children will usually be adopted by relatives or foster parents. Other families—the majority—will make significant changes in their lives and be reunified with their children.

One reason for the optimism I have about the future of the juvenile court is the development of new services for children and families—services that have demonstrated success and that have resulted in better outcomes for children. When 14-year-old Sally (not her real name) came before me several years ago, she had been abused by her mother, her father was not available, and she was so depressed that she had attempted suicide on several occasions. The social worker recommended that she be placed in a mental hospital. I made that placement believing it was necessary to save her life. A few months later at a review hearing the social worker recommended that Sally be placed with a family member and given wrap-around services. I was shocked. How could this be a safe placement when I had removed Sally from her home only a few months earlier? I was not familiar with wraparound services, but the agency had been using them successfully for over a year. Wraparound services take an ecological approach to the care and safety of

a child. A team of professionals, relatives, and community members work together to create an individualized 24-hour plan of supervision while the child lives with a family in the community.

I returned Sally to the relative and nine months later was able to safely dismiss her case. Since that time, using wraparound services, I have been able to place over a hundred children with their families. It is an example of how the juvenile court can use newly developed, carefully evaluated services to place children safely with families, where before they would be committed to institutions. For me, both professionally and personally, this has been nothing less than a miracle.

There is no greater joy than seeing a family successfully reunited, to see parents turn their lives around, gain self-esteem, and proudly walk into court with the confidence that they have become competent parents—and to see children happily accompanying their parents. I feel privileged to be able to preside over cases that produce such remarkable outcomes for children and families. Even in the cases in which the parents are unsuccessful, juvenile court judges are able to conduct adoption hearings, another joyful occasion where families and the court system celebrate the building of a new family through the adoption process. These are the main reasons I have remained in the juvenile court for most of my judicial career. Without these uplifting moments, the job of a juvenile court judge would be too emotionally draining for me and for most judges.

So when I tell you that in my own court in Santa Clara County we have reduced the number of children in foster care by 40 percent, that we are dramatically reducing the number of children in congregate care by utilizing family finding and wraparound services, that adoptions have increased fourfold, and that trials have been reduced significantly with the use of confidential mediation, that our juvenile dependency drug treatment court has provided a new and effective system of support for substance-abusing mothers, that our juvenile mental health court (the first in the world) has demonstrated to the country that youth with mental illness can be humanely and effectively treated by the juvenile court system, and that with judicial leadership in concert with community commitment a Court Appointed Special Advocate (CASA) program has been created with over 900 volunteers who are advocating on behalf of over a thousand children, you will understand that the good feelings that my colleagues in the juvenile court and I have are based on data and evaluation, not anecdotes.

Much of this work would not be possible were it not for our judicial leaders' support for the work of juvenile and family court judges. When Chief Justice Ronald George and Administrative Director of the Courts William Vickrey make children and families a priority in their administration of the California court system, that means our judges have a better opportunity to operate successful courts. When

the California Judicial Council approved section 24 of the Standards of Judicial Administration over 10 years ago, it gave permission to all of our juvenile court judges to get off the bench and step up their advocacy on behalf of children, knowing that we are supported by our leaders in our efforts to work both in and out of the courtroom to secure better results for children and families. When organizations such as the National Council of Juvenile and Family Court Judges provide technical assistance and guidance to assist us, and when the United States Supreme Court and the National Center for State Courts award the William H. Rehnquist Award for Judicial Excellence to a juvenile court judge, that sends a message across this country that the work of the juvenile court is important and that to serve in the juvenile court is to make a significant contribution to children and families in crisis, to the community, and, ultimately, to the nation.

Mr. Justice Kennedy, thank you for this opportunity to speak to you tonight and for this wonderful award. I accept it personally and on behalf of juvenile court judges in California and across the country. We all are grateful for this recognition.

NOTES

1. *In re Gault*, 387 U.S. 1 (1967).
2. NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, RESOURCE GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE & NEGLECT CASES (1995).
3. Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (codified in part at 42 U.S.C. §§ 670–679b (Matthew Bender, LEXIS current through P.L. 109-6, approved 3/31/05)).
4. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended at 42 U.S.C. § 1305 (Matthew Bender, LEXIS current through P.L. 109-6, approved 3/31/05)).
5. Juvenile Justice and Delinquency Prevention Act of 1974, Pub. L. No. 93-415, 88 Stat. 1109 (codified as amended at 42 U.S.C. §§ 5601–5792a (Matthew Bender, LEXIS current through P.L. 109-6, approved 3/31/05)).

Can You Hear Me?

We are delighted to publish the poems that follow, entries to our first Children's Art and Poetry Contest held in 2003 to

honor the 100th anniversary of California's juvenile court. Open to youth of any age who have had experience with the court system, the contest drew a large response from all over the state.

The poems reproduced here—a sampling of the entries, including a range of ages and subjects—were among those published in a booklet distributed at the Celebrating California's Juvenile Court Centennial Conference in Los Angeles. The poems, as well as the background information accompanying them, have not been edited; they are as they were submitted to us, in the language of those who wrote them.

The contest was funded through volunteer efforts at the Administrative Office of the Courts. We express our deepest appreciation to all the young poets who entered the contest and shared their thoughts and feelings with us. And we are also grateful to the many individuals and court personnel who assisted us in reaching out to young people in the court system and helping them participate in this program.

A COLLECTION OF
POETRY BY YOUTH
IN CALIFORNIA'S
COURT SYSTEM



ESTRELLA

*These Are the Days
of My Sentence...*

Court

JUSHEEM W.

Age 16

*Jusheem is in the
delinquency system in
San Mateo County.*

Heart pounding

My legs are weak

I feel like I can't walk

Head Hurts

Feels like somebody is pushing down
on both sides of my head.

Wondering if my family is waiting

Wondering if I will get to go home

Waiting for me to be called in

Waiting to be judged

I will never get to go home

I will never get out of here

Im going to be here forever

Night Time

Incarcerated by my own thoughts.
I try to escape this place of hate but can't.
I feel all hope is lost.
I'm sending prayers to the one on the cross.
Can you help me?
Because I want to do right but at night I turn and toss.
Trying to sleep off this drunkness of sorrow
While thinking bout the past
I'm living in the present trying to plan for tomorrow.
But as I lay in this silence, only young felons breathing.
I hear myself inside my heart and mind yelling and screaming.
I wish I could stay asleep and dreaming.
But awake to reality.
My life is a nightmare where I fight for my sanity.
How long will this go on?
My hearts been torn.
Ripped up, stitched up
Since the day I was born.

DAVID C.

*David is in the
delinquency system in
Sacramento County.*

I Want to Be Adopted

CHELLA N.

Age 13

“Chella did not officially enter DCS [Department of Children’s Services] until the age of 5 even though reports had been made earlier on the family. From that time until age 12, she lived a few months with a relative, a group home, and 2 foster homes. About the time she was 10 an adopted home was sought. Chella went to one adoption fair and inquiries were made but, none that Marin County workers felt were right. I became aware of Chella in the fall of 2001. After 2 visits to California and a Christmas visit from Chella, we both knew that we were meant to be a family. I brought Chella home to Tennessee on March 11, 2002. Our adoption was finalized March 11, 2003. Today Chella is a wonderful part of our family. She has many friends, makes honor roll in school, and is active in band and in church. Chella is my precious gift from God.”

—Chella’s Mom

I want to be adopted
 Because I wanted a mom
 I went to Adoption Fairs
 But I didn’t meet anybody
 That I would want to live with
 For the rest of my life
 I thought about
 How much I would miss my family
 I used to think that I would get
 To live with my mom again
 But I never got to
 My sister is already adopted
 And she likes it just fine
 Now I just don’t know
 What I should do

Not Another Day

My life to this day,
has been wasted away.
A life that no one should have to live,
not even for one day.
I've listened to you
now hear what I say
I will not live that life
not even for another day
starting today I am a changed man
I am gonna live a productive life
the best that I can
I'll never come to this place again
because I'm sick of livin a life of sin.
My life will never again waste away
not for a month, a week, not even another day.

CHRIS W.

Age 16

Innocent Child

CHANDRA P.

Age 16

I was just an innocent child lying in my bed
Not knowing you were lurking and danger was ahead.
I can feel your presence, you're right in my room,
All I can hope and wish for is that mommy wakes up soon.
You touch me all over my body, my feet, my legs,
and my thighs. You tell me you'll buy me what ever I want
But I know there bold face lies
You touch me all over, caress my body and
grab a hold of my face,
You do this without a trace, without a trace of guilt
for what you're doing to me
Taking my innocence and my virginity
You know what you've done to me is not fair,
As you leave my room I feel naked and bare,
I wait in my room so frigid and scared, and feeling like a fool.
When morning comes I run to my school.
I tell my teacher all about you.
She calls up a number I hope its not you,
I'm scared, really scared I don't know what to do.

The police come and they take me away, they say in a group
home is where I must stay.
They take me to court to place you in jail,
They say people like you belong in hell. I see you looking at
me as I testify,
I stutter as I talk, I think I'm gonna cry. I look at my mother
who also looks scared,
I can't handle this place, I can no longer bare.
And when I am done they say that its all over,
My mother hugs me softly as she cries on my shoulder
For she knows that I am not coming home
And I realized that's when I started my journey alone.
Eleven years in the system with a sick pathetic dad,
I miss the home that I once had.
But I know it was for the best, I'm doing well in school not
really good in math.
I know great things are out there,
I must continue the path.

A Home

ANDY W.

Age 13

“This poem has changed my outlook on where I’ve lived in the last few months. I learned from my experiences in writing this poem that if you are happy where you live than that is your home. For a clearer example, in my court experiences I have had 3 homes the foster home I lived in, Yellow Brick Homes in Santa Rosa, and Full Circle in Bolinas. I know these will always be a place of my spirit body and mind.”

A Home is not a window

A tile nor a wall

A Home is not a dorm

With rooms down a hall

A Home is what we make it

From the inside out

A Home is where we stand

Where we live, make things work out.

Needles

the sounds ♦ the rush ♦ the pain ♦ the thrill ♦ the high ♦
nauseatingly wonderful ♦ waking up without even being asleep ♦
with bruises, dark, painful, and purple, Running down my arm ♦ not
knowing where the time went ♦ Still not knowing what I did to pass
the time ♦ It suffocates me ♦ An issue... ♦ It was sweet relief from
all my nightmares ♦ Yet it all felt like a hazy dream ♦ Seeing things
through cloudy eyes ♦ Made it impossible to feel the pain on the
inside ♦ Impossible to see clearly, the girl I was becoming on the
inside ♦ So dingy ♦ So dirty ♦ So skinny ♦ So...nauseating

KASEY C.

*Kasey is in the
delinquency system in
Fresno County.*

Visiting

AMBER

Age 15

“My name is Amber and I have been here at Juvenile Hall San Bernardino for almost three weeks now. So far I am doing very well. I have been rehabilitated from my drug addiction, and I have taken the Lord as my savior. I am not yet finished with court and I am really scared. I am here for a crime I did not commit; the sentence for that crime is life. My whole family is behind me 100%, but they are all scared for me also. I am grateful for my time here to give me a full recovery but I hope the truth is found soon so I may go home. My poem relates to my current visiting experiences with my parents. It is always hard for us knowing I may never see home again, but we pray every night and have faith that it will all go well. Until I return home, I will continue to do my best and have these visits every Wednesday evening.”

When ever I look into their eyes
 I can't seem to stop the loving stare
 I can't bring myself to say the words
 To say how much I really care
 I put my hands over my face
 I always hold my feelings in
 I don't know what I will say when I see them again
 Or when I can say those words again
 To tell them all my love for them
 The last time I even told them
 What they mean to me
 They put their hands over mine
 And told me they stand by my side

I am afraid to speak those words again
For fear they'll lose their delight
Today may even be the last time
I may get to see their faces shine
Their happy faces bring me delight
I finally think that I am prepared
To say the words I want to say
I just hope the words don't slip away
I know my mom will probably cry
My dad and I will both ask why
My mom will only simply sigh
It seems we've just begun our "Hi's"
I see it's time for our good-bye's

Behind Walls

RUBEN V.

*Ruben is in placement
at a drug and alcohol
rehabilitation facility in
San Joaquin County.*

Endless days that count the years,
No longer can I hold back my tears.
Serving time behind a wall
With no one to visit, no one to call.

Like a wild animal locked inside a gate
Waiting patiently for my parole date.
No reason to feel any sorrow.
All I do is pray for tomorrow.

Then one day the gates will open wide,
That boy that's now a man steps outside.
As he leaves he looks behind,
Seeing the same wall holding his own kind.

The broken promises, the empty dreams,
The sorrow is stitched between the seams.

Wonder As I Wander

I wonder as i wander out under the sky why do people i care about
always have to die. Are happy where you are wherever that may be.
I wonder as I wander do you still think of me.

Is it nice up there in heaven for i know you made it there. Are the
clouds made out of marshmallows do you know that I still care.

I wonder as I wander out under the sky why do people I care about
always have to die.

KRISTIN L.

Age 15

“The piece that I have written is dedicated to two very beautiful people who have passed on and are no longer hurting. My grandfather whom I was living with when I had nowhere else in the world to go. He had lung cancer from smoking and died in my grandmother’s arms. We no longer have the best relationship and I don’t live with her anymore. I moved around to 36 out of home placements and met a wonderful lady (Mary Taylor) who works at Edmund D. Edelman Children’s Court. Well, her husband died and she’s not able to see me as much anymore but I want her to know she’s took all the bitterness out of me and has me looking to the lord all the time.”

To Mom

CARRIE M.

Age 11

“Carrie and her brother were wards of the court several years ago due to alcoholism and domestic violence in the home. They were only in foster care for a short time and were returned to the home as the father was in jail and later went to a 90 day rehabilitation program. I cooperated with all the requests of the court and full custody of the children was returned.”

—Carrie’s Mom

Love is patient

Love is kind

Love is something

Some people don’t find

Love will be with you

Everywhere you go

Love is something

Some people don’t know

Love is something

That will stay with you

Love is something

Some people can’t get to

Love is something

That is true

Love is something

For me and you

This Little Girl

She needs your hand
She is so confused
She doesn't know
Where she is or where she is going
She doesn't know if this is all just a dream
She needs your hand she needs it so
She needs your hand to grasp and lead her
You can't begin to understand
What this little girl is going through
She needs your help to know what love is
She was told that she didn't love herself
She is lost in this heart
This heart that is broken
She can't see what is going on
With these feelings inside
She needs your hand to grasp
To tell her everything will be all right

KASSIE O.

Age 16

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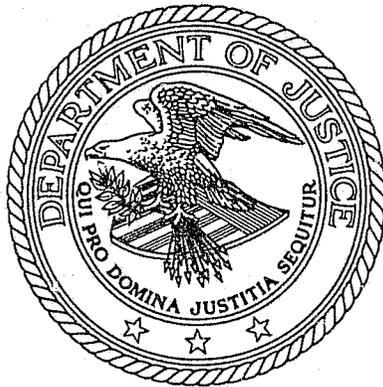
JUSTICE FOR JUVENILES

Charles E. Springer
Vice-Chief Justice
Supreme Court of Nevada

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Department of Justice
Juvenile Justice and Delinquency Prevention

OJJDP



JUSTICE FOR JUVENILES

Charles E. Springer
Vice-Chief Justice
Supreme Court of Nevada

Charles E. Springer is Vice-Chief Justice of the Supreme Court of the State of Nevada. Prior to being commissioned to the Supreme Court, he was Juvenile Court Master for the Second Judicial District Court for the State of Nevada from 1973 to 1980. He has also served the State of Nevada as Attorney General. He received the Outstanding Service Award from the National Council of Juvenile and Family Court Judges in 1980 and has served on the Boards and Commissions of numerous civic and State organizations in an effort to improve the quality of justice for adults and juveniles.



U. S. Department of Justice

Office of Juvenile Justice and Delinquency Prevention

*National Institute for Juvenile Justice
and Delinquency Prevention*

*Juvenile Justice Clearinghouse/NCJRS
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Dear Colleague:

"Justice for Juveniles" is a serious and deliberative look at the juvenile justice system, its philosophical and historical underpinnings, the strengths and weaknesses of today's system, and the implications for its future.

Last year over 35,000 juveniles were arrested in this country for violent crimes, including murder, rape, and aggravated assault. The success of this office's efforts to reduce juvenile crime and create a more secure society depends on the ready exchange of information and ideas among professionals in the field. Seeking learned input and providing information to both the public and private sectors takes a giant leap toward that goal.

Justice Springer brings a unique perspective to the study of our Nation's handling of juvenile offenders. I do not necessarily agree with everything he says, nor does this office necessarily endorse all of his ideas. But we do think that his work is provocative and highly worthwhile. The former Chief Justice of Nevada's highest court, he is a first-string player in the day-to-day scrimmages of the legal system. In addition, he is a student of the system, poking, prodding, and pinching it to see where it's healthy and where it hurts.

Justice Springer's work is a legitimate and lively addition to our continuing examination of the juvenile justice system. Few will argue with his diagnosis. But his prescription for cure is sure to fan the flames of debate so crucial to resolving the issues at hand.

"Justice for Juveniles" is a call for reform. It's a call to action. I commend it to you for thought and discussion.

Alfred S. Regnery
Administrator

April 1986

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I. Opening Statement

I. Opening Statement

Fiat justitia ruat coelum.

Let justice be done, though the sky should fall.

Lord Mansfield, *Rex v. Wilkes*, 1770

That justice be done, for juveniles—in the courts and in their daily lives—is the theme of this publication.

The first step in doing justice for juveniles is to revise juvenile court acts throughout the country so that when juvenile courts deal with delinquent children, they operate under a justice model rather than under the present treatment or the child welfare model. By a justice model is meant a judicial process wherein young people who come in conflict with the law are held responsible and accountable for their behavior.

The juvenile court should be maintained as a special tribunal for children, but when dealing with criminal misconduct, the emphasis and rationale of the court must be changed to reflect the following:

- Although young people who violate the law deserve special treatment because of their youth, they should be held morally and legally accountable for their transgressions and should be subject to prompt, certain, and fair punishment.
- Except for certain mentally disabled and incompetent individuals, young law violators should not be considered by the juvenile courts as being “sick” or as victims of their environments. Generally speaking, young criminals are more wrong than wronged, more the victimizers than the victims.
- Juvenile courts are primarily courts of justice and not social clinics; therefore emphasis in court proceedings should be on the public interest rather than on the welfare and treatment of the child. This does not mean that these ends cannot be successfully carried out by a justice-oriented juvenile court.
- Many environmental factors can contribute to the commission of a criminal act by a young person, but the major factor courts should deal with is the moral decision to violate rather than to obey the law. Law

violators are best dealt with by doing justice—by reproof and punishment.

- To adopt a justice model is not to rule out or diminish the importance of rehabilitative measures employed by juvenile courts. Disapproval of, and punishment for, the wrongful act is probably the single-most important rehabilitative measure available to the court. Additional counseling, education, and the like are easily incorporated into an accountability-punishment disposition for delinquents.

These ideas, however, are incompatible with the basic legal assumptions that ground the present juvenile court structure. What is proposed is a new structure, a model based on justice rather than on the questionable "alegal" social theories that underlie the present system.

It is argued here that the proposed justice model is more

- in harmony with the proper public perceptions of what courts should be about;
- just and fair to juveniles and the public than the present model;
- efficient, because the courts would be engaged principally in judicial work rather than in the endless and often demeaning treatment and life-meddling which presently occupy so much of the juvenile courts' time; and
- effective than the present model because holding juveniles accountable for their misdoings better serves the goals of rehabilitation than the aggregate of nonpunitive "treatment" methods to which most juvenile courts are now necessarily committed.

The idea of basing juvenile courts on the justice model is certainly not presented as a panacea for youth crime. To diminish youth crime to any appreciable degree, society must do justice for juveniles in their daily lives. This is to say that they should be given their *due*, their daily bread; their needs should be fulfilled. Failure to provide for those dependent upon us is an injustice that is both an evil in itself and the basic cause of crime and misery among our youth.

To consider fully the subject of justice for juveniles, then, we must examine justice in both its juridical and extrajudicial meanings. The two are very much related.

Juridical justice: juvenile courts

Juvenile courts as institutions began as a social experiment in Illinois in 1899. As originally set up by the Illinois legislature, juvenile courts were not designed to be courts of justice, but rather were more like coercive social clinics empowered "to regulate the treatment and control of dependent, neglected and delinquent children."¹ The newly created juvenile courts were commanded to treat a criminally active delinquent in the same manner as they would a poor or neglected child and to give to delinquents the same "care, custody and discipline" as "should be given by its parents."²

The Illinois act divested the criminal courts of jurisdiction over persons under age 16 and substituted a paternalistic system which viewed criminally active juveniles as victims of their environments who were not responsible for their criminal acts.

As a consequence of this kind of thinking, juvenile courts operated under a medical model, giving "individualized treatment" to the ailing victims of the slings and arrows of a bad environment. The welfare of the child was the guidepost of the new social court, and it was thought that ministering to the welfare of the individual child would cure or rehabilitate the child and, ultimately, benefit society.

The so-called juvenile justice system, spawned in Illinois and copied throughout the United States and most of the world, is rather obviously not a justice system at all. It is proposed here that a true system of justice should be adopted and that the delinquency jurisdiction of the juvenile court system should be radically redesigned to conform to a justice model.

The underlying assumption is this: crime, by definition, is an act or omission liable to punishment by society as a wrong against society. Society sets standards that determine criminal conduct. We must live up to these standards or violate them at our peril. In this case, the term "we" includes young people, who should be held accountable for their actions and punished for their wrongs, subject to some degree of diminished responsibility.

Such an assumption is contrary to the social welfare philosophy of the traditional juvenile court. However, it is not necessarily contrary to the way that juvenile court judges have traditionally handled delinquency cases. Treating and caring for youthful criminals, rather than punishing them, is simply too contrary to our experience and folk

wisdom and too counterintuitive to be accepted by judges or the general public. A philosophy that denies moral guilt, abhors punishment in any form, and views criminals as innocent, hapless victims of bad social environments may be written into law, but this does not mean that it will be followed in practice.

The time has come to adopt a system of justice for juveniles and to say so. The starting point is legislative reenactment of juvenile court acts to reflect the following:

- Purpose clauses should be amended to declare that the primary objective of the legislation is to achieve justice, to preserve order and domestic peace, and to protect the interests of society in general—not to serve the interest and welfare of the criminally offending child.
- Juvenile courts should be clearly defined as judicial institutions charged with the special task of administering justice in matters relating to children on the basis of a theory of diminished juvenile responsibility, not one of juvenile irresponsibility.
- Delinquency jurisdiction should be clearly defined in terms of criminal responsibility, accountability of juveniles for criminal misconduct, and the legitimacy of punishment.
- Delinquency jurisdiction should be divided into two overlapping levels, thereby recognizing, on the basis of age and other factors, varying degrees of diminished criminal responsibility.
- Noncriminal juvenile misbehavior³ should, when it comes under court cognizance, be treated judicially and not clinically. Where coercive state intervention becomes necessary in the public interest as a last resort, enforcement of the law and of court mandates rather than social manipulation, should be the thrust of judicial action.
- Legislative provisions relating to court procedures, dispositional reports, probation, punitive alternatives, transfer for adult prosecution, institutionalization, continuing jurisdiction, and other pertinent areas should be revised in accordance with the justice model.
- Justice for juveniles should not be seen as a means of excluding youths from beneficial rehabilitative and educative programs. Punishment, deterrence, and rehabilitation go hand in hand. Properly administered juvenile courts can provide an optimal method of dealing with youthful crime.

The need for and the high value of a special tribunal for children is clear. However, there is a danger that the special tribunal, and justice for juveniles, will be lost unless revisions are made in the present system.

Extrajudicial justice

Juridical justice, sometimes called remedial or retributive justice, is the justice administered by courts. However, there is a broader, more inclusive kind of justice that must be considered in order to treat adequately the subject of justice for juveniles.

Simonides (ca. 475 B.C.) defined justice in terms of "giving every man his due." It is right and just that children, the dependent members of society, be given their "due." Denial of this due—injustice—is a much more important cause of social ills and particularly of crime than is denial of juridical justice in our courts.

Although this paper is principally concerned with the institution of retributive justice in the delinquency jurisdiction of juvenile courts, "justice for juveniles" is recognized as being of broader scope and involving justice touching the physical, social, moral, ethical, and spiritual lives of young people.

Notes

1. Statutes of Illinois, *Charities*, ch. 23 (1899).
2. *Ibid.*, ch. 21.
3. Noncriminal misbehavior, sometimes called "status offenses," refers to conduct by minors that is so excessively unruly or beyond control as to require judicial intervention, or to law violations by minors that would not be criminal if committed by an adult.

Part One: Juridical Justice

II. Historical and Philosophical Background of the Juvenile Court

II. Historical and Philosophical Background of the Juvenile Court

My people perish for lack of knowledge.

Hosea (Isee) 4:6

Juvenile court is a very poorly understood institution. Proceedings are held behind closed doors, and too little attention has been given to exposition of what the juvenile court is all about. André Gide said something to the effect that everything has been said before, but last time no one was listening. It is hoped that someone is listening now, for it is very important that the juvenile court be better understood; and it cannot be understood without a rather careful examination of its historical and philosophical antecedents.

Crime and punishment

In arguing for a justice rather than a welfare or treatment model for delinquent juveniles, two assumptions are made. The first is that those who violate criminal laws should be and deserve to be punished for it. The second assumption is that children of the age of reason are also responsible, albeit to a lesser degree, for their criminal acts and also should be subject to a just and deserved punishment.

Throughout most time and in most societies certain behaviors have been considered to be objectionable and subject to disapproval and punishment by the group. As societies developed, customs or unwritten standards of conduct became codified into criminal laws. Parts of these laws were prescribed sanctions or punishments. It was recognized that without the punishment there would be no law. Criminal law without sanction would be merely a pious expression of opinion as to what was acceptable conduct. People who violated laws have traditionally been very much aware of the consequences and have understood punishment as being what was justly coming to them.

In recent years the "old" idea that criminals should be punished for their crimes has been gaining in currency; still, a large body of jurisprudential and criminological opinion holds that punishment for crime is an archaic and barbaric practice arising out of primitive drives for revenge.

It is interesting to see how this came about.

Classical criminology

Until the 18th century, criminal wrongdoers were generally thought of as *deserving* of some kind of punishment from the state and often from the Deity as well. Crime and punishment were thought of as being in the natural order of things. Then, with the onset of 18th-century rationalism, many came to believe that morality, right and wrong, and punishment for crime were much too “unscientific” to provide an acceptable, rational basis to punish criminals. The search was on for some practical justification for punishment, a justification not based on *a priori* first principles of any kind but rather on a claimed and demonstrable utilitarian value to society. Jeremy Bentham (1748–1832) proposed a philosophical doctrine called utilitarianism, which concerned itself not with whether the offender deserved punishment for legal or moral wrongdoing but instead with the question of whether punishment was useful for the good of society, or, as Bentham put it, for “the greatest good of the greatest number.” Bentham reasoned that humans act on the basis of seeking pleasure and avoiding pain and that threat of punishment would deter prospective criminals from committing criminal acts.

Blackstone, unlike his contemporary Bentham, believed that the criminal law should be “founded upon principles that are permanent, uniform and universal; and always conformable to the dictates of *justice*, the feelings of humanity, and the indelible rights of mankind.”¹ Nevertheless, Blackstone believed that punishment for crime was not a dictate of natural justice, but rather a practical, utilitarian necessity. He rejected retribution, or as he called it, “retaliation.” Punishment for crimes, according to Blackstone, does not have as its end “atonement or expiation,” for this is to be left to the “Supreme Being.” Rather, punishment is inflicted as “a precaution (prevention) against future offenses of the same kind.” This prevention is to be brought about in three ways: rehabilitation, deterrence, and incapacitation. “The same one end, of preventing future crimes, is endeavoured to be answered by each of these three species of punishment. The public gains equal security, whether the offender” is rehabilitated or deterred or incapacitated.²

Blackstone expressed the aims of criminal law in terms of the utilitarian end of achieving civil peace and order and protecting the monarch or the state, rather than in terms of justice or fair treatment being meted to an individual offender or victim.

This thinking represents a shift from a retributive system that would punish criminals in order to uphold the moral and legal force of the criminal law to a utilitarian system interested only in protecting the state and preserving peace and order by whatever practical means might appear effectively to prevent crime.³

Contemporaneously (1764), in Italy, Cesare Beccaria, the father of classical criminology, adopted a utilitarian rather than a "justice" theory of criminal law, namely that the purposes of punishment are to defend the liberty and rights of the people by preventing criminals from doing further injury, and to deter others from committing crimes. To accomplish this end, Beccaria believed that for each crime there should be an appropriate penalty, "to make the punishment fit the crime."

Beccaria was outraged at the severity of criminal punishment of the time and believed that it was promptness and certainty of punishment rather than severity that deterred criminality.⁴

The utilitarian theory was humanitarian in approach and emphasized punishments that were proportionate to the crime; still, utilitarians, by the nature of their approach, lost sight of the often mitigating individual traits and attitudes of the offender. This and the classical assumption of an unfettered free will to choose between criminal and noncriminal courses became the principal objects of criticism during the reforms in criminology found in 19th-century positivism to be considered next.

The utilitarian theories of Blackstone, Beccaria, Bentham, and others have been referred to as the classical school of criminology. The classical school is known for humanitarian reforms of the criminal penal system, but its theories were impersonal, amoral, and strictly pragmatic in nature. No concern was expressed about the moral quality of a criminal offense or its rightness or wrongness. There was no assumption that justice required punishment *for* the offense, only that as a matter of practical necessity the state may protect itself or its citizens by trying to deter and prevent criminal conduct. This, they thought, could be achieved by making the consequences of criminality less pleasurable and more painful than compliance with the law.

The classical theories of criminology emerged at the end of the 18th century as the culmination of what was thought to be enlightened political and social theory applied to the problems of crime. The rationalism of the 18th century and adoption of the so-called scientific method led intellectuals of the time to reject as part of criminal law enforcement abstract principles such as right and wrong, good and

bad. Instead, they set themselves to measuring such things as how much punishment, p , would deter a given crime, c .

The utilitarian approach as adopted by the classical school has been the virtually unquestioned premise for criminal "justice" ever since. Justice is placed in quotation marks to stress the meaning of justice in its traditional sense as an abstract principle which involves value judgment and, in a true criminal justice system, assures that offenders are given their due or just deserts.

There can be no true justice system so long as we reject justice as justice and insist that practical, provable results are all that count. Presumably, under a utilitarian system, if punishment were proved "not to work" in any practical or useful sense, it would have to be abolished. This idea, of course, is inconsistent with the idea and ideal of justice espoused here.

Positivistic criminology

At the beginning of the 19th century, most students of crime continued to reject what were looked upon as airy fantasies of morality and ethics, and closely allied themselves to a rational, pragmatic, scientific, and utilitarian approach.

Classical criminology of the 18th century, however, was not scientific enough for 19th-century positivists.⁵ Classical criminology was based on the assumption of the existence of free will and choice and on the psychological theory of hedonism—that people would seek pleasure and avoid pain. The most important departure of the positivists, who saw themselves as very scientific, was their denial that persons who committed criminal acts were doing so of their own free will. No one could see, feel, or hear "will power"; therefore, it does not exist. Rather, decisions that formerly had been considered moral in nature were now to be considered as being "determined" by scientifically measurable external forces—biological, psychological, economic, or social forces—beyond the control of the actor. Those who hold this view are considered "determinists."

Under such a theory of scientific determinism there was no "ought," and it was ridiculous to speak of punishment for an act because the act was not within the actor's control. There was no point in using punishment as a deterrent because it could not be established scientifically that deterrence worked. The only remaining alternative was to find out, again scientifically, what the external causes for behavior

were and to manipulate these causes in such a way as to change the behavior in a socially acceptable manner. The medical analogy is immediately evident—we diagnose the behavioral problem; then we *treat* criminals, we do not punish them.

These scientific, positivistic theories were developed during the last third of the 19th century as a reaction to claimed failures of classical criminology. As indicated, the positivists did not believe that criminals possessed freedom of choice; and they began seeking the external sources and causes of criminal behavior. There were two general approaches for this inquiry: constitutional (physical) and social. The two behavioral forces, often alliteratively referred to as “nature and nurture,” led to two fairly distinguishable schools of determinism: biological-psychological determinism and social determinism.

The theory of constitutional determinism—we are what we are—is closely linked to the ideas of Darwin. Phrenology is one example of early constitutional determinism. The acknowledged father of constitutional determinism is Cesare Lombroso, who used the scientific method in the second half of the 19th century to argue that the typical criminal can be identified by certain physical characteristics or stigmata such as a slanting forehead, long ear lobes or no ear lobes at all, a large jaw with no chin, prominent eyebrow ridges, excessive hairiness or abnormal absence of hair, and other such physical attributes.

Lombroso claimed to be able to identify the “born criminal,” whom he called “*fou moral*,” morally insane. Drawing from Darwin, he theorized that the criminal type was a form of unevolved, morally regressive, primitive being. As can be readily seen, such a being is predestined, *predetermined* to a life of criminality. Crime is not a matter of choice for the criminal throwback but rather a matter of constitution.

Although Lombroso’s theories were eventually discredited, his position as originator of the Italian or positive school of criminology and his approach of transferring emphasis from the crime itself to the scientific study of the criminal is important to the study of juvenile court origins.

Related to constitutional determinism is psychological determinism. Sigmund Freud was a psychological determinist. Basing their theories on deterministic assumptions that criminals are the product of defective mental states or are compelled by repressed unconscious conflicts and early traumatic sexual experiences, the psychological determinists also attributed crime to causes beyond the control of the actor.

The social determinists, "the nurturists," also took the position that crime does not involve personal moral responsibility and asserted that crime is the product of social organization and social conditions. The social theories of Karl Marx are a key example. Marx believed that the elimination of capitalistic exploitation would result in the disappearance of crime.⁶

Enrico Ferri, a 19th-century Italian criminologist, tied the two schools of determinism together by saying that crime "is the result of manifold causes, which, although found always linked into an intricate network, can be detected, however, by means of careful study. The factors can be divided into *individual* or *anthropological*, *physical* or *natural*, and *social*."⁷

Ferri's position strengthened that of both constitutional and social determinists and their principal premise that free will and individual moral responsibility could never provide the basis for any criminal legal system.

Under Ferri's theory, a combination of external circumstances lay behind all criminality. Criminals were thought of as having little, if any, control over the forces acting upon them—forces such as criminal tendencies that were inborn or that developed unalterably during childhood or forces discoverable in the criminal's social or economic environment. Consequently, moral or retributive punishment was unthinkable, and deterrent punishment was very likely of no use. Led by Ferri, the new criminology held to a position that would abolish criminal responsibility and moral guilt as the foundation of criminal law and replace them with the principle of "social defense." The sole purpose of criminal law under this thinking is to permit society to protect itself against the constitutionally or environmentally determined antisocial behavior of its sick or deviant, but morally irresponsible, members. Thus, when a member of society commits a dangerous or harmful act, this should not be the concern of the law; there is no question of guilt or degree of culpability to be answered, but rather what humane measures should be administered to protect society from future harms brought about by the predetermined behavior. Treatment (and sometimes quarantine and eradication) replaces punishment.

Reservedly accepting the precepts of scientific determinism, American thinkers emphasized the treatment dimension: "We can fix it." If crime is caused not by morally responsible criminals but by biological, developmental, psychological, environmental, or social causes, all that needs to be done is find out what these causes are and change them.

Criminals could be "diagnosed"; and when the cause of the problem was ascertained, it would be addressed, and they could be "treated."

The legal community has successfully resisted complete takeover by the positivists in their attempts to displace a system of law with what has been called the "therapeutic state." We still have a system of laws rather than of men (therapists) in our criminal justice system, but the positivists have made great inroads in the area of corrections and in areas involving mental incompetents and juveniles. The idea that criminal offenders are wrongdoers, that they are morally blameworthy, that they are guilty, and that they deserve punishment is too ingrained and intuitively acceptable to be replaced by scientific or philosophic fad even where virtually universally accepted by the scientific and philosophic communities. However we disguise it, we do punish criminals *for* their crime even though the expressed theoretical framework for such action is often confused and contradictory.

Whenever possible, however, the positivistic-deterministic doctrine has accreted itself to our system of criminal justice. It has given us a "corrections" system instead of a "penal" or punishment system. It has given us an indeterminate sentence system so that the social physicians can treat socially harmful innocents in therapeutic "correctional institutions." Worst of all, it has given confusion and contradiction to our juvenile "justice" system.

On paper and in doctrine, the juvenile court system is clearly based on the positivistic-deterministic principles outlined above. Whereas the adult system still preserves the essence of justice, the juvenile system is, theoretically at least, bound completely to a social-defense system that denies personal moral responsibility as nonexistent and absurd. Personal guilt, individual accountability, and punishment *for* wrong conduct is rejected by the language and philosophy of the juvenile justice system.

Notes

1. Sir William Blackstone, *Commentaries on the Laws of England*, Book the Fourth, Clarendon Press, Oxford, 3 (1769).

2. *Ibid.*, 11-12.

3. It is noted that utilitarian and retributive views of punishment are not inherently or necessarily incompatible. Utilitarians stress the future, preventative value of punishment; whereas retributionists stress punishment as the just

desert for past misdeeds. The two views are reconcilable and should be reconciled. Punishment for past acts should also be appreciated for its practical effect in deterring future misconduct.

4. Blackstone, who studied Beccaria, observed that "punishments of unreasonable severity, especially when indiscriminately inflicted, have less effect in preventing crimes, and amending the manners of a people, than such as are

more merciful in general... [C]rimes are more effectually prevented by the *certainly* than by the *severity* of punishment. For the excessive severity of laws (says Montesquieu) hinders their execution; when the punishment surpasses all measure, the public will frequently out of humanity prefer impunity to it." Ibid., 16-17.

5. Positivism is a philosophical doctrine that holds that sense perceptions are the only admissible basis of human knowledge and thought—the scientific approach to crime.

6. Karl Marx, *The Poverty of Philosophy*, Chicago: Imported Publications (1973).

7. *Studies on Criminality in France from 1826 to 1878 (Rome: 1881)*, quoted in *New Horizons in Criminology*, 3rd ed., Prentice Hall, 207 (1959). (Emphasis in original.)

III. Creation of the Juvenile Court, “A Peculiar System”

III. Creation of the Juvenile Court, “A Peculiar System”

[A] peculiar system for juveniles, unknown to our law...

In re Gault, 387 U.S. 1 (1967)

The ideological assumptions that ground the juvenile court acts throughout the country must be understood in order to comprehend the “peculiar system” of juvenile courts.

To begin with, the words “juvenile” and “court” do not go together. Throughout history children have been considered, in the eyes of the law, as no more than property, animals, slaves, or lunatics and not subjects worthy of direct consideration by the law.¹

Throughout history, the underaged were generally held legally responsible for criminal acts if they were old enough to understand that what they were doing was wrong. There was no middle ground; children were either held responsible as adults or not held responsible at all. The only problem was how to determine *when*, at what age, criminal liability attached.

The common, arbitrary dividing line for criminal liability throughout history, found in Mosaic and Roman law and embodied in our common law, is pubescence. Roman law recognized two kinds of children: *infans*, a child under the age of 7 years (called “*quasi impos fandi*,” not having the faculty of speech); and *impubor*, a child 7 years old or older who has not attained the age of puberty, which was set at 14 for boys and 12 for girls. The division is sound biology and sound psychology and provides a model that is useful in today’s world.

Catholic doctrine held that a child under age 7 could not commit mortal sin. Accordingly, children under this age were not in the development of the common law subject to criminal prosecution. Persons 14 and over were considered to be adults and subject to adult prosecution. At 14, marriage was allowed, and the responsibilities of adulthood had been assumed. It was the children between ages 7 and 14, the transitional stage, that required accommodation. In this stage, between infancy and puberty, the child was presumed to lack capacity. However, if it could be proved beyond a reasonable doubt that the child had criminal capacity, the child could be convicted of a crime. Under

Roman law² these decisions were based on three factors: age, the nature of the offense, and mental capacity. In England, Blackstone explained: "The period between *seven* and *fourteen* is subject to much uncertainty; for the infant shall, generally speaking, be judged *prima facie* innocent; yet if he was *doli capax* (capable of deceit), and could discern between good and evil at the time of offense committed, he may be convicted and undergo judgment and execution of death, though he hath not attained to years of puberty."³

In a system where conviction of a felony resulted in death or "transportation" to Australia or America, the adoption of the principle of *doli incapax* from the Roman law was enlightened and provided a relatively high degree of insulation to children from the ordinary consequences of criminal conviction. Under the age of 14 there was a presumption against criminal capacity, but a child could still be convicted, according to Blackstone, under the applicable legal maxim, "*malitia supplet aetatem* (malice, or intention, makes up for the want of years)."⁴ Convicted juveniles frequently avoided punishment, however, by judicial or jury nullification (refusal to convict even where guilt was manifest), and royal pardon was common in such cases. The severity of punishment, although harsh⁵ by present-day standards, was consistent with the practice of the times and with the public's perception of the nature of childhood.

During the period in question, children were mixed with adults as soon as they were considered able to do without their mothers or nurses (around age 7). At this time they were considered ready to join the community of adults sharing in the responsibilities of the work-a-day world.⁶

Changing viewpoints on the place of children in society brought about a change in attitude toward juvenile criminality. During the 16th century the idea that children needed a longer period of preparation for life began to be recognized. The acceptance of children's need for education changed the perception of childhood. Increasingly, a child was thought to have reached adulthood not when he or she was physically able to work, but only after the child was prepared for life by schooling. As society became more urban and more industrialized, the need increased for a period of preparation and therefore a longer period of childhood.

The common law rule of *doli incapax* provided an all-or-none rule for determining criminal liability of the young and immature. Immaturity can have two kinds of significance in the criminal law: one is to draw

a line separating criminal from noncriminal behavior; the other is as a factor mitigating the severity of punishment. The common law, formally at least, recognized only the division between capacity and noncapacity, *doli capax* and *doli incapax*. So we find Blackstone citing instances of "a girl of thirteen, who has burned for killing her mistress; another of a boy still younger, that had killed his companion, and hid himself, who was hanged."⁷ Such eventualities seem to call for a more compassionate approach, one in which prepubescent children would not be subject to such Herodian punishments.

An interesting and very significant response to this need was the so-called child-saving movement in America during the early 19th century, when private organizations were formed to receive and protect children who were abandoned, neglected, abused, or involved in infractions of the law. Institutions called houses of refuge, and the like, were created to house the rescued children.

Social reformers, often called "child savers," sought successfully to have legislation passed that would create a liaison between the courts and the private social services offered by the reformers.⁸ The legislation authorized the court, on complaint by any "reputable" person, to bring about the judicial declaration of a child's status as "dependent" or "neglected," and the consequent institutionalization of the child. These jurisdictional definitions were taken from the English "poor laws."⁹

Often, significantly, the definition of "dependent and neglected" included criminal activity, called "delinquency." The so-called child-saving movement resulted in poor, criminally active "delinquents" being swept into the houses of refuge and similar institutions so that they could be "protected" through their detention in secured residential institutions. However, although children were certainly better off in houses of refuge than in adult prisons, this transfer was achieved absent the due process ordinarily accorded to the criminally accused. All this was done unceremoniously in the name of the state as father, *parens patriae*.

The Juvenile Court Act

The first juvenile court act was passed in Illinois in 1899. It adopted much of the practice and legislation that had resulted from the child-saving, house-of-refuge movement. It created a special court to deal

exclusively with juveniles and incorporated a number of other special procedures for juveniles. Each of these special procedures had already been in practice in one or more jurisdictions—with the exception of one extremely important and radical departure from the past: the circuit and county courts of Illinois were given “original jurisdiction in *all* cases coming within the terms of this act.” This important change divested the adult criminal courts of all criminal jurisdiction over children under age 16.

Cases that fell within the terms of the act included the “disposition of delinquent children,” defined as “any child under the age of sixteen years who violates any law of this State or any City or Village ordinance.” The courts were given powers of disposition, “in the case of a delinquent child,” and the power to commit such a child to a probation officer or to a variety of institutions. It is important to note that jurisdiction over all criminal offenders under age 16 was placed in the juvenile court. From July 1, 1899, there were no more criminals under 16 in Illinois. The juvenile court lost jurisdiction when the child reached 21; and the courts were required to accord to all juvenile criminal law violators, “care, custody and discipline,” not punishment.

A second important feature of the act, as its title reveals, was that its purpose was to regulate the treatment and control of *dependent, neglected, and delinquent* children, thereby equating poor children with criminal children and insisting that they be treated in substantially the same manner. This became more significant when, in 1905, the Illinois act was amended so that the definition of “delinquent” included, in addition to criminal children, children who were incorrigible or who did any number of objectionable, noncriminal things such as knowingly associating with vicious persons, being absent from home without permission, growing up in idleness, visiting any public poolroom, habitually wandering about any railroad yard, and other such knavery.

The act does not mention punishment of a child for criminal conduct—only treatment and control of the kind a parent would give to a child. A reading of the act shows that a 15 year old who committed the most violent and vicious criminal act imaginable would have to be treated in essentially the same benign manner as a poor child or a youthful poolroom visitor, and that at the very most such a child could be treated only until his or her 21st birthday.¹⁰ Understanding this seeming madness is understanding a lot about the juvenile “justice” system.

Notes

1. "*Infans non multum a furioso distat.*" An infant does not differ much from a lunatic. Black's Law Dictionary.

2. See Justinian, *Digest* 3. 19. 10; 4. 1. 18.

3. Blackstone, *Commentaries*, 22-23.

4. *Ibid.*, 465.

5. Compare for example, the severity of punishment under Roman law for parricide, murder of one's parents. According to Blackstone, "parricide was punished in a much severer manner than any other kind of homicide. After being scourged, the delinquents were sewed up in a leathern sock, with a live dog, a cock, a viper, and an ape, and so cast into the sea." *Ibid.* 202-203.

6. P. Aries, *Centuries of Childhood: A Social History of Family Life and Law*, New York: Random House (1965).

7. Blackstone, *Commentaries*, 23.

8. "Child-savers" is a term coined by Anthony Platt to refer to a group of reformers, mostly women, active at the end of the 19th century. See Anthony Platt, "The Rise of the Child Saving Movement: A Study in Social Policy and Correctional Reform," *The Annals of the American Academy of Political and Social Science*, vol. 381. The child-savers believed that "troublesome" youth could be "saved" by removing them from corruption and placing them in a proper environment. According to Platt, this idea led to legislation authorizing widespread governmental intervention into the lives of families. The inclusion of the so-called "status offenders" in juvenile court legislation is an example of this.

9. Poor laws were 16th-century legislative responses by English Parliament to the increasing numbers of urban poor in English society. They provided, among other things, that the children of pauper parents could be involuntarily separated from their parents and apprenticed to others or placed in institutions in the manner of *Oliver Twist*.

10. Although this is true in theory, as now, it was not true in application. Young criminals were "treated" by being locked up in juvenile prisons called "industrial schools" or "training schools." Later statutes allowed for transfer of the older, more serious offenders to adult court; and some statutes excluded murder and other heinous crimes from juvenile court jurisdiction.

IV. Justice for Juveniles

IV. Justice for Juveniles

*From injustice—never justice.
From justice—never injustice.*

Dag Hammarskjöld, 1956

It will now be argued that there should be a return to justice for its own sake and that true justice should be made the soul of the juvenile justice system. Making this argument requires further exploration of the nature of juridical or remedial justice and of crime and punishment.

Crime is defined as an act or omission forbidden by law under pain of punishment. Crime is a public offense—an offense against all of us.

The concept of crime as a public wrong is an evolutionary concept. In less developed societies, the response to what we know as crime was an individual or family matter rather than a response of the tribe or community as a whole. Private revenge and family feuds were still the rule in Europe during the Middle Ages; however, as society became more complex and sophisticated, the disorder of such a system became apparent, and the need for some kind of societal control over criminal conduct was recognized.

In England, religion provided impetus for a change from private revenge to public intervention. Before the enlightenment, and at a time when justice and morality were unchallenged virtues, the law assumed that punishment was a natural and proper consequence of crime. Crime was equated with sin, and public punishment was seen as a means to assuage the sensibilities of the victim, the victim's family, and the community and as an expiating, temporal purgatory. From this evolved the idea that offenses against worldly vicars of God represented by the crown should be subject to punishment emanating from the crown.

The religious imperative and the growing distaste for the disorder of private and family feud led to a system in medieval England whereby money payment enforced by feudal lords took the place of private violence and vengeance. The *wergeld* (sometimes *wergild*) system (*wer*, man; *geld*, money) required different sums of money to be paid for certain kinds of injury to different kinds of men. So much was paid for the loss of an eye, so much for a limb, so much for a life—the principal idea being compensation, money for injury, something paid for something done—that is to say, justice.

The aim of such a system was to appease the victim or the family and to discourage violence and disorder in the realm. At first, *wergeld* was optional: "Buy off the spear or bear it."

This evolved, toward the end of the Anglo-Saxon era, into a compulsory system: no longer could one pay or fight; the offender had to pay, and the victim and his family had to remain silent. Failure to pay resulted in outlawry, a very undesirable and precarious condition wherein one was put outside the protection of the law.

The compulsory *wergeld* was administered by local lords in local courts; administration of justice was not a royal function until the Normans arrived. The feudal lords administering such a system soon learned that crime control and law and order could be profitable as they added to the *wergeld* a commission, an additional fine called a *wite*, to be paid to them for their peacekeeping functions.

Collection of these fines became the prerogative of the crown as the power of the central government, that is the crown, increased. Eventually forfeiture of all property by convicted felons became an important source of royal income.

In this manner, a system of public justice developed: justice administered by the king. The public law, or criminal law, was developed to correct injustices and to vindicate offenses against the public welfare as represented by the king. Generally speaking, the punishment for criminal acts was looked upon as a matter of justice; society was repaying the offender for the crime, and the criminal was repaying society.

Punishment

Punishment can be viewed in two ways: first, as a matter of justice, that is, as a due or consequence for past action, as justice rendered, as payment for past misconduct, and, second, strictly as a matter of utility, whereby pain is inflicted only to prevent future criminal behavior.

The previously mentioned adoption of utility and prevention as the sole justification of criminal punishment was not accepted by all enlightened thinkers of the 18th century. One important enlightenment philosopher who did not adopt the mechanistic views of the utilitarians was Immanuel Kant (1724–1804). Kant rejected the utilitarian idea that the punishment had little to do with the offender and was useful

only as a means for public protection. Punishment, Kant believed, could only be properly inflicted because someone had done wrong, not because it might affect how others act in the future:

Punishment can never be administered merely as a means for promoting another good, either with regard to the criminal himself or to civil society, but must in all cases be imposed only because the individual on whom it is inflicted has committed a crime. For a man ought never to be dealt with merely as a means subservient to the purpose of another, nor be mixed up with the subjects of real right. Against such treatment, his inborn personality has a right to protect him, even although he may be condemned to lose his civil personality. He must first be found guilty and punishable before there can be any thought of drawing from his punishment any benefits for himself or his fellow citizens.¹

According to Kant, punishment is an end in itself; this contrasts with the utilitarians, who see punishment only as a means to an end. Kant was a retributionist; and he defended the moral connection between crime and punishment, making punishment a question of accountability of the offender *for* his or her offense, rather than merely a useful device employed for the good of society as a whole.

According to Grotius, punishment is the “infliction of an ill suffered for an ill done.” Infliction of an ill suffered for an ill done is the very essence of any criminal justice system. Punishment as punishment is central to any definition of crime. Criminal laws do not merely suggest that certain acts not be done; they command it and prescribe punishment if the command is violated. This is true independent entirely of the deterrent, rehabilitative, or incapacitating dividends of punishment.

Justice implies, in its broadest sense, the quality of proportions, impartiality, and the giving of one’s rightful due. When applied to criminal law, punishment becomes part of the justice equation—punishment due to the offender, due to the victim, and due to society as a whole. Without punishment there is no criminal justice, and there is no juvenile justice.

It is true that the inherent justice of punishment for crime cannot be established empirically or by scientific experiment; still, it is a reality that, try as we will to disguise it, does not go away. It is time to recognize legal punishment for what it is—the direct and deserved “pain or inconvenience” inflicted by the state *for* violation of its laws.

Blurred as the concept has become in its consideration by modern theorists, justice is still quite evident in our criminal system and only vainly and ludicrously masked in the juvenile system. There is really no need any longer to disguise punishment as deterrence, treatment, or anything else. It should be seen and called for what it is.

The main reason that we have rejected principles of justice in punishing criminals is because it is "unscientific." According to such reasoning, moral values are not demonstrable, therefore they are meaningless. Thus, punishment for wrong is meaningless and unjustified. If, however, punishment could be "justified" by its usefulness in protecting society as a part of the "social defense," then it would be acceptable. The time has come when we no longer have to be afraid of morality and no longer have to bow in homage to reductionistic science. We can punish criminals and safely say that we are doing so because it is rationally and morally correct to do so.

An enlightening and eloquent elaboration by a lay writer on the subject of punishment is found in *The Craft of Power*, by R.G.H. Siu.² Mr. Siu tells us that punishment must be "more than mere infliction of pain":

There must be concomitant blame. As John Rikaby commented nearly two centuries ago, "To punish is not simply to pain: it is to put pain and blame together. Though it be sometimes just, for a man's own benefit and for the protection of others, to make him suffer pains for what he cannot help, it can never be just to blame him for what he cannot help." The term punishment is improperly used when children and animals are involved, since moral reproach is not understood by them. It is from an exclusive study of this improper sense that utilitarians have evolved their theory of punishment, a theory supposing that a wicked man, a "naughty boy," and a restive horse, are all on a level as objects of punishment. Man, boy, and horse receive stripes alike; but man is blamed severely, the boy perhaps slightly, and the horse not at all.

Siu then goes on to point out that moral condemnation—blame—is the essence of punishment. "The attaching of blame and the administering of pain must both be felt and accepted by the person punished," he asserts. He concludes:

[T]he modern penal system in America is not compulsion but vengeance. When apprehended, blame is not attached; when attached, often not just, and when attached and just, usually not

acknowledged. For the inmate it is not punishment, just torture. There is no rehabilitating—just hardening.

Siu speaks of attaching blame and “administering pain.”³ The thought of intentionally administering pain is a repugnant thought, and we must pause to think about it a moment. Pain is hard to define. The medical definition of pain is a “feeling of distress, suffering, or agony, caused by stimulation of specialized nerve endings.” Generally, we no longer look upon criminal punishment in terms of stimulating specialized nerve endings, and we would find Webster’s meaning far more acceptable: “a form of consciousness characterized by desire of escape or avoidance.” Pain can, as recognized by Webster, vary from “slight uneasiness to extreme distress.” It is submitted that some kind of distress, some degree of discomfort, some form of consciousness involving a desire of avoidance should follow, whenever possible, every criminal event.

There is nothing vengeful or sadistic about this view—punishment, pain, and inconvenience are part of the bargain, something that the criminal wrongdoer should expect, and something that would normally and naturally be expected today if modern social science had not instructed the wrongdoer to the contrary.

Judicial punishment is not vengefulness. It is an expression of social indignation, condemnation, and blame. It is based on principles of justice. It is wrong for criminals to commit crimes; it is right for society to distress criminals when they do. This is not the same as the victim or victim’s family returning evil for evil. It is the necessary action by the state in maintaining its laws.

Punishment for crime is self-justifying; it need not be disguised. The state is keeping its promise: “If you commit a crime, the state will punish you.” It is a promise that must be kept. Crime and punishment are correlatives. They are part of the same thing. They are inextricable in the criminal law, and no additional rationalization or utilitarian apology is necessary.

Punishment for crime is morally justified. There is a moral need for assessment of blame as mentioned by Mr. Siu. This is not speaking of blame of a theological or metaphysical nature, but rather of blame due to one who violates the rules. Human society is replete with rules of all kinds; we disfavor those who violate its rules and customs; we blame them, and usually some kind of punishment or distress is imposed upon rule violators. The same applies to the formalized, codified rules

of the criminal law. Violators have done wrong, and we should candidly recognize this notwithstanding our inability to make in vitro analysis of the concept of wrongness.

In sum, then, there are compelling reasons for a return generally to fundamental principles of criminal justice—that persons who commit crimes should be held accountable for their acts and punished proportionately. These principles should apply to the juvenile justice system; this may eventually lead to a return to justice by our whole society.

Justice in juvenile court

Law violators, young and old, should be punished for their crimes. Even at a very early age, young people are not the guileless, plastic, and pliable people they are portrayed to be by those who would free them from all moral and legal responsibility. Children understand punishment and they understand fairness. Most of the juvenile justice system's faults can be improved by an honest return to undisguised punishment as the natural and just consequence of criminal behavior.

Of course, this does not mean that juvenile court action should be limited to the infliction of pain on children. What it means is that criminally active children should be held responsible and accountable for their crimes. After this is done, many other benefits can flow from a special court created and operated solely for young people. A punishment and accountability regimen promises enhanced expectations from rehabilitation programs and an added measure to deterrence.

Making due punishment the core of the juvenile justice system actually expands the traditional, individual rehabilitation orientation of the juvenile court. Blame and pain, to borrow from Mr. Siu's essay on punishment, are the most important ingredients of moral education. Whatever other form rehabilitative efforts might take—counseling, "rap" sessions, psychotherapy, wilderness training, or whatever—the principal object of such activity is to socialize the offender and to eliminate future criminal behavior. This goal can be furthered by the force of the moral authority of the court. The child can be told of the wrongness and unacceptability of criminal conduct. The child can be made aware that when the law is violated, the child, like every other law violator, must pay for it, must receive some kind of punishment in order to be held accountable for the criminal violation.

Taking this position is not to ignore the known and accepted causal relationships between family, neighborhood, and peer influences and

youthful criminality. The juvenile court is in a particularly good position to evaluate and deal with these causal factors and to order, in certain cases, participation in specialized rehabilitative programs that may tend to alter these factors. The point is that these things are secondary.

The juvenile courts' principal responsibility is to the public and to society as a whole, not to each individual child. It so happens that juvenile courts, after doing "justice" and keeping a vigilant eye on what is best for us all, are in a position to do much to require that valuable, efficacious, but secondary and incidental, benefits be made available to erring juveniles.

Used by itself, the care and treatment model has a very serious drawback which deserves mention. Reference is made to the anomalous situation in which a child might not be eligible to receive needed kinds of social services until he or she commits a crime. ("Want to learn a trade, want the attention of some thoughtful, kind counselor? Go commit a burglary.") If punishment comes first, it is not so bad; but if a wilderness trip or a course in wildlife management is the principal visible consequence of the burglary, it seems that we are rewarding crime rather than punishing it.

Punishment by definition is painful and unpleasant. This certainly does not mean that juvenile courts should be preoccupied with incarceration and other forms of severe punishment. There is too great a tendency already, in our adult criminal justice system, to withhold punishment until multiple offenses have been committed and then, often to the surprise of the offender, impose a long, excessive, and draconian prison sentence. This need not be the case in the juvenile justice system.

The proper way to punish an offender is to impose speedy, certain, proportionate,⁴ and relatively benign punishment, and to increase the level of severity if repeated offenses are committed. This concept, "progressive discomfiture," is based on principles of punitive economy (no more punishment than necessary) and early intervention (early disapproval and punishment preferred over late, severe punishment). The idea is that the "intense distress" end of the punishment spectrum is not appropriate or necessary for most youthful offenders except in cases of very serious or multiple offenses.

One of the greatest advantages of a juvenile court is the broad range of punitive sanctions available to it. There are many and diverse ways for juvenile court judges to induce in their wards "a form of consciousness characterized by desire of escape or avoidance," which can vary

from "slight uneasiness to extreme distress." In many cases, for example, a mere "grounding" or house restriction will create a form of consciousness characterized by desire of escape.

In the case of repeated offenses, the principle of progressive discomfiture requires the court to move from the slight-uneasiness end of the scale toward the extreme-distress end. This is justified from both the retributive and deterrent standpoints. One who continues to flout society's rules is more culpable and deserving of more severe punishment. Also, the mere fact that first offenders continue to repeat their wrongdoing is indicative of the first punishment's failure to deter and the need for imposition of more discomfiture.

The following exemplifies the possible consequences that might follow from juvenile criminal conduct under the principles stated above:

A juvenile commits his first burglary. He entered the house of an elderly widow in the late afternoon. He damaged her storm door and stole her television set and three \$20.00 bills found in her dresser drawer.

A suitable disposition on this first offense might include the following:

- A clear explanation of the wrongness and seriousness and of the consequences of housebreaking, with emphasis on the effect upon the victim. Wrong conduct must be defined as wrong—*labeled* as wrong.
- A firm declaration that a repetition will result in certain incarceration.
- An accountability program possibly including:
 - up to 30 days confinement in a juvenile detention facility, depending on the circumstances of the crime,
 - written essay on the history of burglary and its punishment,
 - written apology to the victim,
 - payment of \$100 to the victim in cash or equivalent for the mental suffering inflicted,
 - victim restitution for actual damage,
 - deprivation of driving or other privileges,
 - house detention or "grounding,"
 - mandatory "sample" detention.⁵

In the event of a second offense, the juvenile should be required to serve a mandatory detention period of at least 1 week followed by a period of home detention of at least 30 days. By house detention is meant supervised restriction to home or school, with no exceptions.

Consequences of future criminal behavior should be explained in terms of relatively long-term institutionalization and possible transfer to adult court.

Third and subsequent offenses obviously call for more severe punishment. Great changes in youths' attitudes can come about by placing 16- and 17-year-olds in jail for a weekend, separated physically but not necessarily visually, from other inmates. Institutional placement may not yet be necessary, but certainly a suspended commitment would be in order. Local detention for up to 60 days can frequently be effective in these kinds of cases if institutional commitment can be safely and justly deferred.

Compulsory educational programs, compulsory counseling, and psychological examination may play a part in this kind of disposition, where indicated.

The above outline is intended to show, in a general way, a manner of providing swift and certain punishment. Instead of putting first-term offenders on probation, it would be preferable, in most cases, to impose punitive sanctions and, when the sanction is completed, the youth should ordinarily be released from court surveillance. This has two advantages: first, too frequently, "on probation" means no sanction at all other than a weekly phone call to a harried probation officer with a giant caseload; second, there is a terrible waste of human resources that results from probation officers having to write out detailed social reports filled with irrelevant minutiae, setting out names and addresses of people, who often are not even involved, and cataloging masses of useless information. Most cases can be disposed of by ordering a punitive disposition and seeing to it that the disposition is carried out. This requires significantly less time, attention, and money than the endless investigating, reporting, planning, chatting, snooping, and jawboning that is going on now.

*Gault*⁶ brought the "peculiar" juvenile court system a step closer to reality by insisting that locking up young people was a juridical function, not a clinical one, thus recognizing the judicial necessity for procedural due process of law.

Now, it is essential to take the next step: adopting a justice model that takes the administration of justice for delinquent juveniles out of the hands of the clinician and social scientist and puts it back in the judicial system where it belongs.

We have seen how the scientists and experimenters have taken young criminals out of the judicial process and placed them into a social clinic misnamed "juvenile court." Under their theory, of course, courts are not necessary. No adjudication of guilt or innocence is called for and young criminals are to be "treated" and cared for, not punished. Under such an assumption, there is no need for the legal protections commonly referred to as "due process." Thus, what had been, historically, essentially a criminal law process could be turned over to new, and indeed peculiar, clinic-courts, which for historical convenience and necessity remained within the judicial branch of government.⁷

Throughout most of this century we have had much more of a *clinic-court* than a *court-clinic*. The move back to *court* began in the 1960's, primarily with regard to procedural matters. In 1967, the U.S. Supreme Court in *Gault* moved the juvenile court toward the judicial end of the spectrum by prohibiting treatment-punishment by incarceration without first affording due process procedural protections.

It is now time to take the next step, one which would make juvenile courts into true courts, or at least *court-clinics*. Judges, then, could perform as judges and not as physicians, diagnosticians, prognosticians, therapists, and social clinicians. Judges should judge; that is the purpose of the justice model. Judges should not be poring over volumes of clinical charts hanging, so to speak, in clipboards attached to the bed of the disabled victim of society's barbs—the sick, troubled, and highly romanticized juvenile delinquent.

It is time that we recognize the impossible double bind our juvenile judges are placed in when they, judicial officers, are commanded to diagnose the "problem" of some young offender, when in most cases it is obvious that the criminal youth does not have a problem—he or she *is* the problem.

Of course there is no reason why a juvenile court judge cannot, in addition to judging, take an active interest in the lives of the young people who come before the court. Specially trained and experienced juvenile court judges can, as they have done in the past, wisely represent the moral good and authority of the community and be the directing

force in providing the care, treatment, and control that will improve the lives of erring children, thereby diminishing the likelihood of future criminal misconduct.

Justice for parents

Consideration of the subject of justice for juveniles cannot be complete without examining the role of parents and legal custodians in the juridical justice scheme. Much of the blame and pain for juvenile criminality has been cast upon the offenders' parents. Juvenile court ideologues have very successfully promoted the idea that since the child is not at fault, it must be the parent. This is the antithesis of juvenile justice. There can be no justice for juveniles if we blame the parents; if the child has done wrong, it must be the child who bears the blame.

As will be discussed below, there are a myriad of causes of juvenile crime; bad parenting is one such cause as may be poverty, bad companions, and a crime-ridden neighborhood. Still, under a justice model, the young offender is responsible for his or her acts and should be held responsible—to a lesser degree yes, but responsible nevertheless.

However much a parent may be at fault, the more responsibility is shifted to the parent, the more it is shifted away from the person who did the misdeed. A familiar melodrama portrays the young burglar whining, "I only did it to get Mommie's attention." The court of justice will tell this young person: "Well now, you've got Mommie's attention, all right, and you've got the court's attention also. This is what your punishment is going to be..."

Of course, parents have an important role to play in juvenile court proceedings, but it is not—except in extraordinary cases—to accept the blame for their children's crimes. After the justice part is over, that is, after the child has accepted the blame and just punishment for the wrongdoing, then the parents fit into the picture. If parental fault contributes to the likelihood of future child criminality, let the court do its part in trying to remedy that fault. Parents can be called upon to assist in enforcing the punitive dispositional program. The court may inquire into the question of whether a child was motivated by a desire to get "Mommie's" attention or to add to the record collection without having to pay for it. Parents can be called on to exert a stronger moral force on their children; they can be called on for a lot of things, but not to take the blame.

Justice should be done, but only to the one who deserves it. There are, of course, cases in which a parent also deserves punishment. In such cases, punishment is in order; in the typical case, however, the eyes of the court should fall on the person responsible: the guilty child.

Repudiation of justice by the so-called juvenile justice system has brought chaos and confusion to our courts. Some juvenile courts accept the treatment doctrine and apply it; others reject it and administer justice insofar as this is not prohibited by legislative or appellate-court edict. The result is a complete lack of homogeneity among juvenile courts with a wide distribution in the degree with which the two poles of treatment and justice are accepted or rejected by each juvenile court judge.

The argument here is for homogeneity, uniformity, and fair administration of justice. After a brief discussion of the need for justice for noncriminal juvenile offenders, the so-called status offenders, this argument will be augmented and exemplified by the inclusion in Chapter VII of proposed legislative provisions designed to engender a uniform system of true juvenile justice.

Notes

1. Immanuel Kant, *Philosophy of the Law*, (reprint of 1887 ed.) trans. by Heastie, New York: Augusta M. Kelley (1950).

2. R.G.H. Siu, *The Craft of Power*, John Wiley & Sons, Inc., 170, 171 (1979).

3. *Ibid.*

4. Proportionality is a difficult concept. There is certainly no derivable equation whereby a certain dollop of punishment can be matched to a misdeed of a certain severity. The tendency is to overpunish. This should be avoided as being unjust and practically counterproductive. The justice model advocated here allows for a very wide range of discretion in imposing punishments at the lower levels of age and seriousness of offense and rather tightly regulated discretion at the upper levels of age and seriousness. The idea is that serious judicial abuses are unlikely at the lower end of the scale; and

abuses are prevented or at least diminished by tighter controls over judicial discretion at the upper end of the scale.

5. There is nothing wrong, under a justice model, with having all young burglars sample the inside of a detention facility for 24 to 48 hours.

6. *In re Gault*, 387 U.S. 1 (1967).

7. It would have been theoretically consistent for the Illinois legislature to have created a new executive agency called the "Juvenile Clinic" or even the "Juvenile Sanitarium," and to have placed the brave new plan outside of the judicial branch entirely. Politics, being the art of the possible, dictated that such a wild scheme was more than any legislature could adopt. So the clinic was grafted to the court, giving us the juvenile-court.

**V. Justice for Young Persons
Beyond Adult Control:
The Status Offenders**

V. Justice for Young Persons Beyond Adult Control: The Status Offenders

*We don't need no education;
We don't need no thought-control.*

Pink Floyd

Discussion has centered on the need for justice for criminally active juveniles. There is also a need for justice with respect to another kind of juvenile coming within the jurisdiction of juvenile courts; namely, the child who has not committed a crime but who is so far beyond parental or other adult control that the child requires, for the social good, coercive judicial intervention. These young people are called, among other things, status offenders, CHINS (children in need of supervision), incorrigible, rebellious, and out of control. The courts can and should be used as a last resort in exercising control over this kind of conduct; and, furthermore, the justice model is appropriate for this kind of situation. A look at the background of this kind of juvenile court jurisdiction is in order.

It is helpful to recognize a dominant theme that runs through positivistic juvenile court composition. By its nature, the business of the juvenile court has been to adjudicate the status of children. It is not what the child does but what the child is. For example, the court's jurisdiction can be invoked when a child is "found to be dependent or neglected." "Dependent and neglected" refers to the status of a child, namely being poor, "destitute or homeless or abandoned, dependent upon the public for support, or as not having proper parental care or guardianship."¹

Although in the 1899 Illinois act a delinquent was a person under age 16 who "violates any law," the 1905 amendment included among delinquents a child who "is incorrigible" (no act specified), "is growing up in idleness and crime,"² and other such status descriptions. Operation of the statute turns on what the child is, the child's status, not on what the child does. Later, under some juvenile court acts and consistent with the underlying philosophy, delinquency was also defined in terms of status. For example, The Uniform Juvenile Court Act in §2(3) and (4), and the Legislative Guide of the Children's Bureau in §2(o) defined

a delinquent in status terms, as one who "has committed a delinquent act and is in need of care or rehabilitation."³

Although the idea of making delinquency a status offense, with need of treatment as an element of the status to be proved, did not gain great acceptance, it received some.⁴ This is a very good example of the tension created by positivistic theory. Carried to extremes, a 17-year-old armed robber could defeat juvenile court intervention by proving that "care or treatment" is not needed. Of course, such a determination is one that would not be accepted by the courts or the public; still, such a conclusion is logically justified by the basic philosophy outlined above and by the words of the act.

This writing repeatedly urges that juvenile court acts be revised to make a clear distinction between criminal and civil jurisdiction, principally so that delinquent children are held responsible for what they do. There still remains the question of what to do with the two kinds of cases that clearly require status adjudications under the civil as distinguished from the criminal or delinquency jurisdiction of the court. These two kinds of cases are children who are not at fault, the neglected and abused children; and children who are at fault, the misbehaving children who have gotten beyond adult control yet have not been found guilty of criminal offenses.

Juvenile courts are involved in matters relating to abused, neglected, and endangered children because of the need for judicial coercion and decisionmaking in matters relating to the duties of parents to provide a reasonable degree of support and nurture to children.⁵ In many foreign jurisdictions, the executive branch of government attends to such matters. In the United States, however, it is generally accepted that where government intervention is of the degree and consequence found in juvenile court matters—especially the separation of parents from children—only the judicial branch should be entrusted with such function.

The misbehaving children, often called, perhaps inappropriately, "status offenders," are quite another problem. The Illinois Juvenile Court Act was amended in 1905 to include within the definition of delinquency a long list of kinds of children, including the poor, immigrants, vagrants, those who would not obey their parents, and those found "habitually begging" or "playing musical instruments on the streets."⁶ There are two explanations for the inclusion of these kinds of children among delinquents. One is the carrythrough of English

poor law legislation; another is the positivistic theory of "predelinquency," the idea that singing, dancing, and begging children would probably get into trouble eventually, so they may as well be locked up in advance.

These theories have been generally and properly discredited, and the question remains as to whether any such children should remain under the aegis of the court at all. Many authorities say that they should not.⁷ This treatise argues for retention of the jurisdiction because it bears on the overall theme of justice for juveniles. The entry of noncriminal, beyond-control minors into the juvenile court system can no longer be justified under either a streetsweeping or predelinquent rationale; but there is a basis for making the coercive forces of the court available to such minors, to society, and to families in cases where all other resources have been exhausted. Minors, who by law must be under the management and control of someone, in some instances get beyond all extrajudicial means of control. Without the availability of some ultimate "last resort" for control, we have simply the emancipation of all such children. Without an ultimate control device, the rebellious minor wins out over family, law, and society simply by repeating his or her long familiar, "No, I won't."

This is something we have to deal with in today's society. There are countless families who want to control their children, but who, for a variety of reasons, are unable to do so.

As proposed, civil jurisdiction would be divided into two categories. One category of jurisdiction would include endangered, abused, and neglected children; the other category would include so-called status offenders, unruly and beyond-control children, and children who violate laws to which adults are not subject, for example, truancy and curfew laws. Such cases by their nature should be kept in the civil rather than the delinquency jurisdiction of the court and subject to civil sanctions only.

Civil jurisdiction over the kind of "misbehaving" status described would be exercised primarily by declaration of wardship and by court-ordered directives or by staff-supervised sanctions or behavior contracts. Probation would be employed where necessary but not in all cases.⁸

This is where *justice* comes in. A child who is a ward and under direct court order and supervision is indeed of a different status than his or her cohort who is not under such control. In the civil proceedings relating to these wards, there should be available a variety of sanctions

short of institutional commitment. Sanctions could include house confinement and limited detention of up to no more than perhaps 5 days.

Institutionalization would not be among permissible dispositions for these minors although there should be a provision allowing for delinquency adjudication based on contempt of lawful court orders. There will occasionally be minors who will not respond to civil sanctions and who therefore must eventually be dealt with by the sanctions that can result only from adjudication of delinquency.

Punitive sanctions should not be used as initial or primary instruments of control for noncriminal, beyond-control young people. The greatest abuse in this regard is found among female juveniles, who are too frequently subjected to detention as a first response. This practice clearly should be discontinued. The proposed procedures would alleviate this problem to some degree.

Young people under status jurisdiction should be subject to institutionalization only as a highly unusual exception and then only after proven or admitted delinquency jurisdiction has been taken by the court.

The following procedures are suggested. Where a minor under status jurisdiction remains rebellious and beyond the control of the court, such a minor would be subject to a delinquency petition charging contempt delinquency. The elements of this delinquency would be:

- a. a clear, direct, and knowing violation of a court order (or perhaps two violations); and
- b. a finding by the court that the minor's contemptuous conduct was of such a serious and aggravated nature that institutionalization would be a fair and proper punishment for the minor's continued course of rebellious conduct and necessary in order to bring the minor within the court's control.

Under this proposal, courts would obviously be more interested in justice and control than in treatment and rehabilitation, but again, this does not mean that we exclude such measures. The rebelliousness may well be the product of treatable social or psychological factors, but still, the emphasis is on what courts do best: administer the law.

Treatment, counseling, and education are certainly desirable adjuncts in the process of gaining control over out-of-control youths. As in the case of delinquency, emphasis is on the judicial, not the clinical.

It should be emphasized that justice for out-of-control juveniles does not mean oppression or overcontrol. Emancipation and supervised independent living arrangements are desirable alternatives to ironfisted, military types of controls. Again, age and maturity are key factors. The temptation to overcontrol youths should be avoided; still, in some cases the courts simply must come to the rescue of society and particularly families who have lost control of their children.

Notes

1. Statutes of Illinois, ch. 23, §§1, 7 (1899).

2. The Revised Statutes of the State of Illinois, § 1 (1905).

3. Paulsen and Whitebread, *Juvenile Law and Procedure*, Juvenile Justice Textbook Series, National Council of Juvenile and Family Court Judges, 39.

4. Maryland requires proof in delinquency cases that the criminal child was "in need of care or treatment." *Ibid.*, 39.

5. Discussion of juvenile justice as it relates to these kinds of children is beyond the scope of this paper.

6. For an interesting list of the kinds of children who could be found to have the objectionable status of delinquent, see Harvey H. Baker, *Procedure of the Boston Juvenile Court*, 1910, reprinted in *Juvenile Justice Philosophy*, Faust and Brantingham, West Publishers, 91 (1978).

7. See, for example, "Institute for Judicial Administration/American Bar Association Juvenile Justice Standards."

8. For example, in a truancy case, the child could, where proper, be ordered to attend school. This could be monitored and reported by school officials without the necessary participation of a probation officer, at least during the initial stages of intervention.

VI. Juvenile Court Legislation

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VI. Juvenile Court Legislation

The juvenile court is a creature of statute. Juvenile justice reform should start with statutory revision.

To install a justice model for juvenile courts, consideration must be given to purpose clauses, definitions, jurisdiction, dispositional reporting, the dispositional process, and transfer or certification proceedings.

The purpose clause

Much confusion and contradiction in juvenile court legislation can be cured by giving careful attention to the purpose or policy clause.

The general purpose of the juvenile court is to do justice. This means that "the best interests of the child" can no longer be stated as the alpha and omega of the juvenile system. The following are the special purposes of the court:

- To settle civil controversies that relate to the protection, care, and custody of abused, neglected, and endangered children.
- To settle civil controversies that relate to minors who are beyond parental or adult control or who commit "minor offenses."
- To protect abused, neglected, and endangered minors by means of placement and protective orders.
- To establish authority over beyond-control minors and those who commit minor offenses by placement and control orders.
- To adjudicate the guilt or innocence of minors accused of committing criminal offenses.
- To punish justly those who have committed criminal offenses and, where possible, to rehabilitate and reeducate such minors.

Properly includable in a purpose clause is a statement to the effect that the best interests of the child are also a proper consideration and that rehabilitation and deterrence are not irreconcilable with justice; they

are important but secondary purposes and functions of the juvenile court.

Jurisdiction

The most critical amendments necessary for a juvenile justice act refer to jurisdiction of the court. There are two major areas of concern:

- a clear division between civil and delinquency (criminal) jurisdiction;
- a three-tiered division separating criminally active minors, mainly by age, but also by offense and past record.

Civil vs. delinquency jurisdiction

One of the major failings in the juvenile court system is what can be referred to as the "one-pot" jurisdictional approach—putting poor, rebellious, and criminal children in the same jurisdictional pot. The "pot" was called "wardship" and into it went dependent and neglected children, delinquent children, and rebellious and beyond-control (considered delinquent) children. All three kinds of children were thought to be the products or victims of bad family and social environments; consequently, it was thought, they should be subject, as wards of the court, to the same kind of solicitous, helpful care. Herein lies the major evidence of the complete positivistic-deterministic takeover of the theoretical and legislative base for the juvenile court system. Thus, the common declaration of status was that of wardship; and, as mentioned above, street dancers, grave robbers, and murderers wind up, theoretically at least, in the same "pot," namely, as wards of the court, subject to being treated by the paternal court in the manner that loving parents would or should treat their child.

During the 1950's, a series of legislative reforms starting in New York and California recognized problems inherent in "one-pot" jurisdiction, and a three-part jurisdiction was provided for. Today, most States recognize basic jurisdictional differences among the three classes of juveniles: the poor, abused, and neglected; the delinquent; and the so-called status offenders. A graver distinction than this tripartite division is the more basic distinction between criminal and civil jurisdiction. This distinction is still blurred and needs clarification. The need for differentiation between criminal and civil was exquisitely expressed in 1926 by Professor John H. Wigmore in language which is extremely relevant to the issues under discussion.

We recognize the beneficent function of the juvenile court. We have always supported it, and we are proud that Illinois invented it. But its devoted advocates, in their zeal, have lost their balance. And, as usual in other fields of science that have been awakening to their interest in the crime problem, their error is due to their narrow and imperfect conception of the criminal law...

They are ignoring... two functions of the criminal law (affirmation of moral law and deterrence), and they are virtually on the way to abolish criminal law and undermine social morality, by ignoring those other two functions... The courtroom is *the only place in the community today where the moral law is laid down* to the people with the voice of authority...

But the social workers and the psychologists know nothing of crime or wrong... And so we say to the devoted social workers and the cold scientists: "Do not think that you have a right to demand that all crimes be handed over to your charge until you have looked a little more deeply into the criminal law and have a better comprehension of the whole of its functions."¹

Once we have clearly separated the civil from the criminal we are better prepared to apply our knowledge of the jurisprudence of each to problems arising in the civil or the criminal area.

Jurisdictional age: A three-tiered approach

This is a delicate and difficult subject. From time immemorial there has been an immunity from criminal liability for certain kinds of persons, principally those who act justifiably in self-defense, those who are coerced or compelled by life-endangering force to commit an act which is prohibited by the criminal law, those who are so mentally disturbed as to be unable to understand the nature and wrongness of their acts, and those who are so young as to lack such understanding.

For centuries, children were divided by the common law into three categories: children who are so young as to be generally thought of as being beyond the proper reach of criminal punishment, prepubescent children who are hard to classify in terms of criminal responsibility, and children over the age of puberty.

The scheme is a reasonable one. The rationale can be applied with some modification to today's world. As noted before, economic and social conditions have radically changed the nature of childhood; thus a developmental stage unknown to the past must be reckoned with, namely, adolescence.

There is every reason to recognize some degree of diminished responsibility of, and give some grace to, postpubescent adolescents in today's world, except in cases of egregious and life-threatening offenses. It makes no sense under present-day conditions to have a law that makes a 14-year-old law violator liable as an adult and subject to the same kinds of sanctions that are imposed in the adult criminal system. Neither does it make any sense to have the rebuttable presumption of *doli incapax* under which children over a given age, say 14, would face a criminal prosecution in which they would either be set free as children or convicted and condemned as adults, depending on a jury's estimation of their level of maturity. A law that would make sense would be a law that allowed for diminished responsibility for younger offenders in a manner that took into consideration the immaturity, impulsiveness, lack of experience, and difference of world view generally associated with young people today. This is reason alone, in a society that professes a great love and regard for its young, to justify the establishment and maintenance of a special court for the young.²

We do not want to expose young people of today to the travails of the adult penal system. Neither do we want to, nor can we afford to, permit young criminal offenders to violate our laws without sanction—without pain or blame.

The answer is to set out some overlapping age brackets of diminished responsibility for all but the most vicious of youthful offenders. As has always been the case, three levels present themselves. At the first level—the child level—are infants, the real children; they would fall into the civil jurisdiction of the court. Although court officials coming in contact with such children should certainly not be discouraged from expressing disapproval and using mild punishments in the treatment of children under say, age 9, such children would not be subject to the delinquency jurisdiction of the court.

The second of the three levels would involve juveniles between age 9 and 14 or 15. This level, to be called the juvenile-offender level, would be roughly comparable to the *impubors*, the 7-through-13 age group under the common law *doli incapax* rule. Except in cases of very serious or repetitive criminality, the court would deal with this level of offenders with relative leniency. Although, as stated, doing justice by holding the offender accountable is the first duty of the court, there is much room at this second level for the understanding and parental-like concern for rehabilitating and reeducating the offender—as long as the offender is made to understand the wrongness and seriousness of violation of the law.

The next level, to be called the youth-offender level, will cover youths of ages 14 or 15 to ages 18 or 19 or possibly 21. Some latitude is given in defining age brackets here because this will be a matter to be decided legislatively, and differences of opinion are certainly allowable as long as the concept of a third level of youth jurisdiction is put into effect.

There is much criminality within this third youth level; and at this point it should be said that very serious and persistent offenders cannot justly be given the grace of juvenile court treatment. As will be seen from the proposed legislative sections in Chapter VII, youths who are charged with certain extremely serious or violent offenses will be charged in the adult court. Likewise, juveniles committing such crimes will be graduated to youth-offender jurisdiction, where more severe punitive sanctions will be available to the court.

The main feature of the youth-offender jurisdiction is the availability of more severe sanctions. This does not necessarily mean institutional incarceration, but certainly rather severe determinate periods of incarceration would be available at the upper end of the age, culpability, and persistency scale.

Definitions

A number of new definitions are included in a statutory-definitions section set out in the next chapter. They are intended to be in accord with the basic concepts of this writing.

Reporting to the court

Adoption of a system of juvenile justice would bring about important changes in the present practice of presenting voluminous "social reports" to the court so it can "diagnose" and then cure the ailing delinquent. As pointed out above, in a justice system judges would no longer be cast in the role of physicians, courts would no longer be clinics, and probation officers would not be nurses.³ In cases involving violations of the law, reports to the court should differ substantially from the clinical report and treatment recommendation still so prevalent in juvenile courts.

In order to do justice, the court will be primarily interested in knowing what the young offender has done and less in who or what the offender is. Surely the court will be interested also in social, mental, emotional,

educational, occupational, and other individual or environmental factors that might have contributed to the minor's behavior, but 17 pages of pseudoscientific jargon are not necessary to apprise the judge (who is neither diagnostician nor therapist) as to what action should be taken.⁴

The purpose of the reporting process in delinquency matters should be to enable the court both to do justice and to effect such rehabilitative and educative measures as are possible. To carry out this purpose, a new, three-phase report is recommended, the report to be made up as follows:

- a. *First phase: Intake.* Except in cases of summary release to parents without intended followup, the court report should be commenced with a first phase that includes all relevant personal background information. The first-phase report will be made up of three parts: the statistical format, the offense summary, and the professional evaluation. The background report will be largely a clerical effort. Too frequently, valuable professional time is taken up with dictating or typing routine statistical data. Nonessential data should be avoided. The gathering of personal data should be augmented by form-letter requests for school records and physical and psychological data where called for. The offense report should consist of the police report, victim and witness narration, and other relevant data. The professional evaluation should consist of a court-service officer's summary of the offender interview and a brief statement and evaluation of the recommended court action.
- b. *Second phase: Disposition.* Most of the information reasonably required for the court to make a just disposition will be contained in the first-phase intake report. At the time of the dispositional hearing, the court-services officer need only append to the first phase of the report a second-phase report which will briefly review the intake report, summarize a second, predispositional interview, and present for the court's consideration a recommended dispositional order.
- c. *Third phase: Compliance.* The third, or postdispositional phase, is the most important phase in the shift to justice in juvenile courts. If orders are solemnly laid down and then ignored, it is obvious that justice is not being done. If the court can be assured with regard to each disposition that its orders are being carried out, not only will young people be held accountable for their criminal acts, they will be receiving the benefit of the variety of remedial and

educative activities which form an essential part of dispositions called for under a justice model.

For reasons previously stated, the third phase of delinquency disposition reporting is critical. This is the phase that assures the court and other parties that the court's orders are being carried out. It is also the phase that triggers dismissal and termination of the court's jurisdiction.

When the dispositional order has been complied with, the court's function will have been fulfilled in almost all cases. The possibility of fairly extensive postdispositional, probationary conditions being imposed in unusual cases should not be ruled out. This should not be the rule, however. Untold court resources are squandered on grandmotherly and meddling solicitude in the cases of young offenders who merely have to be told firmly and decisively that their pranks will no longer be tolerated.

The compliance report will tell the court that the offender has complied with each of the provisions of the dispositional order and that the matter should be dismissed. Absent objections by an interested party, a *pro forma* dismissal order will be issued by the court.

In status cases, a new and different approach to reporting is also indicated. Reports in beyond-control cases will emphasize the actions of the minor, the nonjudicial methods employed in attempts to gain control, and the recommendation to the court. The three-phase form of reporting used in delinquency cases can be easily adapted to beyond-control cases.

Disposition

Disposition, called the "heartbeat of the juvenile court,"⁵ is the euphemism used in juvenile court parlance to describe what is to be done for or to a child, once the child's status as poor, naughty, or criminal has been adjudicated by the court. Although the term was adopted under the philosophy of absolving youthful offenders from blame or fault, the term is a useful one even under a system of justice and individual responsibility because it distinguishes juvenile court diminished responsibility from the full adult responsibility.

What should the disposition process involve if a true justice system is to be adopted? As would be expected, there will be considerable variance in the concept of reporting as here proposed when compared to

reporting as it is presently done. A fairly good perspective of present-day, accepted practices may be seen by examining the May 1983 edition of the *Juvenile and Family Court Journal*, which is completely devoted to the subject of dispositions. In harmony with the basic treatment philosophy discussed throughout, no real distinction is made by most of the writers between the civil and delinquent jurisdiction of the juvenile court, and discussions range from complete acceptance of the treatment philosophy to a justice-model approach referred to as the "accountability of the juvenile court."⁶ One judge writing about dispositions mentions the importance of "making the diagnosis"⁷ and concludes that the "individual treatment approach permeates the dispositional concepts available to the juvenile court judge, even when the legislature mandates harsh 'punishment.'"⁸ (Punishment must always be put in quotes by believers in the benevolent, child-centered, traditional approach.)

Contrary but not necessarily contradictory to the traditional view is the sage observation of Judge Carl E. Guernsey, past president of the National Council of Juvenile and Family Court Judges:

In recent years there has been, first tacitly, and then as part of written policy, the added mandate that such treatment should be consistent with public safety. The once myopic view from the bench has been broadened from focusing on the child alone to a more peripheral look at the child and his victims and potential victims.⁹

Judge Guernsey's views make sense and are in harmony with some recent legislative enactments that have added to the purpose clauses of juvenile court acts a requirement that in addition to considering the welfare or best interests of the child, the court should also consider the interest and welfare of the public. Judge Guernsey believes that we should try to "balance the traditional view (welfare of the child) with the new expectations (public safety)."¹⁰

The views expressed in this treatise simply carry these ideas a step further and advocate a clear statement of legislative intent that in criminal matters public interest comes before individual interest. Justice means public justice when it comes to enforcement of the criminal law.

Although many of the more liberal reformers have advocated it, our adult criminal justice system, when viewed realistically, is not based on treatment and reform of each individual criminal but rather on the assumption, implied or expressed, that those who violate the law should

be punished. Most criminal statutes still provide something to the effect that every person who commits a designated criminal act "shall be punished" by imprisonment or fine.

We have never reached the stage in our criminal law at which it has been stated, "Any person who violates the criminal law shall be considered socially deviant and may be subjected to such care and treatment as would be received from his or her own therapists." The Model Penal Code¹¹ will not use the ugly word punishment; but persons who commit crimes may under this code still be "sentenced to imprisonment for a term," and that, in reality, means that they are being punished, whether for retributive, deterrent, or other reasons.

With due respect to Judge Guernsey, it seems that we are asking too much of juvenile court judges to ask them to balance the child's interest with the public's interest. These interests are always out of balance and always will be. The best interest of the child may frequently coincide with the best interests of the public, but this does not mean that we should lose sight of the purpose of a justice system. This principle should be clearly incorporated into the dispositional process by the juvenile court act.

The following dispositional message of the juvenile court is offered as consistent with the views herein expressed:

Young violator of our criminal laws, you have done wrong; and you are legally accountable for what you have done—you must pay. You are still young, and we are not now going to hold you fully responsible for your misdeeds by sending you away to serve a miserable term in prison. But understand that we are going to punish you and try to convince you that it is wrong and certainly, in the long run at least, very unprofitable to continue as you have been doing. Because of your age we are going to try to include in your punishment certain programs and certain duties which you will have to perform. These are designed to help you in life, to give you a better opinion of your own worth and show to you the wrongness and stupidity of criminality. With this in mind, this is what we are going to do...

The foregoing should not sound like a sermonette. It is a way of trying to impress young criminals with their accountability to all of us for what they have done wrong. Once the young offender knows why he or she is in court and understands the meaning of the situation, then programs can be designed as part of a punishment-and-accountability scheme that will not be perceived as some kind of reward for misconduct rather than as punishment.

For example, very many young criminals are substantially behind their age group in reading skills. Requiring reading instruction or achievement of a certain reasonably attainable goal in reading proficiency would make a very good punitive¹² item in a delinquency dispositional order. The same reasoning would apply to an unlimited number of other goals which could be usefully attained by young persons coming before the court to receive their "just deserts."

This approach is not by any means "antitreatment" or "antirehabilitation"; rather, it strongly favors such measures as a highly efficacious and necessary part of any disposition. The younger the minor the more likely this is to be true.

Nor is it meant that the juvenile court should adopt the formal and austere environment associated with the criminal courts. What is clear is that society's disapproval of juvenile criminality should be firmly expressed by a judicial institution suitably equipped to communicate such disapproval with authority and dignity.

Justice for status wards will also require, in the dispositional process, more of an accountability than a poor-baby approach. If we choose not to emancipate all children and agree that judicial resources should be available as a last resort to control otherwise uncontrollable minors, then we should be frank about their situation. Their situation is simply that our society does not allow the same relatively unrestricted liberty for children that it allows for adults. The law, for example, requires persons of a certain age to go to school; it also requires that underaged children be subject to adult supervision. These requirements are to be found in our law; and if there is law, the law has to be enforced.

Of course, there will always be minors who refuse in an intolerable manner to conform to any adult control. What do we do with such children? We must try to control them and to do so a sanction is necessary. This may be done by making civil court proceedings available in which a determination is first made that the child is unreasonably beyond adult control. Once the determination is made, disposition of the minors can proceed along justice and accountability lines. These youngsters have to be made to understand what courts are all about. Courts make orders and enforce them. A policy decision has to be made as to whether children are to be set free or kept under some kind of control.

If control is the answer, then we should have court proceedings that mean business.

It should be carefully explained to these minors that violation of court orders could result in delinquency adjudication and lockup. It should also be explained that violation of the civil-dispositional order may result in severe sanctions. Again, we want to help and to "treat," but we do not lose sight of the nature and purpose of the courts. Courts are coercive decisionmaking institutions. The red cross should be removed from the door. Out-of-control youths may be helped and treated, but first they must be captured. This needs to be expressed legislatively.

Transfer or certification of juveniles to adult criminal court

The matter of transferring certain juvenile offenders to adult court is very much affected by adoption of justice principles. Following the deterministic principle that individualized treatment should be given to each ailing, underaged victim of society, the long recognized discretionary right of the juvenile court to "waive" its jurisdiction and send a child off to criminal court has traditionally been determined by asking the question, "Is the child treatable in juvenile court?" If the answer was "yes," the child was kept in juvenile court; if the answer was "no," off he or she went to the adult system.

The problem with this logic is that to follow it strictly would be to allow the most vicious and culpable youthful offender to remain within the benign confines of the juvenile court if the judge could be convinced that the child was treatable; or, in the words of the trade, that the child was "amenable to treatment."

The traditional standard, then, has been whether the juvenile court still had something to offer the child. If the child still showed prospects of being able to be "helped," such a child would be immune from transfer. This is very much consistent with the child-oriented system but not consistent with a society-oriented justice system.

As stated, the statutory mandate to juvenile courts has been to give primary concern to the child's interests; and the courts have centered their concern on what the child *is* rather than what the child has done. It follows that in making the transfer decision, courts have been required to make a very subjective and predictive, often conjectural, decision based on what the judge perceived were the chances that the juvenile court's limited resources could rehabilitate the child offender.

To base the decision to transfer on a subjective evaluation as to whether a youth is treatable or not is certainly not a standard based on justice.

It is not justice, for example, to permit a youth who has committed a series of serious and vicious crimes to avoid transfer simply by convincing a judge that he is a nice young man who is quite amenable to staying within the gentle confines of the juvenile court instead of going to prison. Similarly it is not justice to transfer a youth who has committed an isolated, relatively minor offense, but who, because of attitude or impression on the judge, is found unamenable to juvenile court treatment. Transfer should be based on justice—on what the youth has done—not on what a judge thinks the youth might be or become.

Surely, in making decisions under the “amenability” standard, courts do consider the nature and seriousness of the offender’s crime, but they do so under the treatment approach, in the context of making subjective evaluations of treatability. As in so many other areas of juvenile court jurisprudence, what is said differs markedly from what is done. As a result, many transfers occur with little regard to the extant amenability standard, and are based on a perceived need to send serious and persistent offenders to the adult system where appropriate punishments for egregious behavior are available.

As part of the general trend toward a return to a justice model and toward punishment for the crime rather than treatment for the individual, various State legislatures have been enacting transfer statutes that set objective conduct standards for transfer rather than subjective, individual evaluations.

Purpose clauses have been amended to include the interests of the State as well as the interests of the child, although priorities between the two are not always established.¹³

Justice for juveniles requires that youths who face transfer to adult court be judged on what they have done rather than on a subjective prediction as to what might happen if they remain in, or are transferred from, the juvenile system. Justice for society requires that those older youths who commit crimes deserving of severe punishment or who have persistently violated the law be removed from the juvenile justice system.

The question of when transfer to adult court is required should be resolved by application of justice principles. There are certain kinds of crimes and certain levels of persistency in criminality that cry out in the name of justice for more severe sanctions than can be meted out in a system designed for the special consideration of the relatively innocent and immature.

The subjective principle of amenability to juvenile court treatment should be rejected and an objective standard related to the youth's conduct should be established. There are surely certain offenses that, in the case of youths over the age of 14 or 15, should never be cognizable in juvenile court. Such offenses should be specified legislatively to alert prospective perpetrators that juvenile court is no longer available in such cases. Other candidates for transfer should be considered on the basis of offense and past criminal record. If justice and the public interest clearly require that the grace of the juvenile court be denied and that severe adult punishment be imposed, transfer should be effected.

Legislation should specify that these two considerations—seriousness and persistency—be the primary standards for transfer, and that additional consideration be given to the youth's maturity, sophistication, attitude, and other personal attributes. However, such consideration should be employed only as a basis for denying transfer and not as a basis for granting it.¹⁴

The suggested procedure outlined in Chapter VII for discretionary transfer is limited to youths who commit more than one felonious criminal offense. Youths who commit a "major offense" do not fall within juvenile court jurisdiction. Some accommodation should be made in the adult criminal code for return of youth major offenders to the juvenile court under certain rare and extraordinary circumstances.

Notes

1. John H. Wigmore, *Illinois Law Review*, (1926). (Emphasis supplied.)

2. These assertions presuppose certain developmental and sociological changes in children and their present-day role in society. On this see, for example, Franklin E. Zimring, *The Changing Legal World of Adolescence*, The Free Press: New York (1982), in which the author explains the dramatic legal and sociological changes in the lives of adolescents. Zimring recognizes that adolescents can be treated neither as children nor as adults and urges that they must be subject to moral and legal accountability while at the same time being protected from the full burdens of adult responsibility. He wisely advocates a

legal system which recognizes that growing up requires some freedom to make mistakes without incurring all of the adult consequences for the making of harmful decisions.

3. Witness the extremes to which the medical model can be taken: "In determining the disposition to be made of the case the procedure of the physician is closely followed...The judge and the probation officer consider (the case) like a physician and his junior...and then they address themselves to the question of how permanently to prevent the recurrence...If the offense is serious and likely to be repeated...or if the cause of the difficulty is obscure, he is seen by the judge at frequent intervals,

monthly, weekly or sometimes even daily, just as with the patient and the physician in cases of tuberculosis or typhoid." Harvey H. Baker, *Procedure of the Boston Juvenile Court*, 1910, reprinted in *Juvenile Justice Philosophy*, Faust and Brantingham, West Publishers (1978).

4. A most illuminating example of the type of reporting that has been advocated under the clinical approach can be seen in the May 1983 edition of the *Juvenile and Family Court Journal*, published by the National Council of Juvenile and Family Court Judges, on page 84. A model detention report is offered in which the reporter is required to report in six different categories: "manner of thinking," "mood tone," "methods of expressing anger," "sexual reactions," "physical self-interest," and "social interaction." To save time for the busy court official, a variety of applicable phrases may be circled; some examples: "one-track mind; fantasizes and dreams; laughs, jokes and continually runs in high gear; cynical; avoids sex talk; initiates sex play; handles other boys frequently; interested in attractive women or their pictures; combs hair unusually often; too independent." Does the judge really have to know these things?

5. Arthur and Gauger, *Dispositional Hearings: The Heartbeat of the Juvenile Court*, Juvenile Justice Textbook Series, Reno, Nevada: National Council of Juvenile and Family Court Judges (1974).

6. Carl E. Guernsey, "Accountability of the Juvenile Court," *Juvenile and Family Court Journal*, Reno, Nevada: National Council of Juvenile and Family Court Judges, 67 (May 1983).

7. Romae T. Powell, "Disposition Concepts," *Juvenile and Family Court Journal*, Reno, Nevada: National Council of Juvenile and Family Court Judges, 2 (May 1983).

8. *Ibid.*, 6.

9. Guernsey, "Accountability," 68.

10. *Ibid.* (Parenthetical phrases supplied.)

11. "Penal" is defined as "of or pertaining to punishment" in *Webster's New International Dictionary*.

12. Creating a form of consciousness characterized by a desire of escape or avoidance.

13. As indicated above, the legislative inclusion of the public interest as a proper purpose of consideration of juvenile courts has not generally included the mandate that the public interest was the primary consideration.

14. Use of a subjective or predictive standard unfairly allows for transfer of minor offenders who "flunk the attitude test"; and, as well, prevents transfer of serious and repetitive offenders who might be able to convince the court of their "amenability to treatment." See *In the Matter of Seven Minors*, 99 Nev. 427, 664 P. 2d 947 (1983).

VII. Proposed Legislation

VII. Proposed Legislation

The following proposed legislative provisions are offered as an example of language that might be employed in the process of adopting a justice model for juvenile courts in the area of delinquency jurisdiction.

§100 Legislative intents and purposes.

The legislature deems it to be in the public interest that special juvenile courts be maintained for adjudicating the rights, liabilities, and interests of minors.

The general purpose of this act is to do justice for the people of this State and for minors.

Minors coming within the delinquent jurisdiction of the court by reason of having been charged with the commission of a public offense must be treated justly. By justly is meant being accorded all procedural protections and due process afforded to adults who are charged with crimes, with the exception of the right to jury trial. By justly is also meant the providing of substantive justice to both the public and the offender, which means that accused violators of the criminal law must be given a fair, speedy, and proportionate punishment, having due consideration for the diminished responsibility which is a natural and proper incident of their youth and immaturity.

§101 Definitions.

§101.1 **“Adjudication” defined.** “Adjudication” means the formal court determination of a minor’s guilt of a criminal offense or of a minor’s coming within the civil jurisdiction of the court.

§101.2 **“Beyond control” defined.** A minor is “beyond control” if his or her behavior is shown to be beyond the reasonably expected control normally exercised by the minor’s custodian, family, school, or other proper adult authority to a degree that court intervention and supervision are necessary in order to protect the interests of the minor or society as a whole.

§ 101.3 **“Chief of court services” defined.** “Chief of court services” means the person designated to be responsible for reporting, probation, and other court services mentioned in this act. Chief of court services refers to the chief in person and all court service officers appointed by the chief.

§ 101.4 **“Child” defined.** “Child” means a minor of the age of 8 years or younger.

§ 101.5 **“Court” defined.** “Court” means juvenile court.

§ 101.6 **“Court services officer” defined.** “Court services officer” means an officer of the court appointed by the court as a deputy to the chief of court services.

§ 101.7 **“Criminal offense” defined.** “Criminal offense” means any violation of State or local law other than one which only a minor can commit, such as truancy or breaking curfew.

§ 101.8 **“Delinquent” defined.** “Delinquent” used as a noun means any minor of the age of 9 to 17, inclusive, who has committed a criminal offense.

§ 101.9 **“Felonious criminal offense” defined.** “Felonious criminal offense” means a criminal offense which would be a felony if committed by an adult.

§ 101.10 **“Judge” defined.** “Judge” means a judge, master, referee, or other person performing judicial functions in the juvenile court.

§ 101.11 **“Juvenile” defined.** “Juvenile” used as a noun means a minor of the age of 9 to 14, inclusive.

§ 101.12 **“Juvenile offender” defined.** “Juvenile offender” means any juvenile who has committed a criminal offense other than a major offense except a juvenile who has been twice adjudicated guilty of an offense which would be a felony if committed by an adult.¹

§ 101.13 **“Major offense” defined.** “Major offense” means any of the following criminal offenses: murder, attempted murder, robbery, attempted robbery, rape, attempted rape, arson, attempted arson,

mayhem, attempted mayhem, kidnaping, attempted kidnaping, injury to a person or property by explosives, and attempted injury to a person or property by explosives.²

§101.14 **“Minor” defined.** “Minor” means any person under the age of 18 years.

§101.15 **“Penal institution for youth” defined.** “Penal institution for youth” means a secure facility which houses youthful offenders committed by the court for definite punitive terms.

§ 101.16 **“Probation officer” defined.** “Probation officer” means a court service officer assigned to probationary supervision.

§101.17 **“Prosecuting official” defined.** “Prosecuting official” means any public official having authority to prosecute a minor for the commission of a criminal offense.

§ 101.18 **“Transfer” defined.** “Transfer” means the process whereby youthful offenders are judicially removed from juvenile court jurisdiction and are transferred to adult court.

§101.19 **“Youth” defined.** “Youth” means a minor of the age of 15 to 17, inclusive.³

§101.20 **“Youthful offender” defined.** “Youthful offender” means any youth who has committed a criminal offense other than a major offense and any juvenile who has committed a major offense or has been twice adjudicated guilty of an offense which would be a felony if committed by an adult.

§102 Jurisdiction.

The court has exclusive jurisdiction over minors except to the extent otherwise provided in this act.

§102.1 **Civil jurisdiction.** Civil jurisdiction is all jurisdiction of the court except jurisdiction over the commission of criminal offenses. It consists of:

- a. Protective jurisdiction over minors who are endangered or who are abused, neglected, or abandoned.
- b. Jurisdiction over minors who commit offenses which only a minor can commit such as truancy or breaking curfew.

c. Jurisdiction over minors who are beyond control.

§102.2 Delinquent jurisdiction. Delinquent jurisdiction is jurisdiction over criminal offenses committed by minors. It exists in all cases involving:

- a. The commission of a criminal offense by a juvenile.
- b. The commission by a youth of a criminal offense other than a major offense. A youth who has committed a major offense is not within the jurisdiction of the juvenile court and must be prosecuted as an adult.

§103 Hearings: Jury.

All hearings to determine the guilt or innocence of a juvenile charged with a criminal offense must be held before the court without a jury. A youthful offender charged with a criminal offense has the option of waiving trial in the juvenile court and being tried before a jury in the adult court as an adult offender.

§104 Disposition.

§104.1 Civil disposition.

- a. In all cases in which a minor has been adjudicated to be within the civil jurisdiction of the court, the court shall conduct a dispositional hearing within a reasonable time after the adjudication to determine what action should be taken with respect to the minor. A minor within the civil jurisdiction of the court is entitled to receive care, guidance, and control within the minor's own home unless his or her best interest otherwise requires.
- b. When a minor is removed from his or her home or from the control of his or her parents, the court shall secure as nearly as possible the equivalent to the care which should have been given in the home by the parents.
- c. Except for emergency protective detention, a minor coming within the civil jurisdiction of the court shall not be detained except for violation of probation or a direct court order. In no event may any minor under the civil jurisdiction of the court be placed in or committed to any penal institution for youth or any reformatory, training center, general penal institution, or any secure residential

facility designed or employed for the housing or punishment of criminal offenders or delinquents.

§104.2 Delinquent disposition.

a. In all cases in which a juvenile offender or youthful offender has been adjudicated a delinquent, the court shall hold a separate delinquent dispositional hearing within 15 days after the date of adjudication, except in cases where this limit is waived by the minor or there is just and reasonable cause for delay.

b. At the dispositional hearing the court shall hear all matters relating to the nature of the offense, the offender's past record, matters relating to special needs of the offender, recommendations for punitive measures to be taken, and matters relating to recommended care, custody, rehabilitation, education, and treatment of the offender.

c. Following the dispositional hearing, the court shall make its written delinquent dispositional order, which must specify the placement of the minor and set out each dispositional order in a clear and understandable manner.

d. The order must specify custody, wardship, and placement of the offender. Unless clearly contrary to the interests of justice, the offender must be placed with his or her parents. Unless the interests of justice require otherwise, the court may place the offender outside the home in a suitable family or group home, in a community residential center, or in an institution for the punishment of delinquents.

e. Conditional orders may be entered whereby refusal to obey a dispositional order or unreasonable neglect in timely performance of the order results in automatic punishment imposed by a court service officer. Such punitive measures must be prescribed, supervised, and reviewed by the judge and may include brief periods of local detention not to exceed 3 days.

§105 Delinquent dispositional alternatives.

§105.1 **General policy.** All delinquents are to be held accountable for their criminal offenses and must receive just punishments and sanctions which are fairly related to the seriousness of the offense

or offenses and to any record of past adjudicated or admitted offenses. Insofar as possible, speed and certainty are to be considered as the most important factors in providing just and effective punishment. Secure incarceration and placement in penal-type institutions are to be employed only in exceptional and necessary circumstances.

§105.2 Delinquent juvenile offenders. Delinquent juvenile offenders may not be committed to any jail or other penal institution. The maximum punishment for a juvenile offender is placement in a residential center where the offender is not physically restrained from leaving or in a local, secure detention center where the offender is physically restrained from leaving for no more than 90 days. No juvenile offender may be required to spend more than an aggregate of 90 days in detention as a juvenile offender. Punitive dispositions must include, whenever possible, measures that serve the function of both punishment and rehabilitation. Dispositional alternatives for juveniles may include:

- a. Restitution, which may include payment in money or service for property damage and personal injury and also for intangible injuries, including mental anguish and emotional trauma, suffered by the victim.
- b. Detention and restriction at home.
- c. Service to the community.
- d. Compulsory individual or family counseling.
- e. Withholding of driving and other privileges.
- f. Curfew.
- g. Additional attendance at school and tutoring.
- h. Probation.
- i. Confrontation with and apology to the victim.
- j. Residential placement in an open setting.
- k. Secure detention in a local detention center for no more than 90 days.
- l. Other reasonable punitive measures which may be imposed as a consequence of the commission of a criminal offense.

§105.3 Delinquent youthful offenders.

a. Delinquent youthful offenders have a greater degree of culpability and responsibility for the commission of criminal offenses than juvenile offenders. In addition to the dispositional alternatives listed in the previous section, a youthful offender may be committed to secure juvenile institutions of a penal type for a determinate period not to extend beyond the offender's 23rd birthday. Time served in such an institution is limited by the following schedule.⁴

§105.4 **Incarceration limitations.** Youthful offenders of the age of 16 or older may be placed in an adult jail or penal facility for no more than 5 days, if the youth is kept physically separated from other prisoners.

§106 Delinquency disposition: Compliance and enforcement.

§106.1 **General policy.** Desired speed and certainty of punishment requires that all dispositional orders be carried out completely and promptly. When justice has so been carried out, jurisdiction of the court ceases except under exceptional circumstances as determined by the court.

§ 106.2 Compliance; Enforcement; Dismissal.

a. The court service officer shall verify compliance by each delinquent with the court's dispositional order. After the entry of each delinquent dispositional order, a court service officer or probation officer shall meet with the delinquent and determine the manner in which compliance with the court's order can be completed.

b. A court service officer or probation officer must be available to assist or counsel with the delinquent at the request of the delinquent or the delinquent's parents.

c. In the case of a delinquent's refusal or unreasonable neglect to comply with a dispositional order, the chief of court services shall file with the court a request for review of compliance. The request must set out the nature of the violation and request that the matter be heard before the court.

d. In the case of timely compliance, the chief of court services must file with the court a notice of compliance and request for dismissal and exoneration. The request must outline factually the offender's compliance. Upon receipt of the notice and request the court shall, unless good cause appears to the contrary, dismiss the proceedings and notify the delinquent, his or her parents, and his or her attorney of the court's action.

§107 Parole, probation, and suspended commitments.

§107.1 [The subject of parole supervision is beyond the scope of this writing.]

§107.2 Probation.

a. Juvenile offenders may be placed on probation only under exceptional circumstances whereunder the offender is perceived to be in need of intensive supervision and counseling.

b. Youthful offenders may be placed on probation under the same exceptional circumstances as juvenile offenders; and additionally, in cases where conditional, suspended commitments are made, youthful offenders may be committed to a youth penal institution for violation of probation.

§107.3 **Suspended commitments.** The court may commit a youth to a penal institution for youths and suspend execution of the commitment on the condition of the youth's performance of certain probationary or other requirements. If there appears probable cause to believe that such requirements have not been complied with, the youth may be committed to a youth penal institution.

§108 Transfer.

§108.1 **General policy.** Any youth who commits more than one felonious criminal offense may, in the discretion of the court, be transferred to the adult court when the interests of justice and the public require that a youth no longer be judged by the standard of diminished responsibility available in juvenile court and must, accordingly, be transferred to the adult court.

§108.2 Procedural standards for transfer.

a. A proceeding for transfer must be commenced by a verified petition signed by a prosecuting official. The petition must contain:

i. a clear statement of the offense or offenses charged so that the youth receives notice of the time, place, and nature of the offense;

ii. a statement of all past criminal offenses which have been adjudicated or voluntarily admitted by the youth;

iii. a statement why the interests of justice require that the youth be transferred to adult court; and

iv. a statement of the personal character and qualities of the youth, including reference to any special good or bad qualities of character and any other material which might be of use to the court in making the decision whether to transfer.

b. A youthful offender subject to a proceeding for transfer is entitled to have the matter heard and to be represented by counsel. The court must be clearly convinced that transfer is in the interest of justice and in the public interest; and if the court decides to transfer the youth, the youth must be provided with a statement of the reasons for transfer.

§108.3 Substantive standards for transfer.

a. The court must find as a condition for transfer that there is probable cause to believe that the youthful offender committed the offense out of which transfer proceedings originated. The court's finding may be based on admissions of the offender or on police and court records. Where probable cause is denied and a request for hearing on this issue is made by the offender, the court must hold a hearing on the issue.

b. The decision to transfer must be based on the court's consideration of the nature and seriousness of the charged offense, the past record of admitted or adjudicated delinquencies, the character and personal qualities of the youth, and any other relevant factors.

c. The decision to transfer may be made on the basis of the nature and seriousness of the offense alone or on the basis of past criminal record alone or on a combination of these two primary factors. The

character or personal qualities of the youth may not of themselves be used to support a decision to transfer; these factors are to be considered in combination with the primary factors and may constitute a basis for denial of the petition for transfer because the character, personality, or attitude of the youth convinces the court that the interests of justice do not require transfer even though the primary factors by themselves might support such a conclusion.

Notes

1. It bears noting at this point that an entirely new and restrictive definition of "juvenile" is being employed in the definition of "juvenile offender." In an attempt to divide delinquency jurisdiction into two tiers, the designations "juvenile offender" and "youthful offender" were decided upon. Although a juvenile is generally thought of as any underaged person, a juvenile offender has a special meaning as proposed here: a person who is of the age of 8 through 14 who commits a criminal offense other than a major offense. A person of these ages who commits a major offense is not to be considered as a juvenile offender but rather as a youthful offender, to be punished accordingly.

2. Inclusion in the list of major offenses, like age bracketing, is a matter of broad legislative discretion. The list is suggestive only.

3. Youthful offenders include minors of the ages 15, 16, and 17. There is much to be said for extending youth jurisdiction to 19, 20, or 21, but this subject matter, although closely related to the discussion at hand, is beyond the scope of this writing.

4. Here would be inserted a sentencing schedule along the lines developed by statute in California, New York, Washington, and other States which have approved determinate sentencing for serious and repetitive youth offenders.

Part Two: Extrajudicial Justice

VIII. Fairness for Juveniles

VIII. Fairness for Juveniles

The just is the lawful and the fair.

Aristotle

Aristotle recognized that justice encompasses more than merely the lawful—the justice administered by the courts—and includes in its broadest meaning all that is fair. A discussion of justice for juveniles cannot be complete without a consideration of fairness for juveniles. From justice as the lawful, juridical justice, we pass to justice as the fair, extrajudicial or distributive justice.

Our original definition still obtains; justice refers to what is due. In discussing juridical justice the point was made that, where society prohibits certain conduct and prescribes punishment for commission of such conduct, justice requires that the law be followed and that the offender get his or her due. Justice as what is fair and due is a much broader concept, one that goes beyond the system of criminal justice and commands that all citizens act for the good of others and treat each other fairly.

When Thomas Jefferson wrote in the Declaration of Independence of certain unalienable rights which were due to each of us because we are equal by nature, he was writing of this kind of justice. These rights—life, liberty, and pursuit of happiness—can and should be secured by just governments and just laws. They are rights that can and should be secured for children.

What of these unalienable rights for children? What is their due? Their due is the unalienable right to life, and this right to life includes, at a very minimum, (1) the right to nurture, (2) the right to an environment in which they can have some reasonable expectation of normal growth and human fulfillment, and (3) the right to be civilized, that is, the right to the moral training which will enable them to function as integral members of society and to give them the capacity for moral and spiritual growth.

Depriving the young of their right to life is the greatest of all injustices: it dwarfs the injustices endemic to all juridical justice systems. Such injustice is an evil in itself and also the cause of most crime and social malaise.

In a treatise of this kind it is possible to deal only at a very general level with the subject of injustice in the form of unfairness to those who rightfully depend upon us to provide for them. Three distinct but interrelated fields of injustice to juveniles have been mentioned and will now be discussed.

The right to nurture

Children have a right to nurture—to be provided for, to be reared, fostered, and cared for. This is something they cannot do for themselves. Injustice to children in this regard is perhaps the most important and certainly the most overlooked factor in the etiology of crime and other social indeseiderata.

Theodesius Dobzhansky, a geneticist, is credited by Ashley Montagu¹ with using the word “groceries” to describe all the materials that a human needs from the world around to be used for individual growth and development. It is the grossest of injustices to deprive our children of their necessary groceries. That we do so is probably the greatest disaster of our times.

Of prime importance on the grocery list are those items that are indispensable for the growth and development of a normal human organism, particularly the central nervous system. The importance of these kinds of groceries and the effect of their deprivation on behavior has been, until very recently, almost completely neglected by the investigators of human behavior.² The medical scientists have left the study of human behavior to the Freudian psychologists, who believe that behavior is caused by subtle, unconscious sexual patterns and that behavioral aberrations are “functional” rather than organic. Mark and Ervin³ list two factors they believe are responsible for deterring the medical profession from any considered effort to understand the relationship of organic brain mechanisms to violence and antisocial conduct. One factor is that the medical scientists “have assumed that the causes lie largely in the social environment,” and the other is that they “have preferred to have nothing to do with these ill-tempered, dangerous people.”⁴ Whatever the reasons may be, historically, the biological connection to human behavior has not received the attention it deserves from the medical profession.

Classical criminologists have also been loathe to accept the biological connection to criminal conduct because this was thought to argue against free will and individual responsibility, the cornerstone of classical

criminology. The social scientists have looked almost exclusively to the social milieu for the sources of criminal misconduct, another reason why this important field of investigation has been greatly neglected.

Mark and Ervin argue that, since all behavior "filters through the central nervous system," studying the relationship between the brain and violence, for example, is the best way to understand this kind of behavior.⁵ They then explain that, because some stages of brain development occur normally only within certain time limits, if environmental conditions are wrong (if necessary groceries are unavailable), "the resulting anatomical maldevelopment is irreversible." Once the maldevelopment occurs, "the brain structure has been permanently affected, [and] the violent behavior can no longer be modified by manipulating psychological or social influence."⁶

The point is that the organic condition of the brain may be the largest single contributing factor in serious and violent criminal behavior. As one psychiatrist said, "I can't counsel lead poisoning out of this young man's brain." It is difficult to counsel a poisoned brain; and it is difficult to counsel a maldeveloped brain that exists because of deprivation or insufficiency of groceries during childhood, a result of failure to give to children what is their due.

The frequent and predictable consequence of this failure to nurture properly is some degree of neurological maldevelopment which in turn can create what can be accurately described as "neurological cripples." It is from among these neurological cripples that a large proportion of serious, violent, and repetitive juvenile offenders come.

The exact and direct cause of this kind of crippling is often hard to trace. As observed by Lewis and Balla,⁷

The number of different kinds of central nervous system disorders that ultimately result in antisocial behavior and juvenile court referral never ceased to amaze us. Sometimes there was reason to believe that injury to the central nervous system had taken place in utero or shortly thereafter. Often, however, the rough and tumble atmosphere of a tough environment without adequate parental protection took its toll, the punch of an uncontrolled father, uncle, or sibling. The fall from an unguarded window, an untreated ear infection that turned into meningitis—all of these kinds of experiences, and more, befall many of the children whose paths merged at the juvenile court.

It may not always be said these sad people have grocery problems, but this is usually the case. Ashley Montagu⁸ makes an excellent case linking biological aberrations to behavioral disturbances. He shows that as one goes down the socioeconomic ladder, the probability of malfunction dramatically increases. Risk factors, starting with malformed sperm and ova and progressing through such factors as maternal malnutrition, maternal drug abuse (including nicotine and alcohol), birth trauma, infant malnutrition, abuse, neglect, and a long list of early-life injustices, combine in varying degrees and proportions to produce a whole array of undesirable neurological manifestations that might include a predisposition to uncontrolled violent outbursts, learning disabilities, bedwetting, distractability, hyperactivity, and even criminality.

The risk factors that lead to neurological crippling are not necessarily limited to direct physical and chemical influences. It is generally accepted that maternal deprivation and infant neglect can result in neurological maldevelopment. Even given fulfillment of all chemical needs, mammalian nervous systems fail to develop properly absent appropriate sensory and emotional stimulation. Surrogate mothers in the form of colored television sets tending to captive infants in cages called playpens can result in the same kind of crippling that results from deprivation of chemical nutrients.

The human brain is undeveloped at birth. For it to develop properly the infant must be fondled, touched, picked up, rocked, and carried.

Human infants and animals who are deprived of sensory stimulation during the formative period of brain development develop a biological system of brain functioning and structure which predisposes these organisms—these animals, these children—to pathologically violent behavior.⁹

Children have a well-established, continuing, and indispensable need, especially in their very early years, for a minimum quantum of love and care. Whether or not there is an identifiable neurological basis for it, unloved children do not develop properly and are higher-risk candidates for entry into the juridical justice system. There can be no doubt that neglect and abuse of children have a very large impact on their future behavior.

Robert ten Benschel, a leading national expert on child abuse and neglect, has amassed a great collection of evidence to support the connection of child neglect and abuse to later violent criminality.¹⁰

“Studies have shown that virtually ‘all violent juvenile delinquents have been abused children,’ that ‘all criminals at San Quentin prison...studied had violent upbringings as children,’ and that ‘all assassins...in the United States during the past 20 years had been victims of child abuse. That is quite a toll for society to pay for not intervening.’”¹¹ Quite a toll, indeed, for failure to provide groceries and for doing injustice to children.

This is not intended to be a treatise on the biological and ecological causes of crime; it is intended to show that by denying children the groceries they need, society is probably creating (as it has for centuries) a special population of “droids” who are uniquely equipped to do harm and are doing so. Much can be done to remedy this kind of injustice. We fail to do so at great peril to us all.

The right to fairness in the social environment

It is beyond the scope of this paper to discuss social justice, what Aristotle called distributive justice, but it is within its scope to make mention of the sad consequences of our inability to provide a decent social environment for what would appear to be a growing segment of our youthful society.

This is not the place to engage in discourse on the dire ends of poverty, class divisions, urbanization, industrialization, urban blight, unemployment, breakdown of religion, breakdown of the family, and all of the other established criminogenic factors. It is the place, however, to recognize, at least, that the criminal justice system is the least effective means of crime prevention and social control. If we are interested in a relatively crime-free society, we must look elsewhere than the courts.

In a society that recognizes an unalienable right to the pursuit of happiness, its members have a reasonable expectation of receiving their basic social groceries. These groceries consist of the needs that we all have in order to grow and to be happy, fulfilled human beings. Abraham Maslow stated this well when he wrote of a person’s basic drive toward “self-actualization” for which certain needs had to be supplied by society. These needs include “the needs for meaningful work, for responsibility, for creativeness, for being fair and just, for doing what is worthwhile and for preferring to do it well.”¹²

Frustration of these needs is, according to many writers, a major cause of criminality. Robert K. Merton,¹³ for example, sees crime as being

caused by the frustration of the lower socioeconomic sectors within an affluent society that denies them legal access to social status and material goods. Denial of basic social needs is unjust and another important root branch of many social ills, including crime. This is especially true of the youthful, undeveloped members of our society who have a just claim that we provide them with "groceries for growing."

The right to moral, ethical, and social training

We have widespread unhappiness and criminality as likely consequences following from neurological, emotional, and social deprivation. A third, comparable source of youthful malaise is moral disability, or retarded character development, also brought about by denial of certain necessary groceries. It is generally accepted that children learn how to distinguish right from wrong at a very early age, even before they can talk. When parents say, "no," a child becomes aware that he or she must not succumb to all kinds of whims and impulses.

As children approach the age of reason and understanding and learn to talk, they gradually accept certain standards of behavior relative to what is right and what is wrong. These critical values are sometimes said to become internalized so that behavior is controlled not by the supervising, overseeing parent but by internal controls. This desirable condition is reached only by externally imposed training. Those who do not receive this training are missing some very important groceries, a deficit that will eventually affect their moral growth and is likely to affect society as a whole.

The interrelation of physical, social, and moral factors, is plain to see. It is common indeed to see the effects of the three interlocking in the lives of the same kinds of deprived children. The result was well described in the following proposition expressed by Harvard University Professor James Q. Wilson:

[W]e now have available an impressive number of studies that, taken together, support the following view: Some combination of constitutional traits and early family experiences account for more of the variation among young persons in their serious criminality than any other factors, and serious misconduct that appears relatively early in life tends to persist into adulthood. What happens on the street corner, in the school, or in the job market can still

make a difference, but it will not be as influential as what has gone before.¹⁴

Based on the expressed view, Professor Wilson sees the criminal and delinquent as "rational persons with values different from the rest of us," whose "temperament and family experiences" are the most critical of all contributors to criminality.¹⁵

The adverse "temperament and family experiences" that cause most crime results from an unjust deprivation of groceries that should be provided to all children. The major cause of crime is to be found in injustice.

Resolution

This chapter cannot conclude without recognizing and attempting to resolve an apparent contradiction that is built into this treatise as a whole. Great stress has been placed on individual moral and legal responsibility. Young offenders are accountable to society for their criminal offenses. Yet, we continue to manufacture, in our "psychopath factories," neurological cripples who in some cases are practically incapable of coping with their environment and of avoiding impulsive, criminal behavior. We have also morally handicapped individuals who are trained to be criminals and know no other moral or social environment than criminality. One may question how it can possibly be argued that these unaccountable, irresponsible persons should be held accountable and responsible and punished for their almost totally predictable conduct. The only answer that can be given is, "We must."

The mere fact that we are gaining in understanding the factors that predispose persons to commit crimes cannot mean that we excuse such persons, even when highly predisposed, from criminal liability.

The juridical justice system in its function as an arbiter and enforcer of criminal law must, in justice, operate at a high level of certainty and predictability. Even if we were to assume, which we cannot, that some of the neurologically crippled or morally deformed reached a point at which it could be said that they had no internal controls over their actions, such persons could not be granted immunity from criminal responsibility. There are two reasons why this must be so. First, at the present time, there is no way of accurately measuring or identifying such a condition. Second, the very nature of the criminal process is such that certain actions call for certain consequences. The whole system fails when it loses this quality by making ill-defined exceptions.

We may be able to prevent a lot of the causes that generate the type of vulnerable personalities described, but if we are going to maintain any kind of criminal law enforcement by juridical bodies, we must enforce the law, and we must hold even the most predictable offender accountable for violation of our criminal laws.

Notes

1. Ashley Montagu, *Life Before Birth*, New American Library, New York: 21 (1977).

2. The study of biologic factors in shaping personality has been well summarized in the following terms:

Biological theories of crime have never been well received by American criminologists. Tappan said that the little attention given—except in a negative and critical way—was in large part due to the “strongly environmentalist orientation of the sociological criminologists because of the preoccupation of the dynamic psychiatrists with their postulated processes of psychogenesis.” To this may be added the all-pervading impact of the American image in sociology and psychology. Sociologically, life was epitomized in a conception of success in which initiative, opportunity, and change played the main role. Manuel Lopez-Rey, *Crime: Analytical Appraisal*, New York: Praeger (1970) cited in *The Criminal Personality*, vol. 1, New York: Jason Aronson, 59 (1976).

The author recognizes that in recent years the thrust of much psychiatric and psychological research has been biological, and much attention in obstetrics and pediatrics is being devoted to prenatal and early childhood development.

3. Mark and Ervin, *Violence and the Brain*, Hagerstown, Maryland: Harper & Row (1970).

4. *Ibid.*, viii.

5. *Ibid.*, 2.

6. *Ibid.*, 7.

7. Lewis and Balla, *Delinquency and Psychopathology*, Grune & Stratton, 56 (1976).

8. Montagu, *Life Before Birth*.

9. Testimony of James W. Prescott, before the Standing Senate Committee on Health, Welfare, and Science, Senate of Canada, reported in *Child at Risk*, Canadian Government Publishing Centre (1980).

10. *Ibid.*, 36.

11. Testimony of Robert ten Benschel, quoted in *Child at Risk*, 41.

12. Abraham Maslow, *Toward a Psychology of Being*, Nostrand Reinhold Company, 222 (1968).

13. Robert K. Merton, *Social Theory and Social Structure*, Rev. Ed., New York Free Press (1957).

14. James Q. Wilson, “Thinking About Crime,” *The Atlantic*, 86 (September, 1983).

15. *Ibid.*

IX. Summary and Conclusions

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Summary

Aristotle tells us that no government can stand which is not founded on justice. As a Nation we are firmly committed to liberty and justice for all. Justice for juveniles calls for a special kind of justice. Children are dependent upon us not only for life sustenance but for nurture, training, and guidance. The greatest of injustices is to deny our children. Although this book is addressed principally to the argument that a model of juridical justice should be installed in the law courts that judge juveniles who violate the criminal law, it maintains that even a perfect system of juvenile justice will do little good in a society that fails to attend to what is due to its children.

A number of reasons are advanced in favor of adopting a justice model in dealing with young people who violate the law. The main idea is that committing a crime, whether as an adult or a child, is wrong and deserves punishment. Most of us understand this; and certainly young delinquents do—except insofar as they have been told otherwise by the juvenile court.

Here is a call for an end to the practice of prescribing treatment and care for young criminals who are called sick and unaccountable for their iniquities. Here is a call for a juvenile *justice* system that puts moral and legal accountability first and all other court-related processes second. Let the juvenile courts go about whatever educative and rehabilitative business its resources permit; justice comes first. The message of the juvenile court that should be heard by the community and, most importantly, by the delinquent youth is this: "Young citizen, you must obey the law; if you violate the law, you are accountable for your deeds. You are to be blamed and punished for it; still, we will do the best we can to help you so that it does not happen again." This is certainly a far cry from saying, as has often been the case: "Young citizen, you must obey the law; but if you violate the law, we will understand that it is really not your fault. We will diminish your dignity as a person and treat you as if you are sick and disabled. Even though you believe that you have done wrong, we will tell you that this is not so. We are not punishing you, because you do not deserve punishment. We are going to submit you to a series of untested 'treatments' and programs for your own good, after which you will be well again."

Putting justice first is not to demean or diminish the role of education and rehabilitation in the juvenile court process. The truth of the matter is that the single most effective rehabilitative factor in the lives of most juvenile offenders is their being held accountable, being punished, being blamed, and being warned of the consequences of future law violations.

Putting justice first does not mean that juvenile court judges will be ignoring the individual, family, community, and other environmental factors that contribute to youthful criminality. The genius of the juvenile court has been its ability to consider these variables in tailoring dispositions for delinquent offenders. The problem has been that juvenile court judges have been hobbled by the juvenile court's theoretical framework and its taboo on punishment, accountability, and justice system for juveniles, unknown to our law," judges will be well able to formulate fair, proportionate, and responsible dispositions which will hold youths accountable for their misdeeds.

Officially recognizing justice as the legitimate end of the juvenile justice process certainly does not mean that every lollipop thief will be brought before the bar of justice; it does not mean a palpable move from "tears to teargas" in juvenile court jurisprudence. The call for justice is not a call for thumbscrews; rather, it is a call for a more certain, prompt, proportionate response to criminal misconduct. A wide degree of discretion will be allowed at the lower end of the age-seriousness spectrum because the relatively slight punishments and discomforts appropriate for venial offenses by young offenders present only slight potential of injury to the child and because society is not greatly endangered. At the upper end of the same scale, discretion must be reduced, emphasis on individual treatment and paternal care must diminish, and due process and the punitive consequences of the adult criminal justice system must be more nearly approximated.

Suggested legislative provisions to be incorporated into a justice model for juvenile courts are tentatively offered, but no claims for resulting, dramatic future reductions in juvenile crime are made; rather, it is postulated that the major causes of juvenile crime must be sought elsewhere.

Conclusions

Our system of special courts for young people should be preserved. Yet, it cannot be preserved if it remains in its present condition. Presently, the juvenile justice system is not a justice system but, rather, a