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CONVICTING JUVENILES TO LIFE WITHOUT PAROLE

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I. INTRODUCTION

Adulthood is a social construct. For that matter, so is childhood. But like all social constructs, they have real consequences. They determine who is legally responsible for their actions and who is

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> not, what roles people are allowed to assume in society, how people view each other, and how they view themselves. But even in the realms where it should be easiest to define the difference—law, physical development—adulthood defies simplicity.[1]

When does a juvenile legally become an adult? This is literally a life-or-death question because the United States Supreme Court held that the Constitution prohibits the imposition of capital punishment on a juvenile.[2]

Despite the enormous consequences, the Supreme Court has spent little time defining what it means to be a juvenile.[3] Instead, the Court has simply accepted the relatively recently adopted conventional wisdom that a person is considered an adult on his or her eighteenth birthday.[4]

But there is no rational or scientific basis for drawing the line between being an adult and being a juvenile at age eighteen. Indeed, recent scientific research—the same brain research the United States Supreme Court has used to adopt legal principles that both protect and harm adolescents—proves that brain maturation actually occurs from ages ten to twenty-seven.[5]

This article will explore whether the line between a juvenile and an adult should remain at eighteen. It begins by exploring the history of distinguishing childhood from adulthood.[6] Next, this article details the legal system's differing treatment of certain ages.[7] Then, it details the criminal justice system's treatment of persons below the age of eighteen.[8] Next, this article discusses the science behind cognitive development.[9] Then, it discusses Supreme Court decisions that affect rights of individuals based on age.[10] Finally, the article concludes that drawing the line of adulthood at

1. Julie Beck, *When Are You Really an Adult?*, THE ATLANTIC (Jan. 5, 2016), https://www.theatlantic.com/health/archive/2016/01/when-are-you-really-an-adult/422487/ [https://perma.cc/32YT-CY52].

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

3. *See id.* at 574 ("The qualities that distinguish juveniles from adults do not disappear when an individual turns 18 . . . however, a line must be drawn.").

4. *See id.* ("The age of 18 is the point where society draws the line for many purposes between childhood and adulthood.").

5. *See* Brief for American Medical Association et al. as Amici Curiae Supporting Respondents, Roper v. Simmons, 543 U.S. 551 (2005) (No. 03-633), 2004 WL 1636447.

6. *See infra* Part II.

7. *See infra* Part III.

8. *See infra* Part IV.

9. *See infra* Part V.

10. *See infra* Part VI.

age eighteen without consideration of an individual's characteristics is arbitrary under the Constitution.[11]

II. HISTORY OF ADULTHOOD: SHIFTING BETWEEN MENTAL AND PHYSICAL CAPACITY

Historically, society has fluctuated in how it determines when a child becomes an adult. The concepts of who is classified as a child and what emotional, physical, and intellectual properties a child is assumed to possess have adjusted in response to societal changes.[12]

In early Roman law, society set the age of adulthood when a person obtained "intellectual capacit[y] required to exercise full citizenship, manage their affairs, and become parents and the heads of families themselves [at] age fifteen for males."[13] But the Romans did not assume a person's physical capacity meant they had full intellectual maturity.

> Roman law placed free males who were technically "of full years and rights" [at puberty] under the temporary guardianship of adults known as *Curatores*. A *Curator*'s approval was required to validate young males' formal acts or contracts until they reached twenty-five years of age. Indeed, Roman law used the terms "minority" and "majority" in reference, not to age fifteen, but instead to age twenty-five—the age of . . . full maturity.[14]

So, while the Romans acknowledged physical capacity for some rights, legal rights constituting full autonomy were restrained until an individual was considered intellectually mature.

On the other hand, developing Western societies emphasized one's ability to perform in the military to determine their age of majority.[15] In Medieval Europe, there were only adults and infants,[16] and the primary characterization between adults and infants was their physical dependence

11. *See infra* Part VII.

12. Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083, 1093 (1991).

13. Vivian E. Hamilton, *Adulthood in Law and Culture*, 91 TUL. L. REV. 55, 63 (2016). During this era, the onset of puberty signaled the "physical capacity" to become parents. *Id.*

14. *Id.* (footnotes omitted).

15. *See* T.E. James, *The Age of Majority*, 4 AM. J. LEGAL HIST. 22, 23 (1960).

16. PHILIPPE ARIÈS, CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE 128 (Robert Baldick trans., 1962) ("In medieval society the idea of childhood did not exist . . . . The . . . awareness of the particular nature of childhood . . . which distinguishes the child from the adult . . . was lacking.").

on others to survive.[17] Once a child was physically independent, they were considered full-functioning members of society with legal rights.[18]

At this time and place, a person's physical independence directly correlated to their ability to participate in warfare.[19] While no specific age was set by law, attaining the physical capacity to participate in warfare was generally around age fifteen.[20]

But later, the needs of the military changed; suits of armor became heavier and weapons became more lethal.[21] As a result, younger males were no longer physically capable of handling weapons required for war. The change in the nature of military required more physical development, so "[t]he age of eligibility for knighthood (the equivalent of the age of majority at the time) increased to twenty-one."[22]

Over time, English law makers developed a structure that assigned criminal and civil liabilities—including the ability to work, inherit family estates, and commit a crime—on societal age lines.[23] Deriving the difference between juveniles and adults from the age of knighthood, England determined the age of adulthood to be twenty-one.[24] There was no consideration of mental capabilities tied to adult rights.[25]

17. *Id.* at 329 (explaining physical dependence typically ended around age seven).

18. *Id.* "Children"—at least those over the age of seven in mid-16th century England—were treated the same as adults because society lacked the idea that children were different or had different needs. HOLLY BREWER, BY BIRTH OR CONSENT: CHILDREN, LAW, AND THE ANGLO-AMERICAN REVOLUTION IN AUTHORITY 1 (2005). People over the age of seven were of "ripe age" to marry and could drink in taverns, eight-year-olds could be hanged, and teenagers were routinely elected to Parliament. *Id.*

19. *See* Hamilton, *supra* note 13, at 63 ("When the nature of warfare changed during the Middle Ages so did the age of majority.").

20. *See* James, *supra* note 15, at 22 ("Gothic kings seem frequently to have come of age at fifteen."). In France, childhood ended at seventeen when youth were "then judged strong enough and sufficiently qualified for the culture of their lands, the mechanic arts and commerce in which they were all employed." *Id. See also* Hamilton, *supra* note 13, at 63 ("The age of majority between the ninth and eleventh centuries was fifteen for males.").

21. *See* Hamilton, *supra* note 13, at 63.

22. *Id.* at 63–64.

23. The movement towards determining the mental capabilities of adolescents came from the Enlightenment Period where John Locke and philosophers began using reason and scientific developments to show children were different from adults in their inherent vulnerability and lower mental capacity. *See* Ainsworth, *supra* note 12, at 1093–94.

24. James, *supra* note 15, at 33. Historically, European countries used physical capacity to set the age of adulthood, i.e., when a person was physically independent of their parents, they were considered full-functioning members of society. *See* ARIÈS, *supra* note 16, at 329. When a man could participate in warfare, he was considered an adult. *Id.* For England, the military armor was heavy and advanced insofar that the age of military participa-

The United States adopted the age of twenty-one as the age of adulthood during the American Revolution.[26] But the age of adulthood in the United States has also fluctuated, changing over the years and varying among states. When the age of twenty-one for adulthood was implemented, the governments did not question whether a person was physically or mentally capable of adult activities[27]—it was simply the societal norm.[28]

Twenty-one remained the age of adulthood until well into the twentieth century.[29] Then, in 1942, similar to England's rationale, the changing needs of the military dictated a change in the age of adulthood. During World War II the military needed more bodies; as a result, Congress lowered the draft age to eighteen.[30] In doing so, Congress did not consider if eighteen-year-olds were mature enough to participate[31]—they simply needed more bodies.[32]

Lowering the draft age to eighteen created a notable difference between being eligible for the draft and other adult responsibilities, including

tion was raised to twenty-one. *Id. See generally* Tamar Schapiro, *What Is a Child?*, 109 ETHICS 715 (1999) (discussing age-line creation and the nature of adult-child distinction).

25. *See* ARIÈS, *supra* note 16, at 128, 329.

26. *See* 1 DONALD T. KRAMER, LEGAL RIGHTS OF CHILDREN 980 (rev. 2d ed. 2005) (detailing the traditional British common law age of majority at twenty-one in most American states until the passage of the Twenty-Sixth Amendment); *see also Ex parte* Petterson, 166 F. 536, 546 (D. Minn. 1908) ("By the common law the age of majority is fixed at 21 for both sexes, and, in the absence of any statute to the contrary, every person under that age, whether male or female, is an infant . . . .").

27. *See* Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547, 559 (2000) ("The designation of a categorical legal age of majority can be understood as reflecting a crude judgment about maturity and competence.").

28. *See id.*

29. *See* Baril v. Baril, 354 A.2d 392, 396 (Me. 1976) ("At common law the age at which a person's status changed from that of an infant or minor to that of an adult in the case of both sexes was twenty-one years, regardless of physique, mentality, education, experience or accomplishments."); Thomas v. Couch, 156 S.E. 206, 206 (Ga. 1930) ("One becomes of full age on first moment of day preceding twenty-first anniversary of birth . . . ."); Fitzhugh v. Dennington, 2 Lord Raymond 1094, 1096, 92 E.R. 225, 226 (KB 1704) (noting that "twenty-one years . . . is of age").

30. Selective Training and Service Act of 1940, Pub. L. No. 76–783, 54 Stat. 885 (1940) (establishing a national draft) (also known as Burke-Wadsworth Act); *see* Franklin D. Roosevelt, *Statement on Signing the Bill Reducing the Draft Age* (Nov. 13, 1942), in AMERICAN PRESIDENCY PROJECT (John Wooley & Gerhard Peters eds.), https://www.presidency.ucsb.edu/node/210187 [https://perma.cc/4B7R-MYNN].

31. *See Universal Military Training: Hearings Before the S. Comm. on Armed Servs.*, 80th Cong. 2 (1948) (statement by George C. Marshall, U.S. Sec. of Def.) ("[W]e [the United States] must find some method of maintaining a sufficient military posture, one sufficiently strong without the terrific expense of a large standing Military Establishment.").

32. *See id.*

the right to vote. Eighteen-year-olds could be drafted and killed in a war, but they could not vote for their president who was sending them to war.[33] This discrepancy created a furor, so Congress moved to lower the age of adulthood across the board.[34] Soon, the age of eighteen began to replace the age of twenty-one across a range of contexts and has since been adopted as the age of adulthood.[35]

Throughout these age-classification transitions, no one inquired as to whether people were mentally mature enough to vote, serve in the military, or receive other adult rights—society simply deemed the treatment to be unfair given their military participation.[36]

While the age of eighteen is a general guideline for being an adult and is used by the majority of states, each state has a different definition of what classifies a person as an adult—especially in the criminal context.[37] Sixteen states use fourteen as the cutoff age for trying youths as adults, while six states set the bar at thirteen.[38] Kansas and Vermont allow ten-year-olds

33. *See* Larry Cunningham, *A Question of Capacity: Towards a Comprehensive and Consistent Vision of Children and Their Status Under Law*, 10 U.C. DAVIS J. JUV. L. & POL'Y 290, 296 (2006).

34. *The 26th Amendment and the Progressive Constitution,* CONST. ACCOUNTABILITY CTR. (March 24, 2011), https://www.theusconstitution.org/blog/the-26th-amendment-and-the-progressive-constitution/ [https://perma.cc/VPE5-8PS3]. President Dwight Eisenhower became the first president to publicly voice support for amending the minimum voting age. "For years our citizens between the ages of 18 and 21 have, in time of peril, been summoned to fight for America. They should participate in the political process that produces this fateful summons." *Id.*

35. *See* Hamilton, *supra* note 13, at 65; *Termination of Support- Age of Majority*, NAT'L CONF. ST. LEGIS. (May 6, 2015), http://www.ncsl.org/research/human-services/termination-of-child-support-age-of-majority.aspx [https://perma.cc/UMD5-3NQA] (listing statutory citations for the ages of majority of each U.S. state and territory).

36. *See* Michael Philip Rosenthal, *The Minimum Drinking Age for Young People: An Observation*, 92 DICK. L. REV. 649, 653 (1988).

37. *See* Anne Teigen, *Juvenile Age of Jurisdiction and Transfer to Adult Court Laws*, NAT'L CONF. ST. LEGIS. (Jan. 11, 2019), http://www.ncsl.org/research/civil-and-criminal-justice/juvenile-age-of-jurisdiction-and-transfer-to-adult-court-laws.aspx [https://perma.cc/JF5J-SGUR] (showing varying ages of certifying children to adult court from 15 to 18); *Thirteen States Have No Minimum Age for Adult Prosecution of Children*, EQUAL JUST. INSTITUTE (Sept. 16, 2016), https://eji.org/news/13-states-lack-minimum-age-for-trying-kids-as-adults [https://perma.cc/E8CR-N8NB]; *see e.g.*, MINN. STAT. § 609.055, subdiv. 2 (2018) ("Children under the age of 14 years are incapable of committing crime.").

38. Mary Wood, *Standards Needed for Juvenile Confessions, Panelists Say*, UNIV. VA. SCH. L. (Feb. 16, 2005), http://content.law.virginia.edu/news/2005_spr/ps_juvenile.htm [https://perma.cc/U6CV-PHFS].

to be tried as adults,[39] and twenty-three other states have no age cutoff, also allowing ten-year-olds to be tried as adults.[40] When classifying an event as "adult," the physical act itself can dictate an age of adulthood;[41] other times it is the youth's mental ability.[42]

The history of differentiating between adults and juveniles reveals that there has been a lack of consistency in making this crucial determination, and no rational basis for making the distinction.

III. ADULTHOOD AND CRIMINALITY

The difference between an adult and a juvenile is perhaps most pronounced in the criminal justice system. For a variety of reasons, juveniles are given special protection—such as freedom from capital punishment—as well as denied certain rights, like the right to a jury trial.[43]

Generally, when a person turns eighteen, criminal justice systems consider that person to be an adult, and they are no longer afforded the same protective rights as a juvenile.[44] This means that an eighteen-year-old is subject to adult court, including possibly being subjected to the death penalty.[45] Despite the enormous consequences, there is no rational or scientific basis for distinguishing between a person who has just turned eighteen and person who is about to turn eighteen; in fact, there could not be a

39. *Id.*

40. *Id.*

41. *See* MINN. STAT. § 624.7181, subdiv. 2 (2018) ("A person under the age of 21 who carries a semiautomatic military-style assault weapon . . . on or about the person in a public place is guilty of a felony."); MINN. STAT. § 240.25, subdiv. 8 (2018) ("A person under the age of 18 may not place a bet . . . or participate in card playing at a card club at a licensed racetrack."); MINN. STAT. § 97B.021, subdiv. 1 (2018) (noting that children under *sixteen* years of age may possess a firearm if accompanied by a parent, and that if they are *fourteen* or *fifteen,* they must also have obtained a firearms safety certificate).

42. *See, e.g.*, Michael A. Corriero & Alison M. Hamanjian, *Advancing Juvenile Justice Reform in New York A Proposed Model*, N.Y. St. B.J. 20, 22 (2008) ("In Roper, the Supreme Court recognized the developmental differences of minors under 18 as an accepted societal factor in determining the appropriate treatment of juvenile offenders, thereby officially acknowledging the conclusions of behavioral scientists as to the diminished capacity and culpability of adolescents.").

43. *See* McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971) (holding that a juvenile is not guaranteed the right to a jury trial under the Sixth or Fourteenth Amendments).

44. *See Juvenile vs Adult Justice*, PBS FRONTLINE, https://www.pbs.org/wgbh/pages/frontline/shows/juvenile/stats/juvvsadult.html [https://perma.cc/3WSH-5UXP].

45. *See* Roper v. Simmons, 543 U.S. 551 (2005) (holding that the death penalty is unconstitutional for persons *under* the age of eighteen at the time of their capital offense).

rational or scientific basis because the difference between the two could literally be a matter of seconds.

A. Age-Based Criminal Culpability

William Blackstone,[46] an English lawmaker, wrote one of the earliest records for defining the age line in criminality. Blackstone identified young children as incapable of committing a crime due to their mental capacity[47] and established two age lines: seven and fourteen.[48] Children under the age of seven were considered too young to completely understand their actions;[49] thus, they could not form the "vicious will" necessary to commit a crime and could not be charged.[50] Children aged seven through fourteen "were presumed to lack any criminal capacity, but this presumption could be rebutted."[51] No one over the age of fourteen could raise infancy or immaturity as a defense.[52] Blackstone's classification was based on his generalized view of the mental capacity of varying age groups in their ability to understand their wrongdoing.[53]

46. William Blackstone was one of the most important English lawyers during the time of the American Revolution. *See Sir William Blackstone*, ENCYC. BRITANNICA (Feb. 10, 2019), https://www.britannica.com/biography/William-Blackstone [https://perma.cc/2NYQ-QMY9].

47. *See* AM. BAR ASS'N DIV. FOR PUB. EDUC., THE HISTORY OF JUVENILE JUSTICE 5 (2007), http://www.americanbar.org/content/dam/aba/migrated/publiced/features/DYJpart1.authcheckdam.pdf [https://perma.cc/3FVN-J9RL] (citation omitted) ("Two things were required to hold someone accountable for a crime. First, the person had to have a 'vicious will' (that is, the intent to commit a crime). Second, the person had to commit an unlawful act. If either the will or the act was lacking, no crime was committed.").

48. Children under the age of seven were considered too young to completely understand their actions and could not form the "vicious will" necessary to commit a crime. *See* AM. BAR ASS'N DIV. FOR PUB. EDUC., *supra* note 47, at 1. Children aged seven through fourteen were presumed incapable of crime, but this presumption could be rebutted. *See id.* No one over the age of fourteen could raise infancy or immaturity as a defense. *See id.*; DAVID L. MYERS, EXCLUDING VIOLENT YOUTHS FROM JUVENILE COURT THE EFFECTIVENESS OF LEGISLATIVE WAIVER 12 (2001).

49. *See* Application of Gault, 387 U.S. 1, 16 (1967) ("At common law, children under seven were considered incapable of possessing criminal intent.").

50. *See* AM. BAR ASS'N DIV. FOR PUB. EDUC., *supra* note 47, at 1.

51. MYERS, *supra* note 48, at 12.

52. *Id.*

53. AM. BAR ASS'N DIV. FOR PUB. EDUC., supra note 47, at 5 (quoting Blackstone) ("But by the law, as it now stands . . . the capacity of doing ill, or of contracting guilt, is not so much measured by years and days, as by the strength of the delinquent's understanding and judgment.").

Blackstone's age lines are present in the criminal system today—especially as they relate to mental culpability. The modern criminal justice system considers one's mental state in a variety of crimes, such as first-degree murder.[54] Criminal culpability assumes that a person must, or should, know the wrongfulness of the act or be able to form the specific *mens rea* required to commit a crime.[55] Although ages vary, every state has an exception that, depending on the circumstances, limits the criminal responsibility of youth.[56]

The most significant changes to age-based criminality occurred in the twentieth century. The first juvenile court was established in Cook County, Illinois, in 1899.[57] Here, a progressive reform movement sought to change the way the legal system treated youths.[58] Theoretically, the juvenile court was designed to identify underlying causes of behavior and provide necessary treatment to prevent future serious misbehavior.[59] The driving motive behind the juvenile court was to intervene in a minor's life when they were still amenable to change and to "save [them] from a downward career."[60]

However, from the 1980s to the early 1990s, there was an increase in crimes committed by young people, and youth crime arrest rates increased

54. *See* MINN. STAT. § 609.185(a)(1) (2018) (emphasis added) (stating that whoever "causes the death of a human being with premeditation and with *intent* to effect the death of the person" is guilty of murder in the first degree).

55. Andrew Walkover, *The Infancy Defense in the New Juvenile Court*, 31 UCLA L. REV. 503, 509 (1984).

56. *See* Corriero, *supra* note 42, at 21; Jeffrey Fagan, *This Will Hurt Me More Than It Hurts You: Social and Legal Consequences of Criminalizing Delinquency*, 16 NOTRE DAME J.L. ETHICS & PUB. POL'Y 1, 11 (2002). *But see* Marcy Mistrett & Jeree Thomas, *A Campaign Approach to Challenging the Prosecution of Youth as Adults*, 62 S.D.L. Rev. 559, 560 (2017); *State Snapshot*, CAMPAIGN FOR YOUTH JUSTICE, http://www.campaignforyouthjustice.org/state-work/state-snapshot [https://perma.cc/T34K-FPS2].

57. *See* GAULT: WHAT NOW FOR THE JUVENILE COURT? 2 (Virginia Nordin ed. 1968) (referencing Act of April 21, 1899, Ill. Laws, § 21, p. 137 (1899)); *see also* SAMUEL M. DAVIS, RIGHTS OF JUVENILES: THE JUVENILE JUSTICE SYSTEM (2d ed. 2006); Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 5 ANN. REV. CLINICAL PSYCHOL. 47, 49 (2009). *But see* COLO. LAWS ch. 136 § 4 (1899) (explaining that statute that came two months prior to Illinois protecting children between the ages of eight and fourteen).

58. Martin L. Forst & Martha-Elin Blomquist, *Cracking Down on Juveniles: The Changing Ideology of Youth Corrections*, 5 NOTRE DAME J. L. ETHICS & PUB. POL'Y 323–75 (1991).

59. MYERS, *supra* note 48, at 14.

60. Application of Gault, 387 U.S. 1, 15 (1967); *see also* Douglas R. Rendleman, *Parens Patriae: From Chancery to the Juvenile Court*, 23 S.C. L. REV 205, 212 (1973).

by seventy-five percent.[61] During this period, there was also an increase in homicides committed by people under the age of eighteen.[62] As a result, the state began punitively charging young individuals.[63] During this time, more minors were being tried as adults in adult court.[64] Historically, courts had the discretion to transfer the minor to adult court following an assessment of the crime and the individual's culpability.[65] Unfortunately, today many minors are *automatically* transferred to adult court based on their age and criminal act without an assessment.[66] In fact, each year, over 200,000 juveniles under eighteen are prosecuted in adult courts.[67] Many of these cases are transferred without any assessment of individual mental culpability.[68]

B. Minnesota: The Importance of Age in Determining and Addressing Criminality

Today, an adult in Minnesota is defined as a person eighteen years of age or older,[69] while a minor is any individual under the age of eighteen.[70] A child under the age of fourteen is considered incapable of committing a

61. JAMES C. HOWELL, JUV. JUST. & YOUTH VIOLENCE 75 (1997) (referencing SNYDER & TAMAGATA, NAT'L CTR FOR JUV. JUST., JUVENILE OFFENDERS AND VICTIMS: 1996 UPDATE ON VIOLENCE 14 (1996)).

62. *Id.*

63. *See* MYERS, *supra* note 48, at 19 ("In contrast to the conventional juvenile court's emphasis on 'child saving' and serving the 'best interests of children' . . . reforms reflect[ed] a perceived need to 'get tough' with violent adolescents.").

64. CAROL J. DEFRANCES & KEVIN J. STROM, JUVENILES PROSECUTED IN STATE CRIMINAL COURTS 4 (1997).

65. MICHAEL A. CORRIERO, JUDGING CHILDREN AS CHILDREN: A PROPOSAL FOR A JUVENILE JUSTICE SYSTEM 14 (2006).

66. Some states provide for "once an adult, always an adult" transfer, which are laws that require prior juvenile adult transfers to always be prosecuted as an adult regardless of whether the offense is serious or not. Teigen, *supra* note 37.

67. CORRIERO, *supra* note 65, at 128 (referencing Laurence Steinberg, *Should Juvenile Offenders Be Tried as Adults? A Developmental Prospective on Changing Legal Policies* (Jan. 19, 2000), http://willamette.edu/cla/additional-academic-opportunities/debate/pdf/youth_forum/kpdc%20research/motion%202%20affirm/bongo_DATA%20ON%20JUVENILES.pdf [https://perma.cc/7F5F-WM42]).

68. *See, e.g.*, Miller v. Alabama, 567 U.S. 460, 487–88 (2012) ("Of the 29 relevant jurisdictions, about half place at least some juvenile homicide offenders in adult court automatically, with no apparent opportunity to seek transfer to juvenile court. Moreover, several States at times lodge this decision exclusively in the hands of prosecutors, again with no statutory mechanism for judicial reevaluation.").

69. MINN. STAT. § 645.451, subdiv. 3 (2018).

70. § 645.451, subdiv. 2.

"crime" due to their mental capacity and consequently cannot be tried in adult court.[71] While the age of adulthood has not changed, the laws governing criminal punishments for different ages have.

Minnesota established a separate court for juveniles under the age of seventeen in 1905.[72] The juvenile court was created to have jurisdiction over individuals under the age of eighteen, but it does not possess jurisdiction over those sixteen or older in certain situations.[73] The court can also "certify" an individual over the age of fourteen to be tried as an adult.[74] Prior to the 1990s, certification of a juvenile to adult court was "often difficult to obtain even for very violent offenses, and w[as] based in large part upon the testimony of psychologists and psychiatrists."[75] The heightened crime rates of the 1980s and 1990s, however, prompted a change in the certification process.[76] When the certification process changed, juveniles were no longer considered inherently less culpable.[77] Instead they were considered a threat to public safety. So, the burden of proof shifted to the

71. § 609.055, subdiv. 1.

72. *See generally* An Act to Regulate the Treatment and Control of Dependent, Neglected and Delinquent Children, ch. 285, sec. 3, 1905 Minn. Laws 419, https://www.revisor.mn.gov/laws/1905/0/General+Laws/Chapter/285/pdf/ [https://perma.cc/A8XH-Z99Q] (codified at MINN. STAT. § 7164 (1913)). The act stemmed from Cook County, Illinois, which founded the first juvenile court in 1899. *See* Wright S. Walling & Stacia Walling Driver, *100 Years of Juvenile Court in Minnesota—A Historical Overview and Perspective*, 32 WM. MITCHELL L. REV. 883, 889 (2006) (providing a comprehensive review of the creation of the juvenile court).

73. MINN. STAT. § 260B.007, subdiv. 6 (2018); §§ 260B.101, 225.

74. *Juvenile Delinquency*, MINN. JUD. BRANCH, http://www.mncourts.gov/Help-Topics/Juvenile-Delinquency.aspx https://perma.cc/DB3D-TWLM]; *see, e.g.*, MINN. STAT. § 260B.125, subdiv. 1 (2018) (providing that children aged fourteen and older who are charged with a felony-level offense can be certified by the juvenile court and transferred to adult court); MINN. STAT. § 609.055 (2018).

75. JAMES C. BACKSTROM, EXTENDED JUVENILE JURISDICTION "ONE MORE STRIKE AND YOU'RE OUT!" MINNESOTA'S BLENDED SENTENCING LAW 2 (1998), https://www.co.dakota.mn.us/Government/Attorney/WorkExperience/Documents/ExtendedJuvenileJurisdictionBlendedSentencingLaw.pdf [https://perma.cc/9NKS-AKT2].

76. *See generally* Kim Taylor-Thompson, *Minority Rule: Redefining the Age of Criminality*, 38 N.Y.U. REV. L. & SOC. CHANGE 143, 143–200 (2014). Between 1984 and 1998 the number of juvenile petitions increased by 325 percent from 15,000 to more than 63,000. *See* Dana Swayze & Danette Buskovick, *Back to the Future: Thirty Years of Minnesota Juvenile Justice Policy and Procedure, 1980–2010*, MINN. DEPT. OF PUB. SAFETY OFF. OF JUST. PROGRAMS 2 (2014), https://www.leg.state.mn.us/docs/2014/other/140424.pdf [https://perma.cc/Y7RS-4K7V].

77. MINN. STAT. § 260B.001, subdiv. 2 (2018) ("The purpose of the laws relating to children alleged or adjudicated to be delinquent is to promote the public safety and reduce juvenile delinquency by maintaining the integrity of the substantive law prohibiting certain behavior and by developing individual responsibility for lawful behavior.).

juvenile to show by "clear and convincing evidence" that they were suitable for treatment in the juvenile system instead of adult court.[78] Once a child is moved to adult court, juvenile court jurisdiction ends.[79]

The certification process and the consideration of multiple offenses does not always consider whether an *individual* had the mental capacity to warrant adult jurisdiction. Instead, the state and legislature demand the courts look at an individual's age to determine what punishment is warranted. For example, a sixteen-year-old may use tear gas,[80] but only eighteen-year-olds can use a stun gun[81]—a violation of either rule is a misdemeanor.[82] Furthermore, persons under age sixteen can hunt[83] but may not possess a firearm—unless they meet an exception, such possession will result in a misdemeanor.[84] These laws are just some examples of the inconsistent age laws present in Minnesota's system.

IV. SCIENCE BEHIND COGNITIVE DEVELOPMENT: CULPABILITY AND CAPABILITIES

Society recognizes the difference in mental capacity by limiting certain rights—such as requiring heightened ages to consume alcohol or rent a car—to persons over the age of eighteen.[85] Despite eighteen being deemed

78. BACKSTROM, *supra* note 75, at 4.

79. MINN. STAT. § 260B.125 (2018) ("When a child is alleged to have committed, after becoming 14 years of age, an offense that would be a felony if committed by an adult, the juvenile court may enter an order certifying the proceeding for action under the laws and court procedures controlling adult criminal violations."); *see* Minn. R. of Juv. Delinq. Pro. R. 18.01 subdiv. 2 ("The district court has original and exclusive jurisdiction in criminal proceedings concerning a child alleged to have committed murder in the first degree after becoming sixteen (16) years of age. Upon the filing of a complaint or indictment charging a sixteen (16) or seventeen (17) year old child in adult court proceedings with the offense of first-degree murder, juvenile court jurisdiction terminates for all proceedings arising out of the same behavioral incident.").

80. § 624.731.

81. *Id.*

82. § 624.731 subdiv. 8.

83. MINN. STAT. § 97A.451 (2018).

84. § 97B.021.

85. *See* National Minimum Drinking Age Act, 23 U.S.C. § 158 (1984) (mandating that states who allow persons under 21 years of age to purchase and possess alcohol will have their federal highway apportionment fee reduced by ten percent); *Under 25 Car Rental*, HERTZ, https://www.hertz.com/rentacar/misc/index.jsp?targetPage=Hertz_Renting_to_Drivers_Under_25.jsp [https://perma.cc/J4WP-9VSZ] ("While Hertz happily rents to customers 20 and above, there is an added surcharge under some circumstances for renters between 20 and 24 years old.").

the age of adulthood by lawmakers, the brain is not fully formed until the mid-twenties. In fact, most reasoning and decision-making parts of the brain continue developing until the mid-twenties.

A. Psychological and Scientific Research Show Brains Are Not Fully Developed Until Age Twenty-Seven

During much of the 1900s, many believed that the human brain was almost completely formed and unchanging after childhood.[86] However, scientific discoveries show evidence of "neuroplasticity," which challenges this assumption.[87] Adolescence is roughly defined as the period between the onset of puberty and adulthood maturity, which may last from age ten to age twenty-five.[88] Research performed by numerous scientists[89] shows that the areas of the brain responsible for impulse control and executive functioning undergo drastic changes throughout this stage.[90]

B. Risk-taking and the Relationship to Cognitive Development

Adolescent risk-taking is controlled by two systems: the socioemotional and cognitive control systems.[91] The socioemotional system is re-

86. Daniel Weitz, *The Brains Behind Mediation: Reflections on Neuroscience, Conflict Resolution and Decision-Making*, 12 CARDOZO J. CONFLICT RESOL. 471 (2011) (referencing NORMAN DOIDGE, THE BRAIN THAT CHANGES ITSELF 248, i (2007)).

87. *Id.* at xix.

88. COAL. FOR JUVENILE JUSTICE, EMERGING CONCEPTS BRIEF: WHAT ARE THE IMPLICATIONS OF ADOLESCENT BRAIN DEVELOPMENT FOR JUVENILE JUSTICE? 1 (2006), http://www.juvjustice.org/sites/default/files/resource-files/resource_134.pdf [https://perma.cc/8NP2-E9FD].

89. *See* Tracy Rightmer, *Arrested Development: Juveniles' Immature Brains Make Them Less Culpable Than Adults*, 9 QUINNIPIAC HEALTH L. J. 1 (2005) (referencing Jay N. Giedd, *Structural Magnetic Resonance Imaging of the Adolescent Brain*, 1021 ANNALS N.Y. ACAD. SCI. 77 (2004); Beatriz Luna & John A. Sweeney, *The Emergence of Collaborative Brain Function: fMRI Studies of the Development of Response Inhibition*, 1021 ANNALS N.Y. ACAD. SCI. 296 (2004); Elizabeth Sowell et al., *Mapping Continued Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships During Postadolescent Brain Maturation*, 21 J. NEUROSCIENCE 8819 (2001); Lawrence Steinberg, *Risk Taking in Adolescence What Changes and Why?*, 1021 ANNALS N.Y. ACAD. SCI. 51 (2004)).

90. Rightmer, *supra* note 89, at 4.

91. Samantha Schad, *Adolescent Decision Making: Reduced Culpability in the Criminal Justice System and Recognition of Capability in Other Legal Contexts*, 14 J. HEALTH CARE L. & POL'Y 375, 377 (2011) (referencing Praveen Kambam & Christopher Thompson, *The Development of Decision-Making Capacities in Children and Adolescents: Psychological and Neurological Perspective and Their Implications for Juvenile Defendants*, 27 BEHAV. SCI. & LAW 173, 176 (2009); Laurence Steinberg, *Age Differences in Sensation*

sponsible for processing emotions and balancing of rewards versus punishment.[92] The cognitive control system, located in the prefrontal cortex, controls higher executive functions such as impulse control, future orientation, and deliberation.[93] The socioemotional and cognitive control systems work together when an adolescent decides to act.[94] The interplay between the two systems can affect an adolescent's decision to commit a crime, their ability to participate in criminal proceedings, and even their response to interrogation tactics.[95]

The socioemotional system—the reward-seeking function—is highly active in adolescents.[96] Puberty causes a restructuring of dopamine levels within the brain where dopaminergic activity in the prefrontal cortex increases significantly.[97] Dopamine is a neurotransmitter that transmits signals between nerve cells when learning about rewards, essentially making a person feel good.[98] For adolescents, the increase of dopamine occurs *before* the control systems in the prefrontal cortex mature.[99] So, the adolescent brain, full of dopaminergic reward-seeking activity, is particularly sensitive to seeking this feel-good dopamine.[100] According to research on adolescent risk-taking, "[b]ecause dopamine plays a critical role in the brain's reward circuitry, the increase, reduction, and redistribution of dopamine receptor concentration during puberty, especially in projections from the limbic system to the prefrontal area, is likely to increase reward seeking behavior and accordingly, sensation seeking."[101] One way adolescents seek dopamine release is through peer approval and acceptance.[102]

Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model, 44 DEV. PSYCHOL. 1764 (2008)).

92. Steinberg, *supra* note 57, at 54.

93. *Id.*

94. *Id.*

95. Christine S. Scott-Hayward, *Explaining Juvenile False Confessions: Adolescent Development and Police Interrogation*, 31 LAW & PSYCHOL. REV. 53 (2007).

96. Kambam & Thompson, *The Development of Decision-Making Capacities in Children and Adolescents: Psychological and Neurological Perspective and Their Implications for Juvenile Defendants*, 27 BEHAV. SCI. & L. 173, 176 (2009).

97. Steinberg, *supra* note 57, at 54.

98. *See* Richard D. Palmiter, *Is Dopamine a Physiologically Relevant Mediator of Feeding Behavior?*, 30 TRENDS IN NEUROSCIENCES 375, 375–381 (2007).

99. *See* B.J. Casey, Sarah Getz & Adriana Galvan, *The Adolescent Brain*, 28 DEV. REV. 62, 70 (2008).

100. Schad, *supra* note 91, at 378.

101. *Id.* (citing Steinberg, *supra* note 57, at 54).

102. *See* Leah H. Somerville, *The Teenage Brain: Sensitivity to Social Evaluation*, 22 CURRENT DIRECTIONS IN PSYCHOL. SCI. 121, 121 (2011).

The cognitive control system, which controls impulses and considers future implications, does not fully form until the mid-to-late twenties.[103] The prefrontal cortex, which is responsible for more future-thinking control, controlling impulses, and planning ahead—the hallmarks of adult behavior—is one of the last to mature.[104] Underdeveloped aspects of cognitive control, combined with reward-seeking behavior from dopamine levels, tend to result in risky behavior.[105] Furthermore, adolescent youths' lack of experience makes them less aware of risks,[106] such as criminal responsibility.

By adulthood, cognitive capacity for impulse control fully develops.[107] This self-regulation and life experience makes an adult better equipped to resist impulses.[108] Research in the social and neurological sciences shows that, although young people develop at different rates, overall, adolescents tend to be less mature than adults.[109] This "research confirms a guiding principle—the distinction between youth and adults is not simply one of age, but one of motivation, impulse control, judgment, culpability and physiological maturation."[110] Many states recognize that adolescence is a time for youth to learn through trial and error because the "laws reflect societal understanding that adolescents do not have the ability to fully understand adult responsibilities or appreciate potentially grave, long-term consequences."[111]

As will be discussed later, since the 1960s, Supreme Court rulings have accepted findings in adolescent brain science through banning the use of capital punishment for juveniles,[112] limiting life without parole sen-

103. *See* Steinberg, *supra* note 57, at 54.

104. NAT'L INST. OF MENTAL HEALTH, THE TEEN BRAIN: STILL UNDER CONSTRUCTION 3 (NIH Pub. No. 11–4929 2011).

105. *See* Charles Geier & Beatriz Luna, *The Maturation of Incentive Processing and Cognitive Control*, 93 PHARMACOLOGICAL BIOCHEMISTRY & BEHAV. 212, 217–18 (2009).

106. Schad, *supra* note 91, at 378.

107. Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 DEV. REV. 78, 99 (2008).

108. *Id.*; *see also* CORRIERO, *supra* note 65, at 29 ("Self-control . . . is the habit of behavior which can be developed over a period of time, a habit dependent on the experience of successfully exercising it. This particular type of maturity, like so many others, takes practice.") (quoting Professor Frank Zimring).

109. *See* Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 157–71 (1997) (citing ROBERT SIEGLER, CHILDREN'S THINKING 49-57 (2d ed. 1991)).

110. COAL. FOR JUVENILE JUSTICE, *supra* note 88, at 2.

111. *Id.* at 1. For additional examples see Part II (discussing ages for purchasing tobacco, gambling, drinking, and consent).

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

tences to homicide offenders,[113] banning the use of mandatory life without parole,[114] and retroactively applying[115] the unconstitutionality of life without parole decision for offenders under the age of eighteen.[116]

V. *STATE V. NELSON*: THE BRIGHT LINE RULE IN ACTION

A. Facts

In 1995, Jonas Nelson was born into an unhappy family.[117] Jonas's father, Richard Nelson, was abusive and controlling.[118] Jonas's mother left his father in 2010 because she feared for the safety of herself and her children.[119] In August 2013, after patterns of misbehavior, Ms. Singer sent Jonas to live with his father.[120] Some time had passed, and Jonas reached out to his mother, complaining that "his father was not allowing him to work, drive, or do anything and that he felt secluded and alone. He told his friends that his father was being 'very strict and unfair' and not to be fooled by his father's nice-guy act."[121]

On December 30, 2013, Jonas turned eighteen.[122] One week later, on January 6, 2014, Jonas phoned 911 and reported his father had been murdered.[123] Mr. Nelson was found dead on the living room floor from a gunshot wound to the head.[124] Jonas's original description of the night was that "he was upstairs watching a movie when he heard what sounded like glass breaking and a 'pop.'"[125] Jonas then went downstairs and found his father's body and called 911.[126] However, after a series of interrogations lasting from 11:00 p.m. to 4:00 a.m., Jonas proceeded to tell the investigators that he had walked downstairs from his bedroom to get a glass of wa-

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

114. *See, e.g.*, Miller v. Alabama, 567 U.S. 460 (2012).

115. *See, e.g.*, Montgomery v. Louisiana, 577 U.S. 1546 (2016).

116. THE SENTENCING PROJECT, POLICY BRIEF: JUVENILE LIFE WITHOUT PAROLE 1 (2016), http://sentencingproject.org/wp-content/uploads/2015/12/Juvenile-Life-Without-Parole.pdf [https://perma.cc/5TTG-V2NV].

117. *See* Brief and Addendum for Appellant, State v. Nelson, 886 N.W.2d 505 (Minn. 2016) (No. A15-1821), 2016 WL 4212309, at *6.

118. *Id.*

119. *Id.*

120. *Id.* at *7.

121. *Id.* (citations omitted).

122. *Id.*

123. Brief and Addendum for Appellant, *supra* note 117, at *7.

124. *Id.*

125. *Id.*

126. *Id.* at *8.

ter, picked up a .300 Remington Ultra Magnum bolt-action rifle and ammunition from the gun cabinet in the den, and shot his father in the head as he slept on the living room floor.[127] "He said he knew from television shows there would be 'penalties' - 'they say criminals get eight years in prison' - but 'I'm not worried.'"[128]

B. Procedure and Holding

Following a jury trial, Jonas Nelson was found guilty of several offenses, including first-degree premediated murder,[129] second-degree intentional murder,[130] and second-degree unintentional felony murder.[131] The district court sentenced Nelson to life in prison without the possibility of release pursuant to Minnesota statutes section 609.106, subdivision 2(1), for first-degree premeditated murder.[132] At the time of the sentencing, District Court Judge Terrence Conkel said, "[I] took no joy or satisfaction [in issuing the sentence]. . . . I have never before sentenced a person as young as you to prison for so long."[133]

Nelson argued to the Minnesota Supreme Court that even though he was one week past his eighteenth birthday when he committed the offense, he was psychologically and socially still a juvenile.[134] As a result, he argued that the imposition of a mandatory sentence of life in prison without the possibility of release was unconstitutional under the United States Supreme Court decision in *Miller v. Alabama*.[135] The Minnesota Supreme Court did not reach this claim because it had not been raised in the district court.[136] Importantly, the court did not preclude Nelson from making this argument in post-conviction proceedings.[137]

127. *Id.* at *13.
128. *Id.*
129. MINN. STAT. § 609.185(a)(1).
130. § 609.19, subdiv. 1(1).
131. § 609.19, subdiv. 2(1).
132. State v. Nelson, 886 N.W.2d 505, 506, 508 (Minn. 2016).
133. Suzanne Rook, *Nelson Found Guilty of Murder, Sentence to Life Without Parole*, LE CENTER LEADER (Aug. 10, 2015), http://www.southernminn.com/le_center_leader/news/article_2228b340-55b2-57ae-9424-9a205b815466.html [https://perma.cc/8NSZ-PMG5].
134. *Nelson*, 886 N.W.2d at 511.
135. *Id.* at 512 (citing Miller v. Alabama, 567 U.S. 460, 465 (2012)).
136. *Id.*
137. *Id.* Nelson recently filed a post-conviction petition challenging his sentence.

C. Jonas—The Non-Juvenile Offender

Jonas was eighteen and one week when he committed homicide. Jonas underwent a psychological evaluation by Dr. Harlan Gilbertson, who administered an array of intelligence and psychiatric tests and determined that "Jonas, because his father had not let him make decisions, was 'quite socially delayed' and 'probably 13 or 14 from a psychological standpoint.'"[138] Dr. Gilbertson also found Jonas suffered from a dysthymic disorder and PTSD; he was going through life following and doing, not questioning or arguing because he did not make decisions.[139] So, while Jonas's physical age was eighteen-and-one-week, his psychological age was closer to fourteen, an age that would allow for juvenile proceedings and ultimately make the mandatory life without parole sentence unconstitutional.[140]

VI. ANALYSIS: THE CATEGORICAL CHALLENGE FOR NON-JUVENILE OFFENDERS

The United States Supreme Court has explicitly held that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'"[141] In *Miller*, the Supreme Court did not address whether mandatory life without parole is necessarily constitutional as applied to those over the age of eighteen. However, because the constitutional principles are premised on developmental maturity and capacity for rehabilitation, not chronological age, *Miller*'s constitutional principles should apply equally to a defendant who, like Jonas Nelson, was just seven days past his eighteenth birthday at the time of his offense.

The Supreme Court recognized that cognitive abilities impact an individual's ability to assess committing a serious offense that could be worthy of an adult sentence.[142] The Supreme Court also recognized that adolescents are unfinished products, developmentally and morally, and that these factors hold constitutional significance.[143] Consequently, the Eighth Amendment prohibition against cruel and unusual punishment does not

138. Brief and Addendum for Appellant, State v. Nelson, 886 N.W.2d 505 (Minn. 2016). (No. A15-1821), 2016 WL 4212309, at *15.

139. *Id.*

140. *See* Brief and Addendum for Appellant, *supra* note 117, at *30–31 (citing Miller v. Alabama, 567 U.S. 460, 469 (2012)).

141. Miller v. Alabama, 567 U.S. 460, 465 (2012).

142. *Id.* at 472; *see supra* Part V.

143. *Miller*, 567 U.S. at 472; *see also* Kim Taylor-Thompson, *Minority Rule: Redefining the Age of Criminality*, 38 N.Y.U. REV. L. & SOC. CHANGE 143, 146 (2014).

limit the prohibition against life without the possibility of parole to those under the age of eighteen; rather, the Eighth Amendment requires that multiple factors should be taken into account to determine an individual's psychological age, such as maturity, intelligence, experience, and ability to comprehend before a mandatory sentence of life without the possibility of parole can be imposed.[144]

The Eighth Amendment to the United States Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[145] This means that "the State must respect the human attributes even of those who have committed serious crimes."[146]

The Eighth Amendment's prohibition of cruel and unusual punishment requires that "punishment for crime should be graduated and proportioned to [the] offense."[147] This proportionality principle requires the court to evaluate "'the evolving standards of decency that mark the progress of a maturing society' to determine which punishments are so disproportionate as to be cruel and unusual."[148]

Over the last several decades, the Court has issued a series of decisions that stand for the proposition that, under the Eighth Amendment, juvenile defendants are categorically less culpable than others and, therefore, constitutionally different for purposes of sentencing, specifically the death penalty.

In *Thompson v. Oklahoma*, the Court considered whether it was constitutional to execute a fifteen-year-old person.[149] The Court concluded that it was not constitutional because, based on scientific findings, adoles-

144. State v. Critt, 554 N.W.2d 93 (Minn. Ct. App. 1996). These categories reflect qualities necessary to determine if a confession is voluntary. *See id.* This writer believes that if a court could find a confession is voluntary based on these qualities, the court would also determine the person had a mature mental state.

145. U.S. CONST. amend. VIII.

146. Graham v. Florida, 560 U.S. 48, 59 (2010).

147. Roper v. Simmons, 543 U.S. 551, 560 (2005) (internal quotation marks omitted) (quoting Atkins v. Virginia, 536 U.S. 304, 311 (2002)).

148. *Id.* at 561 (quoting Trop v. Dulles, 356 U.S. 86, 100–01 (1958)).

149. 487 U.S. 815, 821–23 (1988) ("In performing that task the Court has reviewed the work product of state legislatures and sentencing juries, and has carefully considered the reasons why a civilized society may accept or reject the death penalty in certain types of cases. Thus, in confronting the question whether the youth of the defendant—more specifically, the fact that he was less than 16 years old at the time of his offense—is a sufficient reason for denying the State the power to sentence him to death, we first review relevant legislative enactments, then refer to jury determinations, and finally explain why these indicators of contemporary standards of decency confirm our judgment that such a young person is not capable of acting with the degree of culpability that can justify the ultimate penalty.").

cents have less capacity to control their conduct and think in long-range terms.[150] Moreover, adolescents differ from adults because they have not achieved independence from parental control. The Court also noted that crimes committed by a young person represent a failure of family, school, and the social system.[151] While a young person should not be absolved of responsibility for his actions, his transgressions are not as morally reprehensible as that of an adult.[152] In *Thompson*, the Supreme Court concluded for the first time that a class of punishment was categorically disproportionate and in derogation of society's evolving standards of decency when imposed upon a youthful offender.[153]

In *Roper v. Simmons*,[154] the Supreme Court declared the death penalty unconstitutional for juvenile defendants. There, the Court recognized that a "lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions."[155] Additionally, the Court discussed that youths still struggle to define their identity; thus, even a heinous crime committed by a youth is less supportable than one by an adult, due to a lack of depraved character in the youth.[156] The Court reasoned that given the lessened culpability, youths should not be subject to the same offenses as adults:

> Whether viewed as an attempt to express the community's moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult. Retribution 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.[157]

150. *Id.* at 834 (noting that Justice Powel in *Eddings v. Oklahoma*, 455 U.S. 104, 115, n.11 (1982), quoted the 1978 Report of the Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders; thus the Court endorsed the view that adolescence is a time and condition of life when a person may be most susceptible to influence and psychological damage).

151. *Id.* at 834.

152. *Id.* at 838.

153. *Id.* at 821–38 (holding that categorically, capital punishment, per the Eighth Amendment, "prohibits the execution of a person who was under 16 years of age at the time of his or her offense").

154. 543 U.S. 551 (2005).

155. *Id.* at 569 (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)).

156. *Id.* at 570.

157. *Id.* at 571.

The Court also noted that youth and immaturity undermine another goal of criminal sentencing: deterrence. The Court recognized that the likelihood of a teenager weighing the consequences or possibility of execution is nonexistent.[158] Moreover, the Court weighed that it is difficult even for expert psychologists to differentiate between a juvenile offender's culpability and transient immaturity.[159] Thus, due to their mental state, juveniles cannot with reliability be classified among the worst offenders.[160]

The Supreme Court extended this reasoning to sentences other than death in *Graham v. Florida*,[161] where the Court declared life in prison without parole was unconstitutional for juvenile defendants who had not committed homicide. In *Graham*, the Court relied on psychology and brain science, noting that parts of the brain involved in behavior control continue to mature through late adolescence.[162] The Court concluded that brain development is relevant to the status of the offender and should be considered next to the nature of the offense to which a harsh penalty may apply.[163] "It follows that, when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability. The age of the offender and the nature of the crime each bear on the analysis."[164]

In *Miller*, the Supreme Court drew upon its decisions in *Thompson*, *Roper*, and *Graham* to establish a substantive constitutional rule banning life without parole for all but the rarest of juveniles.[165] An offender's age *is* relevant in determining the appropriate punishment insofar that developments in brain science continue to show fundamental differences in juvenile and adult minds.[166] As a result, criminal procedure laws that fail to take a defendant's youthfulness into account are fundamentally flawed.[167]

158. *Id.*

159. *Id.*

160. *Id.*

161. 560 U.S. 48, 68 (2010).

162. *Id.*; *see* Brief for American Medical Association et al. as Amici Curiae Supporting Neither Party at 16–24, Graham v. Florida, 560 U.S. 48 (2010) (Nos. 08-7412, 08-7621), 2009 WL 2247127; Brief for American Psychological Association et al. as Amici Curiae Supporting Petitioners at 22–27, Graham v. Florida, 560 U.S. 48 (2010) (Nos. 08-7412, 08-7621), 2009 WL 2236778.

163. *Graham*, 560 U.S. at 68–69.

164. *Id.* at 69.

165. 567 U.S. 460, 476–79 (2012) (stating that capital defendants have the opportunity to demonstrate mitigating circumstances surrounding the act so that "the death penalty is reserved only for the most culpable defendants committing the most serious offenses").

166. *Id.* at 471–72.

167. *Id.* at 472–73.

> [Children] "are more vulnerable . . . to negative influences and outside pressures," including from their family and peers; they have limited "contro[l] over their own environment" and lack the ability to extricate themselves from horrific, crime-producing settings. And because a child's character is not as "well formed" as an adult's, his traits are "less fixed" and his actions less likely to be "evidence of irretrievabl[e] deprav[ity]."[168]

At the heart of this constitutional evolution is an increasingly settled and sophisticated body of research documenting the distinct emotional, psychological, and neurological attributes of youth. Through a series of decisions, the Supreme Court has held that, because adolescents are developmentally distinct from adults, sentencing courts must consider juveniles' "lessened culpability," "greater 'capacity for change,'" and individual characteristics before imposing the harshest available sentences.[169]

Before sentencing a juvenile to life without parole, a court must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison," the *Miller* Court explained.[170] The Court went on to specify five "*Miller* factors" that a sentencing court must consider before sentencing a juvenile to life without parole, including: (1) the juvenile's "chronological age" and related "immaturity, impetuosity, and failure to appreciate risks and consequences;"(2) the juvenile's "family and home environment that surrounds him;" (3) "the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him;" (4) the "incompetencies associated with youth" in dealing with law enforcement and a criminal justice system designed for adults; and (5) "the possibility of rehabilitation."[171] Prior to imposing a juvenile life without parole sentence, the sentencing judge must consider how these factors impact the juvenile's overall culpability.[172]

"*Miller*'s central intuition" was "that children who commit even heinous crimes are capable of change," the Court stated four years later in *Montgomery v. Louisiana*.[173] *Miller* established a "substantive" rule of criminal law which did not merely proscribe mandatory life without parole for juveniles but created a presumption that only those "rare" juveniles

168. *Id.* (quoting Roper v. Simmons, 543 U.S. 551, 570 (2005)).
169. *Id.* at 465 (quoting Graham v. Florida, 560 U.S. 48, 68, 74 (2010))
170. *Id.* at 480.
171. *Id.* at 477–78.
172. *Id.*
173. 136 S. Ct. 718, 736 (2016).

whose offenses reflect "permanent incorrigibility" can be sentenced to terms that deprive them of a meaningful opportunity for release.[174]

The Court explained that the constitutional flaws in mandatory sentences of life without parole for juveniles are the denial of prospects for release; the "preclu[sion] [of] consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences"; the "prevent[ion] [of] taking into account the family and home environment that surrounds him," and the "neglect[] [of] the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him."[175] Not least, "this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it."[176]

Though these constitutional decisions involved defendants who were under eighteen at the time of their offenses, the Supreme Court did not address what to do with those individuals who are just over eighteen; that is, just over the line established twelve years ago in *Roper*—as adopted by *Miller*—but to whom all of the various Eighth Amendment concerns about protecting juveniles from disproportionate punishment apply with equal force. As the Court noted in *Roper*:

> [d]rawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turn 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach.[177]

The Supreme Court has refused to draw bright lines in a closely related area of the law—the application of the death penalty against those with intellectual disability. In *Hall v. Florida*, the Court considered whether the state could determine whether an individual is intellectually disabled based solely on an I.Q. point threshold.[178] Under Florida's statute, if a defendant was found to have an I.Q. score above 70, "sentencing courts [could not] consider even substantial and weighty evidence of intellectual disability" such as "medical histories, behavioral records, school tests and reports, and testimony regarding past behavior and family circumstances."[179]

174. *Id.* at 743.
175. *Miller*, 576 U.S. at 477.
176. *Id.* at 478.
177. Roper v. Simmons, 543 U.S. 551, 574 (2005).
178. 572 U.S. 701, 707 (2014).
179. *Id.* at 712.

Comparing the approaches of various states to determining intellectual disability disqualification for the death penalty and relying on the diagnostic practices of the American Psychiatric Association, the Court ruled that "the law requires that [the defendant] have the opportunity to present evidence of his intellectual disability," as opposed to subjecting him to a mandatory scheme based on a single factor.[180]

Miller's ban on mandatory life without parole sentences is based not on chronological line drawing, but on the Court's conclusion that the neurological differences between youth and adults undermine the justifications for subjecting those whose brains are still developing to the harshest sentences. Notably, research now shows that these neurological and behavioral characteristics are also present in eighteen-year-olds, and federal and state courts have relied on this research to invalidate sentencing schemes that require courts to sentence eighteen-year-olds to life in prison without possibility of parole.[181]

The Court's declaration that youth "are constitutionally different from adults for purposes of sentencing" rests not on bright line age distinctions, but on the Court's recognition that, because of their immaturity, young people, as a group, are less culpable for offenses committed and more capable of rehabilitation.[182] In *Roper*, the Court for the first time relied on a burgeoning body of scientific literature to support "[what] any parent knows"—that children are different than adults.[183] The "relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside."[184] "For most teens, [risky or antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled."[185] By the time the Court rendered its opinions in *Graham* and *Miller*, scientific evidence had assumed a more central role in the Court's Eighth Amendment analysis.[186]

180. *Id.* at 724.

181. *See e.g.*, Miller v. Alabama, 567 U.S. 460, 460 (2012); State v. Critt, 554 N.W.2d 93 (Minn. Ct. App. 1996).

182. *Miller*, 567 U.S. at 471.

183. Roper v. Simmons, 543 U.S. 551, 569 (2005).

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

185. *Id.* (citing Steinberg & Scott, *supra* note 184, at 1009).

186. *Miller*, 567 U.S. at 471 ("Our decisions rested not only on common sense—on what 'any parent knows'—but on science and social science as well."); Graham v. Florida, 560 U.S. 48, 68 (2010) ("[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds.").

Because of the fundamental developmental differences, the Supreme Court has concluded that juveniles are inherently less culpable than adults, and, thus, the penological justifications for the death penalty and life imprisonment without the possibility of parole apply to juveniles with less force.[187] Retribution is less justifiable because the actions of a juvenile are less morally reprehensible than those of an adult due to a juvenile's diminished culpability.[188] Similarly, deterrence is less effective because juveniles' "impetuous and ill-considered actions and decisions" make them "less likely to take a possible punishment into consideration when making decisions."[189] Incapacitation is not applicable because juveniles' personality traits are less fixed and therefore it is difficult for experts to "differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption."[190] Finally, rehabilitation cannot be the basis for life imprisonment without parole because that "penalty forswears altogether the rehabilitative ideal" by "denying the defendant the right to reenter the community."[191]

These same characteristics relied upon by the Supreme Court to limit the punishment on juveniles apply equally to people over the age of eighteen with scholars explaining that "[o]ver the past decade, developmental psychologists and neuroscientists have found that biological and psychological development continues into the early twenties, well beyond the age of majority."[192] Scientists now know that, within the human brain, the areas responsible for movement and sensory perception develop first, followed by cognitive and executive skills, which develop throughout adolescence.[193] Among the last to develop are the areas of the brain required for weighing risks, making reasoned decisions, and controlling impulses, which develop throughout the late teens and twenties.[194]

187. *See Miller*, 567 U.S. at 472–73; *Graham*, 560 U.S. at 69–74; *Roper*, 543 U.S. at 570–71.

188. *Graham*, 560 U.S. at 71.

189. *Id.* at 72.

190. *Id.* at 72–73 (quoting *Roper*, 543 U.S. at 572).

191. *Id.* at 74.

192. Elizabeth S. Scott, Richard J. Bonnie, & Laurence Steinberg, *Young Adulthood as a Transitional Legal Category: Science, Social Change, and Justice Policy*, 85 FORDHAM L. REV. 641, 642 (2016).

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

194. Terry A. Maroney, *The Once and Future Juvenile Brain*, *in* CHOOSING THE FUTURE FOR AMERICAN JUVENILE JUSTICE 189, 193 (Franklin E. Zimring & David S.

It is now well established that "young adulthood is a developmental period when cognitive capacity is still vulnerable to the emotional influences that affect adolescent behavior, in part due to continued development of prefrontal circuitry involved in self-control."[195] Neuroscientific studies show that the brains of eighteen- to twenty-one-year-olds remain immature in three core areas that support self-control and emotional regulation: the amygdala, the prefrontal cortex, and the ventral striatum.[196] These findings are supported by fMRI studies, which show that the volume of cortical gray matter in areas critical to integrating higher thought processing does not peak until the mid-twenties, and which results in a lack of structural development necessary for higher level reasoning and emotional regulation.[197] These studies have led numerous scientists and scholars to agree that "young adult offenders aged 18–24 are more similar to juveniles than to adults with respect to their offending, maturation, and life circumstances."[198]

Increasingly, courts are relying on these contemporary neuroscientific findings about the brain development of young adults to forbid sentencing schemes that mandate life in prison without possibility of parole for eighteen-year-old defendants. In *Cruz v. United States*, the U.S. District Court for the District of Connecticut concluded that "'the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole' for offenders who were 18 years old at the time of their crimes."[199] The Supreme Court held that the district court was not foreclosed from imposing a sentence of life without the possibility of parole, but the sentence is required "to take into account how adolescents, including late adolescents, 'are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.'"[200]

Tanenhaus eds., 2014); *see also* Steinberg, *Social Neuroscience Perspective*, *supra* note 107.

195. Alexandra Cohen et al., *When Does a Juvenile Become an Adult? Implications for Law and Policy*, 88 TEMPLE L. REV. 769, 771 (2016).

196. *See, e.g.*, B.J. Casey, *Beyond Simple Models of Self-Control to Circuit-Based Accounts of Adolescent Behavior*, 66 ANNUAL REV. OF PSYCHOL. 295, 300 (2015).

197. *See* Gogtay, *supra* note 193, at 8174–79.

198. Rolf Loeber, David P. Farrington, & David Petechuk, *Bulletin 1: From Juvenile Delinquency to Young Adult Offending (Study Group on the Transitions Between Juvenile Delinquency and Adult Crime)*, NAT'L CRIM. JUST. REFERENCE SERV. 20 (2013), https://www.ncjrs.gov/pdffiles1/nij/grants/242931.pdf [https://perma.cc/6CVT-3C2C].

199. No. 11-CV-787, 2018 WL 1541898, at *25 (D. Conn. Mar. 29, 2018) (quoting Miller v. Alabama, 567 U.S. 460, 479 (2012)).

200. *Id.* (citing *Miller*, 567 U.S. at 480).

In reaching its conclusion, the *Cruz* Court considered whether the scientific evidence justified distinguishing between those under eighteen and those who are eighteen.[201] The *Cruz* Court first looked at the available scientific and sociological research that the United States Supreme Court considered in *Roper*, *Graham*, and *Miller* to identify differences between juveniles under the age of eighteen and fully mature adults—differences that the Supreme Court concluded undermined the penological justifications for the sentences in question.[202] *Cruz* continued:

> The Supreme Court in these cases identified "[t]hree general differences between juveniles under 18 and adults": (1) that juveniles have a "lack of maturity and an underdeveloped sense of responsibility," often resulting in "impetuous and ill-considered actions and decisions;" (2) that juveniles are "more vulnerable or susceptible to negative influences and outside pressures, including peer pressure;" and (3) that "the character of a juvenile is not as well formed as that of an adult." Because of these differences, the Supreme Court concluded that juveniles are less culpable for their crimes than adults and therefore the penological justifications for the death penalty and life imprisonment without the possibility of parole apply with less force to them than to adults."[203]

The *Cruz* Court then considered those same characteristics and the expert testimony, articles, and studies provided by Temple University psychology professor Dr. Laurence Steinberg, in which Dr. Steinberg stated that that he was "'[a]bsolutely certain' that the scientific findings that underpin his conclusions about those under the age of 18 also apply to 18-year-olds."[204]

Similarly, in *State v. O'Dell*,[205] the Washington Supreme Court held that age is a mitigating factor in sentencing, even when the defendant is

201. *Id.* at *18–24 (citations omitted). The court also concluded that, where there are "some important societal lines remain at age 18, the changes discussed above reflect an emerging trend toward recognizing that 18-year-olds should be treated different from fully mature adults." *Id.* at *22.

202. *Id.* at *22.

203. *Id.* at *22 (citing Miller v. Alabama, 567 U.S. 460, 471–72 (2012); Graham v. Florida, 560 U.S. 48, 68 (2010); Roper v. Simmons, 543 U.S. 551, 569–70 (2005)).

204. *Id.* at *23 (citing Alexandra Cohen et al., *When Does a Juvenile Become an Adult? Implications for Law and Policy*, 88 TEMPLE L. REV. 769 (2016); Laurence Steinberg et al., *Around the World, Adolescence is a Time of Heightened Sensation Seeking and Immature Self-Regulation*, 12532 DEV. SCI. 1, 1–13 (2017) (citation corrected)) (Doc. No. 115-1).

205. 358 P.3d 359, 366 (2015).

over the age of eighteen.[206] Citing to *Roper*, the Washington court found that a sentence that may be proportional for an adult can be disproportionate as applied to a someone who committed an offense shortly after turning eighteen years old.[207] Considering the implications of research findings on adolescent brain development, the court stated:

> In light of what we know today about adolescents' cognitive and emotional development, we conclude that youth may, in fact, relate to [a defendant's] crime, that it is far more likely to diminish a defendant's culpability than this court implied in *Ha'mim*; and that youth can, therefore, amount to a substantial and compelling factor, in particular cases, justifying a sentence below the standard range . . . For these reasons, a trial court must be allowed to consider youth as a mitigating factor when imposing a sentence on an offender like O'Dell, who committed his offense just a few days after he turned 18.[208]

VI. CONCLUSION

The United States Supreme Court has recognized, based on common sense, science, social science, and "[what] any parent knows"[209]—that juveniles are different. Because juveniles are different, the Court has prohibited them from being put to death and has strictly limited the use of life without the possibility of parole.

That same common sense, science, social science, and "[what] any parent knows,"[210] leads inexorably to the conclusion that it is impossible to define "juvenile" as simply someone under the age of eighteen years old. "Juvenile" must be defined by the characteristics of the person, not simply their chronological age.

206. *Id.*
207. *See id.*
208. *Id.*
209. Roper v. Simmons, 543 U.S. 551, 569 (2005).
210. *Id.*