YOUNG ADULTS AND CRIMINAL CULPABILITY

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INTRODUCTION

Deeply rooted in American history is the understanding that children are different. Transcending cultural, social, and legal norms, attitudes about kids have been largely consistent across time. Long before criminologists and legal scholars could point to neuroscientific evidence or behavioral studies to explain why children are different, society generally believed children deserved a second chance and that they could be "saved" from a life of crime. As research developed in the twentieth century, commonsense explanations of juvenile criminal responsibility that underpinned juvenile justice in America were largely substantiated by groundbreaking behavioral and developmental science. While these studies clearly influenced public opinion, they also prompted the U.S. Supreme Court to establish procedural and substantive rules for juvenile adjudications and sentencings. The findings of these studies not only confirmed existing views on juvenile culpability, but further research also revealed that young adults are more similarly situated to juveniles than adults when weighing criminal responsibility.[1] This Comment will consider whether the growing scholarship on the culpability of young adults should influence how courts and society blame and punish persons that commit crimes while between the ages of eighteen and twenty-four. This Comment makes the assumption that "desert based on moral fault is at least a necessary pre-condition for just punishment."[2] That is, whether a young adult is punished like a juvenile or an adult is, in part, dependent on his or her moral blameworthiness. This

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1 Throughout this Comment, young adults will refer to persons between the ages of eighteen and twenty-four. The terms minor, juvenile, youth, adolescents, adolescence, kid, child, or children will refer to persons under the age of eighteen.

2 Stephen J. Morse, *Immaturity and Irresponsibility*, 88 J. CRIM. L. & CRIMINOLOGY 15, 16 (1997).

Comment explores the evidence that indicates that young adults are more similarly situated to juveniles than adults with regard to their moral blameworthiness and how, if it all, this will impact criminal punishment for young adults.

Part I will provide a comprehensive overview on the history of juvenile justice in order to provide context on the philosophical attitudes and jurisprudence over time. Part II will examine findings from scientific research on the blameworthiness of juveniles and young adults. This section will also consider the scientific evidence cited by the U.S. Supreme Court in its recent decisions on juvenile culpability. Part III will evaluate possible responses to addressing the diminished criminal culpability of young adults. Specifically, this section reviews young adult court, a problem-solving court that is gaining popularity across the United States, and constitutional arguments that seek to extend juvenile sentencing philosophies to young adults. This Comment will argue that, despite the neurological and behavioral similarities between young adults and juveniles, the courts will not interfere in any meaningful way to change the relationship between young adults and the criminal justice system because young adults do not invoke the same deep-rooted historical attitudes that exist towards juveniles.

I. HISTORY OF JUVENILE JUSTICE

Society's differential treatment of children has persisted throughout American history. For "as far back as written records go," criminal culpability has been attributed differently to juveniles and adults.[3] Indeed, adults have always been treated differently from juveniles under criminal law and punishment. As studies continue to find that young adults and juveniles are similarly situated, it begs the question of whether young adults should also be treated differently.[4] To properly answer this question, it is critical to review the history of juvenile justice. This history reveals that although there have been minor shifts over time regarding the blame and punishment of juveniles, the Supreme Court, as well as society, has been largely consistent in differentiating juveniles from adults in the legal system.

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3 Kevin Lapp, *Young Adults & Criminal Jurisdiction*, 56 AM. CRIM. L. REV. 357, 357 (2019) (citation omitted); *see also* ELIZABETH S. SCOTT & LAURENCE STEINBERG, RETHINKING JUVENILE JUSTICE 28 (2008) ("Philosophers and educators have recognized for centuries that there is a distinctive stage of life between childhood and adulthood . . . .").

4 *See* Lapp, *supra* note 3, at 359 (noting that "cultural, biological, and legal developments" regarding young adults "undermine . . . the binary structure of criminal justice administration").

A. Origins

Despite the longstanding belief that juveniles and adults are different, there was not always a system that could adequately respond to these differences. As a result, prior to the early nineteenth century, juvenile offenders were punished and confined in prison alongside adults.[5] At that time, the common law relied solely on age to determine whether a child was capable of committing a crime. Under the common law, children younger than the age of seven had no criminal capacity, children between the ages of seven and fourteen had a rebuttable presumption that they had no criminal capacity, and children ages fourteen and older had the same criminal capacity as adults.[6] In effect, once a child turned seven years old, it was possible for him or her to be arrested, tried, and punished like an adult, and it was certain once a child turned fourteen years old.[7] Early reformers rejected this treatment of children and argued that society had a duty to rehabilitate juveniles, not just judge their culpability and punish their actions.[8]

1. Houses of Refuge

As early as 1815, reformers publicly denounced housing juvenile offenders with adults in prison and called attention to the "contamination of innocence as one of the major evils that had resulted" from mixing impressionable children with dangerous criminals.[9] This outrage garnered public attention and led New York state to enact a law that granted the Society for the Prevention of Pauperism with the authority to establish a

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5 *Juvenile Justice History*, CTR. ON JUV. & CRIM. JUST., http://www.cjcj.org/Education1/Juvenile-Justice-History.html [https://perma.cc/GWW2-NPEU] (last visited Feb. 29, 2020); *see also* Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1189 (1970) (stating that juveniles were housed with adults in prison).

6 WAYNE R. LAFAVE, 2 SUBSTANTIVE CRIMINAL LAW § 9.6(a) (3d ed. 2019); *see also In re Gault*, 387 U.S. 1, 17 (1967) ("[C]hildren under seven were considered incapable of possessing criminal intent.").

7 *In re Gault*, 387 U.S. at 17; *see also* Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 106 (1909) ("Our common criminal law did not differentiate between the adult, and the minor who had reached the age of criminal responsibility, seven at common law . . . .").

8 *In re Gault*, 387 U.S. at 15–16.

9 Fox, *supra* note 5, at 1189; *see also* ROBERT S. PICKETT, HOUSE OF REFUGE: ORIGINS OF JUVENILE REFORM IN NEW YORK STATE, 1815–1857, at 21 (1969) (stating that the movement to create a refuge for juvenile offenders began in 1815).

reformatory.[10] Subsequently, in 1825, the New York House of Refuge established the first juvenile reformatory in the United States.[11] The House of Refuge housed youth that authorities had deemed to be on a path towards delinquency and sought to segregate juveniles from corrupting influences because the early reformers believed that juveniles could be "saved" from a life of future criminal conduct.[12] The founders of the House of Refuge believed that poor and destitute children were destined for a life of poverty and primarily blamed the children's "morally inferior parents" as justification for their moral crusade.[13] This crusade was framed as a "benign intervention" for the sake of protecting the public good.[14] To "save" these children, the House of Refuge adopted a penitentiary model that valued isolation and penitence.[15] This model gained popularity and, within twenty years, about twenty-five similar institutions were established throughout the country.[16]

American courts validated this confinement under the doctrine of parens patriae.[17] In the landmark decision, *Ex parte Crouse*, the Pennsylvania Supreme Court affirmed the legality of the Philadelphia House of Refuge penitentiary scheme.[18] In *Crouse*, Mary Ann Crouse was committed to the Philadelphia House of Refuge by a justice of the peace, who relied on allegations from her mother that Mary Ann could not be controlled due to her "vicious conduct."[19] Mary Ann's father sought a writ of habeas corpus against the Philadelphia House of Refuge and demanded the release of his daughter from its custody.[20] The court rejected the habeas petition, holding that the Philadelphia House of Refuge was a school, not a prison.[21] For the

10 PICKETT, *supra* note 9, at 21–49; *see also* N.Y. STATE ARCHIVES, THE GREATEST REFORM SCHOOL IN THE WORLD: A GUIDE TO THE RECORDS OF THE NEW YORK HOUSE OF REFUGE 4 (1989), http://www.archives.nysed.gov/common/archives/files/res_topics_ed_reform.pdf [https://perma.cc/26J5-CWEM] [hereinafter THE GREATEST REFORM SCHOOL IN THE WORLD] (noting that the Society for the Prevention of Pauperism was instrumental in the creation of the New York House of Refuge).

11 THE GREATEST REFORM SCHOOL IN THE WORLD, *supra* note 10, at 4.

12 Fox, *supra* note 5, at 1190–91.

13 Daniel Macallair, *The San Francisco Industrial School and the Origins of Juvenile Justice in California: A Glance at the Great Reformation*, 7 U.C. DAVIS J. JUV. L. & POL'Y 1, 3–4 (2003).

14 *Id.* at 4.

15 *Id.*

16 *Juvenile Justice History*, *supra* note 5.

17 Fox, *supra* note 5, at 1206–07. For further discussion on parens patriae, see *infra* Section I.A.2.

18 *Ex parte Crouse*, 4 Whart. 9, 11 (Pa. 1839); *see also* Fox, *supra* note 5, at 1205 (stating that *Ex parte Crouse* was the first reported case to uphold the House of Refuge scheme).

19 *Ex parte Crouse*, 4 Whart. at 9–10.

20 *Id.*

21 *Id.* at 11.

first time in American jurisprudence, a court invoked the doctrine of parens patriae for juvenile detention and reasoned that "the public has a paramount interest in the virtue and knowledge of its members, and . . . the business of education belongs to [the public]."[22] Through recognizing the Philadelphia House of Refuge as a reformatory with morally and socially acceptable purposes, the Pennsylvania Supreme Court concluded that Mary Ann Crouse's confinement was not only lawful, but also that it would be "an act of extreme cruelty to release her."[23] This historic decision laid the foundation of parens patriae and became the leading authority for states to commit children based on future predictions of delinquency.[24]

By the mid-nineteenth century, scandals and investigations surrounding the houses of refuge had plagued the penitentiary model—the most notable example being the San Francisco Industrial School.[25] The gold rush to California was "one of the greatest peacetime migrations in history" and included large numbers of vagrant and destitute children, especially in San Francisco.[26] This rapid population increase prompted city leaders to advocate for social order.[27] In 1858, the legislature passed the Industrial School Act, which was modeled after the New York House of Refuge.[28] The Industrial School Act marked the establishment of the first institution for delinquent youths on the West Coast.[29] When the school opened in 1859, there was "great optimism and fanfare."[30] The vast majority of students sent to the school had only committed the non-criminal offense of leading an idle and dissolute life.[31] Since children sent to the school were considered to be lacking in moral and spiritual virtue, the school emphasized hard work and rigorous instruction because these activities were believed to be the only way to reverse the juvenile's behavior.[32]

The harsh reality that existed in the San Francisco Industrial School was ultimately uncovered in the late 1860s when allegations of staff brutality

22 *Id.*

23 *Id.* at 12; *see also* Macallair, *supra* note 13, at 57–60 (explaining that the houses of refuge and industrial schools reflected a belief that valued institutional segregation of children and allowed the courts to exercise absolute control over youth).

24 Fox, *supra* note 5, at 1207.

25 Macallair, *supra* note 13, at 8, 10.

26 *Id.* at 10–11.

27 *Id.* at 12.

28 *Id.* at 12–13.

29 *Id.* at 1.

30 *Id.* at 10.

31 *Id.* at 17.

32 *Id.* at 18–19.

prompted two grand jury investigations.[33] The grand juries documented numerous cases of close confinement, beatings, floggings, gagging, diets consisting only of bread and water, and deprivation of sunlight.[34] In some instances, the staff's treatment was so severe that juveniles were driven to suicide.[35] The female inmates were also subject to repeated sexual abuse.[36] The findings of the grand jury investigations sparked public outrage.[37] Although the School attempted to reorganize its structure to restore public confidence, the School continued to be plagued with mismanagement and scandal.[38] In 1892, after thirty-three years, the San Francisco Industrial School was ordered to be closed.[39] Like the San Francisco Industrial School, similar institutions faced the same reality, which led to their ultimate dissolution.[40] This period reflects one attempt at establishing an institution that valued rehabilitative goals for juveniles.

2. Early Juvenile Court System and Parens Patriae

The nineteenth century saw significant changes in both the philosophical attitudes towards delinquent juveniles and the institutional structures that sought to address that delinquency. The rise and fall of the houses of refuge bestowed important lessons on the treatment of juveniles and largely contributed to some of the substantive goals that materialized in the Illinois Juvenile Court Act of 1899 ("1899 Act").[41] The 1899 Act is credited with establishing the first juvenile court in the United States.[42] Remnant policies of the houses of refuge like coercive predictions, an emphasis on family life, and a child-saving philosophy were endorsed by the 1899 Act.[43]

However, the 1899 Act also made groundbreaking changes to the adjudication of juveniles and led to the advancement of the juvenile court system throughout the country. One of the most important features of the

33 *Id.* at 26.
34 *Id.* at 27–28.
35 *Id.* at 27.
36 *Id.* at 28.
37 *Id.* at 30.
38 *Id*.
39 *Id.* at 56.
40 *Id.* at 57.
41 *See* Fox, *supra* note 5, at 1222 (reasoning that the 1899 Act implemented some of the same goals as the House of Refuge).
42 Marsha Levick, Jessica Feierman, Sharon Messenheimer Kelley, Naomi E. S. Goldstein & Kacey Mordecai, *The Eighth Amendment Evolves: Defining Cruel and Unusual Punishment Through the Lens of Childhood and Adolescence*, 15 U. PA. J.L. & SOC. CHANGE 285, 286 (2012).
43 Fox, *supra* note 5, at 1222.

1899 Act was the establishment of a separate court for cases involving persons under sixteen years old who were alleged to be dependent, neglected, or delinquent.[44] Other features of the 1899 Act included creating special procedures for juveniles, prohibiting the detention of children under the age of twelve in a jail or police station, requiring the separation of juveniles and adults when housed in the same institution, and providing for probation officers to investigate and supervise juveniles on probation.[45] The 1899 Act also sought to improve the institutions that housed delinquent juveniles, move towards a more privatized enterprise, and maintain religious segregation.[46]

Soon after 1899 Act was passed, states began replicating the legislation and establishing a juvenile court system in their own jurisdictions.[47] The juvenile court system promoted differential treatment for delinquent children because the court was to serve a fundamentally different mission than the adult criminal justice system.[48] The adult criminal justice system is largely based on the assumption that people possess free will and can voluntarily choose their actions.[49] This assumption is based on the premise that autonomy and freedom are essential to criminal responsibility.[50] Since the adult criminal justice system presumes that people can freely choose whether

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44 PATRICIA YEOMANS SALVADOR, OHIO JUVENILE LAW § 1:2 (2020).

45 *Id.*

46 *See* Fox, *supra* note 5, at 1222–29 (reviewing the existing goals and the new goals that contributed to the 1899 Act).

47 Monrad G. Paulsen, Kent v. United States: *The Constitutional Context of Juvenile Cases*, 1966 SUP. CT. REV. 167, 169; *see also* SALVADOR, *supra* note 44, at § 1:2 ("By 1925 every state but two had a juvenile court.").

48 Paulsen, *supra* note 47, at 170.

49 *See, e.g.*, Stephen J. Morse, *Criminal Responsibility and the Disappearing Person*, 28 CARDOZO L. REV. 2545, 2547 (2007) [hereinafter Morse, *Criminal Responsibility*] ("It is a commonplace that the assumption of free will is foundational for our criminal law responsibility doctrines and practices."). Free will has various interpretations and it is often confused within the context of legal outcomes. Generally, free will assumes "human beings possess the ability or power to act uncaused by anything other than themselves." Stephen J. Morse, *Determinism and the Death of Folk Psychology: Two Challenges to Responsibility from Neuroscience*, 9 MINN. J.L. SCI. & TECH. 1, 3 (2008) [hereinafter Morse, *Determinism and the Death of Folk Psychology*]. That particular formulation of free will is typically referred to as libertarian freedom or contra-causal freedom. Whether human beings actually have free will poses significant philosophical questions regarding blame and punishment. However, free will is not currently a condition in any doctrine of criminal law and it should not be understood as necessary for criminal responsibility. *Id.* at 3–4.

50 *See* Morse, *Determinism and the Death of Folk Psychology*, *supra* note 49, at 13 ("[Many people] believe that [criminal] responsibility is only possible if we genuinely possess contra-causal freedom."). *But see* Morse, *Criminal Responsibility*, *supra* note 49, at 2552–53 (arguing that libertarian freedom is not essential to criminal responsibility and "all doctrines of criminal law are fully compatible or consistent with the truth of determinism or causation").

to engage in criminal acts, punishments are designed to guide their behavior and influence their decision-making.[51] Retribution, deterrence, incapacitation, and rehabilitation are considered the four primary functions of criminal punishment.[52] To briefly summarize each function:

> The principle of retribution aims to give violators of the law their "just deserts" such that punishment provides a harmful response to a wrongful act. The principle of deterrence, on the other hand, is forward-looking and attempts to influence an offender's decision-making with the threat of punishment. . . . The principles of incapacitation and rehabilitation are also forward-looking. Incapacitation also aims to stop defendants from offending, but there is no attempt to influence decision-making; instead the offender's environment is manipulated to make reoffending impossible, typically via incarceration. Rehabilitation is the practice of attempting to reform offenders so that they will not reoffend.[53]

Conversely, the reformers of juvenile justice rejected deterrence and retribution as appropriate functions of punishment for delinquent juveniles. These reformers argued that children, unlike adults, do not possess the kind of free will that is necessary for criminal responsibility.[54] Meaning, juveniles do not choose to engage in criminal activity in the same way that adults do. The reformers instead blamed society as the primary cause of juvenile crime.[55] Accordingly, the juvenile justice system and adult criminal justice system promote different goals in light of these perceived differences. While the adult criminal justice system aims to impose "stigma and pain for the purposes of punishment, deterrence, or reformation[,] [t]he aims of the new juvenile [court are] protection, education, and salvation."[56] Juvenile courts looked to answer the question of "why did this child do it" and not "did this child do it?"[57] In answering broader behavioral questions, the juvenile court purports to act in the best interest of the child, so it is believed that the child does not need any adversarial protections.[58] As a result, trials by jury were prohibited, rules of evidence were not strictly followed, juveniles were not represented by lawyers, and hearings were private and informal.[59]

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51 WILLIAM HIRSTEIN, KATRINA L. SIFFERD & TYLER K. FAGAN, RESPONSIBLE BRAINS: NEUROSCIENCE, LAW, AND HUMAN CULPABILITY 210 (2018).

52 *Id.*

53 *Id.*

54 Paulsen, *supra* note 47, at 169.

55 *Id.*

56 *Id.* at 173–74.

57 *Id.* at 171.

58 *Id.*

59 *See id.* at 170–71 (discussing the procedural limitations of juvenile courts).

Juvenile court proceedings were initially able to avoid constitutional requirements by relying on parens patriae, a well-established common law principle from the courts of equity in England.[60] Parens patriae translates literally to "parent of the country" and is commonly understood to refer to the role of the state as a guardian to juveniles.[61] The theory of parens patriae rests on three premises. First, children must be supervised because childhood is a period of risk and dependency.[62] Second, while a child's family is the primary supervisor, the state plays a leading role in a child's education and must "intervene forcefully whenever the family setting fails to provide adequate nurture, moral training, or supervision."[63] Third, a public official is the appropriate authority in determining what is in a child's best interests.[64] As previously discussed, in 1839, the Pennsylvania Supreme Court was the first American court to invoke the doctrine of parens patriae to rationalize its role in upholding the commitment of a juvenile in the Philadelphia House of Refuge.[65] Over one hundred years later, the U.S. Supreme Court recognized the role of juvenile courts as parens patriae in *Kent v. United States*.[66] In *Kent*, the Court held that the state as parens patriae had an interest in providing "guidance and rehabilitation for the child and protection for society."[67] Traditionally under parens patriae, juveniles exchange their constitutionally protected rights for the court to act in their best interest.[68] Since the court is acting in the best interest of the child, there is no reason for adversarial procedures or due process protections.[69] Accordingly, during the nineteenth

60 In 1922, the U.S. Children's Bureau published a monograph, which reported on the legal questions raised by juvenile courts. In this publication, the Children's Bureau differentiated juvenile courts from other courts based on the English "conception that the State owes a duty of protection to children" and that "children have been regarded as wards of chancery [and] [t]he crown was parens patriae." BERNARD FLENXER & REUBEN OPPENHEIMER, CHILDREN'S BUREAU, U.S. DEP'T LABOR, THE LEGAL ASPECT OF THE JUVENILE COURT 5, 7 (1922). However, under English common law, parens patriae was only used to protect children from adults regarding their property rights or to ensure that they had a proper upbringing. Parens patriae was never invoked to protect children from the consequences of their criminal conduct. Thus, the invocation of parens patriae in the United States during the twentieth century for juvenile courts was arguably a misapplication of the doctrine. Paulsen, *supra* note 47, at 172–73.

61 Claudia Worrell, *Pretrial Detention of Juveniles: Denial of Equal Protection Masked by the Parens Patriae Doctrine*, 95 YALE L.J. 174, 176 n.8 (1985).

62 FRANKLIN E. ZIMRING, AMERICAN JUVENILE JUSTICE 3–4 (2d ed. 2019).

63 *Id.*

64 *Id.*

65 *See supra* notes 17–24 and accompanying text (discussing the Pennsylvania Supreme Court case *Ex parte* Crouse, which invoked parens patriae).

66 Kent v. United States, 383 U.S. 541, 554–55 (1966).

67 *Id.* at 554.

68 Worrell, *supra* note 61, at 176.

69 *Id.*

and early-twentieth centuries, society widely supported treating delinquent juveniles differently than adults and the courts continued to uphold differential treatment through the invocation of parens patriae.

B. Juveniles Begin Receiving the Same Treatment as Adults

The early reformers of the juvenile justice system did not anticipate the constitutional protections required in adult proceedings ever infiltrating the juvenile court room.[70] However, the lack of procedure in juvenile proceedings became subject to criticism as the inequities became more apparent.[71] As described by the Supreme Court in *Kent v. United States*, "[t]here is evidence . . . that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."[72] With increasing resentment and criticism towards the juvenile court system, the transformative Supreme Court decision in *In re Gault* was not surprising.[73] Labeling the juvenile court system as "peculiar," the Court forcefully pushed back against the patriarchal system and condemned its arbitrariness.[74] Pointing to high rates of recidivism among juveniles, the Court suggested that the classic premises for informality within the juvenile court lacked merit.[75] The Court also relied on studies which found that a juvenile will likely resist the rehabilitative aims of juvenile court when due process is not afforded to

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70 Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 804 (2003); *see also In re Gault*, 387 U.S. 1, 15 (1967) ("The early reformers were appalled by adult procedures and penalties . . . .").

71 *See* John Holland, *A Look Back at the Juvenile Justice System Before There Was Gault*, JUV. JUST. INFO. EXCHANGE (May 15, 2017), https://jjie.org/2017/05/15/a-look-back-at-the-juvenile-justice-system-before-there-was-gault/ [https://perma.cc/AXK7-4756] ("By the time Gault reached the Supreme Court, the notion of a patriarchal state juvenile justice system was already eroding."); Orman W. Ketcham, *The Unfulfilled Promise of the Juvenile Court*, 7 CRIME & DELINQ. 97, 109 (1961) (calling for reform in juvenile courts and emphasizing the importance of due process and fair treatment of children); Catherine J. Ross, *Disposition in A Discretionary Regime: Punishment and Rehabilitation in the Juvenile Justice System*, 36 B.C. L. REV. 1037, 1039 (1995) (noting that "rights theorists and child advocates have focused on the struggle between unbridled discretion and rational procedure" in juvenile courts).

72 *Kent*, 383 U.S. at 556.

73 Prior to the U.S. Supreme Court's decision in *In re Gault*, the Court grappled with similar questions of procedure for juveniles and indicated that unbridled discretion and unchecked punishments in juvenile courts were unfair. *See* Haley v. Ohio, 332 U.S. 596, 599–601 (1948) (considering whether a confession from a fifteen-year-old was constitutional). In addition, courts in other jurisdictions were also considering whether states could abandon due process in juvenile courts. *See* Holland, *supra* note 71.

74 *In re Gault*, 387 U.S. at 17–18.

75 *Id.* at 22.

him or her because the child feels deceived or enticed.[76] Famously, the Court concluded: "Under our Constitution, the condition of being a boy [or girl] does not justify a kangaroo court."[77]

The obvious tension between an informal court and the need for some protections led to the formalization of juvenile court procedures. While juveniles do not enjoy all of the procedural protections available to adults,[78] juveniles now have numerous constitutional safeguards. These protections include notice,[79] right to counsel,[80] right against self-incrimination,[81] right to cross-examination,[82] right to a hearing,[83] a statement of reasons for a decision to transfer a juvenile to adult court,[84] proof beyond a reasonable doubt standard,[85] and protection against double jeopardy.[86] The Supreme Court has been careful not to superimpose the "formalities of the criminal adjudicative process" on the juvenile court system because doing so would negate the purpose of having two distinct systems.[87]

The constitutional protections afforded to juveniles by the Court came at significant costs. A more formal juvenile court legitimized harsher punishments for children.[88] Beginning in the 1950s, a new wave of legal

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76 *Id.* at 26; *see also id.* (citing recent studies that suggested with unanimity "that the appearance as well as the actuality of fairness, impartiality and orderliness . . . may be a more impressive and more therapeutic attitude so far as the juvenile is concerned").

77 *In re Gault*, 387 U.S. at 28.

78 *See* Schall v. Martin, 467 U.S. 253, 256 (1984) (holding that the threshold finding for pretrial detention of accused juvenile delinquents is less strict); McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971) (denying the right to a jury trial for juveniles); *In re Gault*, 387 U.S. at 32 (limiting due process requirements to juvenile court adjudications of delinquency).

79 *In re Gault*, 387 U.S. at 33 ("Notice, to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so . . . the child and his parents or guardian be notified, in writing, of the specific charge or factual allegations to be considered at the hearing . . . .").

80 *Id.* at 36 (holding a juvenile has a right to the assistance of counsel when his punishment is comparable to felony prosecution).

81 *Id.* at 49 ("[I]t is also clear that the availability of the privilege [against self-incrimination] does not turn on the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites.").

82 *Id.* at 57.

83 Kent v. United States, 383 U.S. 541, 557 (1966).

84 *Id.*

85 *In re Winship*, 397 U.S. 358, 368 (1970) ("[T]he constitutional safeguard of proof beyond a reasonable doubt is as much required during the adjudicatory stage of a delinquency proceeding as are those constitutional safeguards applied in Gault . . . .").

86 Breed v. Jones, 421 U.S. 519, 541 (1975).

87 McKeiver v. Pennsylvania, 403 U.S. 528, 551 (1971).

88 Barry C. Feld, *Punishing Kids in Juvenile and Criminal Courts*, 47 CRIME & JUST. 417, 424 (2018); *see also* GIDEON YAFFE, THE AGE OF CULPABILITY: CHILDREN AND THE NATURE OF CRIMINAL

scholars claimed that the rehabilitative goals of juvenile courts were ineffective and overstated.[89] Meanwhile, in the 1980s and early 1990s, there was an increase in violent juvenile crime, which incited concerns about public safety.[90] Later research has found that the concerns over public safety, while somewhat justified, were overblown[91] and had features of a moral panic.[92] For example, much of the legislation that intended to "get tough" on juvenile crime in response to the public's moral panic was enacted after violent juvenile crime rates began to decline.[93] Nonetheless, the culmination of the public's moral panic and the criticism of the juvenile court philosophy gave rise to a reexamination of the juvenile justice system as well as campaigns to transfer juvenile cases from juvenile court to adult criminal court.[94]

Transfer (or waiver) laws are the mechanisms used to transfer the jurisdiction over a juvenile's case from the juvenile court system to the adult criminal court system.[95] Transfer laws typically fall within three primary categories: (1) judicial waiver, (2) prosecutorial waiver, or (3) statutory exclusion.[96] Currently, each state uses at least one of these transfer strategies.[97] Judicial waiver, the most common transfer strategy,[98] is the process in which "a juvenile court judge decides whether there is probable cause to believe a juvenile respondent committed a serious offense and, if so, whether the interest of the community would be served by the prosecution

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RESPONSIBILITY 4 (2018) ("In the last decades of the twentieth century, there was a move towards increasingly punitive policies towards child criminals in the United States[.]").

89 David S. Tanenhaus, *The Evolution of Transfer Out of the Juvenile Court*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT 13, 29 (Jeffrey Fagan & Franklin E. Zimring eds., 2000).

90 Scott & Steinberg, *supra* note 70, at 806; *see also* Tanenhaus, *supra* note 89, at 29 ("After World War II, public fears about a juvenile crime wave, fueled by the statistics punished in the FBI's *Uniform Crime Reports* . . . focused attention on the state of American youth.") (citation omitted).

91 Scott & Steinberg, *supra* note 70, at 807.

92 *See id.* ("The elements of a moral panic include an intense community concern . . . that is focused on deviant behavior, an exaggerated perception of the seriousness of the threat and the number of offenders, and collective hostility toward the offenders, who are perceived as outsiders threatening the community.").

93 *Id.* at 808. However, see *id.* at 807–11 for a discussion on racial and ethnic biases driving hostility towards juvenile delinquents.

94 Tanenhaus, *supra* note 89, at 33.

95 Feld, *supra* note 88, at 451; *see also* NAT'L JUV. DEF. CTR., *Transfer*, https://njdc.info/transfer/ [https://perma.cc/E53F-UGC9] (last visited Mar. 15, 2020).

96 Ross, *supra* note 71, at 1042 n.29.

97 Feld, *supra* note 88, at 451.

98 Barry C. Feld, *Legislative Exclusion of Offenses from Juvenile Court Jurisdiction: A History and Critique*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT 83, 84 (Jeffrey Fagan & Franklin E. Zimring eds., 2000).

of that offense in criminal court rather than juvenile court."[99] Under prosecutorial waiver, juvenile and adult criminal courts have concurrent jurisdiction over certain proscribed ages and offenses and prosecutors choose which court to prosecute the charges.[100] Statutory exclusion involves the legislature defining the juvenile court's jurisdiction to exclude juveniles from juvenile court based on their age and offense.[101]

The implementation of transfer laws has sparked criticism from advocates of the juvenile court system because the criminal court philosophy is inherently different from the philosophy of the juvenile court.[102] After the introduction of procedural safeguards in the juvenile court system, one of the few remaining differences between juvenile courts and adult criminal courts is the sentencing philosophies applied after adjudication. Since the widespread utilization of transfer, the focus on rehabilitation at sentencing has vanished for many juveniles.[103] In fact, juveniles transferred to adult court have an increased likelihood of incarceration and longer sentences when compared to juveniles that were not transferred and remained in juvenile court.[104] Prompted by subtle changes in public attitudes, the practice of transferring juvenile offenders to adult criminal court marks one instance where society has overlooked longstanding views of juvenile culpability in order to embrace a more punitive philosophy.

Blended sentencing is another measure that advances a punitive approach to juvenile crime. Blended sentencing laws allow judges in juvenile courts to impose adult sentences or extend their sentencing jurisdiction over the juvenile into early adulthood.[105] In other words, by providing juvenile court judges with juvenile and criminal sentencing options, the judge may: "(1) impose a juvenile or an adult sentence, (2) impose both a juvenile and adult sentence, with the adult sentence suspended under conditions, or (3)

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99 Robert O. Dawson, *Judicial Waiver in Theory and Practice*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT 45, 45 (Jeffrey Fagan & Franklin E. Zimring eds., 2000).

100 Feld, *supra* note 98, at 85.

101 *Id.*

102 *See supra* notes 47–58 and accompanying text (explaining the differences between the philosophies of the adult criminal court and juvenile court).

103 *See* Feld, *supra* note 98, at 85 ("Both offense exclusion and direct-file approaches deemphasize rehabilitation and individualized consideration of the offender . . . .").

104 Feld, *supra* note 88, at 453.

105 Richard E. Redding & James C. Howell, *Blended Sentencing in America*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT 145, 145 (Jeffrey Fagan & Franklin E. Zimring eds., 2000).

impose a sentence past the normal limit of juvenile court jurisdiction."[106] Blended sentencing laws were created in response to public criticism that the traditional punishments imposed by juvenile courts did not effectively deter juveniles from seriously reoffending.[107] In effect, blended sentences have a net-widening effect by extending the reach of adult punishments in juvenile courts, which ultimately undermines the philosophy of juvenile courts and ignores the differences between kids and adults.[108]

Initiatives like transfer laws and blended sentencing have vastly changed juveniles' interactions with the criminal justice system. Fueled by a moral panic and political incentives, the aims of the juvenile court once strongly accepted by the public were partially abandoned by the 1980s and 1990s.

C. Judicial Intervention: Reestablishing that Kids Are Different

While pundits continued to stoke public outrage on juvenile crime and the juvenile court system, the Supreme Court was hinting at its resistance towards a regime that totally ignored the differences between children and adults. The Supreme Court's recognition of procedural rights for juveniles was not meant to "spell the doom of the juvenile court system."[109] Even in affording numerous constitutional rights to juveniles in *In re Gault*, the Court acknowledged that the juvenile justice system has value because it is "operated by people who are better educated and more highly skilled, can call on more and better facilities and services, and has more ancillary agencies to which to refer its clientele than its adult counterpart."[110] Those aspects of the juvenile justice system did not emerge accidently; they were the product of the early reformers' efforts to design a system that could effectively address juvenile delinquency. The Supreme Court's prior criticism of the juvenile court structure was not meant to be an indictment on the philosophy of juvenile justice.

The Supreme Court has maintained that the age of a criminal defendant has meaning. In *Eddings v. Oklahoma*, the Supreme Court held that a juvenile's mental and emotional development could be considered as a mitigating factor during sentencing.[111] The Court recognized that "youth is more than a chronological fact. It is a time and condition of life when a person may be

106 *Id.* at 146.

107 *Id.*

108 *Id.* at 167.

109 McKeiver v. Pennsylvania, 403 U.S. 528, 534 (1971).

110 *In re Gault*, 387 U.S. 1, 18–9 n.23 (1967) (citation omitted).

111 Eddings v. Oklahoma, 455 U.S. 104, 116 (1982).

most susceptible to influence and psychological damage."[112] As primary support for this claim, the Court observed: "Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults."[113] The Court also cited behavioral studies on adolescence to further support its claim.[114] This was one of the first Supreme Court decisions to reiterate the diminished culpability of juveniles since the Court's prior efforts to liken juvenile courts to adult criminal courts.

About six years later in *Thompson v. Oklahoma*, the Supreme Court rejected capital punishment for children under sixteen years old at the time of the crime.[115] Like the Court's rationale in *Eddings*, the plurality opinion in *Thompson* acknowledged the diminished culpability of juveniles. Specifically, the plurality reasoned that juveniles are inexperienced, less educated, and less intelligent and, therefore, less able to weigh the consequences of their conduct and more likely to be motivated by emotion or peer pressure than adults.[116] These characteristics, the plurality concluded, support the finding that juveniles are less culpable than adults.[117] Moreover, the plurality stated that juvenile's diminished culpability makes retribution an inappropriate justification for capital punishment and the "virtually nonexistent" likelihood that an offender engages in any cost-benefit analysis regarding execution makes deterrence also an ineffective justification.[118]

The following year in *Stanford v. Kentucky*, the Supreme Court declined to extend the holding in *Thompson* to juveniles facing the death penalty for offenses committed while they were either sixteen or seventeen years old.[119] However, Justice Brennan's dissent in *Stanford* pointedly identifies how the majority missed the mark on why minors should be treated differently than adults and explained that the differential treatment between minors and adults "reflects the simple truth derived from communal experiences that juveniles as a class have not the level of maturation and responsibility that we presume in adults and consider desirable for full participation in the rights and duties of modern life."[120] Although the Supreme Court had previously

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112 *Id.* at 115.

113 *Id.*at 115–16.

114 *Id.* at 115 n.11 (citations omitted).

115 Thompson v. Oklahoma, 487 U.S. 815, 838 (1988).

116 *Id.* at 835.

117 *Id.*

118 *Id.* at 837.

119 Stanford v. Kentucky, 492 U.S. 361, 380 (1989).

120 *Id.* at 395 (Brennan, J., dissenting).

cited behavioral research in its opinions, Justice Brennan's dissent in *Stanford* brought this research to the forefront of his discussion.[121] Justice Brennan's dissent arguably helped shape how the Court would consider scientific evidence in future juvenile cases.[122]

Over ten years later and with four new justices on the bench, the Supreme Court changed course and effectively overruled its previous holding in *Stanford*.[123] Justice Kennedy, who voted with the majority in *Stanford*, now penned the majority opinion in *Roper v. Simmons*.[124] In *Roper*, the Supreme Court held that the imposition of the death penalty on all juvenile offenders is now unconstitutional under the Eighth Amendment.[125] Justice Kennedy first concluded that the objective indicia of society's standards had changed since the Court's decision in *Stanford*.[126] Justice Kennedy then established that there are three general differences between juveniles and adults: (1) juveniles lack maturity, (2) juveniles are more vulnerable to negative influences and outside pressures, and (3) juveniles' character is not as well formed as adults' character.[127] Unlike the majority in *Stanford*, Justice Kennedy focused primarily on scientific studies to support these differences.[128] However, Justice Kennedy did not only rely on science—he also famously recognized that these differences embody what "any parent knows" about children.[129] Nonetheless, with behavioral and social science studies grounding Justice Kennedy's analysis, the Supreme Court was reshaping how juvenile offenders should be considered under the Constitution and re-invoking the paternalistic philosophy that created juvenile courts.[130]

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121 *See id.* at 394–96 (considering the behavioral evidence that justifies differential treatment for juveniles).

122 *See* Note, *The Psychology of Cruelty: Recognizing Grave Mental Harm in American Prisons*, 128 HARV. L. REV. 1250, 1256 n.44 (2015) (noting that the majority in *Stanford* refused to consider scientific evidence of culpability whereas the dissenting justices would have considered it); *see also* Roper v. Simmons, 543 U.S. 551, 569–74 (2005) (relying largely on scientific evidence to guide its analysis on juvenile culpability).

123 *Roper*, 543 U.S. at 574–75.

124 *Id.* at 554.

125 *Id.* at 574; *see also infra* Section III.B.1 (discussing Eighth Amendment doctrine).

126 *Roper*, 543 U.S. at 567.

127 *Id.* at 569–70. For a more detailed account of the differences between juveniles and adults articulated by Justice Kennedy in *Roper*, see Section II.A.

128 *Roper*, 543 U.S. at 569–70.

129 *Id.* at 569.

130 *See* Elizabeth S. Scott, Miller v. Alabama *and the (Past and) Future of Juvenile Crime Regulation*, 31 MINN. J.L. & INEQ. 535, 543 (2013) ("Paternalistic attitudes about children were submerged in the 1990s, but they are deeply embedded in our culture, and with the reduced focus on the threat of juvenile

The Supreme Court did not stop at its decision in *Roper*. Five years later in *Graham v. Florida*, the Court held that a life without the possibility of parole ("LWOP") sentence for juveniles convicted of a non-homicidal offense is also unconstitutional under the Eighth Amendment.[131] For the first time, the majority opinion—again delivered by Justice Kennedy—referenced "brain science" in its rationale.[132] In discussing the diminished culpability of juveniles, Justice Kennedy first repeated the three general differences between juveniles and adults articulated in *Roper*.[133] Justice Kennedy then went on to explain that those differences should not be reconsidered because no new data has suggested any reason to doubt the validity of those differences.[134] To bolster this point, Justice Kennedy noted that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavioral control continue to mature through late adolescence."[135]

Shortly after the Court's decision in *Graham*, the Court essentially extended that holding to juveniles convicted of homicidal offenses in *Miller v. Alabama*.[136] The holding in *Miller* is more moderate than its predecessors because it does not create a categorical rule against an LWOP sentence.[137] Instead, the Court simply held that a *mandatory* LWOP sentence for juveniles convicted of any offense, including homicidal convictions, is unconstitutional under the Eighth Amendment.[138] In other words, "as long as the [juvenile] is permitted to introduce mitigating evidence of his immaturity and circumstances, he or she *could* be subject to [an LWOP sentence.]"[139] In reaching this conclusion, the Supreme Court explained that the neuroscience evidence presented in the briefs filed with the Court demonstrated "that the

crime, they seem to have reemerged [in the discourse of Supreme Court justices.]"); *see also* Levick et al., *supra* note 42, at 290–92 (explaining the U.S. Supreme Court's evolving treatment of juveniles).

131 Graham v. Florida, 560 U.S. 48, 82 (2010).

132 *Id.* at 68.

133 *Id.*

134 *Id.*

135 *Id.* (citation omitted).

136 Miller v. Alabama, 567 U.S. 460, 479 (2012).

137 *Id.* at 483.

138 *Id.*

139 Scott, *supra* note 130, at 545 (emphasis added).

science and social science supporting *Roper*'s and *Graham*'s conclusions [had] become even stronger."[140]

The Supreme Court elaborated on the meaning of *Miller* in *Montgomery v. Louisiana*.[141] In *Montgomery*, the Court held that the holding in *Miller* rendered an LWOP sentence constitutional only for the "rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility."[142] The Court also clarified that an LWOP sentence is an unconstitutionally excessive sentence for juveniles "whose crimes reflect transient immaturity."[143] The opinion further instructs how sentencing courts should evaluate these juveniles, explaining that a sentencing court must conduct a hearing that considers a juvenile's "youth and attendant characteristics" as sentencing factors prior to imposing an LWOP sentence.[144] The Court reiterated the principle it established in *Roper*, *Graham*, and *Miller*: "[C]hildren are constitutionally different from adults for purposes of sentencing" due to their "diminished culpability and greater prospects for reform."[145] Although the Supreme Court has not yet considered whether the holdings in *Miller* and *Graham* apply to de facto LWOP sentences,[146] many state courts have considered this issue and held that de facto LWOP sentences are subject to the holdings in *Graham* and *Miller*.[147]

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140 *Miller*, 567 U.S. at 472 n.5 (citations omitted); *see also* Laurence Steinberg, *Adolescent Brain Science and Juvenile Justice Policymaking*, 23 PSYCH. PUB. POL'Y & L. 410, 411 (2017) (recognizing that "neuroscience warranted an entire paragraph of the majority opinion" in *Miller*).

141 577 U.S. 190, 208 (2016). In *Montgomery*, the Court was considering whether the holding in *Miller* should be applied retroactively. *Id.* at 193.

142 *Id.* at 209.

143 *Id.* at 210.

144 *Id.* at 209–10. However, the Supreme Court recently held that a sentencing court is not required to make a separate factual finding of permanent incorrigibility or an on-the-record sentencing explanation with an implicit finding of permanent incorrigibility before sentencing a juvenile to an LWOP sentence. Jones v. Mississippi, 141 S. Ct. 1307, 1311 (2021). Although the majority claims that this decision "does not overrule *Miller* or *Montgomery*," *id.* at 1321, the dissent maintains that the majority "guts" both *Miller* and *Montgomery* and "overrule[s] precedent without even acknowledging it is doing so." *Id.* at 1328, 1337 (Sotomayor, J., dissenting); *see also id.* at 1327 (Thomas, J., concurring in judgment) (stating the majority "[o]verule[d] *Montgomery* in substance but not in name"). Thus, the implications of this decision and the meaning of *Miller* remain unclear.

145 *Montgomery*, 577 U.S. at 206–07 (citations omitted).

146 Typically, a de facto LWOP sentence is when the aggregate total of years of imprisonment exceeds the offender's life expectancy. *See, e.g.*, State v. Slocumb, 827 S.E.2d 148, 154–55 (S.C. 2019) (explaining that an offender who committed several crimes with an average per-crime sentence of twenty-six years, totaling a 130-year sentence, had received a de facto LWOP sentence).

147 *See, e.g.*, People v. Caballero, 282 P.3d 291, 293 (Cal. 2012) (holding that a sentence that required the juvenile offender to serve over 100 years before becoming eligible for parole violated *Graham*); State v. Zuber, 152 A.3d 197, 212 (N.J. 2017) (holding that *Miller* applies broadly). For a list of how jurisdictions have resolved this issue, see *Slocumb*, 827 S.E.2d at 158–66.

These Supreme Court holdings have ignited serious questions regarding the role of science in juvenile justice jurisprudence. Neuroscience especially has garnered significant attention in legal scholarship after it was explicitly referenced in *Graham* and *Miller*.[148] Although the Court principally cited to neuroscience as secondary support for its claims on juvenile culpability, many scholars have noted the increasingly influential role of neuroscience in the Court's decisions over time.[149] For example, before the Court's decision in *Roper*, neuroscience played no role in the Court's decisions about juvenile culpability.[150] Then, in *Roper*, the Court relied only on behavioral differences without mentioning neuroscience.[151] In *Graham*, the Court mentioned neuroscience only in passing but two years later in *Miller* devoted an entire paragraph to neuroscience, detailing the findings from neuroscience on adolescent immaturity.[152] This relatively quick progression has left many wondering whether the Court's focus has shifted mainly to behavioral science and neuroscience for questions on diminished culpability.[153] While persuasive, the Court's focus has not truly shifted to science. The Court has recognized the diminished culpability of juveniles long before science could offer any explanation. Indeed, the Court's recent decisions only use science as one way to affirm the longstanding perception of juvenile culpability, not redefine it.

II. YOUTH DEVELOPMENT

A. Why Kids (Under 18) Are Different

The differences between adults and juveniles are substantial and justify the conclusion that punishments imposed on juveniles should be less severe than the punishments for adults.[154] The U.S. Supreme Court has emphatically declared that "children are different" and, in doing so, has

148 *See* Steinberg, *supra* note 140, at 411 (explaining how neuroscience became more influential in legal policy after the Supreme Court's decision in *Roper* and *Graham*).

149 *Id.*; *see also* Stephen J. Morse, *The Status of NeuroLaw: A Plea for Current Modesty and Future Cautious Optimism*, 39 J. PSYCHIATRY & L. 595, 616, 616 n.25 (2011) (arguing that the citation to neuroscience in *Graham* was general and dictum).

150 Steinberg, *supra* note 140, at 411.

151 *Id.*

152 *Id.* at 411–12.

153 *Id.* at 411.

154 SCOTT & STEINBERG, *supra* note 3, at 15.

drawn from behavioral and neurobiological research for support.[155] The Court provides three overarching principles which summarily articulate the general differences between juveniles and adults.[156] First, juveniles are less capable of engaging in mature judgment than adults.[157] Second, juveniles are more vulnerable or susceptible to negative influences and outside pressures.[158] Third, juveniles are more capable of change than adults.[159]

1. Less Capable of Mature Judgment

The proposition that juveniles lack maturity has been widely uncontroversial. Long before developmental research was recognized, society understood that children possessed diminished capacities for mature judgment.[160] As the Court articulated in *Roper*, "any parent knows[,] . . . '[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.'"[161] By framing the behavioral evidence within the lens of what "any parent knows," the Court grounded its analysis in folk psychology[162] and built on commonsense explanations of juvenile antisocial behavior with scientific evidence.

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155 Miller v. Alabama, 567 U.S. 460, 481 (2012); *see also* Elizabeth S. Scott, *"Children are Different": Constitutional Values and Justice Policy*, 11 OHIO ST. J. CRIM. L. 71, 72 (2016) (noting that the Supreme Court "has announced a broad principle grounded in development knowledge that 'children are different' from adult offenders") (footnote omitted).

156 Roper v. Simmons, 543 U.S. 551, 569–70 (2005). The Supreme Court's reliance on behavioral and, more recently, neuroscientific evidence to explain the diminished capacity of juveniles is consistent with most juvenile law scholars. However, it is worth noting that Professor Gideon Yaffe offers a different account to explain why juveniles deserve a break from criminal responsibility. In Yaffe's view, juveniles deserve leniency because they are denied the right to vote and, accordingly, cannot influence the criminal law. For a full account of Yaffe's argument, see YAFFE, *supra* note 88. *But see* Stephen J. Morse, *Against the Received Wisdom: Why the Criminal Justice System Should Give Kids a Break*, 14 CRIM. L. & PHIL. 257, 259–60 (2020) (arguing that the diminished capacity for responsibility is "a more appealing ground for giving kids a break than lack of say over the criminal law").

157 *Roper*, 543 U.S. at 569.

158 *Id.*

159 *Id.* at 570.

160 *See id.* at 569 (acknowledging that a juvenile's lack of maturity is something that "any parent knows").

161 *Id.* (second alteration in original) (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)).

162 The term "folk psychology" is used by philosophers and cognitive scientists to refer to a reason-giving explanation that "accounts for human behavior as a product of intentions that arise from the desires and beliefs of the agent." Morse, *supra* note 2, at 18.

One explanation as to why juveniles are, on average, less capable of mature judgment than adults is that they have deficiencies in the psychosocial domain.[163] In a study that considered whether non-cognitive differences in adults and juveniles could account for juveniles' immature judgment, the researchers found that psychosocial factors play a significant role in the juvenile decision-making process.[164] By considering three components of maturity of judgment—responsibility, perspective, and temperance—the study found that those components were more predictive of antisocial decision-making than age alone.[165] In effect, "psychosocially mature [thirteen]-year-olds demonstrate less antisocial decision-making than psychosocially immature adults."[166] However, juveniles are more likely to exhibit psychosocial immaturity, which suggests that the average juvenile is "less responsible, more myopic, and less temperate than the average adult."[167]

Psychosocial immaturity affects decision-making outcomes because psychosocial factors influence values and preferences among juveniles.[168] The most relevant psychosocial factors to juveniles' mature judgment and decision-making outcomes are susceptibility to peer pressure, future orientation, attitudes towards risk, and the capacity for self-management.[169] Significant research supports the notion that teenagers are more vulnerable to peer influence than adults.[170] Research also suggests that adults are more "future-oriented" than juveniles, meaning adults can envision themselves in the future over a significantly longer time frame.[171] Moreover, juveniles are more likely to discount their future and primarily consider short-term consequences in their decision-making.[172] This likely results from attitudes towards risk, which juveniles generally weigh less substantially than adults.[173]

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163 Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, 18 BEHAV. SCIS. & L. 741, 757 (2000).

164 *Id.* at 744.

165 *Id.* at 757.

166 *Id.*

167 *Id.*

168 Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCH. 1009, 1012 (2003).

169 *Id.*

170 *Id*; *see also infra* Section II.A.2 (discussing juvenile vulnerability to peer pressure).

171 Steinberg & Scott, *supra* note 168, at 1012*; see also* Brief for the Am. Psych. Ass'n, Am. Psychiatric Ass'n, & Nat'l Ass'n of Soc. Workers as Amici Curiae in Support of Petitioners at 8, Miller v. Alabama, 567 U.S. 460 (2012) (Nos. 10-9646, 10-9647) [hereinafter Brief for APA] ("Adolescents . . . are less able to envision the future and apprehend the consequences of their actions.").

172 Steinberg & Scott, *supra* note 168, at 1012.

173 *Id.*

Research also suggests that juveniles are less likely to possess the ability to control their impulses in their decision-making.[174] As a result, risky behavior, like criminal activity, is a normative characteristic of adolescent development.[175] In fact, it is statistically common for adolescents to engage in crime during their youth, which likely explains the "age-crime curve."[176] It is important to distinguish immature juveniles from immature adults: "An impulsive adolescent will almost certainly develop into an adult who is able to exercise self-restraint."[177] On the other hand, an adult that continues to behave like an impulsive teenager is likely going to behave that way forever.[178]

These psychological studies are bolstered by the growing body of neuroscientific research. Neuroscience, or brain science, looks to the brain to explain and understand psychological phenomena like emotions, thoughts, mood and anxiety disorders, addiction, and social problems.[179] The advent of brain-imaging tools in recent years has allowed scientists to study the brain and identify "neurobiological correlates of behavioral, social, emotional, and developmental processes."[180] Although neuroscience has yet to offer any new revelations on human behavior, it maintains legal relevance because "[p]eople are persuaded much more by concrete rather than by abstract evidence, and by neuroscience in particular."[181] Neuroscience has provided some explanations of juvenile immaturity in physical terms.[182] Specifically, research has found that brain development is causally linked to reckless, antisocial behavior in juveniles because "areas of the brain that govern impulse control, planning, and foresight of consequences mature

174 Brief for APA, *supra* note 171, at 7; *see also* Steinberg & Scott, *supra* note 168, at 1012 (finding some support in the research that juveniles are more impulsive than adults).

175 Brief for APA, *supra* note 171, at 7; *see also* SCOTT & STEINBERG, *supra* note 3, at 16 ("Terry Moffitt, one of the world's leading experts on the development of antisocial behavior, has described delinquent behavior as 'a normal part of teenage life.'").

176 Brief for APA, *supra* note 171, at 7–8. The age-crime curve represents crimes that peak sharply during adolescence but drastically drop in young adulthood. *Id.*; *see also* David P. Farrington, Rolf Loeber & James C. Howell, *Young Adult Offenders: The Need for More Effective Legislative Options and Justice Processing*, 11 CRIMINOLOGY & PUB. POL'Y 729, 734 (2012) (discussing age crime curve).

177 LAURENCE STEINBERG, AGE OF OPPORTUNITY: LESSONS FROM THE NEW SCIENCE OF ADOLESCENCE 187 (2014).

178 *Id.*

179 Seth J. Schwartz, Scott O. Lilienfeld, Alan Meca & Katheryn C. Sauvigné, *The Role of Neuroscience Within Psychology: A Call for Inclusiveness Over Exclusiveness*, 71 AM. PSYCH. 52, 54 (2016).

180 *Id.* at 55.

181 STEINBERG, *supra* note 177, at 190; *see also* Morse, *supra* note 149, at 606 (explaining that "neuroscience adds nothing new" and may just be a "better, more persuasive science" to help understand behavior).

182 STEINBERG, *supra* note 177, at 190.

slowly over the course of adolescence and into early adulthood, while the arousal of the limbic system around puberty increases sensation seeking in early adolescence."[183]

Executive functions have also garnered significant attention in the neuroscience community regarding criminal responsibility.[184] "Executive functions allow us to plan actions and formulate intentions, to set and pursue goals, to organize complex actions with multiple parts and phases, while not losing our place, and establish or revise patterns of habitual behavior."[185] Executive functions exist within the frontal lobe of the brain.[186] Brain-imaging research has shown that the frontal lobes are structurally immature into late adolescence and one of the last portions of the brain to fully develop.[187] Consequently, structural immaturity in the frontal lobe is partially responsible for "deficits in response inhibition, planning ahead, and weighing risks and rewards."[188] Indeed, the development of the frontal lobe correlates with maturing executive functions.[189] Notwithstanding the general premise that the frontal lobes are structurally immature into late adolescence, "[d]ifferent executive components mature along separable developmental trajectories" and create disparities among individual juveniles' executive maturity.[190] Simply put, there is not one age at which a child reaches executive maturity.[191]

Juveniles' immaturity does not necessarily mean that they are not responsible; instead, it means that they are on average less responsible than adults.[192]

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183 Scott, *supra* note 155, at 87.

184 *See id.* at 85–87 (discussing how executive functions underpin the structure of criminal law).

185 HIRSTEIN ET AL., *supra* note 51, at 18.

186 Levick et al., *supra* note 42, at 298.

187 *Id.*

188 *Id.*; *see also* SCOTT & STEINBERG, *supra* note 3, at 14 ("Studies of brain development show that during adolescence, significant maturation occurs in brain systems and regions involved in long-term planning, impulse control, regulation of emotion, and evaluation of risk and reward.") (citation omitted).

189 Specifically, structural changes in the prefrontal cortex, which generally occur during adolescence, parallel important changes in brain function like strengthening of activity in brain systems involving self-regulation and self-control, hormone-related changes, and increases in simultaneous involvement of multiple brain regions. HIRSTEIN ET AL., *supra* note 51, at 165.

190 *Id.* at 172.

191 *Id.*

192 STEINBERG, *supra* note 177, at 188; *see also* Steinberg & Scott, *supra* note 168, at 1010 (arguing that juveniles' developmental immaturity should mitigate culpability and justify more lenient punishment but should not completely excuse their behavior).

2. More Susceptible or Vulnerable to Negative Influences

Immaturity and vulnerability go hand in hand.[193] Juveniles are more vulnerable or susceptible to negative influences and outside pressures because of their lack of maturity.[194] For example, external pressures from a juvenile's environment can increase a juvenile's likelihood of engaging in antisocial behavior.[195] Juveniles are typically dependent on their families to provide for their basic needs like housing and, more often than not, juveniles cannot control their environment and they lack the freedom to change their environment.[196] Studies show that "[d]ifficult family and neighborhood conditions are major risk factors for juvenile crime" and, without the autonomy to escape those conditions, juveniles are vulnerable to these risk factors.[197]

Peer pressure also proves to be especially indicative of risky behavior.[198] Juveniles' desire for social validation leads to difficulty in demonstrating independence from peers.[199] Without a strong sense of self, which juveniles objectively do not have, adolescents rely on others to guide their decision-making and behavior.[200] Interestingly, "exposure to peers during a risk-taking task doubled the amount of risky behavior among mid-adolescents," showing that the "presence of peers makes adolescents and youth, but not adults, more likely to take risks and more likely to make risky decisions."[201] Both direct and indirect peer pressure play a causal role in antisocial behavior.[202] For example, "adolescents make choices in response to direct peer pressure to act in certain ways. More indirectly, adolescents' desire for peer approval—and fear of rejection—affect their choices, even without direct coercion."[203] Adolescents also have increased difficulty deflecting or

193 Brief for APA, *supra* note 171, at 15; *see also* Steinberg & Scott, *supra* note 168, at 1014 (noting that because of their developmental immaturity, juveniles respond adversely to external pressures that adults can resist).

194 Brief for APA, *supra* note 171, at 15.

195 *Id.* at 12, 15.

196 *Id.* at 15–16.

197 *Id.*; *see also* YAFFE, *supra* note 88, at 1, 8 (arguing that juveniles have a diminished capacity for criminal responsibility because they are politically disenfranchised—unable to have any say over the laws that govern them).

198 Brief for APA, *supra* note 171, at 16.

199 Levick et al., *supra* note 42, at 295.

200 *Id.*

201 Brief for APA, *supra* note 171, at 16–17 (citations omitted) (internal quotation marks omitted).

202 Levick et al., *supra* note 42, at 296.

203 Steinberg & Scott, *supra* note 168, at 1012.

resisting peer pressure.[204] As a result, exposure to delinquent peers significantly correlates with juvenile crime because juveniles typically do not commit crimes alone and are more likely to commit crimes in groups.[205] Without the ability to resist peer pressure, juveniles are left vulnerable to these negative influences in a way that adults are not.

Juveniles are also vulnerable to the adjudicative process because developmental characteristics affect adjudicative competence.[206] "Adjudicative competence involves a defendant's ability to communicate with lawyers or aid in his or her defense, to make legal decisions as well as understand and participate in such legal procedures, to waive *Miranda* rights, to waive or assist counsel, to stand trial, and to exercise other constitutional protections."[207] Juveniles' diminished developmental characteristics like cognitive ability, psychosocial maturity, and judgment adversely affects their adjudicative competence—making them vulnerable to the complexities of the court system.[208]

3. More Capable of Change

Juveniles are more capable of change because adolescence is a transitory period.[209] A juvenile's experience is "marked by rapid and dramatic change[s]" in his or her biology, cognition, emotion, interpersonal relationships, and social contexts.[210] Rooted in the longstanding perception of growth, the term "adolescence" derives from the Latin word *adolescere*, which means "to grow into adulthood."[211] As juveniles grow, they become more psychosocially mature. In particular, self-management skills, the ability for long-term planning, judgement and decision-making, regulation of emotion, and evaluation of risk and reward improve in functioning.[212] As a result, the factors associated with risky behavior are less intense and not as correlative.[213]

The psychological literature is well established in its "distinction between individuals who offend only during adolescence and those who persist

204 Brief for APA, *supra* note 171, at 18–19.
205 *Id.* at 17.
206 Farrington et al., *supra* note 176, at 732.
207 *Id.*
208 *Id.*
209 Levick et al., *supra* note 42, at 297.
210 SCOTT & STEINBERG, *supra* note 3, at 32.
211 Levick et al., *supra* note 42, at 297.
212 *Id.*
213 *Id.*

offending into adulthood."[214] The overwhelming majority of delinquent juveniles eventually desist and refrain from engaging in criminal behavior in adulthood.[215] Juveniles' criminal conduct frequently derives from experimenting with risky behavior, "not from deep-seated moral deficiency reflective of 'bad' character."[216] Furthermore, research has demonstrated that intervention is not necessary for juveniles to desist from criminal behavior and become productive, law-abiding citizens.[217]

B. Young Adults: Do these Differences Stop at 18?

The age of maturity has different meanings in different systems. For example, the age of criminal maturity is most commonly eighteen.[218] However, the legal age to drive a car, consent to sexual intercourse, or even rent a car from a rental car company can vary from sixteen to twenty-five.[219] As discussed above, neuroscience research has shown that the brain continues to develop into adulthood.[220] Specifically, research has conclusively found that the brain matures through adolescence and into the early twenties, with large structural changes occurring in the frontal lobes and within the prefrontal cortex.[221] Unfortunately, this research cannot yet offer a particular age for purposes of drawing legal distinction between young adults and adults.[222] Some studies suggest that people reach maturity between the ages of fifteen and twenty-two.[223] Other studies have found that the brain's higher executive functions like planning, verbal memory, and impulse control are not fully developed until the age of twenty-five.[224] Although the research might not yet be able to indicate one particular age for legal majority, it remains clear that young adults on average share more cognitive similarities with juveniles, not adults.[225]

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214 *Id. But see* Roper v. Simmons, 543 U.S. 551, 573 (2005) ("It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.").

215 Levick et al., *supra* note 42, at 298.

216 Brief for APA, *supra* note 171, at 20–21.

217 Levick et al., *supra* note 42, at 298.

218 SCOTT & STEINBERG, *supra* note 3, at 16.

219 *See* Farrington et al., *supra* note 176, at 733 (explaining that rental car companies often bar drivers younger than twenty-five years old from renting a car).

220 *See supra* notes 183–191 and accompanying text.

221 SCOTT & STEINBERG, *supra* note 3, at 44.

222 STEINBERG, *supra* note 177, at 202.

223 *Id.*

224 Farrington et al., *supra* note 176, at 734.

225 *Id.* at 741; *see also* Lapp, *supra* note 3, at 364 ("[M]any of the cognitive features that distinguish juveniles from adults also distinguish young adults from adults.").

Education also plays a role in extending adolescence into a person's early twenties because of the increase in college attendance.[226] Post-secondary education delays entry into the full-time labor force and provides young adults with supportive institutions like teachers, counselors, and highly structured programs.[227] By prolonging education, many young adults struggle to achieve financial independence and are forced to rely on parental support for longer periods.[228] These factors have led young adults to define adulthood differently than previous generations.[229] Rather than utilizing formal markers like marriage or other life events to describe adulthood, young adults primarily understand adulthood as encompassing more intangible and psychological markers like becoming financially independent or making independent decisions.[230] In fact, many young adults do not have a sense of adulthood until much later than the age of eighteen.[231] By delaying the transition into adulthood, young adults may "reap the benefits of a longer period of plasticity during which higher-order brain systems continue to mature."[232]

A new conception of development has been recognized as accurately reflecting the distinct differences of young adulthood when compared to adolescence and adulthood.[233] This new developmental stage has been termed "emerging adulthood."[234] Emerging adulthood encompasses ages eighteen through twenty-five and is a period of life when "many different directions remain possible, when little about the future has been decided for certain, when the scope of independent exploration of life's possibilities is greater for most people than it will be at any other period of the life course."[235] This new theory of development reinforces the notion that young

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226 Lapp, *supra* note 3, at 364–65.

227 *Id.* at 365.

228 *Id.* at 365–66.

229 *Id.* at 368.

230 *Id.*

231 *Id.*

232 STEINBERG, *supra* note 177, at 164. However, the benefits that come from delaying the transition into adulthood are not distributed equally. Youth of color and economically poor youth tend to begin adolescence and transition into adulthood sooner because they lack the economic and social resources to extend adolescence. In addition, studies have shown that youth of color are likely to be viewed as older than their chronological age. As a result, economically poor youth and youth of color are at a higher risk of contact with the criminal justice system than other youth. *See* Lapp, *supra* note 3, at 369–71; *see also* STEINBERG, *supra* note 177, at 177 ("[T]he general trend towards a longer adolescence has been far more advantageous to the privileged than to the underprivileged.").

233 Jeffrey Jensen Arnett, *Emerging Adulthood: A Theory of Development from Late Teens Through the Twenties*, 55 AM. PSYCH. 469, 469 (2000).

234 *Id.*

235 *Id.*

adults are not similarly situated to adults and must, at the very least, be conceptualized differently when considering criminal justice policies and criminal responsibility.

The evidence is clear that the brain continues to develop into a person's early twenties, casting doubt on the legitimacy of the current divide between juvenile and adult. Even as early as 1989, Justice Brennan identified the arbitrariness of the age of eighteen as the line drawn by society for maturity and responsibility.[236] Justice Brennan acknowledged that eighteen is a "conservative estimate of the dividing line between adolescence and adulthood" and that maturity does not occur until the early twenties.[237] Scholars have also argued that the age of criminal maturity should be raised to the mid-twenties to better address the effects of brain development.[238] Policymakers and the public have also begun to grapple with the legitimacy of legal regulations and current criminal justice policies in light of this evidence.[239] Despite the widespread recognition that the brain continues to develop into a person's twenties, the U.S. Supreme Court has not considered whether young adults should be treated similarly to juveniles regarding criminal responsibility.

III. RESPONDING TO YOUNG ADULT DIFFERENCES

The overwhelming evidence illustrating that young adults are more similar to juveniles than adults has led to the implementation of many public policies. As a point of global comparison, Switzerland sentences young adults as juveniles, and Germany extends its juvenile jurisdiction to the age of twenty-one.[240] In the United States, states and counties have enacted a variety of policies focused on addressing young adult criminal responsibility.[241] Relatively recently, more than a dozen jurisdictions have created a new criminal justice institution, young adult courts.[242] Young adult offenders have also challenged the constitutionality of their sentences, arguing that continuing to blame and punish them without any consideration for their diminished responsibility violates the Constitution.[243] This section

236 Stanford v. Kentucky, 492 U.S. 361, 396 (1989) (Brennan, J., dissenting).

237 *Id.* (citation omitted).

238 Farrington et al., *supra* note 176, at 734.

239 SCOTT & STEINBERG, *supra* note 3, at 44.

240 Alex A. Stamm, Note, *Young Adults Are Different, Too: Why and How We Can Create a Better Justice System for Young People Age 18 to 25*, 95 TEX. L. REV. 72, 79 (2017).

241 *Id.* at 79.

242 *Id.* at 88.

243 *See infra* Section III.B.

will evaluate the effectiveness of young adult courts and the validity of the constitutional claims.

A. Young Adult Court

Young adult courts, like juvenile courts, create a distinct system designed for young adults[244] and are generally modeled after specialty, problem-solving courts like drug courts.[245] There is no uniform young adult court system and each jurisdiction with a young adult court utilizes a somewhat different model.[246] In 2004, Douglas County, Nebraska, established the country's first young adult court.[247] Under Nebraska's model, the young adult court provides alternative sentencing for young adults charged with a felony offense up to the age of twenty-five.[248] The goal of the program is "to stabilize participant's lives by providing tools for success"; these tools come in the forms of "community supervision, substance use treatment, mental health assistance, education, employment, and frequent drug testing."[249]

Other jurisdictions have implemented similar systems, but the most progressive model is the San Francisco Young Adult Court, established in 2015.[250] The San Francisco model "functions more like a distinct justice system."[251] Under the San Francisco model, young adults, ages eighteen to twenty-four, may be eligible for the program.[252] The young adult court is open to all criminal offenses, including crimes that allege serious bodily injury.[253] However, the District Attorney must agree to defer the young adult to young adult court in many serious felony charges.[254] The Superior Court

244 Lapp, *supra* note 3, at 390.

245 Stamm, *supra* note 240, at 88.

246 Lapp, *supra* note 3, at 390.

247 *Id.* at 390–91.

248 *Problem-Solving Courts*, ST. NEB. JUD. BRANCH, https://supremecourt.nebraska.gov/courts/problem-solving-courts [https://perma.cc/G7RG-VZV4] (last visited Feb. 28, 2020).

249 *Id.*

250 Lapp, *supra* note 3, at 392.

251 *Id.*

252 CAL. SUPER. CT., S.F. CNTY., YOUNG ADULT COURT, https://www.sfsuperiorcourt.org/divisions/collaborative/yac [https://perma.cc/M69V-MXB5] (last visited Feb. 29, 2020).

253 CAL. SUPER. CT., S.F. CNTY., SAN FRANCISCO COLLABORATIVE COURT ELIGIBILITY GUIDELINES: COMMUNITY JUSTICE COURT, DRUG COURT, YOUNG ADULT COURT, MISDEMEANOR BEHAVIORAL HEALTH COURT JUNE 1, 2016–DECEMBER 31, 2016, https://www.sfsuperiorcourt.org/sites/default/files/images/REVISED.DEC2017.%202016CollaborativeCourtEligiblityGuidelines.pdf [https://perma.cc/87CM-3PK9] (last visited Feb. 29, 2020) [hereinafter S.F. COLLABORATIVE COURT ELIGIBILITY GUIDELINES].

254 *Id.*

of California for the County of San Francisco expressly credits the growing body of research that differentiates young adults from juveniles and adults as one of the reasons for the establishment of the young adult court.[255] The court cites the developing prefrontal cortex as well as structural societal changes to justify departing from the traditional justice system model.[256] Moreover, the San Francisco Young Adult Court recognizes that the traditional justice system "is not designed to address cases involving these individuals, who are qualitatively different in development, skills, and needs from both children and older adults."[257]

The San Francisco Young Adult Court aims to ensure public safety and reduce recidivism, increase the assets of young adults, provide a meaningful path to reducing or eliminating young adults' criminal records, and increase collaboration among community resources.[258] Additionally, all of the staff members that work within the San Francisco Young Adult Court are specially trained to address the developmental needs of young adults.[259] This young adult court model intends to treat its cases more like a juvenile court by focusing on individualized, community-based, and rehabilitative services.[260] The San Francisco Young Adult Court also values procedural fairness by affording the following protections to young adults: "Opportunity to be heard; decisions based on facts and program rules that are applied consistently; serious considerations of their concerns; and a program that acts in their best interest."[261]

The young adult court system has seen some success since its implementation. Legal experts "recommend young adult courts as a means of effectively responding to young adult offending."[262] Although there has not yet been a statistically significant number of graduates from the San Francisco Young Adult Court, the court has published the outcomes of its participants thus far. Seventy-five young adults have successfully completed the San Francisco Young Adult Court, and 84% of those graduates have

255 YOUNG ADULT COURT, *supra* note 252.

256 *Id.*

257 *Id.*

258 CAL. SUPER. CT., S.F. CNTY., YOUNG ADULT COURT: POLICIES AND PROCEDURES MANUAL 3–4 (Aug. 2019), https://www.sfsuperiorcourt.org/sites/default/files/images/YACPolices ProceduresAug2019AppendicesFINAL.pdf?1580836257412 [https://perma.cc/R7Y5-5WMS] [hereinafter YOUNG ADULT COURT: POLICIES AND PROCEDURES MANUAL].

259 Lapp, *supra* note 3, at 393.

260 *Id.* at 396.

261 YOUNG ADULT COURT: POLICIES AND PROCEDURES MANUAL, *supra* note 258, at 4.

262 Stamm, *supra* note 240, at 88.

avoided re-arrest.[263] While there is still not enough data to draw a definitive conclusion on the effectiveness of young adult courts, these early outcomes may indicate that young adult courts have the potential to reduce recidivism while saving costs because these young adults are able to avoid short-term and long-term incarceration.[264]

Young adults are uniquely situated in human development and pose different challenges to criminal responsibility than juveniles. Specifically, young adults may vary greatly with regard to their financial independence, dependency on family, and involvement in the labor force or educational institutions.[265] With such diversity among young adults, case-by-case determinations are likely necessary to sufficiently mitigate their culpability in sentencing. Young adult courts establish a system for young adults that is distinct from both the juvenile court system and the adult criminal court system and can better address the complexities of young adulthood in a uniform, specialized manner.

B. Judicial Intervention

The developments in behavioral and neuroscientific research have raised questions surrounding public policy and the adjudication of young adults in adult criminal court. In light of this research, questions regarding justice and fairness necessarily follow. Centuries of differential treatment for juveniles has reinforced our justice system's commitment to attributing blame and punishment only to those who are criminally responsible. Continuing to blame and punish young adults as adults without any recognition for their diminished responsibility has invoked, and will continue to invoke, judicial review. The constitutional arguments that are most relevant to this issue are: (1) Cruel and Unusual Punishment under the Eighth Amendment and (2) Equal Protection under the Fourteenth Amendment. This section evaluates each constitutional challenge and shows the reluctancy of the judiciary to significantly change the binary juvenile-adult court system.

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263 Of the 361 young adults that were referred to San Francisco's young adult court, 281 individuals participated as of August 2015. CAL. SUPER. CT., S.F. CNTY., SAN FRANCISCO COLLABORATIVE COURTS: YOUNG ADULT COURTS (Apr. 2019), https://www.sfsuperiorcourt.org/sites/default/files/images/YACFactSheet_2018.pdf [https://perma.cc/VM5W-AJZC].

264 *See* Lapp, *supra* note 3, at 396 (finding that, while "minimizing the substantial costs of incarceration," young adult courts can "advance therapeutic justice and a successful transition to adulthood").

265 *See supra* notes 226–231 and accompanying text (discussing how social factors can influence young adult development).

1. Cruel and Unusual Punishment

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."[266] The Supreme Court has held that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[267] Accordingly, the Eighth Amendment "has been interpreted in a flexible and dynamic manner."[268] When a punishment is challenged under the Eighth Amendment, the Supreme Court commonly invokes the proportionality principle.[269] Under the proportionality principle, the Court considers whether the specific punishment is disproportionate to the crime.[270] By reviewing the constitutionality of punishments through the lens of proportionality, the Court can respond to changes in public opinion as society becomes "enlightened by a humane justice."[271]

Prior to the Supreme Court's decision in *Graham v. Florida*, the Court mainly applied the proportionality principle to challenges to the death penalty.[272] While the Court did not foreclose the possibility of applying the proportionality principle to challenges to noncapital punishments, it acknowledged that "*successful* challenges to the proportionality of [prison] sentences [would be] exceedingly rare."[273] The longstanding practice of distinguishing challenges to capital punishment from challenges to noncapital punishment was based on the Supreme Court's view that "[d]eath is different."[274] The notion that death is different first arose in Justice Stewart's concurring opinion in *Furman v. Georgia*, the case that briefly ceased capital punishment in the United States.[275] Justice Stewart explained:

> The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal

266 U.S. CONST. amend. VIII.

267 Gregg v. Georgia, 428 U.S. 153, 173 (1976) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).

268 *Id.* at 171.

269 Elizabeth Bennion, *Death Is Different No Longer: Abolishing the Insanity Defense is Cruel and Unusual Under* Graham v. Florida, 61 DEPAUL L. REV. 1, 4 (2011).

270 Graham v. Florida, 560 U.S. 48, 59 (2010); *see also* Weems v. United States, 217 U.S. 349, 367 (1910) ("[I]t is a precept of justice that punishment for crime should be graduated and proportioned to offense.").

271 *Gregg*, 428 U.S. at 171 (quoting *Weems*, 217 U.S. at 378).

272 Bennion, *supra* note 269, at 25.

273 *Graham*, 560 U.S. at 104 (Thomas, J., dissenting) (alterations in original) (quoting Harmelin v. Michigan, 501 U.S. 957, 1001 (1991)).

274 *Id.* at 103.

275 Bennion, *supra* note 269, at 10 (citing Furman v. Georgia, 408 U.S. 238 (1972)).

> justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.[276]

Because of this conception of the death penalty, the Supreme Court has repeatedly recognized that capital punishment "is categorically too harsh a penalty to apply to certain types of crimes and certain classes of offenders."[277] For example, in *Roper v. Simmons*, the Supreme Court ruled that the death penalty is categorically too harsh when imposed on a juvenile offender.[278] Likewise, in *Kennedy v. Louisiana*, the Supreme Court held that the death penalty is categorically too harsh when imposed for the sole crime of rape of a child.[279] However, the Supreme Court in *Graham* blurred the distinction between capital and noncapital punishments and arguably abandoned the death is different philosophy.[280] In *Graham*, the Court created a categorical rule barring juveniles from receiving an LWOP sentence for non-homicide offenses.[281] In other words, the Court stated that an LWOP sentence is categorically too harsh when imposed on a juvenile for a non-homicide offense—a ruling typically reserved only for the death penalty.[282] Surprisingly, the Court did little to rationalize its break from tradition and simply resolved that the prior case law just happened to only involve capital punishment.[283]

The Supreme Court in *Graham* effectively redefined the proportionality principle by shifting the analysis from capital versus noncapital challenges to categorical versus individual challenges.[284] Justice Kennedy, delivering the opinion in *Graham*, explained that the Supreme Court's prior cases "addressing the proportionality of sentences fall within two general classifications."[285] Individual challenges, the first classification of cases, involve challenges to the length of term-of-year sentences given all the facts in a particular case.[286] When reviewing these individual challenges, the Court first compares the gravity of the offense and the severity of the

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276 *Furman*, 408 U.S. at 306 (Stewart, J., concurring).

277 *Graham*, 560 U.S. at 100 (Thomas, J., dissenting).

278 543 U.S. 551, 578 (2005).

279 554 U.S. 407, 447 (2008) (Alito, J. dissenting).

280 *Graham*, 560 U.S. at 102–03 (Thomas, J., dissenting).

281 *Id.* at 82 (majority opinion).

282 *Id.* at 102 (Thomas, J., dissenting); *see also* Bennion, *supra* note 269, at 24 ("*Graham* is the first Supreme Court case to categorically exclude a population from a specific punishment other than death.").

283 Bennion, *supra* note 269, at 25.

284 *Id.*

285 *Graham*, 560 U.S. at 59.

286 *Id.*

sentence.[287] If this threshold comparison leads to an inference of gross disproportionality, then the Court should "compare the defendant's sentence with sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions."[288] If the sentence is still grossly disproportionate after this secondary comparison, then the sentence is unconstitutional.[289]

As for the second classification of cases, Justice Kennedy acknowledged that the cases historically involved challenges the death penalty.[290] But he repackaged the second classification of cases in *Graham* as categorical challenges, or cases that have "used categorical rules to define Eighth Amendment standards."[291] In effect, the Court construed the second classification to involve any categorical challenges to a sentence, regardless of whether it was a capital or noncapital sentence. When reviewing categorical challenges, the Court uses a two-step approach. First, the Court analyzes the "'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."[292] Second, the Court brings its own judgment to bear on the issue.[293] In exercising its independent judgment, the Court is "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.'"[294] Independent judgment also requires the Court to consider the offenders' culpability, the severity of the punishment, and penological goals.[295]

The decision in *Graham* to redefine the proportionality principle was not an anomaly. The Supreme Court again invoked this analysis in *Miller v. Alabama*.[296] In *Miller*, the Court utilized the two-step approach articulated in *Graham* and adopted a categorical rule barring juveniles from ever receiving a mandatory LWOP sentence.[297] In his dissenting opinion in *Miller*, Justice Thomas understood the majority's holding as an "ever-expanding"

287 *Id.* at 60 (citing Harmelin v. Michigan, 501 U.S. 957, 1005 (1991)).
288 *Id.* (citing *Harmelin*, 501 U.S. at 1005).
289 *Id.* (citing *Harmelin*, 501 U.S. at 1005).
290 *Id.*
291 *Id.*
292 *Id.* at 61 (quoting Roper v. Simmons, 543 U.S. 551, 572 (2005)).
293 *Id.*
294 *Id.* (quoting Kennedy v. Louisiana, 554 U.S. 407, 421 (2008)).
295 *Id.* at 67.
296 567 U.S. 460, 489 (2012).
297 *See supra* notes 136–139 and accompanying text (explaining the holding in *Miller*).

application of the proportionality principle.[298] Indeed, after *Graham* and *Miller*, the once prominent view of the Court that death is different is arguably abrogated and the proportionality principle will continue to apply to noncapital cases.

Eighth Amendment challenges to sentences imposed on juveniles have significantly altered how legal institutions can blame and punish juvenile offenders. The success of those challenges has motivated nearly identical challenges from young adults. Specifically, young adult offenders argue that the Supreme Court's holdings in *Roper*, *Graham*, and *Miller* ("*Roper* line of cases") must be extended to young adults under the Eighth Amendment. In other words, young adults contend that the courts should treat young adults as juveniles for purposes of punishment.

Many courts have already been confronted with the question of whether certain sentences imposed on young adults violate the Eighth Amendment. Almost universally, federal and state courts have rejected those constitutional challenges. All of the circuit courts for the U.S. Court of Appeals that have considered this question have ruled definitively against extending any of the holdings in the *Roper* line of cases to young adults.[299] Likewise, almost every state court faced with this issue has also refused such an extension.[300] While

298 *Miller*, 567 U.S. at 508 (Thomas, J., dissenting).

299 *See* United States v. Gonzalez, 981 F.3d 11, 21 (1st Cir. 2020); United States v. Sierra, 933 F.3d 95, 97 (2d Cir. 2019), *cert. denied sub nom.*, Lopez-Cabrera v. United States, 140 S. Ct. 2541 (2020); *In re Liebel*, No. 13-2907 (3d Cir. Aug. 15, 2013); United States v. Chavez, 894 F.3d 593, 609 (4th Cir.), *cert. denied*, 139 S. Ct. 278 (2018); *In re Frank*, 690 F. App'x 146 (5th Cir. 2017); United States v. Marshall, 736 F.3d 492, 498 (6th Cir. 2013); Wright v. United States, 902 F.3d 868, 871–72 (8th Cir. 2018), *cert. denied*, 139 S. Ct. 1207 (2019); United States v. Williston, 862 F.3d 1023, 1040 (10th Cir. 2017); Melton v. Sec'y, Fla. Dep't of Corr., 778 F.3d 1234, 1237 (11th Cir. 2015).

300 The following states have rejected arguments that seek to extend any of the holdings in the *Roper* line of cases to young adults: Alabama, Arizona, Arkansas, California, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nevada, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, South Dakota, Tennessee, Texas, Utah, Vermont, Wisconsin, and Wyoming. These cases include: Thompson v. State, 153 So. 3d 84 (Ala. Crim. App. 2012); State v. Pieck, No. 1 CA-CR 14-0585 PRPC, 2016 WL 4626703 (Ariz. Ct. App. Sept. 6, 2016); Benton v. Kelley, 602 S.W.3d 96 (Ark. 2020); People v. Flores, 462 P.3d 919 (Cal. 2020); Woods v. Comm'r of Corr., 232 A.3d 63 (Conn. App. Ct. 2020); Zebroski v. State, 179 A.3d 855 (Del. 2018); Branch v. State, 236 So. 3d 981 (Fla. 2018); Gandy v. State, 718 S.E.2d 287 (Ga. 2011); Hairston v. State, 472 P.3d 44 (Idaho 2020); People v. Harris, 120 N.E.3d 900 (Ill. 2018); Malone v. State, 150 N.E.3d 1099 (Ind. Ct. App. 2020) (unpublished table decision); Nassif v. State, No. 17-0762 (Iowa Ct. App. July 5, 2018); State v. Ruggles, 304 P.3d 388 (Kan. 2013); State v. Tucker, 181 So. 3d 590 (La. 2015); West v. State, No. 2105 (Md. Ct. Spec. App. Dec. 31, 2018); People v. Manning, 951 N.W.2d 905 (Mich. 2020); Nelson v. State, 947 N.W.2d 31 (Minn. 2020); Scott v. State, 938 So. 2d 1233 (Miss. 2006), *overruled on other grounds by* Lynch v. State, 951 So. 2d 549 (Miss. 2007); State v. Barnett, 598

some state courts have left the question open by avoiding a decision on the merits,[301] as of this writing, only one court has clearly split from the prevailing case law.[302] Indeed, the Washington Supreme Court, relying heavily on neuroscience developments, extended the holding in *Miller*, which barred mandatory LWOP sentences for juveniles, to offenders between the ages of eighteen and twenty.[303]

S.W.3d 127 (Mo. 2020) (en banc); Jonson v. State, 148 P.3d 767 (Nev. 2006); State v. Cook, No. A-4419-18T4, 2020 WL 1487727 (N.J. Super. Ct. App. Div. Mar. 23, 2020); State v. Hopkins, No. S-1-SC-35052, 2016 WL 3128776 (N.M. May 26, 2016); People v. Sanchez, 98 N.Y.S.3d 719 (N.Y. Sup. Ct. 2019); State v. Garcell, 678 S.E.2d 618 (N.C. 2009); State v. Graham, No. 2016-1882, 2020 WL 7391565 (Ohio Dec. 17, 2020); Mitchell v. State, 235 P.3d 640 (Okla. Crim. App. 2010); State v. Holler, 944 N.W.2d 339 (S.D. 2020); Pike v. State, No. E2009-00016-CCA-R3-PD, 2011 WL 1544207 (Tenn. Crim. App. Apr. 25, 2011); Rivers v. State, No. AP-77,051, 2017 WL 6505792 (Tex. Crim. App. Dec. 20, 2017); State v. Perea, 322 P.3d 624 (Utah 2013); State v. Rideout, 933 A.2d 706 (Vt. 2007); State v. McDermott, 810 N.W.2d 237 (Wis. Ct. App. 2012); Nicodemus v. State, 392 P.3d 408 (Wyo. 2017).

301 In *Commonwealth v. Watt*, the Supreme Judicial Court of Massachusetts noted that it had previously declined to extend the holdings of the *Roper* line of cases to young adults, but the court also recognized that the research on brain science has progressed to the point where the court should reconsider the age of criminal majority. 146 N.E.3d 414, 428 (Mass. 2020). However, the court declined to rule on the merits as the record was not fully developed. *Id.* The court remanded the case for a full development of the record regarding brain development so the court could make an informed decision on the constitutionality of an LWOP sentence imposed on young adults. *Id.*; see also *Commonwealth v. Lee*, 206 A.3d 1, 11 (Pa. Super. Ct. 2019) (confining its holding not to extend the *Roper* line of cases to young adults only to cases on post-conviction review and recognizing that an extension is possible on direct appeal); *Commonwealth v. Bredhold*, 599 S.W.3d 409, 423 (Ky. 2020) (reversing the trial court's pre-trial decision that the death penalty is unconstitutional for offenders ages twenty-one or younger on the grounds of justiciability and recognizing that the issue can be considered only on the merits after a conviction and sentence). The Illinois Supreme Court has left the issue open under its state constitution, while rejecting an extension of the *Roper* line of cases to young adults under the U.S. Constitution. People v. Harris, 120 N.E.3d 900, 908–11, 914 (Ill. 2018).

302 Matter of Monschke, 482 P.3d 276, 288 (Wash. 2021).

303 *Id.* at 284–86, 288. Notably, the Washington Supreme Court in *Monschke* decided the issue under its state constitution, not the U.S. Constitution. *Id.* at 279 n.6; *see also id.* ("[I]n the context of juvenile sentencing, [the Washington state constitution] provides greater protection than the Eighth Amendment.") (citation omitted). Additionally, the Washington Supreme Court declined to apply its categorical bar test, which is identical to the analysis used by U.S. Supreme Court for categorical challenges, because it concluded that the categorical bar test only applies to determinations of whether a punishment is categorically too cruel, not determinations of whether an existing constitutional protection should apply to an enlarged class of offenders. *Id.* at 280. Meaning, since the U.S. Supreme Court in *Miller* already determined that a mandatory LWOP sentence is unconstitutional as applied to juveniles, the Washington Supreme Court reasoned that it only had to decide whether an arbitrary distinction between juveniles and young adults between the ages of eighteen and twenty for purposes of mandatory LWOP sentences passed constitutional muster. *Id.* Thus, the Washington Supreme Court avoided the traditional two-step framework for categorical challenges. *See id.* at 292 (Owens, J., dissenting) (arguing that the majority crafted a "false distinction to sidestep" the categorical bar test).

A few different rationales have been offered by the courts for rejecting such constitutional challenges. Most often, the courts simply apply the holdings articulated in the *Roper* line of cases without much analysis. For example, in *State v. Barnett*, the Missouri Supreme Court considered whether the imposition of a mandatory LWOP sentence on a nineteen-year-old offender was constitutional in light of newly available scientific evidence indicating that nineteen-year-old offenders display the "transient, hallmark features of adolescence affecting risk and impulse control."[304] The court in *Barnett* plainly stated that it was constrained by the U.S. Supreme Court's precedent, "which clearly defines a juvenile as an individual younger than [eighteen] years of age," and affirmed the LWOP sentence.[305] The Missouri Supreme Court understood an extension of the holding in *Miller* to a nineteen-year-old offender as contrary to the precedent established by the Supreme Court. This reasoning is quite common, and it allows courts to consider the issue on the merits with little to no constitutional analysis.[306]

Courts have even reasoned that a strict application of the *Roper* line of cases is required because the Supreme Court specifically acknowledged the arbitrariness of drawing the line of criminal majority at eighteen years old. Indeed, in *Roper*, the Supreme Court admitted that the "qualities that distinguish juveniles from adults do not disappear when an individual turns [eighteen]" but still concluded that "a line must be drawn."[307] Accordingly, lower courts have considered that language to be highly instructive and indicative of how the Supreme Court would consider additional scientific evidence showing that young adults have similar qualities to juveniles.[308] For example, in *United States v. Marshall*, the Sixth Circuit relied on that language in *Roper* to conclude that the "Supreme Court has recognized that drawing

304 *Barnett*, 598 S.W.3d at 130.

305 *Id.* at 133.

306 *See, e.g.*, *Woods*, 232 A.3d at 80 (explaining that the holding in *Miller* is "limited to cases in which the defendant is younger than eighteen at the time of the crime"); *Hopkins*, 2016 WL 3128776, at *5 ("Defendant was twenty-one years old at the time he committed these murders and certainly not within the parameters established by *Roper*. Because Defendant was a legal adult, we cannot categorically treat him as a juvenile offender under *Roper*."); *Graham*, 2020 WL 7391565, at *28 ("[B]ecause the United States Supreme Court has drawn the line at 18 for Eighth Amendment purposes, state courts are not free to invoke the Eighth Amendment as authority for drawing it at a higher age. . . . [Therefore,] *Roper* is controlling, and we must follow it.").

307 Roper v. Simmons, 543 U.S. 551, 574 (2005).

308 *See, e.g.*, Nelson v. State, 947 N.W.2d 31, 39 (Minn. 2020) (recognized that the "Supreme Court determined that a 'clear line' must be drawn, even when such a line is under-inclusive"); Tisius v. State, 519 S.W.3d 413, 431 (Mo. 2017) (en banc) ("The Supreme Court . . . recognized the potential for a defendant's mental age to differ from his or her biological age but, nonetheless, implemented a bright line rule as to the minority age for imposition of the death penalty.").

lines based on chronological age is a not-entirely-desirable but nonetheless necessary approach."[309] Similarly, in *United States v. Chavez*, while the Fourth Circuit conceded that individual differences in maturity will lead to "imperfect fits" and arbitrariness, the court still concluded that such differences do not make age-based rules unconstitutional.[310]

Constitutional challenges have also been rejected by the courts based on the view that there is no national consensus to extend the *Roper* line of cases to young adults. As explained above, when evaluating Eighth Amendment challenges, a court must first determine whether there is a national consensus against the challenged sentencing practice.[311] To establish such a national consensus, young adult defendants have commonly pointed to (1) the emerging scientific consensus that young adults are less responsible because brain development continues into mid-twenties,[312] (2) a 2018 resolution from the American Bar Association House of Delegates, which urged jurisdictions that impose capital punishment to prohibit imposing the death penalty on offenders who were twenty-one years old or younger at the time of the crime,[313] (3) state laws that recognize the status of young adulthood as a mitigating factor at sentencing,[314] and (4) the prevalence of certain punishments imposed on young adults.[315] Despite these purported changes, courts have not been persuaded that these developments constitute a national consensus.[316] For instance, in *Hairston v. State*, the Idaho Supreme Court

309 United States v. Marshall, 736 F.3d 492, 498 (6th Cir. 2013).

310 United States v. Chavez, 894 F.3d 593, 609 (4th Cir. 2018).

311 *Supra* note 292 and accompanying text.

312 *See* Hairston v. State, 472 P.3d 44, 49 (Idaho 2020) (noting that the defendant relies on report that argues "there is a new emerging consensus that many aspects of psychological and neurobiological immaturity characteristic of early adolescents and middle adolescents are also characteristics of late adolescents aged nineteen and twenty" to show evolving standards of decency).

313 *See id.* at 46–47 (explaining that defendant relied on the ABA resolution to show evolving standards of decency); People v. Flores, 462 P.3d 919, 966 (Cal. 2020) (noting that the defendant pointed to the ABA resolution to show national consensus).

314 *See* Pike v. State, No. E2009-00016-CCA-R3-PD, 2011 WL 1544207, at *64 (Tenn. Crim. App. Apr. 25, 2011) (highlighting that the defendant relied on, inter alia, a Tennessee state law that recognizes youth as a statutory mitigating factor at sentencing); *Flores*, 462 P.3d at 966 (noting that the defendant relied on a California state law that expanded "youth offender parole hearings" to inmates who were twenty-five or younger at the time of the crime).

315 *See Pike*, 2011 WL 1544207, at *64–65 ("Tennessee has not executed anyone who was younger than twenty-three at the time of the offense . . . . Only 7.7% of Tennessee's present death-sentenced inmates were nineteen or under at the time of the crime.").

316 *See, e.g.*, *Flores*, 462 P.3d at 966 ("[T]hese developments do not establish the 'national consensus' necessary to justify a categorical bar on the death penalty for individuals between the ages of [eighteen] and [twenty-one] at the time of their offenses."); *Hairston*, 472 P.3d at 49 ("While we are not blind to the national and international trends . . . , [the defendant] has provided no evidence

refused to extend the holding in *Roper* to young adults, reasoning that legislative bodies serve as the basis for determining national consensus and there is no consensus among the legislative bodies of the states that still use the death penalty to extend the prohibition against the death penalty to young adults.[317] In other words, the Idaho Supreme Court concluded that the legislatures of the states that still impose capital punishment have not enacted any laws that create such an extension. This rationale tracks closely with the reasoning in the *Roper* line of cases. In *Roper*, the Supreme Court found evidence of national consensus based on the abolition of the juvenile death penalty in the majority of states, the infrequency of its use in the states that have not abolished it, and the consistent downward trend toward abolishing its use.[318] Similarly, the Supreme Court in *Graham* observed the abolition of juvenile LWOP sentences in several states and the infrequency of juvenile LWOP sentences for nonhomicidal offenses.[319] The Supreme Court has even specified that the laws enacted by state legislatures are the "clearest and most reliable" objective evidence of national consensus.[320] As a result, many lower courts only consider state legislative action, which leads those courts to dismiss new scientific evidence and policy resolutions as immaterial developments. Even the other arguments that point to mitigating factors at sentencing and the prevalence of certain sentences are unavailing in light of the fact there is no evidence of state laws barring certain punishments on young adults. Without any action from the state legislatures directly on the issue of punishments for young adults, successfully demonstrating national consensus is unlikely.[321]

Courts have also reasoned that neuroscience alone cannot justify extending the holdings in the *Roper* line of cases to young adults. This

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that a consensus exists among those states that continue to exercise the death penalty about this issue."). In *Monschke* (the case that extended *Miller* to defendants twenty years old and younger), one of the points of contention between the majority and dissent was whether there was a national consensus. 482 P.3d 276, 280 n.8 (Wash. 2021). While the majority conceded that there is "certainly no national majority of state legislatures or courts prohibiting mandatory LWOP" for defendants twenty years old and younger, it argued that there is "definitely an affirmative trend among states to carve out rehabilitative space for 'young' or 'youthful' offenders as old as their mid-[twenties]." *Id.* (citations omitted). *But see id.* at 293–94 (Owens, J., dissenting) (arguing that there is neither a national consensus of states prohibiting mandatory LWOP sentences for defendants twenty years old and younger nor any affirmative trend to carve out a rehabilitative space).

317 *Hairston*, 472 P.3d at 50.

318 Roper v. Simmons, 543 U.S. 551, 567 (2005).

319 Graham v. Florida, 560 U.S. 48, 62 (2010).

320 *Id.* (quoting Atkins v. Virginia, 536 U.S. 304, 312 (2002)).

321 *But see Monschke*, 428 P.3d at 280 n.8 (observing an affirmative trend among states to "carve out rehabilitative space" for young adults).

rationale is arguably the most compelling as it squarely addresses what effect neuroscience should have on sentencing jurisprudence for young adults. In *United States v. Gonzalez*, the defendant argued that the *Roper* line of cases were based on outdated science and modern scientific consensus required the holding in *Miller* to apply to all offenders below the age of twenty-one.[322] The First Circuit rejected this argument, reasoning that "scientific evidence is merely one factor, among an array of factors, that the [Supreme] Court has considered when invalidating certain criminal sentences imposed on juveniles."[323] The First Circuit noted in particular that the scientific consensus on brain development was not the exclusive rationale in the *Roper* line of cases.[324] Instead, the court in *Gonzalez* understood the empirical studies cited in the *Roper* line of cases as offered to merely provide further support for the notion that juveniles were less culpable.[325] The court opined that the Supreme Court chose the age of eighteen as the categorical divide between juveniles and adults after balancing environmental and societal factors and concluding that eighteen "represented the point where society draws the line for many purposes between childhood and adulthood."[326] Indeed, arguments that rely solely on physiological development ignore the Supreme Court's multifaceted approach in the *Roper* line of cases and improperly elevate neuroscience research from one of many factors to the sole determinant of where to draw the line between young adult offenders and adults.[327]

The Delaware Supreme Court expressed almost identical reasoning in *Zebroski v. State*.[328] The court in *Zebroski* highlighted two problems with using scientific evidence to extend the *Roper* line of cases to young adults. First, the court believed that the Supreme Court had already considered such evidence and rejected it, explaining that the Court in *Roper* was aware that "children do not transform into psychologically-and neurologically-mature adults on their eighteenth birthdays" and that the Court's holding was not founded on a "now-outdated understanding of adolescent development."[329] Second, the Delaware Supreme Court asserted that scientific evidence was not the sole

322 United States v. Gonzalez, 981 F.3d 11, 18–19 (1st Cir. 2020).
323 *Id.* at 19.
324 *Id.*
325 *Id.*
326 *Id.* at 20 (internal quotation marks omitted) (citation omitted).
327 *Id.* at 21.
328 179 A.3d 855, 862 (Del. 2018).
329 *Id.* at 861.

(or even primary) reason to draw the line at eighteen years old.[330] As the Delaware Supreme Court read it, the majority opinion in *Roper* "retreated from the science to a more conventional, law-controlled analysis" and chose the age of eighteen based on the societal markers of adulthood, not the most advanced science of the time.[331] This understanding of the Supreme Court's use of scientific evidence in the *Roper* line of cases necessitated the court's conclusion in *Zebroski*: Developments in neuroscience do not support redrawing the line of criminal majority because it is society's collective judgment that draws that line.[332]

Other courts have also recognized that new scientific evidence only confirms existing views of young adults, which derive from society's conventional wisdom. For example, in *State v. McDermott*, a Wisconsin state court compared new scientific findings on young adults' brain development to observations made by ancient Greek philosophers on the behavior of young adults.[333] Specifically, the court referenced the work of Aristotle and Homer to illustrate that impulsivity in adolescence "has been known since humans were able to observe their environment."[334] In the court's view, new scientific evidence only "puts the old wine of human experience in the new bottles of recent research and labels the entire package as 'new.'"[335] This understanding of scientific research essentially confines its role to influencing policy decisions. Some courts have stated that new scientific evidence should be used to convince state legislatures to change the laws, not as the basis for legal relief.[336] While these courts admit that the implications of new scientific evidence give rise to ethical, moral, and public policy concerns, they maintain that legislative bodies are better equipped to address those concerns than the courts.[337]

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330 *Id.* at 862.

331 *Id.* (alterations in original omitted) (citation omitted).

332 *Id.*; *see also* People v. Harris, 120 N.E.3d 900, 913–14 (Ill. 2018) (noting that "[n]ew research findings do not necessarily alter [the] traditional line between adults and juveniles" because the decisions in the *Roper* line of cases were "not based primarily on scientific research"); People v. Sanchez, 98 N.Y.S.3d 719, 725 (N.Y. Sup. Ct. 2019) ("[T]he precise place the line has been drawn is based on law and policy considerations, not science.").

333 810 N.W.2d 237, 244 (Wis. Ct. App. 2012).

334 *Id.*

335 *Id.*

336 *See, e.g.*, State v. Lauderdale, No. 37141-7-III, 2020 WL 7664232, at *6 (Wash. Ct. App. Dec. 24, 2020) (noting brain science might persuade the state legislature).

337 *See, e.g.*, Nelson v. State, 947 N.W.2d 31, 39–40 (Minn. 2020) (citation omitted) ("It is a well-established principle that crimes and sentences are within the province of the Legislature.").

A review of the case law clearly demonstrates that Eighth Amendment challenges to sentences imposed on young adults will continually fail. The cases demonstrate two general patterns regarding how courts have treated these challenges. On the one hand, most courts simply rejected the challenges after narrowly applying the holdings in the *Roper* line of cases without any notable analysis. On the other hand, some courts were willing to engage in the constitutional analysis and grapple with the significance of this new scientific research in young adult sentencing. However, even those courts continued to reject the challenges. By reviewing these decisions in the aggregate, a common narrative is revealed: Neuroscience is not enough.

The landmark holdings in the *Roper* line of cases were not the product of science alone. In the *Roper* line of cases, before even considering the scientific research, the Supreme Court reviewed legislative trends to determine whether there was evidence of a national consensus against the sentencing practice. Only after finding sufficient evidence of national consensus, the Court shifted its attention to the culpability of juveniles. In concluding that juveniles are less culpable than adults, the Court certainly relied on new scientific evidence, which included neuroscience. However, neuroscience did not compel that conclusion. A more plausible reading of the *Roper* line of cases is that the Court used new scientific research as one way to explain why juveniles have diminished culpability. The Supreme Court has long understood juveniles as less culpable than adults and this understanding existed well before neuroscience could offer any explanation. Young adults relying on new scientific evidence to challenge the constitutionality of their punishments undervalue the persuasiveness of conventional wisdom and how that wisdom primarily contributed to the outcomes in the *Roper* line of cases. Indeed, the Supreme Court's use of new scientific evidence in the *Roper* line of cases can be best understood as bolstering longstanding societal views on juvenile culpability, not as disrupting those views. Young adults, on the other hand, have used new scientific evidence in a fundamentally different way—they have used it to disrupt societal views on young adult culpability since society does not perceive young adult culpability similarly to juvenile culpability.

2. Equal Protection Clause

The Equal Protection Clause of the Fourteenth Amendment provides: "No State . . . shall deny to any person within its jurisdiction the equal

protection of the laws."[338] The Supreme Court has interpreted the Clause as guaranteeing that "all persons similarly situated should be treated alike."[339] However, the Supreme Court has noted that the Constitution "does not require things which are different in fact or opinion to be treated in law as though they were the same."[340] Legislatures have the initial discretion to decide what is different and what is the same.[341] That is, legislative bodies can enact discriminatory laws that treat similar people differently. But the legislatures cannot enact such laws with impunity. Indeed, if the government enacts a discriminatory law, the law may be susceptible to an equal protection challenge. All courts evaluating equal protection challenges must answer the same broad question: Is the discrimination justified by a sufficient purpose?[342] In order to answer this broader question, three more specific questions must be asked: (1) What is the classification? (2) What level of scrutiny should apply? and (3) Does the law meet this level of scrutiny?[343] A court begins by identifying what classification the discriminatory law falls into. There are two types of classifications—laws that are discriminatory on their face and laws that are facially neutral law but create a discriminatory impact or effect.[344]

After identifying the appropriate classification, the court then identifies the level of scrutiny that should be applied to the law.[345] There are generally three levels of scrutiny: Strict scrutiny, intermediate scrutiny, and the rational basis test.[346] Strict scrutiny is typically applied to laws that discriminate on the basis of race or national origin.[347] When evaluating discriminatory laws under strict scrutiny, the law is only upheld if the government proves that the law is necessary to achieve a compelling government purpose.[348] Intermediate scrutiny is often applied to laws that discriminate on the basis

338 U.S. CONST. amend. XIV, § 1, cl. 4.

339 City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985) (citing Plyer v. Doe, 457 U.S. 202, 216 (1982)).

340 Tigner v. Texas, 310 U.S. 141, 147 (1940).

341 *See Plyler*, 457 U.S. at 216 ("A legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of the State to remedy every ill.").

342 ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 697 (5th ed. 2015).

343 *Id.* at 698.

344 *Id.*

345 *Id.* at 699.

346 *Id.*

347 *Id.*

348 *Id.*

of gender.[349] Under intermediate scrutiny, a discriminatory law is upheld if it is substantially related to an important government purpose.[350] Lastly, the rational basis test is applied to all other laws that do not invoke a higher level of scrutiny.[351] Under the rational basis test, the discriminatory law is upheld if it "bears some fair relationship to a legitimate public purpose."[352] In other words, a court must determine whether the law is rationally related to a legitimate government purpose.[353]

Finally, the court must determine whether the discriminatory law meets the applied level of scrutiny.[354] To do this, the court evaluates the discriminatory law's ends and its means.[355] The law's ends are evaluated through the level of scrutiny applied.[356] For strict scrutiny, the law's end must be deemed compelling; for intermediate scrutiny, the law's end must be considered important; and for the rational basis test, the law's end must have a legitimate purpose.[357] In considering the means of the law, the court generally focuses on the degree to which the law is overinclusive or underinclusive.[358] A law is overinclusive if it applies to people who do not need to be included in order to meet the law's end.[359] A law is underinclusive if it does not apply to people who are similar to those to whom the law applies in order to meet the law's end.[360] Like when evaluating the law's ends, the law's means are also evaluated through the level of scrutiny applied.[361] For strict scrutiny, a relatively close fit is required (the law's means is not overinclusive or underinclusive); for intermediate scrutiny, a closer fit is required than is under a rational basis test.[362]

Although the Supreme Court in the *Roper* line of cases did not consider whether the challenged sentences violated the Equal Protection Clause, young adult offenders still cite those cases to argue that unequal treatment of juveniles and young adults at sentencing violates the Equal Protection

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349 *Id.*
350 *Id.*
351 *Id.*
352 Plyler v. Doe, 457 U.S. 202, 216 (1982).
353 CHEMERINSKY, *supra* note 342, at 699.
354 *Id.* at 701.
355 *Id.*
356 *Id.*
357 *Id.*
358 *Id.*
359 *Id.* at 702.
360 *Id.* at 701.
361 *Id.* at 702.
362 *Id.*

Clause.[363] Young adults bringing equal protection challenges commonly claim that young adults and juveniles are similarly situated and, therefore, must be treated alike under the law.[364] Like the Eighth Amendment challenges, these equal protection challenges rely on new scientific evidence to illustrate the similarities between juveniles and young adults.[365] Nonetheless, courts continually reject these challenges.[366]

These equal protection challenges are reviewed under the rational basis test.[367] The Supreme Court has repeatedly held that laws discriminating on the basis of age are not subject to a higher level of scrutiny and must only satisfy the rational basis test.[368] As explained above, the rational basis test is satisfied as long as there is a rational relationship between the discriminatory law and a legitimate government purpose.[369] This deferential level of scrutiny effectively creates an insurmountable hurdle for young adults challenging their sentences under the Equal Protection Clause.[370] As a result, courts invariably find that sentencing laws discriminating between juveniles and young adults do not violate the Equal Protection Clause. For example, in *Adams v. Frauenheim*, the U.S. District Court for the Northern District of California held that California's sentencing structure, which treated young adults differently than juveniles, satisfied the rational basis test.[371] The young adult defendant in *Adams* challenged a sentencing provision which allows juveniles who received an LWOP sentence to request a resentencing after

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363 *See, e.g.*, Joint Brief for the Defendants/Appellants on Appeal from the Suffolk Cnty. Superior Ct. at 72, 75, Commonwealth v. Watt, 146 N.E.3d 414 (Mass. 2020) (arguing that a mandatory LWOP sentence imposed on a young adult, but not a juvenile, violates the Eighth Amendment and Equal Protection Clause).

364 *See, e.g.*, *In re Jones*, 255 Cal. Rptr. 3d 571, 573 (Cal. Ct. App. 2019) (restating young adult defendant's argument that the sentencing law violates the Equal Protection Clause because it denies young adults the same opportunity to petition for resentencing that is afforded to similarly situated juvenile offenders).

365 *See, e.g.*, *id.* at 574 (noting that young adult defendant argued that juveniles and young adults are similarly situated because they have "developing brains, lack maturity, and have increased potential for rehabilitation").

366 *See, e.g.*, Adams v. Frauenheim, No. 17-cv-01289-EMC, 2018 WL 3046939, at *7 (N.D. Cal. June 14, 2018) (rejecting equal protection challenge to differential treatment between juveniles and young adults).

367 *See, e.g., id.* at *5 (stating that, when neither a suspect class nor a fundamental right is implicated, the appropriate standard of analysis is rational basis review).

368 Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 83 (2000); *see also* Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976) (declining to apply strict scrutiny to age classifications).

369 *Supra* notes 352–353 and accompanying text.

370 *See* CHEMERINSKY, *supra* note 342, at 700 ("The rational basis test is enormously deferential to the government, and only rarely have laws been declared unconstitutional for failing to meet this level of review.").

371 *Adams*, 2018 WL 3046939, at *6.

serving fifteen years of incarceration.[372] The California Legislature enacted this provision in light of the Supreme Court's holding in *Miller v. Alabama*, which held that mandatory LWOP sentences could not be imposed on juveniles.[373] The district court in *Adams* concluded that the "distinction the California Legislature drew regarding LWOP sentences between juvenile offenders and adult offenders (including those who just turned [eighteen]) is rationally related to the legitimate governmental interest in treating juvenile offenders less harshly than adult offenders due to their immature and still-developing minds."[374] Similarly, in *In re Jones*, the California Court of Appeal rejected a nearly identical challenge.[375] There, the court reasoned that the sentencing provision satisfied the rational basis test because the California Legislature could reasonably decide to distinguish juveniles from young adults.[376] Drawing a bright line at eighteen years old for sentencing purposes, the court reasoned, is not impermissibly arbitrary.[377]

Courts have also denied equal protection challenges after simply reasoning that juveniles and young adults are not similarly situated.[378] In *State v. Robertson*, the Minnesota Supreme Court used that exact reasoning in order to support its holding that a young adult's equal protection claim was meritless.[379] Specifically, the court was considering whether the U.S. Supreme Court's holding in *Miller* imposed an age-based classification that unconstitutionally distinguishes between juvenile offenders and twenty-two-year-old offenders.[380] Since the U.S. Supreme Court already held that adults and children are constitutionally different, the Minnesota Supreme Court reasoned that juveniles and adults are not similarly situated, and equal protection principles do not apply.[381] Courts utilizing this rationale seem to

372 *Id.* at *3–*4.

373 *Id.* at *3.

374 *Id.* at *7.

375 *In re Jones*, 255 Cal. Rptr. 3d 571, 574–75 (Cal. Ct. App. 2019).

376 *Id.* at 575.

377 *Id.*

378 *See, e.g.*, Smith v. State, 908 N.W.2d 539, at *3 (Iowa Ct. App. 2017) (unpublished table decision) (rejecting equal protection challenge on the basis that "[j]uveniles and young adults are not similarly situated for the purposes of sentencing within this constitutional scheme").

379 State v. Robertson, 884 N.W.2d 864, 877 (Minn. 2016). The opinion in *Robertson* does not explicitly explain the reasons for the court's holding. Instead, the court stated that it recently rejected identical arguments in *Munt v. State*, 880 N.W.2d 379 (Minn. 2016), and that it was relying on the reasoning expressed in *Munt* to support its holding. *Robertson*, 884 N.W.2d at 877; *see also Munt*, 880 N.W.3d at 383 (holding that the failure to extend *Miller* to a thirty-five-year-old offender does not violate the Equal Protection Clause).

380 *Robertson*, 884 N.W.2d at 877.

381 *Munt*, 880 N.W.3d at 838.

sidestep traditional equal protection analyses by establishing at the onset that the Equal Protection Clause is inapplicable to these claims.

Accordingly, equal protection challenges to sentences imposed on young adult will likely continue to fail. Even if courts accept that juveniles and young adults are similarly situated in light of new scientific evidence, the Equal Protection Clause only demands that age-based classifications satisfy the rational basis test. This highly deferential level of scrutiny will thwart any equal protection arguments advanced by young adults. For those reasons, challenges under the Equal Protection Clause will not yield any meaningful change to sentences imposed on young adults or address their diminished criminal responsibility.

3. What This Means for Young Adults

Expecting the courts to intervene and redefine young adult culpability is an unrealistic expectation. As the case law indicates, challenges to sentences imposed on young adults under the Eighth Amendment and Equal Protection Clause are widely unsuccessful. Comparatively, an Eighth Amendment challenge is more persuasive as the courts can specifically consider the diminished culpability of young adults while exercising their independent judgment. However, before a court can bring its own judgment to bear, it must first consider the national consensus on the sentencing practice, which has proven to be an obstacle for recent claims. Furthermore, the recent shift by the Supreme Court in establishing categorical rules against noncapital punishments is a rather new analysis for Eighth Amendment challenges. As discussed above, the Supreme Court's holdings in *Graham* and *Miller* broke from the longstanding "death is different" doctrine. The Supreme Court likely abandoned the doctrine in order to bar cruel, noncapital sentencing practices that ignored the differences between children and adults. Whether this new approach to Eighth Amendment challenges will persist over time is unclear. But what is clear is the Supreme Court's commitment to distinguishing juveniles from adults. By re-emphasizing that children are different, the Supreme Court conformed with conventional folk wisdom and built on centuries of differential treatment for children.

Unlike the Supreme Court's traditional understanding that children are different, the criminal culpability of young adults has not been as foundational in either our folk psychological explanations of their behavior or our criminal jurisprudence regulating their behavior. Although new scientific research (especially neuroscience) has revealed groundbreaking evidence regarding the behavior of young adults, the Supreme Court will not

redefine the relationship between young adults and criminal responsibility unless the evidence substantiates longstanding societal beliefs or can fully explain young adults' antisocial behavior. The current constitutional framework creates a "doctrinal box" for lower courts, constraining their ability to redefine young adult criminal responsibility even if they are persuaded by the new scientific evidence. In other words, the rational basis test applied to equal protection challenges and the limitations to exercising independent judgment under Eighth Amendment challenges restrict the courts from extending certain protections to young adults. Lower courts are effectively barred from significantly redefining the relationship between young adults and criminal responsibility.

In the absence of judicial intervention, the most sensible approach that would properly address the differences posed by young adults when compared to juveniles and adults is legislatively establishing a new, separate system. A distinct system that considers the specific needs of young adults and emphasizes a rehabilitative approach would be a long-term solution, which normalizes differential treatment for young adults. The young adult court model, although relatively new, has demonstrated reductions in recidivism for young adults and reduced costs to the community. Young adult courts provide a tailored approach specific to young adults and can offer a rehabilitative focus. The establishment of young adult courts is analogous to the creation of the juvenile justice system during the early twentieth century.

CONCLUSION

This Comment has focused on two overlapping concepts: Folk wisdom and scientific evidence. As exemplified by the history of the treatment of juveniles in the criminal justice system, recent advances in behavioral and neuroscientific research have conformed with society's long-term perception of children. Although the *Roper* line of cases has certainly reshaped sentencing in juvenile justice, the Supreme Court's rationale relied on deep-rooted and traditional understandings of juvenile behavior. Since first invoking parens patriae in the 1800s, the role of the courts in administering separate treatment for juveniles has been embedded in American jurisprudence. Moreover, society's conventional wisdom on the behavior of children is just as well-established. Even though recent behavioral and neuroscientific evidence has shown that young adults also have diminished criminal responsibility compared to adults, history and constitutional doctrine will likely prevent any meaningful response from the courts.

Instead, a better, more comprehensive approach to addressing young adult criminal responsibility is establishing young adult courts. Young adult courts can provide meaningful reform to the criminal justice system and redefine criminal responsibility for young adults in light their diminished capacity.