STATE of CALIFORNIA
COMMISSION ON STATE MANDATES

TEST CLAIM FORM

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

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	Fax Number	Email Address
(619) 531-5413	(619) 531-5219	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	Fax Number	Email Address
(619) 531-6259	(619) 531-6005	timothy.barry@sdcounty.ca.gov

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.

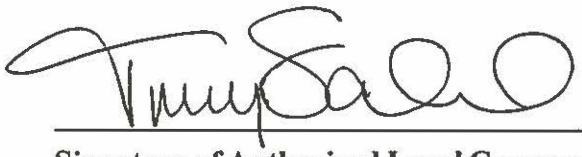
This test claim alleges the existence of a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514. I hereby declare, under penalty of perjury under the laws of the State of California, that the information in 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)

Deputy Chief Administrative Officer/
Auditor and Controller

Print or Type Title



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

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=NiIwLSIkXkw5W1AtSCJNSElIUEw0UDxTIiMuXzNRICAgCg%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:

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[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. . . .

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[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 read[10]:

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 26[11]:

(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 hearing[12] (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 records[13] (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[14] (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[15] (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[16] (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 $10,763[17] 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]

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[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 $10,763[24] 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]

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[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.

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[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		$ 3,000.00
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		None
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		None
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		None
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		None
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		$ 2,500.00
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		$ 2,000.00
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		None
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		None
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		None
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.)

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[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.

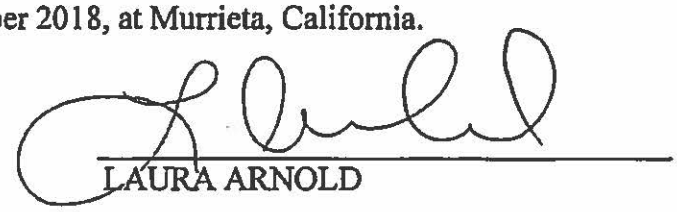
19. Out of that group, there are hundreds of defendants who were or who continue to be represented by Public Defender's throughout the state that were or who still may be convicted the offenses entitling them to a youth offender parole hearing after serving 15, 20 or 25 years of their sentence, thereby 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

INDEX TO SECTION 7 DOCUMENTATION	
STATE AND ASSEMBLY BILLS	**PAGE NO.**
SB 260 (Stats. 2013, ch. 312)	7-1
SB 261 (Stats. 2015, ch. 471)	7-8
AB 1308 (Stats. 2017, ch. 675)	7-12
SB 394 (Stats. 2017, ch. 684)	7-16
STATUTES AND RULES	
Penal Code §1203	7-23
Cal. Rules of Court, Rules 4.411-4.433	7-27
CASE LAW	
Aetna Cas. & Surety Co. v. Indus. Accident Comm'n, 30 Cal.2d 388 (1947)	7-52
Evangelatos v. Superior Court, 44 Cal. 3d 1188 (1988)	7-69
Graham v. Florida, 560 U.S. 48 (2010)	7-108
In re Anthony Maurice Cook, Jr., 7 Cal. App. 5th 393 (2017)	7-148
Matossian v. Fahmie, 101 Cal. App. 3d 128 (1980)	7-155
Miller v. Alabama, 567 U.S. 460 (2012)	7-164
People v. Caballero, 55 Cal. 4th 262 (2012)	7-199
People v. Contreras, 4 Cal. 5th 349 (2018)	7-209
People v. Franklin, 63 Cal. 4th 261 (2016)	7-258
People v. Perez, 3 Cal. App. 5th 612 (2016)	7-282
Roper v. Simmons, 543 U.S. 551 (2005)	7-289

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.

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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.

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95

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.

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96

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.

O

Cal Pen Code § 1203

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

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

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

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.

End of Document

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 required As 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 report The 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.

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) ContentsA 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.

End of Document

Cal Rules of Court, Rule 4.412

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

(a) Defendant's agreement as reason It 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 claim By 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.

End of Document

Cal Rules of Court, Rule 4.413

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 4.413. 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 Janaury 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 probationA 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 culpabilityA 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.

End of Document

Cal Rules of Court, Rule 4.414

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 4.414. 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 crime Facts 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 defendant Facts 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.

End of Document

Cal Rules of Court, Rule 4.415

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 4.415. 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 supervision Notwithstanding 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.

End of Document

Cal Rules of Court, Rule 4.420

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 4.420. 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.

End of Document

Cal Rules of Court, Rule 4.421

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 4.421. 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.

End of Document

Cal Rules of Court, Rule 4.423

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 4.423. 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 factors Any 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.

End of Document

Cal Rules of Court, Rule 4.424

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 4.424. 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.

End of Document

Cal Rules of Court, Rule 4.425

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 4.425. Factors affecting concurrent or consecutive sentences

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

(a) Facts relating to crimes Facts 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 limitations Any 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.

End of Document

Cal Rules of Court, Rule 4.426

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 4.426. Violent sex crimes

(a) Multiple violent sex crimes When 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 victims If 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 occasions If 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 crimes If 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.

End of Document

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.

End of Document

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 terms If 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 1385 If 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.

End of Document

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.

End of Document

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.

End of Document

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 anud 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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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.

"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

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 Cyclopedia 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

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

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*.

" [****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 tort feasor 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.

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.

"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]*.)

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

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

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,*

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.

End of Document

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

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

Case Summary

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 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.

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.

LexisNexis® Headnotes

Governments > Legislation > Initiative & Referendum

Governments > Legislation > Effect & Operation > Prospective Operation

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

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 retrospectively 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 Kauffmen, 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—Vaguesness.

--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-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)**

* Presiding Justice, Court of Appeal, First Appellate District, Division Four, assigned by the Acting Chairperson of the Judicial Council.

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)**

Statues § 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)**

Statues § 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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No appearance for Respondent.

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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

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* 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 Appealjudgment **[****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 (8thed. 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 lability 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 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

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[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.

[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, 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-

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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 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 that 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

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[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?

"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?"

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

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[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 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

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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*.)

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. Althoughdefendants 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* ***[*1207]*** *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 generally5 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 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

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[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 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]** 51which 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 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

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[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. (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[↑] 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)[↑] **(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)* --

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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 Proposition51 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 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]

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[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*.)

[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. Thequestion at issue in *Joseph* was whether a newly enacted comparative-negligence **[****55]** statute should be applied retroactively to a **[***646]** cause of action 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]

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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***.)

[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]** 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-*

[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.)

[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]

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[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 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

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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.)

[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]** 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]**

[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.)

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]

[**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

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[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 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.

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

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[25] In 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*.)

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, their 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]

[**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]**

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[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 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 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

[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.

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 Proposition51 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 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

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[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, 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

[3] Needless 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]**

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[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 barbeque 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***[↑] ***LEdHN[1]***[↑] [1] "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." ***HN2***[↑] ***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 **[****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;

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* 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[↑] ***LEdHN[5]***[↑] [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***[↑] ***LEdHN[6]***[↑] [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***[↑] ***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. 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***[⬆] ***LEdHN[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[⬆] ***LEdHN[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***[↑] ***LEdHN[11]***[↑] [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 "intrajurisdictional" comparison **[****74]** of the sentence at issue with those imposed on other criminals in the same jurisdiction, and an "interjurisdictional" 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*.*

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.

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* 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 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-harshest 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[ning] 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

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[1] The 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 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

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[2] Courts 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").

[3] The 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]

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]

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exceedingly unlikely that the imposition of a life-without-parole sentence on a person of Graham's age would run afoul of those standards.

[4] Although 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).

[5] Alaska 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. 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).

[7] Although 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 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 198498 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 memory[9] by the Court's calculation, spread out across 11 States. [10]*ante, at ___-___, 176 L.*

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").

[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. 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

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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.

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]

[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]**

[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 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 *AmiciCuriae* 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]

[13] It 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*.

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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 Satris, 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 Freedoms > 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 Freedoms > Freedom of Association

Constitutional Law > Bill of Rights > Fundamental Freedoms > General Overview

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > General Overview

Constitutional Law > ... > Freedom of Speech > Commercial Speech > General Overview

Constitutional Law > ... > Fundamental Freedoms > 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 Freedoms > 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 Freedoms > Freedom of Speech > General Overview

Constitutional Law > Bill of Rights > Fundamental Freedoms > 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 Freedoms > 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. *

[***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 conclusionary 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

* Some of them follow: "to add the possibility of a 'wine garden' (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 HN8[↑] 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.

End of Document

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, impetuousness, 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, impetuousness, 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[l] 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***[↑] ***LEdHN[1]***[↑] [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]** I

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[↑] ***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. 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***[↑] ***LEdHN[3]***[↑] [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 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]**

[2] For 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).

[3] The 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[↑] LEdHN[5][↑] [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[↑] LEdHN[6][↑] [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[↑] LEdHN[7][↑] [7] mandatory life-without-parole sentences for juveniles violate the *Eighth Amendment*.[4]

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").

[4] The 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.,

[*471] To start with the first set of cases: *Roper* and *Graham* establish that HN8[] LEdHN[8][] [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]** 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[] 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 " '[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 "forswears 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.*

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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.

[5] The 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 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]

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

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[6] In 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 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***[↑] ***LEdHN[12]***[↑] [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***[↑] ***LEdHN[13]***[↑] [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***[

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[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, 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

[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 "171\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.

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

[9] The 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.

[10] In 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 "t[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 t[old] us nothing about the **[**2473]** 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* (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

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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 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] 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

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§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, *§§405/5-130(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. [**2478] 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 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

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[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. Puzzanchera & B. Adams, Juvenile Arrests 2009, p. 4 (Dec. 2011).

[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 with 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 unsupportable.

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 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

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[2] Neither 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., 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 *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.

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[3] The 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).

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

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[4] In 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 casee. 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 171\2-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 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.

[2] As 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 'unjustifi[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)).

References

U.S.C.S., *Constitution, Amendment 8*

26 Moore's Federal Practice § 632.20 (Matthew Bender 3d ed.)

L Ed Digest, Criminal Law §§ 69, 79

L Ed Index, Parole, Probation, and Pardon

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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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.
[*266]

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 **[**294]** 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.*)
[*267]

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

[2] All 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 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]*.)

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[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.

[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]

[5] We 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 (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

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[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 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.

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. *HN5*[↑] 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.

HN6[↑] *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*.) ***HN7***[↑] 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 "forswears 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*].)
[*370]

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.).)
[*371]

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.
[*380]

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.
[*383]

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*.
[*385]

[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.
[*387]

"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

[2] The 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]
[*393]

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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

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

[6] The 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.

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 foreswear 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"].)
[*398]

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.*

[7] The 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 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

[8] The 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.

[9] If 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]** 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]

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[10] This 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*.)

[11] Specific 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)*).

[12] The 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.

[13] The 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.

[*404]

[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 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.

[*405]

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

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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.)

[14] Nor 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.

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 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

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[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 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 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

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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 (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 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

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[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 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, subds. (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

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* 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. **[*412]** 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 57 [2]—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 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

[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.)

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 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

[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*.

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 Stoneroad (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*

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[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.

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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)–(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)).

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[l] 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 '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." (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 (i)* 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 Alatriste*, 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.
[*289]

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 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]*.)
[*290]

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.

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[2] The 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.*)

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).

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 determinant 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 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.

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 provides 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 heavyset **[***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.

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[2] In 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*.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Constitutional Law > Bill of Rights > State Application

HN2[] Fundamental Rights, Cruel & Unusual Punishment

The *Eighth Amendment* is applicable to the states through the *Fourteenth Amendment*.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Sentencing > 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.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

Governments > Courts > Judicial Precedent

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 which punishments are so disproportionate as to be cruel and unusual.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Capital Punishment

Criminal Law & Procedure > Sentencing > Capital Punishment > General Overview

Criminal Law & Procedure > Sentencing > Capital Punishment > Cruel & Unusual Punishment

HN5[] Fundamental Rights, Cruel & Unusual Punishment

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

Criminal Law & Procedure > Sentencing > Capital Punishment > General Overview

Criminal Law & Procedure > ... > Murder > Capital Murder > Penalties

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: *LEdHN[1A]*[] [1A]*LEdHN[1B]*[] [1B]*LEdHN[1C]*[] [1C]*LEdHN[1D]*[] [1D]*LEdHN[1E]*[] [1E]*LEdHN[1F]*[] [1F]*LEdHN[1G]*[] [1G]*LEdHN[1H]*[] [1H]*LEdHN[1I]*[] [1I]*LEdHN[1J]*[] [1J]*LEdHN[1K]*[] [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:
LEdHN[2][] [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:
LEdHN[3A][] [3A]***LEdHN[3B]***[] [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:
LEdHN[4][] [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:
LEdHN[5][] [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:
LEdHN[6][] [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:
LEdHN[7][] [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 Tessmer, 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

LEdHN[2][] [2] *LEdHN[3A]*[] [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.

LEdHN[3B][] [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*.

LEdHN[1D][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*.

LEdHN[5] [5]*LEdHN[6]* [6]*LEdHN[7]* [7]*LEdHN[8]* [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 impetuousness 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").

LEdHN[1F][] [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.

LEdHN[1G][] [1G] *LEdHN[10A]*[] [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.

LEdHN[10B][] [10B] *LEdHN[11]*[] [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.

LEdHN[12][] [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 table1

[**55]**

[*580] [*30] [**1201]** II. STATES THAT RETAIN THE DEATH PENALTY, BUT SET THE MINIMUM AGE AT 18

Go to table2

[**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 table3

[*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.

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* 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 unfailing 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

[1] The 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*

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[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 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

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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.

[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' views [7] --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.*

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[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_laws.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]

[**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

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[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. 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 *un*reasonableness 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)

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	AGE	STATUTE
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. § 16-1 01 (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	AGE	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*)

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(I) (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

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)

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.

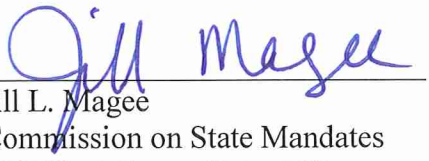
On December 10, 2018, I served the:

- **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
980 Ninth Street, Suite 300
Sacramento, CA 95814
(916) 323-3562

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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