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## **Introductory Note to the United States Supreme Court: Graham v. Florida & the Federal Court of Australia: Habib v. Australia**

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INTRODUCTORY NOTE TO THE UNITED STATES SUPREME COURT: GRAHAM V. FLORIDA & THE  
FEDERAL COURT OF AUSTRALIA: HABIB V. AUSTRALIA  
BY CHRIS JENKS\*  
[February 25 & May 17, 2010]  
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## I. Introduction

The U.S. Supreme Court decision in *Graham*<sup>1</sup> considers whether the Cruel and Unusual Punishments Clause of the U.S. Constitution's Eighth Amendment permits a juvenile offender to be sentenced to life in prison without parole for non-homicide crimes. In almost *non sequitor* contrast, the Federal Court of Australia decision in *Habib*<sup>2</sup> considers whether a tort suit by a former Guantánamo Bay detainee against Commonwealth officials for alleged malfeasance may proceed.

Facially, the cases have few if any similarities—one is a U.S. criminal case, the other an Australian civil case. Indeed it is one aspect of their disparate nature, starkly contrasting judicial attitudes toward the role of “foreign law,” which warrants contemporaneous consideration of both. The U.S. Supreme Court’s attitude towards foreign law is, to be polite, mixed, while the Australian Court not only considers but relies on a wide range of U.S. and United Kingdom cases. Juxtaposed, the two cases offer an interesting view of not only the obvious differences between inward- and outward-looking judicial philosophies, but perhaps a broader sense of how the two legal systems view their role in and contribution to the international rule of law.

## II. U.S. Supreme Court’s Analysis of the Role of Foreign Law in *Graham*

The *Graham* decision is the latest addition to the debate within the Court<sup>3</sup> and among the U.S. legal community<sup>4</sup> on the role of foreign law in American jurisprudence. The Justices were asked to determine whether a teenager previously convicted of violent crimes may be sentenced to life imprisonment without the possibility of parole after subsequent convictions for additional violent but non-homicide offenses. To this end, the Court had to interpret the U.S. Constitution in the context of community norms, revisiting the long-standing debate between original intent and evolving standards. From that debate, corollary positions on the role of international law emerge.

Justice Kennedy issued the opinion and concluded that depriving Graham, a child in the eyes of the law when he committed the offenses, of a meaningful opportunity to “later demonstrate that he is fit to rejoin society” was unconstitutional. Only after reaching this conclusion did Justice Kennedy refer to the standards currently prevailing in the international community, and even then merely to support the conclusion already reached. The Court reminded practitioners that while international views toward a particular punishment are not dispositive, they remain relevant. The Court then noted the “global consensus against the sentencing practice in question” and that the United States “is the only Nation that imposes life without parole sentences on juvenile nonhomicide offenders.”

Contrary to “[t]he debate between petitioner’s and respondent’s *amici* over whether there is a binding *jus cogens* norm against this sentencing practice is” which the majority labeled “of no import,” the Court focused on the issue of whether the punishment is cruel and unusual. In answering that inquiry, the Court noted “the overwhelming weight of international opinion” against the punishment, concluding that this background provided “respect[] and significant confirmation for our conclusions.” Justice Thomas, in his dissenting opinion, “confine[d] to a footnote the Court’s discussion of foreign laws and sentencing practices because past opinions explain at length why such factors are irrelevant to the meaning of our Constitution or the Court’s discernment of any longstanding tradition in *this* Nation.”

Interestingly, the Justices, depending on their views regarding the relevance of international law, each perceive the opposing Justices as intellectually hubristic. Justice Scalia has labeled the idea of U.S. judicial forays into determining American societal standards using foreign law as “somewhat arrogant.”<sup>5</sup> Justice Ginsburg previously implied that same arrogance, but in *not* considering foreign law: “I’ve been asked so many times by jurists abroad: ‘We in our country are inspired by . . . the U.S. Supreme Court, and we refer to your decisions, but you never refer to ours. Don’t we have anything to contribute?’”<sup>6</sup>

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### III. Federal Court of Australia's Analysis of the Role of Foreign Law in *Habib*

In *Habib*, the Australian Federal Court considered the viability of an Australian citizen's civil suit alleging wrongdoing by Australian officials who purportedly were "aiding, abetting and counseling his torture and other inhumane treatment by foreign officials" while he was detained in Pakistan, Egypt, Afghanistan, and Guantánamo Bay.<sup>7</sup>

The Court first had to determine whether Habib's claims were justiciable under Australia's Act of State doctrine. The Commonwealth claimed that they were not because a legal inquiry would require Australian courts "to determine whether Mr Habib's treatment by foreign agents within the territories of foreign states contravened [Australian] Commonwealth laws . . . ." Habib, however, argued that "his claim [is] one in which an Australian citizen seeks redress from the Australian government for the alleged acts of Australian officials unlawful under Australian law and in respect of causes of action recognized by Australian law."

The Court, split in its reasoning, ruled that the Act of State doctrine did not preclude Habib's suit. Two justices, on the one hand, held that the doctrine did not apply because of the nature of the alleged human rights violations and the extraterritorial effect of the Australian anti-torture laws. One justice, on the other hand, held that application of the Act of State doctrine would be inconsistent with Australian Constitutional norms.

The Act of State doctrine in Australia differs somewhat from the U.S. doctrine of the same name. The Australian variant is completely based on common law, and, as the Court in *Habib* notes, "[b]eyond the certainty that the doctrine exists [in Australia] there is little clarity as to what constitutes it."

The Australian Court, mindful of the primacy of the Australian Constitution and statutes, took advantage of the nebulous Act of State doctrine and heavily relied on other jurisdictions. Acknowledging its evolutionary connection to Anglo-American jurisprudence in general and the U.S. Act of State doctrine in particular, the Court displayed little concern as to the appropriateness of referring to foreign law. As a result, and slightly ironically given the underlying nature of the claims, the Australian Court relied, at least partially, on American jurisprudence to determine whether Habib's claims of torture at Guantánamo Bay and elsewhere should proceed to trial.

### IV. Conclusion

While the Court in *Habib* demonstrated openness to considering foreign law, particularly Anglo and American common law, the unsettled nature of the Australian Act of State doctrine likely limits the decision's utility to other courts. One area where *Habib* may prove instructional is for other alleged victims of torture. The *Habib* decision suggests that by directing litigation against their own country's nationals, who allegedly played a role in human rights violations, litigants may avoid immunity issues and analogs of the Act of State doctrine which more directly arise when the litigation is directed at foreign officials.

In terms of the use of foreign law, *Graham* does little more than repeat the current status quo that foreign law is considered after the fact, if at all; and even then, to disparaging lament by some.<sup>8</sup> The use of foreign law has recently garnered increased scrutiny and was addressed in both Justices Sotomayor's and nominee Elena Kagan's confirmation hearings.<sup>9</sup> Notably, the debate over the role of foreign law in American jurisprudence dates at least as far back as Chief Justice Marshall.<sup>10</sup> For example, Chief Justice Roberts stated during his confirmation hearing that "[you] can find anything you want" in foreign law and that "looking at foreign law for support is like looking out over a crowd and picking out your friends."<sup>11</sup> Notably, despite reluctance by U.S. courts to cite to other jurisdictions, in 1995 alone, Australian courts cited U.S. decisions 208 times; ten years later there were only seventy-two citations.<sup>12</sup>

### ENDNOTES

1 *Graham v. Florida*, No. 08-7412 (U.S. May 17, 2010).

2 *Habib v. Commonwealth of Australia* [2010] FCAFC 12 (F.C. Austl.).

3 *See Constitutional Relevance of Foreign Court Decisions*, 4

C-SPAN, Jan. 13, 2005, <http://www.c-spanvideo.org/program/185122-1> (providing the conflicting views of Justices Scalia, who derides the relevance of foreign law, and Breyer, who views consideration of that same law as "opening your eyes").

*See, e.g., American Society of International Law, Judicial*

*Application of International Law A Representative Listing of Current Journal Articles* (2006), available at <http://www.asil.org/pdfs/judappintl2006.pdf> (listing two pages of articles).

- 5 *Constitutional Relevance of Foreign Court Decisions*, *supra* note 3.

- 6 Stephen Yeazell, *When and How U.S. Courts Should Cite Foreign Law*, 26 CONST. COMMENT. 59, 60 (2009).

See also Ruth Bader Ginsburg, Assoc. Justice, U.S. Supreme Court, A Decent Respect to the Opinions of [Human]kind: The Value of a Comparative Perspective in Constitutional Adjudication, Speech at the International Academy of Comparative Law, American University (July 30, 2010), available at [http://www.supremecourt.gov/publicinfo/speeches/view\\_speeches.aspx?Filename=sp\\_07\\_30\\_10.html](http://www.supremecourt.gov/publicinfo/speeches/view_speeches.aspx?Filename=sp_07_30_10.html) (detailing her views of the role of international law to interpret U.S. law, including the Constitution). In her remarks, Justice Ginsburg stated that “[t]he U.S. judicial system will be the poorer, I have urged, if we do not both share our experience with, and learn from, legal systems with values and a commitment to democracy similar to our own.”

- 7 Habib specifically alleged that “officers of the Commonwealth committed the torts of misfeasance in public office and intentional but indirect infliction of harm by aiding, abetting and counselling his torture and other inhumane treatment by foreign officials while he was detained in Pakistan, Egypt and Afghanistan and at Guantánamo Bay.” Moreover, he argued that “[i]f officers. . . were found to have aided, abetted or counselled the commission of those offences, the officers would be taken to have committed those offences (s 11.2 of the Criminal Code Act 1995 (Cth)) and thus, Mr Habib alleges, to have acted beyond the scope of their lawful authority.”

- 8 For example, in October 2010, Oklahoma voters will vote on a proposed amendment to the State Constitution which would “make [Oklahoma State] courts rely on federal and state law when deciding cases. It would forbid [state] courts from looking at international law or Sharia law when deciding cases.” Enrolled H.R.J. Res. 1056, 52nd Leg., 2nd Sess. (Okla. 2010), available at <https://www.sos.ok.gov/documents/legislation/52nd/2010/2R/HJ/1056.pdf>.

- 9 *Sotomayor Confirmation Hearings, Day 3*, N.Y. TIMES, Jul. 16, 2009, available at <http://www.nytimes.com/2009/07/15/us/politics/15confirm-text.html?pagewanted=18> (detailing an answer by then Judge Sotomayor to a question from Senator Coburn on the use of foreign law, “foreign law cannot be used as a holding or a precedent, or to bind or to influence the outcome of a legal decision interpreting the Constitution or American law that doesn’t direct you to that law”). In response to a question from Senator Charles Grassley during her confirmation hearing on whether judges should ever look to foreign law for “good ideas,” nominee Kagan replied

that I guess I’m in favor of good ideas coming from wherever you can get them. But I don’t think that foreign law should have independent precedential weight in any but a very, very narrow set of circumstances. So – so I would draw a distinction between looking wherever you can find them for good ideas, for -- just to expand your knowledge of the way in which judges approach legal issues, but – but making that very separate from using foreign law as – as precedent or as independent weight.

*Senators Press Kagan on Military Recruiter Access, Abortion Rights*, PBS NEWS, June 29, 2010, [http://www.pbs.org/news/hour/bb/law/jan-june10/kagan1\\_06-29.html](http://www.pbs.org/news/hour/bb/law/jan-june10/kagan1_06-29.html).

- 10 Adam Liptak, *American Exception U.S. Court is Now Guiding*

*Fewer Nations*, N.Y. TIMES, Sept. 18, 2009, available at <http://www.nytimes.com/2008/09/18/us/18legal.html> (quoting then circuit court judge John Marshall in 1811 as saying, “It has been said that the decisions of British courts, made since the [American] Revolution, are not authority in this country. . . . I admit it – but they are entitled to that respect which is due to the opinions of wise men who have maturely studied the subject they decide.”).

- 11 *Second Day of Hearings on the Nomination of Judge Roberts*, N.Y. TIMES, Sept. 13, 2005, available at [http://www.nytimes.com/2005/09/13/politics/politicsspecial1/13text-roberts.html?\\_r=1&pagewanted=all](http://www.nytimes.com/2005/09/13/politics/politicsspecial1/13text-roberts.html?_r=1&pagewanted=all) (providing the transcript of the hearings on the nomination of Judge John G. Roberts); see also Noah Feldman, *When Judges Make Foreign Policy*, N.Y. TIMES, Sept. 28, 2008 available at <http://www.nytimes.com/2008/09/28/magazine/28law-t.html> (describing aspects of how conservatives and liberals view international law).

- 12 Liptak, *supra* note 10.

(Slip Opinion)

OCTOBER TERM, 2009

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

GRAHAM v. FLORIDA

CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, 1ST DISTRICT

No. 08–7412. Argued November 9, 2009—Decided May 17, 2010

Petitioner Graham was 16 when he committed armed burglary and another crime. Under a plea agreement, the Florida trial court sentenced Graham to probation and withheld adjudication of guilt. Subsequently, the trial court found that Graham had violated the terms of his probation by committing additional crimes. The trial court adjudicated Graham guilty of the earlier charges, revoked his probation, and sentenced him to life in prison for the burglary. Because Florida has abolished its parole system, the life sentence left Graham no possibility of release except executive clemency. He challenged his sentence under the Eighth Amendment’s Cruel and Unusual Punishments Clause, but the State First District Court of Appeal affirmed.

*Held:* The Clause does not permit a juvenile offender to be sentenced to life in prison without parole for a nonhomicide crime. Pp. 7–31.

(a) Embodied in the cruel and unusual punishments ban is the “precept . . . that punishment for crime should be graduated and proportioned to [the] offense.” *Weems v. United States*, 217 U. S. 349, 367. The Court’s cases implementing the proportionality standard fall within two general classifications. In cases of the first type, the Court has considered all the circumstances to determine whether the length of a term-of-years sentence is unconstitutionally excessive for a particular defendant’s crime. The second classification comprises cases in which the Court has applied certain categorical rules against the death penalty. In a subset of such cases considering the nature of the offense, the Court has concluded that capital punishment is impermissible for nonhomicide crimes against individuals. *E.g.*, *Kennedy v. Louisiana*, 554 U. S. \_\_\_, \_\_\_. In a second subset, cases turning on the offender’s characteristics, the Court has prohibited death for defendants who committed their crimes before age 18, *Roper v. Simmons*, 543 U. S. 551, or whose intellectual functioning is in a low range, *Atkins v. Virginia*, 536 U. S. 304. In cases involving categorical rules, the Court first considers “objective indicia of society’s standards, as expressed in legislative enactments and state practice” to determine whether there is a national consensus against the sentencing practice at issue. *Roper, supra*, at 563. Next, looking to “the standards elaborated by controlling precedents and by the Court’s own understanding and interpretation of the Eighth Amendment’s text, history, meaning, and purpose,” *Kennedy, supra*, at \_\_\_, the Court determines in the exercise of its own independent judgment whether the punishment in question violates the Constitution, *Roper, supra*, at 564. Because this case implicates a particular type of sentence as it applies to an entire class of offenders who have committed a range of crimes, the appropriate analysis is the categorical approach used in *Atkins*, *Roper*, and *Kennedy*. Pp. 7–10.

(b) Application of the foregoing approach convinces the Court that the sentencing practice at issue is unconstitutional. Pp. 10–31.

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\* This text was reproduced and reformatted from the text available at the U.S. Supreme Court website (visited June 1, 2010) <http://www.supremecourt.gov/opinions/09pdf/08-7412.pdf>.

(1) Six jurisdictions do not allow life without parole sentences for any juvenile offenders. Seven jurisdictions permit life without parole for juvenile offenders, but only for homicide crimes. Thirty-seven States, the District of Columbia, and the Federal Government permit sentences of life without parole for a juvenile nonhomicide offender in some circumstances. The State relies on these data to argue that no national consensus against the sentencing practice in question exists. An examination of actual sentencing practices in those jurisdictions that permit life without parole for juvenile nonhomicide offenders, however, discloses a consensus against the sentence. Nationwide, there are only 129 juvenile offenders serving life without parole sentences for nonhomicide crimes. Because 77 of those offenders are serving sentences imposed in Florida and the other 52 are imprisoned in just 10 States and in the federal system, it appears that only 12 jurisdictions nationwide in fact impose life without parole sentences on juvenile nonhomicide offenders, while 26 States and the District of Columbia do not impose them despite apparent statutory authorization. Given that the statistics reflect nearly all juvenile nonhomicide offenders who have received a life without parole sentence stretching back many years, moreover, it is clear how rare these sentences are, even within the States that do sometimes impose them. While more common in terms of absolute numbers than the sentencing practices in, *e.g.*, *Atkins* and *Enmund v. Florida*, 458 U. S. 782, the type of sentence at issue is actually as rare as those other sentencing practices when viewed in proportion to the opportunities for its imposition. The fact that many jurisdictions do not expressly prohibit the sentencing practice at issue is not dispositive because it does not necessarily follow that the legislatures in those jurisdictions have deliberately concluded that such sentences would be appropriate. See *Thompson v. Oklahoma*, 487 U. S. 815, 826, n. 24, 850. Pp. 10–16.

(2) The inadequacy of penological theory to justify life without parole sentences for juvenile nonhomicide offenders, the limited culpability of such offenders, and the severity of these sentences all lead the Court to conclude that the sentencing practice at issue is cruel and unusual. No recent data provide reason to reconsider *Roper*'s holding that because juveniles have lessened culpability they are less deserving of the most serious forms of punishment. 543 U. S., at 551. Moreover, defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of such punishments than are murderers. *E.g.*, *Kennedy, supra*. Serious nonhomicide crimes “may be devastating in their harm . . . but ‘in terms of moral depravity and of the injury to the person and to the public,’ . . . they cannot be compared to murder in their ‘severity and irrevocability.’ ” *Id.*, at \_\_\_\_\_. Thus, when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability. Age and the nature of the crime each bear on the analysis. As for the punishment, life without parole is “the second most severe penalty permitted by law,” *Harmelin v. Michigan*, 501 U. S. 957, 1001, and is especially harsh for a juvenile offender, who will on average serve more years and a greater percentage of his life in prison than an adult offender, see, *e.g.*, *Roper, supra*, at 572. And none of the legitimate goals of penal sanctions—retribution, deterrence, incapacitation, and rehabilitation, see *Ewing v. California*, 538 U. S. 11, 25—is adequate to justify life without parole for juvenile nonhomicide offenders, see, *e.g.*, *Roper*, 543 U. S., at 571, 573. Because age “18 is the point where society draws the line for many purposes between childhood and adulthood,” it is the age below which a defendant may not be sentenced to life without parole for a nonhomicide crime. *Id.*, at 574. A State is not required to guarantee eventual freedom to such an offender, but must impose a sentence that provides some meaningful opportunity for release based on demonstrated maturity and rehabilitation. It is for the State, in the first instance, to explore the means and mechanisms for compliance. Pp. 16–24.

(3) A categorical rule is necessary, given the inadequacy of two alternative approaches to address the relevant constitutional concerns. First, although Florida and other States have made substantial efforts to enact comprehensive rules governing the treatment of youthful offenders, such laws allow the imposition of the type of sentence at issue based only on a discretionary, subjective judgment by a judge or jury that the juvenile offender is irredeemably depraved, and are therefore insufficient to prevent the possibility that the offender will receive such a sentence despite a lack of moral culpability. Second, a case-by-case approach requiring that the particular offender's age be weighed against the seriousness of the crime as part of a gross disproportionality inquiry would not allow courts to distinguish with sufficient accuracy the few juvenile offenders having sufficient psychological maturity and depravity to merit a life without parole sentence from the many that have the capacity for change. Cf. *Roper, supra*, at 572–573. Nor does such an approach take account of special difficulties encountered by counsel in juvenile representation, given juveniles' impulsiveness, difficulty thinking in terms of longterm benefits, and reluctance to trust adults. A categorical rule avoids the risk that, as a result of these difficulties, a court or jury will erroneously conclude that a particular juvenile is sufficiently culpable to deserve life without parole for a nonhomicide. It also gives the juvenile offender a chance to demonstrate maturity and reform. Pp. 24–29.

(4) Additional support for the Court's conclusion lies in the fact that the sentencing practice at issue has been rejected the world over: The United States is the only Nation that imposes this type of sentence. While the judgments of other nations and the international community are not dispositive as to the meaning of the Eighth Amendment, the Court has looked abroad to support its independent conclusion that a particular punishment is cruel and unusual. See, e.g., *Roper, supra*, at 575–578. Pp. 29–31.

982 So. 2d 43, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which STEVENS, GINSBURG, BREYER, and SOTOMAYOR, JJ., joined. STEVENS, J., filed a concurring opinion, in which GINSBURG and SOTOMAYOR, JJ., joined. ROBERTS, C. J., filed an opinion concurring in the judgment. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined, and in which ALITO, J., joined as to Parts I and III. ALITO, J., filed a dissenting opinion.

### Opinion of the Court

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

## SUPREME COURT OF THE UNITED STATES

No. 08–7412

### TERRANCE JAMAR GRAHAM, PETITIONER v. FLORIDA

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT  
[May 17, 2010]

JUSTICE KENNEDY delivered the opinion of the Court.

The issue before the Court is whether the Constitution permits a juvenile offender to be sentenced to life in prison without parole for a nonhomicide crime. The sentence was imposed by the State of Florida. Petitioner challenges the sentence under the Eighth Amendment's Cruel and Unusual Punishments Clause, made applicable to the States by the Due Process Clause of the Fourteenth Amendment. *Robinson v. California*, 370 U. S. 660 (1962).

### I

Petitioner is Terrance Jamar Graham. He was born on January 6, 1987. Graham's parents were addicted to crack cocaine, and their drug use persisted in his early years. Graham was diagnosed with attention deficit hyperactivity disorder in elementary school. He began drinking alcohol and using tobacco at age 9 and smoked marijuana at age 13.

In July 2003, when Graham was age 16, he and three other school-age youths attempted to rob a barbeque restaurant in Jacksonville, Florida. One youth, who worked at the restaurant, left the back door unlocked just before closing time. Graham and another youth, wearing masks, entered through the unlocked door. Graham's masked accomplice twice struck the restaurant manager in the back of the head with a metal bar. When the manager started yelling at the assailant and Graham, the two youths ran out and escaped in a car driven by the third accomplice. The restaurant manager required stitches for his head injury. No money was taken.

Graham was arrested for the robbery attempt. Under Florida law, it is within a prosecutor's discretion whether to charge 16- and 17-year-olds as adults or juveniles for most felony crimes. Fla. Stat. §985.227(1)(b) (2003) (subsequently renumbered at §985.557(1)(b) (2007)). Graham's prosecutor elected to charge Graham as an adult. The charges against Graham were armed burglary with assault or battery, a first-degree felony carrying a maximum

penalty of life imprisonment without the possibility of parole, §§810.02(1)(b), (2)(a) (2003); and attempted armed-robbery, a second-degree felony carrying a maximum penalty of 15 years' imprisonment, §§812.13(2)(b), 777.04(1), (4)(a), 775.082(3)(c).

On December 18, 2003, Graham pleaded guilty to both charges under a plea agreement. Graham wrote a letter to the trial court. After reciting "this is my first and last time getting in trouble," he continued "I've decided to turn my life around." App. 379–380. Graham said "I made a promise to God and myself that if I get a second chance, I'm going to do whatever it takes to get to the [National Football League]." *Id.*, at 380.

The trial court accepted the plea agreement. The court withheld adjudication of guilt as to both charges and sentenced Graham to concurrent 3-year terms of probation. Graham was required to spend the first 12 months of his probation in the county jail, but he received credit for the time he had served awaiting trial, and was released on June 25, 2004.

Less than 6 months later, on the night of December 2, 2004, Graham again was arrested. The State's case was as follows: Earlier that evening, Graham participated in a home invasion robbery. His two accomplices were Meigo Bailey and Kirkland Lawrence, both 20-year-old men. According to the State, at 7 p.m. that night, Graham, Bailey, and Lawrence knocked on the door of the home where Carlos Rodriguez lived. Graham, followed by Bailey and Lawrence, forcibly entered the home and held a pistol to Rodriguez's chest. For the next 30 minutes, the three held Rodriguez and another man, a friend of Rodriguez, at gunpoint while they ransacked the home searching for money. Before leaving, Graham and his accomplices barricaded Rodriguez and his friend inside a closet.

The State further alleged that Graham, Bailey, and Lawrence, later the same evening, attempted a second robbery, during which Bailey was shot. Graham, who had borrowed his father's car, drove Bailey and Lawrence to the hospital and left them there. As Graham drove away, a police sergeant signaled him to stop. Graham continued at a high speed but crashed into a telephone pole. He tried to flee on foot but was apprehended. Three handguns were found in his car.

When detectives interviewed Graham, he denied involvement in the crimes. He said he encountered Bailey and Lawrence only after Bailey had been shot. One of the detectives told Graham that the victims of the home invasion had identified him. He asked Graham, "Aside from the two robberies tonight how many more were you involved in?" Graham responded, "Two to three before tonight." *Id.*, at 160. The night that Graham allegedly committed the robbery, he was 34 days short of his 18th birthday.

On December 13, 2004, Graham's probation officer filed with the trial court an affidavit asserting that Graham had violated the conditions of his probation by possessing a firearm, committing crimes, and associating with persons engaged in criminal activity. The trial court held hearings on Graham's violations about a year later, in December 2005 and January 2006. The judge who presided was not the same judge who had accepted Graham's guilty plea to the earlier offenses.

Graham maintained that he had no involvement in the home invasion robbery; but, even after the court underscored that the admission could expose him to a life sentence on the earlier charges, he admitted violating probation conditions by fleeing. The State presented evidence related to the home invasion, including testimony from the victims. The trial court noted that Graham, in admitting his attempt to avoid arrest, had acknowledged violating his probation. The court further found that Graham had violated his probation by committing a home invasion robbery, by possessing a firearm, and by associating with persons engaged in criminal activity.

The trial court held a sentencing hearing. Under Florida law the minimum sentence Graham could receive absent a downward departure by the judge was 5 years' imprisonment. The maximum was life imprisonment. Graham's attorney requested the minimum nondeparture sentence of 5 years. A presentence report prepared by the Florida Department of Corrections recommended that Graham receive an even lower sentence—at most 4 years' imprisonment. The State recommended that Graham receive 30 years on the armed burglary count and 15 years on the attempted armed robbery count.

After hearing Graham's testimony, the trial court explained the sentence it was about to pronounce:

"Mr. Graham, as I look back on your case, yours is really candidly a sad situation. You had, as far as I can tell, you have quite a family structure. You had a lot of people who wanted to try



and help you get your life turned around including the court system, and you had a judge who took the step to try and give you direction through his probation order to give you a chance to get back onto track. And at the time you seemed through your letters that that is exactly what you wanted to do. And I don't know why it is that you threw your life away. I don't know why.

"But you did, and that is what is so sad about this today is that you have actually been given a chance to get through this, the original charge, which were very serious charges to begin with. . . . The attempted robbery with a weapon was a very serious charge.

.....

"[I]n a very short period of time you were back before the Court on a violation of this probation, and then here you are two years later standing before me, literally the—facing a life sentence as to—up to life as to count 1 and up to 15 years as to count 2.

"And I don't understand why you would be given such a great opportunity to do something with your life and why you would throw it away. The only thing that I can rationalize is that you decided that this is how you were going to lead your life and that there is nothing that we can do for you. And as the state pointed out, that this is an escalating pattern of criminal conduct on your part and that we can't help you any further. We can't do anything to deter you. This is the way you are going to lead your life, and I don't know why you are going to. You've made that decision. I have no idea. But, evidently, that is what you decided to do.

"So then it becomes a focus, if I can't do anything to help you, if I can't do anything to get you back on the right path, then I have to start focusing on the community and trying to protect the community from your actions. And, unfortunately, that is where we are today is I don't see where I can do anything to help you any further. You've evidently decided this is the direction you're going to take in life, and it's unfortunate that you made that choice.

"I have reviewed the statute. I don't see where any further juvenile sanctions would be appropriate. I don't see where any youthful offender sanctions would be appropriate. Given your escalating pattern of criminal conduct, it is apparent to the Court that you have decided that this is the way you are going to live your life and that the only thing I can do now is to try and protect the community from your actions." *Id.*, at 392–394.

The trial court found Graham guilty of the earlier armed burglary and attempted armed robbery charges. It sentenced him to the maximum sentence authorized by law on each charge: life imprisonment for the armed burglary and 15 years for the attempted armed robbery. Because Florida has abolished its parole system, see Fla. Stat. §921.002(1)(e) (2003), a life sentence gives a defendant no possibility of release unless he is granted executive clemency.

Graham filed a motion in the trial court challenging his sentence under the Eighth Amendment. The motion was deemed denied after the trial court failed to rule on it within 60 days. The First District Court of Appeal of Florida affirmed, concluding that Graham's sentence was not grossly disproportionate to his crimes. 982 So. 2d 43 (2008). The court took note of the seriousness of Graham's offenses and their violent nature, as well as the fact that they "were not committed by a pre-teen, but a seventeen year-old who was ultimately sentenced at the age of nineteen." *Id.*, at 52. The court concluded further that Graham was incapable of rehabilitation. Although Graham "was given an unheard of probationary sentence for a life felony, . . . wrote a letter expressing his remorse and promising to refrain from the commission of further crime, and . . . had a strong family structure to support him," the court noted, he "rejected his second chance and chose to continue committing crimes at an escalating pace." *Ibid.* The Florida Supreme Court denied review. 990 So. 2d 1058 (2008) (table).

We granted certiorari. 556 U. S. \_\_\_\_ (2009).

## II

The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." To determine whether a punishment is cruel and unusual, courts must look

beyond historical conceptions to “the evolving standards of decency that mark the progress of a maturing society.” *Estelle v. Gamble*, 429 U. S. 97, 102 (1976) (quoting *Trop v. Dulles*, 356 U. S. 86, 101 (1958) (plurality opinion)). “This is because ‘[t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.’” *Kennedy v. Louisiana*, 554 U. S. \_\_\_, \_\_\_ (2008) (slip op., at 8) (quoting *Furman v. Georgia*, 408 U. S. 238, 382 (1972) (Burger, C. J., dissenting)).

The Cruel and Unusual Punishments Clause prohibits the imposition of inherently barbaric punishments under all circumstances. See, e.g., *Hope v. Pelzer*, 536 U. S. 730 (2002). “[P]unishments of torture,” for example, “are forbidden.” *Wilkerson v. Utah*, 99 U. S. 130, 136 (1879). These cases underscore the essential principle that, under the Eighth Amendment, the State must respect the human attributes even of those who have committed serious crimes.

For the most part, however, the Court’s precedents consider punishments challenged not as inherently barbaric but as disproportionate to the crime. The concept of proportionality is central to the Eighth Amendment. Embodied in the Constitution’s ban on cruel and unusual punishments is the “precept of justice that punishment for crime should be graduated and proportioned to [the] offense.” *Weems v. United States*, 217 U. S. 349, 367 (1910).

The Court’s cases addressing the proportionality of sentences fall within two general classifications. The first involves challenges to the length of term-of-years sentences given all the circumstances in a particular case. The second comprises cases in which the Court implements the proportionality standard by certain categorical restrictions on the death penalty.

In the first classification the Court considers all of the circumstances of the case to determine whether the sentence is unconstitutionally excessive. Under this approach, the Court has held unconstitutional a life without parole sentence for the defendant’s seventh nonviolent felony, the crime of passing a worthless check. *Solem v. Helm*, 463 U. S. 277 (1983). In other cases, however, it has been difficult for the challenger to establish a lack of proportionality. A leading case is *Harmelin v. Michigan*, 501 U. S. 957 (1991), in which the offender was sentenced under state law to life without parole for possessing a large quantity of cocaine. A closely divided Court upheld the sentence. The controlling opinion concluded that the Eighth Amendment contains a “narrow proportionality principle,” that “does not require strict proportionality between crime and sentence” but rather “forbids only extreme sentences that are ‘grossly disproportionate’ to the crime.” *Id.*, at 997, 1000–1001 (KENNEDY, J., concurring in part and concurring in judgment). Again closely divided, the Court rejected a challenge to a sentence of 25 years to life for the theft of a few golf clubs under California’s so-called three-strikes recidivist sentencing scheme. *Ewing v. California*, 538 U. S. 11 (2003); see also *Lockyer v. Andrade*, 538 U. S. 63 (2003). The Court has also upheld a sentence of life with the possibility of parole for a defendant’s third nonviolent felony, the crime of obtaining money by false pretenses, *Rummel v. Estelle*, 445 U. S. 263 (1980), and a sentence of 40 years for possession of marijuana with intent to distribute and distribution of marijuana, *Hutto v. Davis*, 454 U. S. 370 (1982) (*per curiam*).

The controlling opinion in *Harmelin* explained its approach for determining whether a sentence for a term of years is grossly disproportionate for a particular defendant’s crime. A court must begin by comparing the gravity of the offense and the severity of the sentence. 501 U. S., at 1005 (opinion of KENNEDY, J.). “[I]n the rare case in which [this] threshold comparison . . . leads to an inference of gross disproportionality” the court should then compare the defendant’s sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions. *Ibid.* If this comparative analysis “validate[s] an initial judgment that [the] sentence is grossly disproportionate,” the sentence is cruel and unusual. *Ibid.*

The second classification of cases has used categorical rules to define Eighth Amendment standards. The previous cases in this classification involved the death penalty. The classification in turn consists of two subsets, one considering the nature of the offense, the other considering the characteristics of the offender. With respect to the nature of the offense, the Court has concluded that capital punishment is impermissible for nonhomicide crimes against individuals. *Kennedy*, *supra*, at \_\_\_ (slip op., at 28); see also *Enmund v. Florida*, 458 U. S. 782 (1982); *Coker v. Georgia*, 433 U. S. 584 (1977). In cases turning on the characteristics of the offender, the Court has adopted categorical rules prohibiting the death penalty for defendants who committed their crimes before the

age of 18, *Roper v. Simmons*, 543 U. S. 551 (2005), or whose intellectual functioning is in a low range, *Atkins v. Virginia*, 536 U. S. 304 (2002). See also *Thompson v. Oklahoma*, 487 U. S. 815 (1988).

In the cases adopting categorical rules the Court has taken the following approach. The Court first considers “objective indicia of society’s standards, as expressed in legislative enactments and state practice” to determine whether there is a national consensus against the sentencing practice at issue. *Roper, supra*, at 563. Next, guided by “the standards elaborated by controlling precedents and by the Court’s own understanding and interpretation of the Eighth Amendment’s text, history, meaning, and purpose,” *Kennedy*, 554 U. S., at \_\_\_\_ (slip op., at 10), the Court must determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution. *Roper, supra*, at 564.

The present case involves an issue the Court has not considered previously: a categorical challenge to a term-of-years sentence. The approach in cases such as *Harmelin* and *Ewing* is suited for considering a gross proportionality challenge to a particular defendant’s sentence, but here a sentencing practice itself is in question. This case implicates a particular type of sentence as it applies to an entire class of offenders who have committed a range of crimes. As a result, a threshold comparison between the severity of the penalty and the gravity of the crime does not advance the analysis. Here, in addressing the question presented, the appropriate analysis is the one used in cases that involved the categorical approach, specifically *Atkins*, *Roper*, and *Kennedy*.

### III

#### A

The analysis begins with objective indicia of national consensus. “[T]he ‘clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures.’” *Atkins, supra*, at 312 (quoting *Penry v. Lynaugh*, 492 U. S. 302, 331 (1989)). Six jurisdictions do not allow life without parole sentences for any juvenile offenders. See Appendix, *infra*, Part III. Seven jurisdictions permit life without parole for juvenile offenders, but only for homicide crimes. *Id.*, Part II. Thirty-seven States as well as the District of Columbia permit sentences of life without parole for a juvenile nonhomicide offender in some circumstances. *Id.*, Part I. Federal law also allows for the possibility of life without parole for offenders as young as 13. See, e.g., 18 U. S. C. §§2241 (2006 ed. and Supp. II), 5032 (2006 ed.). Relying on this metric, the State and its *amici* argue that there is no national consensus against the sentencing practice at issue.

This argument is incomplete and unavailing. “There are measures of consensus other than legislation.” *Kennedy, supra*, at \_\_\_\_ (slip op., at 22). Actual sentencing practices are an important part of the Court’s inquiry into consensus. See *Enmund, supra*, at 794–796; *Thompson, supra*, at 831–832 (plurality opinion); *Atkins, supra*, at 316; *Roper, supra*, at 564–565; *Kennedy, supra*, at \_\_\_\_ (slip op., at 22–23). Here, an examination of actual sentencing practices in jurisdictions where the sentence in question is permitted by statute discloses a consensus against its use. Although these statutory schemes contain no explicit prohibition on sentences of life without parole for juvenile nonhomicide offenders, those sentences are most infrequent. According to a recent study, nationwide there are only 109 juvenile offenders serving sentences of life without parole for nonhomicide offenses. See P. Annino, D. Rasmussen, & C. Rice, *Juvenile Life without Parole for Non-Homicide Offenses: Florida Compared to Nation 2* (Sept. 14, 2009) (hereinafter Annino).

The State contends that this study’s tally is inaccurate because it does not count juvenile offenders who were convicted of both a homicide and a nonhomicide offense, even when the offender received a life without parole sentence for the nonhomicide. See Brief for Respondent 34; Tr. of Oral Arg. in *Sullivan v. Florida*, O. T. 2009, No. 08–7621, pp. 28–31. This distinction is unpersuasive. Juvenile offenders who committed both homicide and nonhomicide crimes present a different situation for a sentencing judge than juvenile offenders who committed no homicide. It is difficult to say that a defendant who receives a life sentence on a nonhomicide offense but who was at the same time convicted of homicide is not in some sense being punished in part for the homicide when the judge makes the sentencing determination. The instant case concerns only those juvenile offenders sentenced to life without parole solely for a nonhomicide offense.

Florida further criticizes this study because the authors were unable to obtain complete information on some States and because the study was not peer reviewed. See Brief for Respondent 40. The State does not, however,

provide any data of its own. Although in the first instance it is for the litigants to provide data to aid the Court, we have been able to supplement the study's findings. The study's authors were not able to obtain a definitive tally for Nevada, Utah, or Virginia. See Annino 11–13. Our research shows that Nevada has five juvenile nonhomicide offenders serving life without parole sentences, Utah has none, and Virginia has eight. See Letter from Alejandra Livingston, Offender Management Division, Nevada Dept. of Corrections, to Supreme Court Library (Mar. 26, 2010) (available in Clerk of Court's case file); Letter from Steve Gehrke, Utah Dept. of Corrections, to Supreme Court Library (Mar. 29, 2010) (same); Letter from Dr. Tama S. Celi, Virginia Dept. of Corrections, to Supreme Court Library (Mar. 30, 2010) (same). The study also did not note that there are six convicts in the federal prison system serving life without parole offenses for nonhomicide crimes. See Letter and Attachment from Judith Simon Garrett, U. S. Dept. of Justice, Federal Bureau of Prisons, to Supreme Court Library (Apr. 12, 2010) (available in Clerk of Court's case file).

Finally, since the study was completed, a defendant in Oklahoma has apparently been sentenced to life without parole for a rape and stabbing he committed at the age of 16. See Stogsdill, Delaware County Teen Sentenced in Rape, Assault Case, *Tulsa World*, May 4, 2010, p. A12. Thus, adding the individuals counted by the study to those we have been able to locate independently, there are 129 juvenile nonhomicide offenders serving life without parole sentences. A significant majority of those, 77 in total, are serving sentences imposed in Florida. Annino 2. The other 52 are imprisoned in just 10 States—California, Delaware, Iowa, Louisiana, Mississippi, Nebraska, Nevada, Oklahoma, South Carolina, and Virginia—and in the federal system. *Id.*, at 14; *supra*, at 12–13; Letter from Thomas P. Hoey, Dept. of Corrections, Government of the District of Columbia, to Supreme Court Library (Mar. 31, 2010) (available in Clerk of Court's case file); Letter from Judith Simon Garrett, U. S. Dept. of Justice, Federal Bureau of Prisons, to Supreme Court Library (Apr. 9, 2010) (available in Clerk of Court's case file). Thus, only 12 jurisdictions nationwide in fact impose life without parole sentences on juvenile nonhomicide offenders—and most of those impose the sentence quite rarely—while 26 States as well as the District of Columbia do not impose them despite apparent statutory authorization.

The numbers cited above reflect all current convicts in a jurisdiction's penal system, regardless of when they were convicted. It becomes all the more clear how rare these sentences are, even within the jurisdictions that do sometimes impose them, when one considers that a juvenile sentenced to life without parole is likely to live in prison for decades. Thus, these statistics likely reflect nearly all juvenile nonhomicide offenders who have received a life without parole sentence stretching back many years. It is not certain that this opinion has identified every juvenile nonhomicide offender nationwide serving a life without parole sentence, for the statistics are not precise. The available data, nonetheless, are sufficient to demonstrate how rarely these sentences are imposed even if there are isolated cases that have not been included in the presentations of the parties or the analysis of the Court.

It must be acknowledged that in terms of absolute numbers juvenile life without parole sentences for nonhomicides are more common than the sentencing practices at issue in some of this Court's other Eighth Amendment cases. See, e.g., *Enmund*, 458 U. S., at 794 (only six executions of nontriggerman felony murderers between 1954 and 1982) *Atkins*, 536 U. S., at 316 (only five executions of mentally retarded defendants in 13-year period). This contrast can be instructive, however, if attention is first given to the base number of certain types of offenses. For example, in the year 2007 (the most recent year for which statistics are available), a total of 13,480 persons, adult and juvenile, were arrested for homicide crimes. That same year, 57,600 juveniles were arrested for aggravated assault; 3,580 for forcible rape; 34,500 for robbery; 81,900 for burglary; 195,700 for drug offenses; and 7,200 for arson. See Dept. of Justice, Office of Juvenile Justice and Delinquency Prevention, Statistical Briefing Book, online at <http://ojjdp.ncjrs.org/ojstatbb/> (as visited May 14, 2010, and available in Clerk of Court's case file). Although it is not certain how many of these numerous juvenile offenders were eligible for life without parole sentences, the comparison suggests that in proportion to the opportunities for its imposition, life without parole sentences for juveniles convicted of nonhomicide crimes is as rare as other sentencing practices found to be cruel and unusual.

The evidence of consensus is not undermined by the fact that many jurisdictions do not prohibit life without parole for juvenile nonhomicide offenders. The Court confronted a similar situation in *Thompson*, where a plurality concluded that the death penalty for offenders younger than 16 was unconstitutional. A number of States then allowed the juvenile death penalty if one considered the statutory scheme. As is the case here, those States authorized the transfer of some juvenile offenders to adult court; and at that point there was no statutory differentiation

between adults and juveniles with respect to authorized penalties. The plurality concluded that the transfer laws show “that the States consider 15-year-olds to be old enough to be tried in criminal court for serious crimes (or too old to be dealt with effectively in juvenile court), *but tells us nothing about the judgment these States have made regarding the appropriate punishment for such youthful offenders.*” 487 U. S., at 826, n. 24. Justice O’Connor, concurring in the judgment, took a similar view. *Id.*, at 850 (“When a legislature provides for some 15-year-olds to be processed through the adult criminal justice system, and capital punishment is available for adults in that jurisdiction, the death penalty becomes at least theoretically applicable to such defendants . . . [H]owever, it does not necessarily follow that the legislatures in those jurisdictions have deliberately concluded that it would be appropriate”).

The same reasoning obtains here. Many States have chosen to move away from juvenile court systems and to allow juveniles to be transferred to, or charged directly in, adult court under certain circumstances. Once in adult court, a juvenile offender may receive the same sentence as would be given to an adult offender, including a life without parole sentence. But the fact that transfer and direct charging laws make life without parole possible for some juvenile nonhomicide offenders does not justify a judgment that many States intended to subject such offenders to life without parole sentences.

For example, under Florida law a child of any age can be prosecuted as an adult for certain crimes and can be sentenced to life without parole. The State acknowledged a toral argument that even a 5-year-old, theoretically, could receive such a sentence under the letter of the law. See Tr. of Oral Arg. 36–37. All would concede this to be unrealistic, but the example underscores that the statutory eligibility of a juvenile offender for life without parole does not indicate that the penalty has been endorsed through deliberate, express, and full legislative consideration. Similarly, the many States that allow life without parole for juvenile nonhomicide offenders but do not impose the punishment should not be treated as if they have expressed the view that the sentence is appropriate. The sentencing practice now under consideration is exceedingly rare. And “it is fair to say that a national consensus has developed against it.” *Atkins, supra*, at 316.

## B

Community consensus, while “entitled to great weight,” is not itself determinative of whether a punishment is cruel and unusual. *Kennedy*, 554 U. S., at \_\_\_\_ (slip op., at 24). In accordance with the constitutional design, “the task of interpreting the Eighth Amendment remains our responsibility.” *Roper*, 543 U. S., at 575. The judicial exercise of independent judgment requires consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question. *Id.*, at 568; *Kennedy, supra*, at \_\_\_\_ (slip op., at 27–28); cf. *Solem*, 463 U. S., at 292. In this inquiry the Court also considers whether the challenged sentencing practice serves legitimate penological goals. *Kennedy, supra*, at \_\_\_\_ (slip op., at 30–36); *Roper, supra*, at 571–572; *Atkins, supra*, at 318–320.

*Roper* established that because juveniles have lessened culpability they are less deserving of the most severe punishments. 543 U. S., at 569. As compared to adults, juveniles have a “lack of maturity and an underdeveloped sense of responsibility”; they “are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure”; and their characters are “not as well formed.” *Id.*, at 569–570. These salient characteristics mean that “[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.” *Id.*, at 573. Accordingly, “juvenile offenders cannot with reliability be classified among the worst offenders.” *Id.*, at 569. A juvenile is not absolved of responsibility for his actions, but his transgression “is not as morally reprehensible as that of an adult.” *Thompson, supra*, at 835 (plurality opinion).

No recent data provide reason to reconsider the Court’s observations in *Roper* about the nature of juveniles. As petitioner’s *amici* point out, developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence. See Brief for American Medical Association et al. as *Amici Curiae* 16–24; Brief for American Psychological Association et al. as *Amici Curiae* 22–27. Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of “irretrievably depraved character” than are the actions of adults. *Roper*, 543 U. S., at 570. It remains true that “[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character

deficiencies will be reformed.” *Ibid.* These matters relate to the status of the offenders in question; and it is relevant to consider next the nature of the offenses to which this harsh penalty might apply.

The Court has recognized that defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers. *Kennedy, supra*; *Enmund*, 458 U. S. 782; *Tison v. Arizona*, 481 U. S. 137 (1987); *Coker*, 433 U. S. 584. There is a line “between homicide and other serious violent offenses against the individual.” *Kennedy*, 554 U. S., at \_\_\_\_ (slip op., at 27). Serious nonhomicide crimes “may be devastating in their harm . . . but ‘in terms of moral depravity and of the injury to the person and to the public,’ . . . they cannot be compared to murder in their ‘severity and irrevocability.’” *Id.*, at \_\_\_\_ (slip op., at 28) (quoting *Coker*, 433 U. S., at 598 (plurality opinion)). This is because “[l]ife is over for the victim of the murderer,” but for the victim of even a very serious nonhomicide crime, “life . . . is not over and normally is not beyond repair.” *Ibid.* (plurality opinion). Although an offense like robbery or rape is “a serious crime deserving serious punishment,” *Enmund, supra*, at 797, those crimes differ from homicide crimes in a moral sense.

It follows that, when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability. The age of the offender and the nature of the crime each bear on the analysis.

As for the punishment, life without parole is “the second most severe penalty permitted by law.” *Harmelin*, 501 U. S., at 1001 (opinion of KENNEDY, J.). It is true that a death sentence is “unique in its severity and irrevocability,” *Gregg v. Georgia*, 428 U. S. 153, 187 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.); yet life without parole sentences share some characteristics with death sentences that are shared by no other sentences. The State does not execute the offender sentenced to life without parole, but the sentence alters the offender’s life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency—the remote possibility of which does not mitigate the harshness of the sentence. *Solem*, 463 U. S., at 300–301. As one court observed in overturning a life without parole sentence for a juvenile defendant, this sentence “means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days.” *Naovarath v. State*, 105 Nev. 525, 526, 779 P. 2d 944 (1989).

The Court has recognized the severity of sentences that deny convicts the possibility of parole. In *Rummel*, 445 U. S. 263, the Court rejected an Eighth Amendment challenge to a life sentence for a defendant’s third nonviolent felony but stressed that the sentence gave the defendant the possibility of parole. Noting that “parole is an established variation on imprisonment of convicted criminals,” it was evident that an analysis of the petitioner’s sentence “could hardly ignore the possibility that he will not actually be imprisoned for the rest of his life.” *Id.*, at 280–281 (internal quotation marks omitted). And in *Solem*, the only previous case striking down a sentence for a term of years as grossly disproportionate, the defendant’s sentence was deemed “far more severe than the life sentence we considered in *Rummel*,” because it did not give the defendant the possibility of parole. 463 U. S., at 297.

Life without parole is an especially harsh punishment for a juvenile. Under this sentence a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender. A 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only. See *Roper, supra*, at 572; cf. *Harmelin, supra*, at 996 (“In some cases . . . there will be negligible difference between life without parole and other sentences of imprisonment—for example, . . . a lengthy term sentence without eligibility for parole, given to a 65-year-old man”). This reality cannot be ignored.

The penological justifications for the sentencing practice are also relevant to the analysis. *Kennedy, supra*, at \_\_\_\_ (slip op., at 30–36); *Roper*, 543 U. S., at 571–572; *Atkins, supra*, at 318–320. Criminal punishment can have different goals, and choosing among them is within a legislature’s discretion. See *Harmelin, supra*, at 999 (opinion of KENNEDY, J.) (“[T]he Eighth Amendment does not mandate adoption of any one penological theory”). It does not follow, however, that the purposes and effects of penal sanctions are irrelevant to the determination of Eighth Amendment restrictions. A sentence lacking any legitimate penological justification is by its nature disproportionate to the offense. With respect to life without parole for juvenile nonhomicide offenders, none of the goals of penal

sanctions that have been recognized as legitimate—retribution, deterrence, incapacitation, and rehabilitation, see *Ewing*, 538 U. S., at 25 (plurality opinion)—provides an adequate justification.

Retribution is a legitimate reason to punish, but it cannot support the sentence at issue here. Society is entitled to impose severe sanctions on a juvenile nonhomicide offender to express its condemnation of the crime and to seek restoration of the moral imbalance caused by the offense. But “[t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender.” *Tison*, 481 U. S., at 149. And as *Roper* observed, “[w]hether viewed as an attempt to express the community’s moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult.” 543 U. S., at 571. The case becomes even weaker with respect to a juvenile who did not commit homicide. *Roper* found that “[r]etribution is not proportional if the law’s most severe penalty is imposed” on the juvenile murderer. *Ibid.* The considerations underlying that holding support as well the conclusion that retribution does not justify imposing the second most severe penalty on the less culpable juvenile nonhomicide offender.

Deterrence does not suffice to justify the sentence either. *Roper* noted that “the same characteristics that render juveniles less culpable than adults suggest . . . that juveniles will be less susceptible to deterrence.” *Ibid.* Because juveniles’ “lack of maturity and underdeveloped sense of responsibility . . . often result in impetuous and ill-considered actions and decisions,” *Johnson v. Texas*, 509 U. S. 350, 367 (1993), they are less likely to take a possible punishment into consideration when making decisions. This is particularly so when that punishment is rarely imposed. That the sentence deters in a few cases is perhaps plausible, but “[t]his argument does not overcome other objections.” *Kennedy*, 554 U. S., at \_\_\_\_ (slip op., at 31). Even if the punishment has some connection to a valid penological goal, it must be shown that the punishment is not grossly disproportionate in light of the justification offered. Here, in light of juvenile nonhomicide offenders’ diminished moral responsibility, any limited deterrent effect provided by life without parole is not enough to justify the sentence.

Incapacitation, a third legitimate reason for imprisonment, does not justify the life without parole sentence in question here. Recidivism is a serious risk to public safety, and so incapacitation is an important goal. See *Ewing*, *supra*, at 26 (plurality opinion) (statistics show 67 percent of former inmates released from state prisons are charged with at least one serious new crime within three years). But while incapacitation may be a legitimate penological goal sufficient to justify life without parole in other contexts, it is inadequate to justify that punishment for juveniles who did not commit homicide. To justify life without parole on the assumption that the juvenile offender forever will be a danger to society requires the sentencer to make a judgment that the juvenile is incorrigible. The characteristics of juveniles make that judgment questionable. “It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.” *Roper*, *supra*, at 573. As one court concluded in a challenge to a life without parole sentence for a 14 year-old, “incorrigibility is inconsistent with youth.” *Workman v. Commonwealth*, 429 S. W. 2d 374, 378 (Ky. App. 1968).

Here one cannot dispute that this defendant posed an immediate risk, for he had committed, we can assume, serious crimes early in his term of supervised release and despite his own assurances of reform. Graham deserved to be separated from society for some time in order to prevent what the trial court described as an “escalating pattern of criminal conduct,” App. 394, but it does not follow that he would be a risk to society for the rest of his life. Even if the State’s judgment that Graham was incorrigible were later corroborated by prison misbehavior or failure to mature, the sentence was still disproportionate because that judgment was made at the outset. A life without parole sentence improperly denies the juvenile offender a chance to demonstrate growth and maturity. Incapacitation cannot override all other considerations, lest the Eighth Amendment’s rule against disproportionate sentences be a nullity.

Finally there is rehabilitation, a penological goal that forms the basis of parole systems. See *Solem*, 463 U. S., at 300; *Mistretta v. United States*, 488 U. S. 361, 363 (1989). The concept of rehabilitation is imprecise; and its utility and proper implementation are the subject of a substantial, dynamic field of inquiry and dialogue. See, e.g., Cullen & Gendreau, *Assessing Correctional Rehabilitation: Policy, Practice, and Prospects*, 3 *Criminal Justice* 2000, pp. 119–133 (2000) (describing scholarly debates regarding the effectiveness of rehabilitation over the last several decades). It is for legislatures to determine what rehabilitative techniques are appropriate and effective.

A sentence of life imprisonment without parole, however, cannot be justified by the goal of rehabilitation. The penalty forswears altogether the rehabilitative ideal. By denying the defendant the right to reenter the community, the State makes an irrevocable judgment about that person's value and place in society. This judgment is not appropriate in light of a juvenile nonhomicide offender's capacity for change and limited moral culpability. A State's rejection of rehabilitation, moreover, goes beyond a mere expressive judgment. As one *amicus* notes, defendants serving life without parole sentences are often denied access to vocational training and other rehabilitative services that are available to other inmates. See Brief for Sentencing Project as *Amicus Curiae* 11–13. For juvenile offenders, who are most in need of and receptive to rehabilitation, see Brief for J. Lawrence Aber et al. as *Amici Curiae* 28–31 (hereinafter Aber Brief), the absence of rehabilitative opportunities or treatment makes the disproportionality of the sentence all the more evident.

In sum, penological theory is not adequate to justify life without parole for juvenile nonhomicide offenders. This determination; the limited culpability of juvenile nonhomicide offenders; and the severity of life without parole sentences all lead to the conclusion that the sentencing practice under consideration is cruel and unusual. This Court now holds that for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole. This clear line is necessary to prevent the possibility that life without parole sentences will be imposed on juvenile nonhomicide offenders who are not sufficiently culpable to merit that punishment. Because “[t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood,” those who were below that age when the offense was committed may not be sentenced to life without parole for a nonhomicide crime. *Roper*, 543 U. S., at 574.

A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What the State must do, however, is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. It is for the State, in the first instance, to explore the means and mechanisms for compliance. It bears emphasis, however, that while the Eighth Amendment forbids a State from imposing a life without parole sentence on a juvenile nonhomicide offender, it does not require the State to release that offender during his natural life. Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives. The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. It does forbid States from making the judgment at the outset that those offenders never will be fit to reenter society.

### C

Categorical rules tend to be imperfect, but one is necessary here. Two alternative approaches are not adequate to address the relevant constitutional concerns. First, the State argues that the laws of Florida and other States governing criminal procedure take sufficient account of the age of a juvenile offender. Here, Florida notes that under its law prosecutors are required to charge 16- and 17-year-old offenders as adults only for certain serious felonies; that prosecutors have discretion to charge those offenders as adults for other felonies; and that prosecutors may not charge nonrecidivist 16- and 17-year-old offenders as adults for misdemeanors. Brief for Respondent 54 (citing Fla. Stat. §985.227 (2003)). The State also stresses that “in only the narrowest of circumstances” does Florida law impose no age limit whatsoever for prosecuting juveniles in adult court. Brief for Respondent 54.

Florida is correct to say that state laws requiring consideration of a defendant's age in charging decisions are salutary. An offender's age is relevant to the Eighth Amendment, and criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed. Florida, like other States, has made substantial efforts to enact comprehensive rules governing the treatment of youthful offenders by its criminal justice system. See generally Fla. Stat. §958 *et seq.* (2007).

The provisions the State notes are, nonetheless, by themselves insufficient to address the constitutional concerns at issue. Nothing in Florida's laws prevents its courts from sentencing a juvenile nonhomicide offender to life without parole based on a subjective judgment that the defendant's crimes demonstrate an “irretrievably depraved character.” *Roper*, *supra*, at 570. This is inconsistent with the Eighth Amendment. Specific cases are illustrative. In Graham's case the sentencing judge decided to impose life without parole—a sentence greater than that requested by the prosecutor—for Graham's armed burglary conviction. The judge did so because he concluded that Graham



was incorrigible: “[Y]ou decided that this is how you were going to lead your life and that there is nothing that we can do for you. . . . We can’t do anything to deter you.” App. 394.

Another example comes from *Sullivan v. Florida*, No.08–7621. *Sullivan* was argued the same day as this case, but the Court has now dismissed the writ of certiorari in *Sullivan* as improvidently granted. *Post*, p. \_\_\_\_\_. The facts, however, demonstrate the flaws of Florida’s system. The petitioner, Joe Sullivan, was prosecuted as an adult for a sexual assault committed when he was 13 years old. Noting Sullivan’s past encounters with the law, the sentencing judge concluded that, although Sullivan had been “given opportunity after opportunity to upright himself and take advantage of the second and third chances he’s been given,” he had demonstrated himself to be unwilling to follow the law and needed to be kept away from society for the duration of his life. Brief for Respondent in *Sullivan v. Florida*, O. T. 2009, No. 08–7621, p. 6. The judge sentenced Sullivan to life without parole. As these examples make clear, existing state laws, allowing the imposition of these sentences based only on a discretionary, subjective judgment by a judge or jury that the offender is irredeemably depraved, are insufficient to prevent the possibility that the offender will receive a life without parole sentence for which he or she lacks the moral culpability.

Another possible approach would be to hold that the Eighth Amendment requires courts to take the offender’s age into consideration as part of a case-specific gross disproportionality inquiry, weighing it against the seriousness of the crime. This approach would allow courts to account for factual differences between cases and to impose life without parole sentences for particularly heinous crimes. Few, perhaps no, judicial responsibilities are more difficult than sentencing. The task is usually undertaken by trial judges who seek with diligence and professionalism to take account of the human existence of the offender and the just demands of a wronged society.

The case-by-case approach to sentencing must, however, be confined by some boundaries. The dilemma of juvenile sentencing demonstrates this. For even if we were to assume that some juvenile nonhomicide offenders might have “sufficient psychological maturity, and at the same time demonstrat[e] sufficient depravity,” *Roper*, 543 U. S., at 572, to merit a life without parole sentence, it does not follow that courts taking a case-by-case proportionality approach could with sufficient accuracy distinguish the few incorrigible juvenile offenders from the many that have the capacity for change. *Roper* rejected the argument that the Eighth Amendment required only that juries be told they must consider the defendant’s age as a mitigating factor in sentencing. The Court concluded that an “unacceptable likelihood exists that the brutality or coldblooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender’s objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death.” *Id.*, at 573. Here, as with the death penalty, “[t]he differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive” a sentence of life without parole for a nonhomicide crime “despite insufficient culpability.” *Id.*, at 572–573.

Another problem with a case-by-case approach is that it does not take account of special difficulties encountered by counsel in juvenile representation. As some *amici* note, the features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings. Juveniles mistrust adults and have limited understandings of the criminal justice system and the roles of the institutional actors within it. They are less likely than adults to work effectively with their lawyers to aid in their defense. Brief for NAACP Legal Defense & Education Fund et al. as *Amici Curiae* 7–12; Henning, Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child’s Counsel in Delinquency Cases, 81 Notre Dame L. Rev. 245, 272–273 (2005). Difficulty in weighing long-term consequences; a corresponding impulsiveness; and reluctance to trust defense counsel seen as part of the adult world a rebellious youth rejects, all can lead to poor decisions by one charged with a juvenile offense. *Aber* Brief 35. These factors are likely to impair the quality of a juvenile defendant’s representation. Cf. *Atkins*, 536 U. S., at 320 (“Mentally retarded defendants may be less able to give meaningful assistance to their counsel”). A categorical rule avoids the risk that, as a result of these difficulties, a court or jury will erroneously conclude that a particular juvenile is sufficiently culpable to deserve life without parole for a nonhomicide.

Finally, a categorical rule gives all juvenile nonhomicide offenders a chance to demonstrate maturity and reform. The juvenile should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential. In *Roper*, that deprivation resulted from an execution that brought life to its end. Here, though by a different dynamic, the same concerns apply. Life in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope. Maturity

can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation. A young person who knows that he or she has no chance to leave prison before life's end has little incentive to become a responsible individual. In some prisons, moreover, the system itself becomes complicit in the lack of development. As noted above, see *supra*, at 23, it is the policy in some prisons to withhold counseling, education, and rehabilitation programs for those who are ineligible for parole consideration. A categorical rule against life without parole for juvenile nonhomicide offenders avoids the perverse consequence in which the lack of maturity that led to an offender's crime is reinforced by the prison term.

Terrance Graham's sentence guarantees he will die in prison without any meaningful opportunity to obtain release, no matter what he might do to demonstrate that the bad acts he committed as a teenager are not representative of his true character, even if he spends the next half century attempting to atone for his crimes and learn from his mistakes. The State has denied him any chance to later demonstrate that he is fit to rejoin society based solely on a nonhomicide crime that he committed while he was a child in the eyes of the law. This the Eighth Amendment does not permit.

#### D

There is support for our conclusion in the fact that, in continuing to impose life without parole sentences on juveniles who did not commit homicide, the United States adheres to a sentencing practice rejected the world over. This observation does not control our decision. The judgments of other nations and the international community are not dispositive as to the meaning of the Eighth Amendment. But "[t]he climate of international opinion concerning the acceptability of a particular punishment" is also "not irrelevant." *Enmund*, 458 U. S., at 796, n. 22. The Court has looked beyond our Nation's borders for support for its independent conclusion that a particular punishment is cruel and unusual. See, e.g., *Roper*, 543 U. S., at 575–578; *Atkins*, *supra*, at 317–318, n. 21; *Thompson*, 487 U. S., at 830 (plurality opinion); *Enmund*, *supra*, at 796–797, n. 22; *Coker*, 433 U. S., at 596, n. 10 (plurality opinion); *Trop*, 356 U. S., at 102–103 (plurality opinion).

Today we continue that longstanding practice in noting the global consensus against the sentencing practice in question. A recent study concluded that only 11 nations authorize life without parole for juvenile offenders under any circumstances; and only 2 of them, the United States and Israel, ever impose the punishment in practice. See M. Leighton & C. de la Vega, *Sentencing Our Children to Die in Prison: Global Law and Practice* 4 (2007). An updated version of the study concluded that Israel's "laws allow for parole review of juvenile offenders serving life terms," but expressed reservations about how that parole review is implemented. De la Vega & Leighton, *Sentencing Our Children to Die in Prison: Global Law and Practice*, 42 U. S. F. L. Rev. 983, 1002–1003 (2008). But even if Israel is counted as allowing life without parole for juvenile offenders, that nation does not appear to impose that sentence for nonhomicide crimes; all of the seven Israeli prisoners whom commentators have identified as serving life sentences for juvenile crimes were convicted of homicide or attempted homicide. See Amnesty International, Human Rights Watch, *The Rest of Their Lives: Life without Parole for Child Offenders in the United States* 106, n. 322 (2005); Memorandum and Attachment from Ruth Levush, Law Library of Congress, to Supreme Court Library (Feb. 16, 2010) (available in Clerk of Court's case file).

Thus, as petitioner contends and respondent does not contest, the United States is the only Nation that imposes life without parole sentences on juvenile nonhomicide offenders. We also note, as petitioner and his *amici* emphasize, that Article 37(a) of the United Nations Convention on the Rights of the Child, Nov. 20, 1989, 1577 U. N. T. S. 3 (entered into force Sept. 2, 1990), ratified by every nation except the United States and Somalia, prohibits the imposition of "life imprisonment without possibility of release . . . for offences committed by persons below eighteen years of age." Brief for Petitioner 66; Brief for Amnesty International et al. as *Amici Curiae* 15–17. As we concluded in *Roper* with respect to the juvenile death penalty, "the United States now stands alone in a world that has turned its face against" life without parole for juvenile nonhomicide offenders. 543 U. S., at 577.

The State's *amici* stress that no international legal agreement that is binding on the United States prohibits life without parole for juvenile offenders and thus urge us to ignore the international consensus. See Brief for Solidarity Center for Law and Justice et al. as *Amici Curiae* 14–16; Brief for Sixteen Members of United States House of Representatives as *Amici Curiae* 40–43. These arguments miss the mark. The question before us is not whether international law prohibits the United States from imposing the sentence at issue in this case. The question is whether that punishment is cruel and unusual. In that inquiry, "the overwhelming weight of international opinion

against” life without parole for nonhomicide offenses committed by juveniles “provide[s] respected and significant confirmation for our own conclusions.” *Roper, supra*, at 578.

The debate between petitioner’s and respondent’s *amici* over whether there is a binding *jus cogens* norm against this sentencing practice is likewise of no import. See Brief for Amnesty International 10–23; Brief for Sixteen Members of United States House of Representatives 4–40. The Court has treated the laws and practices of other nations and international agreements as relevant to the Eighth Amendment not because those norms are binding or controlling but because the judgment of the world’s nations that a particular sentencing practice is inconsistent with basic principles of decency demonstrates that the Court’s rationale has respected reasoning to support it.

\* \* \*

The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide. A State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term. The judgment of the First District Court of Appeal of Florida is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

*It is so ordered.*

#### Appendix to opinion of the Court

#### APPENDIX

#### I. JURISDICTIONS THAT PERMIT LIFE WITHOUT PAROLE FOR JUVENILE NONHOMICIDE OFFENDERS

Alabama	Ala. Code §12–15–203 (Supp. 2009); §§13A–3–3, 13A–5–9(c), 13A–6–61 (2005); §13A–7–5 (Supp. 2009)
Arizona	Ariz. Rev. Stat. Ann. §§13–501, §13–1423 (West 2010)
Arkansas	Ark. Code §9–27–318(b) (2009); §5–4–501(c) (Supp. 2009)
California	Cal. Penal Code Ann. §667.7(a)(2) (1999); §1170.17 (2004)
Delaware	Del. Code Ann., Tit., 10, §1010 (Supp. 2008); <i>id.</i> , Tit., 11, §773(c) (2003)
District of Columbia	D. C. Code §16–2307 (2009 Supp. Pamphlet); §22–3020 (Supp. 2007)
Florida	Fla. Stat. §§810.02, 921.002(1)(e), 985.557 (2007)
Georgia	Georgia Code Ann. §15–11–30.2 (2008); §16–6–1(b) (2007)
Idaho	Idaho Code §18–6503 (Lexis 2005); §§19–2513, 20–509 (Lexis Supp. 2009)
Illinois	Ill. Comp. Stat., ch. 705, §§405/5–805, 405/5–130 (West 2008); <i>id.</i> , ch. 720, §5/12–13(b)(3) (West 2008); <i>id.</i> , ch. 730, §5/3–3–3(d) (West 2008)
Indiana	Ind. Code §31–30–3–6(1); §35–50–2–8.5(a) (West 2004)
Iowa	Iowa Code §§232.45(6), 709.2, 902.1 (2009)
Louisiana	La. Child. Code Ann., Arts. 305, 857(A), (B) (West Supp. 2010); La. Stat. Ann. §14:44 (West 2007)
Maryland	Md. Cts. & Jud. Proc. Code Ann. §§3–8A–03(d)(1), 3–8A–06(a)(2) (Lexis 2006); Md. Crim. Law Code Ann. §§3–303(d)(2),(3) (Lexis Supp. 2009)
Michigan	Mich. Comp. Laws Ann. §712A.4 (West 2002); §750.520b(2)(c) (West Supp. 2009); §769.1 (West 2000)
Minnesota	Minn. Stat. §§260B.125(1), 609.3455(2) (2008)
Mississippi	Miss. Code Ann. §43–21–157 (2009); §§97–3–53, 99–19–81 (2007); §99–19–83 (2006)
Missouri	Mo. Rev. Stat. §§211.071, 558.018 (2000)
Nebraska	Neb. Rev. Stat. §§28–105, 28–416(8)(a), 29–2204(1), (3), 43–247, 43–276 (2008)
Nevada	Nev. Rev. Stat. §§62B.330, 200.366 (2009)
New Hampshire	N. H. Rev. Stat. Ann. §169–B:24; §628:1 (2007); §§632–A:2, 651:6 (Supp. 2009)
New York	N. Y. Penal Law Ann. §§30.00, §60.06 (West 2009); §490.55 (West 2008)

North Carolina	N. C. Gen. Stat. Ann. §§7B-2200, 15A-1340.16B(a) (Lexis 2009)
North Dakota	N. D. Cent. Code Ann. §12.1-04-01 (Lexis 1997); §12.1-20-03 (Lexis Supp. 2009); §12.1-32-01 (Lexis 1997)
Ohio	Ohio Rev. Code Ann. §2152.10 (Lexis 2007); §2907.02 (Lexis 2006); §2971.03(A)(2) (2010 Lexis Supp. Pamphlet)
Oklahoma	Okla. Stat., Tit. 10A, §§2-5-204, 2-5-205, 2-5-206 (2009 West Supp.); <i>id.</i> , Tit. 21, §1115 (2007 West Supp.)
Oregon	Ore. Rev. Stat. §§137.707, 137.719(1) (2009)
Pennsylvania	42 Pa. Cons. Stat. §6355(a) (2000); 18 <i>id.</i> , §3121(e)(2) (2008); 61 <i>id.</i> , §6137(a) (2009)
Rhode Island	R. I. Gen. Laws §§14-1-7, 14-1-7.1, 11-47-3.2 (Lexis 2002)
South Carolina	S. C. Code Ann. §63-19-1210 (2008 Supp. Pamphlet); §16-11-311(B) (Westlaw 2009)
South Dakota	S. D. Codified Laws §26-11-3.1 (Supp. 2009); §26-11-4 (2004); §§22-3-1, 22-6-1(2),(3) (2006); §24-15-4 (2004); §§22-19-1, 22-22-1 (2006)
Tennessee	Tenn. Code Ann. §§37-1-134, 40-35-120(g) (Westlaw 2010)
Utah	Utah Code Ann. §§78A-6-602, 78A-6-703, 76-5-302 (Lexis 2008)
Virginia	Va. Code Ann. §§16.1-269.1, §18.2-61, §53.1-151(B1) (2009)
Washington	Wash. Rev. Code §13.40.110 (2009 Supp.); §§9A.04.050, 9.94A.030(34), 9.94A.570 (2008)
West Virginia	W. Va. Code Ann. §49-5-10 (Lexis 2009); §61-2-14a(a) (Lexis 2005)
Wisconsin	Wis. Stat. §§938.18, 938.183 (2007-2008); §939.62(2m)(c) (Westlaw 2005)
Wyoming	Wyo. Stat. Ann. §§6-2-306(d),(e), 14-6-203 (2009)
Federal	18 U. S. C. §2241 (2006 ed. and Supp. II); §5032 (2006 ed.)

## II. JURISDICTIONS THAT PERMIT LIFE WITHOUT PAROLE FOR JUVENILE OFFENDERS CONVICTED OF HOMICIDE CRIMES ONLY

Connecticut	Conn. Gen. Stat. §53a-35a (2009)
Hawaii	Haw. Rev. Stat. §571-22(d) (2006); §706-656(1) (2008 Supp. Pamphlet)
Maine	Me. Rev. Stat. Ann., Tit. 15, §3101(4) (Supp. 2009); <i>id.</i> , Tit. 17-a, §1251 (2006)
Massachusetts	Mass Gen. Laws ch. 119, §74; <i>id.</i> , ch. 265, §2 (2008)
New Jersey	N. J. Stat. Ann. §2A:4A-26 (West Supp. 2009); §2C:11-3(b)(2) (West Supp. 2009)
New Mexico	N. M. Stat. Ann. §31-18-14 (Supp. 2009); §31-18-15.2(A) (Westlaw 2010)
Vermont	Vt. Stat. Ann., Tit. 33, §5204 (2009 Cum. Supp.); <i>id.</i> , Tit. 13, §2303 (2009)

## III. JURISDICTIONS THAT FORBID LIFE WITHOUT PAROLE FOR JUVENILE OFFENDERS

Alaska	Alaska Stat. §12.55.015(g) (2008)
Colorado	Colo. Rev. Stat. Ann. §18-1.3-401(4)(b) (2009)
Montana	Mont. Code Ann. §46-18-222(1) (2009)
Kansas	Kan. Stat. Ann. §21-4622 (West 2007)
Kentucky	Ky. Rev. Stat. Ann. §640.040 (West 2008); <i>Shepherd v. Commonwealth</i> , 251 S. W. 3d 309, 320-321 (Ky. 2008)
Texas	Tex. Penal Code Ann. §12.31 (West Supp. 2009)

STEVENS, J., concurring

**SUPREME COURT OF THE UNITED STATES**

No. 08–7412

TERRANCE JAMAR GRAHAM, PETITIONER v. FLORIDA

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT  
[May 17, 2010]

JUSTICE STEVENS, with whom JUSTICE GINSBURG and JUSTICE SOTOMAYOR join, concurring.

In his dissenting opinion, JUSTICE THOMAS argues that today's holding is not entirely consistent with the controlling opinions in *Lockyer v. Andrade*, 538 U. S. 63 (2003), *Ewing v. California*, 538 U. S. 11 (2003), *Harmelin v. Michigan*, 501 U. S. 957 (1991), and *Rummel v. Estelle*, 445 U. S. 263 (1980). *Post*, at 7–9. Given that “evolving standards of decency” have played a central role in our Eighth Amendment jurisprudence for at least a century, see *Weems v. United States*, 217 U. S. 349, 373–378 (1910), this argument suggests the dissenting opinions in those cases more accurately describe the law today than does JUSTICE THOMAS' rigid interpretation of the Amendment. Society changes. Knowledge accumulates. We learn, sometimes, from our mistakes. Punishments that did not seem cruel and unusual at one time may, in the light of reason and experience, be found cruel and unusual at a later time; unless we are to abandon the moral commitment embodied in the Eighth Amendment, proportionality review must never become effectively obsolete, *post*, at 8–9, and n. 2.

While JUSTICE THOMAS would apparently not rule out a death sentence for a \$50 theft by a 7-year-old, see *post*, at 4, 10, n. 3, the Court wisely rejects his static approach to law. Standards of decency have evolved since 1980. They will never stop doing so.

ROBERTS, C. J., concurring in judgment

**SUPREME COURT OF THE UNITED STATES**

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[May 17, 2010]

CHIEF JUSTICE ROBERTS, concurring in the judgment.

I agree with the Court that Terrance Graham's sentence of life without parole violates the Eighth Amendment's prohibition on “cruel and unusual punishments.” Unlike the majority, however, I see no need to invent a new constitutional rule of dubious provenance in reaching that conclusion. Instead, my analysis is based on an application of this Court's precedents, in particular (1) our cases requiring “narrow proportionality” review of noncapital sentences and (2) our conclusion in *Roper v. Simmons*, 543 U. S. 551 (2005), that juvenile offenders are generally less culpable than adults who commit the same crimes.

These cases expressly allow courts addressing allegations that a noncapital sentence violates the Eighth Amendment to consider the particular defendant and particular crime at issue. The standards for relief under these precedents are rigorous, and should be. But here Graham's juvenile status—together with the nature of his criminal conduct and the extraordinarily severe punishment imposed—lead me to conclude that his sentence of life without parole is unconstitutional.

## I

Our Court has struggled with whether and how to apply the Cruel and Unusual Punishments Clause to sentences for noncapital crimes. Some of my colleagues have raised serious and thoughtful questions about whether, as an original matter, the Constitution was understood to require any degree of proportionality between noncapital offenses and their corresponding punishments. See, e.g., *Harmelin v. Michigan*, 501 U. S. 957, 962–994 (1991) (principal opinion of SCALIA, J.); *post*, at 3–5, and n. 1 (THOMAS, J., dissenting). Neither party here asks us to reexamine our precedents requiring such proportionality, however, and so I approach this case by trying to apply our past decisions to the facts at hand.

## A

Graham’s case arises at the intersection of two lines of Eighth Amendment precedent. The first consists of decisions holding that the Cruel and Unusual Punishments Clause embraces a “narrow proportionality principle” that we apply, on a case-by-case basis, when asked to review noncapital sentences. *Lockyer v. Andrade*, 538 U. S. 63, 72 (2003) (internal quotation marks omitted); *Solem v. Helm*, 463 U. S. 277, 290 (1983); *Ewing v. California*, 538 U. S. 11, 20 (2003) (plurality opinion); *Harmelin*, *supra*, at 996–997 (KENNEDY, J., concurring in part and concurring in judgment). This “narrow proportionality principle” does not grant judges blanket authority to second-guess decisions made by legislatures or sentencing courts. On the contrary, a reviewing court will only “rarely” need “to engage in extended analysis to determine that a sentence is *not* constitutionally disproportionate,” *Solem*, *supra*, at 290, n. 16 (emphasis added), and “successful challenges” to noncapital sentences will be all the more “exceedingly rare,” *Rummel v. Estelle*, 445 U. S. 263, 272 (1980).

We have “not established a clear or consistent path for courts to follow” in applying the highly deferential “narrow proportionality” analysis. *Lockyer*, *supra*, at 72. We have, however, emphasized the primacy of the legislature in setting sentences, the variety of legitimate penological schemes, the state-by-state diversity protected by our federal system, and the requirement that review be guided by objective, rather than subjective, factors. *Ewing*, *supra*, at 23 (plurality opinion); *Harmelin*, *supra*, at 998–1001 (opinion of KENNEDY, J.). Most importantly, however, we have explained that the Eighth Amendment “does not require strict proportionality between crime and sentence”; rather, “it forbids only extreme sentences that are ‘grossly disproportionate’ to the crime.” *Ewing*, *supra*, at 23 (plurality opinion) (quoting *Harmelin*, *supra*, at 1001 (opinion of KENNEDY, J.)).

Our cases indicate that courts conducting “narrow proportionality” review should begin with a threshold inquiry that compares “the gravity of the offense and the harshness of the penalty.” *Solem*, 463 U. S., at 290–291. This analysis can consider a particular offender’s mental state and motive in committing the crime, the actual harm caused to his victim or to society by his conduct, and any prior criminal history. *Id.*, at 292–294, 296–297, and n. 22 (considering motive, past criminal conduct, alcoholism, and propensity for violence of the particular defendant); see also *Ewing*, *supra*, at 28–30 (plurality opinion) (examining defendant’s criminal history); *Harmelin*, 501 U. S., at 1001–1004 (opinion of KENNEDY, J.) (noting specific details of the particular crime of conviction).

Only in “the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality,” *id.*, at 1005, should courts proceed to an “intra-jurisdictional” comparison of the sentence at issue with those imposed on other criminals in the same jurisdiction, and an “inter-jurisdictional” comparison with sentences imposed for the same crime in other jurisdictions. *Solem*, *supra*, at 291–292. If these subsequent comparisons confirm the inference of gross disproportionality, courts should invalidate the sentence as a violation of the Eighth Amendment.

## B

The second line of precedent relevant to assessing Graham’s sentence consists of our cases acknowledging that juvenile offenders are *generally*—though not necessarily in every case—less morally culpable than adults who commit the same crimes. This insight animated our decision in *Thompson v. Oklahoma*, 487 U. S. 815 (1988), in which we invalidated a capital sentence imposed on a juvenile who had committed his crime under the age of 16. More recently, in *Roper*, 543 U. S. 551, we extended the prohibition on executions to those who committed their crimes before the age of 18.

Both *Thompson* and *Roper* arose in the unique context of the death penalty, a punishment that our Court has recognized “must be limited to those offenders who commit ‘a narrow category of the most serious crimes’ and

whose extreme culpability makes them ‘the most deserving of execution.’” 543 U.S., at 568 (quoting *Atkins v. Virginia*, 536 U. S. 304, 319 (2002)). *Roper*’s prohibition on the juvenile death penalty followed from our conclusion that “[t]hree general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders.” 543 U. S., at 569. These differences are a lack of maturity and an underdeveloped sense of responsibility, a heightened susceptibility to negative influences and outside pressures, and the fact that the character of a juvenile is “more transitory” and “less fixed” than that of an adult. *Id.*, at 569–570. Together, these factors establish the “diminished culpability of juveniles,” *id.*, at 571, and “render suspect any conclusion” that juveniles are among “the worst offenders” for whom the death penalty is reserved, *id.*, at 570.

Today, the Court views *Roper* as providing the basis for a new categorical rule that juveniles may never receive a sentence of life without parole for nonhomicide crimes. I disagree. In *Roper*, the Court tailored its analysis of juvenile characteristics to the specific question whether juvenile offenders could constitutionally be subject to capital punishment. Our answer that they could not be sentenced to death was based on the explicit conclusion that they “cannot with reliability be classified among the *worst* offenders.” *Id.*, at 569 (emphasis added).

This conclusion does not establish that juveniles can never be eligible for life without parole. A life sentence is of course far less severe than a death sentence, and we have never required that it be imposed only on the very worst offenders, as we have with capital punishment. Treating juvenile life sentences as analogous to capital punishment is at odds with our longstanding view that “the death penalty is different from other punishments in kind rather than degree.” *Solem, supra*, at 294. It is also at odds with *Roper* itself, which drew the line at capital punishment by blessing juvenile sentences that are “less severe than death” despite involving “forfeiture of some of the most basic liberties.” 543 U. S., at 573–574. Indeed, *Roper* explicitly relied on the possible imposition of life without parole on some juvenile offenders. *Id.*, at 572.

But the fact that *Roper* does not support a categorical rule barring life sentences for all juveniles does not mean that a criminal defendant’s age is irrelevant to those sentences. On the contrary, our cases establish that the “narrow proportionality” review applicable to noncapital cases itself takes the personal “culpability of the offender” into account in examining whether a given punishment is proportionate to the crime. *Solem, supra*, at 292. There is no reason why an offender’s juvenile status should be excluded from the analysis. Indeed, given *Roper*’s conclusion that juveniles are typically less blameworthy than adults, 543 U.S., at 571, an offender’s juvenile status can play a central role in the inquiry.

JUSTICE THOMAS disagrees with even our limited reliance on *Roper* on the ground that the present case does not involve capital punishment. *Post*, at 26 (dissenting opinion). That distinction is important—indeed, it underlies our rejection of the categorical rule declared by the Court. But *Roper*’s conclusion that juveniles are typically less culpable than adults has pertinence beyond capital cases, and rightly informs the case-specific inquiry I believe to be appropriate here.

In short, our existing precedent already provides a sufficient framework for assessing the concerns outlined by the majority. Not every juvenile receiving a life sentence will prevail under this approach. Not every juvenile should. But all will receive the protection that the Eighth Amendment requires.

## II

Applying the “narrow proportionality” framework to the particular facts of this case, I conclude that Graham’s sentence of life without parole violates the Eighth Amendment.<sup>1</sup>

## A

I begin with the threshold inquiry comparing the gravity of Graham’s conduct to the harshness of his penalty. There is no question that the crime for which Graham received his life sentence—armed burglary of a nondomicil with an assault or battery—is “a serious crime deserving serious punishment.” *Enmund v. Florida*, 458 U. S. 782, 797 (1982). So too is the home invasion robbery that was the basis of Graham’s probation violation. But these crimes are certainly less serious than other crimes, such as murder or rape.

As for Graham's degree of personal culpability, he committed the relevant offenses when he was a juvenile—a stage at which, *Roper* emphasized, one's "culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity." 543 U. S., at 571. Graham's age places him in a significantly different category from the defendants in *Rummel*, *Harmelin*, and *Ewing*, all of whom committed their crimes as adults. Graham's youth made him relatively more likely to engage in reckless and dangerous criminal activity than an adult; it also likely enhanced his susceptibility to peer pressure. See, e.g., *Roper*, *supra*, at 569; *Johnson v. Texas*, 509 U. S. 350, 367 (1993); *Eddings v. Oklahoma*, 455 U. S. 104, 115–117 (1982). There is no reason to believe that Graham should be denied the general presumption of diminished culpability that *Roper* indicates should apply to juvenile offenders. If anything, Graham's in-court statements—including his request for a second chance so that he could "do whatever it takes to get to the NFL"—underscore his immaturity. App. 380.

The fact that Graham committed the crimes that he did proves that he was dangerous and deserved to be punished. But it does not establish that he was *particularly* dangerous—at least relative to the murderers and rapists for whom the sentence of life without parole is typically reserved. On the contrary, his lack of prior criminal convictions, his youth and immaturity, and the difficult circumstances of his upbringing noted by the majority, *ante*, at 1, all suggest that he was markedly less culpable than a typical adult who commits the same offenses.

Despite these considerations, the trial court sentenced Graham to life in prison without the possibility of parole. This is the second-harshes sentence available under our precedents for *any* crime, and the most severe sanction available for a nonhomicide offense. See *Kennedy v. Louisiana*, 554 U. S. \_\_\_\_ (2008). Indeed, as the majority notes, Graham's sentence far exceeded the punishment proposed by the Florida Department of Corrections (which suggested a sentence of four years, Brief for Petitioner 20), and the state prosecutors (who asked that he be sentenced to 30 years in prison for the armed burglary, App. 388). No one in Graham's case other than the sentencing judge appears to have believed that Graham deserved to go to prison for life.

Based on the foregoing circumstances, I conclude that there is a strong inference that Graham's sentence of life imprisonment without parole was grossly disproportionate in violation of the Eighth Amendment. I therefore proceed to the next steps of the proportionality analysis.

## B

Both intrajurisdictional and interjurisdictional comparisons of Graham's sentence confirm the threshold inference of disproportionality.

Graham's sentence was far more severe than that imposed for similar violations of Florida law, even without taking juvenile status into account. For example, individuals who commit burglary or robbery offenses in Florida receive average sentences of less than 5 years and less than 10 years, respectively. Florida Dept. of Corrections, Annual Report FY 2007–2008: The Guidebook to Corrections in Florida 35. Unsurprisingly, Florida's juvenile criminals receive similarly low sentences—typically less than five years for burglary and less than seven years for robbery. *Id.*, at 36. Graham's life without parole sentence was far more severe than the average sentence imposed on those convicted of murder or manslaughter, who typically receive under 25 years in prison. *Id.*, at 35. As the Court explained in *Solem*, 463 U. S., at 291, "[i]f more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive."

Finally, the inference that Graham's sentence is disproportionate is further validated by comparison to the sentences imposed in other domestic jurisdictions. As the majority opinion explains, Florida is an outlier in its willingness to impose sentences of life without parole on juveniles convicted of nonhomicide crimes. See *ante*, at 11–13.

## III

So much for Graham. But what about Milagro Cunningham, a 17-year-old who beat and raped an 8-year-old girl before leaving her to die under 197 pounds of rock in a recycling bin in a remote landfill? See Musgrave, *Cruel or Necessary? Life Terms for Youths Spur National Debate*, Palm Beach Post, Oct. 15, 2009, p. 1A. Or Nathan Walker and Jakaris Taylor, the Florida juveniles who together with their friends gang-raped a woman and forced her to perform oral sex on her 12-year-old son? See 3 Sentenced to Life for Gang Rape of Mother, Associated Press, Oct. 14, 2009. The fact that Graham cannot be sentenced to life without parole for his conduct says nothing



whatever about these offenders, or others like them who commit nonhomicide crimes far more reprehensible than the conduct at issue here. The Court uses Graham's case as a vehicle to proclaim a new constitutional rule—applicable well beyond the particular facts of Graham's case—that a sentence of life without parole imposed on *any* juvenile for *any* nonhomicide offense is unconstitutional. This categorical conclusion is as unnecessary as it is unwise.

A holding this broad is unnecessary because the particular conduct and circumstances at issue in the case before us are not serious enough to justify Graham's sentence. In reaching this conclusion, there is no need for the Court to decide whether that same sentence would be constitutional if imposed for other more heinous nonhomicide crimes.

A more restrained approach is especially appropriate in light of the Court's apparent recognition that it is perfectly legitimate for a juvenile to receive a sentence of life without parole for committing murder. This means that there is nothing *inherently* unconstitutional about imposing sentences of life without parole on juvenile offenders; rather, the constitutionality of such sentences depends on the particular crimes for which they are imposed. But if the constitutionality of the sentence turns on the particular crime being punished, then the Court should limit its holding to the particular offenses that Graham committed here, and should decline to consider other hypothetical crimes not presented by this case.

In any event, the Court's categorical conclusion is also unwise. Most importantly, it ignores the fact that some nonhomicide crimes—like the ones committed by Milagro Cunningham, Nathan Walker, and Jakaris Taylor—are especially heinous or grotesque, and thus may be deserving of more severe punishment.

Those under 18 years old may as a general matter have “diminished” culpability relative to adults who commit the same crimes, *Roper*, 543 U. S., at 571, but that does not mean that their culpability is always insufficient to justify a life sentence. See generally *Thompson*, 487 U. S., at 853 (O'Connor, J., concurring in judgment). It does not take a moral sense that is fully developed in every respect to know that beating and raping an 8-year-old girl and leaving her to die under 197 pounds of rocks is horribly wrong. The single fact of being 17 years old would not afford Cunningham protection against life without parole if the young girl had died—as Cunningham surely expected she would—so why should it do so when she miraculously survived his barbaric brutality?

The Court defends its categorical approach on the grounds that a “clear line is necessary to prevent the possibility that life without parole sentences will be imposed on juvenile nonhomicide offenders who are not sufficiently culpable to merit that punishment.” *Ante*, at 24. It argues that a case-by-case approach to proportionality review is constitutionally insufficient because courts might not be able “with sufficient accuracy [to] distinguish the few incorrigible juvenile offenders from the many that have the capacity for change.” *Ante*, at 27.

The Court is of course correct that judges will never have perfect foresight—or perfect wisdom—in making sentencing decisions. But this is true when they sentence adults no less than when they sentence juveniles. It is also true when they sentence juveniles who commit murder no less than when they sentence juveniles who commit other crimes.

Our system depends upon sentencing judges applying their reasoned judgment to each case that comes before them. As we explained in *Solem*, the whole enterprise of proportionality review is premised on the “justified” assumption that “courts are competent to judge the gravity of an offense, at least on a relative scale.” 463 U. S., at 292. Indeed, “courts traditionally have made these judgments” by applying “generally accepted criteria” to analyze “the harm caused or threatened to the victim or society, and the culpability of the offender.” *Id.*, at 292, 294.

\* \* \*

Terrance Graham committed serious offenses, for which he deserves serious punishment. But he was only 16 years old, and under our Court's precedents, his youth is one factor, among others, that should be considered in deciding whether his punishment was unconstitutionally excessive. In my view, Graham's age—together with the nature of his criminal activity and the unusual severity of his sentence—tips the constitutional balance. I thus concur in the Court's judgment that Graham's sentence of life without parole violated the Eighth Amendment.

I would not, however, reach the same conclusion in every case involving a juvenile offender. Some crimes are so heinous, and some juvenile offenders so highly culpable, that a sentence of life without parole may be

entirely justified under the Constitution. As we have said, “successful challenges” to noncapital sentences under the Eighth Amendment have been—and, in my view, should continue to be—“exceedingly rare.” *Rummel*, 445 U. S., at 272. But Graham’s sentence presents the exceptional case that our precedents have recognized will come along. We should grant Graham the relief to which he is entitled under the Eighth Amendment. The Court errs, however, in using this case as a vehicle for unsettling our established jurisprudence and fashioning a categorical rule applicable to far different cases.

THOMAS, J., dissenting

**SUPREME COURT OF THE UNITED STATES**

No. 08–7412

**TERRANCE JAMAR GRAHAM, PETITIONER v. FLORIDA**

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT  
[May 17, 2010]

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, and with whom JUSTICE ALITO joins as to Parts I and III, dissenting.

The Court holds today that it is “grossly disproportionate” and hence unconstitutional for any judge or jury to impose a sentence of life without parole on an offender less than 18 years old, unless he has committed a homicide. Although the text of the Constitution is silent regarding the permissibility of this sentencing practice, and although it would not have offended the standards that prevailed at the founding, the Court insists that the standards of American society have evolved such that the Constitution now requires its prohibition.

The news of this evolution will, I think, come as a surprise to the American people. Congress, the District of Columbia, and 37 States allow judges and juries to consider this sentencing practice in juvenile nonhomicide cases, and those judges and juries have decided to use it in the very worst cases they have encountered.

The Court does not conclude that life without parole itself is a cruel and unusual punishment. It instead rejects the judgments of those legislatures, judges, and juries regarding what the Court describes as the “moral” question of whether this sentence can ever be “proportionat[e]” when applied to the category of offenders at issue here. *Ante*, at 7 (internal quotation marks omitted), *ante*, at 1 (STEVENS, J., concurring).

I am unwilling to assume that we, as members of this Court, are any more capable of making such moral judgments than our fellow citizens. Nothing in our training as judges qualifies us for that task, and nothing in Article III gives us that authority.

I respectfully dissent.

I

The Court recounts the facts of Terrance Jamar Graham’s case in detail, so only a summary is necessary here. At age 16 years and 6 months, Graham and two masked accomplices committed a burglary at a small Florida restaurant, during which one of Graham’s accomplices twice struck the restaurant manager on the head with a steel pipe when he refused to turn over money to the intruders. Graham was arrested and charged as an adult. He later pleaded guilty to two offenses, including armed burglary with assault or battery, an offense punishable by life imprisonment under Florida law. Fla. Stat. §§810.02(2)(a), 810.02(2)(b) (2007). The trial court withheld adjudication on both counts, however, and sentenced Graham to probation, the first 12 months of which he spent in a county detention facility.

Graham reoffended just six months after his release. At a probation revocation hearing, a judge found by a preponderance of the evidence that, at age 17 years and 11 months, Graham invaded a home with two accomplices and held the homeowner at gunpoint for approximately 30 minutes while his accomplices ransacked the residence. As a result, the judge concluded that Graham had violated his probation and, after additional hearings, adjudicated

Graham guilty on both counts arising from the restaurant robbery. The judge imposed the maximum sentence allowed by Florida law on the armed burglary count, life imprisonment without the possibility of parole.

Graham argues, and the Court holds, that this sentence violates the Eighth Amendment's Cruel and Unusual Punishments Clause because a life-without-parole sentence is always "grossly disproportionate" when imposed on a person under 18 who commits any crime short of a homicide. Brief for Petitioner 24; *ante*, at 21.

## II

### A

The Eighth Amendment, which applies to the States through the Fourteenth, provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." It is by now well established that the Cruel and Unusual Punishments Clause was originally understood as prohibiting torturous "methods of punishment," *Harmelin v. Michigan*, 501 U. S. 957, 979 (1991) (opinion of SCALIA, J.) (quoting Granucci, "Nor Cruel and Unusual Punishments Inflicted": The Original Meaning, 57 Cal. L. Rev. 839, 842 (1969))—specifically methods akin to those that had been considered cruel and unusual at the time the Bill of Rights was adopted, *Baze v. Rees*, 553 U. S. 35, 99 (2008) (THOMAS, J., concurring in judgment). With one arguable exception, see *Weems v. United States*, 217 U. S. 349 (1910); *Harmelin*, *supra*, at 990–994 (opinion of SCALIA, J.) (discussing the scope and relevance of *Weems*' holding), this Court applied the Clause with that understanding for nearly 170 years after the Eighth Amendment's ratification.

More recently, however, the Court has held that the Clause authorizes it to proscribe not only methods of punishment that qualify as "cruel and unusual," but also any punishment that the Court deems "grossly disproportionate" to the crime committed. *Ante*, at 8 (internal quotation marks omitted). This latter interpretation is entirely the Court's creation. As has been described elsewhere at length, there is virtually no indication that the Cruel and Unusual Punishments Clause originally was understood to require proportionality in sentencing. See *Harmelin*, 501 U. S., at 975–985 (opinion of SCALIA, J.). Here, it suffices to recall just two points. First, the Clause does not expressly refer to proportionality or invoke any synonym for that term, even though the Framers were familiar with the concept, as evidenced by several founding-era state constitutions that required (albeit without defining) proportional punishments. See *id.*, at 977–978. In addition, the penal statute adopted by the First Congress demonstrates that proportionality in sentencing was not considered a constitutional command.<sup>2</sup> See *id.*, at 980–981 (noting that the statute prescribed capital punishment for offenses ranging from "'run[ning] away with . . . goods or merchandise to the value of fifty dollars,'" to "murder on the high seas" (quoting 1 Stat. 114)); see also Preyer, Penal Measures in the American Colonies: An Overview, 26 Am. J. Legal Hist. 326, 348–349, 353 (1982) (explaining that crimes in the late 18th-century colonies generally were punished either by fines, whipping, or public "shaming," or by death, as intermediate sentencing options such as incarceration were not common).

The Court has nonetheless invoked proportionality to declare that capital punishment—though not unconstitutional *per se*—is categorically too harsh a penalty to apply to certain types of crimes and certain classes of offenders. See *Coker v. Georgia*, 433 U. S. 584 (1977) (plurality opinion) (rape of an adult woman); *Kennedy v. Louisiana*, 554 U. S. \_\_\_\_ (2008) (rape of a child); *Enmund v. Florida*, 458 U. S. 782 (1982) (felony murder in which the defendant participated in the felony but did not kill or intend to kill); *Thompson v. Oklahoma*, 487 U. S. 815 (1988) (plurality opinion) (juveniles under 16); *Roper v. Simmons*, 543 U. S. 551 (2005) (juveniles under 18); *Atkins v. Virginia*, 536 U. S. 304 (2002) (mentally retarded offenders). In adopting these categorical proportionality rules, the Court intrudes upon areas that the Constitution reserves to other (state and federal) organs of government. The Eighth Amendment prohibits the government from inflicting a cruel and unusual method of punishment upon a defendant. Other constitutional provisions ensure the defendant's right to fair process before any punishment is imposed. But, as members of today's majority note, "[s]ociety changes," *ante*, at 1 (STEVENS, J., concurring), and the Eighth Amendment leaves the unavoidably moral question of who "deserves" a particular nonprohibited method of punishment to the judgment of the legislatures that authorize the penalty, the prosecutors who seek it, and the judges and juries that impose it under circumstances they deem appropriate.

The Court has nonetheless adopted categorical rules that shield entire classes of offenses and offenders from the death penalty on the theory that "evolving standards of decency" require this result. *Ante*, at 7 (internal quotation marks omitted). The Court has offered assurances that these standards can be reliably measured by

“objective indicia” of “national consensus,” such as state and federal legislation, jury behavior, and (surprisingly, given that we are talking about “national” consensus) international opinion. *Ante*, at 10 (quoting *Roper, supra*, at 563); see also *ante*, at 8–15, 29–31. Yet even assuming that is true, the Framers did not provide for the constitutionality of a particular type of punishment to turn on a “snapshot of American public opinion” taken at the moment a case is decided. *Roper, supra*, at 629 (SCALIA, J., dissenting). By holding otherwise, the Court pretermits in all but one direction the evolution of the standards it describes, thus “calling a constitutional halt to what may well be a pendulum swing in social attitudes,” *Thompson, supra*, at 869 (SCALIA, J., dissenting), and “stunt[ing] legislative consideration” of new questions of penal policy as they emerge, *Kennedy, supra*, at \_\_\_\_ (slip op., at 2) (ALITO, J., dissenting).

But the Court is not content to rely on snapshots of community consensus in any event. *Ante*, at 16 (“Community consensus, while ‘entitled to great weight,’ is not itself determinative” (quoting *Kennedy, supra*, at \_\_\_\_ (slip op., at 24))). Instead, it reserves the right to reject the evidence of consensus it finds whenever its own “independent judgment” points in a different direction. *Ante*, at 16. The Court thus openly claims the power not only to approve or disapprove of democratic choices in penal policy based on evidence of how society’s standards *have* evolved, but also on the basis of the Court’s “independent” perception of how those standards *should* evolve, which depends on what the Court concedes is “‘necessarily . . . a moral judgment’” regarding the propriety of a given punishment in today’s society. *Ante*, at 7 (quoting *Kennedy, supra*, at \_\_\_\_ (slip op., at 8)).

The categorical proportionality review the Court employs in capital cases thus lacks a principled foundation. The Court’s decision today is significant because it does not merely apply this standard—it remarkably expands its reach. For the first time in its history, the Court declares an entire class of offenders immune from a noncapital sentence using the categorical approach it previously reserved for death penalty cases alone.

## B

Until today, the Court has based its categorical proportionality rulings on the notion that the Constitution gives special protection to capital defendants because the death penalty is a uniquely severe punishment that must be reserved for only those who are “most deserving of execution.” *Atkins, supra*, at 319; see *Roper, supra*, at 568; *Eddings v. Oklahoma*, 455 U. S. 104 (1982); *Lockett v. Ohio*, 438 U. S. 586 (1978). Of course, the Eighth Amendment itself makes no distinction between capital and noncapital sentencing, but the “bright line” the Court drew between the two penalties has for many years served as the principal justification for the Court’s willingness to reject democratic choices regarding the death penalty. See *Rummel v. Estelle*, 445 U. S. 263, 275 (1980).

Today’s decision eviscerates that distinction. “Death is different” no longer. The Court now claims not only the power categorically to reserve the “most severe punishment” for those the Court thinks are “‘the most deserving of execution,’” *Roper*, 543 U. S., at 568 (quoting *Atkins*, 536 U. S., at 319), *but also* to declare that “less culpable” persons are categorically exempt from the “*second* most severe penalty.” *Ante*, at 21 (emphasis added). No reliable limiting principle remains to prevent the Court from immunizing any class of offenders from the law’s third, fourth, fifth, or fiftieth most severe penalties as well.

The Court’s departure from the “death is different” distinction is especially mystifying when one considers how long it has resisted crossing that divide. Indeed, for a time the Court declined to apply proportionality principles to noncapital sentences at all, emphasizing that “a sentence of death differs in kind from any sentence of imprisonment, *no matter how long.*” *Rummel*, 445 U. S., at 272 (emphasis added). Based on that rationale, the Court found that the excessiveness of one prison term as compared to another was “properly within the province of legislatures, not courts,” *id.*, at 275–276, precisely because it involved an “*invariably . . . subjective determination*, there being no clear way to make ‘any constitutional distinction between one term of years and a shorter or longer term of years,’” *Hutto v. Davis*, 454 U. S. 370, 373 (1982) (*per curiam*) (quoting *Rummel, supra*, at 275; emphasis added).

Even when the Court broke from that understanding in its 5-to-4 decision in *Solem v. Helm*, 463 U. S. 277 (1983) (striking down as “grossly disproportionate” a life-without-parole sentence imposed on a defendant for passing a worthless check), the Court did so only as applied to the facts of that case; it announced no categorical rule. *Id.*, at 288, 303. Moreover, the Court soon cabined *Solem*’s rationale. The controlling opinion in the Court’s very next noncapital proportionality case emphasized that principles of federalism require substantial deference

to legislative choices regarding the proper length of prison sentences. *Harmelin*, 501 U.S., at 999 (opinion of KENNEDY, J.) (“[M]arked divergences both in underlying theories of sentencing and in the length of prescribed prison terms are the inevitable, often beneficial, result of the federal structure”); *id.*, at 1000 (“[D]iffering attitudes and perceptions of local conditions may yield different, yet rational, conclusions regarding the appropriate length of prison terms for particular crimes”). That opinion thus concluded that “*successful* challenges to the proportionality of [prison] sentences [would be] exceedingly rare.” *Id.*, at 1001 (internal quotation marks omitted).

They have been rare indeed. In the 28 years since *Solem*, the Court has considered just three such challenges and has rejected them all, see *Ewing v. California*, 538 U. S. 11 (2003); *Lockyer v. Andrade*, 538 U. S. 63 (2003); *Harmelin*, *supra*, largely on the theory that criticisms of the “wisdom, cost-efficiency, and effectiveness” of term-of-years prison sentences are “appropriately directed at the legislature[s],” not the courts, *Ewing*, *supra*, at 27, 28 (plurality opinion). The Court correctly notes that those decisions were “closely divided,” *ante*, at 8, but so was *Solem* itself, and it is now fair to describe *Solem* as an outlier.<sup>3</sup>

Remarkably, the Court today does more than return to *Solem*’s case-by-case proportionality standard for noncapital sentences; it hurtles past it to impose a *categorical* proportionality rule banning life-without-parole sentences not just in this case, but in *every* case involving a juvenile nonhomicide offender, no matter what the circumstances. Neither the Eighth Amendment nor the Court’s precedents justify this decision.

### III

The Court asserts that categorical proportionality review is necessary here merely because Graham asks for a categorical rule, see *ante*, at 10, and because the Court thinks clear lines are a good idea, see *ante*, at 24–25. find those factors wholly insufficient to justify the Court’s break from past practice. First, the Court fails to acknowledge that a petitioner seeking to exempt an entire category of offenders from a sentencing practice carries a much heavier burden than one seeking case-specific relief under *Solem*. Unlike the petitioner in *Solem*, Graham must establish not only that his own life-without-parole sentence is “grossly disproportionate,” but also that such a sentence is always grossly disproportionate whenever it is applied to a juvenile nonhomicide offender, no matter how heinous his crime. Cf. *United States v. Salerno*, 481 U. S. 739 (1987). Second, even applying the Court’s categorical “evolving standards” test, neither objective evidence of national consensus nor the notions of culpability on which the Court’s “independent judgment” relies can justify the categorical rule it declares here.

### A

According to the Court, proper Eighth Amendment analysis “begins with objective indicia of national consensus,”<sup>4</sup> and “[t]he clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures,” *ante*, at 10–11 (internal quotation marks omitted). As such, the analysis should end quickly, because a national “consensus” in favor of the Court’s result simply does not exist. The laws of all 50 States, the Federal Government, and the District of Columbia provide that juveniles over a certain age may be tried in adult court if charged with certain crimes.<sup>5</sup> See *ante*, at 33–35 (Appendix to opinion of the Court). Forty five States, the Federal Government, and the District of Columbia expose juvenile offenders charged in adult court to the very same range of punishments faced by adults charged with the same crimes. See *ante*, at 33–34, Part I. Eight of those States do not make life-without-parole sentences available for any nonhomicide offender, regardless of age.<sup>6</sup> All remaining jurisdictions—the Federal Government, the other 37 States, and the District— authorize life-without-parole sentences for certain nonhomicide offenses, and authorize the imposition of such sentences on persons under 18. See *ibid.* Only five States prohibit juvenile offenders from receiving a life-without-parole sentence that could be imposed on an adult convicted of the same crime.<sup>7</sup>

No plausible claim of a consensus against this sentencing practice can be made in light of this overwhelming legislative evidence. The sole fact that federal law authorizes this practice single handedly refutes the claim that our Nation finds it morally repugnant. The additional reality that 37 out of 50 States (a super majority of 74%) permit the practice makes the claim utterly implausible. Not only is there no consensus against this penalty, there is a clear legislative consensus *in favor* of its availability.

Undaunted, however, the Court brushes this evidence aside as “incomplete and unavailing,” declaring that “[t]here are measures of consensus other than legislation.” *Ante*, at 11 (quoting *Kennedy*, 554 U. S., at \_\_\_\_ (slip op., at 22)). This is nothing short of stunning. Most importantly, federal civilian law approves this sentencing

practice.<sup>8</sup> And although the Court has never decided how many state laws are necessary to show consensus, the Court has never banished into constitutional exile a sentencing practice that the laws of a majority, let alone a supermajority, of States expressly permit.<sup>9</sup>

Moreover, the consistency and direction of recent legislation—a factor the Court previously has relied upon when crafting categorical proportionality rules, see *Atkins*, 536 U. S., at 315–316; *Roper*, 543 U. S., at 565–566—underscores the consensus *against* the rule the Court announces here. In my view, the Court cannot point to a national consensus in favor of its rule without assuming a consensus in favor of the two penological points it later discusses: (1) Juveniles are always less culpable than similarly-situated adults, and (2) juveniles who commit nonhomicide crimes should always receive an opportunity to demonstrate rehabilitation through parole. *Ante*, at 16–17, 22–24. But legislative trends make that assumption untenable.

First, States over the past 20 years have consistently *increased* the severity of punishments for juvenile offenders. See 1999 DOJ National Report 89 (referring to the 1990's as “a time of unprecedented change as State legislatures crack[ed] down on juvenile crime”); *ibid.* (noting that, during that period, “legislatures in 47 States and the District of Columbia enacted laws that made their juvenile justice systems more punitive,” principally by “ma[king] it easier to transfer juvenile offenders from the juvenile justice system to the [adult] criminal justice system”); *id.*, at 104. This, in my view, reveals the States’ widespread agreement that juveniles can sometimes act with the same culpability as adults and that the law should permit judges and juries to consider adult sentences—including life without parole—in those rare and unfortunate cases. See Feld, *Unmitigated Punishment: Adolescent Criminal Responsibility and LWOP Sentences*, 10 J. Law & Family Studies 11, 69–70 (2007) (noting that life-without-parole sentences for juveniles have increased since the 1980's); Amnesty International & Human Rights Watch, *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States* 2, 31 (2005) (same).

Second, legislatures have moved away from parole over the same period. Congress abolished parole for federal offenders in 1984 amid criticism that it was subject to “gamesmanship and cynicism,” Breyer, *Federal Sentencing Guidelines Revisited*, 11 Fed. Sentencing Rep. 180 (1999) (discussing the Sentencing Reform Act of 1984, 98 Stat. 1987), and several States have followed suit, see T. Hughes, D. Wilson, & A. Beck, Dept. of Justice, Bureau of Justice Statistics, *Trends in State Parole, 1990–2000*, p. 1 (2001) (noting that, by the end of 2000, 16 States had abolished parole for all offenses, while another 4 States had abolished it for certain ones). In light of these developments, the argument that there is nationwide consensus that parole must be available to offenders less than 18 years old in *every* nonhomicide case simply fails.

## B

The Court nonetheless dismisses existing legislation, pointing out that life-without-parole sentences are rarely imposed on juvenile nonhomicide offenders—129 times in recent memory<sup>10</sup> by the Court's calculation, spread out across 11 States and the federal courts. *Ante*, at 11–13. Based on this rarity of use, the Court proclaims a consensus against the practice, implying that laws allowing it either reflect the consensus of a prior, less civilized time or are the work of legislatures tone-deaf to moral values of their constituents that this Court claims to have easily discerned from afar. See *ante*, at 11.

This logic strains credulity. It has been rejected before. *Gregg v. Georgia*, 428 U. S. 153, 182 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.) (“[T]he relative infrequency of jury verdicts imposing the death sentence does not indicate rejection of capital punishment *per se*. Rather, [it] . . . may well reflect the humane feeling that this most irrevocable of sanctions should be reserved for a small number of extreme cases”). It should also be rejected here. That a punishment is rarely imposed demonstrates nothing more than a general consensus that it should be just that—rarely imposed. It is not proof that the punishment is one the Nation abhors.

The Court nonetheless insists that the 26 States that authorize this penalty, but are not presently incarcerating a juvenile nonhomicide offender on a life-without-parole sentence, cannot be counted as approving its use. The mere fact that the laws of a jurisdiction permit this penalty, the Court explains, “does not indicate that the penalty has been endorsed through deliberate, express, and full legislative consideration.” *Ante*, at 16.

As an initial matter, even accepting the Court's theory, *federal* law authorizes this penalty and the Federal Government uses it. See *ante*, at 13 (citing Letter and Attachment from Judith Simon Garrett, U. S. Dept. of

Justice, Federal Bureau of Prisons, to Supreme Court Library (Apr. 12, 2010) (available in Clerk of Court's case file)). That should be all the evidence necessary to refute the claim of a national consensus against this penalty.

Yet even when examining the States that authorize, but have not recently employed, this sentencing practice, the Court's theory is unsound. Under the Court's evolving standards test, "[i]t is not the burden of [a State] to establish a national consensus *approving* what their citizens have voted to do; rather, it is the 'heavy burden' of petitioners to establish a national consensus *against* it." *Stanford v. Kentucky*, 492 U. S. 361, 373 (1989) (quoting *Gregg, supra*, at 175 (joint opinion of Stewart, Powell, and STEVENS, JJ.); some emphasis added). In light of this fact, the Court is wrong to equate a jurisdiction's disuse of a legislatively authorized penalty with its moral opposition to it. The fact that the laws of a jurisdiction permit this sentencing practice demonstrates, at a minimum, that the citizens of that jurisdiction find tolerable the possibility that a jury of their peers could impose a life-without-parole sentence on a juvenile whose nonhomicide crime is sufficiently depraved.

The recent case of 16-year-old Keighton Budder illustrates this point. Just weeks before the release of this opinion, an Oklahoma jury sentenced Budder to life without parole after hearing evidence that he viciously attacked a 17-year-old girl who gave him a ride home from a party. See Stogsdill, *Teen Gets Life Terms in Stabbing, Rape Case*, Tulsa World, Apr. 2, 2010, p. A10; Stogsdill, *Delaware County Teen Sentenced in Rape, Assault Case*, Tulsa World, May 4, 2010, p. A12. Budder allegedly put the girl's head "'into a headlock and sliced her throat,'" raped her, stabbed her about 20 times, beat her, and pounded her face into the rocks alongside a dirt road. *Teen Gets Life Terms in Stabbing, Rape Case*, at A10. Miraculously, the victim survived. *Ibid*.

Budder's crime was rare in its brutality. The sentence the jury imposed was also rare. According to the study relied upon by this Court, Oklahoma had no such offender in its prison system before Budder's offense. P. Annino, D. Rasmussen, & C. Rice, *Juvenile Life Without Parole for Non-Homicide Offenses: Florida Compared to Nation* 2, 14 (Sept. 14, 2009) (Table A). Without his conviction, therefore, the Court would have counted Oklahoma's citizens as morally opposed to life-without-parole sentences for juveniles nonhomicide offenders.

Yet Oklahoma's experience proves the inescapable flaw in that reasoning: Oklahoma citizens have enacted laws that allow Oklahoma juries to consider life-without-parole sentences in juvenile nonhomicide cases. Oklahoma juries invoke those laws rarely—in the unusual cases that they find exceptionally depraved. I cannot agree with the Court that Oklahoma citizens should be constitutionally disabled from using this sentencing practice merely because they have not done so more frequently. If anything, the rarity of this penalty's use underscores just how judicious sentencing judges and juries across the country have been in invoking it.

This fact is entirely consistent with the Court's intuition that juveniles *generally* are less culpable and more capable of growth than adults. See *infra*, at 21–22. Graham's own case provides another example. Graham was statutorily eligible for a life-without-parole sentence after his first crime. But the record indicates that the trial court did not give such a sentence serious consideration at Graham's initial plea hearing. It was only after Graham subsequently violated his parole by invading a home at gunpoint that the maximum sentence was imposed.

In sum, the Court's calculation that 129 juvenile nonhomicide life-without-parole sentences have been imposed nationwide in recent memory, even if accepted, hardly amounts to strong evidence that the sentencing practice offends our common sense of decency.<sup>11</sup>

Finally, I cannot help but note that the statistics the Court finds inadequate to justify the penalty in this case are stronger than those supporting at least one other penalty this Court has upheld. Not long ago, this Court, joined by the author of today's opinion, upheld the application of the death penalty against a 16-year-old, despite the fact that no such punishment had been carried out on a person of that age in this country in nearly 30 years. See *Stanford*, 492 U. S., at 374. Whatever the statistical frequency with which life-without-parole sentences have been imposed on juvenile nonhomicide offenders in the last 30 years, it is surely greater than zero.

In the end, however, objective factors such as legislation and the frequency of a penalty's use are merely ornaments in the Court's analysis, window dressing that accompanies its judicial fiat.<sup>12</sup> By the Court's own decree, "[c]ommunity consensus . . . is not itself determinative." *Ante*, at 16. Only the independent moral judgment of this Court is sufficient to decide the question. See *ibid*.

## C

Lacking any plausible claim to consensus, the Court shifts to the heart of its argument: its “independent judgment” that this sentencing practice does not “serv[e] legitimate penological goals.” *Ante*, at 16. The Court begins that analysis with the obligatory preamble that “[t]he Eighth Amendment does not mandate adoption of any one penological theory,” *ante*, at 20 (quoting *Harmelin*, 501 U. S., at 999 (opinion of KENNEDY, J.)), then promptly mandates the adoption of the theories the Court deems best.

First, the Court acknowledges that, at a minimum, the imposition of life-without-parole sentences on juvenile nonhomicide offenders serves two “legitimate” penological goals: incapacitation and deterrence. *Ante*, at 20–21. By definition, such sentences serve the goal of incapacitation by ensuring that juvenile offenders who commit armed burglaries, or those who commit the types of grievous sex crimes described by THE CHIEF JUSTICE, no longer threaten their communities. See *ante*, at 9 (opinion concurring in judgment). That should settle the matter, since the Court acknowledges that incapacitation is an “important” penological goal. *Ante*, at 21. Yet, the Court finds this goal “inadequate” to justify the life-without-parole sentences here. *Ante*, at 22 (emphasis added). A similar fate befalls deterrence. The Court acknowledges that such sentences will deter future juvenile offenders, at least to some degree, but rejects that penological goal, not as illegitimate, but as insufficient. *Ante*, at 21 (“[A]ny limited deterrent effect provided by life without parole is *not enough* to justify the sentence.” (emphasis added)).

The Court looks more favorably on rehabilitation, but laments that life-without-parole sentences do little to promote this goal because they result in the offender’s permanent incarceration. *Ante*, at 22. Of course, the Court recognizes that rehabilitation’s “utility and proper implementation” are subject to debate. *Ante*, at 23. But that does not stop it from declaring that a legislature may not “forswea[r] . . . the rehabilitative ideal.” *Ibid*. In other words, the Eighth Amendment does not mandate “any one penological theory,” *ante*, at 20 (internal quotation marks omitted), just one the Court approves.

Ultimately, however, the Court’s “independent judgment” and the proportionality rule itself center on retribution—the notion that a criminal sentence should be proportioned to “the personal culpability of the criminal offender.” *Ante*, at 16, 20 (quoting *Tison v. Arizona*, 481 U. S. 137, 149 (1987)). The Court finds that retributive purposes are not served here for two reasons.

## 1

First, quoting *Roper*, 543 U. S., at 569–570, the Court concludes that juveniles are less culpable than adults because, as compared to adults, they “have a “lack of maturity and an underdeveloped sense of responsibility,”” and “their characters are ‘not as well formed.’” *Ante*, at 17. As a general matter, this statement is entirely consistent with the evidence recounted above that judges and juries impose the sentence at issue quite infrequently, despite legislative authorization to do so in many more cases. See Part III–B, *supra*. Our society tends to treat the average juvenile as less culpable than the average adult. But the question here does not involve the average juvenile. The question, instead, is whether the Constitution prohibits judges and juries from *ever* concluding that an offender under the age of 18 has demonstrated sufficient depravity and incorrigibility to warrant his permanent incarceration.

In holding that the Constitution imposes such a ban, the Court cites “developments in psychology and brain science” indicating that juvenile minds “continue to mature through late adolescence,” *ante*, at 17 (citing Brief for American Medical Association et al. as *Amici Curiae* 16–24; Brief for American Psychological Association et al. as *Amici Curiae* 22–27 (hereinafter APA Brief)), and that juveniles are “more likely [than adults] to engage in risky behaviors,” *id.*, at 7. But even if such generalizations from social science were relevant to constitutional rulemaking, the Court misstates the data on which it relies.

The Court equates the propensity of a fairly substantial number of youths to engage in “risky” or antisocial behaviors with the propensity of a much smaller group to commit violent crimes. *Ante*, at 26. But research relied upon by the *amici* cited in the Court’s opinion differentiates between adolescents for whom antisocial behavior is a fleeting symptom and those for whom it is a lifelong pattern. See Moffitt, Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy, 100 Psychological Rev. 674, 678 (1993) (cited in APA Brief 8, 17, 20) (distinguishing between adolescents who are “antisocial only during adolescence” and a smaller group who engage in antisocial behavior “at every lifestage” despite “drift[ing] through successive systems aimed at curbing their deviance”). That research further suggests that the pattern of behavior in the latter



group often sets in before 18. See Moffitt, *supra*, at 684 (“The well-documented resistance of antisocial personality disorder to treatments of all kinds seems to suggest that the life-course-persistent style is fixed sometime before age 18”). And, notably, it suggests that violence itself is evidence that an adolescent offender’s antisocial behavior is *not* transient. See Moffitt, A Review of Research on the Taxonomy of Life-Course Persistent Versus Adolescence-Limited Antisocial Behavior, in *Taking Stock: the Status of Criminological Theory* 277, 292–293 (F. Cullen, J. Wright, & K. Blevins eds. 2006) (observing that “life-course persistent” males “tended to specialize in serious offenses (carrying a hidden weapon, assault, robbery, violating court orders), whereas adolescence-limited” ones “specialized in non-serious offenses (theft less than \$5, public drunkenness, giving false information on application forms, pirating computer software, etc.)”).

In sum, even if it were relevant, none of this psychological or sociological data is sufficient to support the Court’s “moral” conclusion that youth defeats culpability in *every* case. *Ante*, at 17 (quoting *Roper*, 543 U. S., at 570); see *id.*, at 618 (SCALIA, J., dissenting); R. Epstein, *The Case Against Adolescence* 171 (2007) (reporting on a study of juvenile reasoning skills and concluding that “most teens are capable of conventional, adult-like moral reasoning”).

The Court responds that a categorical rule is nonetheless necessary to prevent the “unacceptable likelihood” that a judge or jury, unduly swayed by “the brutality or cold-blooded nature” of a juvenile’s nonhomicide crime, will sentence him to a life-without-parole sentence for which he possesses “insufficient culpability,” *ante*, at 27 (quoting *Roper*, *supra*, at 572–573). I find that justification entirely insufficient. The integrity of our criminal justice system depends on the ability of citizens to stand between the defendant and an outraged public and dispassionately determine his guilt and the proper amount of punishment based on the evidence presented. That process necessarily admits of human error. But so does the process of judging in which we engage. As between the two, I find far more “unacceptable” that this Court, swayed by studies reflecting the general tendencies of youth, decree that the people of this country are not fit to decide for themselves when the rare case requires different treatment.

2

That is especially so because, in the end, the Court does not even believe its pronouncements about the juvenile mind. If it did, the categorical rule it announces today would be most peculiar because it leaves intact state and federal laws that permit life-without-parole sentences for juveniles who commit homicides. See *ante*, at 23. The Court thus acknowledges that there is nothing inherent in the psyche of a person less than 18 that prevents him from acquiring the moral agency necessary to warrant a life-without-parole sentence. Instead, the Court rejects overwhelming legislative consensus only on the question of which *acts* are sufficient to demonstrate that moral agency.

The Court is quite willing to accept that a 17-year-old who pulls the trigger on a firearm can demonstrate sufficient depravity and irredeemability to be denied reentry into society, but insists that a 17-year-old who rapes an 8-year-old and leaves her for dead does not. See *ante*, at 17–19; cf. *ante*, at 9 (ROBERTS, C. J., concurring in judgment) (describing the crime of life-without-parole offender Milagro Cunningham). Thus, the Court’s conclusion that life-without-parole sentences are “grossly disproportionate” for juvenile nonhomicide offenders in fact has very little to do with its view of juveniles, and much more to do with its perception that “defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers.” *Ante*, at 18.

That the Court is willing to impose such an exacting constraint on democratic sentencing choices based on such an untestable philosophical conclusion is remarkable. The question of what acts are “deserving” of what punishments is bound so tightly with questions of morality and social conditions as to make it, almost by definition, a question for legislative resolution. It is true that the Court previously has relied on the notion of proportionality in holding certain classes of offenses categorically exempt from capital punishment. See *supra*, at 4. But never before today has the Court relied on its own view of just deserts to impose a categorical limit on the imposition of a lesser punishment. Its willingness to cross that well-established boundary raises the question whether any democratic choice regarding appropriate punishment is safe from the Court’s ever-expanding constitutional veto.

## IV

Although the concurrence avoids the problems associated with expanding categorical proportionality review to noncapital cases, it employs noncapital proportionality analysis in a way that raises the same fundamental concern. Although I do not believe *Solem* merits *stare decisis* treatment, Graham's claim cannot prevail even under that test (as it has been limited by the Court's subsequent precedents). *Solem* instructs a court first to compare the "gravity" of an offender's conduct to the "harshness of the penalty" to determine whether an "inference" of gross disproportionality exists. 463 U. S., at 290–291. Only in "the rare case" in which such an inference is present should the court proceed to the "objective" part of the inquiry—an intra- and interjurisdictional comparison of the defendant's sentence with others similarly situated. *Harmelin*, 501 U. S., at 1000, 1005 (opinion of KENNEDY, J.).

Under the Court's precedents, I fail to see how an "inference" of gross disproportionality arises here. The concurrence notes several arguably mitigating facts—Graham's "lack of prior criminal convictions, his youth and immaturity, and the difficult circumstances of his upbringing." *Ante*, at 7 (ROBERTS, C. J., concurring in judgment). But the Court previously has upheld a life-without-parole sentence imposed on a first-time offender who committed a *nonviolent* drug crime. See *Harmelin*, *supra*, at 1002–1004. Graham's conviction for an actual violent felony is surely more severe than that offense. As for Graham's age, it is true that *Roper* held juveniles categorically ineligible for capital punishment, but as the concurrence explains, *Roper* was based on the "explicit conclusion that [juveniles] 'cannot with reliability be classified among the *worst* offenders'"; it did "not establish that juveniles can never be eligible for life without parole." *Ante*, at 5 (ROBERTS, C. J., concurring in judgment) (quoting *Roper*, 543 U. S., at 569 (emphasis added in opinion of ROBERTS, C. J.)). In my view, *Roper*'s principles are thus not generally applicable outside the capital sentencing context.

By holding otherwise, the concurrence relies on the same type of subjective judgment as the Court, only it restrains itself to a case-by-case rather than a categorical ruling. The concurrence is quite ready to hand Graham "the general presumption of diminished culpability" for juveniles, *ante*, at 7, apparently because it believes that Graham's armed burglary and home invasion crimes were "certainly less serious" than murder or rape, *ibid*. It recoils only from the prospect that the Court would extend the same presumption to a juvenile who commits a sex crime. See *ante*, at 10. I simply cannot accept that the subjective judgments of proportionality are ones the Eighth Amendment authorizes us to make.

The "objective" elements of the *Solem* test provide no additional support for the concurrence's conclusion. The concurrence compares Graham's sentence to "similar" sentences in Florida and concludes that Graham's sentence was "far more severe." *Ante*, at 8 (ROBERTS, C. J., concurring in judgment). But strangely, the concurrence uses average sentences for burglary or robbery offenses as examples of "similar" offenses, even though it seems that a run-of-the-mill burglary or robbery is not at all similar to Graham's criminal history, which includes a charge for armed burglary *with assault*, and a probation violation for invading a home at gunpoint.

And even if Graham's sentence is higher than ones he might have received for an armed burglary with assault in other jurisdictions, see *ante*, at 8–9, this hardly seems relevant if one takes seriously the principle that "[a]bsent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will *always* bear the distinction of treating particular offenders more severely than any other State." *Harmelin*, *supra*, at 1000 (opinion of KENNEDY, J.) (quoting *Rummel*, 445 U. S., at 282; emphasis added). Applying *Solem*, the Court has upheld a 25-years-to-life sentence for theft under California's recidivist statute, despite the fact that the State and its *amici* could cite only "a single instance of a similar sentence imposed outside the context of California's three strikes law, out of a prison population [then] approaching two million individuals." *Ewing*, 538 U. S., at 47 (BREYER, J., dissenting). It has also upheld a life-without-parole sentence for a first-time drug offender in Michigan charged with possessing 672 grams of cocaine despite the fact that only one other State would have authorized such a stiff penalty for a first-time drug offense, and even that State required a far greater quantity of cocaine (10 kilograms) to trigger the penalty. See *Harmelin*, *supra*, at 1026 (White, J., dissenting). Graham's sentence is certainly less rare than the sentences upheld in these cases, so his claim fails even under *Solem*.

\* \* \*

Both the Court and the concurrence claim their decisions to be narrow ones, but both invite a host of linedrawing problems to which courts must seek answers beyond the strictures of the Constitution. The Court holds that "[a]

State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime,” but must provide the offender with “some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.” *Ante*, at 24. But what, exactly, does such a “meaningful” opportunity entail? When must it occur? And what Eighth Amendment principles will govern review by the parole boards the Court now demands that States empanel? The Court provides no answers to these questions, which will no doubt embroil the courts for years.<sup>13</sup>

## V

The ultimate question in this case is not whether a life-without-parole sentence ‘fits’ the crime at issue here or the crimes of juvenile nonhomicide offenders more generally, but to whom the Constitution assigns that decision. The Florida Legislature has concluded that such sentences should be available for persons under 18 who commit certain crimes, and the trial judge in this case decided to impose that legislatively authorized sentence here. Because a life-without-parole prison sentence is not a “cruel and unusual” method of punishment under any standard, the Eighth Amendment gives this Court no authority to reject those judgments.

It would be unjustifiable for the Court to declare otherwise even if it could claim that a bare majority of state laws supported its independent moral view. The fact that the Court categorically prohibits life-without-parole sentences for juvenile nonhomicide offenders in the face of an overwhelming legislative majority *in favor* of leaving that sentencing option available under certain cases simply illustrates how far beyond any cognizable constitutional principle the Court has reached to ensure that its own sense of morality and retributive justice pre-empt that of the people and their representatives.

I agree with JUSTICE STEVENS that “[w]e learn, sometimes, from our mistakes.” *Ante*, at 1 (concurring opinion). Perhaps one day the Court will learn from this one.

I respectfully dissent.

ALITO, J., dissenting

**SUPREME COURT OF THE UNITED STATES**

No. 08–7412

TERRANCE JAMAR GRAHAM, PETITIONER v. FLORIDA

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT  
[May 17, 2010]

JUSTICE ALITO, dissenting.

I join Parts I and III of JUSTICE THOMAS’s dissenting opinion. I write separately to make two points.

*First*, the Court holds only that “for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of *life without parole*.” *Ante*, at 23–24 (emphasis added). Nothing in the Court’s opinion affects the imposition of a sentence to a term of years without the possibility of parole. Indeed, petitioner conceded at oral argument that a sentence of as much as 40 years without the possibility of parole “probably” would be constitutional. Tr. of Oral Arg. 6–7; see also *ante*, at 28, n. 12 (THOMAS, J., dissenting).

*Second*, the question whether petitioner’s sentence violates the narrow, as-applied proportionality principle that applies to noncapital sentences is not properly before us in this case. Although petitioner asserted an as-applied proportionality challenge to his sentence before the Florida courts, see 982 So. 2d 43, 51–53 (Fla. App. 2008), he did not include an as-applied claim in his petition for certiorari or in his merits briefs before this Court. Instead, petitioner argued for only a categorical rule banning the imposition of life without parole on *any* juvenile convicted of a nonhomicide offense. Because petitioner abandoned his as-applied claim, I would not reach that issue. See this Court’s Rule 14.1(a); *Yee v. Escondido*, 503 U. S. 519, 534–538 (1992).

## ENDNOTES

- 1 JUSTICE ALITO suggests that Graham has failed to preserve any challenge to his sentence based on the “narrow, as-applied proportionality principle.” *Post*, at 1 (dissenting opinion). I disagree. It is true that Graham asks us to declare, categorically, that no juvenile convicted of a nonhomicide offense may ever be subject to a sentence of life without parole. But he claims that this rule is warranted under the narrow proportionality principle we set forth in *Solem v. Helm*, 463 U. S. 277 (1983), *Harmelin v. Michigan*, 501 U. S. 957 (1991), and *Ewing v. California*, 538 U. S. 11 (2003). Brief for Petitioner 30, 31, 54–64. Insofar as he relies on that framework, I believe we may do so as well, even if our analysis results in a narrower holding than the categorical rule Graham seeks. See also Reply Brief for Petitioner 15, n. 8 (“[T]he Court could rule narrowly in this case and hold only that petitioner’s sentence of life without parole was unconstitutionally disproportionate”).
- 2 THE CHIEF JUSTICE’S concurrence suggests that it is unnecessary to remark on the underlying question whether the Eighth Amendment requires proportionality in sentencing because “[n]either party here asks us to reexamine our precedents” requiring “proportionality between noncapital offenses and their corresponding punishments.” *Ante*, at 2 (opinion concurring in judgment). I disagree. Both the Court and the concurrence do more than apply existing noncapital proportionality precedents to the particulars of Graham’s claim. The Court radically departs from the framework those precedents establish by applying to a noncapital sentence the categorical proportionality review its prior decisions have reserved for death penalty cases alone. See Part III, *infra*. The concurrence, meanwhile, breathes new life into the case-by-case proportionality approach that previously governed noncapital cases, from which the Court has steadily, and wisely, retreated since *Solem v. Helm*, 463 U. S. 277 (1983). See Part IV, *infra*. In dissenting from both choices to expand proportionality review, I find it essential to reexamine the foundations on which that doctrine is built.
- 3 Courts and commentators interpreting this Court’s decisions have reached this conclusion. See, e.g., *United States v. Polk*, 546 F. 3d 74, 76 (CA1 2008) (“[I]nstances of gross disproportionality [in noncapital cases] will be hen’s-teeth rare”); Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 Mich. L. Rev. 1145, 1160 (2009) (“*Solem* now stands as an outlier”); Note, *The Capital Punishment Exception: A Case for Constitutionalizing the Substantive Criminal Law*, 104 Colum. L. Rev. 426, 445 (2004) (observing that outside of the capital context, “proportionality review has been virtually dormant”); Steiker & Steiker, *Opening a Window or Building a Wall? The Effect of Eighth Amendment Death Penalty Law and Advocacy on Criminal Justice More Broadly*, 11 U. Pa. J. Const. L. 155, 184 (2009) (“Eighth Amendment challenges to excessive incarceration [are] essentially non-starters”).
- 4 The Court ignores entirely the threshold inquiry of whether subjecting juvenile offenders to adult penalties was one of the “modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted.” *Ford v. Wainwright*, 477 U. S. 399, 405 (1986). As the Court has noted in the past, however, the evidence is clear that, at the time of the Founding, “the common law set a rebuttable presumption of incapacity to commit any felony at the age of 14, and theoretically permitted [even] capital punishment to be imposed on a person as young as age 7.” *Stanford v. Kentucky*, 492 U. S. 361, 368 (1989) (citing 4 W. Blackstone, *Commentaries* \*23–\*24; 1 M. Hale, *Pleas of the Crown* 24–29 (1800)). It thus seems exceedingly unlikely that the imposition of a life-without-parole sentence on a person of Graham’s age would run afoul of those standards.
- 5 Although the details of state laws vary extensively, they generally permit the transfer of a juvenile offender to adult court through one or more of the following mechanisms: (1) judicial waiver, in which the juvenile court has the authority to waive jurisdiction over the offender and transfer the case to adult court; (2) concurrent jurisdiction, in which adult and juvenile courts share jurisdiction over certain cases and the prosecutor has discretion to file in either court; or (3) statutory provisions that exclude juveniles who commit certain crimes from juvenile-court jurisdiction. See Dept. of Justice, *Juvenile Offenders and Victims: 1999 National Report* 89, 104 (1999) (hereinafter 1999 DOJ National Report); Feld, *Unmitigated Punishment: Adolescent Criminal Responsibility and LWOP Sentences*, 10 J. Law & Family Studies 11, 38–39 (2007).
- 6 Alaska entitles all offenders to parole, regardless of their crime. Alaska Stat. §12.55.015(g) (2008). The other seven States provide parole eligibility to all offenders, except those who commit certain homicide crimes. Conn. Gen. Stat. §53a–35a (2009); Haw. Rev. Stat. §§706–656(1)–(2) (1993 and 2008 Supp. Pamphlet); Me. Rev. Stat. Ann., Tit. 17–a, §1251 (2006); Mass. Gen. Laws Ann., ch. 265, §2 (West 2008); N. J. Stat. Ann. §2C:11–3(b)(2)–(3) (West 2005); N. M. Stat. Ann. §31–18–14 (Supp. 2009); Vt. Stat. Ann., Tit. 13, §2303 (2009).
- 7 Colo. Rev. Stat. Ann. §18–1.3–401(4)(b) (2009) (authorizing mandatory life sentence with possibility for parole after 40 years for juveniles convicted of class 1 felonies); Kan. Stat. Ann. §§21–4622, 4643 (2007); Ky. Rev. Stat. Ann. §640.040 (West 2006); *Shepherd v. Commonwealth*, 251 S. W. 3d 309, 320–321 (Ky. 2008); Mont. Code Ann. §46–18–222(1) (2009); Tex. Penal Code Ann. §12.31 (West Supp. 2009).
- 8 Although the Court previously has dismissed the relevance of the Uniform Code of Military Justice to its discernment of consensus, see *Kennedy v. Louisiana*, 554 U. S. \_\_\_, \_\_\_, (2008) (statement of KENNEDY, J., respecting denial of rehearing), juveniles who enlist in the military are nonetheless eligible for life-without-parole sentences if they commit certain nonhomicide crimes. See 10 U. S. C. §505(a) (permitting enlistment at age 17), 856a, 920 (2006 ed., Supp. II).
- 9 *Kennedy*, 554 U. S., at \_\_\_ (slip op., at 12, 23) (prohibiting capital punishment for the rape of a child where only six States had enacted statutes authorizing the punishment since *Furman v. Georgia*, 408 U. S. 238 (1972) (*per curiam*)); *Roper v. Simmons*, 543 U. S. 551, 564, 568 (2005) (prohibiting capital punishment for offenders younger than 18 where 18 of 38 death-penalty States precluded imposition of the penalty on persons under 18 and the remaining 12 States did not permit capital punishment at all); *Atkins v. Virginia*, 536 U. S. 304, 314–315 (2002) (prohibiting capital punishment of mentally retarded persons where 18 of 38 death-penalty States precluded imposition of the penalty on such persons and the remaining States did not authorize capital punishment at all);

*Thompson v. Oklahoma*, 487 U. S. 815, 826, 829 (1988) (plurality opinion) (prohibiting capital punishment of offenders under 16 where 18 of 36 death-penalty States precluded imposition of the penalty on such persons and the remaining States did not permit capital punishment at all); *Enmund v. Florida*, 458 U. S. 782, 789 (1982) (prohibiting capital punishment for felony murder without proof of intent to kill where eight States allowed the punishment without proof of that element); *Coker v. Georgia*, 433 U. S. 584, 593 (1977) (holding capital punishment for the rape of a woman unconstitutional where “[a]t no time in the last 50 years have a majority of the States authorized death as a punishment for rape”).

10 I say “recent memory” because the research relied upon by the Court provides a headcount of juvenile nonhomicide offenders presently incarcerated in this country, but does not provide more specific information about all of the offenders, such as the dates on which they were convicted.

11 Because existing legislation plainly suffices to refute any consensus against this sentencing practice, I assume the accuracy of the Court’s evidence regarding the frequency with which this sentence has been imposed. But I would be remiss if I did not mention two points about the Court’s figures. First, it seems odd that the Court counts only those juveniles sentenced to life without parole and excludes from its analysis all juveniles sentenced to lengthy term-of-years sentences (e.g., 70 or 80 years’ imprisonment). It is difficult to argue that a judge or jury imposing such a long sentence—which effectively denies the offender any material opportunity for parole—would express moral outrage at a life-without-parole sentence.

Second, if objective indicia of consensus were truly important to the Court’s analysis, the statistical information presently available would be woefully inadequate to form the basis of an Eighth Amendment rule that can be revoked only by constitutional amendment. The only evidence submitted to this Court regarding the frequency of this sentence’s imposition was a single study completed after this Court granted certiorari in this case. See P. Annino, D. Rasmussen, & C. Rice, *Juvenile Life Without Parole for Non-Homicide Offenses: Florida Compared to Nation 2* (Sept. 14, 2009). Although I have no reason to question the professionalism with which this study was conducted, the study itself acknowledges that it was incomplete and the first of its kind. See *id.*, at 1. The Court’s questionable decision to “complete” the study on its own does not materially increase its reliability. For one thing, by finishing the study itself, the Court prohibits the parties from ever disputing its findings. Complicating matters further, the original study sometimes relied on third-party data rather than data from the States themselves, see *ibid.*; the study has never been peer reviewed; and specific data on all 129 offenders (age, date of conviction, crime of conviction, etc.), have not been collected, making verification of the Court’s headcount impossible. The Court inexplicably blames Florida for all of this. See *ante*, at 12. But as already noted, it is not Florida’s burden to collect data to prove a national consensus in favor of this sentencing practice, but Graham’s “heavy burden” to prove a consensus *against* it. See *supra*, at 16.

12 I confine to a footnote the Court’s discussion of foreign laws and sentencing practices because past opinions explain at length why such factors are irrelevant to the meaning of our Constitution or the Court’s discernment of any longstanding tradition in *this* Nation. See *Atkins*, 536 U. S., at 324–325 (Rehnquist, C. J., dissenting). Here, two points suffice. First, despite the Court’s attempt to count the actual number of

juvenile nonhomicide offenders serving life-without-parole sentences in other nations (a task even more challenging than counting them within our borders), the *laws* of other countries permit juvenile life-without-parole sentences, see Child Rights Information, Network, C. de la Vega, M. Montesano, & A. Solter, Human Rights Advocates, Statement on Juvenile Sentencing to Human Rights Council, 10th Sess. (Nov. 3, 2009) (“Eleven countries have laws with the potential to permit the sentencing of child offenders to life without the possibility of release”), online at <http://www.crin.org/resources/infoDetail.asp?ID=19806> (as visited May 14, 2010, and available in Clerk of Court’s case file)). Second, present legislation notwithstanding, democracies around the world remain free to adopt life-without-parole sentences for juvenile offenders tomorrow if they see fit. Starting today, ours can count itself among the few in which judicial decree prevents voters from making that choice.

13 It bears noting that Colorado, one of the five States that prohibit life-without-parole sentences for juvenile nonhomicide offenders, permits such offenders to be sentenced to mandatory terms of imprisonment for up to 40 years. Colo. Rev. Stat. §18–1.3–401(4)(b) (2009). In light of the volume of state and federal legislation that presently *permits* life-without-parole sentences for juvenile nonhomicide offenders, it would be impossible to argue that there is any objective evidence of agreement that a juvenile is constitutionally entitled to a parole hearing any sooner than 40 years after conviction. See Tr. of Oral Arg. 6–7 (counsel for Graham, stating that, “[o]ur position is that it should be left up to the States to decide. We think that the . . . Colorado provision would probably be constitutional”).

HABIB V. AUSTRALIA (FED. CT. AUSTL.)\*  
 [February 25, 2010]  
 +Cite as 49 ILM 1065 (2010)+

# FEDERAL COURT OF AUSTRALIA

## Habib v Commonwealth of Australia [2010] FCAFC 12

Citation: Habib v Commonwealth of Australia [2010] FCAFC 12

Parties: **MAMDOUH HABIB V COMMONWEALTH OF AUSTRALIA**

File number: NSD 956 of 2006

Judges: **BLACK CJ, PERRAM AND JAGOT JJ**

Date of judgment: 25 February 2010

Catchwords: **CONSTITUTIONAL LAW** – act of state doctrine – non-justiciability – scope of act of state doctrine – where Australian citizen has brought proceedings against the Commonwealth – where a determination of the proceedings would depend on findings of the legality of the acts of foreign agents outside Australia – whether act of state doctrine applicable where allegations of grave breaches of international law – whether manageable judicial standards

**HIGH COURT AND FEDERAL COURT** – original jurisdiction of the High Court and Federal Court – judicial scrutiny of actions of the Executive by Ch III Courts – whether Constitutional framework and legislation in question enables such scrutiny

**Held:** act of state doctrine inapplicable

Legislation: The Constitution, ss 51(xxxi), 61, 75, 76, 77(i)  
*Administrative Decisions (Judicial Review) Act 1977* (Cth)  
*Australian Federal Police Act 1979* (Cth)  
*Australian Security Intelligence Organisation Act 1979* (Cth)  
*Crimes (Torture) Act 1988* (Cth), ss 3, 5A, 6, 7, 8  
*Criminal Code Act 1995* (Cth)  
 The Criminal Code, ss 11.2, 16.1, 268.26, 268.74  
*Director of Public Prosecutions Act 1983* (Cth)  
*Federal Court of Australia Act 1976* (Cth), s 25  
*Foreign States Immunities Act 1985* (Cth), s 9  
*Geneva Conventions Act 1957* (Cth), s 7  
*Judiciary Act 1903* (Cth), ss 30, 39B, 44, 79  
*Jurisdiction of Courts (Foreign Lands) Act 1989* (NSW) s 3  
*Law Reform (Miscellaneous Provisions) Act 1955* (ACT) s 34  
*Public Service Act 1999* (Cth)  
*Seas and Submerged Lands Act 1973* (Cth)  
 Federal Court Rules, Order 50 r 1

Treaties: *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment*

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*or Punishment of 1984*

*Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949*

*Geneva Convention relative to the Protection of Civilian Persons in Time of War of August 12, 1949*

*Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts, 1977*

*Rome Statute of the International Criminal Court, 1998*

*Statute of the International Court of Justice, 1945*

*Vienna Convention of the Law of Treaties, 1969*

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*Al Maqaleh v Gates* 604 FSupp.2d 205 (D.D.C. 2009) cited

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*Banco de Vizcaya v Don Alfonso de Borbon Y Austria* [1935] 1 KB 140 cited

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*British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30 cited

*British South Africa Co v Companhia de Moçambique* [1893] AC 602 questioned

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*Lipohar v The Queen* (1999) 200 CLR 485 cited  
*Lowenthal v Attorney-General* [1948] 1 All ER 295 cited  
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*Re Diftfort; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347 considered  
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*Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491 cited  
*Sarei v Rio Tinto PLC* 456 F.3d 1069 (9<sup>th</sup> Cir. 2006) referred to  
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*Telstra Corporation Ltd v Commonwealth* (2008) 234 CLR 210 cited  
*Underhill v Hernandez* 168 US 250 (1897) considered  
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*Wilkinson v Downton* [1897] 2 QB 57 cited  
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Date of hearing: 14-15 September 2009

Place: Sydney



Division: GENERAL DIVISION  
Category: Catchwords  
Number of paragraphs: 136  
Counsel for the Applicant: R Beech-Jones SC, C Evatt, J Kay Hoyle, W Nicholson  
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Solicitor for the Respondent: Australian Government Solicitor

**IN THE FEDERAL COURT OF AUSTRALIA  
NEW SOUTH WALES DISTRICT REGISTRY  
GENERAL DIVISION**

**NSD 956 of 2006**

**BETWEEN:** MAMDOUH HABIB  
Applicant  
**AND:** COMMONWEALTH OF AUSTRALIA  
Respondent  
**JUDGES:** BLACK CJ, PERRAM AND JAGOT JJ  
**DATE OF ORDER:** 25 FEBRUARY 2010  
**WHERE MADE:** SYDNEY

**THE COURT ORDERS THAT:**

- 1 The order sought in paragraph 1 of the notice of motion filed by the respondent on 17 June 2009 be refused.
- 2 The question reserved under s 25(6) of the *Federal Court of Australia Act 1976* (Cth) and Order 50 rule 1 of the Federal Court Rules:

*Should the application be dismissed in respect of the claims made in paragraphs 1 – 36 of the Fourth Further Amended Statement of Claim on the ground identified in paragraph 1 of the Respondent's Notice of Motion filed 17 June 2009 (namely, that, because the determination of those claims would require a determination of the unlawfulness of acts of foreign states within the territories of foreign states those claims are not justiciable and give rise to no "matter" within the jurisdiction of the Court under s 39B of the *Judiciary Act 1903* (Cth) and s 77(i) of the *Constitution*, or give rise to no cause of action at common law).*

be answered as follows:

"No".

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules. The text of entered orders can be located using Federal Law Search on the Court's website.

**IN THE FEDERAL COURT OF AUSTRALIA  
NEW SOUTH WALES DISTRICT REGISTRY  
GENERAL DIVISION**

**NSD 956 of 2006**

**BETWEEN:** MAMDOUH HABIB  
Applicant

**AND:** COMMONWEALTH OF AUSTRALIA  
Respondent

**JUDGES:** BLACK CJ, PERRAM AND JAGOT JJ

**DATE OF ORDER:** 25 FEBRUARY 2010

**WHERE MADE:** SYDNEY

**REASONS FOR JUDGMENT**

**BLACK CJ:**

1 I agree with Jagot J, for the reasons her Honour gives, that the reserved question should be answered 'No'. I would add the following observations. In doing so, I must emphasise that the allegations made by Mr Habib are, at this stage of the proceeding, no more than allegations in an amended statement of claim and not the subject of evidence, much less any judicial determination of their accuracy or otherwise.

2 The applicant Mr Habib, the plaintiff in a proceeding remitted to this Court by the High Court of Australia, is an Australian citizen. He alleges that officers of the Commonwealth committed the torts of misfeasance in public office and intentional but indirect infliction of harm by aiding, abetting and counselling his torture and other inhumane treatment by foreign officials while he was detained in Pakistan, Egypt and Afghanistan and at Guantánamo Bay. If officers of the Commonwealth were found to have aided, abetted or counselled the commission of those offences, the officers would be taken to have committed those offences (s 11.2 of the *Criminal Code Act 1995* (Cth)) and thus, Mr Habib alleges, to have acted beyond the scope of their lawful authority.

3 For this part of his case to succeed, Mr Habib must prove, on the civil standard, that the alleged acts of torture and other inhumane treatment were committed by persons who were, or were acting at the instigation of or with the consent and acquiescence of, public officials or persons acting in an official capacity outside Australia in breach of s 6 of the *Crimes (Torture) Act 1988* (Cth)) ('Crimes (Torture) Act') or by or at the behest of agents of foreign states in breach of s 7 of the *Geneva Conventions Act 1957* (Cth) and ss 268.26 and 268.74 of the Criminal Code. (The Crimes (Torture) Act gives effect for Australia to the provisions of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted by the General Assembly of the United Nations on 10 December 1984* ('the Torture Convention') and the *Geneva Conventions Act 1957* (Cth) gives effect to the *Convention relative to the Treatment of Prisoners of War adopted at Geneva on 12 August 1949* (the Third Geneva Convention) and the *Convention relative to the Protection of Civilian Persons in Time of War adopted at Geneva on 12 August 1949* (the Fourth Geneva Convention). Australia is a party to each of these conventions.) Whilst it is a necessary element of the case against the Commonwealth that the agents of foreign states committed the principal offence, it is not a necessary element that those persons were prosecuted (s 11.2(5) Criminal Code).

4 The question reserved for the Court under s 25(6) of the *Federal Court of Australia Act 1976* (Cth) and O 50 r 1 of the Federal Court Rules is whether, as the Commonwealth asserts, the Court should dismiss the claims of misfeasance in a public office and intentional but indirect infliction of harm for the reason that, since their resolution would require a determination of the unlawfulness of acts of agents of foreign states within the territories of foreign states, those claims are not justiciable and give rise to no 'matter' within the jurisdiction of the Court under s 39B of the *Judiciary Act 1903* (Cth) and s 77(i) of the Constitution, or give rise to no cause of action at common law.

5 The Commonwealth argues that the act of state doctrine of the common law compels this result. Whilst there was dispute about the scope of the doctrine, it was not in contention that it forms part of the common law of Australia: see *Potter v Broken Hill Proprietary Co Ltd* (1906) 3 CLR 479; *Attorney-General (United Kingdom)*

*v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30; *Petrotimor Companhia de Petroleos SARL v Commonwealth of Australia* (2003) 126 FCR 354.

6 Judicial consideration of the doctrine in Australia has been limited and conceptions of it in this country draw upon cases decided by the House of Lords and courts of the United States. The doctrine is commonly defined by reference to the observations of Fuller J in *Underhill v Hernandez* 168 US 250 (1897) at 252 that:

Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.

7 I agree with Jagot J that the common law has evolved such that the authorities do not support the application of the act of state doctrine in the present case. If, however, the choice were finely balanced, the same conclusion should be reached. When the common law, in its development, confronts a choice properly open to it, the path chosen should not be in disconformity with moral choices made on behalf of the people by the Parliament reflecting and seeking to enforce universally accepted aspirations about the behaviour of people one to another.

8 Torture offends the ideal of a common humanity and the Parliament has declared it to be a crime wherever outside Australia it is committed. Moreover, and critically in this matter, the Crimes (Torture) Act is directed to the conduct of public officials and persons acting in an official capacity irrespective of their citizenship and irrespective of the identity of their government. The circumstance that a prosecution may only be brought against an Australian citizen or a person present in Australia and requires the consent of the Attorney-General of the Commonwealth has evident practical consequences, but prohibited conduct is not thereby deprived of its character as a crime nor is the strength of the Parliament's emphatic disapproval of such conduct in any way thereby diminished.

9 The Crimes (Torture) Act reflects the status of the prohibition against torture as a peremptory norm of international law from which no derogation is permitted and the consensus of the international community that torture can never be justified by official acts or policy.

10 As well, and again consistently with Australia's obligations under the Torture Convention, the Parliament has spoken with clarity about the moral issues that may confront officials of governments, whether foreign or our own, and persons acting in an official capacity. It has proscribed torture in all circumstances, answering in the negative the moral and legal questions whether superior orders can absolve the torturer of individual criminal responsibility and whether, in extreme circumstances, torture may be permissible to prevent what may be apprehended as a larger wrong: see the Crimes (Torture) Act, s 11; the Torture Convention, Art 2.

11 In these circumstances, if – contrary to the view that I share with Jagot J – the question were finely balanced and the common law were faced with a choice, congruence with the policy revealed by the Crimes (Torture) Act and its intended reach to the officials of foreign governments, even when acting within their own territory and under superior orders, points against the application of the act of state doctrine in the circumstances alleged by Mr Habib in the present proceeding.

12 Consideration of the relevant sections of the Criminal Code, the Geneva Conventions Act and the Third and Fourth Geneva Conventions also, in my view, support these observations.

13 It is not to the point that Mr Habib's proceeding is a civil claim for damages and not a criminal proceeding under the Crimes (Torture) Act, the Geneva Conventions Act or the Criminal Code. The point is that, if a choice were indeed open, in determining whether or not the act of state doctrine operates to deny a civil remedy contingent upon breach of those Acts, the common law should develop congruently with emphatically expressed ideals of public policy, reflective of universal norms.

I certify that the preceding thirteen (13) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Chief Justice Black

Associate:

Dated: 25 February 2010

**IN THE FEDERAL COURT OF AUSTRALIA  
NEW SOUTH WALES DISTRICT REGISTRY  
GENERAL DIVISION**

**NSD 956 of 2006**

**BETWEEN:** MAMDOUH HABIB  
Applicant

**AND:** COMMONWEALTH OF AUSTRALIA  
Respondent

**JUDGES:** BLACK CJ, PERRAM AND JAGOT JJ

**DATE OF ORDER:** 25 FEBRUARY 2010

**PLACE:** SYDNEY

**REASONS FOR JUDGMENT**

**PERRAM J:**

**I**

14 The applicant, Mr Habib, seeks redress for what he alleges was Commonwealth complicity in alleged acts of torture committed upon him by officials of the governments of the United States, Egypt and Pakistan. In response the Commonwealth invokes the act of state doctrine and contends that because notions of international comity would prevent this Court from reviewing the lawfulness of foreign State acts of torture there can be no inquiry into whether the Commonwealth's officials were themselves complicit in that torture. The issues which arise are:

1. whether the act of state doctrine, to the extent that it would prevent this Court from reviewing the validity of acts of the Commonwealth executive, is inconsistent with Chapter III of the *Constitution*;
2. whether that doctrine applies to cases involving serious breaches of human rights; and
3. whether the doctrine is applicable to conduct of the United States government taking place outside that country.

**II**

15 On 7 October 2001 the United States ("the US") commenced military operations in Afghanistan entitled "Operation Enduring Freedom - Afghanistan" which appears to have had as its initial aim the ousting of the former Taliban regime and the denial to the Al Qaeda terrorist network of a safe-haven. As is well-known, that invasion formed a significant initial aspect of the Global War on Terror announced following the events in the US on the morning of 11 September 2001. On 4 October 2001 the present applicant, Mr Habib, alleges that he was arrested in Pakistan by agents of the government of that country acting with the assistance of agents of the US government. During his detention he alleges he was mistreated by Pakistani officials with the knowledge or assistance of US officials. The catalogue of mistreatments is extensive but includes, by way only of example, the administration of electrical shocks, beating, suspension from chains and being made to stand upon an electrified drum whilst, apparently, shackled to a wall. In mid-November 2001 he alleges that he was removed from Pakistan to Egypt by plane and that the circumstances of his embarkation included his being punched and kicked in the head, assaulted with a gun, shackled and chained with goggles on his eyes and a bag over his head. He claims that he was kept in Egypt for about six months between 21 November 2001 and May 2002 during which time Egyptian officials, with the knowledge or assistance of US officials, interrogated him using torture. Again the list of tortures is long but it includes, to give only the general flavour, the removal of fingernails, the use of electric prods, threatened sexual assault with a dog, forcible injection with drugs, extinguishment of cigarettes on flesh, the insertion of unspecified objects and gases into his anus and the electrocution of his genitals. Many other things besides are alleged to have occurred but they need not be set out. The general tenor is clear. During this six month period of interrogation Mr Habib alleges that he was encouraged to sign a confession that he had taken part in acts of terrorism.

16 In April or May 2002 – Mr Habib is not quite sure which – he claims to have been put back on a plane by Egyptian and US officials and then flown to Bagram airfield which is in Afghanistan and which, there is no

dispute, was then under the *de facto* control of the US. There, he says, he remained for about two weeks, all the time in the custody of US officials. Thereafter, so he claims, he was flown to Khandahar which is also in Afghanistan and which, at this time, was also under the *de facto* control of the US. His stay there was not long for on 6 May 2002 he was placed, Mr Habib alleges, onto another plane and flown to a detention camp in the US naval base situated at Guantánamo Bay which, depending on one's view of the *Cuban-American Treaty* of 1903 may, or may not be, under the ultimate sovereignty of Cuba. In this place he alleges he was kept until 28 January 2005 when he was repatriated to Australia. For the 33 month period between his arrival at Bagram airfield and his ultimate departure from Guantánamo Bay, Mr Habib alleges that he remained at all times in the custody of officials of the US government. Whilst in that custody he alleges he was again the victim of a series of abuses – the list once more is not exhaustive – sleep deprivation, pepper spray, threats of sexual assault, beatings, the use of electrical prods, water boarding, exposure to loud music in a dark cell with flashing lights and smearing with menstrual blood. Mr Habib alleges that in consequence of his torture he has suffered a number of serious ailments including post traumatic stress disorder, major depression, mental distress, bruising and lacerations, burns, loss of memory, nightmares and flashbacks, scarring and sore ribs. Other injuries, mostly of a physical nature, are also alleged.

17 Pertinently to the present proceedings, Mr Habib claims that Australian officials were implicated in his mistreatment. So far as the period of his detention in Pakistan is concerned he says that on at least 24, 26 and 29 October 2001 one or more officers of the Australian Security and Intelligence Organisation (“ASIO”), the Australian Federal Police (“the AFP”) and/or an officer from the Department of Foreign Affairs and Trade (“DFAT”) participated in interrogations of him in the presence of Pakistani and/or US officials. He alleges that he was brought to the interrogation sessions in shackles and under armed Pakistani guard; that the questions he was asked concerned his alleged connexions with Al Qaeda; that it would have been obvious to anyone that he had been physically mistreated; that his questioning continued for many hours; and, that he was told he had lost his Australian citizenship and would be handed over to the Egyptians. He names a particular official within DFAT as being present and alleges that all the Australian officials who were there would have known, by looking at him, of the mistreatment he had suffered. He also alleges that the Australian officials sought, presumably through US or Pakistani officials, to have his detention continue. His allegations concerning his rendition to Egypt are of a similar kind. He claims that the Australian officials involved urged his rendition to that place and that some of the officials were actually present when he was subjected to the mistreatments previously recounted. Further, so he claims, ASIO itself supplied Egyptian officials with information to be used in his interrogation which had been obtained by ASIO under warrant from his home and car in Australia.

18 So far as Australian participation in the events at Guantánamo Bay is concerned Mr Habib's allegations are thus: that there were at least 12 occasions upon which Australian officials participated in interrogations of him; that he was interviewed by them whilst shackled in chains to the floor; that the signs of his mistreatment would have been obvious from his countenance; that he was interrogated by the Australian officials about his links with Al Qaeda; and, that the interrogations were of lengthy durations (on one occasion exceeding 14 hours). Further, he attributes to Australian officials requests by them of the US government that he be transferred to, and kept at, the detention camp at Guantánamo Bay.

19 All of these allegations, and many others besides, are contained in Mr Habib's fourth further amended statement of claim filed in these proceedings. Apart from some general matters upon which there is broad agreement between Mr Habib and the Commonwealth – for example, that Mr Habib was incarcerated by the US government at Guantánamo Bay – Mr Habib's allegations remain, it is to be emphasised, just that – allegations. There has been no trial and hence, thus far, no determination of their correctness.

### III

20 Section 6 of the *Crimes (Torture) Act 1988* (Cth) makes it an offence for a public official outside of Australia to torture a person. Until 26 September 2002 s 7(1) of the *Geneva Conventions Act 1957* (Cth) made it an offence of extraterritorial operation to torture a person protected by the *Convention relative to the Treatment of Prisoners of War adopted at Geneva on 12 August 1949* (“the Third Geneva Convention”) or the *Geneva Convention relative to the Protection of Civilian Persons in Time of War adopted at Geneva on 12 August 1949* (“the Fourth Geneva Convention”). On 26 September 2002, a date of no particular significance, the Commonwealth Parliament determined to relocate the offences relating to the Geneva Conventions from the *Geneva Conventions Act 1957* to ss 268.26 and 268.74 of the *Criminal Code Act 1995* (Cth) (“*Criminal Code*”). In circumstances of war or

armed conflict, the Third Geneva Convention requires States party to the Convention to afford certain protections to prisoners of war whilst the Fourth Geneva Convention performs the same role for civilians. Mr Habib alleges that he was entitled to protection either under the Third or the Fourth Geneva Convention because there were wars or armed conflicts taking place and because he was necessarily either a prisoner of war or a civilian. The Commonwealth has previously denied the applicability of the Conventions to Mr Habib. The thicket of difficult issues arising from that denial – whether there was an armed conflict, whether Mr Habib as a national of a US ally is entitled to their protection and whether he was an enemy combatant rather than a civilian or prisoner of war – do not presently fall for consideration.

21 Mr Habib then alleges that each of the US, Egyptian and Pakistani officials who tortured him committed the various offences against Commonwealth laws set out above. Section 11.2 of the *Criminal Code* deems persons who aid, abet, counsel or procure offences against Commonwealth laws to have themselves committed those offences. Mr Habib alleges that each of the Australian officials who was involved in his interrogation in Pakistan, Egypt, Afghanistan and Guantánamo Bay aided, abetted, counselled or procured the commission of Commonwealth offences by US, Egyptian and Pakistani officials. Consequently, so he alleges, each of the Australian officials has committed the same offences. It follows, says Mr Habib, that the Commonwealth officials acted beyond their jurisdiction for neither the *Australian Federal Police Act 1979* (Cth) (“the AFP Act”) nor the *Australian Security Intelligence Organisation Act 1979* (Cth) (“the ASIO Act”) authorised members of those organizations to commit offences against Commonwealth law. As for the DFAT officials, the power being exercised by them could only have been a species of the executive power of the Commonwealth conferred by s 61 of the *Constitution*. That power was conferred for the express purpose of maintaining the laws of the Commonwealth and could not, therefore, be the source of any authority to commit Commonwealth offences: *A v Hayden* (1984) 156 CLR 532 at 540, 550, 562 and 580-581. The result, so Mr Habib contends, was that the Commonwealth officers concerned intentionally harmed him knowing that what they were doing was beyond anything the law authorised them to do or recklessly indifferent to what the limits of their lawful authority might have been. Consequently, so he claims, they committed the tort of misfeasance in a public office: *Northern Territory v Mengel* (1995) 185 CLR 307 at 345-348. He also alleges that by acting as they did the officials committed the innominate tort of intentional infliction of indirect harm: *Wilkinson v Downton* [1897] 2 QB 57; *Giller v Procopets* (2008) 40 Fam LR 378; cf Larocque F, “The Tort of Torture” (2009) 17 Tort L Rev 158 at 169-172.

#### IV

22 In order to make good his claim that Australian officials committed the crime of aiding and abetting the commission of crimes by foreign officials Mr Habib must prove that the foreign officials committed those crimes. Section 11.2(b) of the *Criminal Code* makes clear what might well otherwise have been obvious that there can be no criminal liability for complicity unless the primary offence is first shown to have been committed. This does not mean, of course, that the principal offender need be convicted or even prosecuted (s 11.2(5)); rather, it is simply a necessary element of the prosecution case. Consequently, Mr Habib will need to prove at the civil standard that each of the foreign officials committed the offences against Commonwealth law which he alleges. It is against that eventual necessity that the Commonwealth now seeks pre-emptively to wield what has come to be known as the act of state doctrine. It relies upon the oft-cited decision of the United States Supreme Court in *Underhill v Hernandez* 168 US 250 (1897) where Fuller CJ (delivering the opinion of the Court) said (at 252) that:

Every sovereign State is bound to respect the independence of every other sovereign State, and the Courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

23 The Commonwealth contends that to determine whether agents of the US, Egypt and Pakistan committed offences against the *Crimes (Torture) Act 1988* (Cth), s 7(1) of the *Geneva Conventions Act 1957* (Cth) or ss 268.26 and s 268.74 of the *Criminal Code* it will inevitably be necessary for this Court to sit in judgment on the acts of the governments of those States done within their own territories, contrary to the proscription in *Underhill*. Consequently, there should be no trial on the merits and the proceedings should be dismissed. On 13 March 2009 I determined *inter alia* that the Commonwealth’s contention that Mr Habib’s proceedings were certain to fail in light of the act of state doctrine was not correct, that there was a triable issue as to whether the doctrine applied and that the matter should proceed: *Habib v Commonwealth (No 2)* (2009) 175 FCR 350 at 370-371 [80]-[82].

Somewhat exceptionally – but, it is to be emphasised, with the consent of Mr Habib – the Commonwealth then successfully sought the stating of a special case to the Full Court posing, on a final basis, the question of whether the act of state doctrine was a complete answer to Mr Habib’s contentions. In my opinion, it is not and that the question should be answered “No”.

## V

24 Much of the debate in this Court revolved around whether the act of state doctrine was subject to an exception where grave breaches of human rights were concerned (see, eg *Kuwait Airways Corporation v Iraqi Airways Company (Nos 4 and 5)* [2002] 2 AC 883 (“*Kuwait Airways*”) at 1079, 1102, 1105 and 1109) and whether the doctrine could apply to US activities at Bagram airfield and Khandahar Afghanistan and Guantánamo Bay (cf. *The Playa Larga and Marble Islands* [1983] 2 Lloyd’s Rep 171 (CA)). Subject to the matters set out in Section VI, those turbid waters need not presently be chanced for the Commonwealth’s contention should clearly be rejected for another, more significant, reason. The act of state doctrine – whatever it might be – has no application where it is alleged that Commonwealth officials have acted beyond the bounds of their authority under Commonwealth law.

25 The relevant principle was expounded by Marshall CJ in *Marbury v Madison* 5 US 137 (1803) at 177 when he said that “[i]t is, emphatically, the province and duty of the judicial department to say what the law is”. The doctrine in *Marbury v Madison* is one of the constitutional norms of this country for “in our system the principle in *Marbury v Madison* is accepted as axiomatic”: *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 262 per Fullagher J; cited with approval *Attorney-General for Western Australia v Marquet* (2003) 217 CLR 545 at 570 [66] per Gleeson CJ, Gummow, Hayne and Heydon JJ; *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* (2007) 232 CLR 1 at 48 [101] per Kirby J; *Singh v Commonwealth* (2004) 222 CLR 322 at 330 [7] per Gleeson CJ; *Commonwealth v Mewett* (1997) 191 CLR 471 at 547 per Gummow and Kirby JJ; *Harris v Caladine* (1991) 172 CLR 84 at 134-135 per Toohey J. The decision in *Marbury v Madison* was concerned with judicial review of legislative action but in this country it is established that the doctrine also explains the capacity of the judiciary to review the legality of administrative action: *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35-36 per Brennan J; *Attorney-General for Western Australia v Marquet* (2003) 217 CLR 545 at 570 [66] per Gleeson CJ, Gummow, Hayne and Heydon JJ; *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 347-348 [73] per McHugh, Gummow and Hayne JJ; *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135 at 152-153 [43]-[44] per Gleeson CJ, Gummow, Kirby and Hayne JJ; *Abebe v Commonwealth* (1999) 197 CLR 510 at 560 [137] per Gummow and Hayne JJ; *Kartinyeri v Commonwealth* (1998) 195 CLR 337 (“*Kartinyeri*”) at 381 [89] per Gummow and Hayne JJ; *Commonwealth v Mewett* (1997) 191 CLR 471 at 497 per Dawson J. The doctrine “ensures that courts exercising the judicial power of the Commonwealth determine whether the legislature and the executive act within their constitutional powers” (*Kartinyeri* at 381 [89] per Gummow and Hayne JJ). That principle accords “an essential place to the obligation of the judicial branch to assess the validity of legislative and executive acts against relevant constitutional requirements” (*Attorney-General for Western Australia v Marquet* (2003) 217 CLR 545 at 570 [66] per Gleeson CJ, Gummow, Hayne and Heydon JJ). The existence of that obligation on the judicial branch is “a basic element of the rule of law” (*Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 482 [5] per Gleeson CJ) and the rule of law itself is “one of the assumptions upon which the *Constitution* is based” (*APLA Limited v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 351 [30] per Gleeson CJ and Heydon J citing *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 193 per Dixon J).

26 These observations are consistent with the text of Chapter III. Section 75(iii) confers jurisdiction on the High Court in matters “in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party”; s 75(v) in all matters “in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth”. Together these two provisions, as Deane and Gaudron JJ explained in *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168 at 204-205:

constitute an important component of the Constitution’s guarantee of judicial process in that their effect is to ensure that there is available, to a relevantly affected citizen, a Ch III court with jurisdiction to grant relief against an invalid purported exercise of Commonwealth legislative power or an unlawful exercise of, or refusal to exercise, Commonwealth executive authority.

27 Consequently no law of the Parliament may bar the right to proceed against the Commonwealth in respect of the scope of its constitutional power: *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 217 per McHugh J; *Commonwealth v Mewett* (1997) 191 CLR 471 at 497 per Dawson J. And, just as a law of the Parliament may not remove from judicial scrutiny issues about the limits of the Commonwealth's lawful authority, so too it must follow that common law doctrines imported from unitary systems such as England's must yield to the ineluctable imperatives of ss 75(iii) and (v). Thus, for example, the doctrine of the Crown's immunity from suit can have no operation in federal jurisdiction for if it did it would surely "cut across the principle in *Marbury v Madison*. It would mean that the operation of the *Constitution* itself was crippled by doctrines devised in other circumstances and for a different system of government": *Commonwealth v Mewett* (1997) 191 CLR 471 at 548 per Gummow and Kirby JJ; *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30 at 44 [11] per Gleeson CJ.

28 The effect of this principle is to ensure that whenever a question as to the limits of Commonwealth power arises it is justiciable. Such questions may arise in a multitude of forms. They may arise directly, and in their purest form, where writs of mandamus or prohibition are sought under s 75(v) of the *Constitution* or s 39B of the *Judiciary Act 1903* (Cth) ("*Judiciary Act*"). But they may arise elsewhere. Thus, any Court exercising federal jurisdiction may declare a law of the Parliament to be invalid where such an issue arises in a matter before it even if the court in question has not been granted jurisdiction in matters arising under the *Constitution* under s 76(i), just as the High Court's power to declare laws invalid in no way awaits the Parliament's decision to grant it the optional jurisdiction in s 76(i). So too, questions as to the limits of executive power may arise outside of a suit to obtain a writ of prohibition or mandamus, for example, in proceedings for statutory orders or declaratory relief or under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). In private law similar questions can occur. There may, for example, be an issue as to whether the Commonwealth or its agencies had the power to enter into a particular commercial arrangement just as the question of *ultra vires* inevitably arises in the tort of misfeasance in a public office. Of course, the Parliament is free in a number of these contexts to vary the substantive law – it can enact an ouster clause or it may be able to abolish the tort – but what it cannot do is to command courts exercising federal jurisdiction to shy away from determining the question of legality when it arises.

29 This then is the principle applicable to Mr Habib's case. His suit is in federal jurisdiction for it both arises under the *Constitution* (s 39B(1A)(b) of the *Judiciary Act*) and under the *Australian Federal Police Act* and the *Australian Security and Intelligence Organisation Act* (s 39B(1A)(c) of the *Judiciary Act*). Thus the judicial power of the Commonwealth is engaged. Whatever else the act of state doctrine is it can neither "cut across *Marbury v Madison*" nor operate so that the *Constitution* itself is "crippled". Yet that is precisely what the Commonwealth's submissions entail. If accepted, they would mean that the High Court (and this Court too) would be unable to entertain Mr Habib's suit to enforce the limits of s 61 of the *Constitution* and to ensure that officers of ASIO and the AFP acted within the law. To the extent that the act of state doctrine would confer immunity from suit on the Commonwealth it is inconsistent with the constitutional orthodoxy of this country and its application is to be rejected in a fashion as complete as it is emphatic.

30 There are four footnotes to these observations. The first concerns the Full Court of this Court's decision in *Petrotimor Companhia de Petroleos SARL v Commonwealth of Australia* (2003) 126 FCR 354 ("*Petrotimor*"). My reading of that decision is that the Court declined, on the basis that it lacked jurisdiction, to entertain a suit which sought *inter alia* to establish that a Commonwealth statute was a law with respect to the acquisition of property and that it had not provided for just terms. The acquisition was said to flow because the property in question was a foreign immovable and was, therefore, subject to the rule laid down by the High Court in *Potter v Broken Hill Proprietary Co* (1906) 3 CLR 479 ("*Potter*") which extended to foreign patents the rule laid down by the House of Lords in *British South Africa Co v Companhia de Moçambique* [1893] AC 602 ("*Moçambique*"). The *Moçambique* rule denied the jurisdiction of the English courts to entertain suits touching upon the title to foreign land because of a distinction between local and transitory actions. Whatever else one might say about those two rules (as to which see Section VI below) they cannot operate to overcome the effects of Chapter III. It may well be that a claim that a law of the Parliament has appropriated foreign immovable property may turn out to be rather difficult to prove but it is not to be accepted that the Commonwealth's constitutional limits cease to be justiciable merely because those limits are played out in a way which touches on foreign property. If the Parliament has erected limitations on power which affect foreign property then those limits are irretrievably



justiciable. To that extent the *Moçambique* rule and its progeny operate to prevent judicial scrutiny of the limits of Commonwealth legislative or executive authority they are to be seen, as Crown immunity itself was seen in *Mewett*, as inconsistent with the scheme contemplated by Chapter III and inapplicable. To the extent that *Petrotimor* holds to the contrary it is, in my opinion, and with great respect to the distinguished judges who decided it, plainly wrong. This is not to decline to follow *Potter* or *Moçambique* (a path foreclosed in this Court) for their direct operation does not arise in Mr Habib's case. It is instead simply to observe that they cannot be applicable where they are directly inconsistent with established constitutional arrangements.

31 The second footnote concerns a line of cases which suggest that there is no "matter" which may be dealt with in federal jurisdiction where a federal court is called upon to extend "its true function into a domain that does not belong to it, namely the consideration of undertakings and obligations depending entirely on political sanctions": *Re Ditfort; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347 at 370 per Gummow J ("Ditfort"). For reasons set out below I doubt whether that principle, which is a part of constitutional law, comprises any part of the act of state doctrine. But whether or not that be so, it is difficult to see that there will ever be such an issue where there is an allegation of excess by the Commonwealth of its constitutional authority. The same remark may be made of the political question doctrine considered in *Baker v Carr* 369 US 186 (1962) at 211.

32 The third footnote concerns the Commonwealth's acceptance during argument that the act of state doctrine could not have been invoked as an answer to a claim under s 75(v) for a constitutional writ. Despite that concession it sought to confine the non-application of the doctrine to suits under that provision and denied that s 75(v) meant that it had become inapplicable in the present suit. For reasons set out above, the inconsistency which exists is not with s 75(v) alone (although it is certainly that). It is rather with the principle in *Marbury v Madison* and the provisions of s 75(iii) and (v) taken together and the schema they express. Mr Habib's suit started life in the High Court as (at least) a suit under s 75(iii) but was remitted to this Court by Gummow J. It is untenable to think that the act of state doctrine could have been pleaded against s 75(iii); no different position obtains in this Court.

33 The last footnote concerns the soundness of the Commonwealth's argument that there were reasons to distinguish, from the perspective of the act of state doctrine, an action in tort against the Commonwealth from an application for a writ of prohibition. As a matter of impression the distinction is unattractive. Mr Habib's claim could now be amended to include a claim for a writ of prohibition directed to ASIO, the AFP and DFAT officers concerned in addition to the claim for damages for misfeasance and indirect infliction of harm. At that point the inevitable working through of the Commonwealth's position would appear to be that the act of state doctrine would both apply and not apply to Mr Habib's suit. Notwithstanding the sentiment of Oliver Wendell Holmes Jr that "[t]he life of the law has not been logic; it has been experience" (Holmes O W Jr, *The Common Law* (Little, Brown and Company, 1881) p 1) such a result bespeaks the presence of an erroneous premise which should be located and rejected.

34 The presentment that the argument may be unsound does not diminish upon its approach. The Commonwealth sought to maintain the existence of the act of state doctrine in civil tort proceedings whilst conceding its non-existence in civil constitutional writ proceedings by characterising the latter as adjuncts to the criminal process contemplated by the *Crimes (Torture) Act 1988*, s 7(1) of the *Geneva Conventions Act 1957* and ss 268.26 and 268.74 of the *Criminal Code*. That mattered, so it was put, because each of the foreign states in question had explicitly consented to criminal jurisdiction over their officials by the very act of acceding to the Third and Fourth Geneva Conventions and the convention underpinning the *Crimes (Torture) Act 1988* (that is, the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted by the General Assembly of the United Nations on 10 December 1984*) (collectively, the Conventions). If they had assented to criminal jurisdiction over their own officials it followed that there could be no room for the operation of the act of state doctrine when criminal breaches of those international instruments was alleged. It did not follow, so the learned Solicitor-General for the Commonwealth submitted, that they had by accession to the Conventions thereby waived the act of state doctrine in civil proceedings. Since constitutional writ proceedings were to be seen as adjuncts of the criminal law there was no anomaly in accepting that the act of state doctrine did not apply in such cases for waiver by accession had occurred. That, however, could not be said in relation to ordinary civil proceedings where, accordingly, the doctrine continued to apply.

35 This argument is not, it should be said, without subtlety. However, it contains two steps which must be rejected. The first concerns the proper characterisation of constitutional writ proceedings as civil or criminal. Civil

proceedings to enforce the criminal law are not entirely unknown in Australian law even if they are not especially common. The usual view is that if a statute is merely criminal and nothing else then equity will grant no injunction: *Hornsby Shire Council v Danglade* (1928) 29 SR (NSW) 118. The fact that many modern statutes dealing with administration create criminal offences has led to considerable developments in the availability in public law of equitable remedies: *Enfield City v Development Assessment Commission* (2000) 199 CLR 135 at 145 [22]. Given the nature of the offences in question it is perhaps open to doubt whether it would be possible to obtain an injunction to restrain their commission. But assuming those problems could be surmounted, there would be no particular difficulties in describing such proceedings as being collateral to the criminal law. It may be that the States Party to the Conventions should be taken to have consented not only to criminal proceedings against their officials under the Conventions (or the legislation implementing the Conventions) but also to civil proceedings seeking to enforce those criminal provisions against them. But even allowing that might be so, an application for a writ of prohibition under s 75(v) does not bear the character of being a suit to enforce, by civil process, the criminal law against the officials of a State Party. So far as States Party other than the Commonwealth are concerned the conclusion is obvious for a writ of prohibition directed to Commonwealth officials does not touch them. So far as the Commonwealth itself is concerned, there is a difference between a proceeding to enforce the criminal law *qua* criminal law and a proceeding which, by contrast, seeks to control excess of jurisdiction and whose effect of enforcing the criminal law is an incident of that process. That distinction is a fatal one for the Commonwealth's argument. It shows that constitutional writ proceedings are not proceedings whose purpose is to enforce the criminal law and it means that it cannot be correct then to assert that States party must have implicitly consented to such proceedings.

36 The second difficulty concerns that very proposition *viz* that the States Party must be taken, by their accession to the Conventions, to have assented to the non-application of the act of state doctrine. In fact, what they assented to was the non-application of immunity *ratione materiae*: *R v Bow Street Metropolitan Stipendiary Magistrate; ex parte Pinochet (No 3)* [2000] 1 AC 147 at 205 per Lord Browne-Wilkinson, 266-267 per Lord Saville of Newdigate, 277-278 per Lord Millett and 290 per Lord Phillips; *Jones v Ministry of the Interior of the Kingdom of the Saudi Arabia* [2007] 1 AC 270 at 286 [19] per Lord Bingham of Cornhill, 303-304 [89]-[94] per Lord Hoffman and 306 [103] per Lord Rodger of Earlsferry, [104] Lord Walker of Gestingthorpe and [105] per Lord Carswell. It is true that in *Pinochet (No 3)* Lord Millett (at 269) spoke of immunity *ratione materiae* as being "closely similar to" and perhaps "indistinguishable from aspects of the Anglo-American act of state doctrine" but it seems to me that that cannot, with respect, be literally correct since the latter doctrine can be invoked in suits where questions of immunity simply do not arise and in which neither the State concerned nor any of its officials are parties.

37 The heart of the matter then is that Mr Habib alleges before a Court exercising federal jurisdiction that Commonwealth officers acted outside the law. The justiciability of such allegations is axiomatic and could not be removed by Parliament still less the common law. No doubt comity between the nations is a fine and proper thing but it provides no basis whatsoever for this Court declining to exercise the jurisdiction conferred on it by Parliament.

## VI

38 What has been said is sufficient to dispose of the matter. Much of the hearing was devoted to whether the act of state doctrine was subject to an exception in the case of gross breaches of human rights. In order to answer that question it would be necessary to have a clear understanding of precisely what the doctrine comprised and which part of it was in play. This Court should proceed on the basis that the doctrine exists. There are considered dicta in the High Court to that effect: *Attorney-General (United Kingdom) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30 at 40-41 ("*Spycatcher*"). A decision of the Full Court of this Court holds to the same effect: *Petrotimor* (2003) 126 FCR 354. Beyond the certainty that the doctrine exists there is little clarity as to what constitutes it. It is likely that the doctrine includes the principle of private international law that requires the *lex situs* to be applied to movables: *Buttes Gas and Oil Co v Hammer* [1982] AC 888 at 931 per Lord Wilberforce (with whom the other members of the House agreed at 938-939) ("*Buttes*"); *Ditfort* at 371 per Gummow J. In the United States the doctrine merely requires foreign state action to be treated as valid: *W S Kirkpatrick Co, Inc v Environmental Tectonics Corp, International* 493 US 400 (1989) ("*Kirkpatrick*") at 406, 409-410 per Scalia J (delivering the opinion of the Court). I would read that interpretation as supporting the view that the doctrine is a super choice of law rule requiring the *lex fori* to apply foreign law as the *lex causae* where it otherwise would

not do so under its own private international law rules: cf. *Ditfort* at 372 per Gummow J. There are statements in this country which support the view that the doctrine is merely concerned with the validity of foreign State acts: *Spycatcher* at 40-41; *Potter* at 498, 500 per Griffiths CJ, 503, 504-505, 507 per Barton J and 510-511, 513 per O'Connor J. But, on the other hand, there are statements too which suggest a connexion between *Underhill* and the rule in *Moçambique*: *Potter* at 495-497 per Griffiths CJ, 510-511, 513 per O'Connor J. As already noted, the *Moçambique* rule holds that local courts do not have jurisdiction to entertain suits involving title to foreign land because actions involving land are local and not transitory: *Moçambique* at 619, 622-623, 627-628 per Lord Herschell LC (with whom Lord Morris agreed), 631 per Lord Halsbury, 634 per Lord Macnaghten. That reading of *Moçambique* is consistent with recent pronouncements in the High Court as to what *Moçambique* means: *Commonwealth v Yamirr* (2001) 208 CLR 1 at 44 [32] per Gleeson CJ, Gaudron, Gummow and Hayne JJ; *Lipohar v The Queen* (1999) 200 CLR 485 at 517 [81] per Gaudron, Gummow and Hayne JJ. The Court's earlier decision in *Potter* seems to regard *Moçambique* as being a manifestation of a rule – derived from *Underhill* – which requires state action in granting title to land (or as in *Potter* state action in issuing a patent) to be deemed valid: cf. *Potter* at 497-498 per Griffiths CJ, 501-503 per Barton J and 511 per O'Connor J. That view of *Moçambique* is not consistent with its application to suits involving land where the title is not in dispute: cf. *Hesperides Hotels Ltd v Muftizade* [1979] AC 508 where the rule was applied even though no issue as to title arose.

39 If the act of state doctrine is concerned with validity (*Spycatcher* at 40-41, *Kirkpatrick* at 406, 409-410) and is not a rule of abstention ('[t]he act of state doctrine is not some vague doctrine of abstention': *Kirkpatrick* at 406 per Scalia J), then it is very difficult to be clear about what *Potter* actually holds. In that regard, there are two particular aspects of *Potter* which deserve emphasis. *First*, the *Underhill* question was first raised by the Court itself (see *Potter* at 493) and was not argued before the Full Court of Victoria where the only two issues were the application of the *Moçambique* rule and the rule in *Phillips v Eyre* (1869) LR 4 QB 225 and (1870) LR 6 QB 1 (see *Potter* at 492) – there was no issue before the Full Court as to its jurisdiction to entertain the defendant's plea that the patent was invalid. *Secondly*, the High Court held that the Supreme Court had no jurisdiction to entertain the plaintiff's suit to enforce his patent because it had no jurisdiction to entertain that defence (*Potter* at 500 per Griffiths CJ and 516 per O'Connor J; Barton J's position is not entirely clear). This was not an application of the *Moçambique* rule at all. The actual application of the *Moçambique* rule would have led to the conclusion that the Supreme Court had no jurisdiction to entertain any kind of suit to enforce a foreign immovable (which was in fact the Supreme Court's conclusion: *Potter v The Broken Hill Proprietary Co Ltd* (1905) VLR 612 at 631 per Hood J and 639-640 per Hodges J). On that analysis the defence that the patent was invalid was irrelevant. On one view what has occurred is that a rule of abstention, *Moçambique*, has become fused with a rule of validity, *Underhill*, in a way which is productive only of confusion.

40 So much may be apparent from the Full Court of this Court's decision in *Petrotimor*, my respectful disagreement with certain aspects of which I have already flagged. That case concerned, in part, an amendment to the *Seas and Submerged Lands Act 1973* (Cth) which changed the definition of the continental shelf so that Australian sovereignty became asserted over a part of the seabed between Australia and East Timor. That part of the seabed had formerly been subject to a claim of sovereignty by Portugal when it was present in East Timor. The applicant held a concession to mine oil in that area from Portugal which was granted in 1974. One of the applicant's contentions was that by changing the definition of the continental shelf the Parliament had appropriated its property in the concession without paying just terms contrary to s 51(xxxi). The Court reasoned that the oil concession was a foreign immovable to which the *Moçambique* rule (or the *Potter* rule) applied (*Petrotimor* at 368 [42]-[43] per Black CJ and Hill J) and that the Court therefore had no jurisdiction to entertain the suit (at 368-369 [44]). This result is disconcerting at two levels. *First*, there was no suggestion that the concession had not been validly granted (as there was in the defendant's defence in *Potter*) so there was no risk that the Court was going to have pass on that question. If the act of state doctrine is a rule requiring local Courts to proceed on the basis that foreign state action is valid then the outcome would have been that the Federal Court was bound to assume that the concession was valid, a proposition which would not have provided any basis for a finding that the Court lacked jurisdiction to determine a debate as to whether s 51(xxxi) had been complied with. The conceptual confusion flowing from *Potter's* curious commingling of a rule of jurisdiction - *Moçambique* - with a rule of validity - *Underhill* - is the likely source of this surprising outcome. *Secondly*, it would appear to mean that the guarantee of just terms in s 51(xxxi) does not extend to property subject to the *Moçambique* rule. The first of these propositions is, for reasons I have already given, inconsistent with Chapter III which casts upon this Court both a jurisdiction and a duty to determine suits in which questions of constitutional power arise whatever

else the rule in *Moçambique*, imported as it is from a unitary system, might say. The second proposition is very difficult to reconcile with the repeated statements in the High Court that “property” in s 51(xxxi) is to be construed liberally (*Telstra Corporation Ltd v Commonwealth* (2008) 234 CLR 210 at 230 [43] and the authorities there collected). It would be difficult to think that the word “property” would not include a foreign immovable and more difficult still to think of any plausible reason why s 51(xxxi) (or any other part of the *Constitution* for that matter) should be construed as stopping at the 10 mile limit.

41 A common thread in all of these uncertainties is the *Moçambique* rule itself. The High Court has reserved the correctness of both *Moçambique* and *Potter: Régie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491 at 520 [75]-[76]. It might be noted for completeness that the *Moçambique* rule has been abolished in NSW by s 3 of the *Jurisdiction of Courts (Foreign Land) Act 1989* and also in the ACT by s 34(1) of the *Law Reform (Miscellaneous Provisions) Act 1955*. The role of those provisions in federal jurisdiction in light of s 79 of the *Judiciary Act 1903* is, as yet, unclear. However, on any view, the rule continues to have an ongoing effect on the content and operation of the act of state doctrine because of its reference to *Underhill*. *Moçambique* undoubtedly binds this Court since it was applied not only in *Potter* but also in *Commonwealth v Woodhill* (1917) 23 CLR 482. *Potter*, of course, binds this Court although there are serious difficulties in disentangling precisely what it holds. The fact that the issue the High Court appears to have decided the case on – *Underhill* – was not argued in the Court below and the fact that although the validity of the patent was put in issue by the defendant’s defence the actual issue before the High Court was whether the *Moçambique* rule applied has resulted in a decision whose precise meaning is, in my respectful opinion, most opaque.

42 It is possible the act of state doctrine also includes the abstention principle discussed by Lord Wilberforce in *Buttes* (at 931-934) which may now be some species of vaguely defined deference rule (*Kuwait Airways* at 1109 [140] per Lord Hope of Craigend, 1101 [113] per Lord Steyn; although cf. 1080 [24] per Lord Nicholls of Birkenhead, 1105 [125] per Lord Hoffman). The Full Court of this Court, whilst not deciding the issue, left open the possibility that the act of state doctrine did include such a principle in *Petrotimor* (at 369 [45]-[46]). Gummow J noted in *Ditfort* (at 370-371) that this kind of issue was closer to the United States political question doctrine. Like Gummow J, I would see the concerns arising from the kind of subject matter in *Buttes* as being resolved, at least in the federal jurisprudence of this country, on the basis of an absence of a “matter” or of parties with standing: *Ditfort* at 370-371. I would not regard it as part of the act of state doctrine which is much more likely to be a choice of law rule.

43 I mention these obscurities because it would be essential to know what the doctrine was before one could determine whether there was an exception from it for human rights breaches. If, contrary to the view I have just expressed, the *Buttes* abstention or deference doctrine in cases lacking manageable judicial standards is part of the act of state doctrine then there can, at least to that part of the doctrine, be no human rights exception. The absence of a matter in the requisite sense is a constitutional prohibition on the exercise of federal jurisdiction. That a human rights breach might somewhere be located within such a suit simply provides no answer to that problem. If, on the other hand, the doctrine is a super choice of law rule then there are no especial difficulties in declining to give effect to particular foreign laws which are repellent to the public policy of this country. It has long been clear that the rule that the *lex situs* is applicable to chattels may be disregarded if it offends the policy of the forum. Thus, foreign laws which confiscate, on the commencement of a war, the property of citizens of the forum will not be enforced in the forum: *Wolf v Oxholm* (1817) 6 M & S 92; 105 ER 1177; *In re Fried Krupp Actien – Gesellschaft* [1917] 2 Ch 188. Another line of cases refuses recognition to foreign expropriation laws which are aimed at particular individuals or classes of individuals. Thus no effect was afforded a Spanish law which appropriated the property of the deposed king: *Banco de Vizcaya v Don Alfonso de Borbon Y Austria* [1935] 1 KB 140. Cut from the same cloth are the better known, but conceptually similar, decisions refusing to give effect to the Nazi law which expropriated Jewish property: *Oppenheimer v Cattermole (Inspector of Taxes)* [1976] AC 249 at 277-278 per Lord Cross of Chelsea, 282-283 per Lord Salmon; *R v Home Secretary; Ex parte L* [1945] KB 7 at 10; *Lowenthal v Attorney-General* [1948] 1 All ER 295 at 299. More recently it has been held that the *lex situs* does not apply where it arises from an invasion in undoubted breach of public international law and a UN Security Council resolution: *Kuwait Airways* at 1081 [27]-[29] per Lord Nicholls of Birkenhead (with whom Lord Hoffman agreed on this issue), 1102 [114] per Lord Steyn and 1111 [148] per Lord Hope. If, contrary to my present view, the act of state doctrine is a loosely defined principle of abstention or deference not connected to any issue of validity then I do not see the conceptual peg upon which a human rights exception might be hung

for there is no foreign law to be disengaged. The kinds of difficulty involved can be seen most clearly by asking how the reasoning in *Oppenheimer v Cattermole* could have been used to outflank the *Moçambique* rule if a suit had been brought in England for trespass to Jewish land situated in Germany confiscated under the Nazi laws. Revulsion is not, by itself, a source of jurisdiction.

44 Finally, mention should be made of the argument that the act of state doctrine could not apply at Bagram airfield, Khandahar or Guantánamo Bay because those places were not part of the United States. If the act of state doctrine is a conflict of laws rule concerned with validity then this issue will not arise for the doctrine will be conceptually ineffective as a defence to Mr Habib's claim: "The issue in this litigation is not whether [the alleged] acts are valid, but whether they occurred": *Sharon v Time, Inc.*, 599 FSupp 538, 546 (SDNY 1984) cited with approval by Scalia J in *Kirkpatrick* at 406. Mr Habib's contention is that his torture caused him personal injury, not that it was invalid, a proposition which, should the allegation be made good, is unlikely to have crossed his mind at the time. In a case where a rule of validity was engaged it would be essential to know which legal system the Courts of this country were bound to recognise. In that context, it would be of no assistance to know that the US is in *de facto* control of Guantánamo Bay (*Rasul v Bush* 542 US 466 (2004) at 471, 480 (Stevens J, delivering the opinion of the Court) and 485 (Kennedy J concurring); *Boumediene v Bush* 553 128 SCt 2229 (2008) at 2251-2253) or Bagram airfield (*Al Maqaleh v Gates* 604 FSupp.2d 205 (D.D.C. 2009) at 209, 222 and 223) or the "installation" at Khandahar (*Amnesty International Canada v Canadian Forces (Defence Staff, Chief)* (2008) 305 DLR (4<sup>th</sup>) 741 at 747 [25]). The relevant inquiry would be one whose endpoint was the identification of the State whose sovereignty Australia recognised in those places. No submission was made by the Commonwealth as to whether Australia recognised US sovereignty in Bagram airfield or Khandahar or Guantánamo Bay.

45 If, on the other hand, the doctrine is a deference principle disconnected from validity (as the Commonwealth contends and which I would reject) then there would be appear to be no particular need to direct attention to the issue of sovereignty at all for the application of legal rules is not in any way involved. On this view of things what applies is a principle of abstention or deference whose end is the avoidance of diplomatic embarrassment. I can see no particular reason why the investigation of the acts of another State are likely to be the less embarrassing just because they are done abroad. Indeed, there may be much to be said for the view that extra-territorial State conduct carries with it a greater potential for embarrassment. If I am wrong in my view that the act of state doctrine is a rule of validity and not a rule of abstention or deference then I would conclude that it is applicable outside the relevant State's territory. However, this is not my view of the doctrine.

## VII

46 The Commonwealth's contention that this Court is not permitted to consider whether its officials' conduct was valid because to do so would require it to sit in judgment on the acts of other States is to be rejected. The question reserved should be answered "No". I agree with the orders proposed by Jagot J.

I certify that the preceding thirty-three (33) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Perram.

Associate:

Dated: 25 February 2010

**IN THE FEDERAL COURT OF AUSTRALIA  
NEW SOUTH WALES DISTRICT REGISTRY  
GENERAL DIVISION**

**NSD 956 of 2006**

**BETWEEN:** MAMDOUH HABIB  
Applicant

**AND:** COMMONWEALTH OF AUSTRALIA  
Respondent

**JUDGES:** BLACK CJ, PERRAM AND JAGOT JJ

**DATE OF ORDER:** 25 FEBRUARY 2010

**PLACE:** SYDNEY

**REASONS FOR JUDGMENT**

**JAGOT J:**

47 The issue is whether the Court is bound to dismiss the major part of the applicant's claim because its resolution in his favour will require finding the acts of agents of foreign states outside Australia to be illegal. According to the respondent, the Commonwealth of Australia, the act of state doctrine precludes this Court (and any Australian court) from so finding, thereby preventing any judicial determination of the claim.

48 The claim is for damages. Liability on the part of the Commonwealth is said to arise from the acts of Commonwealth officers constituting the torts of misfeasance in public office and the intentional but indirect infliction of harm. The essence of the alleged wrongs is that officers of the Commonwealth are said to have aided, abetted and counselled the agents of foreign states to inflict torture on the applicant, Mamdouh Habib, whilst he was detained in Pakistan, Egypt, Afghanistan and Guantánamo Bay following the events of 11 September 2001.

49 Mr Habib commenced the proceeding in the High Court by writ of summons dated 16 December 2005. Section 44(2A) of the *Judiciary Act 1903* (Cth) permits the High Court to remit a matter to a court that has jurisdiction with respect to its subject-matter. The High Court remitted Mr Habib's proceeding to this Court on 26 April 2006. It appears to be common ground that but for the Commonwealth's argument in reliance on the act of state doctrine this Court would have jurisdiction to determine Mr Habib's proceeding. This Court has original jurisdiction in any matter either arising under the Constitution or involving its interpretation or arising under any laws made by the Parliament other than a matter in respect of which a criminal prosecution is instituted or any other criminal matter (ss 39B(1A)(b) and (c) and 44(3) of the *Judiciary Act*).

50 At the outset it should be said that the Commonwealth categorically denies any complicity on the part of its agents in Mr Habib's alleged torture. Mr Habib's allegations are untested. The truth or otherwise of his allegations is not for present comment or consideration. This is because the Commonwealth's position is that the truth of these allegations cannot be tested in an Australian court by reason of the act of state doctrine.

51 The act of state doctrine has been described as "a common law principle of uncertain application which prevents the [forum] court from examining the legality of certain acts performed in the exercise of sovereign authority within a foreign country or, occasionally, outside it" (*R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte* [2000] 1 AC 61 at 106 (*Pinochet (No 1)*)).

52 Mr Habib acknowledges that the act of state doctrine exists and forms part of the common law of Australia, albeit in a form the precise nature and scope of which remains uncertain. Mr Habib contends that as he alleges acts of torture in grave breach of his human rights, constituting serious violations of international law and conduct made illegal by Australian laws having extra-territorial effect, the act of state doctrine is not engaged.

53 The issue arises as a question reserved for the Full Court under s 25(6) of the *Federal Court of Australia Act 1976* (Cth) and Order 50 r 1 of the Federal Court Rules. The question is:

Should the application be dismissed in respect of the claims made in paragraphs 1-36 of the Fourth Further Amended Statement of Claim on the ground identified in paragraph 1 of the Respondent's Notice of Motion filed 17 June 2009?

54 Paragraph 1 of the Commonwealth's notice of motion filed on 17 June 2009 identifies the following ground for dismissal of paragraphs 1-36 of Mr Habib's fourth further amended statement of claim:

...the determination of those claims would require a determination of the unlawfulness of acts of agents of foreign states within the territories of foreign states, [so that] those claims:

- a. are not justiciable and give rise to no "matter" within the jurisdiction of the Court under ss 39B and 44(3) of the Judiciary Act 1903 (Cth) and s 77(i) of the Constitution;
- b. further or in the alternative, give rise to no cause of action at common law.

55 The Commonwealth's contention of non-justiciability by reason of the lack of either a "matter" or common law cause of action depends upon its submission that the act of state doctrine places Mr Habib's claim outside the scope of "the court's true function [and] into a domain that does not belong to it" (*Re Ditfort; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347 at 370).

56 The questions which arise are as follows:

- (1) What issues must the Court determine in order to resolve the impugned paragraphs of the fourth further amended statement of claim? A claim's "susceptibility to judicial handling" can be determined only "in the light of its nature and posture in the specific case, and of the possible consequences of judicial action" (*Baker v Carr* 369 US 186 at 211-212 (1962) cited in *Re Ditfort* at 367-368).
- (2) Does judicial determination of these issues engage the act of state doctrine (which depends on the content and operation of the doctrine)?
- (3) How does the act of state doctrine operate in the Australian constitutional and statutory context?

# **(1) WHAT ISSUES MUST THE COURT DETERMINE?**

## **Some undisputed facts**

57 The undisputed background facts giving rise to Mr Habib's proceeding are recorded in *Habib v Commonwealth* (No 2) (2009) 175 FCR 350; [2009] FCA 228 at [1]-[3] as follows:

[1]. . . On 11 September 2001 a series of terrorists [sic] attacks took place on the mainland of the United States of America ("the US") as a result of which there was significant loss of civilian life. On 9 October 2001, the President of the US wrote to the Speaker of the House of Representatives and the President Pro Tempore of the Senate and informed the Congress that at 12.30 pm on 7 October 2001 US armed forces had commenced combat operations against Al Qaida terrorists and their Taliban supporters in Afghanistan. Pakistan shares a border with Afghanistan. Shortly before the commencement of the US combat operations on 7 October 2001 Mr Habib was present in Pakistan. . . . [B]y 5 October 2001 Mr Habib had been detained by Pakistani authorities. . . . [I]n early October 2001 the Commonwealth of Australia ("the Commonwealth") became aware of that state of affairs.

[2] On 26 and 29 October 2001 Mr Habib was interviewed in Islamabad by an officer of the Australian Security Intelligence Organisation ("ASIO"). . . . [I]n or around mid-November 2001 Mr Habib was taken to Egypt. The Commonwealth. . . was aware in November 2001 that it was likely Mr Habib had been taken to Egypt and. . . became aware in early 2002 that he was almost certainly there. . . .

[3] At some point Mr Habib was transferred from Egypt to Afghanistan. . . . Mr Habib was, by this stage, in the custody of the US. . . . Mr Habib had arrived in Guantánamo Bay by approximately

3 May 2002. . . [H]e remained there for two and a half years until 27 January 2005 incarcerated and uncharged. . . Mr Habib was visited by Australian officials during his incarceration. This included consular officials and officers of ASIO and the AFP [the Australian Federal Police]. He was questioned by some of these people on several occasions. On 27 January 2005, Mr Habib was repatriated to Australia without charge.

58 But for these undisputed facts the questions must be answered by reference to Mr Habib's allegations.

### Relevant people

59 Mr Habib is an Australian citizen (para 1 of the statement of claim). The statement of claim also records the status of officers of the Australian Federal Police (**the AFP**), Australian Security Intelligence Organisation (**ASIO**) and the Department of Foreign Affairs and Trade (**DFAT**) as persons purporting to exercise the duties, functions and powers vested in them by both enabling legislation (the *Australian Federal Police Act 1979* (Cth), the *Australian Security Intelligence Organisation Act 1979* (Cth) and the *Public Service Act 1999* (Cth)) and s 61 of the Constitution (the executive power of the Commonwealth). Further, the statement of claim contends that those officers, in respect of the conduct founding Mr Habib's complaints, were purporting to exercise a public duty in circumstances where the Commonwealth was liable (vicariously or otherwise) for their actions (paras 2, 3 and 4).

### Relevant states

60 The statement of claim (paras 5 and 6) records that the Commonwealth of Australia, the United States of America (**the US**), Afghanistan, Pakistan and Egypt are parties to the *Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949* (**the Third Geneva Convention**) and the *Geneva Convention relative to the Protection of Civilian Persons in Time of War of August 12, 1949* (**the Fourth Geneva Convention**). It also records that Australia and Egypt are parties to the *Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts* (**Additional Protocol 1**). Although not pleaded, it is also not in dispute that Australia, the US, Egypt and Afghanistan are parties and Pakistan a signatory to the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984* (**the Torture Convention**).

61 Paragraphs 7 and 8 of the statement of claim assert that from no later than 1 October 2001 each of Australia, the US, Pakistan and Egypt were engaged in an armed conflict on their own territory and elsewhere with the organisation known as Al Qaeda (**the Al Qaeda armed conflict**) and from on or about 7 October 2001 in a declared war or armed conflict with the State of Afghanistan then under the control of a government known as the Taliban (**the Afghan armed conflict**).

### Relevant conduct

62 Mr Habib was detained between 5 October 2001 and 28 January 2005 (when he was released from Guantánamo Bay without charge). Paragraphs 9 to 16 of the statement of claim relate to Mr Habib's detention and interrogation in Pakistan between about 4 October 2001 and mid November 2001. Paragraphs 17 to 23 relate to his detention and interrogation in Egypt between about 21 November 2001 and May 2002. Paragraphs 24 to 36 relate to his detention and interrogation at Bagram and Kandahar airbases in Afghanistan for two weeks in about May 2002 and thereafter at Guantánamo Bay until 28 January 2005.

63 Mr Habib alleges that he was detained in Pakistan and Egypt by persons engaged or employed by the governments of Pakistan and Egypt respectively, and by or with the assistance of persons engaged or employed by the government of the US in connection with the Al Qaeda armed conflict and the Afghan armed conflict. He alleges that he was detained at Bagram and Kandahar airbases in Afghanistan and in Guantánamo Bay by persons engaged or employed by the government of the US in connection with the Al Qaeda armed conflict and the Afghan armed conflict.

64 Mr Habib alleges that during his period of detention in Pakistan and Egypt he was subjected to repeated and oppressive interrogation and mistreatment undertaken by or at the behest of persons engaged or employed by the governments of Pakistan and Egypt, and by or with the assistance or knowledge of persons engaged or employed



by the government of the US. He further alleges that during his period of detention at Bagram and Kandahar Airbases in Afghanistan and in Guantánamo Bay he was subjected to repeated and oppressive interrogation and mistreatment undertaken by or at the behest of persons engaged or employed by the government of the US.

65 Mr Habib alleges that the conduct carried out by or at the behest of agents of the governments of Pakistan, Egypt and the US in the places identified:

- constituted acts of torture within the meaning of s 3(1) of the *Crimes (Torture) Act 1988* (Cth) (a statute giving effect to the Torture Convention) in circumstances where that conduct was unlawful under Australian law, being contrary to s 6(1) of that Act (a section which makes it an offence for a public official outside of Australia to torture a person);
- in the case of the conduct carried out before 26 September 2002, involved the infliction of torture, inhuman treatment or the wilful causing of great suffering by Mr Habib being a person protected by the Third Geneva Convention and thus was a grave breach thereof within the meaning of article 130 and, as such, was unlawful under Australian law, being contrary to s 7(2)(c) of the *Geneva Conventions Act 1957* (Cth); and
- in the case of the conduct carried out after 26 September 2002, involved actions unlawful under Australian law by reason of ss 268.26(1) and 268.74(1) of the Criminal Code (being the Schedule to the *Criminal Code Act 1995* (Cth) (**The Criminal Code**)) which concern the war crimes of inhumane treatment and outrages upon personal dignity (and which, from 26 September 2002, replaced the equivalent provisions in the Geneva Conventions Act).

66 Mr Habib alleges that officers of the AFP, ASIO and DFAT, by their actions, aided, abetted or counselled this unlawful conduct of the agents of the governments of Pakistan, Egypt and the US. Those officers, thereby, also contravened each of s 6(1) of the *Crimes (Torture) Act*, s 7(2)(c) of the *Geneva Conventions Act* and ss 268.26(1) and 268.74(1) of the Criminal Code (as aiding, abetting or counselling the commission of an offence against a Commonwealth law is itself an offence by operation of s 11.2 of *The Criminal Code*).

67 Mr Habib alleges that he suffered loss and damage as a result of this unlawful conduct of the officers of the AFP, ASIO and DFAT. He also claims that, based on the same facts, the officers of the AFP, ASIO and DFAT acted in a way calculated to cause harm to him, without any lawful justification, and as a result of which he suffered harm.

## Conclusions

68 The Commonwealth described the claim as one depending on Mr Habib proving that his alleged treatment by foreign agents within the territories of foreign states constituted criminal offences against Commonwealth laws.

69 Mr Habib described his claim as one in which an Australian citizen seeks redress from the Australian government for the alleged acts of Australian officials unlawful under and in respect of causes of action recognised by Australian law.

70 The Commonwealth's description of Mr Habib's claims is accurate; to resolve the claim the Court will have to determine whether Mr Habib's treatment by foreign agents within the territories of foreign states contravened Commonwealth laws creating criminal offences.

71 Mr Habib's description, however, is also accurate; his claim is one in which an Australian citizen seeks redress from the Australian government for the alleged acts of Australian officials unlawful under Australian law and in respect of causes of action recognised by Australian law.

## (2) IS THE ACT OF STATE DOCTRINE ENGAGED?

### The Commonwealth's submissions

72 The Commonwealth submitted that the act of state doctrine was described accurately by Fuller CJ of the Supreme Court of the United States in *Underhill v Hernandez* 168 US 250 at 252 (1897) as a rule of the common law under which "the courts of one country will not sit in judgment on the acts of the government of another,

done within its own territory”. The House of Lords approved the doctrine in *Buttes Gas and Oil Co v Hammer* [1982] AC 888. The doctrine forms part of the common law of Australia. It was referred to with approval by the High Court in *Potter v Broken Hill Proprietary Co Ltd* (1906) 3 CLR 479 at 495, 506-507 and 511 (*Potter v BHP*) and *Attorney-General (United Kingdom) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30 at 40-41 (*Spycatcher*). It was applied by the Full Court of the Federal Court in *Petrotimor Companhia de Petroleos SARL v Commonwealth of Australia* (2003) 126 FCR 354; [2003] FCAFC 3 to deny the existence of a matter within the meaning of s 77(i) of the Constitution and s 39B of the Judiciary Act. It was rejected as a reason for precluding summary dismissal of a proceeding for judicial review of the Executive’s dealings with the US in respect of the detention of an Australian citizen in Guantánamo Bay in *Hicks v Ruddock* (2007) 156 FCR 574; [2007] FCA 299. It was referred to by Gummow J in *Re Ditfort* at 371.

73 The Commonwealth submitted that the doctrine is informed by the principles of the separation of powers and international comity (see *Spycatcher* at 41 endorsing *Buttes* at 932 to the effect that the underlying principle “is not one of discretion, but is inherent in the very nature of the judicial process” and the statement of the US Supreme Court in *Oetjen v Central Leather Co* 246 US 297 at 304 (1918) that to permit the validity of the acts of a sovereign state to be examined and perhaps condemned by the courts of another would “imperil the amicable relations between governments and vex the peace of nations”). From this, the Commonwealth said, it follows that the limits of the doctrine are not to be found in *a priori* exceptions whether based on public policy or otherwise but from a consideration of the principles that inform the content of the doctrine. The better view is that where the doctrine is *prima facie* engaged, it operates unless the considerations of international comity and separation of powers that inform the content of the doctrine are clearly inapplicable. According to the Commonwealth, if there is any doubt about these considerations, judicial restraint is required. This is because the doctrine exists to avoid the need for inquiry by a court as to the effect on foreign relations of any particular determination about the validity of sovereign acts of foreign states.

74 The Commonwealth rejected the proposition that the doctrine does not apply where the acts in question are alleged to constitute grave violations of international law. The Commonwealth said this proposition gains no support from the jurisprudence of the US courts or, properly analysed, from the courts of the United Kingdom.

75 The present position of the US Supreme Court is derived from its statement in *Banco Nacional de Cuba v Sabbatino* 376 US 398 (1964). The Court rejected inflexible exceptions to the doctrine. The Court, instead, adopted a multi-factorial analysis as follows at 427-428:

If the act of state doctrine is a principle of decision binding on federal and state courts alike but compelled by neither international law nor the Constitution, its continuing vitality depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs. It should be apparent that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice. It is also evident that some aspects of international law touch much more sharply on national nerves than do others; the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches. The balance of relevant considerations may also be shifted if the government which perpetrated the challenged act of state is no longer in existence, as in the *Bernstein* case [referring to *Bernstein v N V Nederlandsche-Amerikaansche, Stoomvaart-Maatschappij* 210 F.2d 375 (2d Cir. 1954)], for the political interest of this country may, as a result, be measurably altered. Therefore, rather than laying down or reaffirming an inflexible and all-encompassing rule in this case, we decide only that the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.

76 The two relevant decisions of the House of Lords are *Oppenheimer v Cattermole (Inspector of Taxes)* [1976] AC 249 and *Kuwait Airways Corporation v Iraqi Airways Company (Nos 4 and 5)* [2002] 2 AC 883 (*Kuwait*

*Airways No 4* refers to the judgment of the Court of Appeal, *Kuwait Airways No 5* refers to the judgment of the House of Lords, collectively *Kuwait Airways*).

77 Although a tax case, *Oppenheimer* involved the infamous German Nationalist Socialist (Nazi) citizenship laws of 1941 the purported effect of which was to deprive all German Jews living abroad of their German citizenship and property. Lord Cross (at 278) acknowledged that the question of the legitimacy of confiscatory property laws may create wide differences of opinion. His Lordship continued:

But what we are concerned with here is legislation which takes away without compensation from a section of the citizen body singled out on racial grounds all their property on which the state passing the legislation can lay its hands and, in addition, deprives them of their citizenship. To my mind a law of this sort constitutes so grave an infringement of human rights that the courts of this country ought to refuse to recognise it as a law at all.

78 The Commonwealth emphasised the context exposed by the analysis of Lord Salmon in *Oppenheimer*. After expressing his agreement with Lord Cross (at 281), Lord Salmon observed (at 282) that, ordinarily, a refusal by the courts of the United Kingdom to recognise legislation of sovereign states about property within its territory and the citizenship of its nationals on the ground that it was “utterly immoral and unjust” could “obviously embarrass the Crown in its relations with a sovereign state whose independence it recognised and with whom it had and hoped to maintain friendly relations”. In the case at hand, however, Lord Salmon (at 283) characterised the immorality of the Nazi decree of 1941 as “without parallel”. His Lordship continued:

But, even more importantly. . . England was at war with Germany in 1941 – a war which. . . was presented in its later stages as a crusade against the barbarities of the Nazi régime of which the 1941 decree is a typical example. I do not understand how, in these circumstances, it could be regarded as embarrassing to our government in its relationship with any other sovereign state or contrary to international comity or to any legal principles hitherto enunciated for our courts to decide that the 1941 decree was so great an offence against human rights that they would have nothing to do with it.

79 The Commonwealth acknowledged that the decision of the Court of Appeal in *Kuwait Airways No 4* recognised an exception to the act of state doctrine for acts of a foreign sovereign contrary to public policy of the forum state (at [317]-[320]). The Commonwealth said, however, that the decision was not authority for the proposition that an exception to the doctrine exists in circumstances where the proceedings concern grave breaches of international human rights law. According to the Commonwealth, the approach of the House of Lords was affected by an incorrect concession to that effect. The concession wrongly treated *Oppenheimer* as identifying an exception to the act of state doctrine based on the public policy of the forum state. To the contrary, properly analysed, the non-application of the act of state doctrine in *Oppenheimer* enabled the forum court to apply its own public policy.

80 The Commonwealth noted that, despite the concession, Lord Hope in *Kuwait Airways No 5* accepted that any exceptions to the doctrine must be subject to “very narrow limits” so that a judge should be “slow to depart from” the principle that a foreign state ordinarily has jurisdiction over all assets in its territory (at [138]). At [140] his Lordship concluded that:

The golden rule is that care must be taken not to expand its [“the public policy exception”] application beyond the true limits of the principle. These limits demand that, where there is any room for doubt, judicial restraint must be exercised. But restraint is what is needed, not abstention. And there is no need for restraint on grounds of public policy where it is plain beyond dispute that a clearly established norm of international law has been violated.

81 The Commonwealth also described the facts underlying the decision in *Kuwait Airways* as pivotal. *Kuwait Airways* involved an Iraqi law associated with Iraq’s unlawful invasion of Kuwait. The law purported to transfer all Kuwait Airlines’ assets to Iraq and thence to Iraqi Airways. The case raised no issues of breaches of international law “on spurious or inadequate or highly debatable grounds and/or where the country has friendly and peaceful relations with the foreign state in question, or where judicial intervention would undermine the diplomatic process

or vex the peace of nations'' (*Kuwait Airways No 4* at [377]). The breach of international law was beyond debate and arose in the context of hostile action by the foreign state.

82 The Commonwealth submitted that the operation of the analogous doctrine of sovereign immunity is instructive (specifically, immunity *rationae materiae* or subject-matter immunity). In *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte (No 3)* [2000] 1 AC 147 at 269 (*Pinochet (No 3)*) Lord Millet said that sovereign immunity is ''closely similar to and may be indistinguishable from aspects of the Anglo-American act of state doctrine''; the former is a creature of international law operating as a ''plea in bar to the jurisdiction of the national court, whereas the latter is a rule of domestic law which holds the national court incompetent to adjudicate upon the lawfulness of the sovereign acts of a foreign state''.

83 The Commonwealth also relied on *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia* [2007] 1 AC 270 to support the analogy to the doctrine of sovereign immunity. The case concerned allegations of torture in Saudi Arabia. The respondents – in effect – were the Kingdom of Saudi Arabia and its agents. The Commonwealth emphasised that part of the decision (at [17]–[32]) in which Lord Bingham distinguished between universal criminal jurisdiction for torture offences mandated in the Torture Convention and the lack of any equivalent universal civil jurisdiction. His Lordship also rejected the notion that a civil action for torture against agents of a foreign state did not directly implead the state (at [31]). It followed that despite the prohibition on torture being acknowledged as a peremptory norm or *jus cogens* as defined in article 53 of the *Vienna Convention of the Law of Treaties 1969*, that is ''a norm accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted'', the application of the doctrine of sovereign immunity, a ''procedural rule'', did not involve any impermissible derogation from that norm. As Lord Bingham reasoned at [45]:

To produce a conflict with state immunity, it is therefore necessary to show that the prohibition on torture has generated an ancillary procedural rule which, by way of exception to state immunity, entitles or perhaps requires states to assume civil jurisdiction over other states in cases in which torture is alleged. Such a rule may be desirable and, since international law has changes, may have developed. But . . . it is not *entailed* by the prohibition of torture.

84 It followed that the civil claim in *Jones* could not be maintained in a court of the United Kingdom.

85 The Commonwealth submitted that *Jones* establishes sovereign immunity as an answer to any civil case involving an allegation of torture against a foreign state or its agents in the territory of that foreign state. Thus, in the present case, if the agents of Pakistan, Egypt and the USA were sued directly in an Australian court for the alleged acts inflicted on Mr Habib those agents would be entitled to invoke sovereign immunity under s 9 of the *Foreign States Immunities Act 1985* (Cth) (a proposition Mr Habib accepted). According to the Commonwealth, the common jurisprudential underpinnings of the doctrines of sovereign immunity and act of state (that is, international comity and separation of powers) mean that the same result should follow for acts done in the territory of the foreign state. Putting it another way, Mr Habib should not be permitted to do indirectly (claiming against officers of the Commonwealth for aiding, abetting and counselling alleged acts of torture by foreign agents) that which he could not do directly (claiming against foreign agents for alleged acts of torture).

86 The Commonwealth accepted that the act of state doctrine, as a rule of the common law, is capable of statutory modification but submitted that it has not been modified for the purpose of civil proceedings. Under the Crimes (Torture) Act the conduct about which Mr Habib complains, in theory, could be the subject of criminal prosecution. In a prosecution the statute would displace the doctrine. In that event, the Commonwealth said that Parliament has provided for the considerations underpinning the doctrine by two statutory mechanisms – first, the need for the Attorney-General's consent to commence the prosecution (s 8(1) of the Crimes (Torture) Act and s 16.1 of The Criminal Code for offences in a foreign country) and, second, the ongoing prosecutorial discretion of the Director of Public Prosecutions being subject to the Attorney-General's direction (ss 6 and 8 of the *Director of Public Prosecutions Act 1983* (Cth)).

87 The Commonwealth, referring to the distinction between universal criminal and civil jurisdiction highlighted by the reasoning in *Jones*, stressed that the provisions of the Crimes (Torture) Act create a criminal offence. To that extent only the statute modifies the operation of the act of state doctrine. But this, said the Commonwealth, is a common law claim for damages invoking the Court's civil jurisdiction. The Crimes (Torture) Act says nothing

about such a civil claim, just as the availability of a criminal prosecution says nothing about the operation of the doctrine in civil proceedings. Further, the Commonwealth noted that the US has not accepted the jurisdiction of the International Court of Justice under article 36(2) of the *Statute of the International Court of Justice 1945*, nor ratified or acceded to the *Rome Statute of the International Criminal Court 1998 (the Rome Statute)*. Egypt and Pakistan are also not parties to the Rome Statute. None of the foreign states are parties to this proceeding. The Court is thus asked to scrutinise the acts of agents of foreign states where, by sovereign choice, their nation state has limited the circumstances in which their agents' acts may be subject to international judicial scrutiny.

88 Having regard to these considerations the Commonwealth submitted that the act of state doctrine applies as Mr Habib's claim depends on a determination of the illegality of the acts of agents of foreign states in a foreign territory. As the doctrine's limits are to be found in consideration of the principles of international comity and separation of powers, the doctrine may be excluded only where those considerations can be shown to have no application. This is not such a clear case. It is not like *Oppenheimer* where England and Germany were at war. It is not like *Kuwait Airways* where Iraq's invasion of Kuwait was condemned by the international community as a manifest breach of international law. Further, the allegations that underpin the claim are not clear and acknowledged but rather disputed as a matter of fact. Australia was in a coalition with the foreign states in question. The foreign states are not parties to this proceeding. By reason of the operation of the act of state doctrine the claim is unenforceable in an Australian court.

89 The Commonwealth disputed Mr Habib's alternative argument that the doctrine could not apply to acts of agents of a foreign state in the territory of another foreign state. This is relevant to paras 24 to 36 of the statement of claim which concern the alleged acts of US agents occurring at Bagram and Kandahar in Afghanistan and Guantánamo Bay in Cuba. The Commonwealth said that the act of state doctrine either extends to all acts outside the forum state (in this case, Australia) or at least to all acts in territories under the de facto control of the foreign state (in this case, the US). Mr Habib accepted that the airbases in Afghanistan and Guantánamo Bay were under the control of the US which, the Commonwealth said, sufficed to engage the doctrine.

### General conclusion

90 Taken on their own terms, there are three difficulties confronting the Commonwealth's contentions. The first is that the development of the case law does not support the contentions. The second is that the considerations informing the content of the doctrine indicate that the dispute is justiciable in an Australian court. Third, none of the case law directly on point was decided in the Australian constitutional and statutory context.

### The development of the case law

91 The facts of the present case bear some similarity to those that underpinned the seminal decision in *Underhill v Hernandez*. Hernandez was in charge of a revolutionary army in Venezuela. Underhill, a citizen of the US, was in Venezuela under a contract with the government. Underhill sued Hernandez in the US courts for damages for refusal to grant a passport allowing him to leave, confining him to his house and subjecting him to assaults and affronts by Hernandez's soldiers. The US courts gave judgment for Hernandez on the basis that the acts of Hernandez were the acts of Venezuela and not properly the subject of adjudication in the US courts.

92 However, the law in the US developed after *Underhill v Hernandez*. In *Sabbatino* the US Supreme Court refused to recognise any exception from the doctrine for violations of international law *per se* (at 431). Nevertheless, the decision represents a development of the doctrine by requiring consideration of the factors informing the existence of the doctrine on a case-by-case basis (at 427-428).

93 The development of the US jurisprudence did not cease with *Sabbatino*. The US Supreme Court described the doctrine as "not an inflexible one" in *First National City Bank v Banco Nacional de Cuba* 406 US 759 at 763 (1972). The Court adopted an approach, disavowed by both the Commonwealth and Mr Habib in the present case, of deference to an assurance from the Federal Government that its foreign relations would not be affected by a judicial determination of the claim (at 769-770).

94 In *W S Kirkpatrick Co, Inc v Environmental Tectonics Corp, International* 493 US 400 (1989) the US Supreme Court found that the factual predicate for the act of state doctrine did not exist as the Court was not being asked to declare invalid any official act of a foreign state. The fact that the case involved an allegation that

a contract had been procured by a bribe – which was illegal under Nigerian law – was held to be insufficient to engage the doctrine. The Court did not have to decide (in the sense that the case did not turn upon) the question of the Court’s recognition of the official act of a foreign sovereign; the issue in the case was not the validity of those acts but whether they occurred (at 405-406). At 409-410 the Court clarified this distinction in the following terms:

The short of the matter is this: Courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them. The act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid. That doctrine has no application to the present case because the validity of no foreign sovereign act is at issue.

95 In *Doe I v Unocal Corp* 395 F. 3d 932 (9<sup>th</sup> Cir. 2002) the US Court of Appeals for the Ninth Circuit dealt with a case involving claims for damages against a private corporation, Unocal, and the Myanmar military for human rights violations allegedly perpetrated during the construction of an oil pipeline. The claims were brought by Myanmar residents under the *Alien Tort Claims Act* 28 USC § 1350. This Act permitted a foreigner to bring a claim in a US Court for a tort committed in violation of the law of nations. The Court held that the Myanmar military (alleged to have committed the violations when providing security services for the oil pipeline) was immune by reason of sovereign immunity. Contrary to Unocal’s argument, however, Unocal was not protected by the analogous act of state doctrine. While the Court accepted that the case required the Court to decide whether the Myanmar military had violated international law (thus distinguishing *Kirkpatrick*), it applied the *Sabbatino* factors to reach a conclusion that the doctrine was not engaged and thus did not preclude the claim against Unocal. First, as to international consensus, the acts alleged (murder, torture, rape and slavery) were all described by art 959 as *jus cogens* violations and thus involved norms binding on all nations whether or not they agree. By definition, all *jus cogens* violations are internationally denounced. Hence, the Court found that there was a high degree of international consensus about the illegality of the acts alleged – a consensus which severely undermined any application of the act of state doctrine. Second, as to implications for foreign relations, the US government had already denounced Myanmar’s human rights violations. Third, the accused government continued to exist and remained in power. Fourth, the Court said it would be difficult to contend that the violations alleged were in the public interest. Accordingly, applying the four *Sabbatino* factors, the Court found that the act of state doctrine did not bar the claim against Unocal despite the fact that the Myanmar military was protected by sovereign immunity (at 959-960).

96 In *Sarei v Rio Tinto PLC* 456 F.3d 1069 (9<sup>th</sup> Cir. 2006), the claim was by residents of Papua New Guinea against a private company alleging human rights violations in respect of the operation of a copper mine. The Court summarised the relevant principles as follows (at 1084):

The act of state doctrine prevents U.S. courts from inquiring into the validity of the public acts of a recognized sovereign power committed within its own territory. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964); *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 605-607 (9th Cir.1977) (recounting history of doctrine). The doctrine reflects the concern that the judiciary, by questioning the validity of sovereign acts taken by foreign states, may interfere with the executive’s conduct of American foreign policy. *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, 493 U.S. 400, 404, 110 S.Ct. 701, 107 L.Ed.2d 816 (1990). As a result, an action may be barred if (1) there is an “official act of a foreign sovereign performed within its own territory”; and (2) “the relief sought or the defense interposed [in the action would require] a court in the United States to declare invalid the [foreign sovereign’s] official act.” . . . If these two elements are present, we may still choose not to apply the act of state doctrine where the policies underlying the doctrine militate against its application.

97 The jurisprudence of the United Kingdom shows a similar development of principle.

98 Contrary to the Commonwealth’s submissions, the reasoning of Lord Salmon in *Oppenheimer* is not at odds with that of Lord Cross. Lord Salmon expressed his “entire agreement” with all the views of Lord Cross (at 281). Lord Salmon’s observation that England was at war with Germany in 1941 is in the context of a paragraph

that recognised the unparalleled immorality of the Nazi decree (said to be “different in kind” from a mere confiscatory law by the Soviet Republic in June 1918) and declared the decree to be “so great an offence against human rights that they [UK courts] would have nothing to do with it” (at 283).

99 Counsel’s concession in *Kuwait Airways* also does not play as significant a role in the process of judicial reasoning in that decision as the Commonwealth’s submissions suggested. In *Kuwait Airways No 4* the Court of Appeal referred to the opinion of Lord Cross in *Oppenheimer* as “permeated with a consideration of the role of international law” in deciding the legitimacy of foreign legislation (at [275]). The Court of Appeal’s reasons disclose acceptance of what is described as a “public policy” exception to the act of state doctrine on a principled basis and not as a mere reflection of a concession by counsel (see, for example, at [307], [317]-[323], [372]-[383]).

100 The reasoning of the House of Lords in *Kuwait Airways No 5* is consistent with that of the Court of Appeal. Lord Nicholls described the public policy exception as “well established in English law” (at [18]). His Lordship thereafter described the principle of non-justiciability underpinning the decision in *Buttes* (a case at the heart of which was a boundary dispute between states, as Lord Wilberforce noted at 927) as one based on the lack of “judicial or manageable standards by which to judge [the] issues” (at [25] citing *Buttes* at 938). No problem of that kind existed where there was a plain, indeed acknowledged, breach of an established principle of international law (at [26]). Lord Steyn saw the public policy exception recognised by the Court of Appeal as a natural development of the reasoning in *Oppenheimer* (at [114]). Lord Hope identified the limits on the exception but recognised its existence (at [137]-[140]). In so doing his Lordship identified the “wider point of principle” in *Oppenheimer*, namely, that “our courts should give effect to clearly established principles of international law” (at [139]).

101 The “clearly established principles of international law” include the crime of torture which has the status of a *jus cogens* violation.

102 In *Pinochet (No 1)* at 117 Lord Steyn (subject to replacing the word “probably” with “generally” in the text) endorsed the observation in American Law Institute, Restatement (Third) of Foreign Relations Law of the United States (1987) § 443, to the effect that:

A claim arising out of an alleged violation of fundamental human rights – for instance, a claim on behalf of a victim of torture or genocide – would (if otherwise sustainable) probably not be defeated by the act of state doctrine, since the accepted international law of human rights is well established and contemplates external scrutiny of such acts.

103 While their Lordships reached a different view on sovereign immunity in *Pinochet (No 3)* (a case involving extradition for the purpose of a criminal prosecution), they nevertheless identified that the prohibition on torture was absolute from which no deviation is permitted. This is the rationale for universal criminal jurisdiction for torture offences so that the “international criminal – the torturer – could find no safe haven” (at 199).

104 In *Jones* (a civil action precluded by sovereign immunity) Lord Bingham referred to “the extreme revulsion which the common law has long felt for the practice and fruits of torture” as the “subject of express agreement by the nations of the world” through the Torture Convention (at [15]).

105 In *R (on the application of Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598 the claimant, a British citizen held in Guantánamo Bay without access to a lawyer, sought an order that the British Foreign Office make representations to the US government on his behalf. The Court of Appeal (at [52]-[57]) referred to the opinion of Lord Cross in *Oppenheimer* (at 277) and continued:

[53]. This passage lends support to . . . [the] thesis that, where fundamental human rights are in play, the courts of this country will not abstain from reviewing the legitimacy of the actions of a foreign sovereign state. A more topical support for this proposition can be derived from the exercise that the court has to undertake in asylum cases, where the issue is often whether the applicant for asylum has a well-founded fear of persecution if removed to a third country. In such circumstances consideration of the claim for asylum frequently involves ruling on allegations that a foreign state is acting in breach of international law or human rights.

...

[57] . . . the passage from Lord Cross' speech in [*Oppenheimer*] supports the view that, albeit that caution must be exercised by this court when faced with an allegation that a foreign state is in breach of its international obligations, this court does not need the statutory context [that is, relating to refugees] in order to be free to express a view in relation to what it conceives to be a clear breach of international law, particularly in the context of human rights.

106 On the facts in *Abbasi* the Court declined relief observing (at [107] that "(o)n no view would it be appropriate to order the Secretary of State to make any specific representations to the United States, even in the face of what appears to be a clear breach of a fundamental human right, as it is obvious that this would have an impact on the conduct of foreign policy, and an impact on such policy at a particularly delicate time". This "delicacy" included that discussions were continuing at high levels with respect to British detainees, the appellate courts in the US also were to consider the position of detainees and those courts "have the same respect for human rights as our own", the detainees' cases having been taken up by the Inter-American Commission on Human Rights (at [107]).

107 The foregoing discussion shows that a number of the decisions do refer to the existence of a "public policy exception" to the doctrine. A recent article described this process as courts invoking "rule-like exceptions" to justify decisions made by reference to the facts of the particular case (Patterson, Andrew D, "The Act of State Doctrine is Alive and Well: Why Critics of the Doctrine are Wrong", 15 U.C. Davis J. Int'l L. & Pol'y 111 at 124 (2008)). The Commonwealth, as noted, rejected the notion of *a priori* exceptions to the doctrine, based on public policy or otherwise. According to the Commonwealth, the doctrine does not apply where, and only where, it is clear without any further inquiry that the considerations informing the rule's existence are not and cannot be engaged.

108 The Commonwealth's approach is superficially attractive. Whether the language of limitation should be preferred to that of exception, nevertheless, it is apparent that the test which the Commonwealth posits reflects the reasoning in *Underhill v Hernandez*, a decision made in 1897. But the foregoing discussion shows that the jurisprudence of the US and the United Kingdom developed after 1897 in tandem with international law, particularly international law following the exposure of the horrors of the Nazi regime in Europe at the end of the Second World War. Specifically, international humanitarian law has been codified through the Geneva Conventions of 1949 and Additional Protocols of 1977, the Torture Convention has been rapidly and almost universally acceded to, and certain violations of international law (including torture) are recognised to involve contraventions of peremptory norms, or *jus cogens*, being norms about which all nations agree or are taken to agree and from which no derogation is permitted.

109 For similar reasons it cannot be said that the recognition of limits on the doctrine is inconsistent with Australian authority. *Potter v BHP* is a decision of the High Court from the same era as *Underhill v Hernandez* and did not raise issues similar to the present case. The outcome in *Spycatcher* did not turn upon the act of state doctrine. Further, there are some references in decisions of the High Court consistent with recognition of the development of common law jurisprudence in this context. In *Sykes v Cleary* (1992) 176 CLR 77 at 135-136, Gaudron J cited *Oppenheimer* as authority for the proposition that a court is not bound to recognise a foreign citizenship law which "does not conform with established international norms or which involves gross violation of human rights". Her Honour made the same reference in *Sue v Hill* (1999) 199 CLR 462 at [175]. See also the references to both *Oppenheimer* and *Kuwait Airways* in *Applicant S v Minister for Immigration and Multicultural Affairs* (2004) 217 CLR 387; [2004] HCA 25 at [46] and *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1; [2003] HCA 6 at [100], as well as the observations of Beaumont J in *Petrotimor* at [251].

110 The Commonwealth sought to distinguish the present case (in which Mr Habib's allegations remained untested) from cases such as *Oppenheimer* and *Kuwait Airways* in which the violations of international law were clear (indeed, notorious). However, the cases do not support a distinction between known and alleged violations. Moreover, there is no principled basis for such a distinction. As Mr Habib submitted, there is no requirement apparent in the jurisprudence that the violations of international law and human rights alleged be "established at some indeterminate level of confidence at an interlocutory stage". This must be so. The effect of the Commonwealth's invocation of the act of state doctrine, if accepted, is to preclude the truth or otherwise of the allegations founding the claim from being tested and determined. The essence of the allegations founding the claim as ones



involving grave breaches of international law and contraventions of Australian law, remain. As in *Kuwait Airways*, these legal parameters provide the standards necessary for judicial determination and place the present case in a category different from the “judicial no-man’s land” apparent in *Buttes* (see, in particular, the reference by Lord Nicholls in *Kuwait Airways No 5* at [26] to the decision in *Buttes* turning upon “adjudication problems”).

111 The long title of the Crimes (Torture) Act is “[a]n Act to give effect to certain provisions of [the Torture Convention], and for related purposes”. The Act annexes the Torture Convention in its Schedule. Article 2(1) of the Torture Convention is unequivocal: “(e)ach State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction”. Further, under article 2(2) “(n)o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for torture”. Article 4(1) requires that “(e)ach State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture”. Article 14 concerns the rights of victims of torture to compensation analysed in *Jones* (that is, rejection of the proposition of the article conferring universal civil jurisdiction but, rather, construing it as relating to claims of torture in the forum state only).

112 The Crimes (Torture) Act creates an offence of torture. The effect of the legislation is to render torture unlawful under Australian law no matter who engages in it or where it is engaged in, and regardless of whether a prosecution may be commenced and sustained against the alleged torturer. The statute thus reflects and embodies our Parliament’s endorsement of the common law’s “extreme revulsion. . .for the practice and fruits of torture” (*Jones* at [15]). As submitted for Mr Habib, if proved, his allegations would constitute grave violations of international human rights law. The weight of authority discussed above does not support the protection of such conduct from judicial scrutiny other than in the face of a valid claim for sovereign immunity.

113 Mr Habib’s claim is against the Commonwealth. He alleges that the Commonwealth is liable for acts committed by its own officers, albeit in aiding and abetting agents of foreign states. The Commonwealth has no claim for sovereign immunity in respect of a claim brought against it in an Australian court. The fact that the foreign officials could claim sovereign immunity if sued in an Australian court, and the Australian officials if sued in a foreign court, may disclose some incoherence of underlying principle. The same situation, however, arose in *Unocal* when the perpetrators were protected by sovereign immunity but the company on whose behalf the violations were said to have been perpetrated was not protected by the act of state doctrine.

114 As Mr Habib said, the consequence of the Commonwealth’s submission is that Commonwealth officials could not be held accountable in any court for their alleged breaches of Australian laws having extra-territorial effect. The consequence of Mr Habib’s submissions, in contrast, is that each set of government officials would be able to be held accountable for their actions in their national courts. The cases on which the Commonwealth relied do not support a conclusion that the act of state doctrine prevents an Australian court from scrutinising the alleged acts of Australian officials overseas in breach of peremptory norms of international law to which effect has been given by Australian laws having extra-territorial application. The case law indicates to the contrary.

115 In terms of the US jurisprudence, the *Sabbatino* factors show that, first, the prohibition on torture is the subject of an international consensus. Second, Australia’s “national nerves”, as the Commonwealth intimated, might be attuned to the sensibilities of its coalition partners but this has to be weighed in a context where the prohibition on torture forms part of customary international law and those partners themselves are signatories to an international treaty denouncing torture. Moreover, the claim is by an Australian citizen against the Commonwealth of Australia. Findings will be necessary as facts along the way but no declaration with respect to the conduct of foreign officials is required. Those officials will not be subject to the jurisdiction of an Australian court (or, for that matter, any international court by reason of this proceeding). It is the Commonwealth alone which is the respondent to this proceeding. Insofar as the Commonwealth suggested some unfairness to the (unidentified) foreign officials in question by reason of the foreign states not being parties to the proceeding, it is common ground that those states would have a valid claim for sovereign immunity if sued in an Australian court. Such unfairness as might arise, in any event, is a matter for the trial, not the reserved question. Third, the governments of the foreign states in question all remain in existence. Fourth, and as in *Unocal*, it would be difficult to contend that the alleged violations of international law identified in Mr Habib’s claim were in the public interest.

116 In terms of the jurisprudence of the United Kingdom, there is no reason why an Australian court also “should not give effect to clearly established principles of international law” (*Kuwait Airways No 5* at [139]), particularly where those principles involve protection against the infliction of torture which the Commonwealth Parliament has prohibited.

### Considerations informing the content of the doctrine

117 The claim is founded on allegations of torture. The prohibition on torture is an absolute requirement of customary international law. The prohibition is codified in the Torture Convention to which each of the states in question is party (other than Pakistan which is a signatory). It is conduct which the Commonwealth Parliament has proscribed by legislation expressed to apply throughout the world and to all persons, consistent with the international consensus that the torturer must have no safe haven. In terms of the “degree of codification or consensus concerning a particular area of international law” (the first *Sabbatino* factor) the prohibition on torture is an agreed absolute value from which no derogation is permitted for any reason. The prohibition is a clearly established principle of international law in the sense described in *Kuwait Airways No 5* at [139]. The international community has spoken with one voice against torture.

118 As the Commonwealth submitted, international comity is concerned not only with the content of the international consensus against torture but also the question of who may judge any contravention of that norm. While this case will involve factual findings about the conduct of foreign officials, the context in which their conduct arises for consideration is inconsistent with the acceptance of the Commonwealth’s proposition that international comity might be undermined. The case involves an Australian court considering and determining whether, as alleged, officials of its own government aided, abetted and counselled foreign officials to inflict torture upon an Australian citizen in circumstances where the acts of those foreign officials, if proved as alleged, would themselves be unlawful under Australian laws having extra-territorial effect. Insofar as judicial scrutiny might be thought to give rise to a risk of generalised embarrassment to Australia’s foreign relations, the Commonwealth disavowed any suggestion that Australian jurisprudence should adopt an approach of deference to the advice of the executive about the state of foreign relations from time to time (referred to as the *Bernstein* exception, by reference to a US case bearing that name, *Bernstein v N V Nederlandsche-Amerikaansche, Stoomvaart-Maatschappij* 210 F.2d 375 (2d Cir. 1954), discussed in *Sabbatino* at 427-428 and *Patterson* at 128-129).

119 The separation of powers rationale cannot be considered in isolation from that of justiciability. Issues for which there are no “judicial or manageable standards” of judgment are outside the reach of the judicial branch (*Buttes* at 938 and see also *Re Ditfort* at 370). But, as Mr Habib’s submissions proposed, in this case there are clear and identifiable standards by which the conduct in question may be judged – the requirements of the applicable Australian statutes and the international law which they reflect and embody. The Court will not be in a “judicial no-man’s land” (*Buttes* at 938).

120 For these reasons, the two considerations of relevance to the content of the doctrine the Commonwealth identified do not support the operation of the act of state doctrine to preclude judicial determination of Mr Habib’s claim.

### (3) AUSTRALIAN CONSTITUTIONAL AND STATUTORY CONTEXT

121 As a rule of the common law (that is, a judge-made rule), the act of state doctrine yields to any contrary Parliamentary intention. Accordingly, the doctrine can be modified or excluded by statute. This reflects one of the foundations on which the doctrine rests – the separation of powers between the judicial and other branches of government. It is also a product of another fundamental principle – parliamentary sovereignty.

122 It is true that a criminal charge for the offence of torture created by the Crimes (Torture) Act may only be brought against an Australian citizen or a person in Australia and requires the consent in writing of the Attorney-General. The proceeding does not involve a charge under the Act. It alleges breaches of a preemptory norm that the Act, consistent with the Torture Convention, proscribes and makes criminal for the purposes of Australian law.

123 Part of the significance of the provisions of the Crimes (Torture) Act, the Geneva Conventions Act and The Criminal Code called up in the impugned paragraphs of the statement of claim is that they provide standards by which Parliament considered that conduct (including conduct of foreign officials outside Australia) may be

subject to judicial determination by Australian courts. In so doing the provisions also disclose Parliament's intention that the issues in this area of discourse are capable of judicial determination.

124 Another part of the significance of these provisions is that they stipulate a limit on the power of the Commonwealth and its officers. Whatever else the Commonwealth and its officers might do in exercising their powers, they may not act in breach of Commonwealth statutory proscriptions. The question as to who may judge whether they have done so or not calls up for consideration the specific Australian constitutional context.

125 By ss 75(iii) and (v) of the Constitution, the High Court has original jurisdiction in all matters "in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party" and "in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth" respectively. By ss 76(i) and (ii) of the Constitution, the Parliament may make laws conferring original jurisdiction on the High Court in any matter arising under the Constitution or involving its interpretation, or arising under any laws made by the Parliament respectively. Section 30 of the Judiciary Act gives original jurisdiction to the High Court in all matters arising under the Constitution or involving its interpretation. Under s 77(i) of the Constitution, the Parliament of the Commonwealth may make laws defining the jurisdiction of any federal court other than the High Court with respect to any of the matters mentioned in ss 75 and 76. By s 39B(1) of the Judiciary Act this Court has original jurisdiction with respect to any matter in which a writ of mandamus or prohibition or an injunction is sought against an officer or officers of the Commonwealth (s 75(v) of the Constitution). By s 39B(1A)(b) and (c) of the Judiciary Act this Court also has original jurisdiction in any matter arising under the Constitution, or involving its interpretation or arising under any laws made by the Parliament, other than a matter in respect of which a criminal prosecution is instituted or any other criminal matter.

126 These provisions have been described as securing "a basic element of the rule of law" which cannot be removed by the Parliament because it too is bound by the Constitution. Thus as Gleeson CJ said in *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476; [2003] HCA 2 at [5]-[6]:

[5] . . . Parliament may create, and define, the duty, or the power, or the jurisdiction, and determine the content of the law to be obeyed. But it cannot deprive this Court of its constitutional jurisdiction to enforce the law so enacted.

. . .

[6] The Parliament cannot abrogate or curtail the Court's constitutional function of protecting the subject against any violation of the Constitution, or of any law made under the Constitution. However, in relation to the second aspect of that function, the powers given to Parliament by the Constitution to make laws with respect to certain topics, and subject to certain limitations, enable Parliament to determine the content of the law to be enforced by the Court.

127 The Commonwealth's submission that this is a common law claim for damages, not a constitutional claim, needs to be analysed. This is a proceeding in which the Commonwealth is a party. The foundation of the principal tort on which Mr Habib relies in the claim (misfeasance in public office) is conduct by Commonwealth officials in excess of power. Specifically, it is alleged that the acts of the Commonwealth officials exceeded the power of the executive in s 61 of the Constitution in that those acts were not for the execution and maintenance of the Constitution and contravened the laws of the Commonwealth (paras 2.5(ii), 3.3(ii) and 4.5(ii) of the statement of claim). For the same reason the acts could not have been authorised by the enabling legislation constituting the agencies for which the Commonwealth officials performed their functions.

128 As noted in *Habib (No 2)* at [49], "it is plain that the extent of the executive power is consigned to the Ch III courts". And, at [50], that it is equally plain that the "executive power of the Commonwealth does not run to authorising. . . crimes [against humanity] under the guise of conducting foreign relations". Or, using the words of Gummow J in *Re Ditfort* at 369:

In Australia, with questions arising in federal jurisdiction, one looks not to the content of the prerogative in Britain, but rather to s 61 of the Constitution, by which the executive power of the Commonwealth was vested in the Crown. That power extends to the execution and maintenance of the Constitution and of the laws of the Commonwealth and enables the Crown to undertake all executive action appropriate to the spheres of responsibility vested in the Commonwealth. One

such sphere is the conduct of relations with other countries, including the acquisition of international rights and obligations, and in this sphere the executive power of the Commonwealth is exclusive of that of the States . . .

The result is that a question as to the character and extent of the powers of the Executive Government in relation to the conduct of relations with other countries may give rise to a matter which arises under or involves the interpretation of s 61 of the Constitution and will so affect the interests of a plaintiff as to give the necessary standing. These circumstances will provide a subject matter for the exercise of federal jurisdiction pursuant to Ch III of the Constitution. In such a case no question of “non-justiciability” ordinarily will arise.

129 This analysis indicates that the Commonwealth’s submissions find no support in and indeed are inconsistent with the Australian constitutional framework. Section 61 of the Constitution and the legislation having extra-territorial effect on which Mr Habib’s allegations of unlawful conduct rely found the jurisdiction of courts under Ch III of the Constitution. A judge-made doctrine cannot exclude that jurisdiction. This difficulty for the Commonwealth was exposed in argument. Assume a person reasonably believed that officials of the Commonwealth proposed to aid, abet and counsel foreign agents to inflict torture upon that person. The act of state doctrine, being a rule of the common law but no more, could not exclude the High Court’s original jurisdiction guaranteed by s 75(v) of the Constitution to restrain the Commonwealth officer by injunction from acting in excess of s 61 of the Constitution and in breach of s 6 of the Crimes (Torture) Act. Such a claim is manifestly justiciable raising, as it does, the limits of the powers of the Commonwealth. From there it is but a small step to reject the proposition that the act of state doctrine excludes the jurisdiction of a Ch III court to determine a claim for damages against the Commonwealth (and thus in which the Commonwealth is a party as referred to in s 75(iii) of the Constitution) where the Commonwealth’s liability is said to flow from the very same excess of power (albeit that the alleged excess has already taken place, rather than merely being threatened).

130 The Commonwealth’s attempts to answer this example were not persuasive. It may be accepted that the example is hypothetical and is not this case. But it exposes a real difficulty in reconciling the position of the Commonwealth with the provisions of Ch III of the Constitution and the content of the laws which the Parliament has seen fit to pass (specifically, the prohibitions on torture and war crimes founding Mr Habib’s allegations of conduct in contravention of Australian laws having extra-territorial operation).

131 Ultimately, the central submission for Mr Habib is compelling. If accepted, the Commonwealth’s submissions would exclude judicial scrutiny of the conduct of Australian officials alleged to have involved serious breaches of the inviolable human rights of an Australian citizen in an overseas jurisdiction, even though the alleged conduct, if proved, would contravene Australian law at the time and in the place where the conduct is said to have been committed. That is a heavy burden to place on a “self-denying” doctrine (*Pinochet (No 1)* at 107) created by the judicial branch of government in order to avoid it trespassing into the executive’s sphere of action.

132 From this analysis it follows that this Court has both the power, and indeed the constitutional obligation, to determine Mr Habib’s claim

133 Given this conclusion it is not necessary that the territorial issue with respect to the act of state doctrine be addressed. This is the issue raised by Mr Habib that the doctrine cannot be engaged with respect to the acts of agents of the US outside of the territory of the US (that is, in Afghanistan and Guantánamo Bay). For present purposes it is sufficient to say that Mr Habib’s acceptance that the US had complete control over those areas at all material times undermines the logical attraction of confining the doctrine to acts within the territory of the state. *The Playa Larga and Marble Islands* [1983] 2 Lloyd’s Rep 171 (CA), on which Mr Habib relied, did not require resolution of this question. Nor did *Buttes* (at 934) in which Lord Wilberforce described the doctrine as normally relating to acts within the territory of the foreign state.

#### ANSWER TO RESERVED QUESTION

134 Neither of the considerations upon which the Commonwealth relied – the development of the common law jurisprudence and the factors informing the content of the act of state doctrine (international comity and the separation of powers) – support the conclusion that an Australian court may not determine Mr Habib’s claim insofar as that claim alleges that the Commonwealth is liable for the acts of its officials constituting the torts of

misfeasance in public office or the action of intentional but indirect infliction of harm by the aiding, abetting and counselling of agents of foreign states to subject Mr Habib to torture whilst he was detained in Pakistan, Egypt, Afghanistan and Guantánamo Bay.

135 To the contrary the development of Anglo-American jurisprudence indicates that the act of state doctrine does not exclude judicial determination of Mr Habib's claim as it involves alleged acts of torture constituting grave breaches of human rights, serious violations of international law and conduct made illegal by Australian laws having extra-territorial effect. Further, exclusion of the jurisdiction of Australian courts by reference to a doctrine which is a rule of the common law cannot be reconciled with Ch III of the Constitution or the content of the laws of the Parliament that proscribe torture and war crimes committed by any person any where.

136 It follows that the reserved question:

Should the application be dismissed in respect of the claims made in paragraphs 1 – 36 of the Fourth Further Amended Statement of Claim on the ground identified in paragraph 1 of the Respondent's Notice of Motion filed 17 June 2009,

must be answered "No".

I certify that the preceding ninety (90) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Jagot.

Associate:

Dated: 25 February 2010