# NOTES

# THWARTING CALIFORNIA'S PRESUMPTIVE LWOP PENALTY FOR ADOLESCENTS: PSYCHOLOGY'S AND NEUROSCIENCE'S MESSAGE FOR THE CALIFORNIA JUSTICE SYSTEM

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ABSTRACT

*In California, adolescents convicted of special circumstance first-degree murder are presumptively sentenced to life without the possibility of parole ("LWOP") pursuant to section 190.5 of the California Penal Code. To date, California has sentenced more than 250 adolescents to die behind bars. Recent studies in psychology and neuroscience challenge this status quo. These disciplines suggest that adolescents are biophysically determined to suffer from poor decisionmaking capacities and behavior control. This Note argues that adolescent culpability is mitigated by currently valued standards, informed by science's conception of the adolescent, and that adolescent crimes consequently warrant the lesser punishment of twenty-five years to life.*

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## I. INTRODUCTION

In California there are at least 250 individuals who will serve sentences in state prisons for the rest of their lives, punished eternally for mistakes they made during their youth.[1] The vast majority of these individuals committed special circumstance[2] first-degree murder as adolescents,[3] but were sentenced by the California criminal justice system as adults pursuant to section 190.5 of the California Penal Code.[4] In June 1990, the California electorate enacted Proposition 115, amending section 190.5 to permit life in prison without the possibility of parole ("LWOP") for adolescents.[5] Four years later, in *People v. Guinn*, the California Court of Appeal interpreted section 190.5 to, in effect, *require* California courts to condemn most adolescents convicted of special circumstance first-degree murder to die behind bars.[6] This legal regime stands in stark

1. *See Advocacy Intensifies to Eliminate Life Without Parole for Youth*, YOUTH LAW NEWS, Apr.–June 2009, *available at* http://www.youthlaw.org/publications/yln/2009/april_june_2009/advocacy_intensifies_to_eliminate_life_without_parole_for_youth/.

2. Special circumstance murders include those "carried out for financial gain"; those in which "[t]he defendant was convicted previously of murder in the first or second degree"; those "committed by means of a destructive device, bomb, or explosive" when "the defendant knew, or reasonably should have known, that his or her act or acts would create a great risk of death to one or more human beings"; those "committed for the purpose of avoiding or preventing a lawful arrest, or perfecting or attempting to perfect, an escape from lawful custody"; those in which "the victim was a peace officer," "federal law enforcement officer or agent," "firefighter," "witness to a crime who was intentionally killed for the purpose of preventing his or her testimony," "prosecutor," "judge," or "elected or appointed official or former official"; those that are "especially heinous, atrocious, or cruel, manifesting exceptional depravity"; those in which "[t]he defendant intentionally killed the victim by means of lying in wait"; those in which "[t]he victim was intentionally killed because of his or her race, color, religion, nationality, or country of origin"; those "committed while the defendant was engaged in, or was an accomplice in, the commission of" felonies such as robbery, kidnapping, and rape; those "involv[ing] the infliction of torture" or killing by "administration of poison"; those in which "[t]he murder was intentional and perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person or persons outside the vehicle with the intent to inflict death"; and those in which "[t]he defendant intentionally killed the victim while the defendant was an active participant in a criminal street gang." CAL. PENAL CODE § 190.2 (West 2009). The special circumstance of committing a murder while committing or being an accomplice in a felony is the "most frequently imposed out of all the 22 special circumstances, with a significant number based on the felony of robbery." HUMAN RIGHTS WATCH, "WHEN I DIE, THEY'LL SEND ME HOME": YOUTH SENTENCED TO LIFE WITHOUT PAROLE IN CALIFORNIA 22 (2008), *available at* http://www.hrw.org/reports/2008/us0108/us0108web.pdf.

3. *See* HUMAN RIGHTS WATCH, *supra* note 2, at 19.

4. In this Note, an "adolescent" is a sixteen- or seventeen-year-old.

5. CAL. PENAL CODE § 190.5.

6. *See* People v. Guinn, 33 Cal. Rptr. 2d 791, 797 (Ct. App. 1994). A court may, however, exercise its discretion if it finds good reason to impose the less severe sentence of twenty-five years to life. The court in *People v. Guinn* conditioned this discretion, stating that "[t]he fact that a court might grant leniency in some cases, in recognition that some youthful special-circumstance murderers might warrant more lenient treatment, does not detract from the generally mandatory imposition of LWOP as the punishment for a youthful special-circumstance murder." *Id.*

contrast to the law governing juveniles in California only two decades ago. Prior to 1990, adolescents in California were exempted from special circumstance proceedings and LWOP sentences[7]—a punishment then considered suitable only for adults. Adolescents were segregated from adult criminals, tried in juvenile courts, and treated in juvenile detention facilities.[8] California was committed to the rehabilitation and individualized treatment of youthful offenders.[9] Today, California sentences adolescents to an institutionalized death. Modern science challenges this status quo. This Note disputes the *Guinn* court's reading of section 190.5 as establishing a de facto requirement of LWOP. It draws on contemporary psychology's and neuroscience's depictions of the adolescent to provide an *au courant* framework for justly punishing adolescents within California's adult criminal system.

Prevailing science explains that adolescents may generally be risk prone because of their universal deficient behavior control. It suggests that their decisionmaking capacity may be hindered by three characteristics unique to their age group: their high susceptibility to peer influence, their underdeveloped risk-assessment capabilities, and their biophysically determined immature judgment. Further, it portrays the adolescent convicted pursuant to section 190.5 as significantly more responsive to rehabilitation than the adult similarly found guilty of special circumstance first-degree murder.

The "'get tough' on juvenile crime"[10] policy approach manifested in section 190.5 is a response to "public fear and anger at what is perceived to be an epidemic of youth violence, including an alarming increase in juvenile homicide."[11] Focused on the severity of juvenile delinquents'

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7. *Id.*

8. *See* STEVEN SCHLOSSMAN, CAL. OFFICE OF THE ATTORNEY GEN. BCS FORUM, THE CALIFORNIA EXPERIENCE IN AMERICAN JUVENILE JUSTICE: SOME HISTORICAL PERSPECTIVES 3–11 (1989).

9. *See id.* at 9–11.

10. Aaron Kupchik, Jeffrey Fagan & Akiva Liberman, *Punishment, Proportionality, and Jurisdictional Transfer of Adolescent Offenders: A Test of the Leniency Gap Hypothesis*, 14 STAN. L. & POL'Y REV. 57, 57–58 (2003) (reporting results of a natural experiment finding that "adolescents prosecuted as adults are at a greater risk of detention and incarceration and, if incarcerated, are sentenced to longer sentences than adolescents in juvenile courts").

11. Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 137 (1997). In this article, Scott and Grisso inform the debate surrounding "modern punitivist" juvenile justice reforms, challenging two assumptions that underlie these reforms: that adolescents and adults charged with crimes cannot significantly be distinguished and the utilitarian assumption. *Id.* at 137–39. Note that the escalation in the numbers of murders committed by juveniles during the 1980s is well documented, but the number of murders committed by adolescents nationally declined substantially in the decade

crimes, this penal policy has lost sight of the unique characteristics of adolescent offenders. Unwilling to characterize violent adolescent criminals as "blameless children in need of treatment," in the rhetoric of the juvenile justice system,[12] it has equated adolescents' adult-like crimes with the need for adult time.[13] Contemporary science essentially provides an informed perspective of the adolescent as significantly differing from adults, distinct from the rhetoric of the juvenile justice system and not inconsistent with California's current criminal justice system. Science is capable of informing the conventional restraints on punishment employed by California criminal courts when they sentence adolescents according to section 190.5.

The U.S. Supreme Court has recently illustrated that the modern scientific conception of the adolescent can and should be considered by courts as relevant to culpability. Within the last decade, the Supreme Court has held that an adolescent's reckless behavior, immaturity, "underdeveloped sense of responsibility," vulnerability to outside pressures, and youthful character are pertinent to determining the degree to which an adolescent is responsible for a crime.[14] In *Roper v. Simmons*, the Court recognized these deficiencies to render the execution of sixteen- and seventeen-year-olds unconstitutional, relying on several of the psychology and neuroscience studies detailed in Part II of this Note.[15] California courts should also rely on these attributes to understand the otherwise unapparent truth that there are often several mitigating factors present when adolescents decide to participate in crimes subject to section 190.5.

For example, if the judge presiding over the sentencing hearing for

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following the enactment of section 190.5, when sixteen- and seventeen-year-olds committed 37 percent and 31 percent fewer murders, respectively. *See* HOWARD N. SNYDER & MELISSA SICKMUND, NAT'L CTR. FOR JUVENILE JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 1999 NATIONAL REPORT 53 (1999), *available at* http://www.ncjrs.gov/html/ojjdp/nationalreport99/toc.html (follow "Chapter 3: Juvenile Offenders" hyperlink).

12. Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 800–02 (2003) (proposing a separate mitigation model for an independent system of juvenile justice, which is "consistent with criminal law doctrine and practice," based on their conclusion that developmental psychology's characterization of the adolescent as an incompetent decisionmaker with an in-flux character mitigates adolescents' responsibility).

13. *See* Laurence Steinberg & Elizabeth Cauffman, *A Developmental Perspective on Jurisdictional Boundary*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE 379, 380 (Jeffry Fagan & Franklin E. Zimring eds., 2000) (examining whether a "jurisdictional boundary" should be maintained between juveniles and adults, and if so, at what age, in light of the recent findings of developmental psychology).

14. Roper v. Simmons, 543 U.S. 551, 569–70 (2005) (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)).

15. *See id.* at 571, 574–75.

Ray J., a prisoner currently serving a life sentence for a crime he committed at age seventeen, had considered the constructs contemporary psychology and neuroscience provide for understanding the circumstances adolescents face when they decide to commit a crime, mitigation standards currently employed in section 190.5 hearings would have instructed the judge to shy away from sentencing the youthful prisoner to spend the remainder of his life incarcerated with adult criminals. Ray J. did not personally commit the murder that presumptively resulted in his life sentence. Prior to his crime, Ray J. had never been in trouble with the law. He participated in the robbery of a neighborhood convenience store only after his friend persuaded him to do so. During the commission of the robbery, Ray J.'s codefendant fatally shot an employee of the convenience store.[16] Science ultimately instructs that neither Ray J.'s culpability, nor the culpability of most adolescents involved in heinous murders measured by presently valued mitigation standards employed in section 190.5 sentencing hearings, can warrant the disproportionately severe sentence of LWOP.

This Note argues that before another adolescent is sentenced to die behind bars, California courts must heed contemporary science's call to often sentence adolescents convicted of special circumstance first-degree murder to section 190.5's alternative sentence: twenty-five years to life—a sentence that mitigation standards inherent in the California statutory scheme, and informed by modern science, demand. By highlighting that established principles of statutory construction render the *Guinn* court's interpretation of section 190.5 unwarranted, this Note paves the way for California courts to appropriately adjudicate the case of the immature adolescent catapulted into the adult criminal system by current penal policy.

Existing scholarship has enriched policy debates surrounding adolescent culpability, adjudication, and punishment with a perspective from developmental psychology.[17] While this discourse has challenged

16. HUMAN RIGHTS WATCH, *supra* note 2, at 42.

17. *See, e.g.*, Barry C. Feld, *Unmitigated Punishment: Adolescent Criminal Responsibility and LWOP Sentences*, 10 J.L. & FAM. STUD. 11, 70–76 (2007) (proposing a categorical exclusion of LWOP for adolescents); Elizabeth S. Scott, N. Dickon Reppucci & Jennifer L. Woolard, *Evaluating Adolescent Decision Making in Legal Contexts*, 19 LAW & HUM. BEHAV. 221, 221–22 (1995) (challenging the informed consent legal approach that equates adolescent and adult decisionmaking capacities as incorporating too narrow a range of decisionmaking factors and proposing a "judgment" model "that incorporates . . . peer (and parental) influence, risk preference and perception, and temporal perspective"); Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1010 (2003) (arguing that the "developmental immaturity of juveniles mitigates their criminal culpability" under "well-accepted principles of criminal law" and suggesting pre-*Roper*

lawmakers to categorically exclude adolescents from certain severe punishments,[18] less attention has been paid to how current individualized sentencing practices may absorb modern science's recent conclusions. This Note supplements this scholarship by drawing on psychology and neuroscience to specifically inform current California penal policy. Distinguishing itself by failing to demand a complete overhaul of law governing juvenile offenders, this Note emphasizes the manners in which these scientific disciplines can enrich mitigation standards that the adult criminal system presently values—those mandatorily employed by California courts during section 190.5 sentencing hearings.

Part II of this Note details modern science's account of the adolescent. Part III argues that *Guinn*'s construction of section 190.5 as presumptively requiring LWOP is groundless. Further, it implores California appellate courts to correctly interpret section 190.5 as providing for an equal choice between sentencing an adolescent to death in prison and twenty-five years to life. Finally, Part IV contends that recent psychology and neuroscience developments should instruct California courts to often sentence adolescents convicted of special circumstance first-degree murder to the lesser of these two punishments. It argues that scientific developments demonstrate that general attributes of adolescents and the circumstances in which they commit their crimes, measured according to the traditional mitigation standards weighed during section 190.5 sentencing determinations, mandate that section 190.5 defendants receive the lesser alternative punishment.

## II. THE PSYCHOLOGICALLY AND BIOPHYSICALLY UNDERDEVELOPED ADOLESCENT

Psychology and neuroscience provide fundamental insight into the character of the adolescent sentenced according to section 190.5. Studies in developmental psychology conclude that across the adolescent population, behavior-control ability is not fully developed until after adolescence. They

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that the constitutionality of the juvenile death penalty should be reconsidered); Jill M. Ward, *Deterrence's Difficulty Magnified: The Importance of Adolescent Development in Assessing the Deterrence Value of Transferring Juveniles to Adult Court*, 7 U.C. DAVIS J. JUV. L. & POL'Y 253, 260–63 (2003) (assessing the deterrence effect of transferring adolescents into the adult criminal justice system).

18. *See, e.g.*, Jeffrey Fagan, Atkins, *Adolescence, and the Maturity Heuristic: Rationales for a Categorical Exemption for Juveniles from Capital Punishment*, 33 N.M. L. REV. 207, 207–10 (2003) (analogizing the underdevelopment of adolescents to that of the mentally challenged to argue that death penalty jurisprudence requires the exclusion of juveniles from capital punishment); Feld, *supra* note 17, at 70–76.

find that "normal, healthy adolescent[s]"[19] are unable to control their behavior as competently as adults. Further, neuroscience suggests that such limited control is grounded in a biophysical immaturity. Recent studies relate that the brain activity and structure of adolescents differ decisively from those of adults convicted of special circumstance first-degree murder.[20] Accordingly, it is not merely adolescents who are mentally diseased or emotionally infirm, or who act with guns held to their backs, that think and consequently behave differently from an average adult faced with the choice to break the criminal law; adolescents normally "cannot be expected to act with the same control or foresight as a mature adult."[21]

Science portrays the typical juveniles subject to section 190.5 as significantly differing from adults who similarly commit special circumstance first-degree murder. It observes that adolescents, in general, are inherently inclined toward risk taking, including criminal behavior, and provides the foundation for properly understanding such a phenomenon. It explains that adolescents are most likely highly susceptible to peer influence and deficient risk assessors and that they may employ anatomically determined immature judgment. As a result, it instructs that adolescents' decisionmaking capacity, and therefore their behavior-control ability, is deficient when they make choices in the emotionally charged group setting typical of adolescent decisions to partake in criminal activity[22] that might subject them to adult punishment pursuant to section 190.5.

### A. THE TYPICAL RISK-PRONE ADOLESCENT

Adolescents are categorically inclined toward risk taking. "Relative to individuals at other ages, . . . adolescents as a group exhibit a disproportionate amount of reckless behavior, sensation seeking, and risk taking."[23] Thus, the adolescent subject to section 190.5's criminal activity is not a statistical abnormality. Until age eighteen,[24] adolescent behavior is distinguished by an elevation in risk taking,[25] and specifically, criminal behavior. Significantly, the number of persons committing crimes between

19. Brief for the American Medical Association et al. as Amici Curiae Supporting Respondent, *Roper*, 543 U.S. 551 (No. 03-633) [hereinafter Brief for the AMA].

20. *See id.* at 15–16.

21. *Id.* at 2.

22. *See* Steinberg & Scott, *supra* note 17, at 1012.

23. L. P. Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 NEUROSCIENCE & BIOBEHAVIORAL REVIEWS 417, 421 (2000).

24. *Id.* at 419.

25. *Id.* at 418.

ages fifteen and eighteen is radically greater than in any other age group.[26] This is especially true with regard to sixteen- and seventeen-year-olds since "rates of risk behavior [such as crime] peak in late adolescence . . . rather than early or middle adolescence."[27] Self-report studies show that "it is statistically aberrant to refrain from crime during adolescence,"[28] and high rates of crime among adolescents expose that delinquency is "a normal part of teen life"[29] rather than deviant behavior or a manifestation of psychopathology.[30] Even when controlling for varying educational, occupational, family, and home-life backgrounds, the association between adolescence and criminal behavior is irrefutable.[31] Adolescents sentenced according to section 190.5 are held accountable for criminal behavior that, while abnormal for adults, is statistically commonplace for their peers.

More materially, although in a few cases risk taking develops into a deviant adult lifestyle, for most, risk taking is an impermanent, adolescent-specific behavior.[32] Individuals who engage in criminal activity during their adolescence are significantly more likely to cease criminal behavior in their adulthood rather than continue to display antisocial behavior as adults.[33] "When official rates of crime are plotted against age, the rates for both prevalence and incidence of offending appear highest during adolescence; they peak sharply at about age 17 and drop precipitously in young adulthood."[34] In a longitudinal study by Terrie Moffitt, only 7 percent of eighteen-year-old boys denied delinquent activity.[35] Yet other studies find that, by their early twenties, 50 percent of former juvenile delinquents abandon criminal activity and, by age twenty-eight, this figure jumps to 85 percent.[36] These studies suggest that the criminal behavior of many adolescents convicted of special circumstance first-degree murder

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26. *See* David P. Farrington, *Age and Crime*, *in* 7 CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 189, 214–15 (Michael Tonry & Norval Morris eds., 1986) (citing a 1983 self-report study conducted by David Farrington).

27. *See* Jeffrey Jensen Arnett, *Adolescent Storm and Stress, Reconsidered*, 54 AM. PSYCHOLOGIST 317, 321 (1999) (noting that "[r]ates of crime rise in the teens until peaking at age 18").

28. *See* Terrie E. Moffitt, *Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 PSYCHOL. REV. 674, 685–86 (1993).

29. *Id.* at 675.

30. *See* Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEVELOPMENTAL REV. 339, 343 (1992).

31. *Id*. *See also* Farrington, *supra* note 26, at 228 (noting that "age ha[s been found to have] a direct casual effect on crime").

32. Spear, *supra* note 23, at 421.

33. *See* Moffitt, *supra* note 28, at 675.

34. *Id.*

35. *Id.* at 686.

36. *Id.* at 675.

will diminish during their twenties and, within fifteen years of their incarceration, will most likely cease. This suggests that the crimes of adolescents subject to section 190.5 consistently fail to indicate their perpetrators will have adult criminal careers.

As importantly, it is the frequency of an adolescent's delinquent activity, not merely the violence of any given crime, that has been found to be predictive of an adult criminal career.[37] Thus, adolescents convicted pursuant to section 190.5, as opposed to any other adolescent criminal, are not definitively more likely to continue criminal behavior merely because of the violent nature of their commitment offenses.

### B. THE POTENTIALLY COGNITIVELY DEFECTIVE ADOLESCENT

Adolescents' unparalleled participation in criminal activity may be cognitively based, grounded in adolescent understanding and reasoning deficiencies. Adolescents may not have the cognitive skills to make competent decisions when stressed by the opportunity to commit a crime. It is widely recognized that preadolescents' cognitive abilities differ substantially from adults'.[38] Although contemporary researchers claim that by late adolescence individuals attain formal operations[39] and "cannot be distinguished from adults on the ground of competence of decision making alone,"[40] because of the different logical processes adolescents may employ, adolescents' decisionmaking may differ from that of adults in ways relevant to their choices to partake in criminal activity.

Some psychologists rely on a theory describing adolescents as egocentric to explain juveniles' poor decisionmaking.[41] They argue that, while making decisions, adolescents confuse their own thoughts with those of others, conceiving that others are equally concerned with their behavior and appearance.[42] Consequently, they find adolescents to perceive their lives as rare and exceptional and to conclude that "by virtue of [this] fact . . . they are invulnerable to the consequences of reckless behavior."[43]

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37. *See* PAUL E. TRACY & KIMBERLY KEMPF-LEONARD, CONTINUITY AND DISCONTINUITY IN CRIMINAL CAREERS 206–11 (1996).

38. *See* Steinberg & Scott, *supra* note 17, at 1011.

39. *See* Arnett, *supra* note 30, at 348–49.

40. Lita Furby & Ruth Beyth-Marom, *Risk Taking in Adolescence: A Decision-Making Perspective*, 12 DEVELOPMENTAL REV. 1, 10 (1992).

41. *See* Arnett, *supra* note 30, at 348–49; Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, 18 BEHAV. SCI. & L. 741, 743–44 (2000).

42. Arnett, *supra* note 30, at 348–49.

43. *Id.* at 349.

These psychologists instruct that adolescents may partake in criminal behavior because they fail to contemplate that they may be apprehended for their crimes.

Other psychologists reason that adolescent criminal behavior may instead be the result of failed probability reasoning[44] since understanding probability and chance is difficult even for those who have obtained formal operations.[45] This theory finds that adolescents may take risks associated with criminal activity, unable to correctly perceive the risk inherent in such behavior in the first place.[46] It explains that they may engage in criminal behavior, unconscious of the great risk they are taking, judging activities to be less risky than adults would,[47] and that, similarly, criminal behavior may desist during adulthood when an individual's ability to accurately perceive the "probability that negative consequences will result from crime" improves.[48]

Still other experts attribute adolescents' heightened criminal activity to their skewed probability assessments. They suggest adolescents engaged in antisocial behavior overestimate the probability of incarceration, assuming they will "have to do time at some point," and thus ignore negative consequences altogether when deciding to engage in criminal behavior.[49]

On the other hand, additional cognitive psychologists find that while adolescents employ mature logical processes, adolescents "differ in the sorts of information they use and the priorities they hold."[50] Some cognitive experts argue that adolescents' risk taking may be cognitively accounted for not by their inability to assess risks, but by the subjective value they assign different risks.[51] They argue that it is not the competencies of adolescent reasoning that differ from adults, but adolescents' concerns.[52] They explain, for example, that while adults may view a 20 percent probability of being arrested for a crime more negatively

44. *Id.* at 350.

45. *Id.* Some psychologists refute the egocentric theory by finding adolescents to perceive themselves as more vulnerable to risks than adults. *See* Scott et al., *supra* note 17, at 230–31. This theory instructs that adolescents' high degree of criminal behavior may be explained by the different logical processes adolescents employ, even if the egocentric ultimately fails.

46. Arnett, *supra* note 30, at 348–50.

47. *See* Furby & Beyth-Marom, *supra* note 40, at 8.

48. Arnett, *supra* note 30, at 353.

49. Furby & Beyth-Marom, *supra* note 40, at 17.

50. Cauffman & Steinberg, *supra* note 41, at 744.

51. *See id.*

52. *Id.*

than adolescents cognizant of such a risk, adolescents may consider a 20 percent chance of being rejected by their peers to be the more dire consequence. If this is true, adolescents' greater degree of criminal behavior can be attributed to the importance they may assign to popularity with peers rather than to avoiding the consequences of criminal behavior.[53] According to this account, as the values individuals assign to risks change during adulthood, their tendency to commit crimes will diminish. Therefore, even if adolescents convicted of special circumstance first-degree murder share the same logical processes as adults, cognitive psychology suggests that their criminal behavior is not wholly self-determined but caused in large part by their unique value systems.

### C. THE PSYCHOSOCIALLY IMMATURE ADOLESCENT

Adolescents' frequent decisions to participate in criminal activity may also be accounted for by their psychosocially determined immature judgment (adolescents' deficient social and emotional capabilities).[54] Some psychologists argue adolescents' risk-taking behavior may reflect "not simply priorities" but deficient capabilities "not . . . assessed by measures of logical reasoning."[55] In other words, an adolescents' choice to participate in criminal behavior when an adult would not might be explained by the adolescent's emotional and social immaturity. Cognitive attempts to distinguish between adolescents and adults may never find empirical support.[56] Since there is a sufficient factual foundation for psychosocial theories finding adolescents' judgment to be severely underdeveloped, these theories are most persuasive. Adolescents' deficient behavior control, apparent when they feel pressured to participate in a crime resulting in a section 190.5 conviction, may be determined by their judgment, hindered by an inability to act cautiously when pressed to commit a crime.

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53. *See* Furby & Beyth-Marom, *supra* note 40, at 7.

54. *See* Cauffman & Steinberg, *supra* note 41, at 744–45.

55. *Id.* at 744.

56. *See id.* at 743–44. ("Contrary to the stereotype of adolescents as markedly egocentric . . . or as doomed by deficiencies in logical ability, studies show that adolescents (at least, from age 15 on) are no more likely than adults to suffer from the 'personal fable' (the belief that one's behavior is somehow not governed by the same rules of nature that apply to everyone else, as when a cigarette smoker believes that he is immune to the health effects of smoking) and no less likely than adults to employ rational algorithms in decision-making situations. In fact, there is substantial evidence that adolescents are well aware of the risks they take . . . . Moreover, there is little evidence that growth in the logical abilities relevant to decision-making occurs in any systematic way much past age 16." (citation omitted)).

The pervasive adolescent crime rate may be explained by adolescents' impulsivity. Research demonstrates that impulsivity, although stable through childhood and into mid-adolescence, increases from mid-adolescence through age nineteen and then declines in adulthood.[57] This phenomenon is explained by other studies that describe adolescents as having more intense mood swings and anxiety, which may cause them to act impulsively.[58] Accordingly, although adolescents facing decisions to commit crimes may have the cognitive skills necessary to evaluate the costs and benefits of such risky behavior, they may be too impulsive to make wise decisions under pressure.[59]

That the judgment of adolescents differs from adults in ways relevant to their participation in criminal behavior finds further support in adolescents' potentially weakened temporal perspective.[60] Some developmental psychologists argue adolescents' insubstantial risk aversion results from their inability to project themselves into the future and their consequent failure to assign proper weight to long-term consequences. They find that adolescents project themselves over a significantly shorter time frame than do adults when asked to envision themselves in future circumstances[61] and that they generally disregard the future more than adults, weighing short-term risks and benefits that may result from any given action more heavily. They conclude that this is "a response that in some settings contributes to risky behavior."[62] Further, they find that, at the earliest, future-orientation development reaches maturity during an individual's early twenties.[63] The criminal behavior of adolescents

57. Laurence Steinberg & Elizabeth Cauffman, *Maturity of Judgment in Adolescence: Psychosocial Factors in Adolescent Decision Making*, 20 LAW & HUM. BEHAV. 249, 260 (1996). Steinberg and Cauffman build on Scott, Reppucci, and Woolard's challenge of the informed consent model, providing "a framework for research and theory about psychosocial aspects of, and influences on, maturity of judgment in adolescence." *Id.* at 250.

58. Steinberg & Scott, *supra* note 17, at 1013. *See also* Arnett, *supra* note 27, at 320 (noting that "contemporary research tell[s] us . . . that adolescents do indeed report greater extremes of mood and more frequent changes of mood, compared with preadolescents or adults" and that "negative affect increases in the transition from preadolescence to adolescence"); Spear, *supra* note 23, at 429 (explaining that "[i]ncidence of depressed mood increases notably from childhood to adolescence to reach rates during adolescence that are often higher than in adulthood," that adolescents "show greater extremes in moods than adults," and that "in addition to this emotional volatility, anxiety and self-consciousness also appear to peak at this time").

59. Steinberg & Cauffman, *supra* note 57, at 251.

60. Scott et al., *supra* note 17, at 231. *See also* Steinberg & Cauffman, *supra* note 57, at 266 ("[I]t seems reasonable . . . that individuals' capacity for adopting a future time perspective grows gradually from childhood into young adulthood.").

61. Steinberg & Scott, *supra* note 17, at 1012.

62. Scott et al., *supra* note 17, at 231.

63. *Id.*

convicted in compliance with section 190.5 may therefore reflect their poor judgment, precipitated by their limited time perspective.

One psychosocial study in particular provides support for the conclusion that adolescents' immature judgment may partially render them subject to incarceration according to section 190.5. Prominent behavioral psychologists Elizabeth Cauffman and Laurence Steinberg argue that there are three categories of psychosocial factors that affect competent decisionmaking that progress between adolescence and adulthood and "bear on . . . adolescent culpability."[64] These factors are "(1) responsibility, which encompasses such characteristics as self-reliance, clarity of identity, and independence; (2) perspective, which refers to one's likelihood of considering situations from different viewpoints and placing them in broader social and temporal contexts; and (3) temperance, which refers to tendencies to limit impulsivity and to evaluate situations before acting."[65] Based on their study involving more than one thousand adolescents and adults, Cauffman and Steinberg opine that antisocial decisionmaking is closely correlated with an individual's psychosocial immaturity, measured by underdeveloped responsibility, perspective, and temperance.[66] Of great import to this Note, they also conclude that judgment develops through adolescence. They find that psychosocial maturity is not reached until somewhere between ages sixteen and nineteen.[67] Their study evinces that adolescents' criminal behavior resulting in section 190.5 convictions occurs when adolescents, on average, lack perspective and are intemperate and irresponsible.[68] Cauffman and Steinberg's study thus supports the conclusion that adolescents' decisions to commit crimes subject to section 190.5 may be caused by their psychosocial immaturity, defined by their dependence on others, underdeveloped perspective, and destructive impulsivity, and that these individuals will tend toward prosocial behavior and rehabilitation soon after incarceration.

### D. THE ADOLESCENT'S PRONOUNCED SENSITIVITY TO PEER INFLUENCE

The abnormally high degree of criminal activity among adolescents

64. Cauffman & Steinberg, *supra* note 41, at 744.

65. *Id.* at 744–45 (emphasis omitted).

66. *Id.* at 756.

67. *Id.* Cauffman and Steinberg claim that these findings "call into question recent arguments, derived from studies of logical reasoning, that adolescents and adults are equally competent and that laws and social policies should treat them as such." *Id.* at 741.

68. *See id.* at 756–58 ("This is not to say that, as a class, adolescents are irresponsible, solipsistic, or reckless in any absolute sense. . . . Nevertheless, it does appear as if the average adolescent is less responsible, more myopic, and less temperate than the average adult.").

may also be a direct product of their vulnerability to peer pressure, or an indirect consequence of their need for peer approval[69] and choice of role models.[70] The direct and indirect influence of peers may make an already risk-prone adolescent even more so.[71] Indeed, peer delinquency is recognized as a robust contributor to the onset of delinquency in youth.[72] One study, in which youths roughly between ages eight and eighteen were presented with hypothetical predicaments in which peers compelled them to perform antisocial behavior, found that conformity to peer-induced, antisocial behavior increased greatly between the third and the ninth grades—more or less from ages eight to fifteen.[73] Although this study found that conformity to peer-induced, antisocial behavior peaked during the ninth grade, its results lend themselves to a further inference: sixteen- and seventeen-year-olds categorically conform to peer pressure to behave antisocially more than both juveniles under the age of eleven and adults.[74] These results are explained by theories describing adolescence as a period when individuals consider social interactions particularly important[75] and are supported by other scientific observations concluding that adolescents as old as eighteen[76] have a strong tendency to associate with their peers and participate in "peer-directed social interactions."[77] Psychologists find peer association to lead to three forms of peer influences, which may contribute to adolescents' participation in crime resulting in section 190.5 sentences: conformity, social comparison,[78] and mimicry.[79]

Adolescents subject to section 190.5, like all adolescents of their age group, may be particularly vulnerable to direct peer pressure and conform to criminal behavior because they associate with delinquent groups. Psychology finds that people generally tend to make riskier decisions in groups.[80] It also implies that this tendency may be exacerbated during adolescence. It finds that adolescents (most often seventeen-year-olds) progress from membership in nondelinquent groups to membership in

69. Scott et al., *supra* note 17, at 230; Steinberg & Scott, *supra* note 17, at 1012.
70. Steinberg & Scott, *supra* note 17, at 1012.
71. Brief for the AMA, *supra* note 19, at 8–9.
72. Moffitt, *supra* note 28, at 687.
73. Thomas J. Berndt, *Developmental Changes in Conformity to Peers and Parents*, 15 DEVELOPMENTAL PSYCHOL. 608, 615 (1979).
74. *See id.* at 610–11.
75. Spear, *supra* note 23, at 420.
76. *Id.* at 419.
77. *Id.* at 418.
78. Scott et al., *supra* note 17, at 230.
79. Moffitt, *supra* note 28, at 687–88.
80. Steinberg & Scott, *supra* note 17, at 1012.

delinquent groups.[81] It thus suggests that sixteen- and seventeen-year-olds within the jurisdiction of section 190.5 are the most likely of all individuals to make risky decisions in delinquency-oriented peer groups.

Such adolescents may also conform to criminal behavior because of the antisocial leadership of their groups. Theories describe individuals at this age as intrigued by antisocial behavior. They explain that youth whose antisocial behavior will most likely continue into adulthood may consequently assume "influential positions in the peer social structure,"[82] coercing other adolescents to conform to criminal behavior.[83] Thus, science implicitly advances that adolescents' criminal behavior may be explained by the power that leadership positions in the adolescent social structure allow extraordinarily antisocial adolescents to wield over their peers.

Yet, although psychology suggests that the peers of adolescents convicted according to section 190.5 may have influenced them to commit their crimes, it does not necessarily indicate their crimes were premeditated. Experts in this field find that adolescent co-offenders "do not necessarily connote supportive friendships that are based on intimacy, trust, and loyalty"[84] and that adolescent group crimes do not necessarily indicate premeditation.[85] They observe that antisocial groups, comprised of antisocial leaders and their exploited cohorts, have "frequent membership turnover" since persistently antisocial youth "tend to recruit different co-offenders for each offense."[86] They conclude that adolescent crimes are often "unplanned or hastily planned events, the result of a chance coming together of motivation and opportunity."[87] Accordingly, science provides a framework for understanding that adolescents incarcerated pursuant to section 190.5 may have decided to partake in their commitment offense under the influence of antisocial peers, without conspiring with their co-offenders.

Current experts also argue that adolescents may act antisocially in part

81. Moffitt, *supra* note 28, at 687.

82. *Id. See also* Arnett, *supra* note 30, at 355 (explaining that "the adolescent who is highest in sensation seeking might . . . emerge as the leader of the group").

83. *See* Spear, *supra* note 23, at 420 (explaining that peer interactions during adolescence "may . . . facilitate . . . conformity to antisocial behaviors").

84. Moffitt, *supra* note 28, at 688.

85. *See* Jeffrey Fagan, *Contexts of Choice by Adolescents in Criminal Events*, *in* YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 371, 379 (Thomas Grisso & Robert G. Schwartz eds., 2000) (stating that robberies involving adolescents "often are unplanned or hastily planned events"). Fagan applies a contextual framework to "decision making by adolescents in criminal events," incorporating the "developmental context of adolescence." *Id.* at 372.

86. Moffitt, *supra* note 28, at 688.

87. Fagan, *supra* note 85, at 379.

because they likely measure their conduct against the antisocial behavior of their peers.[88] They explain that adolescents may make behavioral choices out of a need for peer approval and in fear of peer rejection, and model themselves after antisocial peers whom they perceive as meeting their shared goals. One professor explains, for example, that for some adolescents, robbery "provides a way of 'campaigning for status.'"[89] During late adolescence, individuals convicted according to section 190.5 may therefore favor antisocial behavior[90] and participate in criminal activity not only under the direct influence of extraordinarily antisocial peers, but also in order to appease and imitate those they associate with.[91]

Furthermore, adolescent criminal activity that leads to a section 190.5 conviction may also be attributable to adolescents' limited cognitive skill and judgment, which is incapacitated during peer association. Psychology observes that when adolescents begin to associate with a delinquent group and experience a new social role and system, they may experience extreme stress.[92] It also explains that under such circumstances, an adolescent may make more emotional decisions, acting even more impulsively[93] and with a poorer decisionmaking capacity[94] than the average, already cognitively or psychosocially impaired adolescent. Such findings lend themselves to the conclusion that when faced with a choice to participate in a group criminal activity, an adolescent subject to section 190.5 may make a more irrational and immature decision not only than an adult would in the same situation, but also a normal, impaired adolescent.

### E. THE INCHOATE BRAIN OF THE ADOLESCENT

During the last fifteen years, neuroscience has provided an anatomical foundation for social science's account of the adolescent. Adolescents sentenced in conformance with section 190.5 are arguably predisposed to criminal behavior because their limited behavior-control abilities may be biophysically determined. Prior to the onset of neuroimaging, scientists were inhibited from studying how a live brain operates and develops over

88. *See* Scott et al., *supra* note 17, at 230 (explaining that adolescents measure their behavior against that of their peers and adapt accordingly).

89. Fagan, *supra* note 85, at 379.

90. *See* Moffitt, *supra* note 28, at 687 (stating that "66% of 17-year-olds reported substantial delinquency" in their peer groups).

91. Steinberg & Scott, *supra* note 17, at 1012.

92. Furby & Beyth-Marom, *supra* note 40, at 22.

93. *Id.*

94. Spear, *supra* note 23, at 423.

time.[95] Since the late 1990s, noninvasive magnetic resonance imaging ("MRI") has permitted scientists to research previously undetectable details of neural development and their relationship to the development in cognitive, emotional, and social functions the brain ultimately controls.[96] Such research suggests that still-developing adolescent brain systems drive adolescents' deficient behavior control[97] in two related ways. First, recent neurological discoveries reveal that adolescents' brain activity differs decidedly from adults'; adolescents more often process information through the amygdala and less often through the frontal lobes.[98] Interestingly, the amygdala is a primitive area of the brain that provides "rapid, precognitive"[99] recognition of fear and threatening circumstances[100] and is associated with *gut-reaction*,[101] *aggressive* and *impulsive*, and *responsive* behavior.[102] Second, new evidence suggests that other areas of the adolescent brain, the frontal lobes, which are essential for "response inhibition, emotional regulation, planning and organization"[103] and are associated with *impulse control* and *mature judgment*,[104] are structurally immature "well into late adolescence."[105] In an MRI study of brain

95. Brief for the AMA, *supra* note 19, at 10–11.

96. Sarah Durston et al., *Anatomical MRI of the Developing Human Brain: What Have We Learned?*, 40 J. AM. ACAD. CHILD ADOLESCENT PSYCHIATRY 1012, 1012 (2001); Elizabeth R. Sowell et al., *Mapping Cortical Change Across the Human Life Span*, 6 NATURE NEUROSCIENCE 309, 309 (2003).

97. *See* Sowell et al., *supra* note 96, at 309.

98. Brief for the AMA, *supra* note 19, at 15.

99. ELKHONON GOLDBERG, THE EXECUTIVE BRAIN: FRONTAL LOBES AND THE CIVILIZED MIND 31 (2001).

100. Kevin S. LaBar et al., *Human Amygdala Activation During Conditioned Fear Acquisition and Extinction: A Mixed-Trial fMRI Study*, 20 NEURON 937, 937 (1998) (summarizing an MRI study in which "[a]ctivation of the amygdale/periamygdaloid cortex was observed during conditioned fear acquisition and extinction"); K. Luan Phan et al., *Functional Neuroanatomy of Emotion: A Meta-Analysis of Emotion Activation Studies in PET and fMRI*, 16 NEUROIMAGE 331, 336 (2002).

101. *See* Interview by Frontline with Deborah Yurgelun-Todd, Dir. of Neuropsychology and Cognitive Neuroimaging, McLean Hosp. (Jan. 31, 2002) (transcript available at http://www.pbs.org/wgbh/pages/frontline/shows/teenbrain/etc/script.html).

102. Brief for the AMA, *supra* note 19, at 12–13.

103. Elizabeth R. Sowell et al., *In Vivo Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions*, 2 NATURE NEUROSCIENCE 859, 860 (1999). *See also* GOLDBERG, *supra* note 99, at 24 (explaining that "[t]he prefrontal cortex plays the central role in forming goals and objectives and then in devising plans of action required to attain these goals" and selects "the cognitive skills required to implement the plans").

104. Brief for the AMA, *supra* note 19, at 13–14 (expounding that the "'neocortex . . . mediate[s] "more complex" information-processing functions such as perception, thinking, and reasoning,' and the prefrontal cortex is associated with a variety of cognitive abilities, including decision making, risk assessment, ability to judge future consequences, evaluating reward and punishment, behavioral inhibition, impulse control, deception, responses to positive and negative feedback, and making moral judgments" (alteration in original) (footnotes omitted) (quoting Sowell et al., *supra* note 103, at 860)).

105. *Id.* at 16.

development between ages four and twenty-one, it was concluded that frontal lobes were the latest to mature. Researchers concluded that "the sequence in which the cortex matured agrees with regionally relevant milestones in cognitive and functional development" through adolescence into adulthood.[106] Thus, the criminal behavior of adolescents convicted of special circumstance first-degree murder may be determined in part by their frequent processing in the amygdala and age-specific incipient brain structure.

That the brain of an adolescent subject to section 190.5 is characterized by a more active amaygdala and more passive frontal lobes has been revealed in two recent studies. One study found enhanced frontal lobe functioning in the adult brain, absent in adolescents, when individuals were asked to respond to visual stimuli.[107] Similarly, in her functional MRI study, Deborah Yurgelun-Todd reported that until age seventeen, adolescents exhibit greater amounts of amygdala activity when indentifying emotional states from facial expressions, while adults display more frontal lobe activity when processing the same information.[108] From these findings, she inferred that adolescents "respond[] differently to the outside world . . . [as] compared to adults. And in particular, with emotional information, the teenager's brain may be responding with more of a gut reaction than an executive or more thinking kind of response." Further, based on her observation of adolescents' less than fully functioning frontal lobes, she noted adolescents likely act impulsively, failing to weigh the consequences of their decisions.[109] These studies indicate that adolescents convicted pursuant to section 190.5, who often make decisions to commit a crime in emotionally charged settings, may be predetermined to do so irrationally and impulsively by their unique brain activity.

Additionally, the limited behavior-control ability of adolescents sentenced according to section 190.5 may also be driven in part by their immature brain structure. Recent studies show that two brain maturation processes—myelination and pruning—continue in the brain's frontal lobes during late adolescence. Myelination is a process that insulates pathways connecting different parts of the brain with the white fatty tissue, myelin. It "makes communication between different parts of the brain faster and more

106. Nitin Gogtay et al., *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 PROC. NAT'L ACAD. SCI. 8174, 8177 (2004).

107. K. Rubia et al., *Functional Frontalisation with Age: Mapping Neurodevelopmental Trajectories with fMRI*, 24 NEUROSCIENCE & BIOBEHAVIORAL REVIEWS 13, 14–18 (2000).

108. *See* Interview by Frontline with Deborah Yurgelun-Todd, *supra* note 101.

109. *Id.*

reliable."[110] The frontal lobes cannot function efficiently "until the pathways connecting the frontal lobes with the far-flung structures of the brain are fully myelinated."[111] During the last decade, the amount of white matter in the prefrontal region of the brain, or the frontal lobes, has been found to increase steadily through late adolescence as a function of age.[112] Such an expansion of white matter is attributable primarily to myelinization during this period.[113] Pruning, on the other hand, is a maturation process in which the brain's gray matter, or outer surface brain cells, decreases and brain function is consequently enhanced.[114] A study of children and adolescents between ages four and twenty-one recently exposed that gray matter in the frontal lobes increases prior to adolescence but does not decrease until after late adolescence. The study thus pointed to a previously obscured, critical frontal lobe development stage that occurs during adolescence.[115] It appears that the late adolescent brain, stimulated during an adolescent's decision to partake in criminal activity, is further structurally determined to communicate and function deficiently.

Although causal relationships cannot be definitively inferred from correlated developmental events, since immature frontal lobes are less able to monitor amygdalae,[116] it is nevertheless compelling that both a more active amygdala and more passive frontal lobes exist during late adolescence when an individual's frontal lobes are biophysically underdeveloped. It is further persuasive that adolescents' deficient behavior-control ability, or limited decisionmaking capacity, coincides with greater activity in an area of the brain often associated with such a deficiency. The concurrency between "the age of relatively complete maturation of the frontal lobes and the age of social maturity is probably more than coincidental."[117] Such circumstances very well may indicate that underdeveloped frontal lobes in adolescents lead to adolescents' hyperactive amygdalae, which in turn generate the deficient decisionmaking capacity and behavior-control ability psychology finds

110. GOLDBERG, *supra* note 99, at 144.

111. *Id.*

112. Allan L. Reiss et al., *Brain Development, Gender and IQ in Children: A Volumetric Imaging Study*, 119 BRAIN 1763, 1770 (1996). Reiss studied individuals ranging from ages five to seventeen and found a linear progression of white matter consistently during the first two decades of life. *Id.* at 1763, 1768.

113. *Id.* at 1770.

114. Brief for the AMA, *supra* note 19, at 18–19.

115. Jay N. Giedd et al., *Brain Development During Childhood and Adolescence: A Longitudinal MRI Study*, 2 NATURE NEUROSCIENCE 861, 861–63 (1999).

116. Brief for the AMA, *supra* note 19, at 14–15.

117. GOLDBERG, *supra* note 99, at 144.

characteristic of adolescents like those subject to section 190.5. In other words, during the last decade, MRI technology has permitted scientists to determine that such adolescents are very possibly organically prone to antisocial behavior.

### F. AN INTERDISCIPLINARY APPROACH TO SECTION 190.5 SENTENCING PRACTICE

Given modern science's conception of the adolescent's behavior-control ability as naturally inferior to that of adults, California's penal policy can no longer afford to focus primarily on the violence of adolescents' crimes in determining culpability. To maintain its once self-proclaimed national leadership in "progressive" and "cutting edge" juvenile justice policies and programs,[118] when punishing sixteen- and seventeen-year-olds convicted of special circumstance first-degree murder, California must keep science's depiction of the adolescent individual in focus. It therefore must decline to routinely censure adolescent criminals as if they were fully competent and culpable adults. To achieve this end, California courts should take into account the findings of psychology and neuroscience in applying the standards of individualized sentencing already a part of the section 190.5 sentencing process. The next part of this Note emphasizes that the *Guinn* court's finding that section 190.5 generally mandates adolescents be sentenced to die behind bars is unjustified according to rooted principles of statutory construction. It argues section 190.5 should be correctly interpreted as allowing for an equal choice between LWOP and twenty-five years to life. Such an interpretation would allow the just sentencing scheme science furnishes to be realized. Science instructs that most adolescent crimes, weighed according to mitigation standards currently employed in section 190.5 sentencing hearings, should incur sentences of twenty-five years to life—a reality that cannot be realized within the *Guinn* regime.

## III. A SOUND CONSTRUCTION OF SECTION 190.5

Section 190.5's presumptive penalty of LWOP was established only after a section 190.5 defendant claimed the statute violated the U.S. Constitution. In *People v. Guinn*, the defendant, Guinn, argued that the statute lacked satisfactory guidelines for the court's exercise of discretion between LWOP and twenty-five years to life and thus allowed LWOP to be "arbitrarily and capriciously imposed, in violation of the guarantees against

118. SCHLOSSMAN, *supra* note 8, at 7, 11.

cruel and unusual punishment."[119] The California Court of Appeal rejected this argument and construed the statute to instead narrowly circumscribe the court's discretion. It interpreted the statute to mandate that sixteen- and seventeen-year-olds who commit special circumstance murder "*must* be sentenced to LWOP, *unless* the court, in its discretion, finds good reason to choose the less severe sentence of 25 years to life."[120] The court based this construction first on "the ordinary language and structure of the provision," offering only one reason for finding the statute's language unequivocal: Justice Dabney offered, "[I]n context, the word 'shall' appears to be mandatory."[121] It also based its construction on "the history of Penal Code section 190.5."[122] The court explained this section was "enacted as part of Proposition 115," which amended the statute "specifically to make youthful offenders, who committed what would have been a death-eligible crime for an adult, subject to special circumstances and LWOP."[123] It further related:

> The fact that a court might grant leniency in some cases, in recognition that some youthful special-circumstance murderers might warrant more lenient treatment, does not detract from the *generally mandatory* imposition of LWOP as the punishment for a youthful special-circumstance murderer. In the first instance, therefore, LWOP is the *presumptive* punishment for 16- or 17-year-old special-circumstance murderers, and the court's discretion is concomitantly circumscribed to that extent.[124]

Thus, the *Guinn* court demanded that courts sentence adolescents convicted of special circumstance first-degree murder to LWOP in most cases.

The *Guinn* court's construction is currently the authority in law. Unlike in the federal judicial system, where trial courts are bound only by decisions of the Supreme Court[125] and the appellate circuit in which they sit,[126] the California Supreme Court has declared California superior courts bound by all decisions of the California Court of Appeal.[127] Several

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119. People v. Guinn, 33 Cal. Rptr. 2d 791, 797 (Ct. App. 1994).

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* (emphases added).

125. *E.g.*, Jaffree v. Wallace, 705 F.2d 1526, 1532 (11th Cir. 1983) (citing Hutto v. Davis, 454 U.S. 370, 375 (1982)); Booster Lodge No. 405 v. NLRB, 459 F.2d 1143, 1150 n.7 (D.C. Cir. 1972), *aff'd*, 412 U.S. 84, 105 (1973); Stell v. Savannah-Chatham County Bd. of Educ., 333 F.2d 55, 61 (5th Cir. 1964).

126. *E.g.*, Colby v. J.C. Penney Co., 811 F.2d 1119, 1123 (7th Cir. 1987).

127. *See* Cole v. Rush, 289 P.2d 450, 453 (Cal. 1955), *overruled on other grounds by* Vesely v. Sager, 486 P.2d 151, 167 (Cal. 1971).

districts of the court of appeal have recently confirmed *Guinn*'s interpretation.[128] For example, in 2008, after detailing the support proffered by the *Guinn* court for its interpretation, the first appellate district stated, "We agree with the court in *Guinn* that the plain language of subdivision (b) of section 190.5, as well as the statute's history, reflect a legislative intent that LWOP be the presumptive punishment for 16- and 17-year-old defendants convicted of special circumstance murder."[129] Accordingly, the *Guinn* court's interpretation of section 190.5 binds not only superior courts in its district, but all superior courts in California until the appellate court construes section 190.5 differently[130] or the California Supreme Court chooses to overturn *Guinn*'s reading of section 190.5.

Moreover, the *Guinn* court's construction is currently the authority in practice. While trial courts do not always adhere to the California Supreme Court's pronunciamento that superior courts are bound by all decisions of the California Court of Appeal,[131] they have generally complied with *Guinn*. They have presumptively sentenced adolescents convicted of special circumstance first-degree murder to spend the remainder of their lives in prison.[132] Yet the *Guinn* court's interpretation is not only unnecessary to preserve the constitutionality of section 190.5,[133] but it is also based on an untenable application of principles of statutory construction. Thus, given its sweeping impact, *Guinn*'s interpretation of section 190.5 should be overturned, and California judges endowed with the discretion to choose *equally* between two options—LWOP or twenty-five years to life.

### A. *GUINN*'S TRANSGRESSION OF STATUTORY CONSTRUCTION PRINCIPLES

Fifteen years before the court of appeal decided *Guinn*, the California Supreme Court applied principles of statutory interpretation to an initiative.[134] Since then, California courts have consistently applied the

128. *See, e.g.*, People v. Jiminez, No. A113176, 2008 WL 376929, at *9 (Cal. Ct. App. Feb. 13, 2008); People v. Howard, No. B186175, 2007 WL 1584600, at *12 (Cal. Ct. App. June 1, 2007).

129. *Jiminez*, 2008 WL 376929, at *8–9.

130. *See* McCallum v. McCallum, 235 Cal. Rptr. 396, 400 n.4. (Ct. App. 1987) ("A decision of a court of appeal is not binding in the courts of appeal. One district or division may refuse to follow a prior decision of a different district or division . . . .").

131. *Id.*

132. *See, e.g.*, People v. Ayala, No. F040115, 2003 WL 21921116, at *4 (Cal. Ct. App. Aug. 13, 2003).

133. The *Guinn* court's interpretation of section 190.5 could have rested merely on its finding of adequate guidelines in the broader statutory scheme of which section 190.5 is a part.

134. *See* Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore, 557 P.2d 473, 481 (Cal. 1976).

following principles to initiatives.[135] To properly interpret an initiative, a court first turns "to the language of the statute, giving the words their ordinary meaning,"[136] interpreted "in the context of the statute as a whole."[137] When the language of the initiative is ambiguous, a court "refer[s] to other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet."[138] The court only looks at information made available to the electorate because if the ordinary meaning of a statute is equivocal, it is the intent of the electorate in passing the initiative that is instructive, not the intent of the proposition's authors evinced in legislative history. As the California Supreme Court explained in *Robert L. v. Superior Court*:

> [M]otive or purpose of the drafters of a statute is not relevant to its construction, absent reason to conclude that the body which adopted the statute was aware of that purpose and believed the language of the proposal would accomplish it. The opinion of drafters or legislators who sponsor an initiative is not relevant since such opinion does not represent the intent of the electorate and we cannot say with assurance that the voters were aware of the drafters' intent.[139]

Further, after consideration of extrinsic evidence, "[i]f a penal statute is still reasonably susceptible to multiple constructions, then [the court] ordinarily adopt[s] the 'construction which is more favorable to the offender . . . .'"[140]

The *Guinn* court negligently applied these principles. At the outset, it failed to justify its reading of a presumptive penalty into section 190.5 when thorough consideration of the ordinary meaning of the statute's language and available indicia of the electorate's intent leaves the statute susceptible to two reasonable interpretations. In addition, it contravened the dictates of the principle of leniency by declining to construe the statute fairly as providing discretion between two equivalent choices.

First, the *Guinn* court's interpretation of section 190.5 should be overturned in light of the statute's inherent ambiguity. Contrary to the *Guinn* court's finding, "the ordinary language and structure" of section 190.5 leaves it open to several reasonable interpretations. The context of

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135. *See, e.g.*, People v. Rizo, 996 P.2d 27, 30 (Cal. 2000) (citing Horwich v. Superior Court, 980 P.2d 927, 930 (Cal. 1999)).

136. People v. Birkett, 980 P.2d 912, 915 (Cal. 1999) (citing People v. Broussard, 856 P.2d 1134, 1136 (Cal. 1993)).

137. *Rizo*, 996 P.2d at 30.

138. *Id.* at 30 (quoting *Birkett*, 980 P.2d at 923).

139. Robert L. v. Superior Court, 69 P.3d 951, 957 (Cal. 2003) (quoting Taxpayers to Limit Campaign Spending v. Fair Political Practices Comm'n, 799 P.2d 1220, 1232 n.10 (Cal. 1990)).

140. *Rizo*, 996 P.2d at 30 (quoting People v. Davis, 633 P.2d 186, 193 (Cal. 1981)).

"shall" does not definitively settle LWOP as the presumptive penalty for adolescents convicted pursuant to section 190.5. Section 190.5 reads:

> The penalty for a defendant found guilty of murder in the first degree, in any case in which one or more special circumstances . . . has been found to be true . . . who was 16 years of age or older and under the age of 18 years at the time of the commission of the crime, *shall* be confinement in the state prison for life without the possibility of parole *or*, at the discretion of the court, 25 years to life.[141]

Here, as the *Guinn* court neglected to recognize, the decidedness of the word "shall" is qualified by the word "or." Given the meaning of the conjunction "or," and that the court's sole reason for finding the meaning of the statute unambiguous based on section 190.5's structure—the context of "shall"—is insufficient, the language of section 190.5 far from necessitates the *Guinn* court's interpretation.

The inclusion of "or" determines section 190.5's ambiguity, as it leaves section 190.5 open to two reasonable interpretations. "Or" is defined as a conjunction that introduces "an alternative."[142] One plausible reading of the statute is that "shall" could indicate a preference for the penalty of LWOP if "or" is understood as introducing the lesser alternative of twenty-five years to life, but there is nothing in the statute's language that mandates this reading. Section 190.5 can also legitimately be interpreted as providing courts with the discretion to choose equally between two alternative sentences. Under such an interpretation, the word "shall" would indicate that the courts' discretion is limited to choosing between sentencing an adolescent to spend the duration of his or her life in prison, and twenty-five years to life. It would not signify a preference for LWOP but rather that courts are not permitted to choose from numerous indeterminate sentences in punishing adolescents convicted of special circumstance first-degree murder. Given the innate ambiguity of section 190.5's language, the *Guinn* court's interpretation is inadequate.

Furthermore, the "structure"[143] of section 190.5 equally fails to require the *Guinn* court's interpretation. Indeed, later in its decision, the *Guinn* court recognized the combination of "shall" and "or" elsewhere in California's statutory scheme to "provide[] for an equal choice between two penalties."[144] The court found that section 190.05 of the California Penal Code, which provides the penalty for defendants found guilty of

141. CAL. PENAL CODE § 190.5(b) (West 2009) (emphases added).
142. WEBSTER'S NEW WORLD DICTIONARY AND THESAURUS 448 (2d ed. 2002).
143. People v. Guinn, 33 Cal. Rptr. 2d 791, 797 (Ct. App. 1994).
144. *Id.* at 799.

second-degree murder who have served a past prison term for murder, "*shall* be confinement in the state prison for a term of life without the possibility of parole *or* confinement in the state prison for a term of 15 years to life,"[145] to allow sentencers to opt between "two equal choices."[146] Thus, the context of the word "shall" in section 190.05 did not make it appear mandatory to the *Guinn* court. Instructively, the contexts of "shall" in sections 190.5 and 190.05 differ only slightly; section 190.5 contains the phrase "at the discretion of the court" between the words "shall" and "or," which section 190.05 lacks. Therefore, if the context of section 190.5 makes "shall" mandatory, it must do so because of this minor difference.

While, as the *Guinn* court implicitly found, "at the discretion of the court" may mean to provide courts with a more limited discretion to sentence adolescents to twenty-five years to life in exceptional circumstances,[147] it by no means entails the *Guinn* court's interpretation of section 190.5. Since section 190.05 requires the penalty for adults convicted pursuant to it to be "specifically . . . decided by a penalty phase jury,"[148] the phrase could simply signify that the *court*, rather than a penalty jury, shall determine the sentence appropriate for any given offender. It need not mean that the court, in a section 190.5 hearing, should do so with a circumscribed discretion absent in a section 190.05 case. Thus, the only variance between the language in sections 190.05 and 190.5 does not automatically render "shall" in the 190.5 context mandatory. It therefore makes section 190.5's language no less ambiguous. Considering the ambiguity of section 190.5's language, and that the *Guinn* court's only proffered explanation for why the structure of section 190.5 requires a presumptive penalty of LWOP fails to render this ambiguity nonexistent, the *Guinn* court's interpretation of section 190.5 should be overturned.

Moreover, there is further reason to overturn the *Guinn* court's construction of section 190.5: the court grossly misinterpreted extrinsic evidence of voters' intent as unequivocally supporting its construction. Assuming, of course, that the court rightly recounted Proposition 115's history based only on information readily available to the electorate, the history of Proposition 115 cannot reinforce the *Guinn* court's interpretation of section 190.5. A proper review of the analysis contained in the official ballot pamphlet also leaves the language of section 190.5 open to several reasonable interpretations. Although Proposition 115 was enacted to make

145. CAL. PENAL CODE § 190.05(a) (emphases added).
146. *See Guinn*, 33 Cal. Rptr. 2d at 799.
147. *Id.* at 797.
148. *Id.* at 799.

adolescents eligible for special circumstance enhancements and LWOP, extrinsic evidence does not unequivocally indicate it was enacted to make *all* adolescents prosecuted according to section 190.5 presumptively subject to LWOP. The June 5, 1990, ballot pamphlet contained the language to amend section 190.5[149] and analysis describing the effects of the proposed initiative. It detailed that the proposition would "increase[ the] penalty for minors convicted of first degree murder to life imprisonment without parole"[150] and stated, "This measure . . . [*a*]*llow*s minors who are 16 or 17 years of age at the time of the crime and convicted of first-degree murder with special circumstances to be punished by life imprisonment without the possibility of parole."[151] If the proposition had not included the language to be amended to section 190.5, this analysis might have solely supported the *Guinn* court's reading of section 190.5. That the analysis explained Proposition 115 as increasing the penalty to LWOP and excluded any mention that adolescents could be sentenced to twenty-five years to life, as well, might have been decisive. Yet, since the ballot pamphlet clearly communicated the court would have discretion between two sentences—LWOP and twenty-five years to life—it does not conclusively prove the electorate intended to make adolescents presumptively subject to LWOP.

Voters could have reasonably interpreted the pamphlet's explanation that the proposition *allowed* adolescents to be sentenced to LWOP to mean merely that the amendment *permitted*, but by no means required, sixteen- and seventeen-year-olds to be sentenced to LWOP instead of the lesser indeterminate sentence available to them. It could have enacted the proposition with the mere intent to make LWOP a viable punishment for adolescents. Therefore, since neither the ordinary meaning and structure of section 190.5, nor indicia of electorate's intent, unequivocally establish that section 190.5 requires a presumptive penalty of LWOP, the *Guinn* court's interpretation should be overturned as groundless.

### B. THE PRINCIPLE OF LENIENCY'S SOLUTION FOR SECTION 190.5'S AMBIGUITY

Considering section 190.5's ambiguity, the statute should be interpreted as the principle of leniency dictates: to provide California courts with an equal choice between two sentences. The California Supreme Court has held that when a statute remains susceptible to two reasonable

149. *See* SEC'Y OF STATE OF CAL., CALIFORNIA BALLOT PAMPHLET: PRIMARY ELECTION JUNE 5, 1990, at 67 (1990).

150. *Id.* at 32.

151. *Id.* (emphasis added and omitted).

interpretations after review of its language and history, the "construction which is more favorable to the offender"[152] should be adopted. In *People v. Davis*, the California Supreme Court determined that LWOP for a sixteen-year-old convicted of rape and first-degree murder prior to the enactment of section 190.5 was not legally authorized. It reasoned that the "relevant statutory provisions [at the time were] equivocal."[153] It thus interpreted former California Penal Code section 190.1 as failing to increase "the maximum penalty that could lawfully be inflicted on minors"[154] instead of construing it to apply to cases where adolescents were tried as adults.[155] Since the statute was "unclear in its effect on the penalty applicable to minors," the court resolved the ambiguity in the adolescent's favor. It found no authority for sentencing him to LWOP. Similarly here, where section 190.5 does not clearly provide the presumptive penalty of LWOP, it should not be construed as authority permitting the sentencing of most adolescents convicted of special circumstance first-degree murder to die behind bars; rather, section 190.5 should be construed in favor of adolescent defendants. California courts should ultimately find section 190.5 to offer an equal choice between LWOP and twenty-five years to life.

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This part has exposed the *Guinn* court's interpretation of section 190.5 as grounded in neither fact nor long-standing principles of statutory construction. It has also demonstrated how section 190.5 should be rightly interpreted to provide for an equal choice between LWOP and twenty-five years to life. Such an interpretation is necessary for courts to sentence adolescents subject to section 190.5 according to mitigation standards enriched by modern science's depiction of adolescent individuals, independent of their crimes. Part IV will flesh out the ways in which science can inform the mitigation criteria integral to the California statutory scheme. By providing cutting-edge substance to currently valued mitigation factors, such an interdisciplinary approach to section 190.5 sentencing would permit courts to consider adolescents' cognitive, psychosocial, or biophysical immaturity, and consequently distinguish their character and the circumstances in which they commit their crimes from those of adults

152. People v. Davis, 633 P.2d 186, 193 (Cal. 1981) (quoting *In re* Tartar, 339 P.2d 553, 556 (Cal. 1959)).

153. *Id.* at 187–88, 193.

154. *Id.* at 196.

155. *See id.*

within the current legal regime. It would empower courts to immediately recognize adolescents' diminished culpability—a limited culpability that should often preclude courts from sentencing incompletely developed adolescents to spend the rest of their lives incarcerated.

## IV. THE MITIGATING CHARACTER AND CIRCUMSTANCES OF ADOLESCENTS AND THEIR CRIMES

While modern science may adequately explain adolescents' and adults' incontrovertibly different relationships to risk taking by tested variances in psychosocial judgment and brain activity and structure, it cannot precisely gauge the moral culpability of those subject to section 190.5.[156] Still, it can meaningfully inform California courts' sentencing by providing the psychological and scientific contexts necessary to find currently valued mitigation factors, mandatorily weighed by courts during section 190.5 sentencing hearings, true of either the adolescents who commit special circumstance first-degree murder or of the circumstances in which they commit their crimes.

Adolescent murderers tried in the traditional juvenile justice system were presumed to be significantly less blameworthy for their crimes than adults.[157] Yet the adult criminal justice system in which special circumstance adolescent murderers are tried and convicted fails to use the youthfulness of adolescents as an indicator of their level of culpability. In this system, the culpability of adolescents and adults alike is instead "mitigated when a harmful act is sufficiently blameworthy to meet the minimum threshold of criminal responsibility, but the actor's capacity or circumstances are compromised . . . sufficiently to warrant less punishment than the typical offender."[158] During sentencing, mitigation factors related to defendants' decisionmaking capacity and the external circumstances of their crimes are considered to license lesser punishments.[159] If limited factors in aggravation are true of adolescent defendants' cases, mitigation factors, informed by modern science's depiction of the adolescent, should preclude courts from sentencing adolescents to spend the duration of their lives incarcerated in adult prisons.

Although section 190.5 does not provide explicit guidelines for the court's exercise of discretion, the California Court of Appeal ruled that

156. *See* Brief for the AMA, *supra* note 19, at 3.
157. *See* Scott & Steinberg, *supra* note 12, at 800.
158. *Id.* at 827.
159. *See id.* at 827–28.

California courts should consider traditional mitigating factors in section 190.5 sentencing determinations. It held that since section 190.5 is "placed with other special circumstance provisions in a distinct statutory scheme—which . . . contains provisions relating to mitigating circumstances," the factors included in section 190.3 of the California Penal Code should guide the court's discretion.[160] In addition, because such "factors allow the court to take into account any mitigating circumstance which extenuates the gravity of the crime," it held that those listed under the California Rule of Court 4.423 ("Rule 4.423") should influence courts' discretion as well.[161] The California Court of Appeal has further implied that California courts should weigh these customary factors in mitigation during section 190.5 sentencing determinations, as they do in section 190.3 adjudications.[162]

160. Such mitigation factors may include the "absence of criminal activity by the defendant which involved the use or attempted use of force or violence"; the lack of a "prior felony conviction"; that "the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act"; that "the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct"; that the "defendant acted under extreme duress or under the substantial domination of another person"; that "at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the affects of intoxication"; or that "the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor." CAL. PENAL CODE § 190.3 (West 2009).

161. People v. Guinn, 33 Cal. Rptr. 2d 791, 797–98 (Ct. App. 1994). The court specifically ruled that California Rule of Court 423 should guide courts' discretion. *Id.* As of January 1, 2002, Rule 423 was renumbered as Rule 4.423. CAL. R. CT. 4.423 (West 2009). Other mitigation factors properly considered by courts during section 190.5 sentencing hearings include that "[t]he defendant was a passive participant or played a minor role in the crime"; that a "victim was an initiator of, willing participant in, or aggressor or provoker of the incident"; that the defendant committed the crime "because of an unusual circumstance, such as great provocation"; that "[t]he defendant participated in the crime under circumstances of coercion or duress, or the criminal conduct was partially excusable for some other reason not amounting to a defense"; that "[t]he defendant, with no apparent predisposition to do so, was induced by others to participate in the crime"; that "[t]he defendant exercised caution to avoid harm to persons or damage to property, or the amounts of money or property taken were deliberately small, or no harm was done or threatened against the victim"; that "[t]he defendant believed that he or she had a claim or right to the property taken, or for other reasons mistakenly believed that the conduct was legal"; that "[t]he defendant was motivated by a desire to provide necessities for his or her family or self"; that "[t]he defendant suffered from repeated or continuous physical, sexual, or psychological abuse inflicted by the victim of the crime, and the victim of the crime, who inflicted the abuse, was the defendant's spouse, intimate cohabitant, or parent of the defendant's child"; that "[t]he defendant has no prior record, or has an insignificant record of criminal conduct, considering the recency and frequency of prior crimes"; that "[t]he defendant was suffering from a mental or physical condition that significantly reduced culpability for the crime"; that "[t]he defendant voluntarily acknowledged wrongdoing before arrest or at an early stage of the criminal process"; that "[t]he defendant is ineligible for probation and but for that ineligibility would have been granted probation"; that "[t]he defendant made restitution to the victim"; or that "[t]he defendant's prior performance on probation or parole was satisfactory." *Id.*

162. *See* People v. Secrease, No. A097806, 2002 WL 31769077, at *1–3 (Cal. Ct. App. Dec. 11, 2002).

Pursuant to the latter section, although a single factor in aggravation will generally support the imposition of an upper term,[163] "the ultimate question for the sentencer is simply whether the aggravating circumstances . . . so substantially outweigh those in mitigation as to call for the penalty of death, rather than life without parole."[164] By analogy, in exercising its discretion in a section 190.5 sentencing hearing, the court's decisive question is whether the aggravating circumstances radically outweigh those in mitigation to necessitate the imposition of LWOP rather than a sentence of twenty-five years to life.

The scientifically recognized differences between adolescents and adults cannot provide a complete excuse for adolescents' criminal behavior within this legal framework.[165] Yet, since the rationale behind *Guinn*'s presumptive sentence of LWOP is unsupported by established principles of statutory construction, California courts may acknowledge the lesser culpability of adolescents made evident by recent scientific findings and decline to normally sentence sixteen- and seventeen-year-olds to LWOP. Courts should recognize that, according to standards integral to the current legal structure, absent several factors in aggravation, choosing the lesser sentence of twenty-five years to life is often warranted.

Having explained the legal scheme in which modern science compels California courts to assess adolescents as distinct from adults, the following sections delineate precisely how psychology and neuroscience provide substance to California's mitigation standards. These sections examine the relevance of scientific findings to understanding that adolescents may often partake in criminal activity under duress or the influence of others and decide to participate in crime while suffering from a mental condition that significantly reduces their culpability. They further explore how recent scientific discoveries are relevant to considering adolescent crimes as reflecting a transient character particularly amenable to rehabilitation.

### A. THE UNAPPARENT DURESS EXPERIENCED DURING ADOLESCENT CRIMES

First, the potentially unique effects of peers and threats on the adolescent psyche can inform California courts when they exercise their

163. *Id.* at *3.

164. People v. Anderson, 22 P.3d 347, 378 (Cal. 2001) (citing People v. Brown, 726 P.2d 516, 532 n.13 (Cal. 1985), *rev'd on other grounds*, California v. Brown, 479 U.S. 538 (1987)).

165. *See* Elizabeth S. Scott, *Criminal Responsibility in Adolescence: Lessons from Developmental Psychology*, *in* YOUTH ON TRIAL, *supra* note 85, at 291, 307.

discretion pursuant to section 190.5. Section 190.3(g) compels courts during section 190.5 sentencing hearings to weigh whether the defendant acted under not only extreme duress,[166] but also "less than 'extreme'" duress,[167] and to similarly consider whether the defendant was not only substantially dominated by another person,[168] but also less than substantially influenced.[169] Further, Rule 4.423(a)(5) allows courts to contemplate whether defendants were induced by others to participate in crimes they had no apparent predisposition to commit.[170] Since recent scientific explanations of the cognitive, psychosocial, and biophysical differences between adolescents and adults demonstrate that adolescents often decide to commit crimes under coercive circumstances, modern science can enrich the mitigation factors in section 190.3(g) and Rule 4.423(a)(5).

Science explains that the psyche of adolescents who decide to commit crimes differs fundamentally from that of adults in four ways relevant to whether an adolescent was coerced to commit a crime. First, since adolescents are more susceptible to peer pressure than adults,[171] the adolescent convicted pursuant to section 190.5 for a crime committed in a group of peers was more likely dominated and induced by an antisocial peer to participate.[172] Recent psychology explains that adolescents' participation in group crimes is more likely the result of their having succumbed to peer influence than of their having formed a premeditated intent to commit a crime.[173] It elucidates that adolescents may be more inclined than adults both to associate in antisocial peer groups domineered by particularly antisocial leaders[174] and to associate in such groups only for succinct periods, having been granted membership merely to partake in the

166. CAL. PENAL CODE § 190.3(g) (West 2009).

167. People v. Arias, 913 P.2d 980, 1042 (Cal. 1996) (explaining that "the catch-all language of section 190.3, factor (k) . . . allows consideration of duress that is less than 'extreme'").

168. CAL. PENAL CODE § 190.3(g).

169. *Arias*, 913 P.2d at 1042 (explaining that "factor (k) allows consideration of . . . domination that is less than 'substantial'").

170. CAL. R. CT. 4.423(a)(5) (West 2009).

171. *See* Berndt, *supra* note 73, at 610–11. Admittedly, the only fair conclusion that can be made based on Berndt's study is that adolescents are more susceptible to *hypothetical* peer pressure. Still, as the Supreme Court agreed in *Roper v. Simmons* when it found that adolescents were generally more "susceptible to negative influences and . . . peer pressure," Roper v. Simmons, 543 U.S. 551, 569 (2005), "it stands to reason that age differences in susceptibility to *real* pressure will be even more considerable," Steinberg & Scott, *supra* note 17, at 1014.

172. *See* Steinberg & Scott, *supra* note 17, at 1014.

173. *Id.*

174. *See* Moffitt, *supra* note 28, at 687.

commitment of offenses.[175] Further, because adolescents may deficiently assess risks, by virtue of either their egocentric outlook[176] or the inordinate value they assign to the acceptance of their peers,[177] it most likely takes less of a threat to substantially influence an adolescent's decision to partake in a crime.[178] Additionally, adolescents may feel more pressured to participate in criminal activity due to their fear of peer rejection. They may choose to commit a crime, modeling themselves after antisocial peers whose criminal behavior secures peer approval.[179] Lastly, the same level of compulsion "may have a more disruptive impact on [adolescents'] decision making than on that of adults."[180] Adolescents' impulsivity,[181] intensified by the stress of newly associating with peers and the circumstances of crime,[182] their underdeveloped future orientation,[183] and, generally, their irresponsibility, immature perspective, and intemperance[184] may make them more susceptible to pressure. Consequently, during sentencing hearings, courts cannot fairly impute adult mental states to adolescents when they commit adult-like crimes based merely on a consideration of how an adult would react to the external circumstances of the crime. California courts should instead acknowledge that adolescents may have been coerced to act when an adult would not have been.

The unique and universal psychological attributes of adolescents suggest that the culpability of nearly *all* adolescents adjudicated according to section 190.5 should be mitigated. Science instructs that most section 190.5 defendants were influenced to commit their crimes by their peers who were either present when they decided to act or approved of the crimes in their wake. In cases like Ray J.'s, where defendants decide to participate in crimes and feel compelled to do so by antisocial peers, courts should find that the adolescent defendants were likely influenced to commit their crimes. Ray J. was not only most likely coerced by an antisocial peer to commit the robbery; but in addition, his potential cognitive inability to fully comprehend the consequences of his decision and his already deficient judgment were probably aggravated by the stress of the group crime. Further, even in cases in which adolescents decide to commit crimes

175. *See id.* at 688.
176. Arnett, *supra* note 30, at 348–49.
177. *See* Scott et al., *supra* note 17, at 230.
178. *See* Steinberg & Scott, *supra* note 17, at 1014.
179. *See id.* at 1012.
180. *Id.* at 1014.
181. *See* Steinberg & Cauffman, *supra* note 57, at 251.
182. *See* Furby & Beyth-Marom, *supra* note 40, at 22.
183. *See* Scott et al., *supra* note 17, at 231.
184. Cauffman & Steinberg, *supra* note 41, at 759.

independently, courts should find that they were plausibly indirectly influenced to act. They likely decided to commit a crime, modeling themselves after, or trying to appease, an antisocial peer. Courts should thus find that the mitigation factors in section 190.3(g) and Rule 4.423(a)(5) apply to section 190.5 cases. As a result, courts should conclude that the culpability of most adolescents who decided to commit crimes resulting in section 190.5 convictions is mitigated.

### B. ADOLESCENTS' MITIGATING MENTAL STATES

The deficient decisionmaking ability of adolescents can also supplement mitigation factors weighed during section 190.5 sentencing hearings. Rule 4.423(b)(2) and section 190.3(k) allow courts to consider whether "[t]he defendant was suffering from a mental or physical condition that significantly reduced culpability for the crime"[185] and to find the crimes of those with mental or physical conditions mitigated, even if their conditions were not as extreme as those of a mentally challenged or psychologically infirm individual.[186] Since California courts are required to take the defendant's mental and physical conditions into account as mitigating factors when exercising discretion pursuant to section 190.5, science instructs they cannot justifiably view adolescents as completely culpable for their adult crimes and regularly sentence them to LWOP.

Psychology and neuroscience detail the adolescent as suffering from poor behavior-control abilities, most likely caused by a deficient decisionmaking capability rooted in the adolescent's immature brain activity and structure. They portray the adolescent's deficient behavior-control ability as organic, "no more subject to the volitional control of the youth than is the poor judgment of adults who are mentally retarded."[187] They explain that although adolescents may understand the immediate, adverse consequences of their choices and the immorality of the crimes that result,[188] the fact that adolescents commit adult-like crime does not ordinarily connote that they did so after weighing the costs and benefits of acting. Adolescents may be capable of sound reasoning, yet science suggests they fail to make well-reasoned decisions as a result of any of the following attributes: their skewed value system;[189] faulty judgment

185. CAL. R. CT. 4.423(b)(2) (West 2009).

186. *See* People v. Arias, 913 P.2d 980, 1042 (Cal. 1996) (noting that section 190.3, factor (k) "allows consideration of any mental or emotional condition, even if it is not 'extreme'").

187. Steinberg & Scott, *supra* note 17, at 1014.

188. *See* Scott & Steinberg, *supra* note 12, at 830.

189. *See* Cauffman & Steinberg, *supra* note 41, at 744.

conditioned by their general impulsivity,[190] substantiated by neuroscience's observation of adolescents' underdeveloped frontal lobes and more active amygdalae;[191] a weakened temporal perspective;[192] irresponsibility, immature perspective, and intemperance;[193] or greater susceptibility to peer influence.[194] These unique psychological factors undermine adolescents' decisionmaking capacity in "predictable, systematic and developmental"[195] ways.[196] These disciplines suggest that the adolescent who chooses to commit a crime resulting in a section 190.5 conviction does not do so after carefully weighing the consequences of doing so.

Modern science thus instructs that adolescents' culpability for the commission of crimes subject to section 190.5 be categorically mitigated by impaired decisionmaking capacity. Science explains that when section 190.5 defendants decided to commit their crimes, they most likely did not go through the full deliberative process an adult would have in their shoes. Like most defendants subject to section 190.5, Ray J. most likely decided to participate in his crime, despite his commitment to not involve himself in street life, as a result of his concern that his peers would reject him if he declined to act—a negative consequence to which he likely attached great weight, but one that an adult would quickly dismiss as insignificant given the other costs of participating. Additionally, Ray J. might not have been able to ignore the "adventure" inherent in criminal activity. This immediate benefit, along with appeasing his peers, might have weighed more heavily in his deliberative process than the abstract, remote possibility of being caught by the police. The last thing he likely considered was the possibility of incarceration for life pursuant to section 190.5. Although adults in the shoes of most section 190.5 adolescents would be able to think of ways to extricate themselves from similar situations, adolescents charged with special circumstance first-degree murder are most likely unable to because they lack experience asserting themselves, are compelled to make hasty decisions to commit their crimes in stressful environments, or are unable to

190. Steinberg & Cauffman, *supra* note 57, at 251.

191. *See* GOLDBERG, *supra* note 99, at 144.

192. Scott et al., *supra* note 17, at 231.

193. Cauffman & Steinberg, *supra* note 41, at 759.

194. Berndt, *supra* note 73, at 610–11.

195. Scott & Steinberg, *supra* note 12, at 830.

196. This assertion must be tentative. More empirical research is necessary to fully understand the degree and breadth of influence that adolescents' psychological attributes have on decisionmaking. Scott & Grisso, *supra* note 11, at 164 n.105. Yet, since these experts' conclusions find tremendous support in neuroscience's discovery of adolescents' immature brains, it is nonetheless highly probable that developmental attributes of the adolescent affect adolescents' decisionmaking capacity in considerable ways.

project themselves into the future.[197] Since modern science's conception of typical adolescents is one in which age-specific traits determine their deficient mental condition, California courts can recognize the diminished culpability of almost all adolescent special circumstance murderers according to Rule 4.423(b)(2) and section 190.3(k).

### C. THE ADOLESCENT AND REHABILITATION

That adolescent defendants' crimes are usually not indicative of permanently corrupt characters, but ones uniquely susceptible to rehabilitation, can also provide substance to mitigating factors for section 190.5 crimes. Section 190.3(k) requires courts to consider "[a]ny . . . circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime"[198] during section 190.5 sentencing deliberations. Case law and characteristics of defendants implicitly measured by mitigation factors in section 190.3 and Rule 4.423 imply that adolescents' unique potential for rehabilitation is proper material for courts to consider when exercising discretion pursuant to section 190.5.

The California Supreme Court and the Ninth Circuit have indicated that a defendant's potential for rehabilitation may be considered under section 190.3(k). In *People v. Easley*, the California Supreme Court interpreted section 190.3(k) as permitting consideration not merely of the circumstances of the crime, but also of any factor of the defendant's character, as mitigating. It did so in order to make section 190.3 consistent with constitutional requirements announced by the U.S. Supreme Court in *Lockett v. Ohio*.[199] Additionally, in *Smith v. McCormick*, the Ninth Circuit implied that a defendant's potential for rehabilitation can be appropriately considered as mitigating evidence. It specifically held that in a capital case, compliance with *Lockett* requires that evidence about a defendant's rehabilitation in prison not be excluded from consideration.[200] Considering that the U.S. Constitution mandates that evidence of a defendant's character—specifically, evidence of a defendant's rehabilitation—be weighed under section 190.3(k) in capital cases, surely in noncapital adjudications of sixteen- and seventeen-year-olds, evidence of their general potential for rehabilitation can be legitimately considered.

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197. *See* Steinberg & Scott, *supra* note 17, at 1013 (providing an example adapted from Scott & Grisso, *supra* note 11, at 165–66).

198. CAL. PENAL CODE § 190.3(k) (West 2009).

199. *See* People v. Easley, 671 P.2d 813, 826 n.10 (Cal. 1983) (citing Lockett v. Ohio, 438 U.S. 586, 604 (1978)).

200. Smith v. McCormick, 914 F.2d 1153, 1165 (9th Cir. 1990).

Moreover, that adolescents' rehabilitation-prone, transitory character is mitigating evidence properly considered under section 190.3(k) is evidenced by other mitigating factors partially measured in section 190.3 and Rule 4.423. Factors in section 190.3(a) through (d), section 190.3(g), Rule 4.423(a)(3) through (a)(5), and Rule 4.423(b)(1) and (b)(2) can be understood as mitigating in part because they demonstrate that a defendant's character is not irreversibly depraved. When courts contemplate a defendant's minimal criminal history, a defendant's mental state, that a defendant acted under duress or the influence of others, or that a defendant was provoked as mitigating, courts recognize in part that the severity of a defendant's crime does not reflect a severely corrupt character. Evidence that science provides of adolescents' temporarily risk-prone constitutions similarly demonstrates adolescent crimes fail to reflect permanently corrupt characters. Thus, California's statutory regime indicates such evidence may be properly recognized as mitigating adolescents' culpability under section 190.3(k).

Science provides significant evidence that adolescent defendants' crimes are out of line with their permanent characters in a way unique to the adolescent experience. Science provides an account of the adolescent as abnormally disposed to risk taking and criminal activity.[201] It explains that, although in a few cases such deviance may continue into adulthood, for most adolescents, criminal activity is an impermanent, developmental age-specific behavior.[202] Studies suggest that nearly all juvenile delinquents abandon criminal activity by their late twenties.[203] Cognitive science, psychology, and neuroscience provide a rich account of this phenomenon based on personal attributes individuals exclusively express during late adolescence. These disciplines explain adolescents' comparatively high degree of risk taking by either their skewed value systems[204] or their tested impulsivity[205] and limited temporal perspective[206]—characteristics that will most likely disappear as the adolescent biophysically matures into adulthood. They explain, for example, that the standard adolescent criminal does not persist in antisocial behavior as an adult because "the developmentally linked values and preferences that drive his or her criminal choices as a teenager," be they an undue preference for peer

201. Spear, *supra* note 23, at 421. *See also* Farrington, *supra* note 26, at 214–15 (explaining that "self-reports also show a peak in the prevalence of offending at about fifteen to eighteen").

202. *See* Spear, *supra* note 23, at 421.

203. *See, e.g.*, Moffitt, *supra* note 28, at 675.

204. *See* Cauffman & Steinberg, *supra* note 41, at 744.

205. Steinberg & Cauffman, *supra* note 57, at 251.

206. *See* Scott et al., *supra* note 17, at 231.

acceptance or inappropriate dismissal of the real possibility of being apprehended, "change in predictable ways as the youth matures."[207] Therefore, "making predictions about the development of relatively more permanent and enduring traits on the basis of patterns of risky behavior observed in adolescence is an uncertain business."[208] At most, science can merely provide evidence that the crime of an adolescent subject to section 190.5 reflected an ephemeral, risk-prone character. Contemporary science suggests that most adolescents' crimes, punished according to section 190.5, fail to reflect characters that could justify sentencing them to LWOP, but rather reflect ones uniquely susceptible to rehabilitation in adulthood. Consequently, California courts should find such adolescents' culpability mitigated according to section 190.3(k).

### D. THE EQUITABLE SENTENCE OF TWENTY-FIVE YEARS TO LIFE

Since the rationale behind *Guinn*'s presumptive LWOP sentence is not grounded in principles of statutory construction applicable to initiative interpretation, California courts may consider contemporary science's conception of the adolescent. When exercising what should be their equal choice between the two sentences provided in section 190.5, courts should normally sentence sixteen- and seventeen-year-olds to twenty-five years to life—a sentence that both punishes adolescents proportionately for their crimes and provides them the opportunity to demonstrate through rehabilitation their ability to function within the law.

Given that modern science provides the constructs for understanding that many otherwise unapparent mitigation factors apply to adolescent defendants and the circumstances in which they commit their crimes, courts must find several other factors in aggravation to justifiably conclude they substantially outweigh those in mitigation and sentence adolescents to prison for the rest of their lives.[209] Although Ray J. did not personally kill

207. Steinberg & Scott, *supra* note 17, at 1015.

208. *Id.* at 1014.

209. The aggravation factor in California Rule of Court 4.421 that the "crime involved great violence" will apply to all defendants guilty of first-degree murder. CAL. R. CT. 4.421 (West 2009). One factor in aggravation may warrant the imposition of an upper term. If this general principle applied in section 190.5 sentencing determinations, the mere violent nature of an adolescent's crime would mandate the imposition of LWOP, and the discretion expressly provided to California courts under section 190.5 would thereby be undermined. Therefore, in deciding between a sentence of LWOP and a sentence of twenty-five years to life, this principle cannot apply. Courts must find true more than this factor in aggravation of adolescent defendants' cases in order to sentence them to LWOP.

Section 190.3 aggravation factors include that the defendant participated in criminal activity in the past involving "use or attempted use of force or violence or the express or implied threat" thereof and "prior felony conviction." CAL. PENAL CODE § 190.3(b), (c) (West 2009). Rule 4.421 aggravation

the victim of his crime, science does not instruct that he is abnormally less culpable for his special circumstance first-degree murder than adults who similarly commit crimes. Science rather explains that all adolescents subject to section 190.5 are less culpable than adults because of age-specific characteristics. It instructs that adolescents most likely act under the influence of others when deciding to commit their crimes, and suffer from a deficient decisionmaking capacity not apparent in most adults, rendering them subject to section 190.5 convictions. According to mitigation standards long recognized as justifying leniency in California's statutory scheme and mandatorily employed in section 190.5 sentencing hearings, science consequently instructs that adolescents' criminal culpability be mitigated. Absent the presence of several factors in aggravation, courts must therefore find these characteristics of adolescents to often warrant the lesser sentence of twenty-five years to life.

## V. CONCLUSION

This Note draws upon recent studies in developmental psychology and neuroscience to inform the policy debate surrounding the sentencing of adolescents for their adult-like crimes. It endeavors to distinguish itself from existing scholarship by arguing that California penal policy need not separate the juvenile from adult criminal courts to justly sentence adolescents convicted pursuant to section 190.5. It explains that mitigation standards currently valued in the adult criminal justice system can absorb modern science's conception of the adolescent to correctly determine adolescents' culpability for their crimes. Courts need not wait for the legislature to take action; they can maintain California's national leadership in juvenile justice by immediately responding to the message of contemporary science.

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factors include that "[t]he defendant was armed or used a weapon at the time of the commission of the crime"; that "[t]he victim was particularly vulnerable"; that "[t]he defendant induced others to participate in the commission of the crime or occupied a position of leadership or dominance of other participants in its commission"; that "[t]he defendant induced a minor to commit or assist in the commission of the crime"; that "[t]he defendant was convicted of other crimes for which consecutive sentences could have been imposed but for which concurrent sentences are being imposed"; that the crime "indicates planning, sophistication, or professionalism"; that "[t]he crime involved an attempted or actual taking or damage of great monetary value"; that "[t]he crime involved a large quantity of contraband"; that "[t]he defendant took advantage of a position of trust or confidence to commit the offense"; that "[t]he crime constitutes a hate crime"; an increasing seriousness of juvenile and adult criminal history; that "[t]he defendant was on probation or parole when the crime was committed"; and that "[t]he defendant's prior performance on probation or parole was unsatisfactory." CAL. R. CT. 4.421.