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EXTENDING SENTENCING MITIGATION FOR DESERVING YOUNG ADULTS

Kelsey B. Shust*

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* J.D., Northwestern University School of Law, 2014; B.A., University of Iowa, 2010. Sincere thanks to the talented *Journal of Criminal Law and Criminology* editors, especially James Crowley, Daniel Faichney, Timothy Fry, and Jonathan Jacobson. For my parents and Brian.

INTRODUCTION

Age, rather than death, has come to define the Supreme Court's Eighth Amendment jurisprudence.[1] In three decisions over the last nine years, the Court has significantly altered the criminal sentencing landscape by doling out constitutional, categorical discounts on capital and noncapital punishment for those who had not yet celebrated their eighteenth birthdays at the time of their crimes.[2] The Court rejected capital punishment for those under eighteen,[3] then life without parole in nonhomicide cases,[4] and most recently, the Court held that the Eighth Amendment prohibits mandatory life without parole sentences.[5] Each decision has turned on attributes, or factors, inherent in youth that the Court has found make those under eighteen less culpable for their crimes under the Eighth Amendment.[6] They

[1] *See* Miller v. Alabama, 132 S. Ct. 2455, 2470 (2012) ("So if . . . death is different, children are different too . . . . [I]t is no surprise that the law relating to society's harshest punishments recognizes such a distinction." (internal quotation marks omitted)); *see also* Mary Berkheiser, *Death Is Not So Different After All:* Graham v. Florida *and the Court's 'Kids Are Different' Eighth Amendment Jurisprudence*, 36 VT. L. REV. 1, 1 (2011) (describing how the Court's approach in *Graham v. Florida* "unceremoniously demolished the Hadrian's Wall that has separated its 'death is different' jurisprudence from non-capital sentencing review since 1972" and, in its place, "fortified an expansive 'kids are different' jurisprudence"); Carol S. Steiker & Jordan M. Steiker, Graham *Lets the Sun Shine in: The Supreme Court Opens a Window Between Two Formerly Walled-Off Approaches to Eighth Amendment Proportionality Challenges*, 23 FED. SENT'G REP. 79, 81 (2010) ("Justice Kennedy [in *Graham*] thus managed to transform what had looked like a capital versus noncapital line, the application of which rendered noncapital challenges essentially hopeless, into a categorical rule versus individual sentence line . . . .").

[2] *See Miller*, 132 S. Ct. at 2455; Graham v. Florida, 130 S. Ct. 2011 (2010); Roper v. Simmons, 543 U.S. 551 (2005). Each of these decisions followed *Atkins v. Virginia*, which held executing mentally retarded criminals to be cruel and unusual punishment due to the offenders' reduced capacity and the executions' failure to serve social justifications recognized for the death penalty. *See* 536 U.S. 304, 318–21 (2002).

[3] *See Roper*, 543 U.S. at 578.

[4] *See Graham*, 130 S. Ct. at 2034.

[5] *See Miller*, 132 S. Ct. at 2469. The Court considered *Miller* along with *Jackson v. Hobbs*, 132 S. Ct. 2455 (2012) (No. 10-9647), which also presented the question of whether a juvenile's sentence of life without parole violated the Eighth Amendment prohibition against cruel and unusual punishment. *See Miller*, 132 S. Ct. at 2460–62.

[6] *See Miller*, 132 S. Ct. at 2464 (citing *Graham*, 130 S. Ct. at 2026; *Roper*, 543 U.S. at 569–70).

include offenders' (1) lack of maturity and underdeveloped sense of responsibility, (2) vulnerability to negative influences and limited control over their environment, and (3) lack of characters that can be rehabilitated.[7]

These factors have not been surmised simply from precedent or common sense. Rather, the Court has relied on scientific and sociological studies to support its finding that these three characteristics are inherent among those under eighteen,[8] reduce that group's culpability, and accordingly reduce the punishments that society can justly impose.[9] But the Court's reliance on such evidence overextends its usefulness. Neuroscientific and psychological data on which the Court has relied does not identify a bright-line age at which these three factors no longer lessen culpability.[10] Their resulting impact on penological justifications supporting legitimate punishment, which have also been central to the Court's holdings, similarly does not hinge on an offender having a particular number of candles on his birthday cake. The Court itself has previously recognized the shallow truth of age, holding youth to be "more than a chronological fact" and instead "a time and condition of life when a person may be most susceptible to influence and to psychological damage."[11] Still, since *Roper v. Simmons*, the Court has resolved to categorically and increasingly mitigate punishment based on youthfulness via the Eighth Amendment only when offenders are under eighteen. While

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[7] *Id.* The Court *Bellotti v. Baird* had posited a similar but distinguishable list of reasons for treating children differently from adults, including: (1) "the peculiar vulnerability of children," (2) "their inability to make critical decisions in an informed, mature manner," and (3) "the importance of the parental role in child rearing." *See* 443 U.S. 622, 634 (1979) (concerning a law restricting the right of a minor to obtain an abortion).

[8] *See Roper*, 543 U.S. at 569.

[9] *See Miller*, 132 S. Ct. at 2464–65; *Graham*, 130 S. Ct. at 2026, 2034; *Roper*, 543 U.S. at 569, 570, 578.

[10] A brief offering up scientific evidence for the Court, for example, recognized its own limitations. *See* Brief for American Psychological Ass'n et al. as Amici Curiae Supporting Petitioners at 6 n.3, Graham v. Florida, 130 S. Ct. 2011 (2010) (Nos. 08-7412, 08-7621) ("[S]cience cannot, of course, draw bright lines precisely demarcating the boundaries between childhood, adolescence, and adulthood."); *see also* Sara B. Johnson et al., *Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy*, 45 J. ADOLESCENT HEALTH 216, 218 (2009) ("[N]euroimaging studies do not allow a chronologic cut-point for behavioral or cognitive maturity at either the individual or population level."). For further discussion, see *infra* Part II.A.

[11] *See* Eddings v. Oklahoma, 455 U.S. 104, 115 (1982). For this reason, the Court required lower courts to also consider "the background and mental and emotional development of a youthful defendant." *Id.* at 116.

the Court in *Roper* acknowledged and discounted the limitations of its bright-line rule,[12] the *Miller* Court did not address the issue.

This Comment aims to seize on the *Miller* Court's silence and demonstrate the inequity in drawing a bright line at eighteen for considering youthfulness in mitigating punishment under the Court's logic. Given both the scientific impossibility of identifying a precise age at which characteristics of youthfulness cease, and the Court's repeated recognition that these very factors impact culpability and preclude just punishment,[13] the current approach cannot stand. Instead, this Comment argues that if the way to address the increasingly punitive orientation of criminal justice remains one of protecting youthful defendants through the Eighth Amendment, then the same consideration of youthfulness that has been deemed constitutionally relevant for those under eighteen must also be available for equally youthful[14] defendants over eighteen to assert when they face equally harsh and irrevocable sentences.

While considerable literature discusses sentencing policy for young offenders, this Comment focuses on the Supreme Court's trio of categorical decisions to examine the justifications for a bright-line rule and, ultimately, to lend support for defendants' abilities to seek out the mitigating force of youthfulness up to age twenty-five. By continuing to categorically exclude those over eighteen in homage to society's traditional demarcation point of adulthood, the Court loses sight of the exceptionality of criminal punishment compared to other rights-allocating areas of the law, such as voting. Furthermore, setting a bright line at eighteen unjustly disregards offenders over eighteen who, in many instances, would likewise be deemed less responsible under the scheme of justifications the Court has set forth.

Following this Introduction, Part I of this Comment provides background regarding the relationship between youthfulness and culpability. First, it sketches its historical foundations, describing both the

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[12] In *Roper*, the Court reasoned that "[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18," but "[t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood." 543 U.S. at 574.

[13] In *Miller*, the Court articulated its most recent affirmation that the factors are of central import for sentencing judges and juries to consider in arriving at appropriate, proportional punishment. *See* 132 S. Ct. at 2468.

[14] This Comment uses the term "youthful" to describe those who possess the characteristics that the Court has relied on in *Roper*, *Graham*, and *Miller* to mitigate punishment. In addition, whereas other writers have opted to distinguish between "children" and "adults," using the age of eighteen as a boundary, this Comment adopts the terms "youth" and "young people" to describe those individuals who are no longer children and not yet fully functioning adults. Kenneth Keniston referred to the period between adolescence and adulthood as "youth" in 1970. Kenneth Keniston, *Youth: A "New" Stage of Life*, 39 AM. SCHOLAR 631, 635 (1970). Scholars today continue to redefine this transitional period. *See infra* Part II.A.

early common law infancy defense and the rise and fall of the rehabilitative juvenile justice model. Second, it describes the biological underpinnings of youthfulness that have been documented through psychological and neuroscientific study. Third, it shows how the Supreme Court has given this evidence Eighth Amendment significance.

Part II then raises three key issues with the Court's bright line at eighteen. It highlights the lack of scientific support for a categorical line, describes the Court's improper comparison to other rights-allocating areas of the law, and demonstrates how penological justifications for punishment can be similarly undermined for youthful defendants over eighteen.

Finally, Part III argues that the Court should make the mitigating effect of youthfulness available to youthful offenders between the ages of eighteen and twenty-five by recasting its categorical line as a presumption. Under such a scheme, defendants up to eighteen years old would be irrebuttably presumed youthful, while defendants between the ages of eighteen and twenty-five could seek to show that they meet the Court's "youthful" criterion and likewise deserve protection from irrevocable sentences.

I. BACKGROUND

A. CENTURIES OF RECOGNIZING THE IMPACT OF YOUTHFULNESS ON CULPABILITY

The correlative relationship between youthfulness and culpability has long been recognized through the concept of infancy.[15] By the seventeenth century, English common law held that children under the age of seven could not be punished for any crime.[16] Those aged seven and under were irrebuttably presumed to lack the mental capacity to form the criminal intent necessary for justly imposing punishment.[17] While individuals

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[15] For an informative discussion of the origins of the infancy defense, see Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 1007–10 (1932).

[16] 4 WILLIAM BLACKSTONE, COMMENTARIES *22–23; 1 SIR MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 27 (Sollom Emlyn ed., 1800) (1736). English law regarding age and criminal responsibility borrowed from Roman civil law, which divided "minors"—generally those under age twenty-one or twenty-five—into general stages, such as *infantia* (birth until age seven), *pueritia proxima* (seven to fourteen), and *pubertas* (above age fourteen). *See* 1 HALE, *supra*, at 16–19. Ecclesiastical courts and Roman civil courts had previously established seven as "the age of reason," finding it to be the age at which a child could lose innocence, be guilty of sin, and be criminally liable for his behavior. *See* MICHAEL A. CORRIERO, JUDGING CHILDREN AS CHILDREN 36–37 (2006).

[17] *See* 4 BLACKSTONE, *supra* note 16, at *23; 1 HALE, *supra* note 16, at 27–28; *see also* EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 4 (5th ed. 1671) (noting that the principal end of punishment, deterrence, is not served when infants are below the "age of discretion").

between ages seven and thirteen were additionally presumed incapable of forming that intent,[18] proof that the child knew his act was wrong could rebut the presumption.[19] After the U.S. Bill of Rights was adopted, the common law rebuttable presumption of incapacity to commit felonies for youth between ages seven and thirteen remained in force, but "adult" punishments, such as execution, could theoretically be imposed on anyone over the age of seven.[20]

These gradations based on age reflected the importance of a guilty conscience for criminal punishment. To constitute a complete crime, "cognizable by human laws," Blackstone wrote, "there must be, first, a vicious will; and secondly, an unlawful act consequent upon such vicious will."[21] If a jury confronted a defendant incapable of committing a felony, Sir Matthew Hale advised that it could find that he committed the act but was not of sound mind, or that he could not discern between good and evil.[22] Determining culpability in this way reflected the understanding that developmental differences prevented very young offenders from forming criminal intent.[23] When offenders then passed the minimum threshold of competence, their diminished responsibility could still render them less culpable.[24] Defendants aged seven to fourteen were presumed to possess a natural incapacity to be guilty of crimes, which the state could rebut upon

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[18] 4 BLACKSTONE, *supra* note 16, at *23; 1 HALE, *supra* note 16, at 26–27 (noting an even greater presumption for those under twelve).

[19] *See* 4 BLACKSTONE, *supra* note 16, at *23; CORRIERO, *supra* note 16, at 37. While the rebuttable presumption recognized that some children matured more quickly than others, it also served the policy interest of punishing children who committed particularly atrocious acts, regardless of their immaturity. *See* CORRIERO, *supra* note 16, at 37.

[20] *See In re* Gault, 387 U.S. 1, 16 (1967); *see also* Julian W. Mack, *The Chancery Procedure in the Juvenile Court*, *in* THE CHILD, THE CLINIC AND THE COURT 310, 310 (Jane Addams ed., 1925); Craig S. Lerner, *Juvenile Criminal Responsibility: Can Malice Supply the Want of Years*, 86 TUL. L. REV. 309, 316 (2011); Victor L. Streib, *Death Penalty for Children: The American Experience with Capital Punishment for Crimes Committed While Under Age Eighteen*, 36 OKLA. L. REV. 613, 616 (1983) ("Seven children were executed prior to 1800 and 95 prior to 1900, the youngest aged ten years.").

[21] 4 BLACKSTONE, *supra* note 16, at *21 ("[A]n unwarrantable act without a vicious will is no crime at all."); *see also* 1 HALE, *supra* note 16, at 38 ("[I]t is the will and intention, that regularly is required, as well as the act and event, to make [an] offense capital.").

[22] *See* 1 HALE, *supra* note 16, at 27.

[23] *See* Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68, 100 (1997).

[24] *See* FRANKLIN E. ZIMRING, AMERICAN JUVENILE JUSTICE 55–56, 57 (2005) ("[E]ven after a youth passes the minimum threshold of competence that leads to a finding of capacity to commit crimes, the barely competent youth is not as culpable and therefore not as deserving of a full measure of punishment as a fully qualified adult offender."); Lerner, *supra* note 20, at 317.

individualized determinations of capacity.[25] For this group of defendants, therefore, "[t]he capacity of doing ill, or contracting guilt," as Blackstone put it, was "not so much measured by years and days, as by the strength of the delinquent's understanding and judgment."[26]

Around the turn of the nineteenth century, recognition of youth developmental differences took on a new character. Progressive reformers,[27] animated by worsening household conditions and scholarly reconceptualization of childhood,[28] sought to establish separate courts to adjudicate young offenders[29]—sometimes as old as twenty-one.[30] The new courts' aim was to treat young offenders rather than punish them.[31] As such, a concern for youth welfare took precedence over concerns with their offenses.[32] The courts exercised states' *parens patriae* authority[33] to

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[25] *See* 4 BLACKSTONE, *supra* note 16, at *23; *see also* Lerner, *supra* note 20, at 317.

[26] 4 BLACKSTONE, *supra* note 16, at *23.

[27] Reformers in this period are commonly called "child savers." *See, e.g.*, MICHAEL B. KATZ, IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA 118–20 (1986); ANTHONY M. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY 3 (2d ed. 1977).

[28] *See* Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 693–94 (1991) [hereinafter Feld, *Transformation*]; *see also* Michael Grossberg, *Changing Conceptions of Child Welfare in the United States, 1820–1935*, *in* A CENTURY OF JUVENILE JUSTICE 3, 22–25 (Margaret K. Rosenheim et al. eds., 2002) (attributing family problems, such as rising divorce and escalating juvenile delinquency, to economic structural changes and noting that new understandings of child development produced concerns about child vulnerability). Works emphasizing the naturalness of children—such as that written by Jean Jacques Rousseau and Johann Pestalozzi, along with the works of G. Stanley Hall and Friedrich Froebel—influenced reformers. *See* ELIZABETH J. CLAPP, MOTHERS OF ALL CHILDREN: WOMEN REFORMERS AND THE RISE OF JUVENILE COURTS IN PROGRESSIVE ERA AMERICA 11, 80 (1998).

[29] In 1899, the Illinois General Assembly enacted the world's first juvenile court law, the Illinois Juvenile Court Act, 1899 Ill. Laws 131 (current version at 705 ILL. COMP. STAT. ANN. 405 (West 2010)). *See* BARRY KRISBERG & JAMES F. AUSTIN, REINVENTING JUVENILE JUSTICE 30 (1993). Other states followed. *See id.* Within the decade after Illinois passed its law, ten states established children's courts, and by 1925, all but two states had established specialized courts. *See id.*

[30] Martin R. Gardner, *The Right of Juvenile Offenders to Be Punished: Some Implications of Treating Kids as Persons*, 68 NEB. L. REV. 182, 191 (1989) ("The juvenile court movement assumed that young people under an articulated statutory age (sometimes as high as 21 years of age) are incapable of rational decisionmaking and thus lack the capacity for moral accountability assumed by the punitive model.").

[31] *See* David S. Tanenhaus, *The Evolution of Juvenile Courts in the Early Twentieth Century: Beyond the Myth of Immaculate Construction*, *in* A CENTURY OF JUVENILE JUSTICE, *supra* note 28, at 42, 42; *see also* Karen Clanton, *At the Helm: The Presiding Judges of the Juvenile Court*, *in* A NOBLE SOCIAL EXPERIMENT? THE FIRST 100 YEARS OF THE COOK COUNTY JUVENILE COURT 1899–1999, at 74, 74 (Gwen Hoerr McNamee ed., 1999).

[32] *See* Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 119–20 (1909) ("The problem for determination by the judge is not, Has this boy or girl committed a specific

emphasize treatment, supervision, and control in place of traditional, punitive criminal procedures.[34] Because punishment and blameworthiness largely had no place in this rehabilitative model of justice, issues regarding youthfulness and culpability received little attention for much of the twentieth century.[35]

That changed by the late 1980s with skyrocketing juvenile crime rates. Between 1980 and 1994, the number of juvenile arrests for violent offenses climbed 64% and juvenile arrests for murder specifically jumped 99%.[36] Media coverage of crime also exploded,[37] and state legislatures responded in near universality.[38] Over a period of just three years from 1992 to 1995, forty states enacted laws making it easier to prosecute juveniles in adult

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wrong, but What is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career.").

[33] First asserted in the United States in a juvenile proceeding in *Ex parte Crouse*, 4 Whart. 9, 11 (Pa. 1839), the *parens patriae* authority justifies governmental intervention in the lives of individuals who are unable to care for themselves. *See* Donna M. Bishop & Hillary B. Farber, *Joining the Legal Significance of Adolescent Developmental Capacities with the Legal Rights Provided by In re* Gault, 60 RUTGERS L. REV. 125, 127 n.7 (2007).

[34] *See* Mack, *supra* note 32, at 120 (arguing that "ordinary trappings" of criminal court are out of place in juvenile hearings, and the judge should sit "with the child at his side, where he can on occasion put his arm around his shoulder and draw the lad to him"); *see also* Feld, *Transformation*, *supra* note 28, at 695.

[35] *See* Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547, 591 (2000).

[36] JEFFREY BUTTS & JEREMY TRAVIS, THE RISE AND FALL OF AMERICAN YOUTH VIOLENCE: 1980 TO 2000, at 2 (2002), *available at* http://goo.gl/N1uGQy. From just 1984 to 1993, the juvenile arrest rate for murder increased 167% from a rate of 5 arrests per 100,000 juveniles to 14 per 100,000. *Id.*; *see also* OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 1996 UPDATE ON VIOLENCE 14–15 (1996) (discussing the arrest rate trend beginning in the late 1980s and noting that "[i]f trends continue . . . juvenile arrests for violent crime will more than double by the year 2010").

[37] *See Network News in the Nineties: The Top Topics and Trends of the Decade*, MEDIA MONITOR (Ctr. for Media & Pub. Affairs, Washington, D.C.), July/Aug. 1997, at 1–3. Between 1990 and 1997, one out of every ten stories on network evening news dealt with crime, climbing from 830 stories during 1992 to 2,574 during 1995. *See id.* at 2. At the same time, fear of crime increased dramatically, particularly in urban areas. *See* Daniel Romer et al., *Television News and the Cultivation of Fear of Crime*, 53 J. COMM. 88, 95 (2003).

[38] *See* FRANKLIN E. ZIMRING, AMERICAN YOUTH VIOLENCE 11–13 (1998). This universal urge to legislate, according to Professor Zimring, suggests a "disturbing" model of legal reform. Absent a showing of deficiency in the current legal institutions' abilities to deal with violence, "[l]egislative changes that are based solely on concern about high offense rates are vulnerable to error in a special way." *Id.* at 12.

criminal court,[39] and forty-seven states and the District of Columbia made changes in their laws concerning juvenile crime.[40] Although many observers mark the beginning of the end of the traditional juvenile court decades earlier when the Supreme Court decided *In re Gault*, spiking juvenile crime rates further upended support for rehabilitative ideals[41] and amassed calls of "adult time" for "adult crime"[42]—especially as fear swirled regarding an entirely different breed of so-called super-predators.[43] Taken together, the new legislative schemes represented a "fundamental shift" in juvenile justice away from rehabilitating offenders and toward punishing

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[39] PATRICIA TORBERT ET AL., OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, STATE RESPONSES TO SERIOUS AND VIOLENT JUVENILE CRIME 3 (1996), *available at* http://goo.gl/2b5ZK2.

[40] *See id.* at 59. Professor Feld situates this "get tough" era of juvenile justice in a broader context dating back to the 1960s when rehabilitation was replaced by a paradigm of just deserts, penal proportionality, and determinate sentences. Barry C. Feld, *A Century of Juvenile Justice: A Work in Progress or a Revolution that Failed?*, 34 N. KY. L. REV. 189, 207–13 (2007).

[41] *See* ELIZABETH S. SCOTT & LAURENCE STEINBERG, RETHINKING JUVENILE JUSTICE 8–9 (2008); Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 137 (1998). The Supreme Court in *In re Gault* extended to juveniles in delinquency proceedings some of the same constitutional rights to which defendants in criminal proceedings are entitled, including the right to counsel and the privilege against self-incrimination. *See* 387 U.S. 1, 41, 55 (1967). Critics of the decision, including Justice Potter Stewart, argued it "serve[d] to convert a juvenile proceeding into a criminal prosecution" and thereby "invite[d] a long step backwards into the nineteenth century." *Id.* at 79 (Stewart, J., dissenting).

[42] *See* Elizabeth S. Scott, *Keynote Address: Adolescence and the Regulation of Youth Crime*, 79 TEMP. L. REV. 337, 351 n.54 (2006). While the slogan appealed to retributive instincts, it also suggested that serious violence is not a characteristic of childhood but "is somehow adult." *See* ZIMRING, *supra* note 38, at 9.

[43] Some politicians, scholars, and media in the mid-1990s used the term "super-predators" to describe an impending generation of violent young offenders. *See, e.g.*, *Hearings on the Juvenile Justice and Delinquency Prevention Act Before the Subcomm. on Early Childhood, Youth and Families of the H. Economic and Educational Opportunities Comm.*, 104th Cong. 90 (1996) (statement of Rep. William McCollum, Chairman, Subcomm. on Crime, H. Comm. on the Judiciary); John J. Dilulio, Jr., *The Coming of the Super-Predators*, WKLY. STANDARD, Nov. 27, 1995, at 23; Bob Dole, Weekly Republican Radio Address (July 6, 1996), *available at* http://goo.gl/396Swt ("Unless something is done soon, some of today's newborns will become tomorrow's 'super predators'—merciless criminals capable of committing the most vicious of acts for the most trivial reasons . . . ."). For others, the fact that the phenomenon never materialized, Gary Marx, *Young Killers Remain Well-Publicized Rarity*, CHI. TRIB., Feb. 11, 1998, § 1, at A1, was unsurprising, *see* Franklin E. Zimring, *Crying Wolf Over Teen Demons*, L.A. TIMES, Aug. 19, 1996, at B5. *But see* Steve Drizin, *Trayvon and the Myth of the 'Juvenile Superpredator,'* HUFFINGTON POST (Sept. 17, 2013, 3:30 PM), http://goo.gl/qnhzy6 (suggesting that even though "the superpredators never arrived," still, "urban legends die hard").

them.[44] Over the coming several years, however, many began to question whether the "get-tough" laws and increasingly "adult" punishments were actually making the public safer.[45]

B. FINDING YOUTHFULNESS IN PSYCHOLOGY AND NEUROSCIENCE

As public debate surrounding youth prosecutions swelled, some researchers looked toward youth development with renewed interest.[46] In the decades laying bare the promise of the rehabilitative juvenile justice model, both developmental psychologists and neuroscientists exploring the practice of brain imaging honed in on changes in brain composition and behavior occurring between adolescence and adulthood.

Psychologists identified a number of important distinctive qualities attributable to youth. For example, psychologists found early adolescence to be accompanied by increased susceptibility to peer pressure.[47] Adolescents were also found to attach more weight to short-term consequences,[48] and they did not extend projections for consequences as far

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[44] *See* TORBERT ET AL., *supra* note 39, at xi.

[45] *See, e.g.*, Maya Bell, *A Child, A Crime—An Adult Punishment*, ORLANDO SENTINEL, Oct. 21, 1999, at A-1 ("Research is thin, but every study on the subject, including the most thorough one conducted at the University of Florida, has shown that young offenders sent to adult prison commit more serious crimes quicker and more often after their releases than similar offenders who remain in the juvenile system."); Barbara White Stack, *Law Giving Juveniles Adult Time Under Fire*, PITTSBURGH POST-GAZETTE, Aug. 5, 2001, at B-1 ("Two state senators . . . say it's time to investigate whether the 5-year-old 'adult time for adult crime' law in Pennsylvania has lived up to its promise . . . ."); Tina Susman, *Doubting the System*, NEWSDAY, Aug. 21, 2002, at A6.

[46] *See* Emily Buss, *What the Law Should (And Should Not) Learn from Child Development Research*, 38 HOFSTRA L. REV. 13, 33 (2009). The MacArthur Foundation, for example, convened a group to study adolescent development and funded extensive research about effective juvenile crime policy. *See id.*

[47] *See* Thomas J. Berndt, *Developmental Changes in Conformity to Peers and Parents*, 15 DEV. PSYCHOL. 608, 608, 615 (1979) (studying youth in third, sixth, ninth, eleventh, and twelfth grades and finding conformity to peers to increase between third and ninth grade, and then decline); Laurence Steinberg & Susan B. Silverberg, *The Vicissitudes of Autonomy in Early Adolescence*, 57 CHILD DEV. 841, 843, 848 (1986) (studying children in fifth, sixth, eighth, and ninth grades and noting that by ninth grade, the proportion of peer-oriented children leveled off); *see also* Scott & Grisso, *supra* note 41, at 162.

[48] *See* William Gardner, *A Life-Span Rational-Choice Theory of Risk Taking*, *in* ADOLESCENT RISK TAKING 66, 66 (Nancy J. Bell & Robert W. Bell eds., 1993); *see also* Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEV. REV. 339, 366–67 (1992) (concluding that high levels of reckless behavior during adolescence implicate developmental roots in sensation seeking and adolescent egocentrism, declining after adolescence—perhaps due to biology, increased maturity, and young people assuming greater responsibilities); Scott & Grisso, *supra* note 41, at 164.

into the future as did older youth.[49] Psychologists additionally discovered evidence suggesting that adolescents may be driven more by rewards and less by risks than "adults" are.[50] Moreover, psychologists found empirical support for the theory on adolescence first articulated by Erik Erikson,[51] which suggested that moving into adulthood involved changes in the way young people formed their identities.[52]

In the field of neuroscience, research began to depict adolescence as a period of continued brain growth and change. A pair of neuroimaging studies in 1999, for instance, showed continued development through adolescence of the brain's frontal lobe[53]—essential for such functions as anticipating consequences, planning, and controlling impulses.[54] Gray matter in the frontal lobe was shown to spike just prior to adolescence[55] and

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[49] *See* A.L. Greene, *Future-Time Perspective in Adolescence: The Present of Things Future Revisited*, 15 J. YOUTH & ADOLESCENCE 99, 102, 108–09 (1986) (studying ninth graders, twelfth graders, and college sophomores).

[50] *See* Leon Mann et al., *Adolescent Decision-Making: The Development of Competence*, 12 J. ADOLESCENCE 265, 275 (1989) ("[O]ur analysis of the modest evidence leads us to conclude that by age 15 years many adolescents have achieved a reasonable level of competence . . . . However, like all humans, adolescents do not consistently behave as competent decision makers . . . ."). *But see* Lita Furby & Ruth Beyth-Marom, *Risk Taking in Adolescence: A Decision-Making Perspective*, 12 DEV. REV. 1, 38 (1992) ("Our review of the empirical evidence on risk taking and of the literature on cognitive development and decision-making skills has found mixed results regarding the degree to which adolescents may be taking more risks than other age levels.").

[51] *See* Alan S. Waterman, *Identity Development from Adolescence to Adulthood: An Extension of Theory and a Review of Research*, 18 DEV. PSYCHOL. 341, 346, 355 (1982) ("It is during the college years that the greatest gains in identity formation appear to occur.").

[52] For an articulation of Professor Erikson's theory, see generally ERIK H. ERIKSON, IDENTITY AND THE LIFE CYCLE (W.W. Norton & Co. 1980) (1959); ERIK H. ERIKSON, IDENTITY: YOUTH AND CRISIS (1968). Professor Erikson artfully described adolescence as "a vital regenerator in the process of social evolution." ERIKSON, IDENTITY: YOUTH AND CRISIS, *supra*, at 134.

[53] Jay N. Giedd et al., *Brain Development During Childhood and Adolescence: A Longitudinal MRI Study*, 2 NATURE NEUROSCIENCE 861, 861 (1999); Elizabeth R. Sowell et al., In Vivo *Evidence for Post-adolescent Brain Maturation in Frontal and Striatal Regions*, 2 NATURE NEUROSCIENCE 859, 860 (1999). These studies used 3D image mapping techniques, whereas early quantitative structural brain-imaging studies in the late 1980s and early 1990s could not assess density. *See* Arthur W. Toga et al., *Mapping Brain Maturation*, 29 TRENDS NEUROSCIENCES 148, 149 (2006).

[54] *See* Adam Ortiz, *Adolescence, Brain Development and Legal Culpability*, A.B.A. JUV. JUST. CTR., Jan. 2004, at 1, *available at* http://goo.gl/b98tT2; *see also Inside the Teenage Brain: Interview: Jay Giedd*, PBS FRONTLINE (2002), http://goo.gl/IeSz3u ("The frontal lobe is often called the CEO, or the executive of the brain. . . . It's a part of the brain that most separates man from beast, if you will.").

[55] *See* Giedd et al., *supra* note 53, at 861 (finding gray matter to increase to maximum sizes around the ages of twelve and eleven for males and females respectively).

then decrease between adolescence and early adulthood[56] in a process known as pruning. Like sculpting a tree, pruning mirrors "cutting back branches [to] stimulate[] health and growth."[57] The gray matter reduction is accompanied by a white matter increase.[58] Through the cellular maturation process known as myelination, white matter development is said to improve cognitive functioning.[59] Because the samples for these studies were limited in age, however, they could not support conclusions about the endpoint of brain maturation.[60] When a team of neuroscientists finally mapped the trajectory of brain maturation using a sample of individuals ranging in age from seven to eighty-seven, they observed gray matter density changes continuing beyond adolescence into adulthood.[61]

Psychology professors Laurence Steinberg and Elizabeth Scott adopted the thrust of these and other emerging neuroscientific studies showing brain maturation to continue into early adulthood as part of their influential 2003 article, *Less Guilty by Reason of Adolescence*.[62] Combined with psychological research, discoveries regarding the brain systems implicated in judgment and impulse control provided the basis for Professors Steinberg and Scott's argument that youth should not be held to the adult standard of criminal responsibility.[63] The authors, renowned in

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[56] *See id.* at 861–62; Sowell et al., *supra* note 53, at 860.

[57] Ortiz, *supra* note 54, at 2.

[58] *See id.*

[59] *See* Sowell et al., *supra* note 53, at 860. For additional general descriptions of brain development, see, for example, Patricia Soung, *Social and Biological Constructions of Youth: Implications for Juvenile Justice and Racial Equity*, 6 NW. J. L. & SOC. POL'Y 428, 433 (2011); Claudia Wallis, *What Makes Teens Tick*, TIME, May 10, 2004, at 56.

[60] *See* Toga et al., *supra* note 54, at 150–51; *see also* Giedd et al., *supra* note 53, at 861 (finding gray matter to decrease following adolescence through age twenty-two, the oldest age of those studied); Sowell et al., *supra* note 53, at 860 (finding loss of gray matter to continue up to age thirty, the oldest age of those studied).

[61] *See* Elizabeth R. Sowell et al., *Mapping Cortical Change Across the Human Life Span*, 6 NATURE NEUROSCIENCE 309, 309–10 (2003). Other researchers have reached similar conclusions. *See* Catherine Lebel & Christian Beaulieu, *Longitudinal Development of Human Brain Wiring Continues from Childhood into Adulthood*, 31 J. NEUROSCIENCE 10937, 10938, 10943 ("[W]e show within-subject brain development during young adulthood in association tracts, particularly frontal connections needed for complex cognitive tasks such as inhibition, executive functioning, and attention.") (studying subjects aged 5.6 to 29.3 years old); *see also* Melinda Beck, *Delayed Development: 20-Somethings Blame the Brain*, WALL ST. J., Aug. 21, 2012, at D1; Tony Cox, *Brain Maturity Extends Well Beyond Teen Years* (NPR radio broadcast Oct. 10, 2011), *available at* http://goo.gl/LWW77k.

[62] *See generally* Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOL. 1009 (2003).

[63] *See id.* at 1011–13.

their fields, asserted that youth culpability should be mitigated for those under eighteen due to adolescents' diminished decisionmaking capacities, their relatively lower ability to resist coercive influences, and the fact that their characters still undergo change.[64] Although the professors acknowledged that "we are a long way from comprehensive scientific understanding in this area, and research findings are unlikely to ever be sufficiently precise to draw a chronological age boundary between those who have adult decision-making capacity and those who do not,"[65] they concluded that sufficient evidence mandated a change in juvenile punishment.[66]

C. ATTAINING EIGHTH AMENDMENT SIGNIFICANCE

1. Roper v. Simmons

In 2005, psychological and neuroscientific evidence-based explanations for youthfulness found their way into Supreme Court jurisprudence. The Court for the first time endorsed scientific findings relating to human development in support of reducing youth culpability in *Roper v. Simmons*, the case of a teenager sentenced to capital punishment for murder.[67] Christopher Simmons sought postconviction relief after the Supreme Court decided *Atkins v. Virginia*,[68] holding executing a mentally retarded person to be unconstitutional cruel and unusual punishment. Despite the grisly details of his crime,[69] Simmons argued that the same reasoning in *Atkins* prohibited the execution of a juvenile who committed his crime when he was younger than eighteen.[70] The Supreme Court

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[64] *See id.* at 1009.

[65] *Id.* at 1016.

[66] *Id.* at 1017.

[67] 543 U.S. 551 (2005). The importance of the Court injecting science into its reasoning was not lost on commentators. *See* Bishop & Farber, *supra* note 33, at 125 ("Although *Roper* will always be best known as the case that abolished the juvenile death penalty in America, the decision is at least equally noteworthy for its endorsement and application of scientific findings relating to adolescent developmental immaturity."); Jeffrey Rosen, *The Brain on the Stand: How Neuroscience Is Transforming the Legal System*, N.Y. TIMES MAG. 48, 51 (Mar. 11, 2007) ("[Justice Kennedy's] indirect reference to the scientific studies in the briefs led some supporters and critics to view the decision as the *Brown v. Board of Education* of neurolaw.").

[68] Atkins v. Virginia, 536 U.S. 304 (2002).

[69] Simmons—and a friend, who was fifteen at the time—broke into a woman's home, bound her eyes and mouth, then drove to a state park, reinforced her bindings, and threw her from a bridge, drowning her. *See Roper*, 543 U.S. at 556–57. Disturbingly, Simmons assured his friends they could "get away with it" because they were minors. *See id.* at 556.

[70] *Id.* at 559.

reconsidered precedent and agreed.[71] In an opinion written by Justice Anthony Kennedy, the Court held that the objective indicia of consensus then provided sufficient evidence that society views juveniles as "categorically less culpable than the average criminal."[72] Juveniles up to the age of eighteen, according to the Court, comprise a certain class of offenders for which the death penalty may not be imposed.[73] Because *Roper* extended to sixteen- and seventeen-year-olds the same protection that *Thompson v. Oklahoma* provided for those under sixteen, the greatest significance of the Court's opinion might have come not from what the Court said, but how it said it.

Specifically, in describing the class of offenders to whom capital punishment can no longer be imposed, the Court relied on three differences between "juveniles under 18" and "adults"—lacking maturity, being vulnerable to negative influences and outside pressures, and not having as well-formed characters.[74] These findings, according to the Court, reflected both what "any parent knows" and what scientific and sociological studies tend to confirm.[75] As a result of these characteristics, young offenders were held to be less blameworthy than adults who commit similar crimes, less likely to be deterred by the prospect of death sentences, and less likely to be irretrievably depraved.[76]

While the *Roper* Court differentiated "juveniles under 18" from "adults," it acknowledged the limitation of such a categorization. Justice Kennedy wrote, "[t]he qualities that distinguish juveniles from adults do not

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[71] *See id.* at 559–60. In *Stanford v. Kentucky*, the Court rejected an opportunity to rule out capital punishment for defendants over fifteen but under the age of eighteen. 492 U.S. 361, 377–78 (1989). Justice Antonin Scalia, questioning petitioner's evidence-based argument, wrote: "petitioners and their supporting *amici* marshal an array of socioscientific evidence concerning the psychological and emotional development of 16- and 17-year-olds. If such evidence could conclusively establish the entire lack of deterrent effect and moral responsibility, resort to the Cruel and Unusual Punishments Clause would be unnecessary . . . ." *Id.* While Justice Scalia announced the judgment of the 5–4 Court, Justice Sandra Day O'Connor did not join this part. *See id.* at 380–82.

[72] *Roper*, 543 U.S. at 567–68 (quoting *Atkins*, 536 U.S. at 316) (internal quotation marks omitted) (relying on evidence that a majority of states rejected the juvenile death penalty, it was used infrequently, and a trend toward abolishment existed).

[73] *See id.* at 568. *Roper* extended the protection to sixteen- and seventeen-year-olds that *Thompson v. Oklahoma* provided for those under sixteen. *See* 487 U.S. 815, 838 (1988).

[74] *See Roper*, 543 U.S. at 569–70.

[75] *Id.* at 569. The Court cited Arnett, *supra* note 48, at 339, for the first finding; Steinberg & Scott, *supra* note 62, at 1014, for the second finding; and ERIKSON, IDENTITY: YOUTH AND CRISIS, *supra* note 52, for the third finding.

[76] *See Roper*, 543 U.S. at 570–71. These arguments regarding retribution and blameworthiness mirror those the Court rejected in *Stanford v. Kentucky*. *See* 492 U.S. 361, 377–78 (1989).

disappear when an individual turns 18."[77] Still, the Court insisted upon drawing a bright line for ruling out the death penalty as disproportionate punishment, looking beyond criminal punishment to suggest a national consensus fitting within the Eighth Amendment rubric. Since eighteen is "where society draws the line for many purposes between childhood and adulthood," the Court concluded, so too it is where "the line for death eligibility ought to rest."[78] The Court thus rejected an individualized standard of culpability based on youthfulness in favor of a categorical rule to protect all offenders below the age of eighteen.

2. Graham v. Florida

The Court cemented its bright line for mitigating unduly harsh punishment in *Graham*. There the Court considered a challenge to a mandatory life sentence for a seventeen-year-old who committed a pair of nonhomicide felonies.[79] In another opinion written by Justice Kennedy, the Court found that Terrance Jamar Graham's life-without-parole punishment constituted cruel and unusual punishment based on three related concerns: (1) the offender's limited culpability, (2) the particular severity of life imprisonment without parole, and (3) the failure of penological theories of retribution, deterrence, incapacitation, and rehabilitation to justify such punishment.[80]

For the first consideration, the *Graham* Court relied on *Roper*'s holding that juveniles are less culpable and therefore less deserving of the most severe punishments because they lack maturity, are more vulnerable to negative influences and outside pressures, and their characters are not as well-formed.[81] The Court also noted that no "recent data" provided a

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[77] *Roper*, 543 U.S. at 574.

[78] *Id.* The majority noted that its rule might be overinclusive. Some members of the protected class likely had "attained a level of maturity some adults will never reach." *Id.* Underinclusivity, however, was not a concern.

[79] *See* Graham v. Florida, 130 S. Ct. 2011, 2020 (2010). Police learned that Terrance Jamar Graham robbed several homes while he was on probation for armed burglary and attempted armed robbery. *See id.* at 2018–20. The trial court revoked Graham's probation and sentenced him to life in prison. *See id.* at 2020.

[80] *See id.* at 2026–30.

[81] *Id.* at 2026 (citing *Roper*, 543 U.S. at 569–70). The *Graham* Court continued:

> These salient characteristics mean that it is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption. Accordingly, juvenile offenders cannot with reliability be classified among the worst offenders. A juvenile is not absolved of responsibility for his actions, but his transgression is not as morally reprehensible as that of an adult.

Id. (internal quotation marks and citations omitted).

reason for the Court to reconsider *Roper*'s sociological and scientific observations.[82] Instead, further developments in psychology and brain science continued to show "fundamental differences between juvenile and adult minds,"[83] including that "parts of the brain involved in behavior control continue to mature through late adolescence."[84]

For the second consideration regarding the severity of life without parole, the Court acknowledged the reality of passing time. Life-without-parole sentences already constitute "the second most severe penalty permitted by law."[85] Furthermore, under sentences of life without parole, younger offenders generally serve more years and greater percentages of their lives behind bars than adults.[86] Consequently, the Court noted that imposing such punishments on younger offenders was especially harsh.[87]

Finally, the *Graham* Court considered penological justifications for juvenile sentences of life without parole for nonhomicide offenses. Weaving many of *Roper*'s developmental findings into its analysis, the Court found that none of the goals of punishment provided adequate justification for sentencing juvenile nonhomicide offenders to life without parole.[88] The Court ruled out retribution (because of offenders' reduced moral culpability),[89] deterrence (because of their impetuousness),[90] incapacitation (because of offenders' capacity for change),[91] and rehabilitation (because life without parole forswears any potential rehabilitation).[92] Finding no legitimate justification for Graham's sentence, the Court found that it was by its nature disproportionate and failed to pass Eighth Amendment muster.[93]

3. Miller v. Alabama

The Court extended its reliance on youth developmental differences even further in *Miller*, which concerned two cases of fourteen-year-olds

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[82] *See id.*

[83] *Id.*

[84] *Id.* (citation omitted).

[85] *Id.* at 2027 (quoting Harmelin v. Michigan, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring in part and concurring in the judgment)).

[86] *Id.* at 2028 ("A 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only. This reality cannot be ignored." (internal citations omitted)).

[87] *See id.*

[88] *See id.* at 2028–31.

[89] *Id.* at 2028.

[90] *Id.* at 2028–29.

[91] *Id.* at 2029.

[92] *Id.* at 2029–30.

[93] *See id.* at 2030.

mandatorily sentenced to life in prison without parole for their involvement in murders.[94] The Court held that the Eighth Amendment forbids mandatory sentencing schemes that do not allow judges or juries to consider the mitigating characteristics of youth, as precedent established that "children are constitutionally different from adults for purposes of sentencing."[95]

Here again, the Court relied upon the distinct developmental qualities of youth that render young offenders less culpable and impair penological justifications for their punishment.[96] But this time, the Court did not rely on national consensus against the punishment or find reason to limit its holding to specific types of crimes.[97] Rather, the Court melded *Roper* and *Graham*'s focus on prohibiting severe punishments based on certain offenders' reduced culpability with other precedent that requires sentencing authorities to consider defendants' characteristics in doling out the most severe punishments.[98] In so doing, the Court noted that the "distinctive (and transitory) mental traits and environmental vulnerabilities" of youth were hardly crime-specific.[99] In addition, it noted that life-without-parole sentences should be treated as akin to capital punishment when the offenders are young.[100] Because youth matters in determining whether an irrevocable sentence is appropriate, the Court held that "a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles."[101]

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[94] Miller v. Alabama, 132 S. Ct. 2455, 2460 (2012). Kuntrell Jackson was fourteen when he robbed a video store with two friends, one of whom shot the clerk when she threatened to call police. *Id.* at 2461. Evan Miller was fourteen when he and a friend smoked marijuana and drank with a neighbor. *Id.* at 2462. When the neighbor passed out, Miller tried to steal his wallet, but the neighbor awoke and grabbed Miller by the throat. *See id.* Miller and his friend beat him with a baseball bat then set his trailer on fire, killing him. *See id.* An Arkansas statute mandated life in prison without parole for Jackson, who was convicted of capital murder, and Alabama law prescribed the punishment for Miller's conviction for murder in the course of arson. *See id.* at 2461, 2462–63.

[95] *Id.* at 2464. The Court's holding turned on finding that mandatory sentencing schemes pose "too great a risk of disproportionate punishment" because they make "youth (and all that accompanies it) irrelevant" to the imposition of the harshest prison sentence and can weaken rationales for punishment. *Id.* at 2469.

[96] *See id.* at 2464–65.

[97] *See id.* at 2465, 2470–71. Although the majority opinion provides some argument regarding "objective indicia," *id.* at 2471–73, the crux of its holding relied on individualized sentencing precedent, *id.* at 2471, 2472 n.11.

[98] *See id.* at 2463.

[99] *Id.* at 2465.

[100] *Id.* at 2466.

[101] *Id.* at 2475.

Despite its lofty phrasing about the importance of youth in sentencing, *Miller* firmly cabined its holding to those under the age of eighteen.[102] Lower courts following *Miller* unsurprisingly do the same. Rather than embracing *Miller*'s appeal for individualized sentencing before the harshest possible penalties can be imposed, they cling to the hardline dichotomy between "juvenile" and "adult" offenders. For example, a Florida court of appeals tersely rejected the petition of a defendant who was nineteen when he committed his crime.[103] To the extent that the petitioner asked the Florida court to expand *Graham* and *Miller* "to other 'youthful offenders' under the age of 21," the court noted it was "bound by the pronouncements of the Supreme Court of the United States."[104] Several other courts following the earlier decisions in *Roper* and *Graham* similarly invoked the Supreme Court's bright line to reject young adults' Eighth Amendment claims.[105] The following Part illustrates why the reasoning underpinning *Roper*, *Graham*, and *Miller* requires courts to allow defendants up to age twenty-five to present evidence in mitigation about their youth at the time of their crimes.

II. DISCUSSION

While the Court for decades has considered youth to be less culpable and recently invoked science to support a new era in that tradition, it refuses to recognize that young people just over the chronological age of eighteen might similarly be less culpable. Yet, the Court recognizes that that age is an imperfect proxy for diminished culpability. The *Roper* majority stated

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[102] *Id.* at 2460.

[103] Janvier v. State, No. 4D13-1695, slip op. at 1–2 (Fla. Dist. Ct. App. Oct. 2, 2013); *see also* Wilcox v. Rozum, No. 13-3761, 2013 WL 6731906, at *1–2 (E.D. Pa. Dec. 23, 2013); People v. Riley, No. 4-12-0225, 2013 WL 936435, at *11 (Ill. App. Ct. Mar. 8, 2013); Commonwealth v. Cintora, 69 A.3d 759, 764 (Pa. Super. Ct. 2013). In *Cintora*, the State described the inapplicability of *Miller* by giving the defendant's age down to the day. *See* Brief for Appellee, *Cintora*, 69 A.3d 759 (No. 3272 EDA 2012), 2013 WL 3858919, at *10 ("[T]he principles set forth in *Miller* only apply to defendants less than 18 years of age. . . . [D]efendant was 19 years, 13 days [] old; when he committed the crimes for which he was convicted.").

[104] *Janvier*, slip op. at 1–2.

[105] *See, e.g.*, Tercero v. Stephens, No. 13-70010, slip op. at 12 (5th Cir. Dec. 18, 2013) (eighteen-year-old); *In re* Garner, 612 F. 3d 533, 534 (6th Cir. 2010) (nineteen-year-old); Hosch v. Alabama, No. CR-10-0188, 2013 WL 5966906, at *64 (Ala. Crim. App. Nov. 8, 2013) (twenty-year-old); Thompson v. State, No. CR-05-0073, 2012 WL 520873, at *77–79 (Ala. Crim. App. Feb. 17, 2012) (eighteen-year-old); Hill v. State, 921 So. 2d 579, 584 (Fla. 2006) (twenty-three-year-old); Jean-Michel v. State, 96 So. 3d 1043, 1044–45 (Fla. Dist. Ct. App. 2012) (nineteen-year-old); State v. Campbell, 983 So. 2d 810, 830 (La. 2008) (eighteen-year-old); State v. Garcell, 678 S.E.2d 618, 645, 647 n.10 (N.C. 2009) (eighteen-year-old).

that "[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18."[106]

This Part presents three reasons why clinging to the bright line at eighteen for mitigating punishment is inadequate. Holding the mitigating factors of youth to be relevant only until age eighteen is inconsistent with, and overextends, the very scientific and sociological data the Supreme Court touts. Further, relying on the age of eighteen simply because eighteen "is the point where society draws the line for many purposes between childhood and adulthood"[107] inappropriately equates the right not to be punished more severely than one deserves with affirmative rights to engage in certain adult conduct. Finally, drawing a bright line at eighteen and disregarding the characteristics of older youthful defendants fails to serve any of the penological justifications that the Supreme Court has ruled imperative for harsh and irrevocable sentences.

A. OVEREXTENDING THE DATA

The Court has eagerly espoused scientific and sociological data to bolster its conclusions regarding what makes "juveniles" developmentally and constitutionally different from "adults." But the Court has been less than eager to address the research's inability to identify a precise point when developmental maturity can be convincingly presumed for the entire class of youth—even in the very data it cites. As one team of researchers has lamented: "Unfortunately, judges, politicians, advocates, and journalists are biased toward drawing a single line between adolescence and adulthood for different purposes under the law that is at odds with developmental cognitive neuroscience."[108]

Examples from *Miller* and *Roper* demonstrate this point. *Miller* and *Roper* both point to Professors Steinberg and Scott's *Less Guilty by Reason of Adolescence* as authority for the developmental differences between

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[106] Roper v. Simmons, 543 U.S. 551, 574 (2005). In her *Roper* dissent, Justice O'Connor took issue with the rule's overinclusiveness *and* underinclusiveness. *See id.* at 601–02 (O'Connor, J., dissenting) ("[T]he age-based line . . . quite likely will protect a number of offenders who are mature enough to deserve the death penalty and may well leave vulnerable many who are not."); *see also* Joseph L. Hoffmann, *On the Perils of Line-Drawing: Juveniles and the Death Penalty*, 40 HASTINGS L.J. 229, 259 (1989) ("If age corresponded perfectly to the combination of relevant factors, then its use as a 'bright line' would not be problematic. Because age is not a 'perfect' proxy, however, its use as a 'bright line' necessarily produces ordinal disproportionality, or comparative injustice.").

[107] *Roper*, 543 U.S. at 574.

[108] B.J. Casey et al., *The Adolescent Brain*, 1124 ANNALS N.Y. ACAD. SCIS. 111, 122 (2008) (citation omitted). It was their hope to present research "to make strides in moving this single line to multiple lines that consider developmental changes across both context (emotionally charged or not) and time (in the moment or in the future)." *Id.*

those under and those over eighteen.[109] Yet, Professors Steinberg and Scott explicitly note that research findings are "unlikely to ever be sufficiently precise to draw a chronological age boundary" for acquiring adult decisionmaking capacities.[110] Further, some of the studies on which they rely actually show development continuing beyond age eighteen.[111] *Miller* also relies on two briefs to suggest that the science supporting *Roper*'s and *Graham*'s conclusions has "become even stronger."[112] While it is true that those briefs point to additional research, that research hardly supports the Court's bright line. Quite the opposite: the brief from a group of psychology professors notes how a youth's brain "is not fully mature until an individual reaches his or her twenties."[113] Compellingly, it points to research from National Institute of Mental Health neuroscientist Jay Giedd, who concluded that the parts of the brain linked to decisionmaking and impulse inhibition do not fully develop until that time.[114] The American Psychological Association amici brief similarly notes how juveniles' development continues throughout late adolescence and into young adulthood.[115] In describing such findings, the American Psychological

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[109] *See* Miller v. Alabama, 132 S. Ct. 2455, 2464 (2012) (citing Steinberg & Scott, *supra* note 62); *Roper*, 543 U.S. at 569, 570, 573 (same). In total, the majority in *Roper* cites Professors Steinberg and Scott four times.

[110] Steinberg & Scott, *supra* note 62, at 1016. Even though they acknowledged the scientific imprecision for drawing a boundary, the psychologists advanced policy arguments in support of one. For instance, they rejected a case-by-case approach for mitigation as an unacceptable, "error-prone undertaking" when the stakes are life and death. *See id.* They also advocated a boundary, even when it excluded potentially deserved youth, to avoid practical inefficiencies and cases in which immaturity might be ignored due to particular desires to impose punitive punishments. *See id.* For discussion of how a youthfulness presumption could address these concerns, see *infra* Parts III.A.1 & III.B.2.

[111] *See, e.g.*, Steinberg & Scott, *supra* note 62, at 1012 (citing Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, 18 BEHAV. SCI. & L. 741 (2000)). Cauffman and Steinberg examined the relationship between age, psychosocial maturity, and antisocial decisionmaking, finding that "the period between 16 and 19 marks an important transition point in psychosocial development that is potentially relevant to debates about the drawing of legal boundaries between adolescence and adulthood." Cauffman & Steinberg, *supra*, at 756. For a thorough critique of the Supreme Court's scientific pitfalls in *Roper*, see generally Deborah W. Denno, *The Scientific Shortcomings of* Roper v. Simmons, 3 OHIO ST. J. CRIM. L. 379 (2006).

[112] *Miller*, 132 S. Ct. at 2464 n.5.

[113] Brief of Amici Curiae J. Lawrence Aber et al. in Support of Petitioners at 15–16, *Miller*, 132 S. Ct. 2455 (Nos. 10-9646, 10-9647) (citations omitted).

[114] *Id.* at 16 n.19 (citing Jay N. Giedd, *Structural Magnetic Resonance Imaging of the Adolescent Brain*, 1021 ANNALS N.Y. ACAD. SCIS. 77, 83 (2004); *see also supra* note 61.

[115] *See* Brief for American Psychological Ass'n et al. as Amici Curiae in Support of Petitioners at 5, 9, *Miller*, 132 S. Ct. 2455 (Nos. 10-9646, 10-9647).

Association skirts the binary "juvenile" and "adult" labels it originally set out to apply.[116]

Recent psychological and sociological research further calls the Court's strict classifications of "juveniles" and "adults" into question. Similar to how psychologist G. Stanley Hall identified a new life stage of "adolescence" at the turn of the twentieth century,[117] researchers today are redefining young adulthood.[118] Alluding to milestones that traditionally defined the transition to adulthood,[119] sociologists are charting the course of a "changing timetable" for development.[120] Leading that charge is Jeffrey Arnett, the same psychologist and research professor cited in *Roper* who has since marshaled support for a new stage of life lasting from the late

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[116] *See id.* at 6 n.3. The error is understandable: "Adulthood," "adolescence," and "early adulthood" have no clear definitional parameters, and researchers often prescribe different labels. *See* Nitin Gogtay et al., *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 PROCS. NAT'L ACAD. SCIS. 8174, 8174 (describing "adolescence and early adulthood" as encompassing ages seventeen to nineteen but also describing as "children and adolescents" a sample of people ages four to twenty-one). *Compare* Casey et al., *supra* note 108, at 117 fig.4 (showing measures in a bar graph for "adolescents" (ages thirteen to seventeen) and "adults" (ages twenty-three to twenty-nine)), *with id.* at 118 fig.5 (showing a measure in a scatterplot for "adults" (ages eighteen to thirty)).

[117] In 1904, G. Stanley Hall published his two-volume magnum opus on what was then considered a new life stage, adolescence. G. STANLEY HALL, ADOLESCENCE: ITS PSYCHOLOGY AND ITS RELATIONS TO PHYSIOLOGY, ANTHROPOLOGY, SOCIOLOGY, SEX, CRIME, RELIGION AND EDUCATION (1904).

[118] This period of young adulthood—subjected to many labels, such as "adultescence," "extended adolescence," and "youthhood"—has become the subject of much interest. *See* Kay S. Hymowitz, *Where Have the Good Men Gone?*, WALL ST. J., Feb. 19, 2011, at C1; Hope Reese, *Yes, 20-Somethings Are Taking Longer to Grow Up—but Why?*, ATLANTIC (Nov. 30, 2012, 12:52 PM), http://goo.gl/FS0muB; *see also* Lev Grossman, *Grow Up? Not So Fast*, TIME, Jan. 16, 2005, at 43; Press Release, MacArthur Foundation, Interdisciplinary Research on the Transition to Adulthood (Aug. 5, 2004), *available at* http://goo.gl/7U7Vbz (announcing a $5.2 million grant in support of research "examining the new challenges facing young people, ages 18 to 34").

[119] *See* JEFFREY JENSEN ARNETT, EMERGING ADULTHOOD: THE WINDING ROAD FROM THE LATE TEENS THROUGH THE TWENTIES, at v (2004) (noting how sociologists define the transition to adulthood in terms of young people finishing school, entering full-time work, getting married, and becoming parents); *see also* JENNIFER M. SILVA, COMING UP SHORT: WORKING-CLASS ADULTHOOD IN AN AGE OF UNCERTAINTY 6 (2013). For a suggestion of "new" adult milestones, see Sue Shellenbarger, *New Ways to Gauge What Grown-Up Means*, WALL ST. J., June 19, 2013, at D3.

[120] *See* Frank F. Furstenberg, Jr. et al., *On the Frontier of Adulthood: Emerging Themes and New Directions*, *in* ON THE FRONTIER OF ADULTHOOD: THEORY, RESEARCH, AND PUBLIC POLICY 3, 5 (Richard A. Settersten, Jr. et al. eds., 2005) [hereinafter ON THE FRONTIER]; *see also* Robin Marantz Henig, *What Is It About 20-Somethings?*, N.Y. TIMES MAG., Aug. 22, 2010, at 28.

teens through the mid- to late twenties—"emerging adulthood."[121] Among the trends on which Professor Arnett and others rely, young people are putting off marriage.[122] In fact, the timing of marriage has unprecedentedly shifted into older ages in recent years.[123] Young people are also living with their parents longer and with greater frequency.[124] When they do not live with their parents, they are still unlikely to have families of their own.[125] As a result, by choice or circumstance,[126] young people are forestalling the beginning of traditionally "adult" life. To impose *Roper*, *Graham*, and *Miller* language, they appear to lack the degree of maturity that previous generations of adults commanded, they still seem vulnerable to outside pressures, and their characters remain not very "well-formed."[127]

Some of the stimuli behind the delay in adulthood are unsurprising: Americans' views toward young people's sexual relationships have

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[121] *See* Jeffrey Jensen Arnett & Susan Taber, *Adolescence Terminable and Interminable: When Does Adolescence End?*, 23 J. YOUTH & ADOLESCENCE 517, 534 (1994) (coining the phrase). *See generally* ARNETT, *supra* note 119; EMERGING ADULTS IN AMERICA: COMING OF AGE IN THE 21ST CENTURY (Jeffrey Jensen Arnett & Jennifer Lynn Tanner eds., 2006); Jeffrey Jensen Arnett, *Emerging Adulthood: A Theory of Development from the Late Teens Through the Twenties*, 55 AM. PSYCHOL. 469 (2000). Professor Arnett's term "emerging adulthood" seems to have taken off, while previous characterizations, such as "the postponed generation" or "incompletely-launched young adults," have not. In fact, a multidisciplinary, international research organization dedicated to the study of "emerging adulthood" has formed. *See About SSEA*, SOC'Y FOR THE STUDY OF EMERGING ADULTHOOD, http://goo.gl/BU2FPB (last visited Mar. 15, 2014).

[122] *See* ARNETT, *supra* note 119, at 4–5; SILVA, *supra* note 119, at 6.

[123] *See* Erin Migdol, *Delaying Marriage Has Serious Consequences for Some, New Research Reveals*, HUFFINGTON POST (Mar. 15, 2013, 11:14 AM), http://goo.gl/Pxgscd (describing how the average ages for marriage have never been higher than they are now for women (26.5) and men (28.7)); *see also* U.S. CENSUS BUREAU, MEDIAN AGE AT FIRST MARRIAGE BY SEX: 1890 TO 2013, at fig.MS-2 (2013), *available at* http://goo.gl/RwBjwl.

[124] *See* RICHARD FRY, PEW RES. CTR., A RISING SHARE OF YOUNG ADULTS LIVE IN THEIR PARENTS' HOME 11 (2013), *available at* http://goo.gl/BJUVGS; *see also* Robert F. Schoeni & Karen E. Ross, *Material Assistance from Families During the Transition to Adulthood*, *in* ON THE FRONTIER, *supra* note 120, at 396, 413 ("In 1990, 70% of eighteen-year-olds lived with their parents, falling to 30% by age twenty-four and to 10% by age thirty. Between 1970 and 1990 there was a monotonic rise in shared housing. Between the ages of twenty and twenty-six, there was a roughly 10 percentage point rise in the share of children living at home.").

[125] *See* Elizabeth Fussell & Frank F. Furstenberg, Jr., *The Transition to Adulthood During the Twentieth Century: Race, Nativity, and Gender*, *in* ON THE FRONTIER, *supra* note 120, at 29, 31, 33 fig.2.3, 58.

[126] For critiques of the millennial generation as self-absorbed and needlessly coddled, see, for example, Jeffrey Zaslow, *The Coddling Crisis: Why Americans Think Adulthood Begins at Age 26*, WALL ST. J., Jan. 6, 2005, at D1; *60 Minutes: The Millennials Are Coming* (CBS television broadcast May 25, 2008), *available at* http://goo.gl/HFIhlo.

[127] *See* ARNETT, *supra* note 119, at 6, 8–9.

changed.[128] More people are pursuing higher education.[129] And a sluggish job market and burdensome student loan debt have otherwise stalled buying homes and starting families.[130] The legal implications of such a delay, however, are less than clear. For this reason, the Court's continued reliance on a categorical line at age eighteen to divide the supposedly scientifically and sociologically mature from the immature for mitigating punishment is troubling. The research on which the Court relies does not support such a line, and additional research suggests that the relevant youthful qualities continue to materialize in individuals into their twenties.

Even though the Court invoked science and sociological data to support its *Roper*, *Graham*, and *Miller* holdings, it makes sense, then, that the Court turned to more a conventional analysis in its rare attempt to justify the line.[131] In this way, the Court suggests that its developmental analysis for punishment applies only within the bounds of previously existing legal conceptions of childhood and adulthood.[132] The following Part demonstrates the asymmetry in such an approach.

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[128] *See id.* at 5.

[129] *See id.* at 5–6; *see also* Furstenberg, Jr. et al., *supra* note 120, at 3, 6.

[130] *See* Shellenbarger, *supra* note 119; *see also* Derek Thompson, *Adulthood, Delayed: What Has the Recession Done to Millennials?*, ATLANTIC (Feb. 14, 2012, 9:00 AM), http://goo.gl/0OJgSB.

[131] Recall the Court reasoned that although "[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18 . . . [t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood." Roper v. Simmons, 543 U.S. 551, 574 (2005); *see also* Ronald Roesch et al., *Social Science and the Courts: The Role of Amicus Curiae Briefs*, 15 LAW & HUM. BEHAV. 1, 4 (1991) ("Because judges are trained in the law and are generally unfamiliar with psychology's research methodology and statistics, they are naturally more inclined to rely on legal scholarship and precedent when they make their decisions. The differences in training and approaches to scholarship make communication between the two disciplines difficult.").

[132] *See* Terry A. Maroney, *The False Promise of Adolescent Brain Science in Juvenile Justice*, 85 NOTRE DAME L. REV. 89, 144–45 (2009) ("[T]he impact of adolescent brain science on juvenile justice has been strongly cabined by the extrinsic reality of legal doctrine. . . . [D]octrinal forces are so entrenched and of such broad applicability within criminal law, adolescent brain science is inadequate to provoke deep change, at least within the courts."). The dissents in *Roper* argue that the other Justices' independent moral judgment about youth culpability—and not science—is the fulcrum on which the judgment turns. Justice O'Connor recognized that the rule decreed by the Court "rests, ultimately, on its independent moral judgment that death is a disproportionately severe punishment for any 17-year-old offender." *Roper*, 543 U.S. at 588 (O'Connor, J., dissenting). Additionally, Justice Scalia wrote that "[o]f course, the real force driving today's decision is . . . the Court's own judgment that murderers younger than 18 can never be as morally culpable as older counterparts." *Id.* at 615 (Scalia, J., dissenting) (internal quotation marks and citations omitted).

B. CRIMINAL PUNISHMENT NOT COMPARABLE TO AFFIRMATIVE RIGHTS TO ENGAGE IN "ADULT" CONDUCT

A categorical rule mitigating punishment based on youthfulness only for those under eighteen is additionally inadequate because it fails to recognize the exceptionality of criminal punishment compared to other contexts of the law where bright-line classifications pervade. States undoubtedly draw bright-line rules to regulate the age at which young people can vote,[133] serve on juries,[134] marry,[135] drive,[136] gamble,[137] and drink.[138] Young people similarly have age-based rights to enter into contracts[139] and choose how doctors may treat them.[140] These categorical rules granting individuals affirmative rights over their conduct amount to "crude determination[s]" that young people of certain ages are mature enough to act in society, in some respects, as adults.[141] Young people can test out certain adult privileges, in spite of the special risks of the learning periods involved.[142]

The Court since *Roper*, however, has conflated this area of granting affirmative rights to young people to try out adult activity with criminal punishment. Unlike other laws that regulate behavior, criminal punishment involves finding people morally blameworthy. Andrew von Hirsch has explained that punishment is different from other government-generated

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[133] The Twenty-Sixth Amendment guarantees eighteen-year-olds the right to vote, U.S. CONST. amend. XXVI, and almost every state recognizes a voting age of eighteen, *see Roper*, 543 U.S. at 581 app. B.

[134] *See Roper*, 543 U.S. at 583 app. C.

[135] *See id.* at 585 app. D.

[136] *See* Thompson v. Oklahoma, 487 U.S. 815, 842 app. C (1988) ("Most States have various provisions regulating driving age, from learner's permits through driver's licenses. In all States but one, 15-year-olds either may not drive, or may drive only with parental consent or accompaniment.").

[137] *See id.* at 847 app. F.

[138] *See, e.g.*, CAL. CONST. art. 20, § 22(d); ALA. CODE § 28-1-5 (LexisNexis 2013); 235 ILL. COMP. STAT. ANN. 5/6-16 (West 2013); N.Y. ALCO. BEV. CONT. LAW § 65(1) (McKinney 2011); 47 PA. CONS. STAT. ANN. § 4-493(1) (West Supp. 2013); TEX. ALCO. BEV. CODE ANN. § 106.03 (West Supp. 2013).

[139] *See, e.g.*, ALA. CODE § 27-14-5(b) (LexisNexis 2007); CAL. FAM. CODE § 6700 (West 2013); 215 ILL. COMP. STAT. ANN. 5/242 (West 2000); MO. ANN. STAT. § 431.056 (West 2000); N.Y. GEN. OBLIG. LAW § 3-101(1) (McKinney 2012).

[140] *See, e.g.*, ALA. CODE § 22-8-4 (LexisNexis 2006); CAL. FAM. CODE § 6922 (West 2013); 410 ILL. COMP. STAT. ANN. 210/1 (West 2011); N.Y. PUB. HEALTH LAW § 2504 (McKinney 2012); 35 PA. CONS. STAT. ANN. § 10101.1 (West 2012); *see also* Elizabeth S. Scott, *The Legal Construction of Childhood*, *in* A CENTURY OF JUVENILE JUSTICE, *supra* note 28, at 113, 120.

[141] *See* Scott, *supra* note 141, at 120.

[142] *See* ZIMRING, *supra* note 38, at 72 (noting such activities as driving).

benefits because its defining characteristic includes state censure.[143] When the state finds people blameworthy, "the requirement of equal treatment becomes much stronger" because unequal treatment implies that they are unequally blameworthy.[144] Drawing a bright line between those who are under and over eighteen for mitigating punishment thus implies they are unequally blameworthy, even though they might possess the same developmental traits that render them less culpable. The *Roper*, *Graham*, and *Miller* decisions applied to those over eighteen therefore overlook the important and unique goals for imposing criminal punishment of treating equally culpable offenders equally and making individualized inquiries of culpability for society's harshest punishments.[145]

In the capital punishment context, the need for an individualized inquiry to measure a person's blameworthiness is hardly a new concept. *Lockett v. Ohio* recognized that individualized decisions are essential in capital cases, fearing that the death penalty might be imposed "in spite of factors which may call for a less severe penalty."[146] *Eddings v. Oklahoma* then highlighted the obligation of sentencing judges and juries to consider youthful defendants' mental and emotional development as part of their calculi.[147] As the *Eddings* Court stated, "youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage."[148] After *Roper*, however, these decisions have had little meaning for offenders just over eighteen. Those whose mental and emotional development is slowed likely face greater burdens in proving youthfulness as a mitigating circumstance.

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[143] *See* Andrew von Hirsch, *Selective Incapacitation Reexamined: The National Academy of Sciences' Report on Criminal Careers and "Career Criminals,"* 7 CRIM. JUST. ETHICS 19, 27 (1988).

[144] *See id.*

[145] Some children's rights advocates fear that criminal legal developments that do not recognize the differences between criminal law and other decisionmaking contexts might undermine youth autonomy. *See* Buss, *supra* note 46, at 43–44. Such fears are reasonable, given that developmental discoveries about youth immaturity have had implications beyond the realm of criminal sentencing. For example, proponents and opponents of a woman's ability to have an abortion have used the science. *See* Scott, *supra* note 140, at 569–76; *see also* Roper v. Simmons, 543 U.S. 551, 617–18 (Scalia, J., dissenting) (comparing scientific evidence presented in the sentencing and abortion contexts). Advocates seeking to prevent alcohol abuse and binge drinking among college students have likewise adopted its thrust. *See* Linda Patia Spear, *The Adolescent Brain and the College Drinker: Biological Basis of Propensity to Use and Misuse Alcohol*, COLLEGE DRINKING—CHANGING THE CULTURE (last reviewed Sept. 23, 2005), http://goo.gl/pTgugW.

[146] Lockett v. Ohio, 438 U.S. 586, 605 (1978); *see also id.* ("The nonavailablility of corrective or modifying mechanisms . . . underscore[] the need for individualized consideration as a constitutional requirement in imposing the death sentence.").

[147] *See* Eddings v. Oklahoma, 455 U.S. 104, 115–16 (1982).

[148] *Id.* at 115.

Because they are beyond the Court's zone of Eighth Amendment protection, lower courts are unwilling to entertain arguments for lessened culpability based on developmental differences.[149]

In the noncapital punishment context, the Court has only recently recognized that young people's blameworthiness must be measured with individualized inquiries. *Miller* held that the especially harsh penalty of life without parole now requires individualized culpability inquiries for those under eighteen.[150] The reasons that make life without parole especially harsh for those under eighteen, however, also apply to marginally older offenders. Just as life without parole deprives a seventeen-year-old offender of "the most basic liberties without giving hope of restoration,"[151] so too does it deprive an eighteen-year-old of that meaningful hope. If it is true that "[m]ost fundamentally, *Graham* insists that youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole,"[152] then the youthfulness of a marginally older offender for whom the sentence would be equally harsh must also be considered.

C. UNDERMINING PENOLOGICAL JUSTIFICATIONS

Finally, the Court's current scheme disregards the same proportional punishment fundamentals that it touts. Each of the Court's line-drawing decisions has highlighted how diminished culpability impairs penological justifications for punishment.[153] While acknowledging that the Eighth Amendment does not mandate adoption of any one particular penological theory, the Court has noted that a sentence must be supported by some justification.[154] Yet, for youthful defendants' irrevocable sentences, the Court has ruled out retribution, deterrence, incapacitation, and rehabilitation. This Section addresses these justifications and describes

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[149] *See supra* notes 103 and 105, and accompanying text.

[150] *See* Miller v. Alabama, 132 S. Ct. 2455, 2475 (2012).

[151] Graham v. Florida, 130 S. Ct. 2011, 2027 (2010).

[152] *Miller*, 132 S. Ct. at 2465.

[153] *See id.* at 2465–66; *Graham*, 130 S. Ct. at 2028–30; Roper v. Simmons, 543 U.S. 551, 571–72 (2005).

[154] *See Graham*, 130 S. Ct. at 2028. The *Graham* Court noted that "[t]he concept of proportionality is central to the Eighth Amendment." *Id.* at 2021. Other Justices, however, do not believe that the Eighth Amendment authorizes courts "to invalidate any punishment they deem disproportionate to the severity of the crime or to a particular class of offenders." *Miller*, 132 S. Ct. at 2483 (Thomas, J., dissenting); Ewing v. California, 538 U.S. 11, 31 (2003) (Scalia, J., concurring in the judgment) ("Proportionality—the notion that the punishment should fit the crime—is inherently a concept tied to the penological goal of retribution."); *id.* at 32 (Thomas, J., concurring in the judgment); Harmelin v. Michigan, 501 U.S. 957, 989 (1991).

why each could similarly be inapplicable to a defendant between the ages of eighteen and twenty-five.

1. *Retribution*

In *Graham* and *Roper*, the Court considered whether retribution was a legitimate reason to severely punish offenders under eighteen. Retribution, described as "the interest in seeing that the offender gets his 'just deserts,'"[155] is intimately concerned with the offender's personal culpability.[156] Whether retribution is viewed as a means to express community moral outrage or to right a victim's wrong, the *Roper* Court noted that the case for retribution is weakened when the defendant is young.[157] According to the Court, "[r]etribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity."[158] In *Graham*, the Court extended the same logic to young people sentenced to life without parole for nonhomicide offenses.[159] Retribution, the Court stated, "does not justify imposing the second most severe penalty on the less culpable juvenile nonhomicide offender."[160]

None of these considerations is unique to those under eighteen. Young people aged eighteen to twenty-five can similarly have lessened moral culpability and blameworthiness as a result of their youth and immaturity. The developmental characteristics attendant to youth continue beyond the age of eighteen, and the normative concern for establishing an age at which society may reasonably demand people to be "adult" is not sacrificed by recognizing that some individuals have not yet attained full developmental maturity by that point. Furthermore, terms of life imprisonment remain comparatively harsh for those just over eighteen who grow old behind bars, spending the prime of their lives incarcerated.

2. *Deterrence*

The Court in *Roper* and *Graham* similarly rejected deterrence as a justification. Deterrence can be described as the general interest in preventing prospective offenders' similar crimes.[161] Outside the capital

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[155] Atkins v. Virginia, 536 U.S. 304, 319 (2002).

[156] *See Graham*, 130 S. Ct. at 2028 ("[T]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender." (citation omitted)).

[157] *See Roper*, 543 U.S. at 571.

[158] *Id.*

[159] *See Graham*, 130 S. Ct. at 2028–29.

[160] *Id.*

[161] Atkins v. Virginia, 536 U.S. 304, 319 (2002).

punishment context, deterrence can also reflect the specific interest in preventing the particular offender from reoffending.[162] For both sorts, "deterrence must operate (if at all) through the potential offenders' minds, so it is essential that they know about the severity of the probable sentence [and] take this into account when deciding whether to offend . . . ."[163] In *Roper*, the Court suggested that the same characteristics that make young offenders less culpable than adults also make them less susceptible to deterrence.[164] In *Graham*, the Court further teased out this reasoning, stating that young people's immaturity and impetuousness make them less likely to consider possible punishment when they make decisions, especially when that punishment is rarely imposed.[165] It additionally ruled out any limited deterrent effect that life that without parole has on nonhomicide offenders, noting how any such effect is outweighed by how disproportionate the punishment is.[166]

Again, this logic is hardly limited to offenders under eighteen. The same characteristics that make those under eighteen less likely to consider possible punishment when they act can also be present in those aged eighteen to twenty-five. If an offender cannot understand and appreciate the severity of an irrevocable sentence when he decides to offend, his sentence loses deterrent value. While such sentences may still have some general deterrent value for other prospective offenders, it remains that they must not be grossly disproportionate to the offender against whom they are imposed. Thus, depending on their crimes, some young people aged eighteen to twenty-five might have such diminished moral responsibility that any limited deterrent effect on prospective offenders that would be gained from the young people's irrevocable sentences would not justify imposing those sentences.

3. *Incapacitation*

The Court in *Graham* also added and rejected the justification of incapacitation. Incapacitation is said to protect the public and make offenders incapable of reoffending.[167] The *Graham* Court recognized that incapacitation can satisfy concerns regarding public safety, but it determined that relating such a justification to young offenders required the assumption that they could be ongoing dangers.[168] Because the non-fixed

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[162] *See* ANDREW ASHWORTH, SENTENCING AND CRIMINAL JUSTICE 79 (5th ed. 2010).
[163] *Id.*
[164] *See* Roper v. Simmons, 543 U.S. 551, 570–72 (2005).
[165] *See Graham*, 130 S. Ct. at 2028–29.
[166] *See id.*
[167] *See* ASHWORTH, *supra* note 162, at 84.
[168] *See Graham*, 130 S. Ct. at 2029.

nature of young people's characters makes such an assumption questionable, the Court ruled out that possibility.[169] Relying on *Roper*, it noted that even "expert psychologists" have trouble differentiating between young offenders who succumb to "unfortunate yet transient immaturity" and those "whose crime reflects irreparable corruption."[170]

The same reasoning can make the incapacitation justification inapplicable to young adults. Just as incorrigibility is inconsistent with youth under eighteen,[171] so too might it be inconsistent with some youth over eighteen. Personality disorders can generally be diagnosed in young people over eighteen,[172] but "[u]sing a chronological age to demarcate the stage [in which such diagnoses are appropriate] can present difficulties as young people of the same chronological age may differ greatly in their levels of developmental maturity."[173] Research likewise shows that young people's identities continue to form substantially beyond eighteen.[174]

4. *Rehabilitation*

Finally, the Court has concluded that a fourth goal, rehabilitation, could not justify irrevocable punishments for young offenders. Although "the concept of rehabilitation is imprecise" and remains the subject of substantial dialogue,[175] the rehabilitative approach generally concerns itself with the perceived needs of the offender rather than with the gravity of the crime.[176] As a result, the aim is to treat the offender and provide the

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[169] *See id.*

[170] *Id.* at 2026.

[171] *See* Miller v. Alabama, 132 S. Ct. 2455, 2465 (2012) (citations omitted).

[172] BRUCE J. COHEN, THEORY AND PRACTICE OF PSYCHIATRY 504 (2003) ("Since children's personalities are still subject to change at least into their young adulthoods, most clinicians are circumspect about diagnosing personality disorder in individuals under the age of 18.").

[173] *See* NAT'L COLLABORATING CTR. FOR MENTAL HEALTH, BORDERLINE PERSONALITY DISORDER: TREATMENT AND MANAGEMENT 348 (2009) (discussing borderline personality disorder).

[174] *See* Waterman, *supra* note 51, at 355; *see also* Jennifer Lynn Tanner & Jeffrey Jensen Arnett, *The Emergence of 'Emerging Adulthood': The New Life Stage Between Adolescence and Young Adulthood*, *in* HANDBOOK OF YOUTH AND YOUNG ADULTHOOD: NEW PERSPECTIVES AND AGENDAS 39, 42 (Andy Furlong ed., 2009) ("Emerging adulthood is an age period during which there is stronger potential for personality change compared to earlier and later decades."). Tanner and Arnett note that people's personalities over the period from adolescence through emerging adulthood "tend to make gains in forcefulness and decisiveness; . . . show increases in self-control, reflecting tendencies to become more reflective, deliberate and planful; and decrease in negative emotionality, including aggressiveness and alienation." *Id.* (citation omitted).

[175] *Graham*, 130 S. Ct. at 2029.

[176] *See* ASHWORTH, *supra* note 162, at 86.

education or skills necessary to reduce his risk of reoffending.[177] In *Graham*, the Court held that life imprisonment without parole could not be justified by rehabilitation because "the penalty forswears altogether the rehabilitative ideal."[178] Denying young offenders reentry to the community, according to the Court, requires making permanent judgments about their value and place in society—inappropriate in light of young offenders' "capacity for change and limited moral culpability."[179]

This justification can be also rejected on a similar basis for some young adults. Those young people who have the same capacity for change and the same limited moral culpability as seventeen-year-olds should not be forsworn from potential rehabilitation simply because they are older than eighteen.

Because *Roper*, *Graham*, and *Miller* recognized that penological goals cannot justify irrevocable sentences when offenders possess certain characteristics of youthfulness, it follows that the penological goals also cannot be met when other young people exhibit the same characteristics. Sentences prescribing death, life in prison without parole for nonhomicide offenses, or mandatory life in prison without parole also would be disproportionate for youthful offenders who are merely of a slightly higher age. Punishment for both groups of offenders should be prohibited by the Eighth Amendment.

III. A PROPOSED SOLUTION

To this point, this Comment has focused on illustrating the inadequacy of drawing a bright line at eighteen for mitigating society's harshest punishments. This Part offers a potential remedy: extending sentencing mitigation to those young adults under twenty-five who would otherwise similarly be deemed less responsible under the scheme of justifications the Court has set forth, absent the Court's firm grip on chronological age.

A. PRESUMPTION OF YOUTHFULNESS

A presumption scheme would better serve criminal sentencing purposes, appreciating age yet refusing to be wholly bound by years and days. *Roper*, *Graham*, and *Miller*'s bright line should be transformed into a scheme in which defendants under the age of eighteen are irrebuttably presumed to possess the youthful characteristics that mandate reduced punishment under the Eighth Amendment, while defendants up to the age

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[177] *See Graham*, 130 S. Ct. at 2030.
[178] *Id.*
[179] *See id.*

of twenty-five can seek, but are not guaranteed, the same protection. Gradating based on age in this way imports into the modern era the early common law focus on punishing offenders based on the strength of their understanding and judgment.[180]

1. *Mandatory and Irrebuttable for Defendants Under Eighteen*

Under such a remedy, sentencing for defendants who were under eighteen at the time of their crimes would not change. A mandatory, irrebuttable presumption would still be afforded to those under eighteen so that they would not face society's most severe punishments of death, life imprisonment for nonhomicide offenses, or mandatory life without parole.

The costs of discontinuing this protection, as the *Roper* Court understood,[181] are great. The sentencing judge or jury, prejudiced by the particular crime details, could succumb to arguments contrary to developmental fact and find youth to be aggravating. Even offering up the youthfulness factors and asking the sentencing judge or jury to apply them for those under eighteen on a case-by-case basis would be insufficient for this group, given the level of discretion incumbent in such an analysis. Prosecutors could appeal to the undercurrent in public consciousness that youthful offenders are uniquely threatening.[182] They have made these arguments in the past, suggesting that crimes committed during youth are predictive of future dangerousness,[183] and jurors have believed them.[184]

Although some acts committed by those under eighteen are heinous and are "not just the acts of happy-go-lucky teenagers," as Justice Scalia contended in *Roper*,[185] the fact remains that the people who committed

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[180] *See supra* notes 16–27 and accompanying text. Whereas early determinations focused on culpability as it related to capacity, this scheme prioritizes responsibility.

[181] *See* Roper v. Simmons, 543 U.S. 551, 573 (2005) ("An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death.").

[182] *See* Elizabeth F. Emens, *Aggravating Youth:* Roper v. Simmons *and Age Discrimination*, 2005 SUP. CT. REV. 51, 76.

[183] *See id.* at 77; *see also supra* note 43. Note that Justice Kennedy's majority opinion in *Roper* found this tendency problematic, *see* 543 U.S. at 573–74, and Justice O'Connor deemed a prosecutor's attempt to argue youth to be aggravating as "troubling," *id.* at 603.

[184] *See* Barry C. Feld, *Adolescent Criminal Responsibility, Proportionality, and Sentencing Policy*: Roper*,* Graham*,* Miller/Jackson*, and the Youth Discount*, 31 LAW & INEQ. 263, 321 & n.313 (2013) ("Surveys of jurors report that the heinousness of a crime invariably trumped a youth's immaturity.").

[185] *Roper*, 543 U.S. at 619 (Scalia, J., dissenting); *see also* Graham v. Florida, 130 S. Ct. 2011, 2051–52 (2010) (Thomas, J., dissenting) (noting how the rarity of a sixteen-year-old sentenced to life without parole corresponded to his crime's rare brutality).

those acts are still teenagers. Given what researchers now know about young people, the potential split-focus between the crime's depravity and the defendant's unique sensibilities should be permanently resolved in a manner that concentrates on the young defendant. Psychologists and scientists have found enough evidence to decisively establish that young people, as a class, are generally different.[186] The cruelty in subjecting that entire class to society's harshest punishments simply to castigate the rare, extraordinarily mature defendant does not warrant abrogating protection for those under eighteen.[187] Whereas common law held that offenders younger than seven deserved categorical special protection,[188] that age should now be eighteen.

2. *Permissive and Rebuttable for Defendants Up to Age Twenty-Five*

Still, like candle flickers that outlast a birthday blow, youthfulness does not always disappear when an offender turns eighteen. Youthful defendants up to the age of twenty-five[189] should therefore have the opportunity to seek mitigation. Defendants could argue that their youthfulness excludes society's harshest penalties as cruel and unjust.[190] They would have to reasonably show—like the younger defendants protected by *Roper*, *Graham*, and *Miller*—that they (1) lacked maturity and had an underdeveloped sense of responsibility, (2) were vulnerable to negative influences and had limited control over their environment, and (3) lacked characters that could be rehabilitated. This showing would unravel the irrevocable punishments' penological goals and preclude courts from imposing them under the Eighth Amendment. Unlike mitigation for younger defendants, however, the burden would then shift to the prosecution, which could show by a preponderance of the evidence that the defendants were sufficiently mature to be punished according to the legislature's design. The prosecution could undermine the defendants' evidence or introduce new evidence showcasing the offenders' culpability, not the crimes' grievousness.

A preponderance of the evidence standard, and not beyond a reasonable doubt, would be the appropriate burden for prosecutors to meet in disclaiming an eighteen- to twenty-four-year-old defendant's assertion of

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[186] *See supra* Part I.B.

[187] *See Roper*, 543 U.S. at 572–73.

[188] *See supra* notes 24–26 and accompanying text.

[189] For a discussion about the endpoint of twenty-five, see *infra* Part III.B.1.

[190] Due to its potential impact on plea bargaining, any determination regarding a defendant's eligibility for irrevocable punishments should precede the guilt phase of a trial.

youthfulness.[191] It would harmonize the interests in respecting legislative determinations of appropriate punishment while avoiding punishing legitimately youthful offenders unjustifiably. It would further retain some of the value in criminal law, not just as a reflector of actual human behavior, but also as a system of rules that suggests its ideal, aspirational expression. Criminal law, after all, not only censures; in so doing, it bestows positive, societal norms. If prosecutors could prove that a defendant, more likely than not, actually *did not* possess the characteristics that warrant mitigation, then the full spectrum of legislatively prescribed sentences would be available. But if prosecutors failed to contradict a youthfulness showing, more likely than not, then they could not subject the defendant to the harshest penalties. The court would determine both whether the defendant reasonably demonstrated his youthfulness and whether the prosecution rebutted the defendant's showing by a preponderance of the evidence.

Such a permissive, rebuttable youthfulness presumption would certainly alter schemes presuming criminal defendants to have the requisite responsibility to be held culpable. It might likewise raise uncertainties about the legal dichotomy between juvenile and criminal courts for older offenders. But, without requiring legislators to overhaul penal codes, this proposal would effectuate the meaning of *Roper*, *Graham*, and *Miller*.

B. ADDRESSING CONCERNS

With the contours of this remedy established, a number of questions emerge. For example, why should the presumption be limited to those under the age of twenty-five? Would imposing the presumption unnecessarily burden courts? Additionally, would allowing this level of judicial discretion invite uncertainty and unwarranted inconsistency? The following Sections address these issues.

1. *Simply a Delayed Bright Line?*

The first and most obvious critique of this remedy is the way it advocates a solution it seemingly opposes: drawing a somewhat arbitrary, albeit delayed, bright line. Drawing a line at twenty-five, however, is more

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[191] Before *Roper*, *Graham*, and *Miller*, Professor Stephen Morse discussed a similar rebuttable presumption scheme but suggested that "[f]airness and efficiency should require the prosecution to prove beyond a reasonable doubt that a particular adolescent was fully responsible." Stephen J. Morse, *Immaturity and Irresponsibility*, 88 J. CRIM. L. & CRIMINOLOGY 15, 63 (1997). He contended that such a high burden was necessary for cases involving defendants on the margin "in a system that prefers incorrect attributions of innocence (or lesser culpability) to incorrect attributions of guilt (or greater culpability)." *Id.* at 63–64.

appropriate than eighteen for several reasons. To be sure, a line at twenty-five comes closer to the science the Court touts. Recall that neuroscientific evidence previously before the Court proved that a youth's brain is not fully mature until an individual's twenties.[192] More recent sociological and psychological evidence continues to support such a finding.[193] For example, as a result of mounting evidence, child psychologists in Britain issued new guidelines in September 2013 "directing clinicians to reconsider how they view patients in younger adulthood" and treat those up to age twenty-five.[194] A line at twenty-five would also better heed the Court's concerns regarding the impact of youthfulness on retribution, deterrence, incapacitation, and rehabilitation.[195] As previously demonstrated, courts risk imposing unjust, unequal punishment when marginally older defendants can be censured more harshly than their younger counterparts, even though both groups possess the same culpability-reducing traits.

Drawing a line at twenty-five, and not some later age, additionally retains the Court's focus on the particular disproportionality of life imprisonment without parole for younger defendants. As the *Graham* Court recognized, "[l]ife without parole is an especially harsh punishment for a juvenile. Under this sentence a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult."[196] This sentiment rings true for those defendants marginally older than eighteen. If a defendant is older than twenty-five, however, the validity of youth-based rebuttals to life imprisonment diminish. Indeed, if defendants are not fully developed by age twenty-five, their available recourse should perhaps not be a youthfulness presumption. It could be a developmental disability defense.[197]

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[192] *See supra* notes 113–15 and accompanying text.

[193] *See supra* notes 118–25 and accompanying text.

[194] Matthew Mientka, *Adulthood Extended to Age 25 by Child Psychologists in UK*, MEDICAL DAILY (Sept. 24, 2013, 5:31 PM), http://goo.gl/8JDJCf; *see also* Lucy Wallis, *Is 25 the New Cut-Off Point for Adulthood?*, BBC NEWS (Sept. 23, 2013, 5:52 PM), http://goo.gl/ZRQ9ZV.

[195] *See supra* Part II.C.

[196] Graham v. Florida, 130 S. Ct. 2011, 2028 (2010).

[197] *See* Atkins v. Virginia, 536 U.S. 304, 318 (2002) ("[C]linical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills . . . . Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities . . . ."). The differences between a developmental disability defense and a youthfulness presumption are much starker than the ages for which they are applicable: the former reflects a defendant's diminished culpability as a result of transitory qualities. The latter reflects both a defendant's permanent diminished capacity and his resulting diminished culpability.

2. *Sacrificing Judicial Efficiency?*

A second critique of the presumption remedy is the burden it would impose on courts, requiring them to evaluate a new class of defendants' youthfulness, case-by-case. Evaluating a defendant's youthfulness, however, is already mandated for society's harshest penalties under the Eighth Amendment. *Eddings* required courts to consider youthfulness before they could impose capital punishment.[198] *Miller* required courts to similarly consider youthfulness when defendants under eighteen face life imprisonment without parole.[199] Where *Eddings* additionally stated that "youth is more than a chronological fact,"[200] this Comment's presumption scheme would ensure that youth amounts to more than a chronological fact in those situations where life imprisonment amounts to capital punishment.[201] In this way, the presumption scheme closes the Eighth Amendment loop fashioned from conjunctive readings of *Eddings*, *Roper*, *Graham*, and *Miller*.

Even if Eighth Amendment case law does not require this youthfulness inquiry, the interest in fair, proportional sentences demands it and offsets any added judicial burden. Outside the sentencing context, such individualized determinations often would be irrational. For example, requiring courts to decide whether every seventeen-year-old is mature enough to vote would "greatly outweigh whatever injustice might be produced by the use of a bright line minimum voting age."[202] When unjustified punishment is the countervailing injustice, however, the interest in judicial efficiency hardly compares.[203] Indeed, the injustice that stems from sentencing equally youthful defendants to significantly harsher punishments must require individualized youthfulness determinations—in spite of efficiency interests.[204] The Supreme Court has held that

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[198] *See* Eddings v. Oklahoma, 455 U.S. 104, 116 (1982).

[199] *See* Miller v. Alabama, 132 S. Ct. 2455, 2475 (2012).

[200] *Eddings*, 455 U.S. at 115.

[201] *See supra* notes 85–86 and accompanying text.

[202] *See* Hoffmann, *supra* note 106, at 281–82. *See generally supra* Part II.B.

[203] While police procedure and criminal sentencing are imperfect analogs, the Court in *J.D.B. v. North Carolina* recognized the need to carve out age as an exception to an otherwise objective *Miranda* rule. 131 S. Ct. 2394, 2407 (2011). In response to the State's argument that a child's age must be excluded from the custody analysis "to preserve clarity," Justice Sonia Sotomayor wrote that the Court has rejected a "more easily administered line, recognizing that it would simply enable the police to circumvent the constraints on custodial interrogations established by *Miranda*." *Id.* (internal quotation marks and citation omitted). In the sentencing context, however, the Court's bright line at age eighteen arguably enables some judges and juries to circumvent Eighth Amendment constraints on punishment.

[204] Commentators such as Professor Feld have previously recognized the burden that mitigating sentences based on youth might impose on courts. *See, e.g.*, Feld, *supra* note 23,

youthfulness diminishes culpability. Imposing fair, proportional punishment requires the same youthfulness consideration for defendants who are merely days or years older.

3. *Inviting Uncertainty and Unwarranted Sentencing Inconsistency?*

Finally, this remedy can be criticized for inviting uncertainty and unwarranted sentencing inconsistencies for defendants aged eighteen to twenty-five. Thankfully, however, the Court has provided lower courts with a sufficient framework that can permit individualized sentencing and avoid unfair disparities.[205] In *Roper*, *Graham*, and *Miller*, the Court offered and strengthened three factors that make youth less culpable under the Eighth Amendment.[206] In so doing, the Court provided a guide for lower courts evaluating whether defendants between the ages of eighteen and twenty-five warrant youthfulness presumptions. The youthfulness cases encourage lower courts to consider evidence of an offender's (1) lack of maturity and underdeveloped sense of responsibility, (2) vulnerability to negative influences and limited control over their environment, and (3) lack of characters that can be rehabilitated.

Sentencing judges or juries in both state and federal courts could rely on these factors similarly to how federal district courts use Federal Sentencing Guidelines. The advisory Guidelines create a baseline for sentencing without sacrificing judicial fact-finding.[207] The youthfulness factors could likewise provide a consistent baseline for addressing eighteen- to twenty-five-year-olds' youthfulness claims. When courts address offender characteristics "in a reasonably consistent manner," according to

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at 122 ("[F]or ease of administration, age alone provides the most useful criterion upon which to allocate mitigation"). In part for this reason, Professor Feld has proposed a "youth discount" in which sentences would be reduced according to age. *Id.* at 122–23; *see also* Feld, *supra* note 184, at 325–27 & n.328 (describing supporters of the "youth discount" principle). Professor Feld has argued that his approach "avoids the conceptual and administrative difficulties of a more encompassing subjective inquiry." Feld, *supra* note 23, at 122. This Comment rejects Professor Feld's age-based approach, siding instead with reasoning offered by Professor Morse, who asked, "Should not efficiency yield to the need to individualize for the small class of adults with the same characteristics as juveniles who therefore might not be responsible?" Morse, *supra* note 191, at 64; *see also id.* at 59 ("[W]e must very carefully identify why adolescents might be treated differently, and if fairness requires differential treatment for the class, it also requires that adults with the same responsibility diminishing characteristics should be treated equally.").

[205] This Comment asserts that the Court *has* identified relevant factors for subsequent courts to consider when evaluating the blameworthiness of young adults. *But see* Feld, *supra* note 184, at 321–22.

[206] Miller v. Alabama, 132 S. Ct. 2455, 2464 (2012) (citing Graham v. Florida, 130 S. Ct. 2011, 2026 (2010); Roper v. Simmons, 543 U.S. 551, 569–70 (2005)).

[207] *See* U.S. v. Booker, 543 U.S. 220, 233 (2005).

the Guidelines, they "help secure nationwide consistency, avoid unwarranted sentencing disparities, provide certainty and fairness, and promote respect for the law."[208]

Moreover, the case law understanding of youthfulness actually constrains federal judicial discretion to a greater degree than the Sentencing Commission envisioned. The Guidelines' section on age provides that "[a]ge (including youth) may be relevant in determining whether a departure is warranted, if considerations based on age, individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines."[209] If judges track Eighth Amendment case law to define "youth," they would have even more characteristics to study.

Across courts, this expanded inquiry regarding youthfulness could curtail discretion and inconsistency, and the Guidelines' nondescript "youth" could be given new meaning for defendants under twenty-five facing capital punishment or life imprisonment for nonhomicide crimes. Although this Comment does not define the factors' exact application, the Court has not otherwise required detailed remedies. For example, the Court has left for states to determine the appropriate ways to enforce constitutional restrictions against executing both mentally retarded and insane individuals.[210] This presumption remedy simply gives courts new lenses through which to view evidence that many already are required to gather.

CONCLUSION

This Comment has demonstrated three reasons why the current approach of recognizing the mitigating effect of youthfulness only when defendants are under eighteen years old cannot stand. If the solution to address the increasingly punitive orientation of criminal justice remains one of protecting youthful defendants through the Eighth Amendment, then courts must also consider defendants' youthfulness when eighteen- to twenty-five-year-olds face irrevocable sentences. Because the Court continues to insist that developmental differences lessen culpability and negate all penological justifications for imposing society's harshest

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[208] U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. H, introductory cmt. (2012) (internal quotation marks and citations omitted), *available at* http://goo.gl/cyilMw.

[209] *Id.* § 5H1.1.

[210] *See* Atkins v. Virginia, 536 U.S. 304, 317 (2002) (citing Ford v. Wainwright, 477 U.S. 399, 405, 416–17 (1986)). For a discussion about how the Court's approach has resulted in a myriad of procedures, see Allison Freedman, Note, *Mental Retardation and the Death Penalty: The Need for an International Standard Defining Mental Retardation*, 12 NW. J. INT'L HUM. RTS. 1, 8–9 (2014).

sanctions, marginally older and equally blameless offenders must be able to seek the same protection from them. A permissive, rebuttable presumption of youthfulness would accomplish this goal. Indeed, as the Court has suggested, "making youth (and all that accompanies it) irrelevant" to the imposition of the harshest and irrevocable sentences "poses too great a risk of disproportionate punishment."[211]

[211] *See Miller*, 132 S. Ct. at 2469.