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CALIFORNIA LEGAL HISTORY



JOURNAL OF THE
CALIFORNIA SUPREME COURT
HISTORICAL SOCIETY

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THE UCLA SCHOOL OF LAW — *Origin, Conflict, and Growth*

SELMA MOIDEL SMITH*

The eventful early history of the UCLA School of Law is the principal theme of this volume of *California Legal History*. The school's first years are of unusual historical interest — and, by reason of the available source materials, are uniquely suited to historical inquiry.¹

This volume presents a number of previously unpublished documents related to the opening of the law school in 1949 and the story of its early development. The principal figures are, on the one hand, the founding dean of the law school and, on the other, the faculty members he recruited.

His colleagues state repeatedly that the dean's model for a law school of the 1950s was the law school of prior decades in which the dean held sole authority. They contend that the dean was determined to exclude from his new law school both the content of the then-prevailing theory of legal liberalism and the accompanying model of shared law school governance. We learn that he rejected the authority of the UCLA Academic Senate and

* Editor-in-Chief, *California Legal History*.

¹ For a general account of the early history of the law school and of its initial law librarian in particular, see Renee Y. Rastorfer, "Thomas S. Dabagh and the Institutional Beginnings of the UCLA Law Library: A Cautionary Tale," *Law Library Journal* 95:3 (Summer 2003): 347–368.

of any equivalent faculty group within the law school. In his own words, the dean decried the eventual imposition of a “constitution and bylaws of the law school whereby the dean has no authority to make appointments to the faculty” nor “any say about the curriculum of the law school.”

SECTION 1: UCLA LAW HISTORICAL DOCUMENTS

We are fortunate to have the manifesto of the dissident faculty members, presented in the form of a Memorandum to the UCLA chancellor in September 1955. None but the most cloistered of legal historians could read the list of grievances and failed demands for redress — commencing with the words, “it becomes necessary to call the circumstances to the attention of the Chancellor” — without calling to mind the familiar (and more eloquent) phrase, “that they should declare the causes which impel them . . . ,” from the American Declaration of Independence. Where the signers of the Declaration pledged their lives, fortunes, and sacred honor, the dissenting faculty members risked their families’ financial security and their future academic careers.² A half-century later they were praised by former UCLA Law Dean Susan Prager, as “the courageous faculty who called for change in the governance of the school.”³

We are similarly fortunate to have the report of the committee appointed by the UCLA chancellor to investigate the faculty’s charges. The committee’s findings take the apparently unprecedented course of withholding the deference customarily accorded to deans and of overturning the established order. They reject the dean’s claim that to put matters right, “all that was needed was the assurance to him and his faculty that the Administration backed him without reservation.” They find, instead, that the dean’s conduct had led to a “loss of confidence . . . based on substantial and reasonable grounds,” that “is irretrievable, in the sense that future changes

² [Memorandum from UCLA Law Faculty to Raymond B. Allen, UCLA Chancellor (Sept. 21, 1955)] University of California, Office of the President records, circa 1885–1975. CU-5, Series 3, Box 17:22, 101 Status of L. Dale Coffman 1948–1957; photocopy available at UCLA Law Library.

³ “Professor Emeritus James D. Sumner,” *UCLA Law* 26:1 (Winter 2004): 27, available at https://law.ucla.edu/~media/Files/UCLA/Law/Component%20Data/Magazines/NEW_PUB_UCLALawMag_Winter2004.ashx.

of conduct by [the dean], which appear unlikely in any event, would not restore that harmonious faculty teamwork which is necessary to the efficient operation and future development of the Law School.”⁴

SECTION 2: UCLA LAW ORAL HISTORIES

Soon after the first dean’s replacement, the UCLA School of Law became, and remains, the youngest top-ranked law school in the country. Its early period is unique for the study of legal history because it is the only leading law school in California or the nation that is old enough to be the subject of historical inquiry well past the lifetimes of its founders — and also young enough to have captured the thoughts of its founders through the medium of oral history.

Oral history is among the most recent of the historian’s tools. As is well known, portable recording machines with long recording times become widely available only after World War II. The later emergence of portable tape recorders led to the widespread practice of oral history as a specialized calling only in the 1960s and ’70s. As is also well known, oral history has at times held a less-favored position as a tool for historical research by reason of the difficulty of verifying or correlating participants’ statements. But here, too, the UCLA School of Law enjoys a fortunate position. The law school created an oral history series on the subject of its own early history, which it conducted during the early to mid-1980s. We therefore have access to multiple accounts of events from participants of varying perspectives and loyalties, from which readers may draw their own conclusions.

Seven oral histories in the UCLA collections offer substantial recollections of the school’s early years. Not only do they discuss the crisis of the deanship, they offer a rare internal view of the professional concerns and personal lives that animate the life of a law school but are seldom visible to the students and larger community. The relevant portions of these seven

⁴ [Findings of the Committee (May 24, 1956)] University of California, Office of the President records, circa 1885–1975. CU-5, Series 3, Box 17:22, 101 Status of L. Dale Coffman 1948–1957; photocopy available at UCLA Law Library.

oral histories are published here for the first time.⁵ They include the oral histories of the following persons:

William Rosenthal, who, as a member of the California State Assembly, initiated and carried to passage the bill to create the School of Law at UCLA in 1947, and later served for many years as a judge of the Superior Court.⁶

J. A. C. “Cliff” Grant, professor of Political Science at UCLA from 1930 to 1969, who chaired the committee to select the first law school dean and also created the law library (and of whom I have kind memories as my professor during the years 1937–39, when I was a Political Science major at UCLA long before the creation of the School of Law).⁷

Edgar A. (“Ted”) Jones, Jr., a professor at the UCLA School of Law from 1951 until he retired in 1991, who was one of the eight dissident faculty members who petitioned the UCLA administration for removal of the first dean.⁸

L. Dale Coffman, who served as the first dean of the UCLA School of Law from 1949 to 1956 (having served previously as dean of the Vanderbilt University Law School) and continued as professor of law until his retirement in 1973.⁹

⁵ Oral histories (and photos, except where noted otherwise) are published by permission of the UCLA Copyright Licensing Office. Each original oral history transcript prepared by the Oral History Program of the UCLA Department of Special Collections provides detailed information about the interviewee, interviewer, and interview history. Copies are available at the UCLA Law Library and Young Research Library Special Collections. In addition to the original editing undertaken by the interviewee and interviewer, minor additional copyediting has been provided for publication. Prior, and current, edits are in the form of insertions indicated by square brackets. For reasons of space, material on topics other than the early history of the UCLA School of Law has generally been omitted from the published version, as have secondary topics and minor redundancies.

⁶ *Father of the UCLA Law School*, oral history transcript / William Rosenthal; interviewed by Bernard Galm [1985], 1986.

⁷ *Comparative Constitutional Law at UCLA*, oral history transcript / James A. C. Grant; interviewed by Steven J. Novak [1986–87], 1989.

⁸ *The Law, Arbitration, and the Media*, oral history transcript / Edgar A. Jones, Jr.; interviewed by Bernard Galm and Thomas J. Connors [1987–1989], 1990.

⁹ *“The Godfather of UCLA”: Regent Edward A. Dickson*, oral history transcript / Ann Sumner, Wilhelmina Dickson, Edward H. Dickson, Vern Knudsen, Gustave Arlt, Elmer Belt, Stafford Warren, and L. Dale Coffman; interviewed by Winston Wutkee [1970 and 1971], 1983.

Harold E. Verrall, brought by Dean Coffman from Vanderbilt to UCLA in 1949, who was one of the two faculty members who supported him against the dissident faculty members, serving until his retirement in 1970.¹⁰

Richard C. Maxwell, who served as the second dean of the UCLA School of Law from 1958 to 1969 and is credited with bringing the school to national prominence, retiring from UCLA in 1981.¹¹

Frances McGann McQuade, who commenced work at the new UCLA School of Law in 1949 as secretary to the dean and retired in 1982 as assistant dean for administration.¹²

SECTION 3: UCLA LAW PERSONAL REMINISCENCES

To complement the earlier historical materials, this section offers newly-written reminiscences of all periods of the school's history, contributed by more than a dozen distinguished emeritus faculty and alumni. Included are judges of the U.S. Court of Appeals for the Ninth Circuit and the California Court of Appeal, and current and former law school professors.

Were these papers not presented in alphabetical order, it would nonetheless be necessary to begin with the essay by Norman Abrams, which begins with his appointment to the faculty in 1959. His discussion provides the essential bridge that traces the influence of the school's early history on its continuing and present-day character — which he identifies as both democratic and collegial.

That character is further described from the faculty perspective in the essays by Michael Asimow, Paul Bergman, James E. Krier, and Daniel H. Lowenstein. The terms “civility,” “mutual supportiveness,” “collegiality,” “warm and friendly environment,” and “positive community of scholars,” are the motifs that animate their accounts of teaching at the UCLA School of Law.

¹⁰ *Fifty Years of Property Law*, oral history transcript / Harold Verrall; interviewed by Bernard Galm [1985], 1987.

¹¹ *Law School Modernizer*, oral history transcript / Richard C. Maxwell; interviewed by Thomas Bertonneau [1981], 1983.

¹² *A Career in Law School Administration*, oral history transcript / Frances McQuade; interviewed by Bernard Galm [1984 and 1985], 1986.

Substantive programs created at the school are discussed in two other faculty essays: David Binder and Paul Bergman together present the origin, aims, and achievements of their path-breaking Clinical Legal Education Program. Charlie Firestone outlines the history and accomplishments of the former Communications Law Program.

Rounding out the faculty perspective are two humorous offerings: The history of the UCLAW Musical is discussed by its creator, Kenneth Graham, who organized this annual student–faculty–staff “musical comedy parody” that ran from 1982 to 2002. His account is introduced by a brief remembrance by George Abele, a student participant in the 1988 production and current president of the California Supreme Court Historical Society. The more personal irreverence of a single professor is the subject of Paul Bergman’s “Pranks for the Memories.”

The student perspective is provided by five appellate judges whose legal careers began at UCLA: Dorothy W. Nelson and Elwood Lui each provide personal accounts of their years at UCLA Law — Nelson as one of the first women, and Lui as one of the first Asians — and the lasting effects of their experiences on their lives and careers. Alex Kozinski creates a close-up portrait of a favorite professor, and Norman Epstein and Steven Z. Perren each conduct wide-ranging tours of their memorable professors and fellow students.

A word of thanks is due to each of these professors and graduates for sharing their experiences with the readers of *California Legal History*. A special thank-you is due to Scott Dewey, formerly of the UCLA Law Library (and now research specialist at the University of Minnesota Law Library), for soliciting on behalf of the journal a number of these personal reminiscences of UCLA Law.

☆ ☆ ☆

SECTION 1
UCLA LAW HISTORICAL
DOCUMENTS

MEMORANDUM

[Presented in person to the UCLA Chancellor by the eight dissenting members of the UCLA School of Law faculty on September 21, 1955]¹

The situation of the School of Law at U.C.L.A. has deteriorated to such an extent that it becomes necessary to call the circumstances to the attention of the Chancellor. The cause of this deterioration is to be found in certain attitudes and practices of Dean Coffman and in his action and conduct in certain cases and situations. In order to acquaint the Chancellor with the facts it will be necessary to analyze these matters in detail. This Memorandum proposes to do so, avoiding personal animosity and limiting the recitals herein to factual statements and to evaluation in terms alone of the welfare of the School.

PART ONE

Understaffing of the Law School Faculty and the Reasons Therefor

The faculty is seriously understaffed. For example, the 1955 Teachers Directory shows that at Berkeley there were fifteen full time members of the law faculty plus an Assistant Dean with no teaching responsibilities,

¹ For further information, see the Editor-in-Chief's introduction on page 1 of this volume: 11 CAL. LEGAL HIST. 1 (2016). This is a verbatim transcript in all respects.



THE FOUNDING MEMBERS OF THE UCLA SCHOOL OF LAW
 FACULTY (L.-R.): HAROLD E. VERRALL, DEAN L. DALE
 COFFMAN, ROLLIN M. PERKINS, ROSCOE POUND, BRAINERD
 CURRIE, AND LIBRARIAN THOMAS S. DABAGH

Courtesy UCLA Law Library

whereas here there were but twelve, this being reduced now to eleven, one of whom teaches a reduced load because of illness. For the past two years the law faculty has been informed by the Dean that budgetary provisions have been made for additional appointments. During this time two faculty committees have made exhaustive surveys to discover persons possibly eligible and available for appointment to this law faculty. These committees have reported their extensive findings to the Dean and law faculty. Nevertheless during this period the meager record of achievement is as follows: Mr. Harold Marsh has been appointed and has resigned under circumstances set forth fully hereafter. In his stead Professor Hawkland of Temple University has been appointed to serve for one semester only.

These negative results of a two year effort to recruit full time permanent personnel raise serious questions as to where the faculty lies. Prima facia it would seem that a law school such as this one, an integral part of one of the largest and most distinguished universities in the country, would possess such a potential for development in terms of location, salary scale, physical facilities, student body, living conditions, etc., that little difficulty would be experienced in fully staffing its faculty with outstanding scholars and teachers. What, then, are the reasons for the stalemate of the past two years? The answer is to be found in certain attitudes and practices on the part of Dean Coffman and in the poor reputation which the school has developed.

Touching upon the Dean's attitudes and practices it must regretfully be noted, in the first place, that Dean Coffman's anti-Semitic prejudices make it unlikely that any person of Jewish extraction can be appointed to the faculty so long as he is Dean. This prejudice is manifested in the following statement which he has made in the presence of Professors Jones, Chadbourn, Verral[l] and others: "The first one hundred members of my faculty will be non-Jewish." In addition, Professor Perkins informed Professor Rice in the presence of Dean Coffman and with Coffman's tacit approval: "The one hundredth man we hire here will be a Jew." Dean Coffman's attitude is manifested also in his files of correspondence respecting appointments to the faculty. In October, 1953, Professor Chadbourn, as chairman of the faculty committee on additions to the faculty, requested of the Dean and was granted permission to study these files. In the file entitled "Applications and Invitations" Professor Chadbourn discovered the following items indicative of the relevance in Dean Coffman's mind of racial considerations:

1. Copy of a letter from Dean Coffman to Professor Warren A. Seavey of Harvard. The letter is dated January 3, 1951, and makes inquiry respecting the qualifications for memberships on this faculty of two Harvard Law School men. In the letter Dean Coffman questions Professor Seavey in the following terms: "Do you know if either of those men is a member of the chosen race?"

2. Copy of a letter from Dean Coffman to Mr. Philip J. Hennessey, 816 Connecticut Avenue, Washington, D.C. The letter is dated March 19, 1951, and makes inquiry respecting the qualifications for membership on this faculty of a certain Mr. Warner. In the letter Dean Coffman questions Mr.

Hennessey in the following terms: "Do you know whether his name has always been Warner, or can you tell me anything about his racial background?"

3. The curriculum vitae of a foreign scholar. On the first page on this document, written in large letters in red pencil in Dean Coffman's hand, is the word "JEWISH."

4. The application of a Mr. Feinstein. Attached to the application is a notation in pencil in Dean Coffman's hand which states as follows: "Not much personality. He is very Jewish looking and acting. LDC."

No effort is made here to maintain that any of these men was on his whole record qualified for membership on the faculty. However, racial background should not in itself disqualify any person from membership on this faculty. There are many distinguished Jewish law teachers who should be regarded as eligible, and excluding them from consideration can only militate against the welfare of the school.

In the second place, Dean Coffman has set up and applied an exclusionary formula which he refuses to define or explain, the exact scope of which cannot therefore be stated. This formula he states in words to the following effect: "I will have no left winger on my faculty." At the faculty meeting of April 6, 1955, Dean Coffman made a statement to this effect. Professor Chadbourn thereupon asked him what he meant by "left winger." Dean Coffman refused to state. Then Professor Chadbourn asked in substance as follows: "Suppose the majority of the faculty were in favor of a man but you considered this man to be a 'left winger,' would you refuse solely on this ground to recommend him for appointment?" Dean Coffman replied that he would so refuse. (Professors Chadbourn and Rice then requested that the minutes of the meeting should set forth this colloquy verbatim. Subsequently the minutes of the meeting, prepared by Assistant Dean Verrall, omitted all reference to "left winger.") At this same meeting and after several members of the faculty had spoken in favor of Professor Richard Donnelly of Yale, Dean Coffman applied his exclusionary formula, branding Donnelly a person with "left wing tendencies" and therefore unacceptable to him. Professor Rice then inquired what evidence the Dean had that Connelly was a "left winger." Coffman replied that Donnelly was interested in civil liberties and his name had appeared on a brief for the American Civil Liberties Union. Professor Rice then inquired whether this disqualified a man automatically. Coffman replied that, though there was

FINDINGS

*[Report of the Chancellor's Committee on the UCLA School of Law controversy]*¹

May 24, 1956

Chancellor Raymond B. Allen

Campus

Dear Chancellor Allen:

The committee you appointed April 9, 1956, to investigate the controversy between Dean L. Dale Coffman and certain members of the School of Law faculty submits the following report and findings.

We have individually and collectively analyzed the documents you submitted to us, including copies of (1) the memoranda of allegations submitted to you by the eight dissenting members of the Law faculty; (2) Dean Coffman's rebuttal or explanation of the allegations in these memoranda, with supporting statements or letters from Professor Rollin M. Perkins, Professor Harold E. Verrall and Dean Roscoe Pound; (3) written statements voluntarily submitted by witnesses who appeared before the committee; (4) letters to Chancellor Allen or to the chairman of the committee regarding the reputation and character of Dean Coffman and Professor

¹ For further information, see the Editor-in-Chief's introduction on page 1 of this volume: 11 CAL. LEGAL HIST. 1 (2016). This is a verbatim transcript in all respects.

James H. Chadbourn, and also regarding the reputation of the School of Law; (5) excerpts from confidential letters to Chancellor Allen in reply to inquiries he had addressed to administrative heads and professors of law schools throughout the country, who knew one or more of the principals in the controversy or who were aware of the controversy — these letters were from two chancellors, nine deans, and seventeen professors from leading universities across the country. These and other relevant documents (originals or copies) are submitted as Exhibits one to eleven to this report.

For our analyses of the documents of items (1) and (2) referred to in the preceding paragraph, we have arranged the allegations and their rebuttals in juxtaposition on large sheets of paper. The allegations of the eight complaining faculty members are on the left side of each sheet; the rebuttals of Dean Coffman are in the middle; and the statements from Dean Pound, Professor Verrall, Professor Perkins, and others are on the right. These allegations or issues and their rebuttals, indexed for convenient reference, are submitted as Exhibit 1.

The allegations and rebuttals concerning anti-Semitism and “left wingers” speak for themselves as presented in Exhibit 1, and, as background information that undoubtedly contributed to the controversy, we carefully examined the documents in Exhibit 1; we were unable to obtain from the witnesses we interviewed any additional relevant evidence on these two issues. After we had heard and analyzed the testimony of witnesses we found that, although these two issues, and also several other issues or allegations, were significant in contributing to the schism, the fundamental issue or question was, has the Dean lost the confidence of his faculty, and, if he has, can he regain and maintain that confidence?

From the beginning of our investigation of the schism we have endeavored to find some promising meeting ground on which we could help you and the disputants mend the schism between the faculty and the dean. We regret that we have not found this promising meeting ground. We hope that the evidence we have obtained from the interviews and the findings we have made will help you and President Sproul make such decisions as will best serve the welfare of the School of Law and the University. We shall be pleased to confer with you and the President, if you so desire, to further clarify or amplify this report.

Summary of interviews. The committee conducted interviews with the following persons, in the order in which their names appear: J. H. Chadbourne

[sic], R. S. Rice, L. Dale Coffman, Arvo Van Alstyne, K. H. York, J. D. Sumner, R. C. Maxwell, E. A. Jones, A. H. McCoid, H. F. Verrall, R. M. Perkins, Justin Miller, Judge W. C. Mathes, M. Philip Davis, Paul Hutchi[n]son, Judge Frederick Houser, Frank Balthis, and John Canaday. Messrs. Chadbourne [sic] and Rice were interviewed together and the five past presidents of the Alumni Association came, at their own request, as a group. All others were interviewed singly. Each interview took from one to three hours.

Following is a brief summary of each of the interviews, along with an attempt to analyze the general impression which each of the witnesses made on the committee.

J. H. CHADBOURNE [sic]. The witness amplified many of the charges contained in the September memorandum. He stated that no modification of the present method of administration of the Law School would be of any avail. "It is not a question of management, not a system, but a person." He stressed the "lack of leadership," "abuse of power," "imperious attitude" of the Dean. He stated that he would be forced to resign if the Dean remains. Not only by his statements but by his manner and his tone, the witness made it quite clear that he is committed to a course of action which would preclude any reconciliation. He stated that the return of the Law School to the Academic Senate was not an issue in the controversy.

R. S. RICE. This witness generally corroborated Chadbourne's [sic] statements and cited the fact that of the thirteen men whom the Dean had appointed over a six year period, three had left under circumstances that indicated their dissatisfaction and eight are now desirous of leaving. In reply to a direct question he said that he would certainly look for another position at once if the Dean remained. He agreed with Chadbourne [sic] on the issue of the Academic Senate. (See Exhibit 5.)

L. DALE COFFMAN. The witness took the position that the situation in the Law School had been brought about by the machinations of Chadbourne [sic] with the possibility of instigation and connivance of unnamed persons outside the Law faculty. Upon further questioning along this line he produced no evidence of outside interference. He minimized the involvement of all members of the faculty with the exception of Chadbourne [sic] and Rice, and was very positive that no one would resign. Upon being asked what remedies he would suggest for the situation, he said emphatically that all that

SECTION 2
UCLA LAW
ORAL HISTORIES

From the Oral History of
WILLIAM H. ROSENTHAL

As a member of the California State Assembly, William H. Rosenthal (1907–1991) initiated and carried to passage the bill to create the UCLA School of Law in 1947. He later served for many years as a judge of the Superior Court.¹

★ ★ ★

BERNARD GALM (UCLA ORAL HISTORY INTERVIEWER): Judge Rosenthal, we're really going to be speaking about the legislation that you introduced to establish the law school at UCLA, but I would like to begin by asking you to state how you arrived in the California Legislature in the first place. What was your background prior to becoming an assemblyman?



WILLIAM H. ROSENTHAL
*Courtesy California State Library,
 Sacramento, California*

¹ For further information, see the Editor-in-Chief's introduction on page 1 of this volume: 11 CAL. LEGAL HIST. 1 (2016).

ROSENTHAL: I was working for the city attorney's office in Los Angeles under Ray Chesebro, the city attorney at that time. I was appointed to that job in 1937. Prior to that I had been working as a practicing lawyer for three or four years. I was appointed at that time to become a trial lawyer, and I was earning the munificent sum of \$105 a month, which was a lot of money at the time. I worked from 1937 in the city attorney's office until 1942, when I decided to run for the vacancy of the State Assembly in my district, referred to as the Fortieth Assembly District, a district in which my brother, Judge Ben Rosenthal, left to be appointed by Governor [Culbert] Olson to the Municipal Court. With that vacancy I kind of decided that I should run for the Assembly, since I was somewhat politically inclined. Politics runs in our family. Both my brothers were in politics. And so I decided to run for the vacancy, which I did. After a very difficult contest I finally won by approximately six hundred votes. I started serving in 1943 at Sacramento.

The first term while I was there I was just a novice and naturally had to learn how to get around. I introduced many pieces of legislation but nothing of any particular note. The second term around I had no opposition at the polls, and I had no opposition for the next five terms, so that I was reelected without opposition, which was very helpful.

In 1945 I introduced a bill on behalf of the UCLA law school because I felt the need for boys and girls who didn't have enough money to go to 'SC [University of Southern California] or some of the other colleges at the time, as Stanford or even up to Boalt Hall [University of California, Berkeley], couldn't drive that far. So I decided it was time to have a law school in Los Angeles County near the major part of the population. I introduced it in 1945, and again being a novice, I didn't know just how difficult it would be. I didn't realize that California was the place where the law schools were maintained. California at Berkeley had all the money and dispersed it in their own way. I didn't realize, of course, that I was bucking a large organization. The bill died in committee. And again, I didn't know why, but I was young and a novice.

GALM: Now, when would you have introduced that bill? In '45?

ROSENTHAL: In 1945. I would say in January, probably, yes.

GALM: And then to what committee would that have been submitted?

ROSENTHAL: To the education committee [Committee on Education].

GALM: I see. Let me ask just one other question: What comprised your district that you represented?

ROSENTHAL: It was the Eastside, commonly referred to as Boyle Heights area, East Los Angeles. A poor district, composed of primarily Jewish people, Mexican people, Negroes, and many, many Asiatics. It was a conglomerate of different ethnic groups.

GALM: And how long had your brother served as assemblyman from that district?

ROSENTHAL: My brother Ben had served there for three terms.

GALM: So, the Rosenthal name was pretty established there?

ROSENTHAL: It was pretty much established, I would think. Nonetheless, I had a very difficult battle the first time, because I ran against the incumbent newspaperman who had access to the newspaper every day, and of course I had nothing.

GALM: Is this a Boyle Heights newspaper?

ROSENTHAL: I think it was called *Eastside Sun* if I remember correctly.

GALM: Who was he?

ROSENTHAL: He was Al Waxman. And incidentally, his nephew is now a congressman from the Fairfax area.

GALM: Henry Waxman?

ROSENTHAL: Henry Waxman. A very interesting observation. But nonetheless, I did win. I then ran as a member of the city attorney's office where I had served for three years or four years. In those days we didn't spend much money like we do today. I think the most I probably spent was \$250, only because that's all I could get — some loaned to me by my brothers, some loaned to me by friends, and very little that you could raise. There wasn't that much interest in politics. I would estimate I spent probably about \$250 in the whole campaign.

Then, as I say, I introduced the bill, and when I lost it in 1945, I re-introduced it in 1947. I introduced it as Assembly Bill No. 1361, introduced [in] the California Legislature, Fifty-Seventh (General) Session. It was numbered 1361. It was introduced by myself as the main author. Assemblyman Vincent Thomas; Vernon Kilpatrick; Glenn Anderson, who is now the congressman from that area and former lieutenant governor and, of course,

From the Oral History of
J. A. C. GRANT

J. A. C. “CLIFF” GRANT (1902–1995), professor of Political Science at UCLA from 1930 to 1969, chaired the committee to select the first law school dean and also created the law library. He served as chairman of the Department of Political Science, dean of the Division of Social Sciences, and head of the UCLA Academic Senate.¹

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STEVEN J. NOVAK (UCLA ORAL HISTORY INTERVIEWER): The genesis of your [oral history] interviews, you might say, was the remark that you’d played a big role in the starting of the UCLA law school and the search for its first dean. So if you’re ready, let’s talk about that.



J. A. C. GRANT

¹ For further information, see the Editor-in-Chief’s introduction on page 1 of this volume: 11 CAL. LEGAL HIST. 1 (2016).

GRANT: Okay.

NOVAK: I guess in 1947 you were made the chairman of a committee that was made up of Berkeley people and UCLA people, and you just sat down and started talking about what should a law school be. How did that come about? What did you decide?

GRANT: Well, as the University of California started, as the UCLA branch of it started growing, we said, "It's got to get out into some of the specialty colleges." And the administration decided, well, one of the most valuable to have and also one of the cheapest to have was the law school. Some specialty schools run into millions just to get some equipment for them, but a law school's a rather inexpensive enterprise. That's one of the misfortunes of it. That's why we have so many of these jerkwater private law schools around the country trying to make money on the deal, and it's messed up the whole legal profession and the whole educational scheme in law schools.

I know one of them in Los Angeles — I had given away most of my valuable law books. Because, see, when I went to UCLA, they didn't have a law library, and it was too far downtown, the L.A. County [Law] Library, to go all the time, so I gradually over the years built up quite a law library of my own. I had several hundred volumes. A few hundred of them I still have, as a matter of fact. But I gave the ones that were of most value to the new law schools that were developing, including UCLA, and some to the county law library. And then I ended up with a lot of stuff that they didn't need, but it was good basic material, and I offered it to one of the local private law schools. And you know the reply? "We can't afford a library." They were teaching law, and they were accredited to the extent that after four years of study instead of three, you could take the bar exam and if you passed it you could get to be a lawyer, but they couldn't even afford a law library. Well, that's sad.

So we said, "We're going to have a law school on this campus. It's just as important as having an engineering school." So having been chewing the fat on that for years, knowing it was inevitable, finally the Legislature passed a statute that made a grant of I think it was \$1 million — I got it later increased to \$1.5 million — for a building to start a law school. And a funny thing happened at that time. Hastings College of the Law, the so-called law department of the University of California in San Francisco — which

had been founded on the basis of a will by the first chief justice, [Serranus C.] Hastings, in which he gave \$100,000 to the state — said, “If you accept it, you’ve got to guarantee 6 percent interest per year on it forever, and that will be to support the Hastings College of the Law, which shall be the law department of the University of California.” And so for years, all Hastings got was \$6,000. It stayed over in San Francisco. Berkeley decided they wanted a law school. They said, “We can’t have one by that name because of the law department of the university over there across the bay, so we will start a school of jurisprudence.” So the Berkeley school was called the School of Jurisprudence, but everybody knew it was a straight law school, handled in the normal way. The other one [Hastings] worked with this \$6,000, and then it fell into the habit of hiring a lot of retiring professors from law schools, famous men who still wanted to teach, and so they brought them in at a fixed salary. They could give them a pretty good salary because they had no research funds, no travel funds, no pension system, none of the fringes that accompany normal university tenure positions that add up the price, just as the price of labor is not the hourly wage but its — you add on all the fringes, and they double that. So the Legislature, at the time they gave us money for a law building, gave Hastings money for a law building. Now, that’s the first time that Hastings started getting on the gravy train. Later, when I was on the University of California president’s staff and working with all the developing graduate programs and so forth, they came in and wanted some money for an assistant professor, and we gave them one. That’s the first time they started getting in on the gravy train of hiring university faculty and becoming really a part of the university. They had their own self-governing board of trustees. On occasion they preempt somebody off our regular university Board of Regents [laughter] and put them on the Hastings board, so that we started growing a little closer. And by the time we started giving them money, they were really regarded as a part of us. It was also becoming a very good law school.

Now, we established this committee. The committee had the task of planning. We had to plan for a building, we had to buy a library. My principal task was to buy the library. I had an idea that a library for this kind of a law school should be a research library, and they gave me \$60,000 to buy the basic books for it. We set up a committee, and it was — the consultant was the law librarian at Berkeley. I forget his name. Tom [Thomas S.]

Dabagh had resigned, was now with the Los Angeles County Law Library. I believe his name was [Eldred R.] Smith. Very nice chap. He was our adviser, but he never bothered giving any advice. He said, “Go ahead and run it, Cliff,” so [laughter] I ran it. I had such good luck with that \$60,000. I couldn’t do it now; you can see what’s happened to law book prices. One book, Thayer’s *Preliminary Treatise on Evidence [and the Common Law (1898)]*, which I think I bought for about a couple of dollars, now costs you sixty, seventy-five bucks. Very different world. But I had such good luck, having spent that \$60,000 — .

By the way, before I finished spending it all, we had picked the new dean and he was here, but he still didn’t give me a damn instant’s help in doing that work. I had to continue buying the law library. In fact, I took a leave of absence to get out from under it, but I stayed in town doing some writing, and I might just as well have not taken a leave, because the library kept calling me up all the time. One day the girl doing the actual ordering called up and said, “I want some help. I’ve got a lot of new offers here, and I want you to look them over and see if we should buy any of them.” I said, “Well, look, we’ve got a dean. Have him do it. I’m out of this business.” And the reply was, “The total help that Dean [L. Dale] Coffman has given to us in the library was to write us a note and say would we please buy him a Martindale-Hubbell. You may recall that I called you up and asked, ‘What in heaven is a Martindale-Hubbell?’ You told me it’s a law directory. And so we bought him a Martindale-Hubbell.” That’s all the help we had gotten out of him. So she said, “Please come over and help me.” So I did.

Well, I had such good luck with the \$60,000 that I went back to the administration and said, “I wish you would give me another \$50,000.” Or was it \$40,000? “Because I have found so many good buys, and the market is just ripe for the pickings.” And I added that I didn’t want to fool anyone. “I’ve already got a better law library than they’ve got at most of” — what we call now the Pac-10. I forgot what we called it then, Pacific Coast Conference or something or other — “a better library than Oregon, Washington, and so forth. Right now we can open, no problem. But there are so many good books out there at such a good price that this is the year to buy them.” I said, “If you’ll give me \$50,000, I’ll cut my request for next year by \$40,000.” They gave me the \$50,000 and didn’t cut my \$40,000. [laughter] I don’t know why, whether it was a mistake or what. So we got going with a

From the Oral History of
EDGAR A. JONES, JR.

EDGAR A. (“TED”) JONES, JR. (1921–2013), professor at the UCLA School of Law from 1951 until he retired in 1991, was one of the eight dissident faculty members who petitioned the UCLA administration for removal of the first dean. He later served as assistant dean of the law school and as president of the National Academy of Arbitrators.¹

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EDGAR A. JONES, JR.

BERNARD GALM (UCLA ORAL HISTORY INTERVIEWER): Professor Jones, you were talking about the meeting of the Association of American Law Schools that you attended in Chicago [in December 1950], and this is where the position at UCLA was —

¹ For further information, see the Editor-in-Chief’s introduction on page 1 of this volume: 11 CAL. LEGAL HIST. 1 (2016).

JONES: Came in view. The meeting was from something like Wednesday through Saturday morning. By Saturday morning I had gone up to the suite of the dean of the University of North Dakota at 2:00 A.M. in the morning. There I met Richard C. Maxwell, who had spent his first year in law teaching at the University of North Dakota. That was [when] I first met Dick Maxwell. The dean — I can't spell it for you, but his name was [Olaf H.] Thormodsgard. I take that to be Norwegian, not Swedish. But in any event, it became very obvious that the people looking for employment were the top law review types, and they were swarming around Dean Thormodsgard, too, to Dick Maxwell's great amusement, because he had spent one year there and he had a very warm affectionate feeling for the dean, but he didn't have warm affectionate recollections of weather at North Dakota.

GALM: Was he just present in the room? Was he part of — ?

JONES: No, he came up there just to say, "Hello, this is my mentor," and so on. That was how I met him. We chatted, as a matter of fact, at some length even, but that was that.

Periodically I would see [University of Chicago School of Law Dean Albert J.] Harno in the hall or something, and he'd say, puff, puff, puff — I was looking pretty dim right now — "Wait and see. Wait and see." So Saturday morning the thing was over by noon. About nine o'clock in the morning I was standing up — they had a main ballroom. Leading down to it were some stairs and an intermediate landing area, and [UCLA School of Law Dean L. Dale] Coffman was standing there by himself watching the thing. And over on the side as I came into the area were Dean Harno and Dean [Alfred] Gausewitz [of New Mexico]. So I went over there and they greeted me, "How's it going?" — very paternal about it. Harno says, "We've got to get a job for this young man and that marvelous family." I said nothing. He said, "Have you talked to Coffman yet?" — pointed at him with his pipe. I said, "No, I haven't had a chance to get near him." Harno looked at me with this sort of quizzical little grin. He says, "There he is."

So I went over to Coffman and I said, "Dean Coffman — ." And he turned around, sort of down his nose at me, as well he might. He had been pestered by dozens and dozens of these young guys. He said, "Yes?" I didn't tell you this: After the communists took over in China, Roscoe Pound left China, of course, and came to UCLA. Coffman offered him a job here.

He was about eighty-three, eighty-two or eighty-three years old, but he joined the faculty here. I knew this. I was aware of this. So I said to Coffman, “How is Dean Pound?” Now he turned around more and he said, “Do you know Dean Pound?” The ball came right across the plate! I [replied], “I don’t know him personally except I have corresponded with him from China and I have a handwritten manuscript that he sent me at my request.” Lock-in — lock-in conversation. [laughter]

Now, this is just at the end of the whole meeting there. We talked no more than fifteen or twenty minutes more. He went back out here. They were in a temporary structure over behind Royce Hall, an area where the parking structure is now I think. It was a wooden building, the type that the Army was building out in California during the war. It had an aisle going down the middle and offices off on each side. He went down to Pound’s office. As was recounted to me later, he said, “Do you know a young man named Edgar Jones?” “Oh, sound fellow, sound fellow.” [laughter]. That was the dialogue!

I got an offer to come out here. They were looking for somebody. Basically it was L. Dale Coffman who did these things. He was looking for a young law professor that would come out and sort of start things here. He wanted a moot court and he wanted things done. So this newspaper venture sounded more interesting to him than if I had been the editor of a law review. Plus Harno. I had referred to Harno, and I think even there — although I left the area there around ten o’clock that morning, I think that Harno and he talked after I had gotten off the scene. But in any event, there came a telephone call back to Virginia to Charlie Gregory from Coffman, who wanted to know about me, and Charlie told him about me.

GALM: Had you given Gregory as a reference?

JONES: Oh, yeah. He was —

GALM: Rather than the dean? Or did he talk with the dean, too?

JONES: I stayed an extra year. This was during that extra year. I had graduated. I neglected to say that. I had graduated, but I stayed an extra year to work with Gregory in labor law. I went around with him to arbitration hearings that he conducted. I drove him, as a matter of fact. He didn’t like driving, so I made a deal with him. I’d drive if he’d take me. He was the one that got me interested in law teaching. So he gave me a very high

recommendation, and then I ended up getting the offer to come out here. This was how it happened.

GALM: What was your initial impression of Coffman at that meeting?

JONES: Very favorable, very favorable. He was a very genial, friendly person. He was stilted. He had this way of talking with a sort of an exaggerated voice. But he was a genuinely very charming man. I liked him. I never ceased to like him, actually. I came to understand that he had some very serious problems which really meant that he couldn't function as the dean of this law school. But I never ceased to think he was a very charming person. I have to say, when I say that, he was charming to those whom he liked. He was not charming, you know, to those whom he didn't like, whom he thought for any reason were people that were any of the catalog of negative adjectives. And he was very much a product of that era of intense fear of communism. The fact that I was a practicing Catholic was a number one asset on the pro side. There were many, many university contexts in which that would have been a negative that I would have had to have overcome. I don't know how many, outside of those universities that were Catholic in their structure, in which I have never had any interest in being present —

GALM: So as a Catholic, he saw you as a staunch anti-communist?

JONES: Yeah, without question. That was to him an important thing. He had already become embroiled here with Brainerd Currie. I've got to find the correspondence on that. I know I rooted around and found it. I told you about it. I did dig it out when I was talking with Ken [Kenneth] Graham's class. But Brainerd Currie had — this is probably what we should do next time just as a preface, as it were, an epilogue preface. He had really thought through the business of the oath within the university. And he wrote a superb set of memoranda, just totally persuasive and right on target. He was certainly not in any way a communist dupe or anything along that line. He was a constitutional law scholar. That wasn't his specialty. I say he was a constitutional law scholar who profoundly understood what was at issue. And Dale Coffman didn't. He just didn't. He had the most simplistic ideas about communism and the threat of communism to the United States and to the university, to the faculty of the law school. It was really a form of paranoia which a lot of people had at that time, though. He was not alone. He had the chairman of the Board of Regents, Mr. Dickson — What was his name?

From the Oral History of
L. DALE COFFMAN

L DALE COFFMAN (1905–1977) served as the first dean of the UCLA School of Law from 1949 to 1956, having served previously as dean of the Vanderbilt University Law School for three years. He continued as professor of law at UCLA until his retirement in 1973.¹

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WINSTON WUTKEE (UCLA ORAL HISTORY INTERVIEWER): When did you first meet [Board of Regents Chair Edward] Dickson or hear of him?

COFFMAN: I met Mr. Dickson before I came out here. It was before Christmas of 1948, when I was invited out here. As a matter of fact, I got a call from — who was the provost at that time?



L. DALE COFFMAN

¹ For further information, see the Editor-in-Chief's introduction on page 1 of this volume: 11 CAL. LEGAL HIST. 1 (2016).

WUTKEE: [Clarence] Dykstra.

COFFMAN: Dykstra — a telegram from him asking me to come out. I had just started a school there at Vanderbilt. It had been for all practical purposes closed during the last two years of the war, and so I really had to build it almost from the ground floor up. I knew they were building a new school here, and I thought that Dykstra wanted to talk to me about some of the problems of building a new school. I didn't have any idea really that I was being considered as dean.

Dykstra had a cocktail party for me and Mrs. Coffman, and during the afternoon I met Dickson there. Dickson was the first one who said anything about my coming here. He wanted me to come. He said, "I want to be sure that you come." Dykstra hadn't said anything to me about coming yet, and Dickson had remarked that the campus had had a bad reputation for too many — well, Dickson said — "Reds" on the campus, and he said he didn't want anybody like that.

I said, "Well, a lot of things can be said against me, but that's not one of them." Then Dykstra that evening did make an offer, and I went back to Nashville, Tennessee, and wrote him and turned it down. I didn't think it was enough to make a change.

So then I went on to the Association of American Law Schools' meeting. I think it was in Cincinnati that year. While there I got a telegram from Dykstra increasing the offer, asking me to come and asked me to call him. So I talked it over with Mrs. Coffman, and I called him and told him I would come. (So I turned it down once.)

WUTKEE: Did Mr. Dickson phone you after you turned it down or contact you at all by letter or any other communication?

COFFMAN: No, he was working through Dykstra. I know it was Dickson then who got the increase and, as a matter of fact, increased all the salaries up and down the Pacific Coast.

WUTKEE: The first meeting that you met Mr. Dickson, how did you size him up?

COFFMAN: Oh, I liked him from the start very much. He was my friend on this campus. He called me regularly about university business and asked me to call him. I told him one time that I understood there were

rules about any member of the faculty calling a member of the regents. He says, “With you, pay no attention to that. If you have something on your mind, I want to hear it.” So he called me regularly and insisted that I call him on any problem that I had.

After I was here a short time, I found out about this Academic Senate control of the university. I didn’t have any such business as that with Vanderbilt, and I’d had associations with three other universities: the University of Iowa, the University of Nebraska, and Harvard (Iowa and Harvard as a student, Nebraska as a member of the faculty). There was no such control in any of those schools. And as a matter of fact, I told Ed Dickson that if this was continued with reference to the law school, he’d better think about getting himself another boy.

WUTKEE: Then what did he say immediately on that?

COFFMAN: Immediately on that, he, working through other regents, eliminated that control of the law school. [UC President Robert Gordon] Sproul didn’t like it, I know, but after all, the regents did do it, and so I was not subject to Academic Senate control.

WUTKEE: Had you known of Mr. Dickson’s prior career in California at all? Had anyone briefed you prior to your meeting him?

COFFMAN: Not in any detail, no. I knew he had been in the newspaper business and he was the owner–publisher of the newspaper, which he later sold to Hearst. And incidentally, John Francis Neylan was personal counsel to William Randolph Hearst. John Francis Neylan was the best man when Ed Dickson and Wilhelmina got married. So their friendship goes way back. I got to know Ed Dickson and Neylan both very well during the so-called oath controversy here on the campus. I stated publicly that I’m not a Communist, I never have been, I never expect to be, and I don’t see wherein it interferes with my academic freedom to say so.

WUTKEE: Did you and Mr. Dickson have talks over that issue?

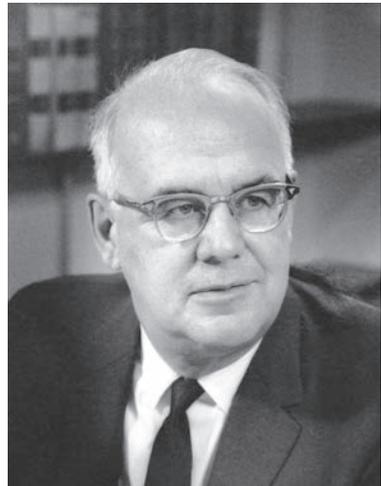
COFFMAN: Oh, indeed so.

WUTKEE: Can you relate Mr. Dickson’s feelings on this?

COFFMAN: Oh, Mr. Dickson, of course; was — let’s not — have you got that thing going?

From the Oral History of
HAROLD E. VERRALL

Harold E. Verrall (1902–1995) was brought to the UCLA School of Law from Vanderbilt University Law School by Dean L. Dale Coffman in 1949. As assistant dean, he was one of the two faculty members who supported Dean Coffman against dissident faculty members. He remained at UCLA as professor of law until his retirement in 1970 and continued as professor at UC Hastings College of the Law until 1979.¹



HAROLD E. VERRALL

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BERNARD GALM (UCLA ORAL HISTORY INTERVIEWER): [Before Dean Coffman came to UCLA in 1949], what were his major accomplishments [as dean of the law school at Vanderbilt]? Expansion of the library, expansion of the faculty — ?

¹ For further information, see the Editor-in-Chief's introduction on page 1 of this volume: 11 CAL. LEGAL HIST. 1 (2016).

VERRALL: And he had to supervise the construction of classrooms, which were far different from those of the university because the classes would be larger. So we had to have the classrooms with built-up benches and seating so that all the students could see the instructor at the podium.

GALM: Later on, when we talk about the building at UCLA and so forth, I'll ask you, or you can volunteer, for comparisons between Vanderbilt, ideas which he may have already begun at Vanderbilt, or introduced at Vanderbilt, that he later reintroduced at UCLA.

VERRALL: Well, I would say that probably his policies were very much the same, except on a magnified scale. In other words, the building we got built here was probably three times the capacity of the Vanderbilt building that we had left. Oh, maybe even more than three times, four times. But they figured the school here would be a school of 1,000 to 1,500 students, so we'd need that space.

GALM: Did you teach, more or less, the same courses that you taught before the war — Property courses?

VERRALL: That was the dean's policy. He wanted somebody who had had years of experience in teaching in the Property field, years of teaching in the Criminal Law field, years of teaching in the Procedural Law field, years of teaching in the Torts field, not quite as much, but that was the field he was going to take over himself.

GALM: I know that in the early years at UCLA he had weekly luncheon meetings with the faculty. Was that also a feature at Vanderbilt?

VERRALL: At Vanderbilt we had, oh, I would say, more daily luncheon meetings, with a faculty meeting about every two or three or four weeks. At luncheon we'd have our faculty meetings. At UCLA we also had the daily luncheons for years and years. For the first ten years of the school a group of the faculty, and indeed practically all of the faculty, would go out to lunch. No, it was about the same.

GALM: Was there any interaction with other departments or schools at Vanderbilt?

VERRALL: Really, the answer should be no. We knew many of the other department heads and the faculty, and we maintained social contacts. But

from the point of view of university functioning, no, Vanderbilt was run in a little different way, I would say each department almost separate from the other.

GALM: Did Dean Coffman have an assistant dean at Vanderbilt?

VERRALL: Well, a member of the faculty would assist on admissions. I was the goat most of the time. The school wasn't big enough to require a full-time assistant dean.

GALM: Do you recall what your first impressions were of Dean Coffman?

VERRALL: Well, I noticed the first thing he did was to fill up his pipe, and light it without saying very much, and then smoke. So I assumed he was doing that for the purpose of attracting attention to himself. He was a person who wanted to be front and center all the time, ever since I knew him.

GALM: Had you known him before he came to Vanderbilt?

VERRALL: No, I only knew him over the telephone before he came to Vanderbilt. And that was during the six months before I returned, before I left the government service and came back into teaching.

GALM: Did you socialize much with him at Vanderbilt? I mean, separate from the entire law faculty.

VERRALL: Yes. [Rollin M.] Perkins and Coffman and myself, we got together, oh, probably once a week.

GALM: Dean Coffman then was appointed here at UCLA in 1949.

VERRALL: Yes.

GALM: Before he left had he discussed with you the possibility of your coming?

VERRALL: Oh yes.

GALM: Had he discussed it at all before he accepted the deanship?

VERRALL: Yes. He had talked to both Rollin Perkins and myself. Well, I don't know just when it was, at one of our social meetings. We always talked a little bit of business as we socialized.

GALM: When did you say yes?

VERRALL: I told him that I'd like to come to California the very first time he broached the subject. So he knew it was yes all the way from my point of view. The only question would be what the university would say. They have certain procedures and they have certain likes and dislikes, like all people do. So I didn't say yes to UCLA until I got a formal invitation.

GALM: Had you ever been to the West Coast by that time?

VERRALL: Oh yes. In the middle thirties, during the Depression, I had driven out to Washington and then down from Washington to Los Angeles, all down the coast. So I'd been familiar with the California weather, California people.

GALM: Was that a family trip that you made?

VERRALL: No, just myself and my wife. We wanted to see what the West was like. We both liked it.

GALM: What did you see as being the advantages for you in the move? You were a full professor at Vanderbilt.

VERRALL: Well, the advantages would be great because the University of California never did things in a little way. So we figured from the very beginning they were going to build a good-sized law school that would have a national reputation. And, you see, Boalt Hall [University of California, Berkeley] was known throughout the whole of the United States as one of the leading law schools of the nation. And we figured that UCLA would be the same, become one of the leaders. No, we were very happy, both Perkins and myself.

GALM: When you arrived, what was the state of affairs as far as the law school was concerned?

VERRALL: They had an old military barracks that they had put some partitions in for [counts] one, two, three, four about six rooms in it. Perkins took one; I took the one next to it. Dean [Roscoe] Pound across the hall from Perkins, and Brainerd Currie across the hall from where I was. The other two little rooms were the dean's office, the office of the dean, and the secretarial office.

We were in that barracks, and then they had another barracks they were building into a law school library. The librarian, Tom [Thomas S.]

Introduction to the Oral History of
RICHARD C. MAXWELL

MURRAY L. SCHWARTZ*

It is of course impossible to recapitulate or summarize in a few pages what Richard C. Maxwell accomplished in his eleven years as dean of the UCLA School of Law. His was a truly prodigious performance. The limitations of the printed page being what they are, I shall try to convey some feeling for what he wrought by comparing briefly the state of the law school when he became its dean with its condition when he left office, and by trying in a few words to describe the personal attributes that in my view made it possible for him to effect the changes.

I regret that my account is inadequate. The story should some day be writ large and *in extenso*.

When Richard C. Maxwell became its acting dean in 1958, the UCLA Law School was nine years old. Those early years had been marked by difficulties that transcended the normal growing pains of a new institution. By 1958 the school had not only stopped growing but had been in a state of administrative receivership for several years. There were but nine regular faculty members the preceding year; the arrival of three new members (of which I was one) in fall

* Excerpted from a “Dedication” in 28 UCLA L. REV. 2 (December 1980) for the original typescript of Maxwell’s oral history, 1983.

1958 increased the roster by one-third. Of the 432 students in the law school, 182 were in the first-year class, which met in one section.

The educational policy of the school was revealed in the architecture of the building, which had been completed in 1952. The educational facilities consisted of three classrooms of decreasing size, for the first-, second-, and third-year classes (in that order), and a handsome courtroom, used primarily for a Practice Court course taught by a federal judge or practitioner on Saturday mornings.

Only third-year students had any choices in the courses they took, and those choices were few and far between. Nor was student life greatly enriched by extracurricular activities. A handful, at most, of prospective employers interviewed the top ten percent of the senior class (on law review, as well) for the few jobs available upon graduation. The school had no formal relationship with the academic life of the rest of the university, and there were few contacts with the external professional world. In the view of the national law school community, UCLA had not met the expectations raised when it was created as the first major new law school of the post-World War II era. It was widely regarded as a school in deep trouble.

The appointment of Richard C. Maxwell as dean did not come easily. Those internal difficulties that had resulted in the creation of the administrative receivership of the law school also produced a great reluctance on the part of important members of the University of California Board of Regents — a body in which echoes of the loyalty-oath fight between regents and faculty still reverberated — to approve an “insider” as dean. Indeed, in his first year as chief administrator, the title was *acting dean*; it was not until the next year that the regents were willing to confirm him as dean.

Richard Maxwell’s deanship lasted from 1958 through 1969, eleven years of change and expansion. Although the passage of another fourteen years or so since 1969 scarcely affords a sufficient retrospective to appreciate all the accomplishments of his leadership — and statistics alone cannot possibly convey them — it may be instructive to describe the law school when he left office in 1969, for comparison with the institution in 1958 when he took office.

By 1969 the student body numbered 727; the faculty some 37. The administrative staff had increased, although for its size the school had one of the smallest administrative staffs in the country. In 1969 the school became the first in the country to undertake a substantial minority-student admissions

program (in 1958 it was almost entirely white with a small number of women students). The school was one of the few to have a woman on its faculty, and in 1969 one of the few to have appointed several minority law professors.

The instructional program had loosened and expanded. Only the first-year courses were required, and all were divided into sections; all courses in the second and third years became optional, with several sections for the larger courses. The optional part of the curriculum took on meaning as some ninety courses and sixteen seminars were offered in 1968–69.

The increase in the number of students (mandated by the Board of Regents in light of the growing pressure for law school admission) was made possible by an addition to the building in 1966. The building of that addition in turn made possible the reconstruction of the existing classrooms to provide smaller ones, seminar rooms and facilities for special programs. The law school's architecture no longer assumed — or required — a high rate of student attrition.

The law school moved into the university. When it became part of the Academic Senate, its faculty served with the faculty from other departments on that body's many committees. Law school faculty held such positions as director of the UCLA Institute of Industrial Relations, director of the African Studies Center, chairman of the Chancellor's Advisory Committee for International and Comparative Studies, associate director of the Latin American Center, and associate director of the Institute for Government and Public Affairs.

As the reputation of the school grew, so did the opportunities available to its graduates. UCLA became one of the regular stops for the increasing number of firms and institutions that regularly recruited at law schools.

This account of Richard Maxwell's administration does not adequately communicate the magnitude of his accomplishment. The story is not just one of the incremental development of an educational institution, with the usual problems of assimilation of today's policies, programs, and personnel, even as tomorrow's are being proposed and implemented. (Consider the problems associated with expanding a faculty from twelve to forty in a decade.) The UCLA story of 1958–69 is truly one of a metamorphosis. To put it in general terms: in 1958 Richard Maxwell became dean of a law school whose academic and professional training models were the traditional law schools of the 1930s and 1940s, a law school that fell far short of being first-rate when measured

against them. When he left the deanship in 1969, the school had not only achieved distinction according to traditional criteria but had also become one of the most innovative schools in the country.

How did this unassuming Midwesterner bring this about? Intelligence and a capacity for hard work — which he possesses in the fullest measure — are necessary but hardly sufficient conditions. In my view — from the vantage point of close observation over the entire course of his deanship — the other attributes were near-boundless enthusiasm coupled with infinite patience, willingness to engage the administration or anyone in fierce battle on behalf of the law school, insistence upon emphasizing the strengths of those he led, ignoring their weaknesses, and an unusually high receptivity to innovation.

Although I shall not embarrass him by elaboration (this is a eulogy not an elegy), I will state, by way of illustration, that when I reviewed the years I have known and worked closely with him, it was hard to recall a single occasion on which, in public or private, he spoke negatively about another human being (and this includes more than one who in my view had given him ample reason to call the wrath of heaven down upon their heads).

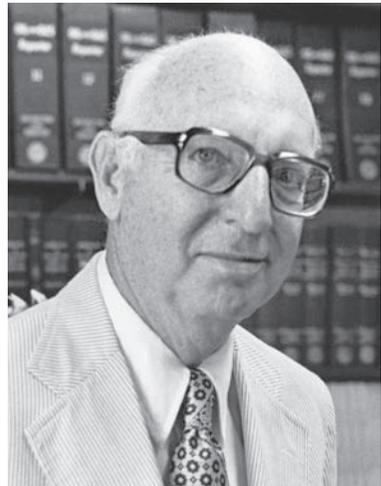
While my assignment has been to recount his accomplishments as dean, I think it fitting to point out that he is also the holder of the one law school chair at UCLA, the Connell Professorship of Law, and a distinguished scholar.

He has been the winner of one of the coveted UCLA Distinguished Teaching Awards and has been chosen Professor of the Year by the senior class. He has continued to be one of those faculty members to whom students and colleagues alike turn for advice and support. Shortly after he retired from the deanship, he was elected president of the Association of American Law Schools, a recognition that comes to one law professor in the entire country per year. It was an accolade that recognized not only his accomplishments at UCLA (and derivatively the law school itself) but also his qualities as a human being.

There is an apocryphal report that Alexander the Great wept after he conquered Persia because he then had no more worlds to conquer. Unlike Alexander, Richard C. Maxwell has decided that there are other worlds to conquer; the time has not yet come for him to weep for want of a new challenge. But for us to compliment his character or praise his achievements is not necessarily to accept with equanimity his decision to leave UCLA. For his departure causes us to weep.

From the Oral History of
RICHARD C. MAXWELL

RICHARD C. MAXWELL (1919–2016) served as the second dean of the UCLA School of Law from 1958 to 1969 and is credited with bringing the school to national prominence. He served as professor of law at UCLA from 1953 until his retirement as Michael J. Connell Distinguished Professor of Law in 1981 and thereafter at Duke University as Harry R. Chadwick, Sr. Professor of Law.¹



RICHARD C. MAXWELL

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THOMAS BERTONNEAU (UCLA ORAL HISTORY INTERVIEWER): Dean Maxwell, it is the usual style to begin these oral histories by finding out a little of the interviewee's biography. I would like to ask you to describe the circumstances of your childhood. Tell me a little bit about your family and how you got started out in life.

¹ For further information, see the Editor-in-Chief's introduction on page 1 of this volume: 11 CAL. LEGAL HIST. 1 (2016).

MAXWELL: Let's see, I was born in Minneapolis, Minnesota, in 1919. My father was at the time a Presbyterian minister; I believe that at the time of my birth he was overseas with the United States armed forces as a chaplain. I grew up in Minneapolis, and it happened that my mother and father were divorced when I was at a fairly early age. So I was raised during most of my life in the home of my grandfather, where my mother also resided. It was, in those days, a kind of extended family that probably doesn't exist anymore — a constant going and coming of uncles and aunts and cousins. It was a big old house in South Minneapolis, about a half a block from Minnehaha Creek. It was about as pleasant a place to grow up as you can imagine.

BERTONNEAU: Sounds a little bit like a Mark Twain story, or maybe a small-town America —

MAXWELL: Well, Minneapolis is not a small town, but actually that part of Minneapolis in those days was lovely.

BERTONNEAU: Let's find out the names of your father and your mother and this grandfather that seems to be important.

MAXWELL: My grandfather was Sherman Wesley Callender; that's on my mother's side. My father was born in Russia and emigrated when he was quite young. His name was Bertram Wayburn Maxwell. My mother's name was Blossom Callender. This is the spelling that we use, although you can find the name spelled in a variety of ways. The Callenders have been in this country for a very long time.

BERTONNEAU: Was your grandfather an educated man?

MAXWELL: Well, I think for his time he was an educated man. His father was — you mentioned Mark Twain — his father, John Callender, was actually a Mississippi riverboat captain. That, of course, goes well back into the nineteenth century; my grandfather must have been born about 1866. They came from somewhere in Massachusetts and settled in Minnesota. My grandfather was educated in the sense that he went to business school, and he was an independent, quite well-to-do businessman in Minneapolis during most of my childhood. However, during the Depression, he was much less well-to-do, and my later growing-up years, although still quite comfortable, were far from affluent.

BERTONNEAU: What kind of a milieu was it to live in? What are your early memories of that life?

MAXWELL: Early, early memories are really of wonderful winter snowfalls, of Minnehaha Creek at freshet level, with fish coming in from the lakes; early memories are of going north to the fishing lakes in Minnesota, hot summers in Minneapolis, really very good school experiences — absolutely no complaint. I worked in the sense that I had a very large and quite rigorous paper route, which I think is the source of the back problems I encountered later in life.

BERTONNEAU: I was curious when you said that your father was a Presbyterian minister: it seems to be a fairly typical part of the biographies of the first generation of administrators here at UCLA. Many of them came from clerical families.

MAXWELL: Is that right?

BERTONNEAU: Do you think that has anything to do with someone going into education or administration?

MAXWELL: I doubt it very much, although I was very close to my father, particularly in later years. He actually left the clergy and took a Ph.D. from the University of Iowa in history and political science, and was for some years a professor during the Depression at Washburn College in Topeka, Kansas, where I did not live. Then he became an editor for Macmillan and lived in New York City for — oh goodness, he must have gone there when he was fifty, and he died there at about eighty-two. So he spent a large part of his career in a metropolis.

So I can hardly claim that I had a clerical influence, although I must say that my grandfather was a typical Scottish Presbyterian — a member of the session, which is the governing board of the church — and until I was at least sixteen, I was thoroughly schooled in Presbyterian doctrine and was a regular attendant at Sunday school.

BERTONNEAU: What, in your character, would we recognize as a vestige of that time?

MAXWELL: I am really not sure how much. Well, I think you would — it is true that I probably am to some extent a victim of the American work ethic. I think that as much as anything. And also, there are certainly

vestiges of the very rigorous moral atmosphere, in at least surface terms, of that environment.

BERTONNEAU: Could you be a little bit more elaborate on that point?

MAXWELL: Well, I can recall that when, at a mature age, I began to go to movies on Sunday, I would feel a twinge of guilt. In other words, I came from an environment where in my early years the Sabbath was observed. One walked through the snow in the winter to church; one went to Sunday school and then later to church; one came back and had roast beef, mashed potatoes, gravy, and carrots.

You could then go out and engage in skiing down the sides of the gully in which Minnehaha Creek flowed, or you could read; but you did not go to the movies. You did not engage in that kind of frivolous activity. Drinking, by my immediate family, was not condoned during my earlier years, although in his later years my grandfather, though he certainly did not become a moral libertine or anything of the sort, would occasionally have a drink with my uncles on holidays.

BERTONNEAU: The society of Presbyterians has to be a rather ordered society. It's a typical Puritan kind of society in that sense, is it not?

MAXWELL: Well, yes.

BERTONNEAU: Are you an ordered sort of person?

MAXWELL: I think that I am, yes; I think that's correct. I am meticulous about a great many things — that certainly is true — and that probably is an aid to administration. I'm not sure that it's a particular aid to teaching and scholarship, although in some ways it is. I miss a class only under the most extraordinary circumstances — put it that way. [laughter] Undoubtedly that goes back to subliminal influences.

My grandfather, although his business went down the American drain with nearly everybody else's in the early thirties, . . . had become a great expert in handling railroad traffic and the shipment of produce. So he was able to work and earn a living until he was almost ninety, as a specialist in this area. So that's the kind of atmosphere in which I was raised.

BERTONNEAU: You described yourself, I suppose somewhat ironically, as a *victim* of the work ethic. What do you mean by that?

From the Oral History of

FRANCES MCGANN MCQUADE

Frances McGann McQuade (1916–2007) commenced work at the new UCLA School of Law in 1949 as secretary to the dean and retired in 1982 as assistant dean for administration.¹

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BERNARD GALM (UCLA ORAL HISTORY INTERVIEWER): Mrs. McQuade, before we start getting into the history of the law school, I'd like to ask you something about your personal background. Where were you born?

MCQUADE: I was born in Chicago, but I grew up mainly in New York City, and I graduated from Manhattanville College in New York and from the Katharine Gibbs School, which is really a school for people who have



FRANCES MCGANN MCQUADE

¹ For further information, see the Editor-in-Chief's introduction on page 1 of this volume: 11 CAL. LEGAL HIST. 1 (2016).

graduated from college to learn how to be executive secretaries. I married [John J. McQuade], and my husband's business brought him to California.

Shortly after we got to California, I decided I needed to look for a job, came to the university — we were living on the Westside — so I came to the university and came to work for Robert Vosper, who at that time was the associate librarian. And while I was in the library building [later Powell Library], part of that space was allocated to the new dean of the law school for temporary offices. And when he came, who was L. Dale Coffman, he was looking for a secretary, and because I was in the building, I heard about the job and applied for it and was accepted by Dean Coffman. The law school at that time consisted of one large room and one smaller room, and we began interviewing applicants for the law school and trying to set up a law school. He had anticipated that he was going to bring with him from Vanderbilt the woman who had been his administrative assistant, I guess. So he really hadn't too much information about how to set up records, and so on, and I had absolutely none; so it took us a while to get the law school organized, I must say.

GALM: Before we get into that aspect of it, let me just ask you a few questions about things that you may not know firsthand, but perhaps that you know secondhand, or thirdhand. And that has to do with the establishment of the law school itself at UCLA. What is your sense of how it [the allocation bill] got through the [California State] Legislature?

MCQUADE: Well, I know very little about that; not having lived in California, of course, I had no knowledge of the legislative procedures. I believe that present Judge [William] Rosenthal was the one who was instrumental in getting the funds allocated by the Legislature. I really have no idea about the determination of the need for a law school on this campus, or anything of that sort. Clearly by the time that Dean Coffman had come, information had been put out about the opening of the school because candidates were coming to apply, and the [law] library had already started. When the building, a small building, was given to the library, they already had a sizable collection to move in there. And I really have no idea how that all began.

GALM: You had mentioned the library. Do you know whether Dean Coffman appointed the librarian, or was that appointment made before he came?

MCQUADE: There was someone in charge of gathering the collection before he came, but when he came he appointed Thomas Dabagh as the director of the law library. He stayed on for about a year or so, and then he went on to Berkeley to become assistant to the president, I think. Then a man by the name of Louis Piacenza, who Mr. Dabagh had brought in as an assistant, was made law librarian. But Dean Coffman made those appointments.

GALM: Did the law librarian also act as an assistant to Dean Coffman? Was that part of his title or job description?

MCQUADE: I have the feeling that that was the intent when Mr. Dabagh was appointed, but I don't think it actually worked out that way. I think that they were not compatible for that purpose.

GALM: Was there an actual focus of incompatibility?

MCQUADE: Well, I think they just — it was a mutual decision that they just simply weren't getting along.

GALM: Let's get back to the actual physical setting of the [temporary law school quarters] — could you describe just what you had and where it was at?

MCQUADE: It was in what is now Powell Library, and I think it was in the area at that time called Special Collections. It was one room, oh, I don't know, I suppose fifteen by fifteen [feet], let me just say, and then another smaller room adjacent to it, which I used as a kind of a secretarial/reception and general room, and the other room was Dean Coffman's office. I think I went to work for him about in February of 1949, and we were there until June, when a building that was a Quonset hut kind — no, they weren't, they were barracks buildings, they weren't Quonset huts. We were given one of those for a classroom, one of them for the library, and then a half of one that was for the office space. We had faculty offices there, the dean's office, and then a general office, which I occupied. The other half of it was allocated to the personnel office of the campus. And those were all, in very general terms, in the back of Royce Hall, kind of where the humanities building [Rolfe Hall] is now. Subsequently, about two or three years after that, when the faculty got larger, we got another building, some distance away, probably two or three buildings on, for additional faculty offices, until we moved into the permanent building in 1951, I think it was.

GALM: I know you had a bit of trouble with your neighbors there. Can you sort of describe just what that problem was?

MCQUADE: It turned out that the building that was adjacent to the classroom building was the building in which the UCLA Band practiced; and as you may or may not know, law classes consist in large part of discussion between the faculty member teaching the course and the students, and the students with each other, and it's essential that they hear. Well, the band had very little regard for the law school activity, and we had a constant argument with the band people trying to get them to arrange their schedule to suit our time when we weren't having classes. We had many faculty members who would simply walk out of the class and say, "I can't teach." And blow into the dean's office, who would then blow into the — at that time it was a provost and not a chancellor, to his office. So I suppose that blowup took place once a week, and everyone was glad when the football season was over.

GALM: Theater arts was your neighbor, too.

MCQUADE: Yes, they were, and we often saw them out building their sets and wearing their costumes, or lack there of, and that was of great interest to the law students and, I guess, the faculty, too. They were never bored, with one thing or another.

GALM: So actually then, how many classes of students did you have in the barracks?

MCQUADE: Well, in '49 we accepted a first-year class, and their classes were — I think there were about fifty students, and so they all met in one section. It was scheduled so they would have an hour of class, and then an hour off, and then an hour of class. They carried approximately fifteen hours of class; so they met, say, three hours in the morning and two hours in the afternoon and five days a week, in general terms.

Then in the second year we accepted another class, so that in 1950 we had a first year and a second year. They met in the alternate hours, so that we were able to manage with one classroom for those two classes. Then when we had a third class, we were in the main building and, of course, then able to have a better schedule.

GALM: How many applicants, do you recall, did you get for the first year?

SECTION 3
UCLA LAW PERSONAL
REMINISCENCES

THE UCLA LAW SCHOOL —

Reminiscences from Its Second Decade

NORMAN ABRAMS*

I.

The UCLA Law School was founded in 1949. I, along with several others, joined the faculty in the summer of 1959, just as the school's second decade began. It was still a very small school with a faculty of twelve (prior to our arrival), but it was already on its way to becoming the newest major law school in the country. In the almost six decades since, the school has undergone remarkable changes — in number of faculty, the physical plant, the curriculum, the size and makeup of the student body, the number and kinds of programs, projects and centers, and above all else, in its stature as one of the top-ranked law schools in the country. But some things have not changed.

I arrived in August, along with three other new faculty (Bill Warren, Bob Jordan, and Bill Cohen). We referred to ourselves as the “class” of '59. Herb Morris also effectively joined the law school that year. (He had been a junior member of the Philosophy Department faculty doing some teaching

* Distinguished Professor of Law Emeritus, UCLA. For further information, see the Editor-in-Chief's introduction on page 1 of this volume: 11 CAL. LEGAL HIST. 1 (2016).

in the law school, but around that time he began to make the law school his primary academic home.) The core faculty then was a mixture of some distinguished middle and senior faculty enticed from other institutions and a couple of very junior academics at the beginning of their teaching careers.

In its first decade, the school had suffered from some internal problems — culminating in a successful rebellion by the faculty against the then dean; this period of turmoil caused some faculty to leave and, overall, made the law school a somewhat less attractive place for new faculty than it might otherwise have been. By the time the class of '59 arrived, however, the internal problems had all been resolved, and a new interim dean, Dick Maxwell, had been appointed, soon to be confirmed as dean. Our “class” was the first set of appointments entirely post-turmoil, and probably the largest number of new hires in a single year to that point. The future of the school was very bright; its trajectory upward and without limit. And that has been the situation ever since.

I mention those early internal problems, but forgo developing the details. While the fact of that early turmoil helps to explain certain characteristics of the law school, the specific details are not important. (It is also the case that I have no firsthand knowledge of the matter; I only knew of it through the lunchtime stories of my early colleagues.) This history, I believe, contributed to shaping the legal/political structures governing the internal operations of the school, and also to its culture — large impacts on the character of the school that have continued ever since.

What were these impacts? First, most law schools during that era functioned under a strong dean system. Faculty democracy tended to be very limited. The effect of that early history, by the time the class of '59 arrived, was to reverse the then-common relationship between dean and faculty. Ours was a faculty for which faculty democracy was an important value; accordingly, the faculty democratically resolved most issues of academic policy and, often, many of the implementing details. Of course, it is cumbersome to have the faculty trying to exercise a large amount of essentially executive authority, and over the years, the faculty has learned to delegate some of this authority, but it is fair to say that faculty democracy is still one of the strengths of the school.

Even more importantly, out of that period of turmoil, civility grew as a faculty value; a very strong sense of a shared community and getting along

with one's colleagues also became and have remained hallmarks of the school. This is not the case at many law schools or in academic departments generally. There is an impersonal, everybody-going-their-own way quality at many schools, and some actually descend into periods of backbiting, jealousies, and extreme conflict. With one or two minor lapses, our faculty has managed to avoid such internal conflicts, and we have, I believe, a well-deserved strong reputation for being a positive community of scholars and a very special place to hang one's academic hat. We read and comment on each other's scholarly papers. We collaborate in joint work. We respect each other — all of this despite the fact that we have grown to be a diverse faculty, with many differences among ourselves, and with, for example, political views that span the spectrum. The traditions and culture of community have been handed down from senior to junior faculty now through a number of generations. It is a character trait in which we justly take pride.

II.

During the early years of the '60s decade, we hired new faculty slowly, and consequently, remained for some time a small but dedicated band. Small size had consequences: it meant, for example, that faculty meetings were not large gatherings and, with the exception of admissions and faculty hiring committees, we mainly functioned as a committee of the whole.

Faculty meetings were memorable, though. One of the first important issues addressed after I joined the faculty was whether to continue to have fixed and required courses in the second year of the three-year law school curriculum — an issue that seems almost quaint today, but it loomed large at the time. There was little disagreement about the first-year curriculum. The courses were all basic, important as foundational courses, and traditionally required and taught in the first year — courses which included Contracts, Torts, Property, and Criminal Law. The second-year required courses included Business Associations, Evidence, and Constitutional Law. Were these courses important enough that every student should be required to take them? Was there value in giving students a choice whether to take these courses and if so, whether, in the second or the third year?

The issues were strongly debated with views expressed about the value of the courses in question, especially by faculty who taught them. In the

end, the second-year courses all became electives, but nothing much really changed: the subject matters of the second-year courses were on the bar examination, so even though they were now electives, almost all students took these courses, and mostly in the second year.

Another significant issue addressed during that early period was, should we offer classes on Saturdays? At the time, the only Saturday class was Trial Practice, taught by a federal judge who was not available to teach during the week. (Note: the Trial Practice course was the curriculum's then only limited venture into the world of what we today call Clinical Legal Education. It was ten years later that the school began a full-fledged, clinical legal education program.)

The question regarding Saturday classes arose because we were running out of classroom space; the building was relatively small. (Later, over a period of twenty to thirty years, there would be three construction projects each of which would make a major addition to the original building.) In the end, the Saturday class proposal was defeated. And it is interesting to recall the discussion in the faculty meeting and the telling argument that won the day. The point was made that Orthodox Jews and Seventh Day Adventists would not be able to attend classes on those days. The rejoinder was that by then many of our classes were being taught in two sections, and we could schedule one of the sections so that it did not meet on Saturdays, and put those students who could not attend Saturday classes in the appropriate section. The sur-rejoinder was that this would require those students to declare their religious preferences in order to qualify for the no-Saturday classes section — and that, it was contended, would be an unconstitutional requirement. And so the proposal died. I was a very young junior faculty member, and the quality and integrity of that discussion had a strong impact on me.

A second consequence of the small size of the faculty in those early years was that in order to have all of the traditional or mainline courses taught, each faculty member needed to carry a heavy teaching load of such courses. For example, as a regular matter, for many years, I taught each year four mainline courses — Criminal Law, Constitutional Criminal Procedure, Administrative Law, and Evidence. Today, that would be an unheard-of course load; in that early period, it was hardly noteworthy. What this also meant was that, given the small number of faculty, the curriculum

could not be enriched with a wide range of specialized courses or seminars from which students could choose. To achieve that kind of curriculum, we needed to grow, and as the decade progressed, grow we did.

A third beneficial consequence of the small size of the faculty during that early period was that we were small enough to form a single social group. Faculty often got together socially and there developed a tradition of a faculty lunch table at the UCLA Faculty Center, which had been built the year I arrived. On any given day, there might be eight to twelve law school faculty at this table, which, while not formally reserved for us, was generally recognized as our table. Conversations ranged widely from erudite constitutional law or philosophy discussions to academic gossip or current events. Most often, some of the people at the table went after lunch to a downstairs coffee lounge and a 30–45-minute extension of the conversation. I always thought of the faculty lunch table and post-lunch coffee as a mechanism for bonding and integrating the faculty into a cohesive social group — one which was both nourished by, and contributed to, the tradition of a shared sense of community.

Alas, those halcyon days could not last. With the passage of time, the faculty grew; the student body grew and the physical plant grew. By the end of the decade of the '60s, the faculty had more than doubled in size. Today it stands doubled still again, to more than seventy, a number which makes things like a single faculty social group and a faculty lunch table effectively things of the distant past.

Before concluding, I wanted to mention two non-academic items, both of which, while very different from each other, also had a role in shaping the character of the law school. The first was the tragic Bel Air Fire of 1961, which swept across the low-lying Santa Monica Mountain range just north of the law school — and was clearly visible from the second-floor rooftop of the classroom/library wing of the building, which in turn was easily accessible from the office wing of the building.

The entire faculty gathered on the rooftop to watch the conflagration in awe and distress; the fire seemed very close; I had never seen anything like it before, or since. Several members of the faculty had homes in the path of the flames. Two faculty homes burned to the ground, I believe, and several more were barely saved. One of my colleagues was so traumatized by the loss of his home that it took years before he even began to rebuild.

All of the faculty were affected by what we had seen; we had front row seats to a massive tragedy, and some of our own had been directly affected.

The second item is a much more positive one — a tradition that began in those early days and still continues today — the dean's annual law school beginning-of-the-year party for the faculty and their families. What was noteworthy about these parties in those early days was their location. For the first ten years or so after I arrived, the party was held at Ken and Louise York's place in Topanga Canyon. It was too casual and informal to be called an estate, though we did jokingly refer to Ken as Squire York: it was on a hilltop; though they had goats and other animals, it did not seem to be a farm, but there was lots of room to wander and for kids to play. Subsequently, the location was switched to Monroe and Aimee Price's family summer place on a cliff top overlooking the Pacific, north of Malibu, with a stairway down to the beach below, so that we were able to have a multi-level beach party. Glorious. Only in Southern California.

★ ★ ★

FOR THE RECORD

MICHAEL ASIMOW*

I taught at UCLAW for over forty years. I have enough memories to fill a book. When I walk the halls of UCLAW now, I am flooded with memories. Where to begin?

A bit of bio for those who don't know me. After graduating from Berkeley Law in 1964, I worked for Irell and Manella (then a small firm) in Los Angeles for two years. I got a call from a faculty member at Berkeley asking me if I had ever thought about teaching. It had never occurred to me, but the idea was very attractive. Because my family didn't want to move away from L.A., I approached UCLA, and the rest was history. This was 1967 and I was twenty-eight years old. I received the princely salary of \$14,400 per year, which didn't seem too bad since it was more than I was making in law practice. The dean was the great Richard Maxwell, who almost single-handedly rescued UCLA from the disasters of its early years.

Leaving practice for law teaching was one of the best decisions of my life. From the first day, I knew that this was the job I was born for. To this

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day, I still get a thrill out of teaching and I have always loved the research end of the job. Committees — not so much.

At UCLA I taught numerous subjects. I started as a tax teacher. The dean asked me if I could teach Administrative Law. I hated the subject in law school (where it was a required course), but I said I'd give it a try. Administrative Law turned out to be the subject in which I specialize, and I have continued working in it throughout my career. I also taught numerous other subjects including Business Associations, Constitutional Law, Business Planning, and Contracts. Because I love first-year teaching, Contracts has remained my favorite.

I retired in 2001, and started collecting my generous pension, but in fact I never retired. I continued teaching one class a year and doing research. Although I was very happy as a UCLA emeritus, in 2010, I moved to Stanford Law School. At Stanford, I still teach one class a year (depending on the school's needs) and continue doing research. This move occurred primarily because most of my children and grandchildren live in the Bay Area and my wife Merrie and I wanted to be closer to them.

As I reflect back on my forty-plus years at UCLA, my first thoughts turn to my colleagues who are no longer with us. Most of all, I remember my dear friend and tennis partner Gary Schwartz, but also my great colleagues Julian Eule, Don Hagman, Murray Schwartz, Hal Horowitz, Ralph Rice, Herb Schwartz, Ben Aaron, Arthur Rosett, David Mellinkoff, and so many others.

I'm so grateful to my thousands of students and my fellow professors. I remember so fondly the warm and friendly atmosphere of the UCLAW faculty. We had our political disagreements, of course, but everyone remained civil and friendly. There was never the kind of backbiting and political intrigue that has occurred at so many law schools. I worked under numerous deans and interim deans — Dick Maxwell, Murray Schwartz, Bill Warren, Susan Prager, Norm Abrams, Jon Varat, Steve Yeazell, and Mike Schill. Every one of them offered me nothing but friendship, support and encouragement.

To select just one of many possible subjects that I might write about now, I'd like to mention popular culture. In the 1990s, Paul Bergman came up with the idea of writing a book on courtroom movies. I offered him so many suggestions that he invited me to become his co-author and so *Reel*

Justice was born. My work with Paul was and is one of the richest collaborations I've ever had [see also the essay by Paul Bergman in this volume]. This launched me into a new career of research and teaching about the intersection of law and pop culture — that is, law and lawyers in movies and television.

When Paul and I decided to offer a pop culture seminar, the Curriculum Committee turned us down. But we beefed up our application and resubmitted it and the course was approved. I recall so vividly the many times I offered this seminar at UCLA and all the enthusiastic students who enrolled in it. I continue working on pop culture subjects to this very day. UCLAW was a place where a faculty member could branch out into a new and untried field and receive the unstinting support of the administration and colleagues (even if they had their doubts about the academic value of studying movies and television).

So I conclude these reminiscences by offering my thanks to everyone at UCLA past and present — faculty, students, and staff. I had a wonderful career teaching at UCLAW and nothing but fond memories of my many years there.

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PRANKS FOR THE MEMORIES

PAUL BERGMAN*

I joined the UCLA Law School faculty in 1970. I'm sure that one of the reasons that I ended up as a law teacher is that I enjoyed being a law student. Here are some of the ways that I continued to have fun during my first decade on the faculty side of the podium.

1. PHOTO SIN-THESIS

In the early 1970s, David Binder and his wife Melinda had recently returned from a hiking trip to Nepal. Because at the time few people had taken “exotic” trips like this, David left announcements in the mailboxes of law school faculty and staff inviting them to view slides from the trip during a lunchtime gathering in the old Faculty Conference Room. Sensing the opportunity for amusement, I purchased a few commercial slides of questionable taste. Shortly before David's presentation I wandered into his office and surreptitiously slipped a couple of my naughty slides into his carousel of slides. When it came time for the show, I was shocked to see that a huge crowd was gathered in the

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Faculty Conference Room, not just law school folk but people from Murphy Hall and elsewhere. I thought about removing my slides from the carousel but doing so would have been impossible — in their square holders, all the slides looked alike. As David was describing photos of Nepalese villagers, suddenly one of my slides popped up. There was dead silence for about ten seconds. Then David screamed one word: “Bergman.” The show did go on, at least until the second slide appeared. I’d probably be sacked if I did this today, but it’s an incident that no one who was there will ever forget.

2. ADJUNCT PROFESSOR OF THE WINTER QUARTER

In 1978, I was an adjunct professor of law, not yet a full professor. I was therefore not eligible for the annual Professor of the Year award. So I decided to try for a lesser award: Adjunct Professor of the Winter Quarter. Undeterred by the fact that no such award existed, I posted flyers all around the law school announcing the award and asking students to vote for me.

The “Karst Report” was issued in the middle of my campaign. The report recommended changes to the process by which applicants who were members of under-represented racial minority groups would be admitted to the law school. The changes were partly in response to the U.S. Supreme Court’s recent *Bakke* decision. Nevertheless, the report generated mass protests by students. As had happened a few years earlier during the anti-Vietnam War protests, students lined the halls for days, shouting and pounding on any object that would produce a lot of noise.

I decided to use the boisterous protests as a chance to increase my chances of winning a non-existent award. I placed one of the law school’s videotape recorders in the main hallway and wrote a script for a phony news story. With the noisy protesters in the background, I made a video recording of my secretary Vi Denney reporting that what was happening was a spontaneous demonstration in support of my campaign to be named Adjunct Professor of the Winter Quarter. Luckily Vi and I escaped to the quietness of the third floor before the students realized what we had done. But none of us succeeded — the faculty adopted the Karst Report recommendations, and I never was named Adjunct Professor of the Winter Quarter. (Ironically, about a decade later the faculty considered a variety of changes to the admission of

applicants from under-represented minority groups. The students of the late 1980s protested nearly as vigorously in favor of maintaining the processes prescribed by the Karst Report as the students of the late 1970s had protested in an effort to convince the law school not to adopt them.)

3. PHOTO, PHOTO ON THE WALL

Through the 1970s, the law school tradition was to display formal photos of all currently tenured law school professors on an interior wall in the law library. Coincidentally, the law school decided to terminate the tradition at nearly the same moment that Paul Boland and I were granted tenure. The wall on which we proudly expected to see photos of ourselves was suddenly empty. We took the setback sitting down — that is, we took very casual Polaroid pictures of each other sitting in our offices, eating an ice cream cone. We then went to the now-empty wall where the tenured faculty photos had until recently been displayed, and taped our photos to the wall. We left notes in each faculty member's mailbox, inviting him or her to stop by the faculty photo wall in the law library to see the newest additions. The photos stayed up on the wall for a couple of weeks before they vanished. Boland and I weren't positive that our tenured status would endure that long.

4. BERGMAN'S HOLIDAY BOUTIQUE

As holiday seasons approached, my custom in the 1970s was to create a parody of the usual holiday catalog and distribute it to students and faculty who might be looking for just that special gift to a favorite lawyer. Here are a few sample items from one of the catalogs.

Cheaper By the Case

Yes, opinions at Bergman's Holiday Boutique are Cheaper by the case! Why purchase an entire volume of the Federal Reporter or the California Appellate Reports when all you really need is one case. The cover of each case is made of genuine Alaskan Baby Sealskin (except Environmental Law cases).

Unanimous Opinion	\$6.95
Opinion with Concurrence	\$7.95
Opinion with Concurrence and Dissent	\$8.95

Cases on Point

Do you know a special lawyer who never seems to be able to find a case on point when one is really needed? Here's the answer. Choose a specially wrapped box of six opinions from the jurisdiction of your choice, each opinion guaranteed to be strictly on point. (First 100 orders receive a 7th case on point at no extra charge.)

Boxed set of six intermediate court opinions	\$19.95
Boxed set of six Supreme Court opinions	\$39.95
Boxed set of six Texas opinions	\$0.95

Electronic Plea Collar

Does your gift-giving list include a criminal defense lawyer who is always itching to plead clients guilty? We have just the solution: the Electronic Plea Collar. The colorless collar fits comfortably under any dress shirt. Studies prove that the collar is 94 per cent effective at preventing plea bargaining by emitting a vile odor when its language processor detects the words "deal," "drop," or "golf." Defense lawyers cannot detect the odor, but prosecutors cannot tolerate it.

Electronic Plea Collar	\$24.95
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Dictum Alarm

Is your favorite appellate court lawyer frequently reprimanded by judges for relying on arguments based on dictum? If so, Bergman's Holiday Boutique has the perfect gift! Just roll the Dictum Alarm over the pages of any appellate court opinion. It will respond with a loud shriek whenever it is passed over a sentence that constitutes dictum. (Activated by 28 AA batteries, not included.)

Dictum Alarm	\$13.95
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5. RETIREMENT PLANNING

In the mid 1970s, all UC employees were allowed to choose whether to rely exclusively on their UC retirement benefits, or to coordinate those benefits with Social Security benefits. Faculty members with specialized

knowledge in financial planning distributed memos explaining the ramifications of making one choice or the other. What these memos had in common is that I could understand none of them. Figuring that other law school faculty and staff could be in the same boat, I distributed a memo that all could understand.

To: Faculty and Staff
From: Paul Bergman
Re: UCRS and Social Security

February 18, 1975

Like Bill Klein, I have adopted a position of rigid refusal to give advice as to whether they should choose to coordinate UCRS with Social Security. However, I want to point out the following facts that I have carefully culled from the complex computations.

Retirement benefits will be larger for those whose salaries are bigger, under either alternative.

If you retire after 40 years of service, you will have worked twice as long as an employee who retires after 20 years of service.

The following figure seems to be pervasive, and may be meaningful: 32.1 per cent.

Attila the Hun had neither UCRS nor Social Security but was able to retire comfortably.

Sample computation: Multiply your years of UC service by your age when you began service. Take your Average Salary Factor, divide it by your benefit percentage, reduce that by 2 per cent of your Otherwise Eligible benefit at 64 or 65, whichever comes first, and hypothecate the remainder over a ten year span. Then figure the likely cost of a world cruise in 1990. Under either plan, you will not have enough.

6. DUSTBALL

By 1978, I had achieved a form of tenure called “security of employment.” In my newly exalted status, I sent a memo to Dean Bill Warren asking him to extend the honor to another long-term law school occupant.

To: Dean Bill Warren
From: Paul Bergman
Re: Honorary Tenure for Ball O'Dust

September 1978

Dear Dean Warren,

I think it appropriate for the law school to grant Honorary Tenure to Ball O'Dust. Ball has been a member of the law school community for at least seven years. Thus, UC tenure policy requires that Ball either be granted tenure or terminated. I support the honorary tenure option because Ball has remained in the law school day and night, in his office in the corner of the third step from the top of the staircase leading to the law school's third floor. Conferral of Honorary Tenure on Ball will recognize Ball's contribution to the law school community as a welcoming presence whose steadfastness is comforting in these turbulent times.

Thank you for your consideration. I hope that you will follow up on this matter at your earliest opportunity.

Paul

7. CLASS ACTS

My interest in practical jokes often followed me into the classroom. One law student organization regularly sponsors a Red Cross Blood Drive. When a Blood Drive day coincides with one of my teaching days, I often wrap my wrists, forearms, neck and scalp with ketchup-smearred gauze. The gauze was not immediately visible to students, as when I come to class the gauze is hidden by a scarf, a hat and a sweater. I begin class with a fervent plea along these lines: "I urge you to donate blood today if you haven't already done so. I donated earlier, and I assure you that the donation process is easy and painless. The Red Cross nurses are highly skilled; you won't feel a thing." As I talk, I remove my hat, sweater and scarf, slowly revealing gauze strips that appear to be smearred with blood. As the students realize the gag, their hesitant titters build into loud laughter and often applause. Of course, I hope I never dissuaded a student from donating blood!

I taught the first year Civil Procedure course once, in Fall Semester 1991. It was my students' first law school course, and I began it by telling the students that the Admissions Office had admitted too many 1L students. (Luckily I taught this course four years before my wife Andrea became the law school's assistant dean of admissions!) Adopting my most serious tone, I told the class that three students in our section had to be dismissed, and that after observing them for a week, I would make a final decision about which students to dismiss. I gave them time to write down any objections they had. After a few minutes I called on students and put a list of their objections on the blackboard. Just as I had anticipated, virtually all of their objections were procedural: "We don't know what standards you are using to judge us." "We should have a chance to talk to you before you dismiss us." "The Dean should have the right to review your decisions." "It's too late now to do this." I then assured the students that this was an exercise: no one would be dismissed from the 1L class. The purpose of the exercise was to demonstrate that as a society we care not only about legal outcomes, but also we care strongly about the procedures that lead to those outcomes. Civ. Pro., I said, focuses on these procedures. Admittedly this exercise was as much a teaching method as a prank. But it was my way of responding to a common student belief that Civ. Pro. covers insignificant minutiae and is much less important than "real" first year courses like Torts, Contracts and Criminal Law.

8. THE REST OF THE STORY

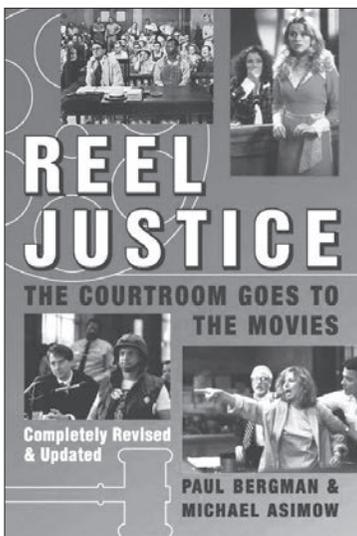
I am truly blessed to have been a faculty member at UCLAW for over forty-five years. When I was hired in 1970 to teach students how to be lawyers and try cases, I had been out of law school less than two years myself. If you had asked me upon graduation from Boalt Hall to identify ten ways in which I might use my law degree, law teaching would not have been close to being on the radar screen. But as a student I loved the classroom experience, and as a lawyer I wanted to use whatever skills and talents I had in service to marginalized people. Despite my qualms that I knew little more about the practice of law than my students, I thought that teaching-by-doing was a perfect way for me to find a purpose for my life that I was passionate about.

I have enjoyed every minute of it (with the possible exception of committee work). I truly value the opportunity to teach and learn from students, even though they have stayed the same age and I have gotten older every year. My law school faculty colleagues have always been kind and generous with me beyond my deserving, a true community rather than a collection of academic specialty groups. And I love writing. Just as I never thought I'd be a law teacher, I never imagined that I would have lists of books and articles to my credit.

Ultimately, UCLAW has allowed me to follow my professional interests in whatever direction they took me. When I wanted to help students improve their legal drafting skills, my proposal to teach a will drafting course and prepare wills for actual clients was approved without hesitation. Likewise for my Street Law proposal, in which I provided law students with opportunities to teach law-related material to high school students and used their experiences to help them think about how to communicate legal principles and knowledge effectively.

Most significantly, UCLAW supported the development of my interest in Law and Popular Culture. I first used clips from courtroom-focused films and TV shows as educational tools when I began teaching Evidence in the early 1990s. As I sought to identify sources of clips beyond those that I already knew about, I realized that no one had ever analyzed the genre of courtroom

films even though law-related films and TV shows were for many people the primary source of their knowledge of law, lawyers and the legal system. A book proposal began to form in my mind, and over a series of lunches with my wonderful and brilliant colleague Michael Asimow the shape of *Reel Justice: The Courtroom Goes to the Movies* came together. Its publication in the mid-1990s, followed by a second edition in 2006, changed my life. Inside the law school, Michael and I developed a brand new UCLAW course in Law and Popular Culture. The course was tremendously popular, and we asked



students to think as carefully about the portrayal of law and lawyers in films and TV shows as they thought about principles of torts and contracts.

But the biggest impact of *Reel Justice* on my life was taking my interest in teaching law through film clips outside the law school. Like Michael, I have presented *Reel Justice* programs all over the country and beyond. My audiences have included law teachers, lawyers, judges, and community groups. Depending on a group's interest, film (and sometimes TV) clips are an entertaining method of addressing topics as diverse as trial tactics, legal ethics, divorce law, legal history, and (of course) principles of evidence law. I have also discussed the portrayals of law and lawyers in popular culture on numerous TV and radio shows. I am so grateful to UCLA for supporting my work because these experiences have tremendously enriched my life. I hope that in all that I have done I have also been a goodwill ambassador for the law school.

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THE EARLY YEARS OF CLINICAL LEGAL EDUCATION AT UCLA:

Across Substantive Domains

DAVID BINDER AND PAUL BERGMAN*

DEDICATION

We dedicate this brief memoir about the first decade of UCLA law school's clinical program to our late and beloved colleague and friend, Paul Boland. Paul was one of the "Three B's" during the decade before he began a distinguished career on the bench, and his fingerprints are all over the design of the UCLA model of clinical education. Paul was a genuinely kind and caring soul; if you were his friend for a minute you were his friend for life. We are grateful for our time together.

* * *

Under the leadership of Deans Richard Maxwell and Murray Schwartz, UCLA law school applied for and received a grant from CLEPR (the Council on Legal Education for Professional Responsibility) and in 1969 became one of the first law schools in the country to establish a Clinical Legal Education program. The program was started partly in response to law student demands for greater relevance in a legal education. Students wanted to go

* Professors Emeriti, UCLA School of Law. Copyright 2016 by the authors. For further information, see the Editor-in-Chief's introduction on page 1 of this volume: 11 CAL. LEGAL HIST. 1 (2016).

beyond three years of analysis of abstract legal principles and reasoning; they also wanted to learn how to be lawyers while promoting social justice. Law schools responded by emulating medical schools and adding “learn by doing” programs that breathed new life into the traditional law school assortment of “podium courses,” seminars, and moot court exercises. Students would learn how to practice law by working with faculty on actual cases.

UCLA hired David Binder to establish its clinical education program. David was then a public interest lawyer at the Western Center on Law and Poverty, but he had been a lawyer in private practice before that. Under David’s guidance, the law school hired three additional clinicians as adjunct professors: Paul Bergman, Paul Boland, and Bob Chartoff. The long-term job prospects for these four initial clinical faculty members were uncertain. The CLEPR grant provided two years of seed money; after that it was up to the law school either to support the program on its own or terminate the experiment. Bravely and perhaps naively, David, the Pauls and Bob began teaching clinical courses in the fall of 1970. Bob departed the law school after a couple of years. Law school funding for the clinical program did not. UCLA continued to support clinical education and the “Three B’s” developed the program as a team until 1980, when Paul Boland went on the bench. His parting gift to the law school was an ethic of caring for students and clients; his parting gift to Paul Bergman was a classic original Eames chair that Boland was too tall to sit in comfortably.

In the beginning, UCLA’s clinical courses were focused on litigated disputes. Binder, Boland, and Chartoff taught Civil Trial Advocacy courses. They supervised students in the representation of low-income clients who were plaintiffs or defendants in a variety of civil disputes. Bergman taught Criminal Trial Advocacy; he supervised students in the representation of criminal defendants at trial. (Bergman somehow persuaded David Binder and the UCLA hiring committee that he was competent to do so, based on the one state court indigent criminal appeal he had handled while clerking for a Ninth Circuit Court of Appeals judge.) For the record, we fulfilled the rules that required us to secure the written consent of all clients to have law students work on their cases.

Soon after the clinical program was established, the Three B’s made a fundamental decision that established a UCLA Model of clinical legal education that set UCLA apart from the clinical programs that many of

its peer schools established. We decided that our primary educational mission was to help students who would enter diverse practice areas after graduation to learn how to use lawyering skills competently. The result was a “skills-centered” clinical program that focused not on discrete types of legal problems of low income clients but instead on complex lawyering skills such as interviewing, counseling, negotiation, and trial practice. These skills were important across virtually all fields of law practice, whether clients were business leaders or low income tenants and whether legal claims were based on contracts law, tort law or the U.S. Constitution. Moreover, as a general rule these skills were not systematically taught to law school graduates by practicing lawyers — if they were taught at all. The creation of courses devoted to different lawyering skills meant that the UCLA clinical program would not become a general purpose legal services office that aimed to maximize the number of low income clients that it served.

The UCLA Model of clinical legal education had three primary characteristics:

- Courses were based on discrete lawyering skills rather than on discrete types of legal problems of low income clients. UCLA clinical courses carried titles such as Interviewing and Counseling or Negotiation, rather than Landlord–Tenant Clinic or Domestic Violence Clinic.
- In simulated exercises that took place during classes and in out-of-class individual exercises (our teaching load was heavy!), students practiced and received feedback on the skill or skills to which a course was devoted. The substantive law backgrounds of the simulated exercises varied; one might involve a contracts dispute and another one a wrongful termination dispute.
- The actual cases that students worked on were selected because they allowed students to practice and receive feedback on the discrete skill or skills to which individual courses were devoted. For example, students enrolled in an Interviewing and Counseling clinical course worked with clients who sought advice concerning a wide range of legal problems. If further legal work was needed the clients were referred to other offices. Students enrolled in a Depositions clinical course represented clients in the deposition phase of complex litigated disputes that arose in a variety of substantive law areas, both taking and defending depositions.

The skills-centered design of UCLA clinical courses helps to explain UCLA's prominence in the national development of a literature of clinical legal education. The Three B's (joined at and for different periods of time by Al Moore, Gary Blasi, Susan Gillig, Carrie Menkel-Meadow, Lucie White, Bill Graham, Robert Mann and Vikki Bonebakker) began analyzing lawyering skills and creating course materials and simulated exercises aimed at developing students' competence in the skills that lawyers needed to represent clients competently across substantive domains. These course materials became textbooks and law review articles in which UCLA clinicians analyzed lawyering skills with the same care that more traditional law school professors analyzed Torts, Contracts, and other substantive law subjects. For example:

- Along with psychologist Susan Price, David Binder wrote *Legal Interviewing and Counseling*, in which he developed the then-radical idea that legal problems belonged to clients and not lawyers and that lawyers should educate clients about alternative approaches and their likely consequences and encourage the clients to make important decisions.
- Paul Bergman wrote *Trial Advocacy in a Nutshell*, which approached courtroom advocacy as learnable skills rather than intuitive artistry. For instance, Paul's Trial Ad book incorporated the "Safety Model of Cross Examination" that Paul had developed and described in an earlier *UCLA Law Review* article. (In 2016, Paul published the 6th edition of the Trial Ad Nutshell.)
- Paul Bergman, David Binder, and Susan Price published *Lawyers As Counselors — A Client-Centered Approach*. Ever since the publication of the book and its successor editions, the notion of client-centered representation has dominated the teaching of lawyering skills within law schools and in the legal profession generally.
- David and Paul co-authored *Fact Investigation*. From the time of Langdell in the 1870s at Harvard onwards, legal education had emphasized analysis of appellate court arguments. *Fact Investigation* analyzed the processes of factual inference, and set out reasoning and investigative methods for developing strong factual arguments.

- Al Moore wrote about cognitive schema and inferential reasoning in decision-making.
- Carrie Menkel-Meadow analyzed legal negotiation and the structure of problem-solving.
- UCLA clinical faculty wrote scripts for and produced lawyering skills videotapes that were used in law school classes across the country. The videotapes consisted of short vignettes of lawyer–client interactions that law school instructors and students could critique in class. (A new generation of recorded exercises is planned as we write this memoir.)

The books, articles and materials written by UCLA clinicians were used in clinical education courses across the country. This lawyering literature demonstrated not only that lawyering skills were complex, but also that they were worthy of and amenable to description, analysis and teaching. This work helped to support the idea that clinical legal education was a legitimate part of a first-rate academic legal education.

UCLA clinicians also spurred the international development of clinical legal education by partnering with colleagues Avrom Sherr and Roger Burridge at the UK's Warwick University for a series of legendary Clinical Education Conferences. The conferences attracted clinicians from all across the country and Europe, as well as law school instructors from countries such as Japan that were in the process of trying to establish clinical programs. The conferences were paper-based, and many important lawyering skills articles that further stimulated the analytical underpinnings of clinical legal education and the understanding of lawyering skills were first presented as papers at the UCLA/Warwick conferences. The early conferences took place at UCLA's idyllic Lake Arrowhead Conference Center. The lakeside locale was so identified with the clinical conferences that when it became Warwick's turn in 1993 to host a conference, England's Lake District was the only logical site at which it could take place.

A desire to teach lawyering skills across substantive domains was reflected in UCLA's unique Witness Volunteer Program. In simulated lawyering skills exercises, students initially served as clients and witnesses for each other. But we soon realized that law students talked and acted too much like law students to serve as adequate proxies for the people whom our students would be working for and with after graduation. With that

in mind we brought on board Witness Volunteer Coordinators (the first coordinators were Bunny Friedman and Marian Gilbert) whose task it was to recruit volunteers from the community to serve as clients and witnesses in simulated exercises. The community volunteers usually performed in roles that the clinical instructors had created. But instructors often invited volunteers to “be yourself” and discuss personal experiences. Since our goal was to train students to use lawyering skills effectively across all substantive domains, the nature of the specific legal problem that a volunteer talked about was largely irrelevant. If a volunteer wanted to talk about a restaurant-related dispute in which the volunteer had once been embroiled rather than the circumstances in a “canned” landlord–tenant dispute, that was fine with us.

UCLA demonstrated support for clinical education in a variety of ways. One small example is that the Three B’s obtained tenure as professors of law with full faculty rights and privileges, not as clinical professors of law with limited faculty rights as at many other law schools. UCLA also softened the margins among faculty members by encouraging clinicians to teach non-clinical courses, and vice versa. On a regular basis, David taught Civil Procedure and Paul taught Evidence. While these courses were not clinical, we incorporated simulated exercises into classes and blended discussions of skills into our coverage of substantive law.

As clinical education at UCLA and elsewhere expanded beyond its initial focus on court cases based on the legal problems of individual low income clients, UCLA clinicians maintained a skills-centered ethos. Paul for example taught a Street Law course, in which law students taught law-related materials to high school age students. Paul considered his primary “clients” to be the law students enrolled in the course, and he approached the course primarily as an opportunity to develop students’ lawyering skills no matter what topics they chose to cover in their teaching. For example, how did students attempt to establish rapport with the students in their classes? What did their classroom experiences teach them about how to develop rapport with clients? What did they learn about communicating the meaning of abstract legal principles such as due process of law to non-lawyers? How might educating high school students compare to educating clients, judges and jurors? By using simulated exercises and students’ teaching experiences as a vehicle for helping them to develop lawyering skills, Paul sought to help

students transfer their learning from law school into their professional lives, regardless of the fields of law they worked in.

Decades on, the excitement of the early years of clinical education remains one of the memories for which we are most grateful. All of us, instructors and students alike, were aware that we were involved in an experimental and untested type of legal education. We were privileged to experience the moments when students began to understand the meaning of professional responsibility and to realize that they could translate their legal knowledge into actions that could improve the lives of clients. The excitement extended to the videotapes we made to record students as they practiced lawyering skills in classroom and out-of-class simulated exercises. Even though the recording machines used reel-to-reel tapes and the pictures were black-and-white, in the 1970s the ability to see oneself immediately on a TV screen was itself a thrill (if occasionally painful). Our careers unexpectedly and serendipitously turned in the direction of law school teaching at a unique time in the history of legal education, and for that we are forever thankful.

Just as we teach client-centered lawyering, we are also student-centered law school instructors. With this in mind, we asked a few of our earliest clinical students to send us brief recollections of their time as UCLA clinical students. We conclude this memoir with their responses.

PAUL MARCUS (Paul has had a distinguished career as a law school academic, among other things serving as the dean of William and Mary Law School and president of the Association of American Law Schools):

I remember vividly the time I spent with Dave Binder, Paul Bergman, and Paul Boland in the clinical program at UCLA. I learned a great deal about the practice of law, the respect to be given to all clients and lawyers, and the standards of professional responsibility that we must adhere to. We worked on cases for poor people, individuals who could not get lawyers, individuals we cared about a lot.

In the coming year, I will become the president of the Association of American Law Schools. The theme I will emphasize is Access to Justice: What law schools can do to involve students and professors in providing legal services to those in need. I learned a lot about this during my time at UCLA. I never forgot it.

DOROTHY WOLPERT (Dorothy was an “OWL” (Older and Wiser Law student) when she entered law school. She has enjoyed a lengthy career as a civil litigator and a transactional lawyer):

I couldn't possibly recount what the clinical program meant to me and did for me in a few sentences! It was the highlight of my legal education.

After two years of appellate erudition, I was finally exposed to professors who were talking about people and their actual problems and how to prepare ourselves to help them solve those problems. Rigor and compassion were the hallmarks of the courses; and the principles on which they were based were loyalty and the best interests of the client and our public responsibility as officers of the court.

In forty years of practice I've yet to interview a client for the first time without thinking of my closing statement. David taught me that. When I started my first job, I knew where the courthouse was — unlike many of my young colleagues. I knew from firsthand experience the awful power of a judge. I appeared in a case for a young Mexican who was on probation and was seeking permission to visit his family in Mexico, which had just suffered a catastrophic earthquake. He didn't know if his family had survived.

I pled with the judge as best I could. My client, more eloquent than I, said he had to go home to grieve for them if they were dead. The monstrous judge responded in a chilling voice: “You can grieve here,” and denied the request. That experience has made it easier and mandatory for me always to tell my clients that you never can know what will happen to you in a court of law and that risk factor must always be part of one's decision-making in pursuing and conducting lawsuits.

Your amazing work in trying to impose some order on “the anarchy of human experience without suppressing the vitality of diversity and disarray” has inspired me and countless students and made them better lawyers. I could go on, but won't.

RICHARD FYBEL (Rich has been on the bench in Orange County, California, for many years, first as a Superior Court trial judge and later as an associate justice of the California Court of Appeal):

In 1970 and 1971, as a third-year law student, I was fortunate to participate in the first year of UCLA law school's clinical program. The program was led by star Professors Binder, Boland, and Bergman. I represented a mother in court in dependency proceedings in a successful effort to regain custody of her child. I also represented a woman who was sued on a questionable debt; we prevailed at trial when the lawyer for the plaintiff company was unprepared and a continuance was denied. My practical experiences in the program and the important lessons learned from our wonderful professors have stayed with me during my professional career as a lawyer and judge. I remain grateful to have been included in the inaugural year of the clinical program.

BOB MCKAY (Bob is in private practice as a commercial and real estate lawyer and litigator in Pasadena, California):

I believe the clinical program that Dave Binder created was UCLA's first. I thought the class would be a respite from the typical law school routine. It was. I was excited about being in Dave's first class, and in the forefront of clinical programs with the opportunity to help real clients in real need of representation — to find out how it really works. I really looked forward to the class. Dave gave his students a head start on the real practice of law. Through the program a classmate and I had the opportunity to work on an actual case and argue in court. We won — victory attributable to the clinical program, and, of course, Dave. The experience was invaluable.

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MEMORIES OF LONG AGO:

My Years at UCLA School of Law

NORMAN EPSTEIN*

It seems so long ago, probably because it is. I graduated from UCLA with a BA in the spring of 1955, entered the School of Law there that fall, and graduated with the Class of 1958. Look at it this way: if the speaker when I graduated from law school had received his or her (more likely “his” in those days) degree, as long before then as my time since then, he or she would have been admitted to practice at about the turn of the century (the one before this one). I’ve been asked to assemble some memories of my three years in law school, and what follows are a few of them. They stand out, mostly, because they seemed odd or startling at the time. And, looking back, they still do.

First let me set the scene. The three outstanding qualities I remember about the UCLA School of Law are that it was good, it was new, and it was free.

I’ll start with the last: it was free. Or nearly so. There was no tuition for California residents, and the only thing we had to pay to the university was an “incidental fee.” That was not tuition, but payment for various benefits

* Presiding Justice, California Court of Appeal, Second Appellate District, Division Four. For further information, see the Editor-in-Chief’s introduction on page 1 of this volume: 11 CAL. LEGAL HIST. 1 (2016).

that went with being a student, such as tickets for varsity games. The fee, as I recall it, was about \$37 a semester. I already was the beneficiary of a free education as an undergraduate at UCLA. I was treated to a full, free public school education by the citizens of Los Angeles for twelve years, and then by the citizens of California for another seven. They gave me a profession and a life, and I'll always be grateful.

The school was relatively new then, in its first decade. The building was almost spanking new. Walking through it, the first thing we noticed was that there were three large classrooms, one for each of the three years. Each classroom was progressively smaller than the last, with the third-year classroom being about half the size of the classroom for first-year students. The message was subtle, but we all understood it.

And the school was good. The founding dean, L. Dale Coffman, had come from Vanderbilt, at about the same time and from the same place as the then-new UCLA head football coach, Red Sanders. Dean Coffman assembled a remarkably able faculty for the new school, including Roscoe Pound, the renowned former dean of Harvard Law School. They delivered a first-rate education in the law.

Two of the faculty are among the finest persons I have ever known. Arvo Van Alstyne taught Constitutional Law and several other courses. He was a brilliant teacher and a wonderful person. I enrolled in or audited every course he taught at UCLA. He eventually moved to Utah where he held an executive academic position and, I believe, was an elder in the Mormon Church. He died of cancer, far too young.

The other was Richard Maxwell, a renowned scholar and national expert on the law of oil and gas. He taught Property and several other courses. After Dean Coffman was obliged to step down as dean, and after the service of an interim dean, Dick Maxwell became the dean and guided the school into what some have described as its greatest years. Certainly so, up to then. He retired from the faculty and began a new career in legal education at Duke University school of law.

Dean Coffman taught one of the two sections in Torts, a first-year course. We were divided by alphabet, the first half being assigned to Dean Coffman's section and the other to Professor Allan McCoid. I recall vividly and with horror the day we reached the renowned *Palsgraf* case (*Palsgraf v. Long Island Railroad Co.* (1928) 248 N.Y. 339). We all knew we had to

have some grasp of that case (it's still a conundrum), or else. And many were petrified over the prospect of being called on to recite or explain it. Professor Coffman announced the case, then began to scan the classroom, moving his gaze slowly from left to right. When he got to the middle it was as though an electric eye contact had been made. The student upon whom he had then fixed his gaze thought he had been called on to recite the case, and proceeded to do so. He had it wrong, and all of us agonized dying for him, but no rescue was possible. (I don't believe that student was among the second-year class.)

I recall something almost as untoward in the final round of the Roscoe Pound Moot Court Competition. The four of us, two students on each side, were before a hypothetical supreme court made up of three federal judges. The presiding judge interrupted my argument and asked me to turn to page whatever of our brief, then to a particular paragraph and line, then pointed out that we had misspelled a word. I suppose the idea was to see if we could maintain composure. I think I mumbled an apology for the error and went on with my argument. One of the other judges asked only a single question during the entire ninety-minute argument. I've committed the question to rote memory. He turned to the PJ and asked, "Isn't it time for lunch?" Perhaps there was some wisdom that I missed. But the question did make an impression. (My partner and I managed to win the competition.)

At the time, the Office of Legislative Counsel had a program under which it brought in a second-year law student from each of the five major California law schools for a (paid) summer clerkship. I was fortunate to have the appointment from UCLA. I learned most of what I know about the legislative process and working with statutes during that summer. The legislative counsel, the first to hold that position, was Ralph N. Kleps. He was a renowned scholar and had written the definitive article on judicial review of administrative adjudication. (The article is *Certiorarified Mandamus: Court Review of California Administrative Decisions (1939-1949)*, 2 STAN. L. REV. 285.) He later became the first director of the Administrative Office of the Courts, serving under the Chief Justice and the Judicial Council.

He shared a story with me about his time as a student at Cornell. He was president of the Young Democrats, which had invited the First Lady of New York, Eleanor Roosevelt, to come to Ithaca and give an address.

Kleps had an opportunity to speak with Mrs. Roosevelt privately. He asked her what advice she would give to a young man (meaning himself) interested in a career in politics. She looked directly at him and responded, “be born rich.” He obviously never forgot it, but he evidently did forget about a career in politics.

During my final year, when thoughts turned to finding a job, the only one I was interested in was with the state attorney general. I was interviewed for the position by Frank Mackin, the assistant attorney general in charge of the Los Angeles office. His office was on the 6th floor of the old state building (on First Street, between Spring and Broadway, now razed), and my interview was at noon. It was 1958, an election year. We were about five minutes into the interview when the phone rang. The conversation lasted about fifteen minutes. I tried not to pay attention, but it seemed obvious that he was speaking to the then-attorney general, Pat Brown, who was running for governor. I always suspected that I got the job because by the time the conversation ended, I had heard too much.

Finally, I end this reminiscence where it began, at the law school. The fall bar exam was held there, in the first-year classroom. The only question I recall from the exam was from the first session. It was a mixed tort/property problem, positing two neighbors who had a party wall on their property line. After a hard rain the wall collapsed, damaging the property and causing someone to be injured. There were several of us huddled in the hall after the session, going over what the question was about. One of the group announced that he had figured out what the exam author wanted us to discuss: water rights. According to him, we were supposed to discuss various theories about getting rid of the rain runoff. My first thought was, good grief, I missed it entirely. My second thought followed: that this guy had. (I don’t know how this fellow did on the bar exam.)

The exam itself was given in July, and it was hot. The air conditioning, such as it was, was not working. So, the doors of the classroom were open. The mass of sweating humanity packed inside the classroom seemed to attract every flying insect in Westwood, and they assembled there in plenary session, to attack us helpless prey. Somehow, we all got through it; I don’t know about the insects.

One final story about the bar exam: The Supreme Court clerk’s office was on the top floor of the state building, near the coffee shop. One morning

the clerk walked over to several of us at the coffee shop on that floor. He told us the bar results were out and we all had passed, except one of our group, Phil Griffin. We all trooped down to the State Bar office which was in the Rowan Building. Phil got up to the window to verify how he did; he was told that his name was not on the list of successful candidates. We returned to the office in a funk. Then Phil got a call from his wife. The mail had just arrived and he had passed. Turns out the list of names had been mis-alphabetized. So, we did what any recent law student would do: theorized about what torts the bar people may have committed in causing this emotional distress. (Phil went on to a long and distinguished career in the AG's office.)

As it has for so many others, the law school has been an important part of my life. And most of the memories are good ones. I have been privileged to be a part of the school family ever since.

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REFLECTIONS ON MY TIME AT UCLA LAW

CHARLIE FIRESTONE*

I came to direct the UCLA Communications Law Program in August, 1977. Geoffrey Cowan and Monroe Price co-founded the program in 1972. Geoff directed it the first two years, then went to teach undergraduate communications at UCLA, and engage in the other four things he was doing at the same time, as he has continued to do to this day.

Monroe started many activities at the law school, including the *UCLA-Alaska Law Review* (quite a concept in itself), the Indian project with Carole Goldberg, and other assorted activities that comprised a wing of the law school that we called Monroe, Inc. Monroe would toss five or six balls in the air on a given day and the trick was understanding which ones to run with, which to let drop to the ground. Monroe's departure to become dean of the Cardozo Law School in New York was a big loss for the law school. He was also known for absent-mindedness, such as the apocryphal story that he walked into someone's office and said, "Monroe?," and the person said, "No, I'm Bill, you're Monroe."

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When Geoff Cowan left the program, Tracy Westen took it over and ran it for three years with Molly Larson as his assistant. By the time I got there the program was the best communications law offering in the country with courses, speakers, public interest litigation, and the groundwork for bringing the *Federal Communications Bar Journal* to the school.

I came from a public interest communications law firm in Washington, D.C. Jimmy Carter had recently won the presidency and my mentor headed a new agency, the National Telecommunications and Information Administration, to which he asked me to become general counsel. But if I stayed out of the government, I was in line to argue a major communications case before the Supreme Court, *FCC v. National Citizens Committee for Broadcasting*. It was an appeal by the FCC, the newspaper industry, and the broadcast industry from a ruling in the court of appeals requiring the divestiture of every major newspaper–broadcaster combination in the country. Moving to UCLA Law to prepare and argue the case was perfect. I could teach, run the program, involve students in the case, and get away from Washington.

When I arrived, Dean Warren called me into his office. First things first, he said. Would I come to dinner with two other new professors, Steve Shiffrin and Ted Eisenberg? Of course. And would I come to the Faculty Malibu Beach Party that weekend. Wow, I really was in L.A. Then Geoff Cowan had a “Goodbye Tracy, Hello Charlie” party with the likes of Norman Lear, and who knows who else, welcoming me to the city.

With extensive contacts from eight years in the Washington, D.C., communications bar, I solidified the move of the bar journal, renamed the *Federal Communications Law Journal* to be edited by UCLA law students. I was the faculty adviser, a role I greatly enjoyed. I offered a paper in lieu of final for my Communications Law course, so students could get credit for their work and publish it in the FCLJ if it was good enough. And the opportunity to edit a journal also brought new students to the Communications Law Program. They were a fun, tight-knit cadre of students highly interested in the field.

I thought I would stay for only a year or two. But it was interesting, I loved L.A., my wife and I started a family. And the NTIA, a part of the Commerce Department, seemed a bit bureaucratic and had a general counsel in place for well over a year before I could even consider going back. We

stayed for one, two, three years, and decided the way to live was to act like we would be there forever. Then Ronald Reagan won the presidency, so no one was going to bring me back to the government, nor was I particularly interested in returning. All in all, we lasted thirteen years in Los Angeles before returning to D.C.

The Communications Law Program consisted of the courses in Communications Law, which were unusual in that day, a bevy of speakers including Chief Judge David Bazelon of the District of Columbia Circuit, Frank Mankiewicz, then president of NPR, and actor George Takei. We held a series of biennial symposia on satellite law, something at the cutting edge of its day, clinical communications public interest litigation, and externships, where students could get a quarter's worth of credit by working for FCC commissioners or the like. We placed students in the FCC chairman's office, as well as other commissioners' offices in the FCC and FTC, the Directors Guild, Association of American Publishers, American Film Institute, public interest law firms, House subcommittees, the National Association of Broadcasters, NTIA, four judges of the U.S. Court of Appeals, and even the International Institute of Communications in London, England. UCLA Law was well known to all communications practitioners, and I think without much question was regarded as the best place to study if one wanted to specialize in that field.

The NCCB case on newspaper–broadcast cross-ownership was extremely high profile. Students helped in the research, and I held a moot court at the law school on the case before arguing it in January 1978. Justices Karst and Shiffrin were particularly sharp in their questioning. The critique was invaluable, though the outcome was an inevitable 8–0 reversal, upholding the FCC's original rules which allowed for grandfathering existing cross-ownerships unless they were actual monopolies.

We were to get a second Supreme Court case, *Community Television of Southern California v. Gottfried*. I won't go into the details, but a local Los Angeles attorney, Abe Gottfried, literally made a federal case out of the local public broadcaster's refusal to air the captioned ABC Newscast offered to it by PBS, and misled him as to the reasons for not doing so. Here again students were invaluable in their aid in the briefing, and Angela Campbell, FCLJ editor in chief, top aide in the briefing, and now a clinical professor at Georgetown Law, even came back with me for the argument.

When we arrived at the Supreme Court for the argument, the Court gallery was packed. All those people to hear us? No, the first case was the Bob Jones University case which challenged whether the U.S. Government could refuse tax exemption to an organization openly discriminatory against Blacks. When that argument concluded, and they called our case, the gallery emptied.

Other litigation proceeded to encourage more access to the airwaves for minorities and women. One case we considered and worked on but did not bring was particularly interesting. George Takei, Mr. Sulu on *Star Trek*, was a candidate for the L.A. City Council. Under the FCC's equal opportunity rules for political broadcasting, a local station that aired one candidate had to give equal time to his or her opponents. This meant that the local station that had the rights to *Star Trek* reruns would not air the episodes, depriving Takei and his fellow actors of their residuals. What particularly galled him was that the episode they withheld was one where he was on a planet that made him get progressively crazier and crazier. Hardly a campaign asset. We were going to propose that the rule should only apply when the candidate's appearance was as himself, not a fictional character. It would have application as well to Ronald Reagan, who was running that year for president, when he appeared in *Bedtime for Bonzo* or as the Gipper. Unfortunately the student work on that one was too deficient to edit and submit in time to be relevant.

Creating symposia was one of the highlights of our activities. In 1979 we held one on "The Foreseeable Future of Television Networks." Speakers included Norman Lear, FCC Chairman Charles Ferris and Richard Frank, president of TV distribution for Paramount Pictures.

In 1981, with inspiration from Monroe Price, the active participation of my assistant Doris Davis and many students, and support from the National Endowment for the Humanities, we created "Privacy and Democracy in 1984," a look into the future. Davis thought that speeches from humanists were fine, but the program needed more, and convinced me to engage an improv group called the Groundlings to perform in between sessions. We spent time briefing them with materials and discussions as to where the technology was headed, and it paid off. Led by Phil Hartman (later of *Saturday Night Live*), the group performed songs such as "I'm Just an Analog Man in a Digital World," and had a family scene where

the father breaks down to his wife, “Marge, I’m afraid I just can’t provide enough data for the family.”

In 1981 we also convened a symposium on the Regulation and Deregulation of the New Video Technologies. Appearing were FCC commissioners Tyrone Brown and Anne Jones, former FCC Chairman Richard Wiley, Congressman Al Swift, NTIA Administrator Henry Geller and various industry and public interest leaders.

We went on to hold a series of symposia every two years on satellite law. This came about at the urgings of my best student during my thirteen years at UCLA, Martin Rothblatt. A single parent of a mixed-race child, and working part-time at Hughes Aircraft, Martin still had time to ace his courses and exhort me to do more in satellite law. I gave him independent study time to help devise and put together readings for the first symposium in 1981, and we held two more after that.

After graduation, Rothblatt went to Covington & Burling in Washington, D.C., and worked for some satellite clients. Before turning thirty, Rothblatt was president and CEO of Geostar. Subsequently he formed his own firm and helped a man named Rene Anselmo start PanAmSat, the first competitor to Intelsat that eventually sold for \$3B, all from a plan he had concocted while in law school. He then (maybe not in exact order) conceived of direct broadcast satellites and started CD Radio, which is now SiriusXM, married and had three more children, got a Ph.D. in bioethics, changed sexes and became Martine, found out that her daughter had a devastating pulmonary disease for which pharmaceutical companies were not willing to research a cure because it was too rare, researched cures on her own enough to craft a request to crowd-source a cure, found one and saved her daughter’s life, formed a company called United Therapeutics, went public with the company, and in 2014 was the highest paid female CEO in the country. Her latest book, *Virtually Human*, looks at cyber-consciousness: extending life by transferring one’s consciousness to a computer. I was honored to present the UCLA Alumna of the Year award to her in 2014, pointing out that her entire life consisted of crossing boundaries in space, race, gender, business, and even life.

Among the course offerings was a seminar that engaged the students in a comprehensive rewrite of the Communications Act of 1934. In the spring 1978 students prepared papers in different areas of the extensive law,

material that was part of House Communications Subcommittee Chairman Lionel Van Deerlin's rewrite activity. Congressman Henry Waxman, a member of the subcommittee and UCLA Law alumnus, conducted field hearings at the law school on the topic.

Another area of activity was to provide legal advice and support for the League of Women Voters of California, who sponsored statewide debates on gubernatorial candidates Jerry Brown and Evelle Younger.

I kept teaching a seminar in the program through 1989, but in 1985 I left as director, bringing in Daniel Brenner as my successor. Brenner required that the position be on the tenure track. It had always been an adjunct position, a fact I was quite happy with. When I attended my first faculty meeting, I learned that I had no vote as an adjunct. To my delight, that was the last faculty meeting I attended. Ultimately, placing the position on the tenure track led to the demise of the program. In a close and controversial vote a few years later, Brenner did not gain tenure. I think the faculty saw the rare opening of a tenure track position as too alluring to them to bring in another traditional professor. This was their most valuable currency, and they did not want it going to an odd backwater position. With Brenner's departure, the program was eventually dissolved — the editing of the FCLJ went to the University of Indiana, public interest litigation was on the wane, and they decided that entertainment law was more in the crosshairs of UCLA tradition. This was in the mid-1990s, the early days of the digital revolution.

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THE UCLAW MUSICAL

Introduction: UCLA School of Law, 1987–1990

GEORGE ABELE*

I had never been to Los Angeles before arriving for my first day of law school at UCLA. I knew no one. The bulletin board in the school hallway contained a flyer for auditions in a musical written and directed by Professor Kenneth Graham, and performed by law students. “What a great way to meet my classmates,” I thought. A second thought crossed my mind as well: “What a great way to embarrass myself in front of the entire student body.” Singing was not my strong suit. Or any suit at all, for that matter.

I sought out Professor Graham. “I’d like to be in the musical,” I said, “but I can’t sing.” “Anyone can sing,” he encouraged me. “You don’t have to be a Broadway star.” Practicing my lawyer-to-be skills, I negotiated a non-singing role, the only one in the production. I played a law professor who provided a narration for the performance, to fill in the storyline between the musical numbers.

We rehearsed for months, and I found the camaraderie I was looking for. Professor Graham was as friendly and as patient as one could be, gently

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GEORGE ABELE
ON STAGE,
FEBRUARY 1988.

*Courtesy
Kenneth Graham*

guiding us through the storyline and lyrics he had written to Cole Porter songs. Showtime was upon us before we knew it, and we performed in front of much of the student body and faculty. I recall when I stepped out on stage to open the show, I heard a fellow classmate call out from the audience, “Let’s go Abele!” Momentarily distracted, I nearly forgot my lines, but managed to survive the stage fright. We carried off the show without a hitch.

At the beginning of second year, I had the opportunity to take Evidence with Professor Graham. Recalling the bond we had forged in the play, I registered, expecting, perhaps, some lenient treatment when it came to the challenges I had heard Evidence class could present. As I settled into my seat toward the back of the class on the first day, Professor Graham began, “What evidence is admissible? Let’s go, Mr. Abele!” Momentarily distracted, I completely forgot my lines.

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THE HISTORY OF THE UCLAW MUSICAL

KENNETH GRAHAM*

The UCLA law school has a long history of doing musical comedy parodies. Originally, students performed these during the law school's annual variety show, "The Law Revue." For example, one year Ralph Shapiro wrote a parody of "Fiddler on the Roof" that brought down the house when students sang "If I Were A Lawyer" to the tune of "If I Were A Rich Man."

The history of the show as a separate entity began in 1981 when Bill Peters and Bryan Hull wrote "My Fair Law Student" for their classmates to perform as part of The Law Revue, then invited Professor Graham, their Procedure teacher, to fill that role in their show. At one rehearsal, when the lines they wrote did not fit the music, Graham (who had no previous experience with lyric writing) sketched out a better set of lyrics, which they readily adopted.

That might have ended it, but later that year Graham broke his elbow playing basketball. On visiting him in the hospital, the students urged Graham to try his hand at another parody for the next Law Revue. Graham agreed and, using the tunes from Rodgers and Hammerstein's

* Professor Emeritus, UCLA School of Law. For further information, see the Editor-in-Chief's introduction on page 1 of this volume: 11 CAL. LEGAL HIST. 1 (2016).

“Oklahoma!” came up with “Carcinoma.” Because of its length, the directors of The Law Revue would only schedule it if it were performed as the last number. The remaining audience applauded the performance of “Carcinoma” even though it did not end until well after midnight. And so the tradition began.

Here is a complete list of the shows and the originals from which they were taken:

- 1982 Carcinoma (“Oklahoma!”)
- 1983 Obfuscate (“Kiss Me, Kate”)
- 1984 Soporific (“South Pacific”)
- 1985 Songs Without Heart (The Rodgers & Hart Songbook, the first show not based on a single musical but an entire body of work)
- 1986 Damp Hankies (“Damn Yankees”)
- 1987 My Fair Lawyer (“My Fair Lady”)
- 1988 Exam-a-Game (“The Pajama Game”)
- 1989 Coleslaw (The Cole Porter Songbook)
- 1990 S.O.U.L.S. (“A Funny Thing Happened on The Way to the Forum”)
- 1991 West Side Glory (“West Side Story”)
- 1992 Guise Enthralls (“Guys and Dolls”)
- 1993 The Wizard of Laws (“The Wizard of Oz,” the only show based on a movie)
- 1994 The Good Lawyer Svejik (The Beatles Songbook)
- 1995 Muzak Man (“The Music Man”)
- 1996 Justice Mall (the only musical based on classical music, “Pictures at An Exhibition”)
- 1997 Anti-Kids’n’Fun (“Annie Get Your Gun”)
- 1998 I.R.A.C., By George (The George and Ira Gershwin Songbook)
- 1999 Thinking An I (“The King and I”)
- 2000 Kernal Knowledge (The Jerome Kern Songbook)
- 2001 Care or \$ell? (“Carousel”)
- 2002 No Diploma (“Oklahoma!”)
- 2003 Fogey Barcicle (The Hoagie Carmichael Songbook)
- 2003 We’re Singing It Again (the first Alumni Musical — selections from the above shows)

The careful reader of this list will note that while many of the shows took music from a single Broadway musical, a significant number drew from a composer's complete body of work; for example, "Songs Without Heart" rested on the many songs written by Richard Rodgers and Lorenz Hart.¹

WRITING THE SHOWS

Once the musical became an annual affair, immediately after one year's show Graham began writing the musical for the following year. Usually it took around six months to complete the script. But we should note two exceptions.

"S.O.U.L.S." (the acronym stood for "Some Other University Law School") began life as a project for the annual meeting of the Association of American Law Schools. When the AALS decided to come to Los Angeles, UCLAW Professor Jesse Dukeminier (a member of the local program committee) suggested they recruit Graham to write something for evening entertainment. However, when the Committee saw a first draft of a parody of "A Funny Thing Happened on The Way to The Forum," they promptly rejected it as "too controversial."² Graham later recycled the script for local use.

The second case of rapid writing began when at the cast party in 1990, Graham casually mentioned that he had thought of using "West Side Story" to recount the battles over affirmative action at UCLAW but decided this would not work as the original required more choreography than usual. The students urged Graham to give it a shot. He did — and completed the script in six weeks. "West Side Glory" proved quite successful, particularly in stirring student discussion of the complexity of the issues.

Graham usually altered the original script during rehearsals — sometimes because he found a better line or lyric, but often as a result of suggestions from cast members. Hence, in addition to the original script, the show archives contain an "As Performed" version prepared after the

¹ Readers who would like to see more, including programs and photographs of the shows should visit our Facebook page, "The UCLAW Musical." The complete show archive with scripts, CDs and DVDs of performances, photos, T-shirts, and other memorabilia was deposited in the UCLA Law Library's historical collections.

² The premise of the show involved the then-current attempt by some right-wing groups to hire students to spy on their teachers and report any attempts to indoctrinate students with some leftist ideology.



THE STAFF SCENE FROM THE “WIZARD OF LAWS,” 1993.
 L.-R.: STUDENTS TIFFANY WAGNER AND MEGAN SATTERLEE,
 UCLA LAW LIBRARIAN FRED SMITH, STUDENT MARCUS
 DELGADO (SEATED), AND (IN CENTER WITH LONG DRESS) LINDA
 KRESSH OF THE LAW SCHOOL PLACEMENT OFFICE.

Courtesy Kenneth Graham

show. Because students, faculty, and staff contributed to the final product, we attributed authorship to “The Aesopian Collective.”³

Though we advertised the shows as “musical comedy” (and they had a lot of jokes poking fun at student and faculty foibles), as the example of “West Side Glory” shows, they also dealt with serious issues. Many shows had something to say about feminism and the status of women (including sexual harassment). Other shows looked at climate change and CIA spying on domestic dissidents (“Care or \$ell?”), the culture of corporate law firms (“Anti-Kids’n’Fun”), jury trial (“Kernal Knowledge”), and nostalgia for the 1960s (“Fogey Barcicle”). While one faculty supporter thought the show took a Manichean view of the world, another quoted a line from

³ For those too young to remember the McCarthy era, members of the Communist Party were accused of using “Aesopian” language that had one meaning for initiates while outsiders assumed the words had their normal meaning.

the show during a faculty meeting. In perhaps the most remarkable tale of influence, in “Soporific” one of the characters called another “a rebel without a pause.” Someone in the audience used that line in an article in a national publication to refer to members of The National Lawyers Guild. From there someone picked it up to use as a label for a local talk-show host.

MUSIC AND MUSICIANS

Over the years, many talented musicians provided accompaniment for the singers and dancers, beginning with Mark Swanson who played piano for the first three shows. Mark had performed a similar role for undergraduate performances at Stanford.⁴ In some later shows it took two or more pianists to fill Mark’s shoes. Notable exceptions include Cathy Paul⁵ and Darron Flagg.⁶ So that the pianists did not have to play at all the rehearsals, they recorded the music on tape cassettes (remember those?) that were played on a boom-box at rehearsals. The cast and the pianists usually assembled at the Graham manse on the Thursday night before the dress rehearsal to run through the music.

The show had other musicians. Beginning with “Obfuscate,” the show usually had a faculty band that played an overture and an entr’acte. At their first appearance, the band included Professors Reggie Alleyne (flute), Michael Asimow (piano), Ken Graham (trombone), Henry McGee (violin), and Patrick Patterson (winds and arrangements). Students sometimes joined the faculty band, but eventually students formed their own bands. Jason Axe, who, as an undergraduate, had been an arranger for the UCLA marching band, played a key role in this development. The student band originally accompanied the big production

⁴ After a brief period practicing law, Mark went to music school at Indiana University and when last heard from had joined the music faculty at Dartmouth, where he served as director of university choruses.

⁵ Cathy joined us for “Coleslaw,” the musical that had more songs than most.

⁶ Darron had classical training; his skill led Graham to the ill-fated venture into classical music, “Justice Mall,” based on “Pictures at an Exhibition” by Moussorgski. But neither Darron nor his collaborators (Peggy Chen and Jason Axe) bear any responsibility for that disaster.



PROFESSOR CLYDE
SPILLENGER (RIGHT)
AND ADAM KAUFMAN, A
MEMBER OF THE STUDENT
BAND, IN “THE GOOD
LAWYER SVEJK,” 1994.

Courtesy Kenneth Graham

numbers, but they reached their zenith in “The Good Lawyer Svejck” when they accompanied most of the Beatles’ songs in that show.⁷

In a couple of shows we used recorded music. For example, in “Damp Hankies” the second act began with the cast singing Don McLean’s “American Pie.” And in “The Wizard of Laws,” the opening scene featured the music from “2001: A Space Odyssey.” And later the cast closed Act I by singing lyrics written to accompany “The Star Wars Theme” by John Williams.

THE CAST: RECRUITMENT AND REHEARSALS

We began recruiting students for the musical soon after the start of the fall semester.⁸ We posted flyers around the law school and hung envelopes with sign-up sheets on bulletin boards. The sign-up sheets asked students to indicate their talents and interests. Once we had these, we printed up scripts and held an informational meeting where students could pick up scripts, ask questions, and get a sign-up sheet for auditions.

After the students had enough time to read the script and decide what roles they wanted, we held auditions. In the early years, the student directors in consultation with Graham cast the show.⁹ At the auditions, students had to read a bit of dialog and sing one of their character’s songs. The student directors usually found the casting easy, but when he took over the director’s role, Graham found it quite difficult, except in those years where

⁷ The faculty band did a couple of numbers.

⁸ In some years, student groups like ours got a table at law school orientation to provide information about and recruit members for their organizations. When available, we took advantage of this.

⁹ The consultation requirement was added after several students who had been in the show the previous year quit after the student director passed them over for lead roles. Graham thought prior service in the show should count for something but most student directors rejected this.

few students auditioned. The shows were usually double-cast; that is, one student played the role in the 7:00 PM show and a different student took over the role in the late show.

The number of students in the shows varied widely and without apparent reason. For example, only twelve students appeared in “Coleslaw,” which ironically had more songs than most shows.¹⁰ On the other hand, “The Good Lawyer Svejik” had more than twenty-five cast members along with more musicians than any other show.

Similarly, the student skills spanned the range from Karen Ragland and Susan Keller, who had been professionals before coming to law school, to those who had never set foot on a stage before. Seeing some of the latter blossom over the course of their work provided a real delight. Though you might not expect this, the professionals took direction better than some of the students who thought they had been stars in high school.

We rehearsed for a month. During the first three weeks, rehearsals were held Monday through Thursday from 6:00 to 8:00 PM. However, not every cast member was called for every rehearsal; we typically called the chorus members only twice a week. But many cast members rehearsed on their own outside of the scheduled rehearsals.

Cast members were busiest the week of the show. Typically, everyone was called for every rehearsal. On Thursday night the cast assembled at the Graham home to run through the music for the first time with the pianists. The dress rehearsal took place on Friday night and sometimes the students wanted an additional rehearsal on Saturday afternoon prior to the evening’s performance.¹¹ Then after the show, cast members helped strike the set and move props back to the law school before heading off for the cast party.

We held rehearsals in the student lounge but moved into the law school lobby to choreograph the dance numbers. The week of the show, we moved into the lobby twice to run through the show with each cast, a move that occasionally brought complaints from students trying to study in empty classrooms along the main hall. When Keith Endo took over as our sound

¹⁰ Because of the small numbers, leads in one show had to appear in the chorus in the other, putting further strain on their vocal cords.

¹¹ At the extra Saturday rehearsals, cast members usually stayed in the theater after the rehearsal, ordering takeout rather than trudging home to eat.

technician, he came to these rehearsals to see how he needed to set up the sound system — for example, which performers might need body microphones to be heard. Dress rehearsals took place, of course, in the performance venue.

FACULTY AND STAFF: RECRUITMENT AND REHEARSALS

We worked hard to get faculty to participate in the show because we drew an audience that wanted to see their professors on stage as much or more than their classmates. During Susan Prager's deanship, she encouraged faculty to take part as she did and allowed Graham to make his pitch at faculty meetings. Some faculty participated regularly, including those mentioned above who joined the faculty band.

Though most faculty did not want to do more than join the faulty chorus, Ken Karst, Dan Lowenstein, and Gary Schwartz agreed to sing solos. Once this became clear, Graham began to write songs for them to sing. When writing "The Good Lawyer Svejek," Graham asked Professor Schwartz to name his favorite Beatles tune; then "Let It Be" became "Let Tort Be." This dirge against tort reform included the memorable line, "My class notes would be obsolete." When Gary sang this in the show, not long before his untimely death, it brought the house down.

Staff participation began early, with most of the regulars drawn from the Law Library and the Placement Office but occasionally we got administrative assistants to join us — most memorably in "Songs Without Heart," where the hero (then a paralegal), went to law school at the urging of his co-workers. Perhaps the most memorable staff work came in "Anti-Kids'n'Fun" where they played The WackyNuts, a group of escapees from a lunatic asylum who flitted through many of the scenes.

On a few occasions, faculty and staff offspring appeared on stage. The dean's daughter, Casey Prager, appeared as "Dean Vaguer" in "Guise Enthralls." And Nancy Berkowitz's daughter Andrea played violin in "I.R.A.C., By George" during the song "Bummertime," based on "Summertime." Our L.L.M. candidates rarely appeared in the show, but when they did, they enjoyed it.

Originally the student director tried to do faculty and staff rehearsals, but this proved too onerous. So Kris Knaplund and Ken Graham shared

this task. (In later years, Kris also recruited faculty members). Faculty put up some resistance when we began to choreograph their production number in “West Side Glory,” but our student choreographer, Julie Van Wert, finally convinced them they could do it. When they did so, the audience expressed great appreciation for their efforts — even when faculty feet would not do what their brains told them needed doing.

We made one concession to the demands on faculty time. Since faculty meetings usually took place on Friday, during dress rehearsal we usually put on the faculty out of order whenever they were able to arrive. The students did not mind since this was the first time they had seen the faculty number. Though we offered staff members a similar dispensation, many of them were willing to stick around in order to see the rest of the show. During the performance, rather than wait back stage, faculty and staff sat in seats reserved for them and came backstage shortly before they were scheduled to come on.

PRODUCTION

Putting on the show required a lot of advance work that most cast members knew little about. When the show left The Law Revue to become a separate entity, the Public Interest Law Foundation (or PILF) under the leadership of Alan Garfield agreed to produce the show in return for adding any profits to their coffers.¹² So each year, PILF provided one person (sometimes two) to serve as the producer. The producers enlisted other PILF members for specific tasks. For example, each year someone with artistic skills would draw the show logo that was used for publicity, program covers, and T-shirts.

The producer’s most important task was to arrange for lighting and the sound system, as well as people with the ability to work each. During the early years, we rented lights from Angstrom Lighting in Hollywood. Richard Graham (no relation) gave us a reduced rate because PILF was a non-profit. Ditto for Jim Ash of Ash Audio. One year when our student operator had trouble working the soundboard, Jim drove all the way up from Torrance to show him how.

¹² The amounts raised varied, but even when production costs ate up most of the profits, PILF still had the advantage of telling outside funders that none of their money went to administrative costs as profits from the show defrayed these expenses.



THE CAST OF "KERNAL KNOWLEDGE," 2000,
ACKNOWLEDGING THE BACKSTAGE STAFF.

Courtesy Kenneth Graham

The producer not only had to rent this equipment but also arrange to pick it up before the show and return it afterwards. Usually at least one PILF member had a pick-up truck we used for this purpose, as well as moving props to and from the law school. Most years the only such props were tables and chairs, though in a couple of shows PILF members created scenery that also had to be moved.

The producer also had to arrange for a piano. After a couple of fiascos in moving the piano from the student lounge, we turned to renting a piano from the School of Music, which greatly simplified things. The School of Music would move the piano to the venue and tune it just before the dress rehearsal. In most years, the producer also found us a pianist (or pianists).

The producer helped promote the show and provide people to man the ticket table. Most years, the promotion consisted of putting up posters and making announcements in classes. In the early years, the cast helped promote the show by giving a preview of the show songs at noon in the law school lobby. We had to drop this after some faculty complained that the crowd made it hard for them to get to the Faculty Center for lunch.

The producer also had to recruit PILF members to work the night of the show. They performed such tasks as taking tickets and handing out programs.¹³ They also recorded the shows, first on Graham's boom-box, then later on his video camera. Other students worked backstage as prompters, stage managers, and prop managers.¹⁴ After the show, PILF members helped the cast strike the set and move stuff back to the law school.¹⁵

We referred to the entire crew it took to put on the show as “403 N.W.2d 143” — the citation for a Michigan case: “People v. Music.”

THE END OF THE PILF CONNECTION

For the most part, the relationship with PILF worked well — with a couple of exceptions. The first problem arose over the artwork for “My Fair Lawyer II.” The artist, Kat Kozic, originally based the show logo on the artwork for “My Fair Lady,” which showed George Bernard Shaw pulling the strings on a female figure (presumably Eliza) in a semi-recumbent position. However, several PILF members objected to this artwork as “sexist,” and Kat tried several alternatives, but the only one that satisfied them showed the female figure standing upright and using a pair of scissors to cut the strings. Kat was so unhappy with this ugly version that she asked not to have it credited to her in the program.¹⁶

The second controversy erupted over “The Muzak Man.” In one scene, an elderly spinster (impliedly lesbian) remarked that Hershey's chocolate kisses “looked a little like nipples.” A PILF member wrote an angry letter to the dean, completely misrepresenting the dialog, and asking how the dean could permit the law school name to become besmirched by such an

¹³ The show used what came to be known as “festival seating”; that is, first-come, first-served seating. The sole exception: we reserved seats for faculty and staff members in front so they could easily reach the stage to perform.

¹⁴ This job took on greater importance after “Damp Hankies,” when the first person who played the Devil walked off with a flash producer that allowed the Devil to make fire appear to emerge from his hand — a device that Graham had bought at a magic shop at the suggestion of the student director.

¹⁵ Since the lighting and sound equipment could not be returned until the following Monday, we had to find a secure place to store it — usually Graham's office.

¹⁶ Graham then reached an agreement with the PILF leadership that PILF members were not to meddle with the artistic side of the show.

obscene production. The dean, who had been present and found nothing offensive, suggested that he take up the problem with the PILF leadership. When Graham saw this exchange of correspondence, he feared this might lead PILF to ask for control over the content of the show.¹⁷

By this time, the enthusiasm of PILF members to aid in the production of the show began to wane. In one year, the producer could not get enough people to staff the show and cast members had to enlist friends to fill in. Moreover, PILF now had a more lucrative way to make money — an annual auction of items donated by faculty and alumni. The last straw (at least for Graham) was when he was in the lobby selling tickets for the show while PILF members were in the lounge selling tickets for the auction.

In 1996, the PILF leadership agreed with Graham that it was time for us to go our separate ways.

THE POST-PILF ERA

The most immediate consequence of cutting the PILF connection was that Graham had to formally become the producer of the show — a role he had pretty much filled in the last few PILF years. The second (and more momentous consequence) was that since we were no longer raising money for PILF, we did not have to use the cheapest venue. As a result, the first show under the new regime, “Anti-Kids’n’Fun,” moved to the Northwest Campus Auditorium. Unlike the classrooms in which previous shows had been performed, this was a genuine theater with most of the usual facilities, such as curtains, dressing rooms, and the like.

Fortuitously, the year before, when PILF could not provide a sound man, we asked the Theater Arts Department to suggest someone we could hire — and that’s how we met Keith Endo. When Keith learned we were going off on our own, he told us that he had his own sound equipment and a couple of follow spots. He suggested a package deal; his services and his equipment for not much more than we had paid for his services.¹⁸

¹⁷ It never did.

¹⁸ We later learned that in addition to his freelancing at UCLA, Keith was also a prize-winning lighting designer for legitimate theater productions.

For the rest of the shows, Kieth was more than a sound man, though he did a very good job of that.¹⁹ During dress rehearsals, he shouted out stage directions: “Don’t turn your back to the audience,” or “Come downstage to deliver that line.” He also made audio recordings of the shows. Finally, during dress rehearsals, Keith took photographs — lots of them.²⁰

AFTER THE CURTAIN CAME DOWN

The cast first took their bows, as orchestrated by the director.²¹ Once that was completed, most of the cast helped to strike the set — an onerous task for just two people, particularly after all of Keith Endo’s sound equipment had to be removed from the auditorium. Once the set was struck, his equipment loaded into Keith’s car, and any props moved back to the law school, it was time to head off for the cast party.

The first cast parties took place in the law school, but the venue gradually shifted to local restaurants with a few held at the home of cast members.²² In addition to reprising their performance, sometimes the cast members presented the director with what became the customary souvenir — an enlarged copy of the show logo signed by cast members and others (faculty members or the production staff). Ken Graham had these framed and hung in his office until his retirement forced him into a smaller office, when some of them had to be moved to his home.²³

THE END OF THE UCLAW MUSICAL

Several developments contributed to the demise of the show. First, the university tried to make up for budget cuts by increasing the fees for use of

¹⁹ For example, in addition to the usual stage microphones, Keith also used body mics where appropriate, and a backstage speaker so those waiting to go on stage did not have to peer through the curtain to see when it was time for their entrance.

²⁰ Several hundred of these appear on the show’s Facebook page.

²¹ Following a custom begun by our first director, Patty Mayer, the directors did not take bows. Ken Graham did come on stage after “No Diploma” to accept a plaque presented by Dean Jonathan Varat to commemorate the show’s twentieth anniversary. He did the same after the Alumni Show.

²² One early party was held at Patty Mayer’s home.

²³ A few of these are in the law school archives, and the rest will eventually end up there as well.

an auditorium, making the show financially precarious.²⁴ Second, younger faculty from Ivy League schools found the show too undignified to participate in, and some older faculty stopped participating once PILF ceased its sponsorship.²⁵ Finally, the author's muse seemed to have deserted him.

The show left an interesting legacy. It raised thousands of dollars for the UCLA Public Interest Law Foundation. It brought students, faculty, and staff together in a common effort that enriched their interactions elsewhere. It led to several marriages between cast members that endure to this day, including the marriage of a faculty member (Evan Caminker) who went on to become the dean of the University of Michigan Law School. But most importantly, as many students wrote when they signed the show posters and repeated at alumni reunions, "It was the most fun I had in law school."

★ ★ ★

²⁴ Dean Susan Prager covered the shortfall during her deanship and later Ken Graham subsidized the excess costs of the show over the money from ticket sales.

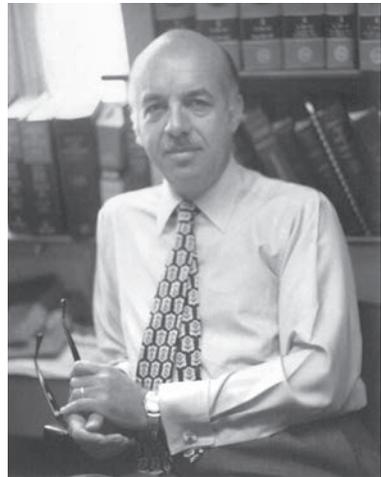
²⁵ Faculty participation not only helped bring out an audience but also validated student participation in the show.

I LICENSED NIMMER

ALEX KOZINSKI*

I started law school at UCLA in the fall of 1972. No one in my family had been a lawyer or had anything to do with the law, so I had no idea what to expect. The first day of class, I had quite a surprise: The professor at the front of the class looked very familiar and, on closer inspection, I recognized him as Edgar “Ted” Jones, the judge on the 1960s TV show, *Day in Court* — an early and much tamer version of Judge Judy and Judge Wapner.

Was I jazzed! A law school with celebrities as teachers. I knew I’d made the right decision in picking the school



MELVILLE B. NIMMER

Photo by Hon. Alex Kozinski

* Judge (formerly Chief Judge), U.S. Circuit Court of Appeals for the Ninth Circuit, Pasadena, California. Reprinted by permission of the author from 60 J. COPYRIGHT Soc’y U.S.A. 201 (2013). For further information, see the Editor-in-Chief’s introduction on page 1 of this volume: 11 CAL. LEGAL HIST. 1 (2016).

closest to Hollywood. It was also the only one that didn't reject me, but I took credit for that too in strategically blowing a few key classes as an undergrad. The professors that first quarter were all showmen of one type or another, the way law professors tend to be. Some did it by strutting across the classroom and gesticulating with dramatic flair. Others did it by presenting deep paradoxes or anomalies in the law, and asking us to ponder the mysterious and nonlinear way in which the law developed. Still others did it by creative use of the Socratic method, always managing to manipulate students into making contradictory arguments and then telling them they were beginning to think like lawyers. And one did it by lampooning my accent, which got a big laugh.

There was one class that was a bit different, and that was Contracts. The professor was a neatly dressed, quiet, balding man with a mustache. He always wore a suit, a tie, and a shirt with French cuffs. He would walk into class, sit at the desk on the dais facing the class and, at the stroke of nine, start lecturing. He didn't move the entire period, except to turn pages in the book or recognize a student by pointing.

The entire lecture consisted of words, spoken softly but clearly, as he deftly peeled back the mysteries of consideration, meeting of the minds, parol evidence, and mutual mistake of fact. His explanations were simple and to the point; his Socratic dialogue was always calculated to illuminate, never to shock and awe.

Only once during the two quarters he taught us Contracts did Nimmer get up from his desk. I remember it vividly because it was such an event. He was in the midst of explaining a particularly tricky concept when some student (probably me) asked a convoluted, off-the-wall question. Nimmer paused a few seconds and then, as if making up his mind to do something distasteful but necessary, he pushed back his chair and stood up. He then buttoned his coat and started to turn towards the blackboard. As he did, he turned back to us and, in a tone that was half explanation and half apology, said, "I'll have to approach the . . . the . . . board." The last word came out muffled, as if it was not a term to be used in mixed company. We all cracked up.

With a few strokes of the chalk, he drew a diagram that untangled the questioner's conundrum, and quick as a bunny he was back at his desk, wiping chalk from his fingers with a monogrammed handkerchief. His

look of relief at having survived the ordeal told us he'd never do it again, and he never did.

★ ★ ★

While Nimmer was always soft-spoken and polite in class, we found out he had used the F-word before the Supreme Court. One of my classmates had heard a rumor to that effect and we were all wondering whether inside the mild-mannered Professor Nimmer was a Lenny Bruce trying to break free.

So, at the beginning of class, one student (probably me again) asked him about his representation of Paul Robert Cohen in the Supreme Court: "Is it true that the Chief Justice wouldn't let you quote what was written on Cohen's jacket?"

"Well, he tried," Nimmer answered. "When I started speaking, the Chief Justice said: 'Mr. Nimmer, the Court is familiar with the facts of your case so there is no need to state them.'" Nimmer continued, "I felt that if I let him censor what I said in the Supreme Court I'd be conceding that the word was taboo in other courtrooms as well. So I responded, 'I think I can summarize the facts very briefly, Mr. Chief Justice,' and I did."

The class was silent as we waited for Nimmer to quote that summary, but he never did. I guess he thought that kind of language wasn't appropriate for the classroom.

★ ★ ★

One day he assigned an opinion with which I disagreed completely. I tried to make the point in class, but I didn't manage to persuade anybody, least of all the professor. Why didn't this case have a dissent? A dissent would surely have explained to everyone's satisfaction that the majority was out to lunch.

So I decided to write a dissent of my own, and when I was done I dropped by Nimmer's office and handed it to him.

"What is this?" he asked.

"It's a dissent to the Smith case," I explained. "If you'll just read it, you'll see how wrong the opinion is."

I left it with him and waited for a week or two, hoping he'd buttonhole me after class — or, dream of dreams, during class — and tell me how brilliant the dissent was and how wrong the Smith case had been, but he never did.

After a couple of weeks, I could stand it no longer. So I went to his office and asked him what he thought of my dissent.

“It was very good,” he said. “You ought to write more of them.” Little did either of us know that one day writing dissents would be my life.

“But were you persuaded?” I asked impatiently.

“It had its points,” Nimmer said, his voice trailing off.

After a few moments of silence, I completed his thought: “But you weren’t persuaded, right?”

He shook his head. There was nothing left to say, so I turned to leave. As I did, it occurred to me that I hadn’t kept a copy so I asked him for it back. He looked a bit perplexed and then he said, “Um, I filed it,” pointing to the trash can. So my first dissent persuaded no one and wound up in the round file.

★ ★ ★

Near the end of the school year, I got it in my head to take pictures of my various professors. I had a state-of-the-art Nikon F, and I loaded it up with a roll of Kodak Gold 100 ASA film. I stopped my various professors wherever I could find them — after class, in the corridor, coming out of the bathroom.

I found Nimmer in his office, sitting at his desk, of course. He was dressed, as usual, in a blue shirt with gold cufflinks and a conservative pattern tie. He looked pretty much as he did in class, except his suit jacket was off. When he learned my business he demurred, but I would have none of it. Realizing he wasn’t going to get rid of me without a fuss, he resignedly took off his glasses and leaned slightly on his right elbow. I had about five seconds to take my best shot, and I fired off exactly one.

Those being the days of film, I had to wait till the roll was full and the film was developed to see the results. By and large, they were a mixed bag, but the picture of Nimmer was pretty much perfect. Surrounded by books, illuminated by daylight streaming into his office, neat and kempt like a model from a Brooks Brothers ad — that was the Nimmer we all knew and loved. I had a copy of the picture printed and dropped it off at his office. He looked at it, gave me a slight smile and thanked me. As I left, I wondered if the picture would get filed, like my dissent, in the round file.

★ ★ ★

It was a few weeks later, just as finals were starting. I was walking down the main hall of the law school carrying a large cardboard box with my books and notes, pretty much oblivious to everything around me. Suddenly, I heard a voice calling behind me: “Mr. Kozinski, Mr. Kozinski, may I have a word with you?”

It was Professor Nimmer. Contracts had ended weeks ago and I had no idea what he could possibly want with me. Maybe — my heart leapt at the thought — he had found my dissent under a stack of books, re-read it and decided I was right after all. Could it be?

“I don’t quite know how to say this,” he said, “but I may have . . . um . . . infringed your copyright.”

Say what? Had he published my dissent without my permission? But he was pointing to a poster on the bulletin board right next to where we were standing. It was an announcement for a lecture he was going to give a few days later, and right there, under the title and description, was a picture of the speaker. And not just any picture. My picture.

“They asked me for a picture to include in the announcement for this lecture,” Nimmer was saying. “And the only picture I could find was the one you gave me.” His voice trailed off. Finally he added, “I neglected to ask your permission.”

When I finally got it, I put down my box, thrust out my hand and spoke words that I’m sure many a copyright scholar would be pleased to have been able to speak: “Professor Nimmer, I grant you a copyright license!”

He took my hand and we shook on it. Little did I know that years later, in a case involving a gustatory melodrama, I would hold that a transfer of copyright had to be in writing, but a non-exclusive license could be oral: “The leading treatise on copyright law states that ‘[a] nonexclusive license may be granted orally, or may even be implied from conduct.’” *Effects Assocs., Inc. v. Cohen*, 908 F.2d 555, 558 (9th Cir. 1990) (quoting 3 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 10.03[A], at 10-36 (1989)).

I’m sure this was the right answer, but I’ve always wondered just how it got into the treatise. Do you think Nimmer put it there to make sure the license I gave him orally, on the spur of the moment, would hold up in court?

Nah. To quote Elvis, “we can’t build our dreams on suspicious minds.” I’m sure Nimmer knew very well that an oral license was sufficient, and when I offered it, he was happy to accept, knowing it would stand up if it

was ever challenged. And now I'm happy to grant a written license to the Copyright Society of the same picture, to be run as part of their Nimmer Treatise Commemorative Issue. I'm honored to contribute to a Festschrift celebrating the finest copyright treatise of our generation.

★ ★ ★

SOME MEMORIES OF UCLA LAW SCHOOL

JAMES E. KRIER*

I joined the UCLA law faculty in summer 1969, after a year of clerking in San Francisco and two years of practice in Washington, D.C. The school had been founded only twenty years before, and had a relatively small faculty when I interviewed there — about thirty people. By the time I arrived it was substantially larger, thanks to a hiring spree that brought me and seven or eight others onto the faculty all at once. We young turks were instantly integrated into the faculty, treated as family, but we also developed close and supportive bonds with each other, and I remember how commonly five or six of us would all be at work in our offices late into the night, consulting with each other, laboring not just on our own, but — in a way — as a group determined to make a contribution to the school.

I had offers from several established old law schools (including Penn and Virginia) considered at the time to be far superior to UCLA, yet my experience interviewing at UCLA convinced me that it was the only place for me. The people I met were warm, sharp, ready to test my mettle with

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much wit and humor, and, most important, free of the stiffness and pomposity that I found at some of the other schools I visited. They were my kind of people, and I thrived working among them, and with the young new colleagues who joined the faculty around the same time.

Westwood was still a village of sorts in 1969, and most of the faculty lived on the west side of Los Angeles, within a few miles of the law school. This made out-of-office socializing easy, and there was lots of it, usually in the form of dinner parties. There was also, of course, socializing during the workday, especially in the form of lunch at the Faculty Club, where a considerable number of us would gather at the same large table every day shortly before noon, eat together, and then go as a group for coffee in one of the club's lounges. I wonder if this wonderful tradition still goes on. I wonder if dinner parties are still a regular thing, now that many of the faculty live distant from the school, and now that the faculty is so much larger. I wonder if there is still a Ken Karst haiku contest each year. (I think it was haiku!) I wonder if the bonds among faculty are still as warm and tight as they were back in the day.

I say with utter confidence that my colleagues at UCLA were instrumental in the development of my career, and of my views about what a faculty should be. My years at UCLA were the happiest and most fruitful years of my life.

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TAKING A CHANCE ON LAW, UCLA STYLE

DANIEL H. LOWENSTEIN*

According to Tolstoy's famous opening of *Anna Karenina*, all happy families resemble one another. I doubt if that is true of happy families, but to a large extent it is true of American law schools, happy or otherwise. No matter where you go to law school, you will study Property, Contracts, Torts, Crimes, Constitutional Law, and a variety of other subjects, probably believing that your task is to figure out the rules in each subject and memorize them as best you can. You will be subjected to a barrage of questions intended to help you with your real task, figuring out how to solve problems and accomplish goals within the framework of clear and unclear rules. You will hone your skills at practical reason and, nowadays, be subjected to large doses of what is called legal theory, much of it claptrap. If all goes well, when you finish you will be prepared to pass the bar examination and, although

* Daniel H. Lowenstein joined the UCLA Law School faculty in 1979 after four years as deputy secretary of state of California under Jerry Brown and four years as the first chairman of the California Fair Political Practices Commission. At UCLA he became the first law professor to specialize in election law and in 1995 he published the first twentieth-century American casebook on that subject. In 2009 he retired from the law school faculty to become the first director of the UCLA Center for the Liberal Arts and Free Institutions (CLAFI). For further information, see the Editor-in-Chief's introduction on page 1 of this volume: 11 CAL. LEGAL HIST. 1 (2016).

not quite prepared to practice law well, you will be prepared to be prepared for practice. Meanwhile, your professors will devote a portion of their ingenuity to figuring out ways to reduce their teaching loads and spend as much of their time as possible writing books and law review articles that once in a while will contain something useful.

Although the big picture is much the same at all law schools, an omniscient observer would find that each law school has its own particular personality, helping to shape the experience of its students and, especially, its faculty members. In this essay, I'd like to emphasize three features I believe contribute to UCLA's particular quality. A confirmed Tolstoian might jump to the conclusion that if these qualities create differences from other schools, they must tend toward making our school an unhappy one. But whatever validity Tolstoy's claim about happy and unhappy families may have, experience at UCLA suggests (I am happy to say) that the claim cannot be extrapolated to law schools.

The first feature is the mutual supportiveness that exists in the law school. This is the one my colleagues and I like most to talk about, and the possibility has to be allowed that we exaggerate its magnitude, both absolutely and relative to other law schools. But most of my colleagues and others who have visited the law school in one capacity or another have believed it is real. Perhaps the most important manifestation of supportiveness is also, fortunately, the least frequent. That is, when a faculty member finds himself in the middle of a controversy or in some comparable difficulty, his colleagues are likely to rally 'round, and quickly. More routinely, faculty members are generous with their time in reading and commenting on drafts of articles and in discussing problems that occasionally arise in teaching.

One of the things university faculty members do is present papers, often to their own faculties but also by invitation at other schools. This is also done by candidates for faculty positions. My experience at law schools, both when I was a job candidate in 1979 and since then, is that law school faculties tend to fall into two categories. Some are very aggressive when someone is presenting a paper, peppering him or her with questions, often rather hostile and of a "gotcha" nature. Other faculties tend to be quite passive. They ask few questions and the questions they ask tend to be general and even bland. Usually, the UCLA law faculty does not fall into either of

these categories. The questions are just as frequent and possibly even more probing than the first category, but they are not hostile. Rather, they are designed to help the presenter improve the paper and to get at the truth. I don't think I've ever been more proud to be a member of our faculty as at some of these sessions.

The supportive environment of the law school in particular and UCLA in general makes it a very good place to work. I do not mean to suggest that it is a utopia. For example, early in my UCLA career I learned that when the towel dispenser breaks in the bathroom on your corridor, you are in for a six-month war. But drying your hands on your trousers is worth it for colleagues and an administration (well, sometimes an administration) that will both challenge you and stand behind you.

The remaining two features can be put under one heading, "Taking a Chance,"¹ but they are distinct and I will discuss them separately. The first refers to chances the law school takes, especially in faculty hiring. The second refers to encouragement or, at least, toleration of chances taken by faculty members.

I believe UCLA stands out among leading law schools for its adventurous spirit in hiring faculty members whose records depart from the standard. I will give four examples. The first is Steve Shiffrin, who joined the faculty a couple of years before I did and was an expert on the First Amendment. Shiffrin had spent ten years teaching and coaching the debate team at CSU Northridge and during that period went to law school at night at Loyola. Things have changed, somewhat, but in those days a candidate for a leading law school was supposed to have gone to one of the half dozen or so top schools. Beyond the leading twenty or so was pretty much unheard of. But UCLA took a chance on Shiffrin, who was one of the most brilliant members of our faculty until, after ten years, family considerations caused him to move to Cornell.

I myself am the second example. My educational background more or less fit the standard mold, but equally important, especially in those days, was some combination of a prestigious federal court clerkship, employment in elite federal government offices such as the Justice Department Office of

¹ The learned reader has probably noticed that my title for this essay is taken from the song, "Taking a Chance on Love," by Vernon Duke with lyrics by John La Touche and Ted Fetter, introduced in the Broadway musical (later a movie) *Cabin in the Sky*.

Legal Counsel, and employment in a large corporate law firm. Typically, a candidate would have been out of law school three to five years. I had been out of law school twelve years, which I spent traveling around the world (one year), working for California Rural Legal Assistance, a federally-funded legal services agency (three years), working for Jerry Brown when he was California secretary of state (four years), and serving as the first chairman of the California Fair Political Practices Commission (four years). So far as most leading law schools were concerned, I might as well have spent those years in a Bowery flophouse. But UCLA took a chance. Okay, the thing about taking a chance is that it doesn't always work out so well!

The third example is Gary Blasi. Blasi went to college at the University of Oklahoma and never went to law school at all. Rather, he qualified to take the California bar exam the old-fashioned way, by apprenticeship. He took and passed the exam in 1976 and our law school took a chance on him in 1991. He has had a distinguished career and helped to found the David J. Epstein Program in Public Interest Law and Policy, as well as contributing to the law school in countless other ways.

The final example is Sam Bray, whose record, while mostly as blue-chip as you could ask for, included an undergraduate degree from Bob Jones University. About ten years ago I spent three weeks in a seminar with a woman who was an expert in eighteenth-century English literature at Bob Jones and I learned (to my surprise, I am embarrassed to say) that there was some first-rate intellectual activity going on in that place. Nevertheless, I am pretty sure that Bray's *curriculum vitae* caused some lips to curl at other law schools. UCLA took a chance, and once again hit the jackpot. Bray, whose interests are wide-ranging but has concentrated particularly on remedies, is off to a great start in his career and was awarded tenure not too long ago. Among many other things, he is the author of what might be the only published law review article on the hendiadys — and it is a gem.²

UCLA — and this is a trait of the campus generally, not simply the law school — encourages or tolerates chance-taking by faculty members. One example is the latitude faculty members have in extending their teaching and research in unconventional directions. A typical example from early

² Samuel L. Bray, "'Necessary AND Proper' and 'Cruel AND Unusual': Hendiadys in the Constitution," 102 *Virginia Law Review* 687 (2016).

in my own career at UCLA is that in my first year, I taught an existing course entitled Legislation. By my second year, I had decided the course I wanted to teach was on election law, so a new course was created with the title “Law and the Political Process.” At the same time, I devoted my research to election law and began, for starters, with a couple of articles on the California initiative process. At the time, no other law professor in the United States was specializing in election law and, even after Proposition 13, the initiative was about as obscure a subject in academe as you could find. Neither UCLA nor I could know that for a wide variety of reasons, election law would eventually become an important subject both in the legal-political world and in law school curricula. Around the same time, faculty members were extending the bounds of courses and research to “Law and — ,” with the blank filled by a bewildering variety of subjects, such as economics, psychology, history, philosophy, political science, literature, and many, many others.

But although this latitude in teaching and research is real and important, it is not in itself distinctive to UCLA in general or the law school in particular. Most law schools and universities, especially the better ones with reasonably ample resources, are similarly permissive. Furthermore, the latitude can be abused. In a history department, a faculty member offers a seminar entitled, “Working Conditions for Women in the Textile Industry in Lynn, Massachusetts, from 1820 to 1840.” Can you guess what that faculty member’s current research project is on? For better and for worse, flexibility in teaching and research is inevitable in a higher educational system in which the academic departments reflect disciplinary divisions established well over a century ago.

What, then, is distinctive about UCLA? I would say it is a relatively high degree of pluralism. The attentive reader probably figured, when I referred in my opening paragraph to a high percentage of legal theory as claptrap, that whatever else may be true of the author of this essay, he is — for better or for worse depending on your taste — pretty cynical. Not so fast, for here is the point: many if not all of my colleagues would probably agree that much legal theory is claptrap. The question on which we would disagree is, which parts? One of the subjects I teach is statutory interpretation. I believe some of the theoretical debates in statutory interpretation — for example, textualism vs. intentionalism vs. purposivism — can be

quite illuminating and of unusual practical importance, given that some of the leading theorists are or have been prominent judges. No doubt, many of my colleagues regard these theoretical disputes as nonsense or, to stick with the technical term I've been using, claptrap — terms I would readily apply to some of their pet legal theories.

Such differences do not prevent us from being happy colleagues. At UCLA — and I repeat that this is not at all limited to the law school — there is a wide and deep norm of *laissez-faire*. I may think what you are doing is nonsense, but I won't try to interfere, and I don't expect you to try to interfere with my preferred brand of nonsense. In the law school, UCLA's strong observance of pluralism has both reinforced and been nourished by the supportiveness and the willingness to take a chance in hiring that I have described. It also gives a particular quality to the latitude in teaching and research that, as I have mentioned, is not in itself unique to UCLA.

The *laissez-faire* norm is widespread at UCLA and I have seen much evidence of it. I will conclude with one example, again drawn from my own experience. Eleven or twelve years ago a friend interested in higher education reform suggested I try to start a center for the study of the foundations of free institutions similar to centers being created at a number of prestigious colleges and universities. I thought such centers could serve a good purpose, but I had a broader interest. During my law school career I had sadly observed what seemed to me a steady marginalization at UCLA and other universities of study of the history and achievements of Western civilization, a subject that had once been regarded as the core of a liberal education. My friend's suggestion was the catalyst for me to work with such allies as I could recruit to create what we eventually called the Center for the Liberal Arts and Free Institutions, or CLAFI.

The reasons for the marginalization of Western civilization were many and complex. Some were bureaucratic; some reflected a broad tendency in universities away from the humanities in favor of supposedly more economically relevant areas such as STEM; some reflected changing fashions; and some — oddly in my opinion — were ideological. These and other seeming barriers were what made me think success in creating CLAFI was a long shot.

Developing a group of supportive faculty members took time but was not difficult. What very pleasantly surprised me was the positive response

of the administration. I spoke to a number of UCLA officials, who ranged from cordial to enthusiastic. When a tentative decision was made to house the new center in the Humanities Division, the then-dean of Humanities, Tim Stowell, wisely decided to take on getting the opinions of a number of faculty members within the division. I had a very good meeting with him in which he made a comment that I believe was crucial to his agreement and very relevant to this essay. Many of the faculty members he spoke to had no interest in what CLAFI proposed to do and, in some cases, may even have been somewhat hostile. But they nevertheless recognized that CLAFI would serve a number of people at UCLA who were interested in its goals, and for that reason they supported (or at least did not oppose) its creation. That is *laissez-faire* in action. CLAFI has never encountered the resistance and controversy that has befallen somewhat comparable centers at other institutions.

When CLAFI was approved, I wanted to be able to devote most of my time to it. I therefore retired from the law school, though with emeritus status I have been able to continue teaching there each year. The law school administration was cooperative in my switch and where appropriate has continued to support me in my new venture.

Had I been inclined to do so, I could have filled an essay of at least this length with complaints and criticisms of UCLA and the law school. But in the ways that matter most, UCLA is a splendid place to work and, more importantly, facilitates the faculty's teaching and research that, at their best, serve the people of California.

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MY TIME AT UCLA LAW

ELWOOD LUI*

My parents emigrated from Canton (Guangzhou), China in the late 1920s. I was the youngest of seven children born and raised in Los Angeles. My parents' relatives and friends dreamed of making a sufficient fortune to return to China to retire. World War II and the Chinese Civil War dashed that dream for many of them. While my parents did return to China about a dozen years later, they were able to return to Los Angeles just as the Japanese army was about to capture Hong Kong, where the family had been living.

I was born after the family returned from China and just before Pearl Harbor. My father's business was successful enough to allow my older siblings to attend college. But when it came time for me to go to college, I had to pay for my own education. Fortunately, I was admitted to UCLA, which had a great reputation and was virtually tuition free at that time.

When I arrived at UCLA as a freshman in the fall of 1958, it was quite different demographically than it is today. There were very few minority

* Associate Justice, California Court of Appeal, Second Appellate District, Division One. For further information, see the Editor-in-Chief's introduction on page 1 of this volume: 11 CAL. LEGAL HIST. 1 (2016).

students. It was a bit scary for me at first because everyone seemed so intelligent. I had an aptitude for financial matters, and eventually I decided to study accounting to improve my prospects for employment after graduation.

The business school was located adjacent to the law school. The law students seemed to study constantly and appeared to enjoy what they were doing. It also seemed that the best accounting students were planning to attend law school.

As the Vietnam War was escalating and the draft seemed to be a certainty, my closest friends and I decided that by joining the Army Reserve, we could at least determine our own destiny and not be drafted. After six months of active duty, I returned to UCLA to earn my MBA at the business school. After receiving my MBA, I married and went to work at Deloitte, one of the large accounting firms. My first child was born soon thereafter. While I had, as I had hoped, enjoyed the study of accounting, I found the work in that field not as satisfying, so I began night law school at Loyola and finished the first year while working full time. I missed UCLA and the environment of the campus — Loyola just didn't seem like home. Fortunately, I did well enough in my first year to transfer to UCLA law school.

I can remember walking up the front steps of the law school and to the admissions office to enroll. I was excited, and happy to return home after spending five years on the UCLA campus, mostly around the law school itself.

My class of 1969 was the last of the small classes, and we had only around 180 students. The next two years were grueling. In addition to working full time to put myself through school and support my family, I attended Army Reserve meetings two weekends a month during my second year. I was always tired, but I could eventually see the light at the end of the tunnel. As a working student, there was not much time for any extracurricular activities.

The weekend before final exams in my last year of law school, my wife went into labor with our second child. I spent that weekend studying for finals and awaiting the birth of our second son.

One of my favorite family photos is a picture of my parents, my wife and our sons outside Kerckhoff Hall on the day of our law school graduation. My wife is holding our new baby as our older son stands next to her,

smiling. That night, my father told me for the first time that he always hoped that I would become a lawyer because one of his most respected friends, Y. C. Hong, was the first Chinese American to be admitted to practice in California. He wanted me to be like Y. C., who had been my mother's immigration lawyer and was a pillar of the Chinese community.

At that time it was difficult for minority and women lawyers to obtain positions in private practice firms, so I started my legal career at the California Attorney General's Office. After a few years, I went into private practice, before having the good fortune to be appointed by Governor Jerry Brown to the Municipal Court, and then elevated to the Superior Court and Court of Appeal. I served twelve years on the bench before returning to private practice. I am proud to be the first Chinese American to be appointed to the appellate court in the history of California.

When I left the court, I became a partner in Jones Day and saw that firm grow from 400 lawyers with three offices to 2,800 lawyers with almost fifty offices throughout the world. I was asked to start Jones Day's San Francisco office, and later to supervise the Chinese practice in the firm's four offices in Greater China. There were not many minority lawyers in the big law firms when I joined in 1987, and I became the first Asian partner in a firm that had started almost a hundred years earlier. Fortunately, times have changed and minority and women lawyers are now commonplace in law firms.

Last year I decided to retire after spending twenty-eight years with Jones Day. Governor Brown reappointed me to the Court of Appeal, the first time that a retired appellate judge had made a comeback. I enjoyed my time in private practice, but being a judge is an honor and a privilege. It is a way that someone can serve the community.

I am proud that my wife Crystal and I have two sons who have also pursued legal careers. Our older son, Bradley, is a partner in Morrison and Foerster, and the partner in charge of his firm's Washington, D.C., office. Our son Christopher practiced with O'Melveny and Myers and was an assistant United States attorney before his appointment as a Los Angeles Superior Court judge.

I have been the beneficiary of an extraordinary education at UCLA, which trained me and gave me the knowledge to pursue a career in business and law. I could not have succeeded without that education.

Last month I was invited to be a moot court judge at the law school. As I was walking from the parking facility to the school, I saw several hundred high school students on a tour of the campus. I thought how great it would be if they had as good a college experience as I enjoyed. I remember the day some forty years earlier that I walked up the steps of the law school to the admissions office to enroll. After the moot court session, I wandered around looking for where my name was posted. As a donor, I was told that my name would be recognized somewhere in the school. I found it on the Founders Wall, and it made me smile — it was a small “payback” to the school for the many opportunities that it has opened for me.

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MEMORIES OF UCLA LAW SCHOOL

DOROTHY W. NELSON*

In the class of 1953, the second graduating class, there were only two women, Ann Mobley and me. Dean Dale Coffman made it very clear that we didn't necessarily belong in law school. We took his Torts class. The first day he announced that he would only call upon women on Ladies Day. Ann and I were thrilled because we knew we would only be called upon on the day he announced it would be, and so we were super-prepared on those days.

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Dean Roscoe Pound taught a number of classes, all of which I took. I did well in his Common Law Actions class because I had had three years of Latin in high school. If you gave a particularly good answer to any of his questions in class, he made you a member of his "Tenth Legion," upon which he called to answer particularly difficult questions. We took turns driving him to school, stopping at a restaurant called Ollie Hammond's so he could have a bowl of "mush" that I called cream of wheat. Each time we

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drove him he would hand us a big cigar, and I still have stashed away in my attic my “Roscoe Pound” cigars. He was a wonderful mentor to me and recommended me for a research job at USC under a Professor Holbrook. We (with the assistance of two other research attorneys) wrote a book on how to reform the court system in Los Angeles County. During that time, I was asked to fill in for a professor teaching a law reform class and then invited to join the USC faculty as its first woman member.

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When I became dean of the USC Law School, my connection with UCLA was greatly increased, for USC and UCLA had lived through the Kent State–Cambodia days, and experiments with the first affirmative action programs, together. I was on the phone, almost daily, with Dean Murray Schwartz (whose wife taught a course at USC on Law and Anthropology) and Dean Richard Maxwell, discussing strategy, and they became some of my nearest and dearest friends.

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It was my feeling that Los Angeles, with three fine law schools — UCLA, USC and Loyola — should collaborate since we had some of the greatest legal talent in the U.S. in Los Angeles. We often exchanged faculty (I borrowed Professor Mel Nimmer for example) and had a number of joint faculty workshops. Together we created the Western Center on Law and Poverty. It was housed at USC. Unfortunately, when the Western Center Board decided to sue Police Chief Davis for harassment of Blacks in Los Angeles, a decision that the Center had made, having nothing to do with any of us as deans, the police chief went on public television calling me a “communist,” causing great unhappiness for the very conservative USC Board of Trustees. It was my friends at UCLA and Loyola law schools who helped me survive this crisis.

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Perhaps the most significant thing to happen to me during my time at the law school was my introduction to the Baha’i Faith. Our freshman class had approximately seventy-two students, including two women (Ann Mobley and me) and one Black student. A professional fraternity invited the entire

class to join. We all did. Six weeks later, we were informed by letter that no women or Blacks could join. This was 1950 (before *Brown*). The president of our class, Donald Barrett, called us all together and suggested that we all resign and form the UCLA Law Association. We all agreed.

I had known Donald as an undergraduate, a very bright and a successful campus political figure — after all, he was our class president — but I honestly didn't think this was something in which he was interested. I approached him and asked him why he did it. He replied that his whole life was changing because he was going to Baha'i meetings in Westwood Village. I said, "Oh, is that Buddhist or Hindu?," for I had never heard the word Baha'i before. He said, "No, it is the latest of the world's revealed religions. It teaches the abolition of racism and prejudice of all kinds and such principles as the equality of men and women. Basically, he said that the Baha'i Faith believes Messengers or Manifestations of God appear every 500 to 1000 years to renew the spiritual teachings of God (Power of Prayer, Golden Rule, Fatherhood of God) that remain constant, and to update the social teachings as mankind matures. He called this progressive revelation, each Messenger writing the latest chapter in one continuous book. The latest Messenger is called Baha'u'llah (Arabic for the "Glory of God") who proclaimed his Message in Persia in 1863. Then Don said that there were no clergy in the Faith for this is the era when all on the face of the earth will be educated so that they may seek out truth for themselves. He asked if my husband and I would like to attend a meeting in Westwood, called a "fireside," where someone would speak and then questions and answers were entertained. I respectfully declined due to my activity in my Episcopal Church, but thanked him for his courageous action. To make a long story shorter, Don became a Baha'i our second year of law school and we watched and listened to him intensely. In the next ten years, members of our class and their families, seventeen in number, became Baha'is. It materially affected my life because Baha'is resolve conflict in over 180 countries (6 million members) through "consultation," a form of mediation, hence my specialty in mediation and Alternative Dispute Resolution as an academic.

UCLA LAW REMINISCENCES

STEVEN Z. PERREN*

If you want to keep your memories, you first have to live them.

— Bob Dylan

We did.
We revisit life's joys when we tell of them.

I recall Haines Hall 39: our orientation. We, the class of '67, were uneasy at what lay before us. Our anxiety was undisturbed when the assistant dean gave us an all too brief welcome informing us that the assignments were posted by the admissions office. My fear turned to terror. The level of my sophistication was evidenced by the fact that after I read the first assignment in Civil Procedure I wondered how could it be that nearly all the case authors had first names that began with "J"?

A digression: If there is a heaven, it will mirror UCLA in the '60s. My memory may fade, but my affection for the school and those three wonderful years only grows with time.

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From '64 to '67 the law school was in change and so was society. There were but three classrooms all opening into the main marble hallway extending from the school's entrance to a large glass wall at the opposing end. Also exiting into that hallway was one of the University's wonders: the men's room and its row of urinals that would make Rodin jealous. Since the class was nearly all male, few lamented that women would not be privy to the sculpture. The library was a comfy little place with a bank of study carrels in the stacks on the west.

End of digression.

Our class consisted of slightly in excess of 300 white young men from campuses across the country, three women, one Asian, one Hispanic and one African American.¹ Our senior citizen was a 55-year-old chicken farmer from Riverside who commuted daily to school. We, like Gaul, were divided into three parts — alphabetically. I was in the third section with men who became and remain dear friends. This womb would birth a law firm that would first violate then vindicate legal advertising, future chief counsel to Disney and Sony, the leading land developer of Orange County, an L.A. district attorney, a state senator, and a bevy of lawyers who would lead the major firms in Los Angeles, champion civil rights, and find fame in the courtroom; a few even became jurists. We had one classmate who, following midterms, dropped out only to become the president of the Canary Islands Surfers Association. Who knew?

Though we would help shape the law of the state and nation, our concerns lay with understanding what Bernie Jacobs was talking about when we were enfeoffed. Don Hagmann drew a flat line of chalk nearly across the greenboard which, like a rocket, vertically ascended to the ceiling to demonstrate the learning curve for Civil Procedure; Bill Cohen would dazzle us with his questions and genius while his colleague in Torts, Edgar Jones, fresh from T.V.'s *Day in Court*, would engage in an equal but very different obfuscation. Leon Letwin unleashed us on the library to look for "answers." Feverishly we would, like children on a scavenger hunt, search for the *precise case* only to discover that it was about the journey, not the destination.

¹ I have been privileged to greet the entering classes of the 21st Century. They reflect the ethnic, religious, gender and racial diversity of our country. We have come a long way.

Professor James (Sunny Jim) Sumner was special, he was physically imposing; a lieutenant in the Army during World War II, he was a South Carolina gentleman whose speech and manner were all Shelby Foote. He regaled us with his war stories, confused us with his drawl and kept us sweating during his questions. Contracts: the offer, the acceptance, consideration, hawk's beaks and "third party beneficiaries," which he pronounced with a Southern flair. I fell victim to him when the subject was "quantum meruit." He grilled me on fair value and quasi-contract. I replied while repeatedly mispronouncing "quantum mairuit." He took great delight in my torture of the word. Suddenly, he shot his steely glance at me asking, "Mistuh Perren, how do you spell that?" I rejoined, "Oh, something like thud potty beneficiuairy." A silence that seemed eternal was shattered by the roar of laughter coming from all quarters — including the lectern. I was silent. We learned and we had a great time doing so.

Many years later, following my appointment to the trial bench, I was watching the Bruins from the press box at the Rose Bowl. I was seated next to Professor Murray Schwartz who, for reasons I will never understand, remembered me. We started to chat; I started to sweat. Our conversation became informal and cordial. Never, however, was I able to address him as Murray. He was, and will forever remain, Professor Schwartz.

The reverence started with a discussion of intoxication, diminished capacity, and insanity. I was seated on the left of the classroom about midway up. His eyes caught mine. "What did they have in common?" he asked. I stammered but no words came out. He asked again. My memory is vague; all I recall is that my life and career were headed over a cliff. Somehow the word "choice" crept from my lips. A hush fell over the class. I recall the curve of a smile on the professor's lip as he pressed the issue. We were off and running: what is the role of the criminal law, what is its role in a free and ordered society, and why and how should we punish? At that moment I discovered myself and my calling.

Included in the first year was competition for moot court. I prided myself on my skill as a speaker. Teamed with a classmate who was very good, I knew we had this under control. We made our argument to a student panel from moot court. It was then I learned a lesson I carry to this day: there is a difference between the orator and the skilled lawyer: the former announces, the latter speaks and educates. I still see the presiding judge. The issue concerned

implied warranties on the private sale of a car. The judge asked why we would imply such warranties on a private transaction. A simple question. I blew it — but with style. It is about the power of your logic, not the power of your voice.

In 1964 Roger Traynor had become Chief Justice of California, succeeding Phil Gibson. The Court was considered the finest in the land and led the way in the burgeoning areas of products liability and criminal due process. The Warren Court was in full flower: *Gideon* had been decided the year before, *Miranda* was on the horizon and the Fourth Amendment would soon be in play while Douglas's "penumbra" lay just around the corner. The Freedom Rides had begun in '61, Schwerner, Chaney, and Goodman had been murdered that summer and the March to Selma would soon follow. "Civil Rights" was not just a classroom topic. We didn't know it then but, as Pete Seeger said, "Wasn't That a Time?"

The Law School Mantra: In the first year you were scared to death, in the second year you were worked to death and in the third year you were bored to death.

We pretty well knew after the first year those who were likely to make law review. There were few surprises. The reward: endless hours of writing and polishing notes and comments in addition to the studies that confronted the rest of us.

Our section was blessed with Professor Jesse Dukeminier. What a kind, gentle and wonderful man and teacher. Each class he would somehow squeeze himself into the intersection of the chalkboard and the wall only to emerge with a great question and a dusty suit. And then it happened:

No interest in property is valid unless it vests not later than twenty-one years, plus the period of gestation, after some life or lives in being which exist at the time of the creation of the interest.

What? Metaphysical claptrap. Who needs to understand it?²

² I was appointed to the Bench in 1983. Shortly thereafter I was confronted with a dispute over title to a parking lot. The issues concerned "possibility of reverter," "fees on condition subsequent" and "the rule against perpetuities." I was so proud of how I resolved this that I sent my Memorandum of Opinion to the professor. He replied that I had done a nice job in articulating my reasoning over some twenty pages. He asked if counsel had thought to consider Civil Code § "xxxx." (They had not.) In a brief section it resolved the whole dispute. He was very kind in his letter noting that he was the author of that section.

He made it fun . . . kind of. Recall that Professor Dukeminier had written large portions of the property law of Kentucky and California.

Our final exam included the following question (I paraphrase): Assume you land on Mars and must develop a principle for inheritance and gifting, what would the core principles be? What a relief not to decide if A, B or C prevailed.

I recall that there was a series of performances at Schoenberg Hall nominally entitled, “The International Steamed Spring Vegetable Pie.” They were very Man Ray and “Dada.” I recall one in which an 8mm film was shown on the bare back of a woman. It was so very “’60s,” an eponymous title for a generation. As I watched, my vision was slightly obscured by a man holding an open black umbrella from which hung pieces of fruit: “The Duke.”

Professor David Mellinkoff taught us Commercial Transactions. The class was sandwiched between construction of the law school addition and the advent of “U.C.C. Bingo.” It proved to be an insurmountable challenge even for the master of “The Language of the Law.” The construction was immediately adjacent to the classroom. Jackhammers raged, heavy equipment roared and Professor Mellinkoff could not be heard. In desperation he attempted to write his portion of the Socratic dialogue on the chalkboard. Plato would not have learned under these circumstances. The subject consisted of a never-ending potpourri of code sections. The class was energized when Bingo cards bearing the code sections in the obligatory ranks and files were sold by some enterprising classmates. The rules: first, the code section had to be stated by the Professor. This led to some interesting responses by classmates who recited inappropriate sections in the hope that the professor would repeat them. Mellinkoff caught on. The second rule: whoever “won” had to stand and announce “Bingo,” proceed to the lectern and show the card. A check made payable “To Order or to Bearer” was the prize and was presented to the winner with the tacit blessing of our teacher.

By the third year most of the class had found the jobs they would take upon graduation. I also had a job waiting: as an undergrad, I had been commissioned a lieutenant in the Army Reserve — accompanied by a three-year deferment to attend law school. My classmates were working part time. I was performing in the Musical Comedy Workshop at UCLA and had been cast in “The Short and Turbulent Reign of Roger Ginsberg.”

an original musical composed by John Rubenstein, a student, who would receive a Tony for “Pippin” five years later.

We graduated June 14, 1967. There were two ceremonies: the first was at Royce Hall solely for the law school graduates; the second was a combined graduation at Pauley Pavilion — for the professional schools. Our irreverence persisted. Prior to declaring us doctors, dentists, and lawyers we had been asked not to throw our mortar boards in the air; to no one’s surprise we did not heed the admonition. Our Bar Review courses commenced the next day. We adjourned to El Toril.

★ ★ ★

SPECIAL SECTION
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A MODEL FOR JUVENILE PAROLE REFORM:

California's Youth Offender Parole Hearings Challenge the Modern Parole System and Apply the Fundamental Principles in Graham and Miller to the Release Decision-Making Process

COURTNEY B. LAHAIE¹

INTRODUCTION

Juvenile sentencing has experienced a number of significant changes in the past decade resulting from both judicial decisions and legislation. In 2005, in *Roper v. Simmons*,² the U.S. Supreme Court abolished the imposition of the death penalty for juvenile offenders who committed the crime of conviction while under the age of eighteen.³ Five years later, in *Graham v. Florida*,⁴ the Supreme Court created a categorical ban on life without parole sentences for juvenile offenders convicted of non-homicide offenses.⁵ Included in its decision in *Graham*, the Supreme Court established a mandate holding that while a state is not required to guarantee release of a juvenile offender, it must provide the offender “some meaningful

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² 543 U.S. 551 (2005).

³ *Id.* at 578. See also *infra* text accompanying note 29.

⁴ 560 U.S. 48 (2010).

⁵ *Id.* at 61, 82.

opportunity to obtain release.”⁶ Two years later, in *Miller v. Alabama*,⁷ the Supreme Court considered the constitutionality of life without parole sentences for juvenile homicide offenders. In *Miller*, the Court held that “children are constitutionally different from adults for the purposes of sentencing.”⁸ Accordingly, juvenile offenders require individualized sentencing, and mandatory life without parole sentencing schemes for juvenile offenders violate the Eighth Amendment.⁹ *Roper*, *Graham*, and *Miller* activated a new era of sentencing reform for juvenile offenders by recognizing the physiological and psychological differences between adult and juvenile offenders and setting forth guidelines for acknowledging these differences during sentencing.

In addition to sentencing reform, the decisions in *Graham* and *Miller* compel parole reform for juvenile offenders, based on the mandate that states must provide juvenile offenders with a meaningful opportunity to obtain release. In the modern American Parole System, policies and procedures vary greatly between states. Additionally, parole boards have traditionally operated with little oversight from the criminal justice system, resulting in arbitrary decision-making by parole boards and a lack of due process.¹⁰ Furthermore, the parole decision-making process is deeply discretionary with boards permitted great flexibility in evaluating and weighing factors during the release decision-making process.¹¹ The mandate in *Graham*, to provide juvenile offenders with a meaningful opportunity to obtain release, implicates several challenges under the modern American Parole System.¹² For instance, the findings in *Roper*, *Graham*, and *Miller* demonstrate that age is a mitigating factor in juvenile sentencing decisions and juvenile offenders are less culpable than adults and more capable of change.¹³ In contrast, youthful age is calculated as a factor for increased risk in the risk assessment tools used by parole boards during the

⁶ *Id.* at 75.

⁷ 132 S. Ct. 2455 (2012).

⁸ *Id.* at 2464.

⁹ *Id.* at 2466.

¹⁰ See *infra* Part II.b.

¹¹ See *infra* Part II.c.

¹² See *infra* Part III.

¹³ *Roper v. Simmons*, 543 U.S. 551, 569 (2005); *Graham v. Florida*, 560 U.S. 48, 68 (2010); *Miller v. Alabama*, 132 S. Ct. 2455, 2464–2465 (2012).

decision-making process.¹⁴ Additionally, low release rates and the current criteria emphasized by parole boards in release decision-making hinder the opportunity for realistic release.¹⁵ Ultimately, the modern parole system functions antagonistically to the fundamental principles set forth in *Roper, Graham, and Miller*.

Courts and legislatures have initiated a number of changes following the decisions in *Roper, Graham, and Miller*. These reforms, however, have primarily focused on juvenile sentencing schemes and only recently have begun to consider the parole process. In 2000, more than 100,000 juvenile offenders were incarcerated nationwide.¹⁶ As a result of numerous policy changes following the recent court decisions, the number of incarcerated juvenile offenders has decreased approximately forty percent.¹⁷ In 2013, several states — Arkansas, California, Louisiana, Texas, Wyoming, and Utah — enacted policy changes modifying the parole review process for juvenile offenders.¹⁸ Most notably, California enacted Senate Bill 260, which requires the parole review board to conduct specialized Youth Offender Parole Hearings for juvenile offenders.¹⁹ Following these changes, two states — Hawaii and West Virginia — enacted juvenile parole reforms in 2014.²⁰ Finally, in 2015, California expanded its Youth Offender Parole

¹⁴ See *infra* Part III.c.

¹⁵ See *infra* Part III.b.

¹⁶ Nicole D. Porter, The Sentencing Project, *The State of Sentencing 2013: Developments in Policy and Practice* (Jan. 2014), available at http://sentencingproject.org/doc/publications/sen_State%20of%20Sentencing%202013.pdf.

¹⁷ *Id.* at 17.

¹⁸ *Id.* at 15. The following reforms were made in each state. Arkansas, through House Bill 1993, enacted a measure that allows juvenile homicide offenders to gain parole eligibility after twenty-eight years. In Louisiana, House Bill 152 permits juvenile homicide offenders to become eligible for parole after thirty-five years. Senate Bill 2, in Texas, extended the sentence of forty years to life for a capital felony from defendants aged seventeen to those eighteen years of age. Wyoming, pursuant to House Bill 23, authorized parole review for juvenile offenders convicted of first-degree murder after twenty-five years. In Utah, Senate Bill 228 permits parole eligibility for juvenile offenders convicted of aggravated first-degree murder after twenty-five years. *Id.*

¹⁹ See *infra* Part IV.c.

²⁰ Nicole D. Porter, The Sentencing Project, *The State of Sentencing 2014: Developments in Policy and Practice* (Jan. 2015), available at http://sentencingproject.org/doc/publications/sen_State_of_Sentencing_2014.pdf. Hawaii, under House Bill 2490, enacted comprehensive juvenile justice reform, including House Bill 2116, which

Hearings to include offenders who were under twenty-three years of age when convicted of the eligible controlling offense.²¹ Parole reform for juvenile offenders is ripe for examination following the Supreme Court's recent decision in *Montgomery v. Louisiana*,²² which held that the decision in *Miller* must be applied retroactively to state collateral review and specifically acknowledged the significant function of the parole system for juvenile offenders following the decisions in *Roper*, *Graham*, and *Miller*.²³

This article focuses primarily on the parole system and the release of juvenile offenders.²⁴ The principal goal is to explain the implications and rationale set forth in *Roper*, *Graham*, and *Miller* and consider the application of those principles to parole hearings. Part I provides a brief account

non-retroactively abolished all LWOP sentencing for juvenile offenders. Additionally inmates in Hawaii receive parole review every year once eligible. In West Virginia, House Bill 4210 banned LWOP for juvenile offenders. Furthermore, all juvenile offenders are eligible for parole after serving fifteen years and West Virginia requires parole boards to consider age as a factor in the decision-making process. *Id.* at 11.

²¹ S.B. 261, 2015 Leg., 2015–2016 Reg. Sess. (Ca. 2015). See also *infra* note 167.

²² ___ S. Ct. ___, 2016 WL 280758 (2016).

²³ *Id.* at 15–16. The Court first determined that *Miller* set forth a “substantive rule of constitutional law” giving it a “retroactive effect.” *Id.* Additionally, such an effect does not require re-sentencing, but can be remedied by permitting juvenile offenders to be considered for parole. *Id.* at 16. “Extending parole eligibility to juvenile offenders does not impose an onerous burden on the States The opportunity for release will be afforded to those who demonstrate the truth of *Miller*’s central intuition — that children who commit even heinous crimes are capable of change.” *Id.* The Court concluded by stating,

In light of what this Court has said in *Roper*, *Graham*, and *Miller* about how children are constitutionally different from adults in their level of culpability, . . . prisoners like *Montgomery* must be given the opportunity to show their crime did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside prison walls must be restored.

Id.

²⁴ In this article, the term “juvenile offender” is used to describe an offender who, at the time the relevant offense was committed, was under the age of eighteen. A juvenile offender has often reached the age of majority at the time of sentencing and almost certainly is eighteen or older at the potential time of parole. This does not, however, remove their status as a “juvenile offender.” Furthermore, following the Court’s decision in *Miller*, a juvenile offender may be sentenced to life without parole for a homicide offense; so long as the sentencing decision and scheme were not mandatorily imposed. This article focuses only on juvenile offenders who receive a sentence, regardless of offense or length, which includes the opportunity or possibility for parole release.

of *Roper*, *Graham*, and *Miller*, focusing on the proportionality analysis employed by the Court and the distinct characteristics identified in the rationale. This section emphasizes the scientifically supported differences between juveniles and adults that compelled the decision in each case. Part II provides an overview of the parole system in America, beginning with a brief history of the genesis of parole in the United States. This section evaluates the existing procedures utilized by parole boards and assesses the impact that minimal oversight and maximum flexibility have had on parole board functions, including the discretion permitted in selecting and weighing criteria for release. Part III evaluates how *Graham's* mandate requiring states to provide juvenile offenders with a "meaningful opportunity to obtain release" implicates several challenges in the modern parole system. Some of the challenges considered are: when, during incarceration, a state is required to provide a meaningful opportunity; whether the current system actually provides a realistic opportunity to obtain release; and how the current assessment of age is contrary to the findings in *Roper*, *Graham*, and *Miller*. Part IV examines recent legislation passed in California that targets parole hearings for youthful offenders. This section then suggests that the California legislation can be used as a viable model by other states to develop standards for juvenile offender parole hearings that adhere to the fundamental principles set forth in *Roper*, *Graham*, and *Miller* and provide juvenile offenders with an actual, realistic opportunity for release.

I. A DECADE OF CHANGE: THE LEGACY OF *ROPER*, *GRAHAM*, AND *MILLER*

Over the past decade, juvenile sentencing has been dramatically altered through the historic decisions in *Roper v. Simmons*, *Graham v. Florida*, and *Miller v. Alabama*.²⁵ These decisions created a special status of diminished

²⁵ *Roper v. Simmons*, 543 U.S. 551 (2005) (abolishing the death penalty for juvenile offenders as a violation of the Eighth Amendment); *Graham v. Florida*, 560 U.S. 48 (2010) (creating a categorical ban on life without parole sentences for juvenile non-homicide offenders as a violation of the Eighth Amendment); *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (requiring individualized sentencing for juvenile homicide offenders, finding that mandatory life without parole sentencing schemes violate the Eighth Amendment).

culpability for juvenile offenders, through the acknowledgment that juveniles exhibit distinct differences from adults in maturity, susceptibility, and character.²⁶ Relying on neurological, psychological, and social scientific evidence, the Supreme Court recognized that juvenile offenders are not only less culpable than adults, but are also more capable of change and therefore require distinct, individualized sentencing schemes.²⁷

a. *Roper v. Simmons*

In 2005, the United States Supreme Court dramatically altered precedent in *Roper v. Simmons* by re-evaluating the Eighth Amendment's cruel and unusual punishment jurisprudence as applied to juvenile sentencing.²⁸ In *Roper*, the Court held that "the Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of eighteen when their crimes were committed."²⁹ The decision and analysis used in *Roper* followed directly from *Atkins v. Virginia*³⁰ and set the foundation for the developments in juvenile sentencing moving forward.³¹

²⁶ See *Roper*, 543 U.S. at 569–570; *Graham*, 560 U.S. at 68; *Miller*, 132 S. Ct. at 2464.

²⁷ See *Roper*, 543 U.S. at 569; *Graham*, 560 U.S. at 68; *Miller*, 132 S. Ct. at 2464–2465.

²⁸ 543 U.S. 551 (2005). The decision in *Roper* upended the holding in *Stanford v. Kentucky*, 492 U.S. 361 (1989), which previously controlled in the area of juvenile capital punishment jurisprudence. The Court in *Stanford* found the Eighth and Fourteenth Amendments did not bar the execution of juvenile offenders older than fifteen and younger than eighteen. *Id.* at 380.

²⁹ 543 U.S. at 578. The Court's decision to clearly define "juvenile offenders" as those under the age of eighteen is significant in that it creates a strict nationwide definition that must be observed in each state. *But see* *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding that the Eighth Amendment bans the use of the death penalty for mentally retarded offenders, but allows each state to set its own parameters for defining such an offender).

³⁰ 536 U.S. 304 (2002). In *Atkins*, the Court abolished the death penalty for mentally retarded offenders, finding that such individuals "do not act with the level of moral culpability that characterizes the most serious adult criminal conduct." *Id.* at 306. Furthermore, the execution of mentally retarded offenders would not satisfy the penological justifications of deterrence and retribution that are associated with the death penalty. *Id.* at 321.

³¹ *Roper*, 543 U.S. at 559–560. Simmons was charged with burglary, kidnapping, stealing, and murder in the first degree and following a conviction at trial, the jury recommended the death penalty. *Id.* at 557–558. The Missouri Supreme Court affirmed the conviction, sentence, and denial of post conviction relief and the federal courts denied certiorari. *Id.* at 559. See also *Simmons v. Bowersox*, 235 F.3d 1124, *cert. denied*, 534 U.S.

In *Roper*, the Court conducted a proportionality analysis considering “evolving standards of decency” to evaluate the imposition of the death penalty as a punishment for juvenile offenders.³² The Court found substantial evidence of a national consensus against the death penalty for juvenile offenders, citing that thirty states already prohibited the death penalty for juveniles.³³ Additionally, in the twenty states without formal prohibition, the practice was infrequent.³⁴ The Court thus concluded that society viewed juveniles as “categorically less culpable than the average criminal.”³⁵ Furthermore, this diminished culpability would lessen, if not nullify, the penological justifications of retribution and deterrence, often cited as the “two distinct societal purposes served by the death penalty.”³⁶ Ultimately, the Court concluded that the “death penalty is reserved for a narrow category of crimes and offenders” and, thus, is a disproportionate punishment for juvenile offenders.³⁷

The crux of the Court’s rationale rested on three normative characteristics of juvenile offenders: “a lack of maturity and an underdeveloped sense of responsibility,” a greater “susceptib[ility] to negative influences,” and a “character . . . [that] is not as well formed”³⁸ First, relying on scientific and sociological evidence, the Court acknowledged that a lack of maturity leads to impetuous and reckless behavior.³⁹ Second, juveniles

924 (2001); *State v. Simmons*, 944 S.W.2d 165 (en banc), *cert. denied*, 522 U.S. 953 (1997). Following the Supreme Court’s decision in *Atkins*, 536 U.S. at 321, *Simmons* filed a new petition for post conviction relief based on the reasoning found therein. *Roper*, 543 U.S. at 559. The Missouri Supreme Court resentenced *Simmons* to life without the possibility of parole and the Supreme Court affirmed. *Id.* at 559–560. *See also State ex rel. Simmons v. Roper*, 112 S.W.3d 397 (2003).

³² *Roper*, 543 U.S. at 561 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

³³ *Roper*, 543 U.S. at 564.

³⁴ *Id.*

³⁵ *Id.* at 567 (quoting *Atkins v. Virginia*, 536 U.S. 304, 316 (2002)).

³⁶ *Id.* at 571. The Court rationalized: “Retribution is not proportional if the law’s most severe penalty is imposed on one whose culpability . . . is diminished” *Id.* Additionally, while the deterrent effect was unclear, the Court concluded that “the same characteristics that render juveniles less culpable than adults suggest . . . that juveniles will be less susceptible to deterrence.” *Id.*

³⁷ *Id.* at 569.

³⁸ *Id.* at 569–570.

³⁹ *Id.* at 569. Additionally, widespread recognition of a lack of maturity and responsibility has resulted in most states’ limiting involvement in specified activities,

are more susceptible to negative influences, like peer pressure, and exhibit less control over their environment and autonomous decision-making functions.⁴⁰ Finally, the Court recognized that unlike an adult, a juvenile's character is "more transitory, less fixed" and has not yet fully formed.⁴¹ Taken together, these three distinct characteristics indicate that juvenile offenders are less culpable, less morally reprehensible, and more capable of change. The rationale and analysis set forth in *Roper* laid the foundation for *Graham* and *Miller*.

b. *Graham v. Florida*

Five years after *Roper*, the Supreme Court considered, for the first time, a categorical ban on a term-of-years sentence for juveniles, ultimately holding that the Constitution prohibits a life without parole (LWOP) sentence for juvenile offenders convicted of a non-homicide offense.⁴² In its analysis, the Court relied heavily on the categorical approach and proportionality review it previously used in *Roper*.⁴³ Furthermore, the holding in *Graham* continued to hinge on developmental and sociological science, along with the same rationale and characteristics identified in *Roper*.

As in *Roper*, the analysis in *Graham* began with an assessment of societal standards and values by considering indicia of a national consensus.⁴⁴ Unlike the clear consensus found in *Roper*, the Court discovered a mixed collection of statutes and thus turned its examination to the actual practice

such as voting and serving on a jury, to those aged eighteen and above. *Id.* See generally Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEVELOPMENTAL REV. 339 (1992).

⁴⁰ *Roper*, 543 U.S. at 569.

⁴¹ *Id.* at 570.

⁴² *Graham v. Florida*, 560 U.S. 48, 61, 82 (2010). Graham pled guilty to armed burglary and attempted armed robbery. *Id.* at 53–54. The court initially withheld adjudication and sentenced Graham to probation. *Id.* at 54. Within six months, Graham was arrested for violating his probation on suspicion of participating in another robbery. *Id.* Following trial, the court imposed the maximum penalty for the earlier armed burglary and attempted robbery offenses — life imprisonment and fifteen years, respectively. *Id.* at 57.

⁴³ *Id.* at 61–62.

⁴⁴ *Id.* at 62. The Court began its analysis by acknowledging that a national consensus, as evidenced by legislation, is the "clearest and most reliable objective evidence of contemporary values." *Id.* (quoting *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989)).

and application of the law in jurisdictions allowing for LWOP sentences for juveniles convicted of non-homicide offenses.⁴⁵ Upon examining application of the statutes, the Court determined that the practice of sentencing juveniles to LWOP for non-homicide offenses was infrequent and rarely imposed, noting that only 123 juveniles nationwide were serving LWOP sentences.⁴⁶ Satisfied that the application of the law in practice showed a national consensus in favor of a categorical ban, the Court then considered proportionality and culpability.

In assessing culpability, the Court turned to the characteristics of maturity, susceptibility, and character set forth in *Roper*.⁴⁷ Based on developments in the neurological and psychological sciences, the Court reasoned that the findings in *Roper* still accurately characterized the differences between juveniles and adults and appropriately demonstrated the diminished culpability of juvenile offenders.⁴⁸ Finding that juveniles, as a class, have a lessened culpability, the Court then considered the nature and severity of the offense committed and explained, “a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability.”⁴⁹ Precedent set forth that diminished culpability distinguished offenders from receiving the most severe punishments,⁵⁰ and following *Roper*, a sentence of life imprisonment without the possibility of parole was the most severe punishment permitted by law for juvenile offenders.⁵¹

⁴⁵ *Graham*, 560 U.S. at 62. A census of state legislation found: six states prohibited LWOP for juvenile offenders, seven states allowed LWOP for juvenile offenders for homicide offenses only, and thirty-seven states plus the District of Columbia allowed LWOP for non-homicide juvenile offenders in specified circumstances. *Id.* See also *Id.* at 82–85 for an Appendix of the states in each category.

⁴⁶ *Id.* at 62–64. The Court further revealed that 77 of the 123 juvenile offenders serving LWOP sentences, or 63%, were located in Florida. Additionally, though thirty-seven states and the District of Columbia statutorily permitted LWOP sentences for juvenile non-homicide offenders, only eleven states actually imposed the sentence in practice. *Id.* at 64.

⁴⁷ *Id.* at 68.

⁴⁸ *Id.*

⁴⁹ *Id.* at 69.

⁵⁰ See, e.g., *Kennedy v. Louisiana*, 554 U.S. 407, 439 (2008); *Tison v. Arizona*, 481 U.S. 137, 156 (1987); *Enmund v. Florida*, 458 U.S. 782, 798 (1982); *Coker v. Georgia*, 433 U.S. 584, 600 (1977).

⁵¹ *Graham*, 560 U.S. at 69–70. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 569 (2005); *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1990). See also *Naovarath v. State*, 105 Nev.

As a final step in the proportionality analysis, the Court again considered penological justifications, explaining that “a sentence lacking any . . . justification is by its nature disproportionate to the offense.”⁵² As in *Roper*, neither retribution nor deterrence would justify the imposition of LWOP for juvenile non-homicide offenders.⁵³ The Court further explained that the penological justifications of incapacitation and rehabilitation would also be inadequate to legitimize the sentence.⁵⁴ Therefore, the Court concluded that the Eighth Amendment prohibits a LWOP sentence for a juvenile non-homicide offender, thus creating the first categorical ban for a term-of-years sentence.⁵⁵ Perhaps the most significant and lasting implication of the decision in *Graham* is its allusion to the parole system with the assertion that a state is not required to guarantee release, but a state *must* provide the offender “some meaningful opportunity to obtain release.”⁵⁶

c. *Miller v. Alabama*

The Court in *Miller v. Alabama* extended the rationale adopted in *Roper* and *Graham* to invalidate the mandatory imposition of LWOP sentences for juvenile homicide offenders.⁵⁷ *Miller* enhances the proposition that

525, 526 (1989) (explaining that a life without parole 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 offender], he will remain in prison for the rest of his days”).

⁵² *Graham*, 560 U.S. at 71.

⁵³ *Id.* at 71–72. The Court explained that the retribution rationale would not apply as it relies on the proportionality of culpability and the sentence imposed. *Id.* at 71. Furthermore, the deterrence rationale applied in *Roper* would still pertain to the findings in *Graham* and would be amplified because the punishment was rarely imposed. *Id.* at 72.

⁵⁴ *Id.* at 72–74. The Court acknowledged that in many situations incapacitation is a legitimate penological justification, as recidivism is a serious risk, but in the context of juvenile non-homicide offenders, the justification is insufficient given the diminished culpability of the offender. *Id.* at 72. Finally, rehabilitation serves as a justification for parole, which is clearly absent in a life without parole sentence. *Id.* at 73.

⁵⁵ *Id.* at 82.

⁵⁶ *Id.* at 75.

⁵⁷ 132 S. Ct. 2455, 2463–2464 (2012). The rationale in *Roper* and *Graham* created two precedents. The first supported the categorical bans adopted in both cases based on the proportionality analysis. *Id.* at 2463. The second developed from *Graham*, when the Court analogized LWOP sentences for juveniles to the death penalty. *Id.* at 2463–2464.

“children are constitutionally different from adults for the purposes of sentencing” and established that the distinct differences between juveniles and adults require juvenile offenders to receive individualized sentencing, even for the most serious offenses.⁵⁸

The Court began its analysis by acknowledging the characteristics of maturity, susceptibility, and character first defined in *Roper* and again found these differences between juveniles and adults to be controlling.⁵⁹ These differences in culpability, as the Court explains, are supported not only by neurological and social science,⁶⁰ but also by common sense.⁶¹ Likewise, the Court reiterated its diminished culpability rationale from *Roper* and *Graham* to emphasize the lack of penological justifications for imposing the harshest, most severe punishments on juvenile offenders.⁶²

The Court then shifted its rationale to apply the findings in *Graham* to the application of *Miller*. The Court explained that while *Graham* created a categorical ban on LWOP for non-homicide offenses, the rationale *Graham* applied regarding the “distinctive (and transitory) mental traits and environmental vulnerabilities” of juveniles was not crime-specific and is therefore implicated in *any* LWOP sentencing scheme enforced on a juvenile.⁶³ *Miller* further clarified that the distinct differences between juveniles and adults outlined in *Roper* and *Graham* require that sentencing authorities

The Court then used the rationale in this comparison to consider the mandatory imposition of LWOP to juvenile offenders. *Id.*

⁵⁸ *Id.* at 2464. It is necessary to note that *Miller* does not invalidate LWOP sentences for juvenile homicide offenders, but only prohibits a sentencing scheme that applies such a punishment *mandatorily*.

⁵⁹ *Id.*

⁶⁰ *Id.* at 2464 n.5 (explaining that the science used to support the decisions in *Roper* and *Graham* has also developed to provide stronger support for the proposition).

⁶¹ *Id.* at 2464 (emphasizing a proposition set forth in *Roper* that the differences between juveniles and adults defined by the Court are what “any parent knows”). See also *Yarborough v. Alvarado*, 541 U.S. 652, 674 (2004) (Breyer, J., dissenting) (explaining that “youth is an objective circumstance” and “a widely shared characteristic that generates commonsense conclusions about behavior and perception”).

⁶² *Miller*, 132 S. Ct. at 2465. The Court cited to its findings in *Graham* regarding the lack of penological justifications for retribution, deterrence, incapacitation, and rehabilitation. *Id.* See also *Graham v. Florida*, 560 U.S. 48, 71–74 (2010).

⁶³ *Miller*, 132 S. Ct. at 2465. The Court further explains that “youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole.” *Id.*

consider youthfulness in order to maintain proportionality and a mandatory sentencing scheme removes any such individualized consideration, thus violating the fundamental principle established by these precedents.⁶⁴

Roper, *Graham*, and *Miller* established that “children are constitutionally different from adults for the purposes of sentencing.”⁶⁵ In conceptualizing these differences — ultimately identified as a lack of maturity, a higher susceptibility to pressure, and a still developing character⁶⁶ — the Court relied heavily on neurological, psychological, and sociological data.⁶⁷ Additionally, since the Court’s decision in *Roper*, empirical research studies have continued to identify and support the neurological and psychological developmental science relied on in each opinion.⁶⁸ Ultimately, the shift in Eighth Amendment jurisprudence developed by *Roper*, *Graham*, and *Miller* places the emphasis on the offender, rather than the offense, for any case

⁶⁴ *Id.* at 2466. The Court also acknowledged that the rules created for LWOP are distinct for juvenile offenders because precedent defines LWOP as akin to the death penalty. *Id.* See also *State v. Lyle*, 854 N.W.2d 378, 402, 404 (Iowa 2014) (The Supreme Court of Iowa further extended the rationale in *Miller* to invalidate any mandatory minimum sentencing scheme for juvenile offenders because such a scheme does not allow the courts to consider youth as a mitigating factor in sentencing).

⁶⁵ *Miller*, 132 S. Ct. at 2464.

⁶⁶ *Roper v. Simmons*, 543 U.S. 551, 569–570 (2005).

⁶⁷ *Roper*, 543 U.S. at 569; *Graham*, 560 U.S. at 68; *Miller*, 132 S. Ct. at 2464, 2464 n.5.

⁶⁸ See, e.g., Dustin Albert & Laurence Steinberg, *Judgment and Decision Making in Adolescence*, 21 J. RES. ON ADOLESCENCE 211, 212 (2011) (reviewing research and findings related to adolescent decision-making, including consideration of normative models, theoretical developments, and examination of the influence of social and emotional factors). See also Julia Dmitrieva et al., *Arrested Development: The Effects of Incarceration on the Development of Psychosocial Maturity*, 24 DEV. & PSYCHOPATHOLOGY 1073, 1073 (2012). Research has identified three measures of psychosocial maturity — temperance, perspective, and responsibility — that continue to explain the distinct differences between juveniles and adults. *Id.* Temperance is described as the “ability to curb impulsive and aggressive behavior,” whereas perspective examines the “ability to see things from multiple temporal and social vantage points.” *Id.* Finally, responsibility is the “ability to function autonomously.” *Id.* Evidence indicates that the degree and rate of development among adolescents for each measure is highly variable. *Id.* For a more detailed explanation of each of the three measures, see Laura Cohen, *Freedom’s Road: Youth, Parole, and the Promise of Miller v. Alabama and Graham v. Florida*, 35 CARDOZO L. REV. 1031, 1043–1046 (2014). Cohen also provides a physiological basis for the differences between juveniles and adults by exploring evidence of brain maturation through the use of magnetic resonance imaging (MRI). *Id.* at 1046–1048.

involving the conviction and sentencing of a juvenile.⁶⁹ Accordingly, as a means to provide the “meaningful opportunity for release” that the Court sought in *Graham*,⁷⁰ the established principles and jurisprudence should be applied to other areas of the justice system, namely the parole system.⁷¹

II. THE AMERICAN PAROLE SYSTEM: AN ANALYSIS OF PRACTICES AND POLICIES

a. History of the American Parole System

In 1876, New York became the first jurisdiction to implement what would become the modern American Parole System.⁷² This system was predicated on an indeterminate sentencing scheme and a shifting focus to rehabilitation.⁷³ Interestingly, the system in New York was developed at a reformatory for youthful offenders.⁷⁴ By the early 1900s, most state and federal prisons were utilizing some form of a parole system,⁷⁵ and by the 1970s the established practice allowed over 70% of prisoners to obtain release through parole.⁷⁶

A shift in ideology in the 1980s, and the rise of the “tough on crime” era, caused several changes in the American prison and parole systems.⁷⁷ Sentencing schemes changed in key ways, including: a reversion to determinate

⁶⁹ See Cohen, *supra* note 68, at 1054.

⁷⁰ *Graham*, 560 U.S. at 75.

⁷¹ See *infra* Part II.b.

⁷² See Cohen, *supra* note 68, at 1067.

⁷³ *Id.*

⁷⁴ See *Elmira System*, Encyclopedia Britannica, <http://www.britannica.com/topic/Elmira-system> (last visited Nov. 14, 2015). In 1876, Zebulon Brockway established a parole system at Elmira Reformatory, which housed youthful offenders. Brockway was influenced by Alexander Maconochie and the mark system he implemented in Australia. The system classified prisoners, provided vocational training, and awarded marks for good behavior. Once a prisoner had acquired enough marks, he was eligible for release. *Id.* See also *Mark System*, Encyclopedia Britannica, <http://www.britannica.com/topic/mark-system> (last visited Nov. 14, 2015).

⁷⁵ See Cohen, *supra* note 68, at 1067.

⁷⁶ JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER RE-ENTRY 62 (2009). In this article, “parole” means the release of a prisoner from incarceration before the completion of the prisoner’s sentence.

⁷⁷ *Id.* at 63.

sentencing, the introduction of mandatory minimums, and an escalation of LWOP sentences.⁷⁸ The enactment of “truth-in-sentencing” laws also affected the parole system through a significant decrease in release rates, with several states eliminating parole altogether.⁷⁹ These changes continue to plague the current parole system and, as a result, the release of eligible prisoners is rare in many states.⁸⁰

b. Parole Boards: Existing Procedures and Due Process

Parole procedures and policies vary greatly by state, and the differences are so varied that a national consensus or trend cannot be determined.⁸¹ The parole system has generally operated with little oversight from the courts, and the processes encounter less scrutiny than other aspects of the criminal

⁷⁸ *Id.* at 65. *But see* Cohen, *supra* note 68, at 1068–1069 (noting that even with the trend toward retribution, indeterminate sentencing is still prevalent in the United States and is certainly contemplated as necessary regarding juvenile offenders, as evidenced by the decisions in *Graham* and *Miller*).

⁷⁹ *See* Petersilia, *supra* note 76, at 66–67 tbl. 3.1. *See also* Emily G. Owens, *Truthiness in Punishment: The Far Reach of Truth-in-Sentencing Laws in State Courts*, 8 J. EMPIRICAL LEGAL STUD. 239S (2011). In 1994, Congress passed the Violent Crime Control Act HR 3355 (VCCA) authorizing over \$30 billion for law enforcement expenditures and projects and increasing the enactment of, what are commonly referred to as, truth-in-sentencing (TIS) laws. *Id.* at 239S. TIS laws affect the ability of a prisoner to obtain release via a parole board. *Id.* at 243S. Though statutes differ by state, the majority of states with TIS laws require an offender to serve at least 85% of his sentence before being eligible for release. *Id.* This is due, in large part, to the Truth-in-Sentencing incentive grants, 42 U.S.C. § 13704, which provide funding to states that require certain violent felons to serve at least 85% of a sentence without considering good behavior or other incentives.

⁸⁰ *See* OHIO ADULT PAROLE AUTH., PAROLE BOARD REPORT CALENDAR YEAR 2014 (2015), *available at* <http://www.drc.ohio.gov/web/Reports/ParoleBoard/Calendar%20Year%202014%20Report.pdf> (reporting in Ohio, in 2014, only 4.8% of eligible prisoners were released on parole after a hearing); FLA. PAROLE COMM’N, FLORIDA COMMISSION ON OFFENDER REVIEW 2014 ANNUAL REPORT, at 8, *available at* <https://www.fcor.state.fl.us/docs/reports/FCORannualreport201314.pdf> (reporting in Florida, in 2014, out of the 4,626 inmates eligible for release, decisions were made for 31%, or 1,437, of offenders, with only 1.6%, or 23, of those decisions resulting in parole).

⁸¹ *See* JEREMY TRAVIS & SARAH LAWRENCE, URBAN INSTITUTE, BEYOND THE PRISON GATES: THE STATE OF PAROLE IN AMERICA 1 (2002), *available at* <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/310583-Beyond-the-Prison-Gates.PDF>. *See also* JOAN PETERSILIA, REFORMING PROBATION AND PAROLE: IN THE 21ST CENTURY 139 (2002) (explaining that the Federal parole release system was abolished following the TIS reform movement).

justice system.⁸² Additionally, there is very little available scholarship on parole processes and procedures.⁸³ This lack of inquiry and oversight into the parole system has resulted in parole boards' receiving significant latitude in developing release procedures, often to the detriment of due process.⁸⁴

In *Greenholtz v. Inmates of the Nebraska Penal & Correctional Complex*,⁸⁵ inmates in Nebraska filed a class action lawsuit against members of the parole board, claiming the state's parole statutes and procedures denied them procedural due process.⁸⁶ The Supreme Court rejected the finding of the lower courts that inmates have a constitutionally protected

⁸² See Sarah French Russell, *Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment*, 89 IND. L.J. 373, 396 (2014); Laura Appleman, *Retributive Justice and Hidden Sentencing*, 68 OHIO ST. L.J. 1307, 1307 (2007).

⁸³ See Russell, *supra* note 82, at 399–400. In 2012, in an effort to address the lack of scholarship, Russell conducted a comprehensive, nationwide study of parole release procedures. *Id.* at 399. Forty-five states responded to the survey. *Id.* at 400. Findings from the survey examine the following aspects of state parole systems: the nature and type of interview or hearing utilized in each state, *Id.* at 400–401 & nn.176–187; the role and presence of an attorney during hearings, *Id.* at 402–403 & nn.188–196; the role and presence of the prosecutor during hearings, *Id.* at 403–404 & nn.197–202; input from the victim or a representative of the victim, *Id.* at 404–405 & n.203; consideration of other sources of input such as case history and criminal background, *Id.* at 405 & nn.204–210; and whether inmates are given access to such information, *Id.* at 405–406 & nn.211–213. The survey additionally inquired whether states applied special procedures when considering a juvenile offender for release. *Id.* at 400 n.175. At the time of the survey, some states would consider age among their criteria, but no board implemented separated procedures. *Id.* Since 2012, some states — California, CAL. PENAL CODE § 3051 (2014); Louisiana, LA. REV. STAT. ANN. § 15:574.4(D)(1) (Supp. 2013); and Nebraska, NEB. STAT. ANN. § 83-1, 110.04 (2013) — have enacted legislation that creates special procedures for juvenile offender hearings.

⁸⁴ See Russell, *supra* note 82, at 398 (explaining that the Constitution does not require parole procedures to meet minimal due process standards). See also *Swarthout v. Cooke*, 131 S. Ct. 859, 862 (2011) (“There is no right under the Federal Constitution to be conditionally released before the expiration of a valid sentence, and the States are under no duty to offer parole to their prisoners.”). But see Russell, *supra* note 82, at 396 (further explaining that *Graham* challenges this proposition for juvenile offenders, because the mandate for a release mechanism is tied to constitutional jurisprudence).

⁸⁵ 442 U.S. 1 (1979).

⁸⁶ *Id.* at 3–4. Though statutes in Nebraska provided for both mandatory and discretionary parole, the issues in the case only addressed the discretionary parole practices. *Id.* at 4. The procedures implemented by the parole board in discretionary parole hearings were governed in part by the statutes and in part by the board's experience and prior practices. *Id.*

liberty interest in parole hearings,⁸⁷ and instead held, “there is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence.”⁸⁸ The Court further explained, “a state may . . . establish a parole system, but it has no duty to do so,”⁸⁹ and, “a state may be specific *or* general in defining the conditions for release and the factors that should be considered by the parole authority.”⁹⁰ Likewise, state courts have also generally declined to extend more than minimum due process safeguards to parole hearings.⁹¹ The freedom and flexibility granted to parole boards has not only affected due process protections, but is also apparent in the various factors and criteria relied upon for release.

c. Factors Considered in Parole Hearings

The Supreme Court has acknowledged that the parole process is discretionary in nature⁹² and, as a result, very few restrictions have been placed

⁸⁷ See *Inmates of the Nebraska Penal & Correctional Complex v. Greenholtz*, 576 F.2d 1274, 1276–1277 (8th Cir. 1978).

⁸⁸ *Greenholtz*, 442 U.S. at 7.

⁸⁹ *Id.*

⁹⁰ *Id.* at 8 (emphasis added) (explaining that the lack of restrictions imposed on parole boards allows the system to comply with the public interest in deterrence and rehabilitation).

⁹¹ See, e.g., *Burghart v. Carlin*, 264 P.3d 71, 73 (Idaho 2011) (finding that there is no liberty interest and right to procedural due process in Idaho for parole hearings); *Hill v. Walker*, 948 N.E.2d 601, 605–606 (Ill. 2011) (holding that the Illinois parole statute does not create an expectation of parole and therefore, does not require procedural due process); *In re Hill*, 827 N.W.2d 407, 419–420 (Mich. Ct. App. 2012) (finding that the Michigan statute does not trigger a protected liberty interest and that the inmate was not entitled to appointed counsel). See generally Russell, *supra* note 82, at 400–406 (reporting survey results about parole board procedures by state). Data collected from the survey demonstrates the minimal due process safeguards applied by states in parole hearings. Notable findings include: in some states, an inmate is not present for the parole hearing, *Id.* at 401 & n.187 (explaining that in Florida a hearing will be held by the decision-makers and will include the prosecutor and victim, but not the inmate); fourteen states do not allow an inmate to have an attorney present during a hearing or interview and six do not consider input from an inmate’s attorney during the decision-making process, *Id.* at 402 & nn.188, 191; sixteen states allow a prosecutor to present testimony at a hearing, but only one state allows cross-examination, *Id.* at 404 & nn.200–201; and twenty-eight states do not allow an inmate to have full access to information from the prosecutor’s office, *Id.* at 405 & n.211.

⁹² *Greenholtz*, 442 U.S. at 9–10 (The Court explained that a release decision “depends on an amalgam of elements, some of which are factual but many of which are

on parole boards in selecting criteria for release.⁹³ In general, parole boards will consider the following factors: the seriousness of the offense committed; the prisoner's background and prior criminal history, including past experiences with probation and parole; educational background and vocational skills; prison disciplinary record; participation in prison programs; level of remorse; mental and physical health, including substance abuse and treatment; the views of the victim and prosecutor; and the potential danger to the community.⁹⁴ Many states additionally require prospective parolees to complete evaluations and assessments that purport to measure the likelihood of recidivism.⁹⁵

As with other areas of the parole process, parole boards are allowed great flexibility in evaluating and weighing these factors during the release decision-making process.⁹⁶ Board members have the power to determine which factors will be considered, to evaluate those factors subjectively,⁹⁷ and to decide the weight accorded to each factor.⁹⁸ As a result, some factors have emerged as highly influential and determinative in the decision-making

purely subjective appraisals by the Board members based upon their experience . . .”).

⁹³ See Russell, *supra* note 82, at 396.

⁹⁴ *Id.* at 397 (citing to Richard A. Bierschbach, *Proportionality and Parole*, 160 U. PA. L. REV. 1745, 1750–1751 (2012)). See also Cohen, *supra* note 68, at 1074.

⁹⁵ See Cohen, *supra* note 68, at 1070–1072 & nn.170–173 (providing a general overview of actuarial-based risk and needs assessments). The evaluations take into consideration both static and dynamic factors. *Id.* at 1070. Static factors are fixed and include: “age at sentencing or at first offense, offense of conviction, prior probation or parole history, employment history, substance abuse history, and gender.” *Id.* at 1071. Dynamic factors, on the other hand, may alter over time to reflect the prisoner's current status. *Id.* Dynamic factors include: “present age, active gang affiliation, prison programming, prison disciplinary violations, current custody level, and ongoing ties to the community.” *Id.*

⁹⁶ *Id.* at 1074.

⁹⁷ See Petersilia, *supra* note 81, at 133–134 (explaining that one of the criticisms of the parole system includes the arbitrariness of decision-making that is based on personal experience and intuition rather than facts and data).

⁹⁸ See, e.g., *Bryant v. Warden*, 776 F.2d 394, 397 (2d Cir. 1985) (concluding that the parole board has discretion throughout the process, including the ability to determine the weight of mitigating factors); *Nunez-Guardado v. Hadden*, 722 F.2d 618, 624 (10th Cir. 1983) (explaining that the parole commission has the discretion to define the weight assigned to prisoner conduct); *Rodriguez v. Board of Parole*, 953 N.Y.S.2d 740, 741 (N.Y. App. Div. 2012) (concluding that the parole board is “not required to articulate every factor considered or give equal weight to each factor”).

process: the offense committed is traditionally considered the “most influential factor in parole release decisions.”⁹⁹ Institutional behavior has also been shown to affect release decisions, but only insofar as prison misconduct will negatively impact release — evidence of prison program participation and good behavior is unlikely to influence a release decision in a significant way.¹⁰⁰ In recent years, the potential danger posed by release has become increasingly influential in the decision-making process.¹⁰¹

Accordingly, the broad discretionary nature of parole boards, and the parole system as a whole, has led to a highly subjective release system. Release decisions are often predicated on very few factors, with the most influential being the offense committed — a static factor that a prisoner is unable to change.¹⁰² Additionally, truth-in-sentencing laws have disrupted the need for a parole system by requiring certain offenders to serve at least 85% of a sentence before becoming parole eligible.¹⁰³ The adult parole system is not required to provide a meaningful opportunity for release.¹⁰⁴ Therefore, in order to fulfill the mandate set forth in *Graham*,¹⁰⁵ the parole system must be scrutinized and altered to account for differences in juvenile offenders.

⁹⁹ See Carolyn Turpin-Petrosino, *Are Limiting Enactments Effective? An Experimental Test of Decision Making in a Presumptive Parole State*, 27 J. CRIM. JUST. 321, 331–332 (1999). See also Cohen, *supra* note 68, at 1040–1041 (noting that “courts have generally upheld Board decisions based solely on offense severity if the hearing transcript and decision reflect at least some consideration of [other factors]”); W. David Ball, *Heinous, Atrocious, and Cruel: Apprendi, Indeterminate Sentencing, and the Meaning of Punishment*, 109 COLUM. L. REV. 893, 896 (2009) (arguing that a parole denial based largely or solely on offense severity undermines the jury’s verdict by extending the punitive sentence).

¹⁰⁰ See Mary West-Smith et al., *Denial of Parole: An Inmate Perspective*, 64 FED. PROBATION 3, 5 (2000). See also Cohen, *supra* note 68, at 1075 (explaining prison disciplinary infractions are “frequently-cited grounds for parole denials,” but participation in programming rarely gives rise to release).

¹⁰¹ See Bierschbach, *supra* note 94, at 1751.

¹⁰² See Cohen, *supra* note 68, at 1076.

¹⁰³ See Owens, *supra* note 79, at 243S and accompanying text.

¹⁰⁴ See Ball, *supra* note 99, at 944.

¹⁰⁵ *Graham v. Florida*, 560 U.S. 48, 75 (2010) (holding that a state does not have to guarantee release, but that a state must provide a “meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation”).

III. A MEANINGFUL OPPORTUNITY FOR RELEASE: WHAT *GRAHAM*'S MANDATE MEANS FOR JUVENILE OFFENDERS AND THE PAROLE SYSTEM

In *Graham v. Florida*, the Supreme Court articulated a mandate that requires states to provide juvenile non-homicide offenders with “a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.”¹⁰⁶ In contrast, there is no constitutional provision requiring states to provide any form of parole or early release for adult offenders.¹⁰⁷ As such, the mandate in *Graham* implicates several challenges under the modern American Parole System.

a. Timing: When Should a “Meaningful Opportunity” be Offered?

Following the decision in *Graham* a number of questions regarding compliance with the mandate were left unanswered, including — when, during incarceration, must a state provide a juvenile offender with a meaningful opportunity for release?¹⁰⁸ In the absence of a clear rule, jurisdictions have been mixed in their interpretation and response to the mandate.¹⁰⁹ At a

¹⁰⁶ *Id.* See also *Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012) (concluding, with regard to LWOP sentences for juvenile homicide offenders, “we require [the sentencer] to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison”).

¹⁰⁷ See *supra* Part II.b–c.

¹⁰⁸ See Russell, *supra* note 82, at 406. Another question implicated by the decision — whether one meaningful opportunity for release is sufficient or if periodic review is required. *Id.* at 411. Periodic review is typical in the parole system, but the length of time between reviews is becoming increasingly longer. *Id.* Additionally, periodic review is likely more beneficial for juvenile offenders, because it accounts for the differing rates of maturity and rehabilitation present in youthful offenders. *Id.* Furthermore, a single opportunity system means a state risks both that an offender will come up for review too early and be denied release and that review will come too late and a rehabilitated offender will remain incarcerated unnecessarily while waiting. *Id.*

¹⁰⁹ The courts have been divided on whether a no-parole, term-of-years sentence that will exceed a juvenile’s life expectancy violates the mandate, because the offender was not sentenced to “life.” Compare *Bunch v. Smith*, 685 F.3d 546 (6th Cir. 2012) (an eighty-nine year sentence did not violate the mandate and require relief), and *Smith v. State*, 93 So.3d 371 (Fla. Dist. Ct. App. 2012) (affirming an eighty-year sentence), with *People v. Mendez*, 114 Cal. Rptr. 3d 870 (Cal. Ct. App. 2010) (reversing a sentence that was not parole eligible for eighty-four years).

minimum, the mandate would require an opportunity for release prior to the completion of the full sentence or death.¹¹⁰ However, many argue that a “meaningful opportunity for release” is synonymous with a meaningful opportunity to live outside of prison.¹¹¹

In assessing when to provide a “meaningful opportunity” for review and release, a state may consider any number of solutions — two are discussed below. First, a state can develop policies using the evidence and rationale the Court relied upon to support its decision in *Graham*.¹¹² For example, the Court utilized neurological and psychological science to reinforce its rationale that children differ from adults.¹¹³ This data, along with the factors first defined in *Roper* — maturity, susceptibility, and character¹¹⁴ — was critical to the ultimate decision in *Graham*.¹¹⁵ Evidence shows that brain and character maturation and development occurs well into late adolescence.¹¹⁶ Therefore, states may be able to provide a “meaningful opportunity for release” if parole review is set to coincide with late adolescence, or the anticipated time of brain and character maturation.¹¹⁷

The drafters of the Model Penal Code (MPC) have constructed an alternative reform solution known as “second look sentencing.”¹¹⁸ The

¹¹⁰ See Russell, *supra* note 82, at 407.

¹¹¹ *Id.* at 408. See also Alice Ristroph, *Hope, Imprisonment, and the Constitution*, 23 FED. SENT’G REP. 75 (2010). Ristroph argues that the mandate in *Graham* means “the juvenile defendant is not to be denied hope, and the state is not to abandon hope for the juvenile’s eventual rehabilitation.” *Id.*

¹¹² See Russell, *supra* note 82, at 409.

¹¹³ *Graham v. Florida*, 560 U.S. 48, 68 (2010) (explaining that neurological differences in brain development and maturation are evident between juveniles and adults).

¹¹⁴ *Roper v. Simmons*, 543 U.S. 551, 560–570 (2005).

¹¹⁵ *Graham*, 560 U.S. at 68–69.

¹¹⁶ See Brief for the American Psychological Association et al., as Amici Curiae Supporting Petitioners, *Graham v. Florida*, 560 U.S. 48 (2010) (Nos. 08-7412, 08-7621), 2009 WL 2236778.

¹¹⁷ See Russell, *supra* note 82, at 409 (explaining that setting initial review at ten years from incarceration should allow for an offender’s brain and character to have matured, making rehabilitation more likely).

¹¹⁸ MODEL PENAL CODE: SENTENCING § 305.6 cmt. a (Tentative Draft No. 2, 2011). The American Law Institute (ALI) has been developing a model penal code for sentencing. Tentative Draft No. 2 was approved at the 2011 annual meeting. According to the website for the ALI, “the material [in Tentative Draft No. 2] may be cited as representing the Institute’s position until the official text is published.” *Model Penal*

proposal from the MPC alters the parole system by shifting the release mechanism to the judiciary.¹¹⁹ “Second look sentencing” would allow a juvenile offender, after serving ten years, to petition the court for a “sentence modification.”¹²⁰ Rather than a parole hearing to determine release, the “sentencing modification” would function as a re-sentencing, with the judiciary analyzing whether an offender’s sentence should be altered.¹²¹ The drafters of the MPC, consistent with the Court’s holdings in *Roper*, *Graham*, and *Miller*, chose to create separate review standards for juvenile offenders, because research in psychology and criminology has continued to emphasize the differences between juvenile and adult offenders.¹²²

The mandate in *Graham* specifies that a juvenile offender should be given a “meaningful opportunity to obtain release *based on* demonstrated maturity and rehabilitation.”¹²³ Therefore, solutions adopted by the states should allow for a reasonable amount of time for an offender to demonstrate a change in maturity and character, but decision-makers should be wary of setting the timeframe both too early and too late.¹²⁴ Furthermore,

Code: Sentencing, The American Law Institute, <https://www.ali.org/publications/show/sentencing/#drafts> (last visited Nov. 15, 2015).

¹¹⁹ MODEL PENAL CODE: SENTENCING § 305.6(1) (Tentative Draft No. 2, 2011).

¹²⁰ *Id.* § 6.11(A)(h). Additionally, the original sentencing court may allow an offender to become eligible for sentencing modification prior to the ten-year period. *Id.* See also *Id.* § 305.6 (creating a sentencing scheme for adult offenders, setting modification review at fifteen years).

¹²¹ *Id.* § 305.6(4). A judiciary would determine “whether the purposes of sentencing . . . would better be served by a modified sentence than the prisoner’s completion of the original sentence.” *Id.*

¹²² *Id.* § 6.11A cmt. c. The comment further explains that differences between juveniles and adults have been recognized and supported by evidence in the following areas: blameworthiness, potential for rehabilitation, harm prevention, number of serious violent offenders, and deterrence. *Id.* § 6.11A cmt. c(1)–(5). See also *Id.* § 6.11A cmt. h (explaining that evidence suggests juveniles are more likely to change, and often do so to a greater degree than adult offenders); *Id.* § 6.11A cmt. g (recommending caps on juvenile sentences that are below the current maximum sentences available to adult offenders).

¹²³ *Graham v. Florida*, 560 U.S. 48, 75 (2010) (emphasis added).

¹²⁴ See Russell, *supra* note 82, at 410 & n.241. Russell emphasizes that creating an opportunity for review that is too early can be detrimental to juvenile offenders. Juvenile offenders often encounter a number of disciplinary issues in the first years of imprisonment, particularly if placed in adult prison, which can negatively affect parole decisions. *Id.*

as demonstrated by the examples above, parole reform for juvenile offenders may be achieved through either the judiciary or the legislature.

b. A Realistic Opportunity for Release

Another challenge implicated by the mandate in *Graham* centers on the likelihood of release and the criteria currently utilized by parole boards to determine release.¹²⁵ Additionally, the Eighth Amendment proportionality analysis relied on in *Graham* considers the likelihood of release in the assessment of sentence severity.¹²⁶ “Thus, under *Graham*, a meaningful opportunity for release means a realistic one.”¹²⁷

The *Graham* mandate makes an assessment of an offender’s maturity and rehabilitation crucial to the release analysis.¹²⁸ In contrast, the current parole system generally emphasizes offense severity and will often base decisions solely on the committed offense.¹²⁹ The fundamental principle behind *Graham* and *Miller* is that children are less culpable than adults and more capable of change, indicating that sentencing schemes should account for these differences in spite of the severity of the offense.¹³⁰ The mandate in *Graham* suggests that, in the case of juvenile offenders, offense severity should be afforded little to no weight in the release decision-making process.¹³¹

¹²⁵ See *supra* Part II.c.

¹²⁶ *Graham*, 560 U.S. at 79 (explaining that the Eighth Amendment does not permit a state to deny *Graham* the opportunity to atone for his crimes and obtain release). See also *Solem v. Helm*, 463 U.S. 277, 303 (1983); *Rummel v. Estelle*, 445 U.S. 263, 280–281 (1980).

¹²⁷ See Russell, *supra* note 82, at 412. Russell also explains that *Graham* rejects the idea of clemency as an alternative to a meaningful opportunity. *Id.* See also *Graham*, 560 U.S. at 82 (concluding with the assertion, “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”) (emphasis added).

¹²⁸ *Graham*, 560 U.S. at 75.

¹²⁹ See *supra* Part II.c. See also sources cited *supra* note 99 and accompanying text.

¹³⁰ See, e.g., *Graham*, 560 U.S. at 68; *Miller v. Alabama*, 132 S. Ct. 2455, 2464–2465 (2012). See also Russell, *supra* note 82, at 412–413 (explaining that the Court in *Graham* and *Miller* acknowledges and accepts offense severity, but nevertheless determines that a juvenile offender should be given a meaningful opportunity to obtain release).

¹³¹ See Russell, *supra* note 82, at 413 (arguing that offense severity is taken into account during the initial sentencing, which includes the eligibility parameters for parole). See also Ball, *supra* note 99, at 971–972. Ball asserts that a parole board should not

Given the low release rates,¹³² and the emphasis on offense severity in release decisions,¹³³ the current parole system is unlikely to provide a meaningful and realistic opportunity for release for juvenile offenders.¹³⁴ To mitigate this, states, through courts and legislatures, should set forth specific guidelines for juvenile offender parole decisions, outlining criteria that should play a significant role in the decision-making process.¹³⁵

c. Age as a Necessary Factor in Release Decisions for Juvenile Offenders

Under the current parole system, age is considered in various ways and can often be both a static and dynamic factor.¹³⁶ Additionally, age is a significant factor evaluated by the risk assessment instruments used by parole boards in their decision-making process.¹³⁷ Contrary to the fundamental premise in *Graham* and *Miller* that youth are more capable of change, the risk assessment instruments generally estimate youthfulness as an increased measure of risk.¹³⁸ For example, even though the Court has held that juveniles are less culpable,¹³⁹ the risk assessment will correlate “early

“consider the commitment offense in determining a prisoner’s suitability for parole” and, particularly in the case of juvenile offenders, that parole should be based on rehabilitation. *Id.*

¹³² See sources cited *supra* note 80 and accompanying text.

¹³³ See *supra* Part II.c. See also sources cited *supra* note 99 and accompanying text.

¹³⁴ See Russell, *supra* note 82, at 414 (noting “one cannot conclude based on current parole release rates of prisoners convicted of violent crimes whether a particular state’s parole board will provide a rehabilitated juvenile offender with a realistic chance for release”).

¹³⁵ See *infra* Part IV. See also Russell, *supra* note 82, at 413–414.

¹³⁶ See Megan Annitto, *Graham’s Gatekeeper and Beyond: Juvenile Sentencing and Release Reform in the Wake of Graham and Miller*, 80 BROOK. L. REV. 119, 159 (2014). Age is a static factor when it remains fixed, as in age at the time of committed offense or age at first arrest. *Id.* Conversely, the current age of the offender is often considered as a dynamic factor, because risk of recidivism diminishes over time. *Id.* at 159–160.

¹³⁷ See Christopher Slobogin, *Risk Assessment*, in THE OXFORD HANDBOOK OF SENTENCING AND CORRECTIONS, 196–197 (Joan Petersilia & Kevin R. Reitz, eds. 2012); James Austin, *The Proper and Improper Use of Risk Assessment in Corrections*, 16 FED. SENT’G REP. 194, 195 (2004).

¹³⁸ See Slobogin, *supra* note 137, at 198–199 (explaining that youthfulness at the time of the offense committed will generally raise the level of risk associated with an offender).

¹³⁹ See, e.g., *Miller v. Alabama*, 132 S. Ct. 2455, 2464–2465 (2012).

onset of criminal or delinquent activity . . . with a greater likelihood of future criminal behavior.”¹⁴⁰ So, under the modern parole system, an offender’s youthfulness is more likely to increase his risk level, thus decreasing the likelihood of release.¹⁴¹

Under the current parole system, the consideration of age as a criterion for release is contrary to both the mandate set forth in *Graham*¹⁴² and the fundamental principle behind the decisions in *Roper*, *Graham*, and *Miller*.¹⁴³ In order for the parole system to provide a meaningful opportunity for release for juvenile offenders, states must alter their current criteria to adequately reflect the premise that youthfulness indicates a higher likelihood of rehabilitation.¹⁴⁴ Furthermore, changes must be implemented throughout the system in order to comply with the mandate in *Graham* and provide an actual and realistic opportunity for release for juvenile offenders.¹⁴⁵

IV: A MODEL FOR JUVENILE PAROLE REFORM: CALIFORNIA’S ENACTMENT OF YOUTH OFFENDER PAROLE HEARINGS

In 2011, in *Brown v. Plata*,¹⁴⁶ the Supreme Court affirmed an order to relieve overcrowding in California prisons and impose a population limit in response to grossly inadequate facilities and care which violated the

¹⁴⁰ See Annitto, *supra* note 136, at 159; Austin, *supra* note 137, at 197.

¹⁴¹ See Annitto, *supra* note 136, at 159–160. For example, in Nevada, that an inmate’s risk score is increased by two points if he was incarcerated as a juvenile, whereas completion of prison programs may only reduce a score by one point. *Id.* at 159–160 & n.294.

¹⁴² *Graham v. Florida*, 560 U.S. 48, 75 (2010).

¹⁴³ See *Roper v. Simmons*, 543 U.S. 551, 569 (2005); *Graham v. Florida*, 560 U.S. 48, 68 (2010); *Miller v. Alabama*, 132 S. Ct. 2455, 2464–2465 (2012).

¹⁴⁴ See Annitto, *supra* note 136, at 414.

¹⁴⁵ *Id.* Annitto argues that under the modern parole system, parole boards are not required to provide realistic release for offenders. *Id.* Accordingly, “simply making juvenile offenders eligible for parole under existing practices will not guarantee compliance with Eighth Amendment requirements.” *Id.* Furthermore, state legislatures and courts are key to the implementation of criteria that will provide juveniles with a meaningful opportunity to obtain release. *Id.*

¹⁴⁶ 131 S. Ct. 1910 (2011).

Eighth Amendment ban on cruel and unusual punishment.¹⁴⁷ To satisfy the court-mandated prison population reduction, California passed three laws from 2012 to 2013, two of which directly affect juvenile offenders.¹⁴⁸ In 2012, California contributed to nearly half of the reported nationwide decline in prison populations.¹⁴⁹ As a result of these measures, California has become a leader in juvenile sentencing reform and has passed legislation that should serve as a model for other states to amend their parole release process for juvenile offenders.

a. California Addresses de Facto LWOP Sentences Following Graham and Miller

Following *Graham* and *Miller*, states¹⁵⁰ were left to address a number of unanswered questions, including how to confront de facto LWOP

¹⁴⁷ *Id.* at 1922–1923. The case arose from two class actions involving prisoners with mental disorders and medical disorders. *Id.* at 1922. The Court found that the prison populations were nearly double the capacity and had operated as such for eleven years. *Id.* at 1924. As a result, the mental health and medical care provided by the prisons did not meet constitutional minimums and had frequently caused serious harm and in some instances death. *Id.* at 1923.

¹⁴⁸ Jesse Wegman, *Once Again, California Eases Harsh Sentencing Laws*, N.Y. Times (Sept. 25, 2013), available at http://takingnote.blogs.nytimes.com/2013/09/25/once-again-california-eases-harsh-sentencing-laws/?_r=0. The third law contributed to the release of prisoners serving sentences under California's Three Strikes Law. *Id.*

¹⁴⁹ See Porter, *supra* note 16. In 2012, California's prison population was reduced by 15,035 prisoners. *Id.*

¹⁵⁰ Along with California, Iowa also serves as a leader in juvenile sentencing reform and its courts have likewise reversed de facto LWOP sentences for juvenile offenders. In *State v. Ragland*, the Iowa Supreme Court established guidelines for applying *Miller*. 836 N.W.2d 107 (Iowa 2013). First, the court held that *Miller* applies retroactively in Iowa because it not only affects procedure, but also the substantive law. *Id.* at 117. Furthermore, the court reasoned that *Miller* must also apply to “sentences that are the functional equivalent of life without parole” given that the “spirit of the constitutional mandates of *Miller*” are based on the profound effect such sentences have on juveniles. *Id.* at 121. Finally, the court determined that the commutation provided by the governor for juvenile offenders currently serving LWOP sentences did not allow for the individualized sentencing required under *Miller*. *Id.* at 122. See also Mike Wiser, *Branstad commutes life sentences for 38 Iowa juvenile murderers*, The Gazette (July 16, 2012), <http://thegazette.com/2012/07/16/branstad-commutes-life-sentences-for-38-iowa-juvenile-murderers/> (explaining that following the Court's decision in *Miller*, the governor of Iowa commuted the sentences of thirty-eight offenders, who were sentenced as juveniles to LWOP, to serve a mandatory sixty years in prison before being eligible for parole).

sentences.¹⁵¹ California first considered a de facto LWOP sentence for a non-homicide juvenile offender in *People v. Caballero*.¹⁵² The California Supreme Court held a term-of-years sentence for a juvenile non-homicide offender with a parole eligibility date that occurs outside of the life expectancy violates the Eighth Amendment.¹⁵³ Adhering to the rationale that juveniles are developmentally distinct from adults, the Court determined that the holding in *Graham* was not limited to a specific sentence, but rather requires that all juvenile non-homicide offenders be granted a realistic opportunity to obtain release.¹⁵⁴ The Court further explained that in order to receive a realistic opportunity to obtain release, offenders must be able to demonstrate a change in maturity and growth, which can only be achieved if the opportunity arises during an offender's lifetime.¹⁵⁵ Following the decision in *Caballero*, the California Legislature has enacted two significant reforms related to juvenile offenders.

b. The Fair Sentencing for Youth Act

Following the decisions in *Graham* and *Miller*, the California Legislature enacted the "Fair Sentencing for Youth Act" to address parole eligibility for juvenile offenders.¹⁵⁶ The Act allows juvenile offenders sentenced to LWOP to petition the court for re-sentencing after serving fifteen years.¹⁵⁷

¹⁵¹ A "de facto LWOP sentence" is a term-of-years sentence that will exceed, or in some instances more than likely exceed, a person's natural life, thus resulting in a virtual life sentence.

¹⁵² 282 P.3d 291 (Cal. 2012). *Caballero* was sentenced on three counts — forty years to life, thirty-five years to life, and thirty-five years to life — to be served consecutively as 110 years to life. *Id.* at 293.

¹⁵³ *Id.* at 295. The state argued that *Caballero's* sentences did not violate the categorical ban imposed by *Graham* because each sentence "was permissible individually because each included the possibility of parole within [*Caballero's*] lifetime." *Id.* at 294.

¹⁵⁴ *Id.* at 295. The California Supreme Court reasoned that the Supreme Court's extension of *Graham's* rationale in *Miller* to juvenile homicide cases supported the proposition that *Graham's* ban on LWOP sentences for non-homicide offenses applied to all juvenile non-homicide cases. *Id.* at 294.

¹⁵⁵ *Id.* at 295.

¹⁵⁶ S.B. 9, 2012 Leg. (Ca. 2012), available at http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_0001-0050/sb_9_bill_20120930_chaptered.pdf (codified at CAL. PENAL CODE § 1170 (West 2013)).

¹⁵⁷ CAL. PENAL CODE § 1170(d)(2)(A)(i). Pursuant to CAL. PENAL CODE § 190.5(b) (West 2008), a juvenile offender age sixteen or seventeen in California may be sentenced

Upon consideration of specified factors,¹⁵⁸ if the offender’s sentence is not recalled he may re-petition the court for review at a later date, allowing juvenile offenders serving a LWOP sentence multiple opportunities to obtain parole eligibility.¹⁵⁹ The “Fair Sentencing for Youth Act” does not address parole hearings, and likewise does not guarantee release through the parole system for juvenile offenders — the Act simply provides juvenile offenders serving LWOP sentences an opportunity to demonstrate rehabilitation, which in turn could provide a change in sentencing to possibly receive parole.¹⁶⁰

to LWOP or twenty-five years to life if convicted of murder in the first degree. Accordingly, under CAL. PENAL CODE § 1170(d)(2)(A)(i), the court may convert a LWOP sentence to life with the first possibility of parole after twenty-five years, meaning that an offender may petition the court for resentencing after fifteen years and, if granted, would become parole eligible after serving another ten years. *See also* *People v. Gutierrez*, 58 Cal. 4th 1354 (2014). In *Gutierrez*, the California Supreme Court held CAL. PENAL CODE § 190.5 constitutional following *Miller* because the statute provides courts with the discretion to sentence an individual to LWOP or twenty-five years to life and there is no “presumption in favor of life without parole.” *Id.* at 1361.

¹⁵⁸ CAL. PENAL CODE § 1170(d)(2)(F)(i)–(viii). Factors the court may consider include:

The defendant was convicted pursuant to felony murder . . . does not have juvenile felony adjudications for assault . . . committed the offense with at least one adult codefendant . . . had insufficient adult support or supervision and had suffered from psychological or physical trauma . . . has performed acts that tend to indicate rehabilitation or the potential for rehabilitation, including, but not limited to, availing himself or herself of rehabilitative, educational, or vocational programs . . . has maintained family ties or connections with others . . . has eliminated contact with individuals outside of prison who are currently involved with crime . . . has had no disciplinary actions for violent activities in the last five years in which the defendant was determined to be the aggressor.

Id.

¹⁵⁹ CAL. PENAL CODE § 1170(d)(2)(H). *See* Russell, *supra* note 82, at 392 n.126 (explaining that the Act applies retroactively to juvenile offenders currently serving LWOP sentences). *See also* Kelly Scavone, *How Long is Too Long? Conflicting State Responses to De Facto Life Without Parole Sentences after Graham v. Florida and Miller v. Alabama*, 82 FORDHAM L. REV. 3439, 3474 (2014).

¹⁶⁰ *See* Russell, *supra* note 82, at 392; Scavone, *supra* note 159, at 3475 (acknowledging that § 1170 may provide “juvenile offenders the opportunity for parole but may not actually be effective in providing any meaningful chance at rehabilitation and release for the majority of juvenile LWOP offenders”).

c. California Provides a Realistic Opportunity to Obtain Release through Youth Offender Parole Hearings

In 2013, the California Legislature passed a bill creating special “Youth Offender Parole Hearings” for juvenile offenders in order to create a meaningful opportunity to obtain release consistent with *Graham*.¹⁶¹ California Senate Bill 260 sets forth the intent of the state legislature, as follows:

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* and the decisions of the United States Supreme Court in *Graham v. Florida* and *Miller v. Alabama*. . . . 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.¹⁶²

The Youth Offender Parole Hearings differ from adult parole hearings in that the parole board is instructed 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.”¹⁶³ Additionally, during its assessment, if the board uses risk assessment instruments,¹⁶⁴ such evaluations may only be administered by a licensed psychologist who must also

¹⁶¹ S.B. 260, 2013 Leg., 2013–2014 Reg. Sess. (Ca. 2013), available at http://www.leginfo.ca.gov/pub/13-14/bill/sen/sb_0251-0300/sb_260_bill_20130916_chaptered.pdf (codified at CAL. PENAL CODE §§ 3051, 4801 (West 2013)). For more information on California Senate Bill 260 and the Youth Offender Parole Hearings, see Human Rights Watch, *California Youth Offender Parole: A Guide for Prisoners and Their Families and Friends* (2014), available at http://www.caresforyouth.org/YOPH_SB_260_Guide_5-1-14_v3.pdf

¹⁶² S.B. 260 § 1 (citations omitted).

¹⁶³ CAL. PENAL CODE § 4801(c). Additionally, “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.” CAL. PENAL CODE § 3051(f)(2).

¹⁶⁴ See *supra* Part III.c.

give great weight to the diminished culpability and hallmark features of youth.¹⁶⁵ Furthermore, the bill created parameters, based on the offender's sentence, detailing when an offender will become eligible for a Youth Offender Parole Hearing.¹⁶⁶ When originally drafted, the bill applied to offenders who were convicted of a controlling offense that was committed before the age of eighteen.¹⁶⁷ In 2015, however, the state legislature passed California Senate Bill 261 extending the applicability of Youth Offender Parole Hearings to offenders who were convicted of a controlling offense that was committed under the age of twenty-three.¹⁶⁸

California's Youth Offender Parole Hearings, created by California Senate Bill 260, address issues that currently plague the parole system and impede compliance with *Graham's* mandate that youth offenders should receive a realistic opportunity to obtain release.¹⁶⁹ First, the decisions in *Graham* and *Miller* failed to establish timing guidelines that would direct states when an opportunity for release should be made available to offenders, leading to inconsistent interpretations and responses from the states.¹⁷⁰ Neurological and developmental data from the American Psychological Association (APA) shows that brain development continues through late adolescence,¹⁷¹ and the drafters of the MPC have recommended "second

¹⁶⁵ CAL. PENAL CODE § 3051(f)(1).

¹⁶⁶ S.B. 260 § 4 (codified at CAL. PENAL CODE § 3051(b)(1)–(3)). Accordingly, a juvenile offender serving a determinate sentence for the controlling offense, meaning a sentence with a fixed length, will become parole eligible, and thus eligible for a youth offender parole hearing, during his fifteenth year. § 3051(b)(1). A juvenile offender sentenced to a life term of less than twenty-five years for the controlling offense will become eligible in his twentieth year of incarceration. § 3051(b)(2). Finally, a juvenile offender sentenced to a life term of twenty-five years or more for the controlling offense will become eligible during his twenty-fifth year. § 3051(b)(3). As defined in the statute, the controlling offense "means the offense or enhancement for which any sentencing court imposed the longest term of imprisonment." § 3051(a)(2)(B).

¹⁶⁷ S.B. 260 § 4. The statute, as originally enacted and currently, does not apply to offenders sentenced under California's Three Strikes Law or "Jessica's Law," also known as the Sexual Predator Punishment and Control Act.

¹⁶⁸ S.B. 261, 2015 Leg., 2015–2016 Reg. Sess. (Ca. 2015), available at http://www.leginfo.ca.gov/pub/15-16/bill/sen/sb_0251-0300/sb_261_bill_20151003_chaptered.pdf (codified at CAL. PENAL CODE §§ 3051, 4801 (West 2016)).

¹⁶⁹ See *supra* Part III.

¹⁷⁰ See cases cited *supra* note 109 and accompanying text.

¹⁷¹ See *supra* Part III.a. See also *supra* note 116 and accompanying text.

look sentencing” for juvenile offenders, which would allow youthful offenders to petition for resentencing after ten years.¹⁷² Section 3051 of the California Penal Code addresses this timing issue by clearly setting forth parameters that detail when juvenile offenders are eligible for parole.¹⁷³ The guidelines developed under section 3051 exceed those recommended by the MPC, but effectively create a graduated scale based on sentence length that establishes set timeframes for parole eligibility. Additionally, section 1170 of the California Penal Code allows juvenile offenders sentenced to LWOP to petition the court for re-sentencing after fifteen years, which is supported by the data from the APA that juvenile brains continue to develop into late adolescence and suggests that California legislators are willing to provide even the most dangerous of juvenile offenders with the possibility of parole release upon a showing of growth and maturity.¹⁷⁴

Another issue juvenile offenders face under the current parole system is the effect and weight of age as a factor in parole release decisions. Risk assessment instruments, used by many parole boards in release evaluations, consider age as a significant factor in the decision-making process.¹⁷⁵ Contrary to the evidence relied upon by the Court in *Roper*, *Graham*, and *Miller*, however, risk assessment tools generally conclude that a juvenile offender’s age is an increased risk factor rather than an indication of susceptibility to rehabilitation.¹⁷⁶ In contrast, section 3051 requires that California parole boards choosing to utilize risk assessment tools must do so through a licensed psychologist and that the evaluation of those tools must “take into consideration the diminished culpability of juveniles.”¹⁷⁷ Furthermore, while age need not be considered as a factor in other jurisdictions,¹⁷⁸ section 4801 of the California Penal Code mandates that the parole board

¹⁷² See *supra* notes 118–122 and accompanying text.

¹⁷³ CAL. PENAL CODE § 3051(b)(1)–(3). See *supra* note 166 and accompanying text.

¹⁷⁴ See *supra* notes 156–158 and accompanying text.

¹⁷⁵ See sources cited *supra* note 137.

¹⁷⁶ See sources cited *supra* notes 138, 140–141 and accompanying text.

¹⁷⁷ CAL. PENAL CODE § 3051(f)(1).

¹⁷⁸ See Cohen, *supra* note 68, at 1073–1076 (explaining the arbitrary nature of parole decision-making and the practice of giving different factors varying weight in the decision-making process); Annitto, *supra* note 136, at 144–145 (discussing the variations in state parole board decision-making and the arbitrariness associated with release decisions and the factors considered).

“shall give great weight to the diminished culpability of juveniles . . . [and] the hallmark features of youth.”¹⁷⁹ Accordingly, the California legislation not only adequately considers age as a factor in its parole release decisions, but does so in a manner consistent with the fundamental principle behind the Court’s decisions in *Roper*, *Graham*, and *Miller*.

Similarly, the current parole system’s general emphasis on offense severity challenges *Graham*’s mandate to provide a meaningful opportunity to obtain release.¹⁸⁰ Additionally, the prevalence of low release rates under the current system further decreases the opportunity for juvenile offenders to achieve a realistic chance of release consistent with *Graham*.¹⁸¹ Under section 3051, juvenile offenders are still required to show significant rehabilitative improvements in order to obtain release, but the considerable weight afforded to youth under section 4801 increases the likelihood of parole suitability and the successful attainment of a realistic opportunity for release.¹⁸² Early results from California “suggest that the effect of the specific criteria and rationale focused on development in the legislation, in tandem with a politically favorable environment, has been impactful.”¹⁸³

Though in its early stages, the Youth Offender Parole Hearings instituted under section 3051 of the California Penal Code demonstrate an effective juvenile sentencing and parole reform model that other states should consider adopting. The decisions in *Graham* and *Miller* addressed issues pertaining not only to the sentencing of juvenile offenders, but also to the parole of such offenders, by mandating a meaningful opportunity for release. The current parole system inadequately addresses this mandate and fails to provide a meaningful or realistic opportunity for release

¹⁷⁹ CAL. PENAL CODE § 4801(c).

¹⁸⁰ See *supra* Part II.c. See also sources cited *supra* note 99 and accompanying text.

¹⁸¹ See sources cited *supra* note 80 and accompanying text.

¹⁸² See Human Rights Watch, *supra* note 161.

¹⁸³ See Annitto, *supra* note 136, at 162 and n.308 (citing an interview the author conducted with Elizabeth Calvin from the Human Rights Watch). Annitto elaborates that in the initial months following the enactment of S.B. 260, “twelve out of twenty-one applicants were granted a parole release date,” which illustrates a “stark contrast” with California’s prior annual release rates, which at times were “zero percent.” *Id.* But see Scavone, *supra* note 159, at 3478. Scavone notes that opponents to reforms like S.B. 260 will often argue that such mechanisms increase the risk of releasing dangerous offenders and place an undue burden on victims to participate in frequent or multiple parole hearings. *Id.*

for juvenile offenders. The reforms enacted in California through section 3051, section 4801, and section 1170 adhere to the fundamental principle in *Roper*, *Graham*, and *Miller* and provide an alternative mechanism for parole release for juvenile offenders, who have been shown to be constitutionally different from adult offenders.

CONCLUSION

Juvenile justice sentencing and reform policies have altered dramatically over the past decade. While the decisions in *Roper*, *Graham*, and *Miller* largely affected sentencing schemes for juvenile offenders, the Court additionally created a mandate in *Graham* that states must provide juvenile offenders with a meaningful and realistic opportunity to obtain release. This mandate directly affects the American Parole System, because it imposes a duty on the states regarding parole of juvenile offenders that does not exist for adult offenders. Currently, the modern parole system operates adversely to the fundamental principle that juveniles are constitutionally different than adults and must receive a meaningful opportunity to obtain release.

Since 2013, a number of states have begun to implement parole reforms for juvenile offenders in an effort to follow the mandate set forth in *Graham*. Most notably, California enacted Senate Bill 260 and implemented Youth Offender Parole Hearings for juvenile offenders. These hearings address the issues that exist in the current parole system by creating a clear timing component and requiring board members to afford great weight to the diminished culpability of juvenile offenders. This requirement significantly increases the likelihood that a juvenile offender will receive a meaningful and realistic opportunity to obtain release. The Supreme Court in *Roper*, *Graham*, and *Miller* declared that juveniles are constitutionally different from adults and instructed that states must provide juvenile offenders with a meaningful opportunity for release. In order to follow this mandate, states need to develop effective parole reform for juvenile offenders. California's Youth Offender Parole Hearings system offers other states a viable model of effective parole reform for juvenile offenders.

A MODEL FOR JUVENILE PAROLE REFORM:

California's Youth Offender Parole Hearings Challenge the Modern Parole System and Apply the Fundamental Principles in Graham and Miller to the Release Decision-Making Process

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INTRODUCTION

Juvenile sentencing has experienced a number of significant changes in the past decade resulting from both judicial decisions and legislation. In 2005, in *Roper v. Simmons*,² the U.S. Supreme Court abolished the imposition of the death penalty for juvenile offenders who committed the crime of conviction while under the age of eighteen.³ Five years later, in *Graham v. Florida*,⁴ the Supreme Court created a categorical ban on life without parole sentences for juvenile offenders convicted of non-homicide offenses.⁵ Included in its decision in *Graham*, the Supreme Court established a mandate holding that while a state is not required to guarantee release of a juvenile offender, it must provide the offender “some meaningful

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² 543 U.S. 551 (2005).

³ *Id.* at 578. See also *infra* text accompanying note 29.

⁴ 560 U.S. 48 (2010).

⁵ *Id.* at 61, 82.

opportunity to obtain release.”⁶ Two years later, in *Miller v. Alabama*,⁷ the Supreme Court considered the constitutionality of life without parole sentences for juvenile homicide offenders. In *Miller*, the Court held that “children are constitutionally different from adults for the purposes of sentencing.”⁸ Accordingly, juvenile offenders require individualized sentencing, and mandatory life without parole sentencing schemes for juvenile offenders violate the Eighth Amendment.⁹ *Roper*, *Graham*, and *Miller* activated a new era of sentencing reform for juvenile offenders by recognizing the physiological and psychological differences between adult and juvenile offenders and setting forth guidelines for acknowledging these differences during sentencing.

In addition to sentencing reform, the decisions in *Graham* and *Miller* compel parole reform for juvenile offenders, based on the mandate that states must provide juvenile offenders with a meaningful opportunity to obtain release. In the modern American Parole System, policies and procedures vary greatly between states. Additionally, parole boards have traditionally operated with little oversight from the criminal justice system, resulting in arbitrary decision-making by parole boards and a lack of due process.¹⁰ Furthermore, the parole decision-making process is deeply discretionary with boards permitted great flexibility in evaluating and weighing factors during the release decision-making process.¹¹ The mandate in *Graham*, to provide juvenile offenders with a meaningful opportunity to obtain release, implicates several challenges under the modern American Parole System.¹² For instance, the findings in *Roper*, *Graham*, and *Miller* demonstrate that age is a mitigating factor in juvenile sentencing decisions and juvenile offenders are less culpable than adults and more capable of change.¹³ In contrast, youthful age is calculated as a factor for increased risk in the risk assessment tools used by parole boards during the

⁶ *Id.* at 75.

⁷ 132 S. Ct. 2455 (2012).

⁸ *Id.* at 2464.

⁹ *Id.* at 2466.

¹⁰ See *infra* Part II.b.

¹¹ See *infra* Part II.c.

¹² See *infra* Part III.

¹³ *Roper v. Simmons*, 543 U.S. 551, 569 (2005); *Graham v. Florida*, 560 U.S. 48, 68 (2010); *Miller v. Alabama*, 132 S. Ct. 2455, 2464–2465 (2012).

decision-making process.¹⁴ Additionally, low release rates and the current criteria emphasized by parole boards in release decision-making hinder the opportunity for realistic release.¹⁵ Ultimately, the modern parole system functions antagonistically to the fundamental principles set forth in *Roper, Graham, and Miller*.

Courts and legislatures have initiated a number of changes following the decisions in *Roper, Graham, and Miller*. These reforms, however, have primarily focused on juvenile sentencing schemes and only recently have begun to consider the parole process. In 2000, more than 100,000 juvenile offenders were incarcerated nationwide.¹⁶ As a result of numerous policy changes following the recent court decisions, the number of incarcerated juvenile offenders has decreased approximately forty percent.¹⁷ In 2013, several states — Arkansas, California, Louisiana, Texas, Wyoming, and Utah — enacted policy changes modifying the parole review process for juvenile offenders.¹⁸ Most notably, California enacted Senate Bill 260, which requires the parole review board to conduct specialized Youth Offender Parole Hearings for juvenile offenders.¹⁹ Following these changes, two states — Hawaii and West Virginia — enacted juvenile parole reforms in 2014.²⁰ Finally, in 2015, California expanded its Youth Offender Parole

¹⁴ See *infra* Part III.c.

¹⁵ See *infra* Part III.b.

¹⁶ Nicole D. Porter, The Sentencing Project, *The State of Sentencing 2013: Developments in Policy and Practice* (Jan. 2014), available at http://sentencingproject.org/doc/publications/sen_State%20of%20Sentencing%202013.pdf.

¹⁷ *Id.* at 17.

¹⁸ *Id.* at 15. The following reforms were made in each state. Arkansas, through House Bill 1993, enacted a measure that allows juvenile homicide offenders to gain parole eligibility after twenty-eight years. In Louisiana, House Bill 152 permits juvenile homicide offenders to become eligible for parole after thirty-five years. Senate Bill 2, in Texas, extended the sentence of forty years to life for a capital felony from defendants aged seventeen to those eighteen years of age. Wyoming, pursuant to House Bill 23, authorized parole review for juvenile offenders convicted of first-degree murder after twenty-five years. In Utah, Senate Bill 228 permits parole eligibility for juvenile offenders convicted of aggravated first-degree murder after twenty-five years. *Id.*

¹⁹ See *infra* Part IV.c.

²⁰ Nicole D. Porter, The Sentencing Project, *The State of Sentencing 2014: Developments in Policy and Practice* (Jan. 2015), available at http://sentencingproject.org/doc/publications/sen_State_of_Sentencing_2014.pdf. Hawaii, under House Bill 2490, enacted comprehensive juvenile justice reform, including House Bill 2116, which

Hearings to include offenders who were under twenty-three years of age when convicted of the eligible controlling offense.²¹ Parole reform for juvenile offenders is ripe for examination following the Supreme Court's recent decision in *Montgomery v. Louisiana*,²² which held that the decision in *Miller* must be applied retroactively to state collateral review and specifically acknowledged the significant function of the parole system for juvenile offenders following the decisions in *Roper*, *Graham*, and *Miller*.²³

This article focuses primarily on the parole system and the release of juvenile offenders.²⁴ The principal goal is to explain the implications and rationale set forth in *Roper*, *Graham*, and *Miller* and consider the application of those principles to parole hearings. Part I provides a brief account

non-retroactively abolished all LWOP sentencing for juvenile offenders. Additionally inmates in Hawaii receive parole review every year once eligible. In West Virginia, House Bill 4210 banned LWOP for juvenile offenders. Furthermore, all juvenile offenders are eligible for parole after serving fifteen years and West Virginia requires parole boards to consider age as a factor in the decision-making process. *Id.* at 11.

²¹ S.B. 261, 2015 Leg., 2015–2016 Reg. Sess. (Ca. 2015). See also *infra* note 167.

²² ___ S. Ct. ___, 2016 WL 280758 (2016).

²³ *Id.* at 15–16. The Court first determined that *Miller* set forth a “substantive rule of constitutional law” giving it a “retroactive effect.” *Id.* Additionally, such an effect does not require re-sentencing, but can be remedied by permitting juvenile offenders to be considered for parole. *Id.* at 16. “Extending parole eligibility to juvenile offenders does not impose an onerous burden on the States The opportunity for release will be afforded to those who demonstrate the truth of *Miller*’s central intuition — that children who commit even heinous crimes are capable of change.” *Id.* The Court concluded by stating,

In light of what this Court has said in *Roper*, *Graham*, and *Miller* about how children are constitutionally different from adults in their level of culpability, . . . prisoners like *Montgomery* must be given the opportunity to show their crime did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside prison walls must be restored.

Id.

²⁴ In this article, the term “juvenile offender” is used to describe an offender who, at the time the relevant offense was committed, was under the age of eighteen. A juvenile offender has often reached the age of majority at the time of sentencing and almost certainly is eighteen or older at the potential time of parole. This does not, however, remove their status as a “juvenile offender.” Furthermore, following the Court’s decision in *Miller*, a juvenile offender may be sentenced to life without parole for a homicide offense; so long as the sentencing decision and scheme were not mandatorily imposed. This article focuses only on juvenile offenders who receive a sentence, regardless of offense or length, which includes the opportunity or possibility for parole release.

of *Roper*, *Graham*, and *Miller*, focusing on the proportionality analysis employed by the Court and the distinct characteristics identified in the rationale. This section emphasizes the scientifically supported differences between juveniles and adults that compelled the decision in each case. Part II provides an overview of the parole system in America, beginning with a brief history of the genesis of parole in the United States. This section evaluates the existing procedures utilized by parole boards and assesses the impact that minimal oversight and maximum flexibility have had on parole board functions, including the discretion permitted in selecting and weighing criteria for release. Part III evaluates how *Graham's* mandate requiring states to provide juvenile offenders with a “meaningful opportunity to obtain release” implicates several challenges in the modern parole system. Some of the challenges considered are: when, during incarceration, a state is required to provide a meaningful opportunity; whether the current system actually provides a realistic opportunity to obtain release; and how the current assessment of age is contrary to the findings in *Roper*, *Graham*, and *Miller*. Part IV examines recent legislation passed in California that targets parole hearings for youthful offenders. This section then suggests that the California legislation can be used as a viable model by other states to develop standards for juvenile offender parole hearings that adhere to the fundamental principles set forth in *Roper*, *Graham*, and *Miller* and provide juvenile offenders with an actual, realistic opportunity for release.

I. A DECADE OF CHANGE: THE LEGACY OF *ROPER*, *GRAHAM*, AND *MILLER*

Over the past decade, juvenile sentencing has been dramatically altered through the historic decisions in *Roper v. Simmons*, *Graham v. Florida*, and *Miller v. Alabama*.²⁵ These decisions created a special status of diminished

²⁵ *Roper v. Simmons*, 543 U.S. 551 (2005) (abolishing the death penalty for juvenile offenders as a violation of the Eighth Amendment); *Graham v. Florida*, 560 U.S. 48 (2010) (creating a categorical ban on life without parole sentences for juvenile non-homicide offenders as a violation of the Eighth Amendment); *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (requiring individualized sentencing for juvenile homicide offenders, finding that mandatory life without parole sentencing schemes violate the Eighth Amendment).

culpability for juvenile offenders, through the acknowledgment that juveniles exhibit distinct differences from adults in maturity, susceptibility, and character.²⁶ Relying on neurological, psychological, and social scientific evidence, the Supreme Court recognized that juvenile offenders are not only less culpable than adults, but are also more capable of change and therefore require distinct, individualized sentencing schemes.²⁷

a. *Roper v. Simmons*

In 2005, the United States Supreme Court dramatically altered precedent in *Roper v. Simmons* by re-evaluating the Eighth Amendment's cruel and unusual punishment jurisprudence as applied to juvenile sentencing.²⁸ In *Roper*, the Court held that "the Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of eighteen when their crimes were committed."²⁹ The decision and analysis used in *Roper* followed directly from *Atkins v. Virginia*³⁰ and set the foundation for the developments in juvenile sentencing moving forward.³¹

²⁶ See *Roper*, 543 U.S. at 569–570; *Graham*, 560 U.S. at 68; *Miller*, 132 S. Ct. at 2464.

²⁷ See *Roper*, 543 U.S. at 569; *Graham*, 560 U.S. at 68; *Miller*, 132 S. Ct. at 2464–2465.

²⁸ 543 U.S. 551 (2005). The decision in *Roper* upended the holding in *Stanford v. Kentucky*, 492 U.S. 361 (1989), which previously controlled in the area of juvenile capital punishment jurisprudence. The Court in *Stanford* found the Eighth and Fourteenth Amendments did not bar the execution of juvenile offenders older than fifteen and younger than eighteen. *Id.* at 380.

²⁹ 543 U.S. at 578. The Court's decision to clearly define "juvenile offenders" as those under the age of eighteen is significant in that it creates a strict nationwide definition that must be observed in each state. *But see* *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding that the Eighth Amendment bans the use of the death penalty for mentally retarded offenders, but allows each state to set its own parameters for defining such an offender).

³⁰ 536 U.S. 304 (2002). In *Atkins*, the Court abolished the death penalty for mentally retarded offenders, finding that such individuals "do not act with the level of moral culpability that characterizes the most serious adult criminal conduct." *Id.* at 306. Furthermore, the execution of mentally retarded offenders would not satisfy the penological justifications of deterrence and retribution that are associated with the death penalty. *Id.* at 321.

³¹ *Roper*, 543 U.S. at 559–560. Simmons was charged with burglary, kidnapping, stealing, and murder in the first degree and following a conviction at trial, the jury recommended the death penalty. *Id.* at 557–558. The Missouri Supreme Court affirmed the conviction, sentence, and denial of post conviction relief and the federal courts denied certiorari. *Id.* at 559. See also *Simmons v. Bowersox*, 235 F.3d 1124, *cert. denied*, 534 U.S.

In *Roper*, the Court conducted a proportionality analysis considering “evolving standards of decency” to evaluate the imposition of the death penalty as a punishment for juvenile offenders.³² The Court found substantial evidence of a national consensus against the death penalty for juvenile offenders, citing that thirty states already prohibited the death penalty for juveniles.³³ Additionally, in the twenty states without formal prohibition, the practice was infrequent.³⁴ The Court thus concluded that society viewed juveniles as “categorically less culpable than the average criminal.”³⁵ Furthermore, this diminished culpability would lessen, if not nullify, the penological justifications of retribution and deterrence, often cited as the “two distinct societal purposes served by the death penalty.”³⁶ Ultimately, the Court concluded that the “death penalty is reserved for a narrow category of crimes and offenders” and, thus, is a disproportionate punishment for juvenile offenders.³⁷

The crux of the Court’s rationale rested on three normative characteristics of juvenile offenders: “a lack of maturity and an underdeveloped sense of responsibility,” a greater “susceptib[ility] to negative influences,” and a “character . . . [that] is not as well formed”³⁸ First, relying on scientific and sociological evidence, the Court acknowledged that a lack of maturity leads to impetuous and reckless behavior.³⁹ Second, juveniles

924 (2001); *State v. Simmons*, 944 S.W.2d 165 (en banc), *cert. denied*, 522 U.S. 953 (1997). Following the Supreme Court’s decision in *Atkins*, 536 U.S. at 321, *Simmons* filed a new petition for post conviction relief based on the reasoning found therein. *Roper*, 543 U.S. at 559. The Missouri Supreme Court resentenced *Simmons* to life without the possibility of parole and the Supreme Court affirmed. *Id.* at 559–560. *See also State ex rel. Simmons v. Roper*, 112 S.W.3d 397 (2003).

³² *Roper*, 543 U.S. at 561 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

³³ *Roper*, 543 U.S. at 564.

³⁴ *Id.*

³⁵ *Id.* at 567 (quoting *Atkins v. Virginia*, 536 U.S. 304, 316 (2002)).

³⁶ *Id.* at 571. The Court rationalized: “Retribution is not proportional if the law’s most severe penalty is imposed on one whose culpability . . . is diminished” *Id.* Additionally, while the deterrent effect was unclear, the Court concluded that “the same characteristics that render juveniles less culpable than adults suggest . . . that juveniles will be less susceptible to deterrence.” *Id.*

³⁷ *Id.* at 569.

³⁸ *Id.* at 569–570.

³⁹ *Id.* at 569. Additionally, widespread recognition of a lack of maturity and responsibility has resulted in most states’ limiting involvement in specified activities,

are more susceptible to negative influences, like peer pressure, and exhibit less control over their environment and autonomous decision-making functions.⁴⁰ Finally, the Court recognized that unlike an adult, a juvenile's character is "more transitory, less fixed" and has not yet fully formed.⁴¹ Taken together, these three distinct characteristics indicate that juvenile offenders are less culpable, less morally reprehensible, and more capable of change. The rationale and analysis set forth in *Roper* laid the foundation for *Graham* and *Miller*.

b. *Graham v. Florida*

Five years after *Roper*, the Supreme Court considered, for the first time, a categorical ban on a term-of-years sentence for juveniles, ultimately holding that the Constitution prohibits a life without parole (LWOP) sentence for juvenile offenders convicted of a non-homicide offense.⁴² In its analysis, the Court relied heavily on the categorical approach and proportionality review it previously used in *Roper*.⁴³ Furthermore, the holding in *Graham* continued to hinge on developmental and sociological science, along with the same rationale and characteristics identified in *Roper*.

As in *Roper*, the analysis in *Graham* began with an assessment of societal standards and values by considering indicia of a national consensus.⁴⁴ Unlike the clear consensus found in *Roper*, the Court discovered a mixed collection of statutes and thus turned its examination to the actual practice

such as voting and serving on a jury, to those aged eighteen and above. *Id.* See generally Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEVELOPMENTAL REV. 339 (1992).

⁴⁰ *Roper*, 543 U.S. at 569.

⁴¹ *Id.* at 570.

⁴² *Graham v. Florida*, 560 U.S. 48, 61, 82 (2010). Graham pled guilty to armed burglary and attempted armed robbery. *Id.* at 53–54. The court initially withheld adjudication and sentenced Graham to probation. *Id.* at 54. Within six months, Graham was arrested for violating his probation on suspicion of participating in another robbery. *Id.* Following trial, the court imposed the maximum penalty for the earlier armed burglary and attempted robbery offenses — life imprisonment and fifteen years, respectively. *Id.* at 57.

⁴³ *Id.* at 61–62.

⁴⁴ *Id.* at 62. The Court began its analysis by acknowledging that a national consensus, as evidenced by legislation, is the "clearest and most reliable objective evidence of contemporary values." *Id.* (quoting *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989)).

and application of the law in jurisdictions allowing for LWOP sentences for juveniles convicted of non-homicide offenses.⁴⁵ Upon examining application of the statutes, the Court determined that the practice of sentencing juveniles to LWOP for non-homicide offenses was infrequent and rarely imposed, noting that only 123 juveniles nationwide were serving LWOP sentences.⁴⁶ Satisfied that the application of the law in practice showed a national consensus in favor of a categorical ban, the Court then considered proportionality and culpability.

In assessing culpability, the Court turned to the characteristics of maturity, susceptibility, and character set forth in *Roper*.⁴⁷ Based on developments in the neurological and psychological sciences, the Court reasoned that the findings in *Roper* still accurately characterized the differences between juveniles and adults and appropriately demonstrated the diminished culpability of juvenile offenders.⁴⁸ Finding that juveniles, as a class, have a lessened culpability, the Court then considered the nature and severity of the offense committed and explained, “a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability.”⁴⁹ Precedent set forth that diminished culpability distinguished offenders from receiving the most severe punishments,⁵⁰ and following *Roper*, a sentence of life imprisonment without the possibility of parole was the most severe punishment permitted by law for juvenile offenders.⁵¹

⁴⁵ *Graham*, 560 U.S. at 62. A census of state legislation found: six states prohibited LWOP for juvenile offenders, seven states allowed LWOP for juvenile offenders for homicide offenses only, and thirty-seven states plus the District of Columbia allowed LWOP for non-homicide juvenile offenders in specified circumstances. *Id.* See also *Id.* at 82–85 for an Appendix of the states in each category.

⁴⁶ *Id.* at 62–64. The Court further revealed that 77 of the 123 juvenile offenders serving LWOP sentences, or 63%, were located in Florida. Additionally, though thirty-seven states and the District of Columbia statutorily permitted LWOP sentences for juvenile non-homicide offenders, only eleven states actually imposed the sentence in practice. *Id.* at 64.

⁴⁷ *Id.* at 68.

⁴⁸ *Id.*

⁴⁹ *Id.* at 69.

⁵⁰ See, e.g., *Kennedy v. Louisiana*, 554 U.S. 407, 439 (2008); *Tison v. Arizona*, 481 U.S. 137, 156 (1987); *Enmund v. Florida*, 458 U.S. 782, 798 (1982); *Coker v. Georgia*, 433 U.S. 584, 600 (1977).

⁵¹ *Graham*, 560 U.S. at 69–70. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 569 (2005); *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1990). See also *Naovarath v. State*, 105 Nev.

As a final step in the proportionality analysis, the Court again considered penological justifications, explaining that “a sentence lacking any . . . justification is by its nature disproportionate to the offense.”⁵² As in *Roper*, neither retribution nor deterrence would justify the imposition of LWOP for juvenile non-homicide offenders.⁵³ The Court further explained that the penological justifications of incapacitation and rehabilitation would also be inadequate to legitimize the sentence.⁵⁴ Therefore, the Court concluded that the Eighth Amendment prohibits a LWOP sentence for a juvenile non-homicide offender, thus creating the first categorical ban for a term-of-years sentence.⁵⁵ Perhaps the most significant and lasting implication of the decision in *Graham* is its allusion to the parole system with the assertion that a state is not required to guarantee release, but a state *must* provide the offender “some meaningful opportunity to obtain release.”⁵⁶

c. *Miller v. Alabama*

The Court in *Miller v. Alabama* extended the rationale adopted in *Roper* and *Graham* to invalidate the mandatory imposition of LWOP sentences for juvenile homicide offenders.⁵⁷ *Miller* enhances the proposition that

525, 526 (1989) (explaining that a life without parole 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 offender], he will remain in prison for the rest of his days”).

⁵² *Graham*, 560 U.S. at 71.

⁵³ *Id.* at 71–72. The Court explained that the retribution rationale would not apply as it relies on the proportionality of culpability and the sentence imposed. *Id.* at 71. Furthermore, the deterrence rationale applied in *Roper* would still pertain to the findings in *Graham* and would be amplified because the punishment was rarely imposed. *Id.* at 72.

⁵⁴ *Id.* at 72–74. The Court acknowledged that in many situations incapacitation is a legitimate penological justification, as recidivism is a serious risk, but in the context of juvenile non-homicide offenders, the justification is insufficient given the diminished culpability of the offender. *Id.* at 72. Finally, rehabilitation serves as a justification for parole, which is clearly absent in a life without parole sentence. *Id.* at 73.

⁵⁵ *Id.* at 82.

⁵⁶ *Id.* at 75.

⁵⁷ 132 S. Ct. 2455, 2463–2464 (2012). The rationale in *Roper* and *Graham* created two precedents. The first supported the categorical bans adopted in both cases based on the proportionality analysis. *Id.* at 2463. The second developed from *Graham*, when the Court analogized LWOP sentences for juveniles to the death penalty. *Id.* at 2463–2464.

“children are constitutionally different from adults for the purposes of sentencing” and established that the distinct differences between juveniles and adults require juvenile offenders to receive individualized sentencing, even for the most serious offenses.⁵⁸

The Court began its analysis by acknowledging the characteristics of maturity, susceptibility, and character first defined in *Roper* and again found these differences between juveniles and adults to be controlling.⁵⁹ These differences in culpability, as the Court explains, are supported not only by neurological and social science,⁶⁰ but also by common sense.⁶¹ Likewise, the Court reiterated its diminished culpability rationale from *Roper* and *Graham* to emphasize the lack of penological justifications for imposing the harshest, most severe punishments on juvenile offenders.⁶²

The Court then shifted its rationale to apply the findings in *Graham* to the application of *Miller*. The Court explained that while *Graham* created a categorical ban on LWOP for non-homicide offenses, the rationale *Graham* applied regarding the “distinctive (and transitory) mental traits and environmental vulnerabilities” of juveniles was not crime-specific and is therefore implicated in *any* LWOP sentencing scheme enforced on a juvenile.⁶³ *Miller* further clarified that the distinct differences between juveniles and adults outlined in *Roper* and *Graham* require that sentencing authorities

The Court then used the rationale in this comparison to consider the mandatory imposition of LWOP to juvenile offenders. *Id.*

⁵⁸ *Id.* at 2464. It is necessary to note that *Miller* does not invalidate LWOP sentences for juvenile homicide offenders, but only prohibits a sentencing scheme that applies such a punishment *mandatorily*.

⁵⁹ *Id.*

⁶⁰ *Id.* at 2464 n.5 (explaining that the science used to support the decisions in *Roper* and *Graham* has also developed to provide stronger support for the proposition).

⁶¹ *Id.* at 2464 (emphasizing a proposition set forth in *Roper* that the differences between juveniles and adults defined by the Court are what “any parent knows”). See also *Yarborough v. Alvarado*, 541 U.S. 652, 674 (2004) (Breyer, J., dissenting) (explaining that “youth is an objective circumstance” and “a widely shared characteristic that generates commonsense conclusions about behavior and perception”).

⁶² *Miller*, 132 S. Ct. at 2465. The Court cited to its findings in *Graham* regarding the lack of penological justifications for retribution, deterrence, incapacitation, and rehabilitation. *Id.* See also *Graham v. Florida*, 560 U.S. 48, 71–74 (2010).

⁶³ *Miller*, 132 S. Ct. at 2465. The Court further explains that “youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole.” *Id.*

consider youthfulness in order to maintain proportionality and a mandatory sentencing scheme removes any such individualized consideration, thus violating the fundamental principle established by these precedents.⁶⁴

Roper, *Graham*, and *Miller* established that “children are constitutionally different from adults for the purposes of sentencing.”⁶⁵ In conceptualizing these differences — ultimately identified as a lack of maturity, a higher susceptibility to pressure, and a still developing character⁶⁶ — the Court relied heavily on neurological, psychological, and sociological data.⁶⁷ Additionally, since the Court’s decision in *Roper*, empirical research studies have continued to identify and support the neurological and psychological developmental science relied on in each opinion.⁶⁸ Ultimately, the shift in Eighth Amendment jurisprudence developed by *Roper*, *Graham*, and *Miller* places the emphasis on the offender, rather than the offense, for any case

⁶⁴ *Id.* at 2466. The Court also acknowledged that the rules created for LWOP are distinct for juvenile offenders because precedent defines LWOP as akin to the death penalty. *Id.* See also *State v. Lyle*, 854 N.W.2d 378, 402, 404 (Iowa 2014) (The Supreme Court of Iowa further extended the rationale in *Miller* to invalidate any mandatory minimum sentencing scheme for juvenile offenders because such a scheme does not allow the courts to consider youth as a mitigating factor in sentencing).

⁶⁵ *Miller*, 132 S. Ct. at 2464.

⁶⁶ *Roper v. Simmons*, 543 U.S. 551, 569–570 (2005).

⁶⁷ *Roper*, 543 U.S. at 569; *Graham*, 560 U.S. at 68; *Miller*, 132 S. Ct. at 2464, 2464 n.5.

⁶⁸ See, e.g., Dustin Albert & Laurence Steinberg, *Judgment and Decision Making in Adolescence*, 21 J. RES. ON ADOLESCENCE 211, 212 (2011) (reviewing research and findings related to adolescent decision-making, including consideration of normative models, theoretical developments, and examination of the influence of social and emotional factors). See also Julia Dmitrieva et al., *Arrested Development: The Effects of Incarceration on the Development of Psychosocial Maturity*, 24 DEV. & PSYCHOPATHOLOGY 1073, 1073 (2012). Research has identified three measures of psychosocial maturity — temperance, perspective, and responsibility — that continue to explain the distinct differences between juveniles and adults. *Id.* Temperance is described as the “ability to curb impulsive and aggressive behavior,” whereas perspective examines the “ability to see things from multiple temporal and social vantage points.” *Id.* Finally, responsibility is the “ability to function autonomously.” *Id.* Evidence indicates that the degree and rate of development among adolescents for each measure is highly variable. *Id.* For a more detailed explanation of each of the three measures, see Laura Cohen, *Freedom’s Road: Youth, Parole, and the Promise of Miller v. Alabama and Graham v. Florida*, 35 CARDOZO L. REV. 1031, 1043–1046 (2014). Cohen also provides a physiological basis for the differences between juveniles and adults by exploring evidence of brain maturation through the use of magnetic resonance imaging (MRI). *Id.* at 1046–1048.

involving the conviction and sentencing of a juvenile.⁶⁹ Accordingly, as a means to provide the “meaningful opportunity for release” that the Court sought in *Graham*,⁷⁰ the established principles and jurisprudence should be applied to other areas of the justice system, namely the parole system.⁷¹

II. THE AMERICAN PAROLE SYSTEM: AN ANALYSIS OF PRACTICES AND POLICIES

a. History of the American Parole System

In 1876, New York became the first jurisdiction to implement what would become the modern American Parole System.⁷² This system was predicated on an indeterminate sentencing scheme and a shifting focus to rehabilitation.⁷³ Interestingly, the system in New York was developed at a reformatory for youthful offenders.⁷⁴ By the early 1900s, most state and federal prisons were utilizing some form of a parole system,⁷⁵ and by the 1970s the established practice allowed over 70% of prisoners to obtain release through parole.⁷⁶

A shift in ideology in the 1980s, and the rise of the “tough on crime” era, caused several changes in the American prison and parole systems.⁷⁷ Sentencing schemes changed in key ways, including: a reversion to determinate

⁶⁹ See Cohen, *supra* note 68, at 1054.

⁷⁰ *Graham*, 560 U.S. at 75.

⁷¹ See *infra* Part II.b.

⁷² See Cohen, *supra* note 68, at 1067.

⁷³ *Id.*

⁷⁴ See *Elmira System*, Encyclopedia Britannica, <http://www.britannica.com/topic/Elmira-system> (last visited Nov. 14, 2015). In 1876, Zebulon Brockway established a parole system at Elmira Reformatory, which housed youthful offenders. Brockway was influenced by Alexander Maconochie and the mark system he implemented in Australia. The system classified prisoners, provided vocational training, and awarded marks for good behavior. Once a prisoner had acquired enough marks, he was eligible for release. *Id.* See also *Mark System*, Encyclopedia Britannica, <http://www.britannica.com/topic/mark-system> (last visited Nov. 14, 2015).

⁷⁵ See Cohen, *supra* note 68, at 1067.

⁷⁶ JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER RE-ENTRY 62 (2009). In this article, “parole” means the release of a prisoner from incarceration before the completion of the prisoner’s sentence.

⁷⁷ *Id.* at 63.

sentencing, the introduction of mandatory minimums, and an escalation of LWOP sentences.⁷⁸ The enactment of “truth-in-sentencing” laws also affected the parole system through a significant decrease in release rates, with several states eliminating parole altogether.⁷⁹ These changes continue to plague the current parole system and, as a result, the release of eligible prisoners is rare in many states.⁸⁰

b. Parole Boards: Existing Procedures and Due Process

Parole procedures and policies vary greatly by state, and the differences are so varied that a national consensus or trend cannot be determined.⁸¹ The parole system has generally operated with little oversight from the courts, and the processes encounter less scrutiny than other aspects of the criminal

⁷⁸ *Id.* at 65. *But see* Cohen, *supra* note 68, at 1068–1069 (noting that even with the trend toward retribution, indeterminate sentencing is still prevalent in the United States and is certainly contemplated as necessary regarding juvenile offenders, as evidenced by the decisions in *Graham* and *Miller*).

⁷⁹ *See* Petersilia, *supra* note 76, at 66–67 tbl. 3.1. *See also* Emily G. Owens, *Truthiness in Punishment: The Far Reach of Truth-in-Sentencing Laws in State Courts*, 8 J. EMPIRICAL LEGAL STUD. 239S (2011). In 1994, Congress passed the Violent Crime Control Act HR 3355 (VCCA) authorizing over \$30 billion for law enforcement expenditures and projects and increasing the enactment of, what are commonly referred to as, truth-in-sentencing (TIS) laws. *Id.* at 239S. TIS laws affect the ability of a prisoner to obtain release via a parole board. *Id.* at 243S. Though statutes differ by state, the majority of states with TIS laws require an offender to serve at least 85% of his sentence before being eligible for release. *Id.* This is due, in large part, to the Truth-in-Sentencing incentive grants, 42 U.S.C. § 13704, which provide funding to states that require certain violent felons to serve at least 85% of a sentence without considering good behavior or other incentives.

⁸⁰ *See* OHIO ADULT PAROLE AUTH., PAROLE BOARD REPORT CALENDAR YEAR 2014 (2015), *available at* <http://www.drc.ohio.gov/web/Reports/ParoleBoard/Calendar%20Year%202014%20Report.pdf> (reporting in Ohio, in 2014, only 4.8% of eligible prisoners were released on parole after a hearing); FLA. PAROLE COMM’N, FLORIDA COMMISSION ON OFFENDER REVIEW 2014 ANNUAL REPORT, at 8, *available at* <https://www.fcor.state.fl.us/docs/reports/FCORannualreport201314.pdf> (reporting in Florida, in 2014, out of the 4,626 inmates eligible for release, decisions were made for 31%, or 1,437, of offenders, with only 1.6%, or 23, of those decisions resulting in parole).

⁸¹ *See* JEREMY TRAVIS & SARAH LAWRENCE, URBAN INSTITUTE, BEYOND THE PRISON GATES: THE STATE OF PAROLE IN AMERICA I (2002), *available at* <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/310583-Beyond-the-Prison-Gates.PDF>. *See also* JOAN PETERSILIA, REFORMING PROBATION AND PAROLE: IN THE 21ST CENTURY 139 (2002) (explaining that the Federal parole release system was abolished following the TIS reform movement).

justice system.⁸² Additionally, there is very little available scholarship on parole processes and procedures.⁸³ This lack of inquiry and oversight into the parole system has resulted in parole boards' receiving significant latitude in developing release procedures, often to the detriment of due process.⁸⁴

In *Greenholtz v. Inmates of the Nebraska Penal & Correctional Complex*,⁸⁵ inmates in Nebraska filed a class action lawsuit against members of the parole board, claiming the state's parole statutes and procedures denied them procedural due process.⁸⁶ The Supreme Court rejected the finding of the lower courts that inmates have a constitutionally protected

⁸² See Sarah French Russell, *Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment*, 89 IND. L.J. 373, 396 (2014); Laura Appleman, *Retributive Justice and Hidden Sentencing*, 68 OHIO ST. L.J. 1307, 1307 (2007).

⁸³ See Russell, *supra* note 82, at 399–400. In 2012, in an effort to address the lack of scholarship, Russell conducted a comprehensive, nationwide study of parole release procedures. *Id.* at 399. Forty-five states responded to the survey. *Id.* at 400. Findings from the survey examine the following aspects of state parole systems: the nature and type of interview or hearing utilized in each state, *Id.* at 400–401 & nn.176–187; the role and presence of an attorney during hearings, *Id.* at 402–403 & nn.188–196; the role and presence of the prosecutor during hearings, *Id.* at 403–404 & nn.197–202; input from the victim or a representative of the victim, *Id.* at 404–405 & n.203; consideration of other sources of input such as case history and criminal background, *Id.* at 405 & nn.204–210; and whether inmates are given access to such information, *Id.* at 405–406 & nn.211–213. The survey additionally inquired whether states applied special procedures when considering a juvenile offender for release. *Id.* at 400 n.175. At the time of the survey, some states would consider age among their criteria, but no board implemented separated procedures. *Id.* Since 2012, some states — California, CAL. PENAL CODE § 3051 (2014); Louisiana, LA. REV. STAT. ANN. § 15:574.4(D)(1) (Supp. 2013); and Nebraska, NEB. STAT. ANN. § 83-1, 110.04 (2013) — have enacted legislation that creates special procedures for juvenile offender hearings.

⁸⁴ See Russell, *supra* note 82, at 398 (explaining that the Constitution does not require parole procedures to meet minimal due process standards). See also *Swarthout v. Cooke*, 131 S. Ct. 859, 862 (2011) (“There is no right under the Federal Constitution to be conditionally released before the expiration of a valid sentence, and the States are under no duty to offer parole to their prisoners.”). But see Russell, *supra* note 82, at 396 (further explaining that *Graham* challenges this proposition for juvenile offenders, because the mandate for a release mechanism is tied to constitutional jurisprudence).

⁸⁵ 442 U.S. 1 (1979).

⁸⁶ *Id.* at 3–4. Though statutes in Nebraska provided for both mandatory and discretionary parole, the issues in the case only addressed the discretionary parole practices. *Id.* at 4. The procedures implemented by the parole board in discretionary parole hearings were governed in part by the statutes and in part by the board's experience and prior practices. *Id.*

liberty interest in parole hearings,⁸⁷ and instead held, “there is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence.”⁸⁸ The Court further explained, “a state may . . . establish a parole system, but it has no duty to do so,”⁸⁹ and, “a state may be specific *or* general in defining the conditions for release and the factors that should be considered by the parole authority.”⁹⁰ Likewise, state courts have also generally declined to extend more than minimum due process safeguards to parole hearings.⁹¹ The freedom and flexibility granted to parole boards has not only affected due process protections, but is also apparent in the various factors and criteria relied upon for release.

c. Factors Considered in Parole Hearings

The Supreme Court has acknowledged that the parole process is discretionary in nature⁹² and, as a result, very few restrictions have been placed

⁸⁷ See *Inmates of the Nebraska Penal & Correctional Complex v. Greenholtz*, 576 F.2d 1274, 1276–1277 (8th Cir. 1978).

⁸⁸ *Greenholtz*, 442 U.S. at 7.

⁸⁹ *Id.*

⁹⁰ *Id.* at 8 (emphasis added) (explaining that the lack of restrictions imposed on parole boards allows the system to comply with the public interest in deterrence and rehabilitation).

⁹¹ See, e.g., *Burghart v. Carlin*, 264 P.3d 71, 73 (Idaho 2011) (finding that there is no liberty interest and right to procedural due process in Idaho for parole hearings); *Hill v. Walker*, 948 N.E.2d 601, 605–606 (Ill. 2011) (holding that the Illinois parole statute does not create an expectation of parole and therefore, does not require procedural due process); *In re Hill*, 827 N.W.2d 407, 419–420 (Mich. Ct. App. 2012) (finding that the Michigan statute does not trigger a protected liberty interest and that the inmate was not entitled to appointed counsel). See generally Russell, *supra* note 82, at 400–406 (reporting survey results about parole board procedures by state). Data collected from the survey demonstrates the minimal due process safeguards applied by states in parole hearings. Notable findings include: in some states, an inmate is not present for the parole hearing, *Id.* at 401 & n.187 (explaining that in Florida a hearing will be held by the decision-makers and will include the prosecutor and victim, but not the inmate); fourteen states do not allow an inmate to have an attorney present during a hearing or interview and six do not consider input from an inmate’s attorney during the decision-making process, *Id.* at 402 & nn.188, 191; sixteen states allow a prosecutor to present testimony at a hearing, but only one state allows cross-examination, *Id.* at 404 & nn.200–201; and twenty-eight states do not allow an inmate to have full access to information from the prosecutor’s office, *Id.* at 405 & n.211.

⁹² *Greenholtz*, 442 U.S. at 9–10 (The Court explained that a release decision “depends on an amalgam of elements, some of which are factual but many of which are

on parole boards in selecting criteria for release.⁹³ In general, parole boards will consider the following factors: the seriousness of the offense committed; the prisoner's background and prior criminal history, including past experiences with probation and parole; educational background and vocational skills; prison disciplinary record; participation in prison programs; level of remorse; mental and physical health, including substance abuse and treatment; the views of the victim and prosecutor; and the potential danger to the community.⁹⁴ Many states additionally require prospective parolees to complete evaluations and assessments that purport to measure the likelihood of recidivism.⁹⁵

As with other areas of the parole process, parole boards are allowed great flexibility in evaluating and weighing these factors during the release decision-making process.⁹⁶ Board members have the power to determine which factors will be considered, to evaluate those factors subjectively,⁹⁷ and to decide the weight accorded to each factor.⁹⁸ As a result, some factors have emerged as highly influential and determinative in the decision-making

purely subjective appraisals by the Board members based upon their experience . . .”).

⁹³ See Russell, *supra* note 82, at 396.

⁹⁴ *Id.* at 397 (citing to Richard A. Bierschbach, *Proportionality and Parole*, 160 U. PA. L. REV. 1745, 1750–1751 (2012)). See also Cohen, *supra* note 68, at 1074.

⁹⁵ See Cohen, *supra* note 68, at 1070–1072 & nn.170–173 (providing a general overview of actuarial-based risk and needs assessments). The evaluations take into consideration both static and dynamic factors. *Id.* at 1070. Static factors are fixed and include: “age at sentencing or at first offense, offense of conviction, prior probation or parole history, employment history, substance abuse history, and gender.” *Id.* at 1071. Dynamic factors, on the other hand, may alter over time to reflect the prisoner's current status. *Id.* Dynamic factors include: “present age, active gang affiliation, prison programming, prison disciplinary violations, current custody level, and ongoing ties to the community.” *Id.*

⁹⁶ *Id.* at 1074.

⁹⁷ See Petersilia, *supra* note 81, at 133–134 (explaining that one of the criticisms of the parole system includes the arbitrariness of decision-making that is based on personal experience and intuition rather than facts and data).

⁹⁸ See, e.g., *Bryant v. Warden*, 776 F.2d 394, 397 (2d Cir. 1985) (concluding that the parole board has discretion throughout the process, including the ability to determine the weight of mitigating factors); *Nunez-Guardado v. Hadden*, 722 F.2d 618, 624 (10th Cir. 1983) (explaining that the parole commission has the discretion to define the weight assigned to prisoner conduct); *Rodriguez v. Board of Parole*, 953 N.Y.S.2d 740, 741 (N.Y. App. Div. 2012) (concluding that the parole board is “not required to articulate every factor considered or give equal weight to each factor”).

process: the offense committed is traditionally considered the “most influential factor in parole release decisions.”⁹⁹ Institutional behavior has also been shown to affect release decisions, but only insofar as prison misconduct will negatively impact release — evidence of prison program participation and good behavior is unlikely to influence a release decision in a significant way.¹⁰⁰ In recent years, the potential danger posed by release has become increasingly influential in the decision-making process.¹⁰¹

Accordingly, the broad discretionary nature of parole boards, and the parole system as a whole, has led to a highly subjective release system. Release decisions are often predicated on very few factors, with the most influential being the offense committed — a static factor that a prisoner is unable to change.¹⁰² Additionally, truth-in-sentencing laws have disrupted the need for a parole system by requiring certain offenders to serve at least 85% of a sentence before becoming parole eligible.¹⁰³ The adult parole system is not required to provide a meaningful opportunity for release.¹⁰⁴ Therefore, in order to fulfill the mandate set forth in *Graham*,¹⁰⁵ the parole system must be scrutinized and altered to account for differences in juvenile offenders.

⁹⁹ See Carolyn Turpin-Petrosino, *Are Limiting Enactments Effective? An Experimental Test of Decision Making in a Presumptive Parole State*, 27 J. CRIM. JUST. 321, 331–332 (1999). See also Cohen, *supra* note 68, at 1040–1041 (noting that “courts have generally upheld Board decisions based solely on offense severity if the hearing transcript and decision reflect at least some consideration of [other factors]”); W. David Ball, *Heinous, Atrocious, and Cruel: Apprendi, Indeterminate Sentencing, and the Meaning of Punishment*, 109 COLUM. L. REV. 893, 896 (2009) (arguing that a parole denial based largely or solely on offense severity undermines the jury’s verdict by extending the punitive sentence).

¹⁰⁰ See Mary West-Smith et al., *Denial of Parole: An Inmate Perspective*, 64 FED. PROBATION 3, 5 (2000). See also Cohen, *supra* note 68, at 1075 (explaining prison disciplinary infractions are “frequently-cited grounds for parole denials,” but participation in programming rarely gives rise to release).

¹⁰¹ See Bierschbach, *supra* note 94, at 1751.

¹⁰² See Cohen, *supra* note 68, at 1076.

¹⁰³ See Owens, *supra* note 79, at 243S and accompanying text.

¹⁰⁴ See Ball, *supra* note 99, at 944.

¹⁰⁵ *Graham v. Florida*, 560 U.S. 48, 75 (2010) (holding that a state does not have to guarantee release, but that a state must provide a “meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation”).

III. A MEANINGFUL OPPORTUNITY FOR RELEASE: WHAT *GRAHAM*'S MANDATE MEANS FOR JUVENILE OFFENDERS AND THE PAROLE SYSTEM

In *Graham v. Florida*, the Supreme Court articulated a mandate that requires states to provide juvenile non-homicide offenders with “a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.”¹⁰⁶ In contrast, there is no constitutional provision requiring states to provide any form of parole or early release for adult offenders.¹⁰⁷ As such, the mandate in *Graham* implicates several challenges under the modern American Parole System.

a. Timing: When Should a “Meaningful Opportunity” be Offered?

Following the decision in *Graham* a number of questions regarding compliance with the mandate were left unanswered, including — when, during incarceration, must a state provide a juvenile offender with a meaningful opportunity for release?¹⁰⁸ In the absence of a clear rule, jurisdictions have been mixed in their interpretation and response to the mandate.¹⁰⁹ At a

¹⁰⁶ *Id.* See also *Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012) (concluding, with regard to LWOP sentences for juvenile homicide offenders, “we require [the sentencer] to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison”).

¹⁰⁷ See *supra* Part II.b–c.

¹⁰⁸ See Russell, *supra* note 82, at 406. Another question implicated by the decision — whether one meaningful opportunity for release is sufficient or if periodic review is required. *Id.* at 411. Periodic review is typical in the parole system, but the length of time between reviews is becoming increasingly longer. *Id.* Additionally, periodic review is likely more beneficial for juvenile offenders, because it accounts for the differing rates of maturity and rehabilitation present in youthful offenders. *Id.* Furthermore, a single opportunity system means a state risks both that an offender will come up for review too early and be denied release and that review will come too late and a rehabilitated offender will remain incarcerated unnecessarily while waiting. *Id.*

¹⁰⁹ The courts have been divided on whether a no-parole, term-of-years sentence that will exceed a juvenile’s life expectancy violates the mandate, because the offender was not sentenced to “life.” Compare *Bunch v. Smith*, 685 F.3d 546 (6th Cir. 2012) (an eighty-nine year sentence did not violate the mandate and require relief), and *Smith v. State*, 93 So.3d 371 (Fla. Dist. Ct. App. 2012) (affirming an eighty-year sentence), with *People v. Mendez*, 114 Cal. Rptr. 3d 870 (Cal. Ct. App. 2010) (reversing a sentence that was not parole eligible for eighty-four years).

minimum, the mandate would require an opportunity for release prior to the completion of the full sentence or death.¹¹⁰ However, many argue that a “meaningful opportunity for release” is synonymous with a meaningful opportunity to live outside of prison.¹¹¹

In assessing when to provide a “meaningful opportunity” for review and release, a state may consider any number of solutions — two are discussed below. First, a state can develop policies using the evidence and rationale the Court relied upon to support its decision in *Graham*.¹¹² For example, the Court utilized neurological and psychological science to reinforce its rationale that children differ from adults.¹¹³ This data, along with the factors first defined in *Roper* — maturity, susceptibility, and character¹¹⁴ — was critical to the ultimate decision in *Graham*.¹¹⁵ Evidence shows that brain and character maturation and development occurs well into late adolescence.¹¹⁶ Therefore, states may be able to provide a “meaningful opportunity for release” if parole review is set to coincide with late adolescence, or the anticipated time of brain and character maturation.¹¹⁷

The drafters of the Model Penal Code (MPC) have constructed an alternative reform solution known as “second look sentencing.”¹¹⁸ The

¹¹⁰ See Russell, *supra* note 82, at 407.

¹¹¹ *Id.* at 408. See also Alice Ristroph, *Hope, Imprisonment, and the Constitution*, 23 FED. SENT’G REP. 75 (2010). Ristroph argues that the mandate in *Graham* means “the juvenile defendant is not to be denied hope, and the state is not to abandon hope for the juvenile’s eventual rehabilitation.” *Id.*

¹¹² See Russell, *supra* note 82, at 409.

¹¹³ *Graham v. Florida*, 560 U.S. 48, 68 (2010) (explaining that neurological differences in brain development and maturation are evident between juveniles and adults).

¹¹⁴ *Roper v. Simmons*, 543 U.S. 551, 560–570 (2005).

¹¹⁵ *Graham*, 560 U.S. at 68–69.

¹¹⁶ See Brief for the American Psychological Association et al., as Amici Curiae Supporting Petitioners, *Graham v. Florida*, 560 U.S. 48 (2010) (Nos. 08-7412, 08-7621), 2009 WL 2236778.

¹¹⁷ See Russell, *supra* note 82, at 409 (explaining that setting initial review at ten years from incarceration should allow for an offender’s brain and character to have matured, making rehabilitation more likely).

¹¹⁸ MODEL PENAL CODE: SENTENCING § 305.6 cmt. a (Tentative Draft No. 2, 2011). The American Law Institute (ALI) has been developing a model penal code for sentencing. Tentative Draft No. 2 was approved at the 2011 annual meeting. According to the website for the ALI, “the material [in Tentative Draft No. 2] may be cited as representing the Institute’s position until the official text is published.” *Model Penal*

proposal from the MPC alters the parole system by shifting the release mechanism to the judiciary.¹¹⁹ “Second look sentencing” would allow a juvenile offender, after serving ten years, to petition the court for a “sentence modification.”¹²⁰ Rather than a parole hearing to determine release, the “sentencing modification” would function as a re-sentencing, with the judiciary analyzing whether an offender’s sentence should be altered.¹²¹ The drafters of the MPC, consistent with the Court’s holdings in *Roper*, *Graham*, and *Miller*, chose to create separate review standards for juvenile offenders, because research in psychology and criminology has continued to emphasize the differences between juvenile and adult offenders.¹²²

The mandate in *Graham* specifies that a juvenile offender should be given a “meaningful opportunity to obtain release *based on* demonstrated maturity and rehabilitation.”¹²³ Therefore, solutions adopted by the states should allow for a reasonable amount of time for an offender to demonstrate a change in maturity and character, but decision-makers should be wary of setting the timeframe both too early and too late.¹²⁴ Furthermore,

Code: Sentencing, The American Law Institute, <https://www.ali.org/publications/show/sentencing/#drafts> (last visited Nov. 15, 2015).

¹¹⁹ MODEL PENAL CODE: SENTENCING § 305.6(1) (Tentative Draft No. 2, 2011).

¹²⁰ *Id.* § 6.11(A)(h). Additionally, the original sentencing court may allow an offender to become eligible for sentencing modification prior to the ten-year period. *Id.* See also *Id.* § 305.6 (creating a sentencing scheme for adult offenders, setting modification review at fifteen years).

¹²¹ *Id.* § 305.6(4). A judiciary would determine “whether the purposes of sentencing . . . would better be served by a modified sentence than the prisoner’s completion of the original sentence.” *Id.*

¹²² *Id.* § 6.11A cmt. c. The comment further explains that differences between juveniles and adults have been recognized and supported by evidence in the following areas: blameworthiness, potential for rehabilitation, harm prevention, number of serious violent offenders, and deterrence. *Id.* § 6.11A cmt. c(1)–(5). See also *Id.* § 6.11A cmt. h (explaining that evidence suggests juveniles are more likely to change, and often do so to a greater degree than adult offenders); *Id.* § 6.11A cmt. g (recommending caps on juvenile sentences that are below the current maximum sentences available to adult offenders).

¹²³ *Graham v. Florida*, 560 U.S. 48, 75 (2010) (emphasis added).

¹²⁴ See Russell, *supra* note 82, at 410 & n.241. Russell emphasizes that creating an opportunity for review that is too early can be detrimental to juvenile offenders. Juvenile offenders often encounter a number of disciplinary issues in the first years of imprisonment, particularly if placed in adult prison, which can negatively affect parole decisions. *Id.*

as demonstrated by the examples above, parole reform for juvenile offenders may be achieved through either the judiciary or the legislature.

b. A Realistic Opportunity for Release

Another challenge implicated by the mandate in *Graham* centers on the likelihood of release and the criteria currently utilized by parole boards to determine release.¹²⁵ Additionally, the Eighth Amendment proportionality analysis relied on in *Graham* considers the likelihood of release in the assessment of sentence severity.¹²⁶ “Thus, under *Graham*, a meaningful opportunity for release means a realistic one.”¹²⁷

The *Graham* mandate makes an assessment of an offender’s maturity and rehabilitation crucial to the release analysis.¹²⁸ In contrast, the current parole system generally emphasizes offense severity and will often base decisions solely on the committed offense.¹²⁹ The fundamental principle behind *Graham* and *Miller* is that children are less culpable than adults and more capable of change, indicating that sentencing schemes should account for these differences in spite of the severity of the offense.¹³⁰ The mandate in *Graham* suggests that, in the case of juvenile offenders, offense severity should be afforded little to no weight in the release decision-making process.¹³¹

¹²⁵ See *supra* Part II.c.

¹²⁶ *Graham*, 560 U.S. at 79 (explaining that the Eighth Amendment does not permit a state to deny *Graham* the opportunity to atone for his crimes and obtain release). See also *Solem v. Helm*, 463 U.S. 277, 303 (1983); *Rummel v. Estelle*, 445 U.S. 263, 280–281 (1980).

¹²⁷ See Russell, *supra* note 82, at 412. Russell also explains that *Graham* rejects the idea of clemency as an alternative to a meaningful opportunity. *Id.* See also *Graham*, 560 U.S. at 82 (concluding with the assertion, “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”) (emphasis added).

¹²⁸ *Graham*, 560 U.S. at 75.

¹²⁹ See *supra* Part II.c. See also sources cited *supra* note 99 and accompanying text.

¹³⁰ See, e.g., *Graham*, 560 U.S. at 68; *Miller v. Alabama*, 132 S. Ct. 2455, 2464–2465 (2012). See also Russell, *supra* note 82, at 412–413 (explaining that the Court in *Graham* and *Miller* acknowledges and accepts offense severity, but nevertheless determines that a juvenile offender should be given a meaningful opportunity to obtain release).

¹³¹ See Russell, *supra* note 82, at 413 (arguing that offense severity is taken into account during the initial sentencing, which includes the eligibility parameters for parole). See also Ball, *supra* note 99, at 971–972. Ball asserts that a parole board should not

Given the low release rates,¹³² and the emphasis on offense severity in release decisions,¹³³ the current parole system is unlikely to provide a meaningful and realistic opportunity for release for juvenile offenders.¹³⁴ To mitigate this, states, through courts and legislatures, should set forth specific guidelines for juvenile offender parole decisions, outlining criteria that should play a significant role in the decision-making process.¹³⁵

c. Age as a Necessary Factor in Release Decisions for Juvenile Offenders

Under the current parole system, age is considered in various ways and can often be both a static and dynamic factor.¹³⁶ Additionally, age is a significant factor evaluated by the risk assessment instruments used by parole boards in their decision-making process.¹³⁷ Contrary to the fundamental premise in *Graham* and *Miller* that youth are more capable of change, the risk assessment instruments generally estimate youthfulness as an increased measure of risk.¹³⁸ For example, even though the Court has held that juveniles are less culpable,¹³⁹ the risk assessment will correlate “early

“consider the commitment offense in determining a prisoner’s suitability for parole” and, particularly in the case of juvenile offenders, that parole should be based on rehabilitation. *Id.*

¹³² See sources cited *supra* note 80 and accompanying text.

¹³³ See *supra* Part II.c. See also sources cited *supra* note 99 and accompanying text.

¹³⁴ See Russell, *supra* note 82, at 414 (noting “one cannot conclude based on current parole release rates of prisoners convicted of violent crimes whether a particular state’s parole board will provide a rehabilitated juvenile offender with a realistic chance for release”).

¹³⁵ See *infra* Part IV. See also Russell, *supra* note 82, at 413–414.

¹³⁶ See Megan Annitto, *Graham’s Gatekeeper and Beyond: Juvenile Sentencing and Release Reform in the Wake of Graham and Miller*, 80 BROOK. L. REV. 119, 159 (2014). Age is a static factor when it remains fixed, as in age at the time of committed offense or age at first arrest. *Id.* Conversely, the current age of the offender is often considered as a dynamic factor, because risk of recidivism diminishes over time. *Id.* at 159–160.

¹³⁷ See Christopher Slobogin, *Risk Assessment*, in THE OXFORD HANDBOOK OF SENTENCING AND CORRECTIONS, 196–197 (Joan Petersilia & Kevin R. Reitz, eds. 2012); James Austin, *The Proper and Improper Use of Risk Assessment in Corrections*, 16 FED. SENT’G REP. 194, 195 (2004).

¹³⁸ See Slobogin, *supra* note 137, at 198–199 (explaining that youthfulness at the time of the offense committed will generally raise the level of risk associated with an offender).

¹³⁹ See, e.g., *Miller v. Alabama*, 132 S. Ct. 2455, 2464–2465 (2012).

onset of criminal or delinquent activity . . . with a greater likelihood of future criminal behavior.”¹⁴⁰ So, under the modern parole system, an offender’s youthfulness is more likely to increase his risk level, thus decreasing the likelihood of release.¹⁴¹

Under the current parole system, the consideration of age as a criterion for release is contrary to both the mandate set forth in *Graham*¹⁴² and the fundamental principle behind the decisions in *Roper*, *Graham*, and *Miller*.¹⁴³ In order for the parole system to provide a meaningful opportunity for release for juvenile offenders, states must alter their current criteria to adequately reflect the premise that youthfulness indicates a higher likelihood of rehabilitation.¹⁴⁴ Furthermore, changes must be implemented throughout the system in order to comply with the mandate in *Graham* and provide an actual and realistic opportunity for release for juvenile offenders.¹⁴⁵

IV: A MODEL FOR JUVENILE PAROLE REFORM: CALIFORNIA’S ENACTMENT OF YOUTH OFFENDER PAROLE HEARINGS

In 2011, in *Brown v. Plata*,¹⁴⁶ the Supreme Court affirmed an order to relieve overcrowding in California prisons and impose a population limit in response to grossly inadequate facilities and care which violated the

¹⁴⁰ See Annitto, *supra* note 136, at 159; Austin, *supra* note 137, at 197.

¹⁴¹ See Annitto, *supra* note 136, at 159–160. For example, in Nevada, that an inmate’s risk score is increased by two points if he was incarcerated as a juvenile, whereas completion of prison programs may only reduce a score by one point. *Id.* at 159–160 & n.294.

¹⁴² *Graham v. Florida*, 560 U.S. 48, 75 (2010).

¹⁴³ See *Roper v. Simmons*, 543 U.S. 551, 569 (2005); *Graham v. Florida*, 560 U.S. 48, 68 (2010); *Miller v. Alabama*, 132 S. Ct. 2455, 2464–2465 (2012).

¹⁴⁴ See Annitto, *supra* note 136, at 414.

¹⁴⁵ *Id.* Annitto argues that under the modern parole system, parole boards are not required to provide realistic release for offenders. *Id.* Accordingly, “simply making juvenile offenders eligible for parole under existing practices will not guarantee compliance with Eighth Amendment requirements.” *Id.* Furthermore, state legislatures and courts are key to the implementation of criteria that will provide juveniles with a meaningful opportunity to obtain release. *Id.*

¹⁴⁶ 131 S. Ct. 1910 (2011).

Eighth Amendment ban on cruel and unusual punishment.¹⁴⁷ To satisfy the court-mandated prison population reduction, California passed three laws from 2012 to 2013, two of which directly affect juvenile offenders.¹⁴⁸ In 2012, California contributed to nearly half of the reported nationwide decline in prison populations.¹⁴⁹ As a result of these measures, California has become a leader in juvenile sentencing reform and has passed legislation that should serve as a model for other states to amend their parole release process for juvenile offenders.

a. California Addresses de Facto LWOP Sentences Following Graham and Miller

Following *Graham* and *Miller*, states¹⁵⁰ were left to address a number of unanswered questions, including how to confront de facto LWOP

¹⁴⁷ *Id.* at 1922–1923. The case arose from two class actions involving prisoners with mental disorders and medical disorders. *Id.* at 1922. The Court found that the prison populations were nearly double the capacity and had operated as such for eleven years. *Id.* at 1924. As a result, the mental health and medical care provided by the prisons did not meet constitutional minimums and had frequently caused serious harm and in some instances death. *Id.* at 1923.

¹⁴⁸ Jesse Wegman, *Once Again, California Eases Harsh Sentencing Laws*, N.Y. Times (Sept. 25, 2013), available at http://takingnote.blogs.nytimes.com/2013/09/25/once-again-california-eases-harsh-sentencing-laws/?_r=0. The third law contributed to the release of prisoners serving sentences under California's Three Strikes Law. *Id.*

¹⁴⁹ See Porter, *supra* note 16. In 2012, California's prison population was reduced by 15,035 prisoners. *Id.*

¹⁵⁰ Along with California, Iowa also serves as a leader in juvenile sentencing reform and its courts have likewise reversed de facto LWOP sentences for juvenile offenders. In *State v. Ragland*, the Iowa Supreme Court established guidelines for applying *Miller*. 836 N.W.2d 107 (Iowa 2013). First, the court held that *Miller* applies retroactively in Iowa because it not only affects procedure, but also the substantive law. *Id.* at 117. Furthermore, the court reasoned that *Miller* must also apply to “sentences that are the functional equivalent of life without parole” given that the “spirit of the constitutional mandates of *Miller*” are based on the profound effect such sentences have on juveniles. *Id.* at 121. Finally, the court determined that the commutation provided by the governor for juvenile offenders currently serving LWOP sentences did not allow for the individualized sentencing required under *Miller*. *Id.* at 122. See also Mike Wiser, *Branstad commutes life sentences for 38 Iowa juvenile murderers*, The Gazette (July 16, 2012), <http://thegazette.com/2012/07/16/branstad-commutes-life-sentences-for-38-iowa-juvenile-murderers/> (explaining that following the Court's decision in *Miller*, the governor of Iowa commuted the sentences of thirty-eight offenders, who were sentenced as juveniles to LWOP, to serve a mandatory sixty years in prison before being eligible for parole).

sentences.¹⁵¹ California first considered a de facto LWOP sentence for a non-homicide juvenile offender in *People v. Caballero*.¹⁵² The California Supreme Court held a term-of-years sentence for a juvenile non-homicide offender with a parole eligibility date that occurs outside of the life expectancy violates the Eighth Amendment.¹⁵³ Adhering to the rationale that juveniles are developmentally distinct from adults, the Court determined that the holding in *Graham* was not limited to a specific sentence, but rather requires that all juvenile non-homicide offenders be granted a realistic opportunity to obtain release.¹⁵⁴ The Court further explained that in order to receive a realistic opportunity to obtain release, offenders must be able to demonstrate a change in maturity and growth, which can only be achieved if the opportunity arises during an offender's lifetime.¹⁵⁵ Following the decision in *Caballero*, the California Legislature has enacted two significant reforms related to juvenile offenders.

b. The Fair Sentencing for Youth Act

Following the decisions in *Graham* and *Miller*, the California Legislature enacted the "Fair Sentencing for Youth Act" to address parole eligibility for juvenile offenders.¹⁵⁶ The Act allows juvenile offenders sentenced to LWOP to petition the court for re-sentencing after serving fifteen years.¹⁵⁷

¹⁵¹ A "de facto LWOP sentence" is a term-of-years sentence that will exceed, or in some instances more than likely exceed, a person's natural life, thus resulting in a virtual life sentence.

¹⁵² 282 P.3d 291 (Cal. 2012). *Caballero* was sentenced on three counts — forty years to life, thirty-five years to life, and thirty-five years to life — to be served consecutively as 110 years to life. *Id.* at 293.

¹⁵³ *Id.* at 295. The state argued that *Caballero's* sentences did not violate the categorical ban imposed by *Graham* because each sentence "was permissible individually because each included the possibility of parole within [*Caballero's*] lifetime." *Id.* at 294.

¹⁵⁴ *Id.* at 295. The California Supreme Court reasoned that the Supreme Court's extension of *Graham's* rationale in *Miller* to juvenile homicide cases supported the proposition that *Graham's* ban on LWOP sentences for non-homicide offenses applied to all juvenile non-homicide cases. *Id.* at 294.

¹⁵⁵ *Id.* at 295.

¹⁵⁶ S.B. 9, 2012 Leg. (Ca. 2012), available at http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_0001-0050/sb_9_bill_20120930_chaptered.pdf (codified at CAL. PENAL CODE § 1170 (West 2013)).

¹⁵⁷ CAL. PENAL CODE § 1170(d)(2)(A)(i). Pursuant to CAL. PENAL CODE § 190.5(b) (West 2008), a juvenile offender age sixteen or seventeen in California may be sentenced

Upon consideration of specified factors,¹⁵⁸ if the offender's sentence is not recalled he may re-petition the court for review at a later date, allowing juvenile offenders serving a LWOP sentence multiple opportunities to obtain parole eligibility.¹⁵⁹ The "Fair Sentencing for Youth Act" does not address parole hearings, and likewise does not guarantee release through the parole system for juvenile offenders — the Act simply provides juvenile offenders serving LWOP sentences an opportunity to demonstrate rehabilitation, which in turn could provide a change in sentencing to possibly receive parole.¹⁶⁰

to LWOP or twenty-five years to life if convicted of murder in the first degree. Accordingly, under CAL. PENAL CODE § 1170(d)(2)(A)(i), the court may convert a LWOP sentence to life with the first possibility of parole after twenty-five years, meaning that an offender may petition the court for resentencing after fifteen years and, if granted, would become parole eligible after serving another ten years. *See also* *People v. Gutierrez*, 58 Cal. 4th 1354 (2014). In *Gutierrez*, the California Supreme Court held CAL. PENAL CODE § 190.5 constitutional following *Miller* because the statute provides courts with the discretion to sentence an individual to LWOP or twenty-five years to life and there is no "presumption in favor of life without parole." *Id.* at 1361.

¹⁵⁸ CAL. PENAL CODE § 1170(d)(2)(F)(i)–(viii). Factors the court may consider include:

The defendant was convicted pursuant to felony murder . . . does not have juvenile felony adjudications for assault . . . committed the offense with at least one adult codefendant . . . had insufficient adult support or supervision and had suffered from psychological or physical trauma . . . has performed acts that tend to indicate rehabilitation or the potential for rehabilitation, including, but not limited to, availing himself or herself of rehabilitative, educational, or vocational programs . . . has maintained family ties or connections with others . . . has eliminated contact with individuals outside of prison who are currently involved with crime . . . has had no disciplinary actions for violent activities in the last five years in which the defendant was determined to be the aggressor.

Id.

¹⁵⁹ CAL. PENAL CODE § 1170(d)(2)(H). *See* Russell, *supra* note 82, at 392 n.126 (explaining that the Act applies retroactively to juvenile offenders currently serving LWOP sentences). *See also* Kelly Scavone, *How Long is Too Long? Conflicting State Responses to De Facto Life Without Parole Sentences after Graham v. Florida and Miller v. Alabama*, 82 *FORDHAM L. REV.* 3439, 3474 (2014).

¹⁶⁰ *See* Russell, *supra* note 82, at 392; Scavone, *supra* note 159, at 3475 (acknowledging that § 1170 may provide "juvenile offenders the opportunity for parole but may not actually be effective in providing any meaningful chance at rehabilitation and release for the majority of juvenile LWOP offenders").

c. California Provides a Realistic Opportunity to Obtain Release through Youth Offender Parole Hearings

In 2013, the California Legislature passed a bill creating special “Youth Offender Parole Hearings” for juvenile offenders in order to create a meaningful opportunity to obtain release consistent with *Graham*.¹⁶¹ California Senate Bill 260 sets forth the intent of the state legislature, as follows:

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* and the decisions of the United States Supreme Court in *Graham v. Florida* and *Miller v. Alabama*. . . . 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.¹⁶²

The Youth Offender Parole Hearings differ from adult parole hearings in that the parole board is instructed 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.”¹⁶³ Additionally, during its assessment, if the board uses risk assessment instruments,¹⁶⁴ such evaluations may only be administered by a licensed psychologist who must also

¹⁶¹ S.B. 260, 2013 Leg., 2013–2014 Reg. Sess. (Ca. 2013), available at http://www.leginfo.ca.gov/pub/13-14/bill/sen/sb_0251-0300/sb_260_bill_20130916_chaptered.pdf (codified at CAL. PENAL CODE §§ 3051, 4801 (West 2013)). For more information on California Senate Bill 260 and the Youth Offender Parole Hearings, see Human Rights Watch, *California Youth Offender Parole: A Guide for Prisoners and Their Families and Friends* (2014), available at http://www.caresforyouth.org/YOPH_SB_260_Guide_5-1-14_v3.pdf

¹⁶² S.B. 260 § 1 (citations omitted).

¹⁶³ CAL. PENAL CODE § 4801(c). Additionally, “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.” CAL. PENAL CODE § 3051(f)(2).

¹⁶⁴ See *supra* Part III.c.

give great weight to the diminished culpability and hallmark features of youth.¹⁶⁵ Furthermore, the bill created parameters, based on the offender's sentence, detailing when an offender will become eligible for a Youth Offender Parole Hearing.¹⁶⁶ When originally drafted, the bill applied to offenders who were convicted of a controlling offense that was committed before the age of eighteen.¹⁶⁷ In 2015, however, the state legislature passed California Senate Bill 261 extending the applicability of Youth Offender Parole Hearings to offenders who were convicted of a controlling offense that was committed under the age of twenty-three.¹⁶⁸

California's Youth Offender Parole Hearings, created by California Senate Bill 260, address issues that currently plague the parole system and impede compliance with *Graham's* mandate that youth offenders should receive a realistic opportunity to obtain release.¹⁶⁹ First, the decisions in *Graham* and *Miller* failed to establish timing guidelines that would direct states when an opportunity for release should be made available to offenders, leading to inconsistent interpretations and responses from the states.¹⁷⁰ Neurological and developmental data from the American Psychological Association (APA) shows that brain development continues through late adolescence,¹⁷¹ and the drafters of the MPC have recommended "second

¹⁶⁵ CAL. PENAL CODE § 3051(f)(1).

¹⁶⁶ S.B. 260 § 4 (codified at CAL. PENAL CODE § 3051(b)(1)–(3)). Accordingly, a juvenile offender serving a determinate sentence for the controlling offense, meaning a sentence with a fixed length, will become parole eligible, and thus eligible for a youth offender parole hearing, during his fifteenth year. § 3051(b)(1). A juvenile offender sentenced to a life term of less than twenty-five years for the controlling offense will become eligible in his twentieth year of incarceration. § 3051(b)(2). Finally, a juvenile offender sentenced to a life term of twenty-five years or more for the controlling offense will become eligible during his twenty-fifth year. § 3051(b)(3). As defined in the statute, the controlling offense "means the offense or enhancement for which any sentencing court imposed the longest term of imprisonment." § 3051(a)(2)(B).

¹⁶⁷ S.B. 260 § 4. The statute, as originally enacted and currently, does not apply to offenders sentenced under California's Three Strikes Law or "Jessica's Law," also known as the Sexual Predator Punishment and Control Act.

¹⁶⁸ S.B. 261, 2015 Leg., 2015–2016 Reg. Sess. (Ca. 2015), available at http://www.leginfo.ca.gov/pub/15-16/bill/sen/sb_0251-0300/sb_261_bill_20151003_chaptered.pdf (codified at CAL. PENAL CODE §§ 3051, 4801 (West 2016)).

¹⁶⁹ See *supra* Part III.

¹⁷⁰ See cases cited *supra* note 109 and accompanying text.

¹⁷¹ See *supra* Part III.a. See also *supra* note 116 and accompanying text.

look sentencing” for juvenile offenders, which would allow youthful offenders to petition for resentencing after ten years.¹⁷² Section 3051 of the California Penal Code addresses this timing issue by clearly setting forth parameters that detail when juvenile offenders are eligible for parole.¹⁷³ The guidelines developed under section 3051 exceed those recommended by the MPC, but effectively create a graduated scale based on sentence length that establishes set timeframes for parole eligibility. Additionally, section 1170 of the California Penal Code allows juvenile offenders sentenced to LWOP to petition the court for re-sentencing after fifteen years, which is supported by the data from the APA that juvenile brains continue to develop into late adolescence and suggests that California legislators are willing to provide even the most dangerous of juvenile offenders with the possibility of parole release upon a showing of growth and maturity.¹⁷⁴

Another issue juvenile offenders face under the current parole system is the effect and weight of age as a factor in parole release decisions. Risk assessment instruments, used by many parole boards in release evaluations, consider age as a significant factor in the decision-making process.¹⁷⁵ Contrary to the evidence relied upon by the Court in *Roper*, *Graham*, and *Miller*, however, risk assessment tools generally conclude that a juvenile offender’s age is an increased risk factor rather than an indication of susceptibility to rehabilitation.¹⁷⁶ In contrast, section 3051 requires that California parole boards choosing to utilize risk assessment tools must do so through a licensed psychologist and that the evaluation of those tools must “take into consideration the diminished culpability of juveniles.”¹⁷⁷ Furthermore, while age need not be considered as a factor in other jurisdictions,¹⁷⁸ section 4801 of the California Penal Code mandates that the parole board

¹⁷² See *supra* notes 118–122 and accompanying text.

¹⁷³ CAL. PENAL CODE § 3051(b)(1)–(3). See *supra* note 166 and accompanying text.

¹⁷⁴ See *supra* notes 156–158 and accompanying text.

¹⁷⁵ See sources cited *supra* note 137.

¹⁷⁶ See sources cited *supra* notes 138, 140–141 and accompanying text.

¹⁷⁷ CAL. PENAL CODE § 3051(f)(1).

¹⁷⁸ See Cohen, *supra* note 68, at 1073–1076 (explaining the arbitrary nature of parole decision-making and the practice of giving different factors varying weight in the decision-making process); Annitto, *supra* note 136, at 144–145 (discussing the variations in state parole board decision-making and the arbitrariness associated with release decisions and the factors considered).

“shall give great weight to the diminished culpability of juveniles . . . [and] the hallmark features of youth.”¹⁷⁹ Accordingly, the California legislation not only adequately considers age as a factor in its parole release decisions, but does so in a manner consistent with the fundamental principle behind the Court’s decisions in *Roper*, *Graham*, and *Miller*.

Similarly, the current parole system’s general emphasis on offense severity challenges *Graham*’s mandate to provide a meaningful opportunity to obtain release.¹⁸⁰ Additionally, the prevalence of low release rates under the current system further decreases the opportunity for juvenile offenders to achieve a realistic chance of release consistent with *Graham*.¹⁸¹ Under section 3051, juvenile offenders are still required to show significant rehabilitative improvements in order to obtain release, but the considerable weight afforded to youth under section 4801 increases the likelihood of parole suitability and the successful attainment of a realistic opportunity for release.¹⁸² Early results from California “suggest that the effect of the specific criteria and rationale focused on development in the legislation, in tandem with a politically favorable environment, has been impactful.”¹⁸³

Though in its early stages, the Youth Offender Parole Hearings instituted under section 3051 of the California Penal Code demonstrate an effective juvenile sentencing and parole reform model that other states should consider adopting. The decisions in *Graham* and *Miller* addressed issues pertaining not only to the sentencing of juvenile offenders, but also to the parole of such offenders, by mandating a meaningful opportunity for release. The current parole system inadequately addresses this mandate and fails to provide a meaningful or realistic opportunity for release

¹⁷⁹ CAL. PENAL CODE § 4801(c).

¹⁸⁰ See *supra* Part II.c. See also sources cited *supra* note 99 and accompanying text.

¹⁸¹ See sources cited *supra* note 80 and accompanying text.

¹⁸² See Human Rights Watch, *supra* note 161.

¹⁸³ See Annitto, *supra* note 136, at 162 and n.308 (citing an interview the author conducted with Elizabeth Calvin from the Human Rights Watch). Annitto elaborates that in the initial months following the enactment of S.B. 260, “twelve out of twenty-one applicants were granted a parole release date,” which illustrates a “stark contrast” with California’s prior annual release rates, which at times were “zero percent.” *Id.* But see Scavone, *supra* note 159, at 3478. Scavone notes that opponents to reforms like S.B. 260 will often argue that such mechanisms increase the risk of releasing dangerous offenders and place an undue burden on victims to participate in frequent or multiple parole hearings. *Id.*

for juvenile offenders. The reforms enacted in California through section 3051, section 4801, and section 1170 adhere to the fundamental principle in *Roper*, *Graham*, and *Miller* and provide an alternative mechanism for parole release for juvenile offenders, who have been shown to be constitutionally different from adult offenders.

CONCLUSION

Juvenile justice sentencing and reform policies have altered dramatically over the past decade. While the decisions in *Roper*, *Graham*, and *Miller* largely affected sentencing schemes for juvenile offenders, the Court additionally created a mandate in *Graham* that states must provide juvenile offenders with a meaningful and realistic opportunity to obtain release. This mandate directly affects the American Parole System, because it imposes a duty on the states regarding parole of juvenile offenders that does not exist for adult offenders. Currently, the modern parole system operates adversely to the fundamental principle that juveniles are constitutionally different than adults and must receive a meaningful opportunity to obtain release.

Since 2013, a number of states have begun to implement parole reforms for juvenile offenders in an effort to follow the mandate set forth in *Graham*. Most notably, California enacted Senate Bill 260 and implemented Youth Offender Parole Hearings for juvenile offenders. These hearings address the issues that exist in the current parole system by creating a clear timing component and requiring board members to afford great weight to the diminished culpability of juvenile offenders. This requirement significantly increases the likelihood that a juvenile offender will receive a meaningful and realistic opportunity to obtain release. The Supreme Court in *Roper*, *Graham*, and *Miller* declared that juveniles are constitutionally different from adults and instructed that states must provide juvenile offenders with a meaningful opportunity for release. In order to follow this mandate, states need to develop effective parole reform for juvenile offenders. California's Youth Offender Parole Hearings system offers other states a viable model of effective parole reform for juvenile offenders.



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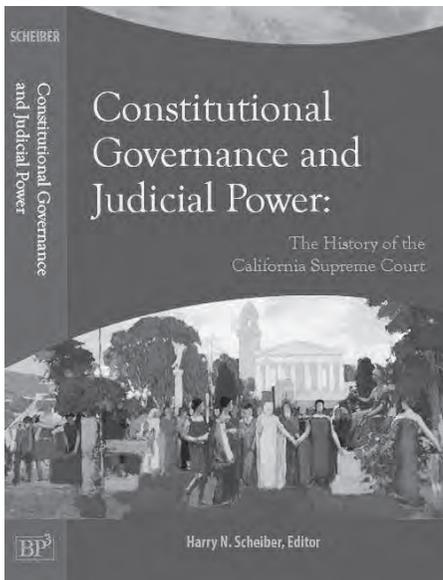
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