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## Why Justice Kavanaugh Should Continue Justice Kennedy's Death Penalty Legacy—Next Step: Expanding Juvenile Death Penalty Ban

Alli Katzen

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**NOTE:**

**Why Justice Kavanaugh Should Continue  
Justice Kennedy’s Death Penalty  
Legacy—Next Step: Expanding Juvenile  
Death Penalty Ban**

ALLI KATZEN\*

*As science and society both progress, Supreme Court rulings should reflect those changes. The national consensus has been gradually moving away from the use of the death penalty, particularly as applied to offenders between the ages of eighteen and twenty-five. Research clarifies that the brain is not fully developed in the areas most directly linked to culpability until after this age range. The combination of these factors should compel the Court to raise the minimum age for death sentences, but the shifting bench presents unpredictability.*

INTRODUCTION .....965

I. DEATH PENALTY AND JUVENILE SENTENCING

    JURISPRUDENCE .....967

    A. *The Death Penalty as Disproportionate* .....969

    B. *Juvenile Life Without Parole Sentencing as Disproportionate* .....971

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\* J.D. Candidate 2020, University of Miami School of Law; B.A. 2015, University of Michigan. I would like to thank Professor Shara Pelz for her guidance, not only on this Note, but also throughout law school. A big thank you to Judge Beth Bloom for her wise insight and continuous encouragement. Additionally, I would like to thank Professor Tamara Lave for her inspiration. I am especially grateful for my family, who encourages me at *all* times.

II. APPLYING PROPORTIONALITY TO OFFENDERS UNDER	
TWENTY-FIVE SENTENCED TO DEATH .....	973
A. <i>The Consensus</i> .....	973
1. DEATH PENALTY LEGISLATION.....	973
2. ACTUAL PRACTICE.....	977
3. SOCIETY HAS ALREADY REDRAWN THE LINE; DEATH	
PENALTY JURISPRUDENCE NEEDS TO CATCH UP.....	981
B. <i>The Science to Back it Up</i> .....	985
C. <i>Penological Goals</i> .....	987
III. THE COURT SHOULD FIND SENTENCING OFFENDERS UNDER	
TWENTY-FIVE TO DEATH UNCONSTITUTIONAL—BUT WILL	
IT?.....	990
A. <i>Kennedy’s Legacy</i> .....	990
B. <i>Kavanaugh’s Future</i> .....	991
CONCLUSION.....	994

## INTRODUCTION

“Even if true, teenagers!”<sup>1</sup> This is the sentiment expressed by Senator Scott Newman about the alleged sexual assaults committed by future Supreme Court Justice Brett Kavanaugh when he was in high school and college. While Justice Kavanaugh categorically denied the sexual assault claims, many of his defenders maintained that even if the accusations were true, his previous actions should not play a role in his confirmation to the highest court. In other words, his actions as a teenager should not matter twenty or thirty years later. But do Justice Kavanaugh and his supporters feel the same is true about defendants who face the possibility of death—a consequence lasting much longer than twenty or thirty years later—for their actions taken before the age of twenty-five? If the Supreme Court decides whether sentencing offenders under the age of

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<sup>1</sup> Senator Scott Newman (@SenatorNewmanMN), TWITTER (Sept. 17, 2018, 1:38 PM), [https://twitter.com/SenatorNewmanMN/status/1041758288440950787?ref\\_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwtterm%5E1041758288440950787&ref\\_url=https%3A%2F%2Fwww.twincities.com%2F2018%2F09%2F18%2Fmn-senator-scott-newman-teenagers-tweet-over-brett-kavanaugh-sex-allegation-goes-viral%2F](https://twitter.com/SenatorNewmanMN/status/1041758288440950787?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwtterm%5E1041758288440950787&ref_url=https%3A%2F%2Fwww.twincities.com%2F2018%2F09%2F18%2Fmn-senator-scott-newman-teenagers-tweet-over-brett-kavanaugh-sex-allegation-goes-viral%2F).

twenty-five to death is constitutional, Justice Kavanaugh could be viewed as a hypocrite if he votes in favor of such a sentence.

The Court has been on a path towards declaring the death penalty unconstitutional since 1972, when the Supreme Court effectively suspended imposition of the death penalty by holding that it was unconstitutional as applied.<sup>2</sup> Although the nationwide moratorium ended only a few years later when states amended their death penalty statutes,<sup>3</sup> the Supreme Court continued to limit the revised statutes. Most notably, the Court struck down mandatory death sentences,<sup>4</sup> death sentences for offenders who lacked the intention to kill,<sup>5</sup> death sentences for offenders with mental disabilities,<sup>6</sup> and death sentences for offenders who were under the age of eighteen at the time of the offense.<sup>7</sup>

However, with the loss of the Court's "pivotal swing vote" from the bench,<sup>8</sup> and the addition of the newest justice nominated by a President who tweets thoughts like "SHOULD GET DEATH PENALTY!" about criminal defendants,<sup>9</sup> the future of death penalty jurisprudence may be in jeopardy. This Note argues that death penalty jurisprudence should continue expanding the ban to apply to offenders under the age of twenty-five. Furthermore, this Note will

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<sup>2</sup> See *Furman v. Georgia*, 408 U.S. 238 (1972).

<sup>3</sup> Olivia B. Waxman, *The Story of the Last U.S. Execution Before a Nationwide Moratorium Took Effect 50 Years Ago*, TIME (June 2, 2017), <http://time.com/4801230/last-execution-before-moratorium/>.

<sup>4</sup> See *Woodson v. North Carolina*, 428 U.S. 280 (1976).

<sup>5</sup> See *Enmund v. Florida*, 458 U.S. 782 (1982).

<sup>6</sup> See *Atkins v. Virginia*, 536 U.S. 304 (2002).

<sup>7</sup> See *Roper v. Simmons*, 543 U.S. 551 (2005).

<sup>8</sup> Robert Barnes, *Justice Kennedy, the Pivotal Swing Vote on the Supreme Court, Announces His Retirement*, WASH. POST (June 27, 2018), [https://www.washingtonpost.com/politics/courts\\_law/justice-kennedy-the-pivotal-swing-vote-on-the-supreme-court-announces-retirement/2018/06/27/a40a8c64-5932-11e7-a204-ad706461fa4f\\_story.html](https://www.washingtonpost.com/politics/courts_law/justice-kennedy-the-pivotal-swing-vote-on-the-supreme-court-announces-retirement/2018/06/27/a40a8c64-5932-11e7-a204-ad706461fa4f_story.html). On June 27, 2018, Justice Kennedy announced his resignation from the Court. *Id.*

<sup>9</sup> Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 1, 2017, 8:43 PM), [https://twitter.com/realDonaldTrump/status/925931294705545216?ref\\_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctw-term%5E925931294705545216&ref\\_url=https%3A%2F%2Fwww.theguardian.com%2Fus-news%2F2018%2Fsep%2F06%2Fterrorist-attack-new-york-trump-tweet-death-penalty](https://twitter.com/realDonaldTrump/status/925931294705545216?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctw-term%5E925931294705545216&ref_url=https%3A%2F%2Fwww.theguardian.com%2Fus-news%2F2018%2Fsep%2F06%2Fterrorist-attack-new-york-trump-tweet-death-penalty).

discuss why Justice Kavanaugh may, and should, continue Justice Kennedy's legacy as the swing vote in death penalty cases.

Part I of this Note overviews the relevant death penalty and juvenile sentencing cases. This Part introduces the proportionality analysis that courts utilize in Eighth Amendment cases. Part II applies that proportionality analysis to death sentences imposed on offenders under the age of twenty-five. It first explores how the national consensus reflects society's departure from the practice, and then discusses pertinent brain development research that supports this consensus. Part II concludes by showing why legitimate penological goals are not furthered by sentencing offenders under the age of twenty-five to death. Finally, Part III assesses how this issue may play out in the Court, with an analysis of Justice Kavanaugh's pre-Supreme Court opinions and writings. This Note concludes that, consistent with science, his own jurisprudence, and national and international trends, Justice Kavanaugh should vote against imposing the death sentence on offenders under twenty-five if the issue is presented before him.

#### I. DEATH PENALTY AND JUVENILE SENTENCING JURISPRUDENCE

In the last two decades, the Court has made sweeping, categorical sentencing limitations applicable to specific groups of people: a ban on death sentences for mentally disabled<sup>10</sup> and juvenile offenders,<sup>11</sup> a ban on life without the possibility of parole sentences for juvenile non-homicide offenders,<sup>12</sup> and most recently, a ban on mandatory life without parole sentencing schemes for juveniles.<sup>13</sup> Ultimately, these cases turned on whether the sentence violates the Eighth Amendment's ban on "cruel and unusual punishments."<sup>14</sup> These landmark opinions provide insight and guidance on how the Court arrives at its decisions through a process often referred to as the "proportionality" analysis.<sup>15</sup>

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<sup>10</sup> See *Atkins v. Virginia*, 536 U.S. 304 (2002).

<sup>11</sup> See *Roper v. Simmons*, 543 U.S. 551 (2005).

<sup>12</sup> See *Graham v. Florida*, 560 U.S. 48 (2010).

<sup>13</sup> See *Miller v. Alabama*, 567 U.S. 460 (2012).

<sup>14</sup> U.S. CONST. amend. VIII.

<sup>15</sup> See, e.g., *Kennedy v. Louisiana*, 554 U.S. 407, 426 (2008).

The concept of proportionality appears in Supreme Court opinions as far back as 1910, when the Court stated that “it is a precept of justice that punishment for crime should be graduated and proportioned to [the] offense.”<sup>16</sup> The Court explained that, while a punishment may not be cruel and unusual on its face, it may violate the Eighth Amendment in light of the crime that fashioned the punishment or the offender whom it is punishing.<sup>17</sup> While originalist interpreters of the Constitution may argue that a punishment should only violate the Eighth Amendment if the Founders would have considered it to be cruel and unusual,<sup>18</sup> the Supreme Court has repeatedly rejected that interpretation in this context.<sup>19</sup>

The Eighth Amendment proportionality analysis is conducted through the lens of the “evolving standards of decency that mark the progress of a maturing society.”<sup>20</sup> Although the cruel and unusual Eighth Amendment “standard itself remains the same, . . . its applicability must change as the basic mores of society change.”<sup>21</sup> For the Court to assess if a punishment is disproportionate to a crime—and therefore is cruel and unusual according to society’s current standards—it looks at “objective factors to the maximum possible extent.”<sup>22</sup> The Court has “pinpointed that the ‘clearest and most

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<sup>16</sup> *Weems v. United States*, 217 U.S. 349, 367 (1910).

<sup>17</sup> *Atkins v. Virginia*, 536 U.S. 304, 311 (2002) (“[E]ven though ‘imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual,’ it may not be imposed as a penalty for ‘the “status” of narcotic addiction’ . . . because such a sanction would be excessive.”) (quoting *Robinson v. California*, 370 U.S. 660, 667 (1962)).

<sup>18</sup> *Originalist View of Death Penalty Under 8th Amendment*, C-SPAN (Oct. 8, 2016), <https://www.c-span.org/video/?c4624027/originalist-view-death-penalty-8th-amendment> (clip, title, and description were not created by C-SPAN).

<sup>19</sup> *Atkins*, 536 U.S. at 311 (“A claim that punishment is excessive is judged not by the standards that prevailed in 1685 when Lord Jeffreys presided over the ‘Bloody Assizes’ or when the Bill of Rights was adopted, but rather by those that currently prevail.”).

<sup>20</sup> *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

<sup>21</sup> *Furman v. Georgia*, 408 U.S. 238, 382 (1972) (Burger, J., dissenting).

<sup>22</sup> *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (“Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices; judgment should be informed by objective factors to the maximum possible extent.”).

reliable objective evidence of contemporary values is . . . legislation.”<sup>23</sup>

This analysis is concluded “by asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators.”<sup>24</sup> The Court must determine whether the penalty in question furthers the penological goals that the death penalty is meant to address.<sup>25</sup> As such, this Note will follow a similar approach to determine whether the death penalty ban should be extended to offenders up to the age of twenty-five.

#### A. *The Death Penalty as Disproportionate*

Two cases that most clearly illustrate the Supreme Court’s application of the death penalty proportionality jurisprudence are *Atkins v. Virginia*<sup>26</sup> and *Roper v. Simmons*.<sup>27</sup> In 2002, the *Atkins* Court imposed a categorical ban on death sentences for “mentally retarded defendants.”<sup>28</sup> The Court not only examined the number of states that passed legislation banning the death penalty for the mentally disabled, but it also looked at what was actually occurring in practice.<sup>29</sup> It noted that despite the fact that less than half of the states had passed such legislation, “the practice [was] uncommon” in the states where it was still legal.<sup>30</sup> When considered in combination with the number of states that had an outright prohibition on the death penalty for this class of defendants, the Court found that “a national consensus ha[d] developed against” the execution of mentally disabled offenders.<sup>31</sup>

The Court decided that it had “no reason to disagree” with the national consensus that had formed against the death penalty as a punishment for the mentally disabled because such a punishment did

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<sup>23</sup> *Atkins*, 536 U.S. at 312 (quoting *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989)).

<sup>24</sup> *Id.* at 313.

<sup>25</sup> *Id.* at 319.

<sup>26</sup> *Id.* at 304.

<sup>27</sup> *Roper v. Simmons*, 543 U.S. 551 (2005).

<sup>28</sup> *Atkins*, 536 U.S. at 319.

<sup>29</sup> *Id.* at 314–16 (finding that after Congress passed legislation forbidding a death sentence for mentally disabled defendants, at least eighteen states “followed suit”).

<sup>30</sup> *Id.* at 316.

<sup>31</sup> *Id.*

not further the penological goals of a death sentence.<sup>32</sup> The two goals that the death penalty is meant to serve are retribution and deterrence.<sup>33</sup> The theory of retribution rests upon “the interest in seeing that the offender gets his ‘just deserts,’”<sup>34</sup> or simply stated, the punishment that he deserves. Therefore, because a death sentence is the most severe punishment, it should be reserved for only the most culpable offenders.<sup>35</sup> The Court found that offenders who have “subaverage intellectual functioning” are less culpable, and ruled that when it “appl[ie]d the Eighth Amendment in the light of our ‘evolving standards of decency,’” sentencing a “mentally retarded offender” to death is forbidden under the Constitution.<sup>36</sup>

As the country’s national consensus increasingly rejected the use of the death penalty for certain groups of offenders, the Court followed suit.<sup>37</sup> Three years after *Atkins* was decided, the Court in *Roper v. Simmons* made another categorical ban on the death penalty, this time for offenders under the age of eighteen.<sup>38</sup> This ruling was an extension of a previous Supreme Court decision, *Thompson v. Oklahoma*, where the Court found the death penalty was unconstitutional for offenders under the age of sixteen.<sup>39</sup> Just as the *Atkins* Court began its analysis by examining the national consensus on the issue, the *Roper* Court began with “a review of objective indicia of [a national] consensus.”<sup>40</sup>

To assess the national consensus, both *Atkins* and *Roper* considered both legislative action and legislative restraint, emphasizing the presence of legislation prohibiting the death penalty for the relevant class of offenders.<sup>41</sup> This was compounded by the lack of legislation reinstating the death penalty where it had previously been abolished.<sup>42</sup> After taking into account that no state “that previously prohibited capital punishment for juveniles” had reinstated it since the

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<sup>32</sup> *Id.* at 321.

<sup>33</sup> *Gregg v. Georgia*, 428 U.S. 153, 183 (1976).

<sup>34</sup> *Atkins*, 536 U.S. at 319.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 321.

<sup>37</sup> *Roper v. Simmons*, 543 U.S. 551, 564 (2005).

<sup>38</sup> *Id.* at 578.

<sup>39</sup> *Thompson v. Oklahoma*, 487 U.S. 815 (1988).

<sup>40</sup> *Roper*, 543 U.S. at 564.

<sup>41</sup> *Id.* at 566.

<sup>42</sup> *Id.*



last time the issue was before the Court, and that a majority of states passed legislation banning the death penalty for juveniles, the *Roper* Court found that the national consensus was against the juvenile death penalty.<sup>43</sup> The Court then exercised its “own independent judgment” to determine whether it agreed with the national consensus as to “whether the death penalty is a disproportionate punishment for juveniles.”<sup>44</sup> Ultimately, it found that the punishment was in fact disproportionate, and declared it unconstitutional as juveniles “cannot with reliability be classified among the worst offenders” for whom the death penalty is reserved.<sup>45</sup>

### B. *Juvenile Life Without Parole Sentencing as Disproportionate*

The Court employs the proportionality analysis in two types of cases: “challenges to the length of term-of-years sentences” and “categorical restrictions on the death penalty.”<sup>46</sup> The term-of-years sentencing cases encompass restrictions on juvenile sentencing, and therefore both groups of cases are critical to this Note, which advocates for banning the death penalty for a larger group of the population.

Five years after the Court declared that the death penalty is an unconstitutional punishment for offenders under the age of eighteen, the Court continued to categorize punishments as cruel and unusual as applied to certain groups of people. In 2010, the Court declared in *Graham v. Florida* that, in addition to the requirement that juveniles be exempt from the death penalty, they must also be exempt from life without parole sentences if convicted of a non-homicidal crime.<sup>47</sup> While the *Graham* Court used the proportionality analysis, it noted that this test was usually applied differently in non-death penalty cases.<sup>48</sup> Yet the approach previously seen in cases of

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<sup>43</sup> *Id.* at 564–67 (calculating that thirty states “prohibit[ed] the juvenile death penalty, comprising 12 that ha[d] rejected the death penalty altogether and 18 that maintain[ed] it but, by express provision or judicial interpretation, exclude[d] juveniles from its reach”).

<sup>44</sup> *Id.* at 564.

<sup>45</sup> *Id.* at 569.

<sup>46</sup> *Graham v. Florida*, 560 U.S. 48, 59 (2010).

<sup>47</sup> *Id.* at 82.

<sup>48</sup> *Id.* at 60–62 (explaining that in challenges to term-of-years sentences the “court must begin by comparing the gravity of the offense and the severity of the sentence”). Justice Kennedy stated that it is difficult for a challenger in this type

categorical restrictions to the death penalty is appropriate when “a sentencing practice itself is in question,” as was the case in *Graham*.<sup>49</sup>

As such, the Court began its analysis by looking at the “objective indicia of national consensus.”<sup>50</sup> The Court rejected the State’s argument that there was no “national consensus against [sentencing juvenile offenders to life without parole]” despite the underwhelming number of jurisdictions that prohibit such a sentence.<sup>51</sup> The Court explained that the State’s argument was “incomplete” because legislation is not the only way to gauge consensus. Rather, “[a]ctual sentencing practices are an important part of the Court’s inquiry into consensus.”<sup>52</sup> The actual sentencing practices revealed that there was a national consensus against life without parole for juvenile non-homicide offenders, evidenced by the fact that the practice was the “most infrequent” in jurisdictions that did not legislate against its use.<sup>53</sup>

When faced with another challenge against a juvenile sentencing scheme, the Court followed the *Roper* and *Graham* Courts in finding

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of case to succeed because the Eighth Amendment “‘does not require strict proportionality between crime and sentence’ but rather ‘forbids only extreme sentences that [are] ‘grossly disproportionate’ to the crime.’” If the Court makes the rare finding that there is “an inference of gross disproportionality,” it then continues the analysis by comparing the sentence at issue with similar cases in other jurisdictions. Only if the comparison confirms the Court’s inference does it then find the punishment to be unconstitutional. *Id.* at 60 (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1001, 1005 (1991) (Kennedy, J., concurring in part and concurring in judgment)).

<sup>49</sup> *Graham*, 560 U.S. at 61–62.

<sup>50</sup> *Id.* at 62.

<sup>51</sup> *Id.* (“Six jurisdictions do not allow life without parole sentences for any juvenile offenders . . . . Seven jurisdictions permit life without parole for juvenile offenders, but only for homicide crimes . . . . Thirty-seven States as well as the District of Columbia permit sentences of life without parole for a juvenile non-homicide offender in some circumstances . . . . Federal law also allows for the possibility of life without parole for offenders as young as 13.”)

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 62–64 (finding that in practice, “only 11 jurisdictions nationwide in fact impose life without parole sentences on juvenile nonhomicide offenders – and most of those do so quite rarely – while 26 States, the District of Columbia, and the Federal Government do not impose them despite apparent statutory authorization”).

the practice unconstitutional.<sup>54</sup> Mirroring the reasoning in *Graham*, the Court in *Miller v. Alabama* considered the national consensus against mandatory life without parole sentences for juvenile homicide offenders and again, focused heavily on what actual practices suggested.<sup>55</sup> In both *Graham* and *Miller*, the Court emphasized that life without parole sentences for juveniles are akin to death sentences when imposed at such a young age.<sup>56</sup> Thus, it concluded that the penological goals were not served because young offenders are more susceptible to rehabilitation, and in turn, found the practices to be unconstitutional.<sup>57</sup>

## II. APPLYING PROPORTIONALITY TO OFFENDERS UNDER TWENTY-FIVE SENTENCED TO DEATH

As illustrated by the landmark cases discussed in Part I, the Court relies heavily on objective indicia of a national consensus as the initial part of its proportionality analysis.<sup>58</sup> Accordingly, this analysis begins by examining the application of death penalty to offenders under the age of twenty-five.

### A. *The Consensus*

#### 1. DEATH PENALTY LEGISLATION

The proportionality analysis is conducted to determine whether a punishment is excessive under society's evolving standards. Accordingly, the Court relies on objective factors to form its decision.<sup>59</sup> A thorough analysis must begin with an examination of the pertinent legislation, as it is "most reliable objective evidence of contemporary values."<sup>60</sup> A review of the nation's legislation reveals a national consensus against the death penalty overall. Currently, twenty states and the District of Columbia have outlawed the use of the death penalty entirely, with eight of those states doing so after *Roper* was

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<sup>54</sup> *Miller v. Alabama*, 567 U.S. 460 (2012).

<sup>55</sup> *Id.* at 482–87.

<sup>56</sup> *See id.* at 474; *Graham v. Florida*, 560 U.S. 48, 70 (2010).

<sup>57</sup> *Miller*, 567 U.S. at 489.

<sup>58</sup> *Id.* at 482.

<sup>59</sup> *Atkins v. Virginia*, 536 U.S. 304, 311–12 (2002).

<sup>60</sup> *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989).

decided in 2005.<sup>61</sup> Of the thirty states that still permit the death penalty, three of them have imposed a moratorium since *Roper*.<sup>62</sup> Although no state has passed legislation to extend the juvenile death penalty ban beyond what is required by *Roper*, one state's judiciary has redrawn the line.<sup>63</sup> In 2017, a Kentucky circuit court declared the state's death penalty statute unconstitutional as applied to offenders who were under the age of twenty-one at the time of the offense.<sup>64</sup> Thus, there are effectively twenty-four states and the District of Columbia that ban the death penalty for offenders under the age of at least twenty-one, with twelve of these states having established the ban in the fifteen years since *Roper* was decided.<sup>65</sup>

Notably, there are few states that have reinstated the death penalty since abolishing it. Only Nebraska has done so, and only after a dramatic political battle ensued.<sup>66</sup> The Court has emphasized the importance of the inconsequential number of states that have legislated to reinstate the death penalty compared to the many states that have legislatively abolished it.<sup>67</sup> The *Atkins* Court explained that, in light of the "fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime," the comparison between the number of states that reinstate the death penalty and the amount of states that pass legislation to prohibit the death penalty is "powerful evidence" of the national consensus.<sup>68</sup>

While, in *Atkins*, the comparison between the two numbers was stark (zero states had reinstated the death penalty while sixteen had

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<sup>61</sup> *States with and Without the Death Penalty*, DEATH PENALTY INFO. CTR. (Oct. 11, 2018), <https://deathpenaltyinfo.org/states-and-without-death-penalty>.

<sup>62</sup> *Id.*

<sup>63</sup> See *Commonwealth v. Bredhold*, No. 14-CR-161, 2017 WL 8792559 (Ky. Cir. Ct. Aug. 1, 2017).

<sup>64</sup> *Id.*

<sup>65</sup> *States with and Without the Death Penalty*, *supra* note 61.

<sup>66</sup> Grant Schulte, *Nebraska Set for Execution After About-Face on Death Penalty*, AP NEWS (Aug. 13, 2018), <https://www.apnews.com/1f4837c843074ffca2d1684583334b00>. In 2015, the Nebraska legislature voted to abolish the death penalty, only to have the bill vetoed by Governor Ricketts. The legislature successfully overrode the veto, but a year later, Ricketts poured his own money into a successful campaign to reinstate the death penalty.

<sup>67</sup> *Roper v. Simmons*, 543 U.S. 551, 566 (2005); *Atkins v. Virginia*, 536 U.S. 304, 315–16 (2002).

<sup>68</sup> *Atkins*, 536 U.S. at 315–16.

abolished it since the issue was last before the Court),<sup>69</sup> a less stark contrast in *Roper* was still sufficient for the Court to find a national consensus against the death penalty for juveniles.<sup>70</sup> Although no state restored the death penalty for juveniles in the fifteen years since the Court approved the punishment,<sup>71</sup> only five states had eradicated the practice.<sup>72</sup> The *Roper* Court professed that, while the “rate of change” was “less dramatic” or “telling” than it was in *Atkins*, it was still significant because it exemplified a trend.<sup>73</sup>

When comparing the rate of change that the *Roper* Court found indicative of a national consensus against the juvenile death penalty with the rate of change that has occurred since the Court last made a categorical restriction on the death penalty based on age in *Roper*, there appears to be a national consensus against the death penalty as applied to offenders at least under the age of twenty-one, if not also for offenders under the age of twenty-five.<sup>74</sup> Five states abolished and zero states reinstated the death penalty for juveniles in the fifteen years between *Stanford* and *Roper*.<sup>75</sup> In the fifteen years since the Court held that eighteen is the minimum age at which an offender may be sentenced to death, one state has raised the minimum age to twenty-one,<sup>76</sup> and eleven jurisdictions have abandoned the death penalty altogether, albeit some only temporarily.<sup>77</sup> Although

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<sup>69</sup> *Id.* There was a thirteen-year gap between 1989, when the Court decided in *Penry v. Lynaugh* that sentencing a mentally disabled person to death was not a violation of the Eighth Amendment, and when the Court confronted the same issue in *Atkins* in 2002, overruling *Penry*. Compare *id.*, with *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989).

<sup>70</sup> *Roper*, 543 U.S. at 565.

<sup>71</sup> See *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989) (holding imposition of the death penalty “on any person who murders at 16 or 17 years of age . . . does not offend the Eighth Amendment’s prohibition against cruel and unusual punishment”).

<sup>72</sup> *Roper*, 543 U.S. at 565.

<sup>73</sup> *Id.* at 565–66 (quoting *Atkins*, 536 U.S. at 315, n.18).

<sup>74</sup> *Id.*

<sup>75</sup> *Roper*, 543 U.S. at 565–66.

<sup>76</sup> *Commonwealth v. Bredhold*, No. 14-CR-161, 2017 WL 8792559 (Ky. Cir. Ct. Aug. 1, 2017).

<sup>77</sup> Eight states (Connecticut, Delaware, Illinois, Maryland, New Jersey, New Mexico, New York, and Washington) have abolished the death penalty since *Roper* and three states (Colorado, Pennsylvania, and Oregon) have imposed gubernatorial moratoria since *Roper*. *States with and Without the Death Penalty*, *supra* note 61.

no state has specifically legislated to extend the juvenile restriction to offenders under the age of twenty-five, the Court has continuously emphasized that “[i]t is not so much the number of these [s]tates that is significant, but the consistency of the direction of change.”<sup>78</sup>

Further evidencing the national consensus in favor of raising the minimum age at which one may receive a death sentence, the American Bar Association (“ABA”) adopted a resolution in 2018 urging jurisdictions to raise the minimum age above what is currently mandated by *Roper*.<sup>79</sup> Considered to be the “voice of America’s legal profession,” the ABA is highly influential and persuasive in deciding modern legal issues, and should therefore carry great weight when expressing opinions on judicial matters.<sup>80</sup>

The trend is clear: states are increasingly abolishing the death penalty entirely, rather than legislating the minimum age.<sup>81</sup> While only one state has raised the minimum age, and only as high as age twenty-one, and no state (or, more accurately, none out of the one that raised the minimum age) has reinstated the death penalty for offenders aged eighteen to twenty-five, it is nonetheless “powerful evidence” that no state that prohibited the death penalty at the time of *Roper* has since reinstated it.<sup>82</sup>

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<sup>78</sup> *Atkins*, 536 U.S. at 315.

<sup>79</sup> A.B.A. Res. 111 (Feb. 2018). The resolution adopted a report that based its finding on case law, brain development research, trends in legislation, and analysis of the penological goals, to determine that offenders who committed a crime before the age of twenty-one should be barred from receiving a death sentence. *Id.*

<sup>80</sup> William C. Hubbard, *Respect and Influence: The ABA’s Voice Is Strengthened by Members’ Efforts*, A.B.A. J. (2015), [http://www.abajournal.com/magazine/article/respect\\_and\\_influence\\_the\\_abas\\_voice\\_is\\_strengthened\\_by\\_members\\_efforts](http://www.abajournal.com/magazine/article/respect_and_influence_the_abas_voice_is_strengthened_by_members_efforts).

<sup>81</sup> However, since Kentucky recently became the first state to raise the minimum age past eighteen, rather than abolish the death penalty completely, other conservative states may follow suit as raising the minimum age is less extreme than outright abolition.

<sup>82</sup> *Atkins*, 536 U.S. at 316. Nebraska’s reinstatement of the death penalty in 2016 should not carry weight in the national consensus analysis. It has effectively remained the same since *Roper* was decided, as Nebraska did not abolish the death penalty until 2015 through a veto override. *See* Schulte, *supra* note 66. Thus, if its reinstatement carried weight in the analysis, so too would its initial abolishment.

Furthermore, the fact that only one state has raised the minimum age above eighteen and none have gone as far as twenty-five is not as damning to the state of the national consensus as it may appear at first glance. In *Graham*, the Court explained that the “evidence of consensus is not undermined by the fact that many jurisdictions do not prohibit” the punishment at issue.<sup>83</sup> The Court demonstrated that the nature of the sentencing scheme and, thus, the actual sentencing practice, revealed that although a great majority of jurisdictions had not declared the sentencing practice at issue unconstitutional, “it does not necessarily follow that the legislatures in those jurisdictions have deliberately concluded that it would be appropriate.”<sup>84</sup> Accordingly, the following Section will demonstrate how the death penalty as applied in practice to offenders who were between eighteen and twenty-five years old at the time of the offense is further evidence of the national consensus against such practice.

## 2. ACTUAL PRACTICE

A tally reveals that thirty jurisdictions permit a death sentence for offenders who were eighteen to twenty-five years old at the time of the crime.<sup>85</sup> Focusing on this number and ignoring the legislative trend, a death penalty proponent may argue that this evidences a national consensus in favor of keeping the death penalty available for eighteen- to twenty-five-year-olds. However, that “argument is incomplete and unavailing.”<sup>86</sup> Although the Court has declared legislation to be the most “reliable objective evidence of contemporary values,” it is only a part of the national consensus analysis.<sup>87</sup> In fact, the Court has gradually removed the weight originally granted to legislation and now places a heavier emphasis on the actual practices.<sup>88</sup> If thirty-nine jurisdictions permit the sentence at issue, as was the case in *Graham*, the narrow conclusion is that there is not a national consensus against the sentence, and therefore, it is not a

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<sup>83</sup> *Graham v. Florida*, 560 U.S. 48, 66 (2011).

<sup>84</sup> *Id.* (internal quotation marks omitted).

<sup>85</sup> This tally is conservative because it includes the federal government, as well as the three states that currently have gubernatorial moratoria in place. *States with and Without the Death Penalty*, *supra* note 61.

<sup>86</sup> *Graham*, 560 U.S. at 62.

<sup>87</sup> *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989).

<sup>88</sup> *See Miller v. Alabama*, 567 U.S. 460, 482–86 (2012).

disproportionate punishment under society's evolving standards.<sup>89</sup> Yet, just as this conclusion led the Court to find life without parole for non-homicide juvenile offenders unconstitutional, the Court may likewise find a death sentence for offenders who were eighteen to twenty-five at the time of the offense to be unconstitutional simply because thirty jurisdictions (including the federal government and three states with moratoria) permit the practice.

While departing from the twenty-nine jurisdictions that permitted mandatory life without parole for juveniles, the *Miller* Court stated that "simply counting [the jurisdictions that permit the sentence at issue] would present a distorted view."<sup>90</sup> A simple tally warps the national consensus because, although many jurisdictions may not have technically declared the sentence illegal, "an examination of actual sentencing practices" in those jurisdictions illuminates the national consensus in reality, rather than on paper.<sup>91</sup>

Twenty states permitted death sentences for mentally disabled people when *Atkins* was decided, but in its finding of a national consensus against the practice, the Court focused on the legislative trend away from the sentence, as well as the fact that it was an uncommon practice in the jurisdictions in which it was permitted.<sup>92</sup> Similarly, when *Roper* was decided, twenty states permitted death sentences for offenders under the age of eighteen.<sup>93</sup> Mirroring the reasoning in *Atkins*, the *Roper* Court found a national consensus against the juvenile death penalty based on the legislative trend and "infrequent" practice.<sup>94</sup>

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<sup>89</sup> *Id.* at 483.

<sup>90</sup> *Id.* at 482–83.

<sup>91</sup> *Graham*, 560 U.S. at 62.

<sup>92</sup> *Atkins v. Virginia*, 536 U.S. 304, 316 (2002). In some of the states where the death penalty was legal, executions had not "been carried out in decades," and there was therefore no need to legislate which groups to exclude from the death penalty in those states. *Id.* In the states that executed more "regularly" and had no ban on executing mentally disabled people, "only five ha[d] executed offenders possessing a known IQ less than 70 since [the Court] decided *Penry*." *Id.*

<sup>93</sup> *Roper v. Simmons*, 543 U.S. 551, 564 (2005).

<sup>94</sup> *Id.* at 564–65. Even though twenty states did not prohibit the juvenile death penalty, in the fifteen years since *Stanford* was decided, only six of those states actually executed offenders who committed crimes as juveniles. *Id.* In the latter ten of those years, only three states executed offenders who were juveniles at the time of the crime. *Id.*



Unlike in *Atkins* and *Roper*, a majority of states permitted the sentences at issue in *Graham* and *Miller*.<sup>95</sup> Although thirty-nine jurisdictions permitted life without parole sentences for non-homicide juvenile offenders when *Graham* was decided, the Court found that only eleven states were actually imposing such sentences.<sup>96</sup> The *Miller* Court found the State's argument—that twenty-nine jurisdictions allowing mandatory juvenile life without parole sentences demonstrated a national consensus in favor of the practice—to be a weak point.<sup>97</sup> Again, the Court explained that merely looking at the number of jurisdictions that permit the practice is a “distorted view” in most cases.<sup>98</sup> Once the Court in *Miller* considered the number of states that send juveniles to adult court and then “do not have separate penalty provisions for those juvenile offenders,” as well as the states that impose such mandatory sentences “by virtue of generally applicable penalty provisions . . . without regard to age,” it found that the apparent legislative trend was misleading.<sup>99</sup>

As illustrated by the four pertinent cases, the fact that a large number of states permit a practice may not indicate a national consensus in favor of that practice. Twenty-six states currently lack any prohibition against the death penalty for offenders who were eighteen to twenty-four at the time of the offense.<sup>100</sup> This number is neither as low as the twenty states that permitted the sentences at issue in *Atkins* and *Roper*, nor as high as the number of states in *Graham* (thirty-nine) and *Miller* (twenty-nine).

How, then, is it possible that there is a national consensus rejecting the application of the death penalty to offenders under twenty-five at the time of the offense, and yet only one state has acted to raise the minimum age beyond what is required by *Roper*? Actual sentencing practices may provide insight as to how these two circumstances exist both simultaneously and in contradiction of one another. Of the twenty-six states that permit death sentences for

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<sup>95</sup> See *Miller v. Alabama*, 567 U.S. 460, 482–84 (2012).

<sup>96</sup> *Graham*, 560 U.S. at 64.

<sup>97</sup> *Miller*, 567 U.S. at 482.

<sup>98</sup> *Id.* at 485.

<sup>99</sup> *Id.* at 486.

<sup>100</sup> *States with and Without the Death Penalty*, *supra* note 61. Although thirty states permit the death penalty, Kentucky prohibits the death penalty for offenders who were under the age of twenty-one at the time of the offense, and three additional states (Colorado, Pennsylvania, and Oregon) have moratoria imposed.

offenders who were eighteen to twenty-five at the time of the offense, three have not carried out an execution in at least fifteen years, four have not carried out an execution in at least ten years, and six have not carried out an execution in at least five years.<sup>101</sup> In practice, only half of the twenty-six states have carried out executions in the past five years, and only eight did so in 2017 or 2018.<sup>102</sup> Furthermore, Texas alone carried out more than half of the total executions in 2018.<sup>103</sup> Removing Texas as the outlier, it becomes clear that overall, executions are quite rare nationwide, with seven states carrying out one to three executions each in the past year.<sup>104</sup>

An even smaller fraction of states is responsible for executing offenders who were eighteen to twenty-four at the time of their offense. While eight states carried out executions in 2018, only four of those states executed offenders who were under the age of twenty-five when the offense was committed, and only one state executed an offender who was under twenty-one.<sup>105</sup> Overall, seven people who were under the age of twenty-five at the time of their offense were executed in 2018. The majority of these seven were sentenced to death before *Roper* was decided, which was before brain

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<sup>101</sup> John Gramlich, *11 States That Have the Death Penalty Haven't Used It in More than a Decade*, PEW RES. CTR. (Aug. 10, 2018), <http://www.pewresearch.org/fact-tank/2018/08/10/11-states-that-have-the-death-penalty-havent-used-it-in-more-than-a-decade/>. Since Gramlich's article was written, the numbers have changed; Nebraska carried out its first execution since 1997, South Dakota carried out its first execution since 2012, and Washington abolished the death penalty. See Jon Herskovitz, *Nebraska Carries out Its First Execution Since 1997*, REUTERS (Aug. 14, 2018, 6:08 AM), <https://www.reuters.com/article/us-nebraska-execution/nebraska-carries-out-its-first-execution-since-1997-idUSKBN1KZ11M>; Associated Press, *After 7-Hour Delay, South Dakota Carries out First Execution Since 2012*, SIOUXLAND NEWS (Oct. 29, 2018), <https://siouxlandnews.com/news/local/south-dakota-carries-out-first-execution-since-2012>; *States with and Without the Death Penalty*, *supra* note 61.

<sup>102</sup> *The Death Penalty in 2018: Year End Report*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/documents/2018YrEnd.pdf> (last visited Jan. 5, 2019).

<sup>103</sup> *Id.* Texas carried out thirteen of the twenty-five total executions in 2018. *Id.*

<sup>104</sup> *Id.* Three states carried out one execution, three states carried out two executions, and one state carried out three executions, in addition to the thirteen people that Texas executed. *Id.*

<sup>105</sup> *Execution List 2018*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/execution-list-2018> (last visited Jan. 5, 2019).

development research exploded.<sup>106</sup> Therefore, an examination of death sentences handed down in 2018 is even more revealing of the national consensus against the death penalty for offenders under the age of twenty-five. Forty-two death sentences were imposed in 2018, yet only eight of those offenders were under twenty-five at the time of the offense, and none were under the age of twenty-one.<sup>107</sup> These numbers are even more illuminating in light of the fact that in 2017, the age group that comprised the largest volume of convicted murderers was twenty- to twenty-four-year-olds.<sup>108</sup>

In light of the actual practice of death sentences applied to this group of young offenders, the fact that only one state has raised the minimum age of the death penalty is not indicative of the lack of consensus. Because the practice is so uncommon, “there is little need to pursue legislation barring the execution” of offenders who were under the age of twenty-five at the time of the offense.<sup>109</sup> The vast majority of states either outright abolished the death penalty for all ages, do not actively sentence people to death, or do not actually administer executions, particularly for offenders under the age of twenty-five. Therefore, it is fair to conclude that the jurisdictions that permit the practice on paper have not “endorsed [such a sentence] through deliberate, express, and full legislative consideration,” because the issue rarely arises in those states.<sup>110</sup> “[I]t is fair to say that a national consensus has developed against”<sup>111</sup> executing offenders who were under the age of twenty-five at the time of the offense.

### 3. SOCIETY HAS ALREADY REDRAWN THE LINE; DEATH PENALTY JURISPRUDENCE NEEDS TO CATCH UP

Beyond just the scope of death penalty legislation and practices, broader cultural notions are indicative of a national consensus in

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<sup>106</sup> *Id.* Carey Dean Moore was twenty-one at the time of the offense, which occurred thirty-eight years before he was finally executed in 2018. *Id.*

<sup>107</sup> *Death Sentences in 2018*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/2018-sentencing> (last visited Jan. 5, 2019).

<sup>108</sup> *Number of Murder Offenders in the United States in 2017, by Age*, STATISTA, <https://www.statista.com/statistics/251884/murder-offenders-in-the-us-by-age/> (last visited Jan. 6, 2019).

<sup>109</sup> *Atkins v. Virginia*, 536 U.S. 304, 316 (2002).

<sup>110</sup> *Graham v. Florida*, 560 U.S. 48, 67 (2011).

<sup>111</sup> *Atkins*, 536 U.S. at 316.

favor of raising the minimum age for death sentences. General trends in treating young adults differently when they reach age eighteen, twenty-one, and twenty-five are present throughout society. The *Roper* Court opened the door to criticism when it admitted that it settled on the age of eighteen at which to redraw “the line for death eligibility” merely because that is “the point where society draws the line for many purposes between childhood and adulthood.”<sup>112</sup> The Court was right—“[d]rawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules.”<sup>113</sup> While the *Roper* Court’s reasoning for drawing the line at eighteen may have been a legitimate “meaningful basis” in 2005, that line must be updated to reflect not only modern scientific research, but also societal norms.<sup>114</sup> This Section will describe the ways in which society draws the line between childhood and adulthood after age eighteen, and, therefore, why the Court’s categorical rule must be revised.

It is true that traditionally, and in some ways still today, society considers a person an adult on his or her eighteenth birthday.<sup>115</sup> Society is well aware that “[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18.”<sup>116</sup> The idea that a person becomes an adult at age eighteen is reinforced by the fact that many legal rights are granted on one’s eighteenth birthday and are enshrined in amendments to the Constitution. However, one of the most notable rights in this category, the right to vote, was not always available to Americans at age eighteen.<sup>117</sup> The right to vote was originally granted at the age of twenty-one, and only lowered to age eighteen when Congress could not justify drafting young

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<sup>112</sup> *Roper v. Simmons*, 534 U.S. 551, 574 (2005).

<sup>113</sup> *Id.*

<sup>114</sup> *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring) (explaining that there must be a “meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not”).

<sup>115</sup> Jennifer Lai, *Old Enough to Vote, Old Enough to Smoke?*, SLATE (Apr. 23, 2013, 7:37 PM), <https://slate.com/news-and-politics/2013/04/new-york-minimum-smoking-age-why-are-young-people-considered-adults-at-18.html>.

<sup>116</sup> *Roper*, 534 U.S. at 574.

<sup>117</sup> Jocelyn Benson & Michael T. Morley, *The Twenty-Sixth Amendment*, CONST. CTR., <https://constitutioncenter.org/interactive-constitution/amendments/amendment-xxvi> (last visited Jan. 7, 2019).

men to fight in Vietnam if those same men were deprived the right to vote and express a voice on the war in which they would fight.<sup>118</sup>

Yet, because “[a]dulthood is a social construct,” it is amorphous and changes as society learns and grows.<sup>119</sup> As such, the period that marks the beginning of adulthood has changed in the last few decades, and legislatures have recognized and implemented that change. Now coined as a time of “emerging adulthood,” the modern generation of eighteen- to twenty-five-year-olds are beginning adulthood much later than previous generations.<sup>120</sup> As graduate degrees have become more common, people are getting married later, having children later, and “settling into long-term adult roles” later.<sup>121</sup> Based on these social developments, as well as brain development research that will be discussed *infra* Section II.B, legislatures have enacted statutes since *Roper* that question the social significance that the Court gives to the age of eighteen.<sup>122</sup>

In fact, a study of “objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question”<sup>123</sup> regarding what age to separate children from adults reveals that societal “adulthood” has moved well beyond the age of eighteen. Legislatures have shifted the line as far as age twenty-six—the Affordable Care Act allows an individual to avoid the burden of securing their own health insurance until age twenty-six by staying on his or her parent’s health insurance plan.<sup>124</sup> The United States Sentencing Commission has defined youthful offenders as “persons age 25 or younger.”<sup>125</sup> The Internal Revenue Service

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<sup>118</sup> *The 26th Amendment*, HISTORY, <https://www.history.com/topics/united-states-constitution/the-26th-amendment> (last visited Jan. 7, 2019).

<sup>119</sup> Julie Beck, *When Are You Really an Adult?*, ATLANTIC (Jan. 5, 2016), <https://www.theatlantic.com/health/archive/2016/01/when-are-you-really-an-adult/422487/>.

<sup>120</sup> Jeffrey Jensen Arnett, *Emerging Adulthood: A Theory of Development from the Late Teens Through the Twenties*, 55 AM. PSYCHOLOGIST 469, 469 (2000).

<sup>121</sup> *Id.*

<sup>122</sup> *Roper v. Simmons*, 534 U.S. 551, 574 (2005).

<sup>123</sup> *Id.* at 564.

<sup>124</sup> *How to Get or Stay on a Parent’s Plan*, HEALTHCARE.GOV, <https://www.healthcare.gov/young-adults/children-under-26/> (last visited Jan. 7, 2019).

<sup>125</sup> WILLIAM H. PRYOR, JR. ET AL., *Youthful Offenders in the Federal System*, U.S. SENTENCING COMM’N (May 2017),

permits students under the age of twenty-four to remain as dependents on their parents' tax forms.<sup>126</sup> For purposes of federal student aid funding, the Department of Education considers students under twenty-three-years-old to be dependents, "assumed to have the support of parents."<sup>127</sup> The federal government restricts individuals under the age of twenty-one from purchasing guns.<sup>128</sup> Notably, all of these examples that characterize individuals as adults at an age above twenty-one are federal, and hence, represent the national consensus.

However, federal agencies do not act radically or alone. The federal government incentivizes states through funding to allow individuals to remain in foster programs up to the age of twenty-one; half of all states take part in this program.<sup>129</sup> Four states consider offenders up to the age of twenty-four to be juveniles insofar as they are allowed to "remain under juvenile court jurisdiction."<sup>130</sup> At least thirteen states maintain youthful offender statutes that apply to individuals up to the age of twenty-five.<sup>131</sup> This number is growing. Vermont passed legislation effective in 2018 to raise the youthful offender age from seventeen to twenty-one.<sup>132</sup> In addition, the federal government has been incentivizing states to maintain the minimum legal drinking age at twenty-one through the use of highway funding

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[https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170525\\_youthful-offenders.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170525_youthful-offenders.pdf).

<sup>126</sup> *Dependents and Exemptions*, IRS, <https://www.irs.gov/faqs/filing-requirements-status-dependents-exemptions/dependents-exemptions/dependents-exemptions-2> (last updated Dec. 13, 2018).

<sup>127</sup> *Federal Student Aid*, OFFICE U.S. DEPT. EDUC., <https://studentaid.ed.gov/sa/fafsa/filling-out/dependency> (last visited Jan. 7, 2019).

<sup>128</sup> 18 U.S.C § 922(b)(1) (2018).

<sup>129</sup> *Extending Foster Care Beyond 18*, NAT'L CONF. ST. LEGISLATURES (July 28, 2017), <http://www.ncsl.org/research/human-services/extending-foster-care-to-18.aspx>.

<sup>130</sup> *Delinquency Age Boundaries*, JUV. JUST. GEOGRAPHY, POL'Y, PRAC. & STAT, <http://www.jjgps.org/jurisdictional-boundaries#delinquency-age-boundaries?year=2016&ageGroup=3> (last visited March 3, 2020).

<sup>131</sup> Alex A. Stamm, Note, *Young Adults Are Different, Too: Why and How We Can Create a Better Justice System for Young People Age 18 to 25*, 95 TEX. L. REV. 72, 81–87 (2017).

<sup>132</sup> VT. STAT. ANN. tit. 33, § 5280 (2018).

since 1984.<sup>133</sup> Some states have extended that minimum age to the ability to purchase cigarettes.<sup>134</sup>

These are only a fraction of the policies that draw the line at an age above eighteen, oftentimes as old as age twenty-five. Reflective of the trend in favor of drawing the line distinguishing juveniles from adults at a later age, the nation is seeing a rapid increase in such legislation, largely as a result of what is now known about brain development.<sup>135</sup>

### B. *The Science to Back it Up*

The national consensus is clear—the nation is against the practice of sentencing offenders who were younger than twenty-five at the time of the offense to death and is in favor of redrawing the legal line marking the start of adulthood at least at the age of twenty-one, if not higher. Society has evolved in this direction as a result of its changing culture and advancing scientific research. The period of emerging adulthood—ages eighteen to twenty-five—is “characterized by change and exploration,” rather than marriage and babies as it was for prior generations.<sup>136</sup> The reason for this cultural shift may be explained by recent studies on brain development, which demonstrate that the brain is not finished developing until much later than older studies suggested.<sup>137</sup>

When the Court engages in a proportionality analysis, it must “consider reasons for agreeing or disagreeing” with the national consensus after it establishes that one exists.<sup>138</sup> The *Roper* Court sided with the national consensus against the death penalty for offenders under the age of eighteen when it exercised its “own independent judgment” because it found brain development research proved younger offenders to be less culpable offenders.<sup>139</sup> Brain

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<sup>133</sup> 23 U.S.C. § 158 (2018).

<sup>134</sup> *Raising the Tobacco Age to 21*, CAMPAIGN FOR TOBACCO-FREE KIDS, <https://www.tobaccofreekids.org/what-we-do/us/sale-age-21> (last updated Aug. 30, 2018).

<sup>135</sup> See INST. OF MED. OF THE NAT’L ACADEMIES, PUBLIC HEALTH IMPLICATIONS OF RAISING THE MINIMUM AGE OF LEGAL ACCESS TO TOBACCO PRODUCTS 3–6 (2015).

<sup>136</sup> Arnett, *supra* note 120, at 469.

<sup>137</sup> See INST. OF MED. NAT’L ACADEMIES, *supra* note 135, at 78.

<sup>138</sup> *Atkins v. Virginia*, 536 U.S. 304, 313 (2002).

<sup>139</sup> *Roper v. Simmons*, 543 U.S. 551, 564, 567 (2005).

development research was only first emerging in a mainstream way in 2005 when *Roper* was decided, and as a result, it was essentially the first time that the Court relied on neuroscience in a “decision[] about developmental differences between adolescents and adults.”<sup>140</sup> This was likely a factor in the Court’s hesitancy to raise the minimum death penalty age higher than eighteen.

However, since 2005, it has become “well established” that “characteristic developmental changes” in the brain are “not complete until approximately twenty-five years of age.”<sup>141</sup> Crucially, the part of the brain that remains underdeveloped into the mid-twenties is the same part of the brain that the Court found reduced the culpability of juvenile offenders—the prefrontal cortex.<sup>142</sup> The prefrontal cortex’s stage of development can explain the reasoning behind an immature decision that has consequences of life or death, as it “plays a central and pervasive role in human cognition.”<sup>143</sup> It is the part of the brain that allows an individual to “exercise good judgment when presented with difficult life situations,” “control the expression of intense emotions,” control “impulse,” and resist making risky decisions in the presence of friends.<sup>144</sup>

An informed appreciation of the effects of an underdeveloped prefrontal cortex in young adults supports what has long been illustrated by crime data showing that “young adult crime does not define offenders, but rather is ‘a transitory state that they age out of.’”<sup>145</sup>

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<sup>140</sup> Laurence Steinberg, *The Influence of Neuroscience on US Supreme Court Decisions About Adolescents’ Criminal Culpability*, 14 NATURE REVIEWS NEUROSCIENCE 513, 513 (2013).

<sup>141</sup> Mariam Arain et al., *Maturation of the Adolescent Brain*, 9 NEUROPSYCHIATRIC DISEASE TREATMENT 449, 451 (2013).

<sup>142</sup> *Youthful Offenders in the Federal System*, *supra* note 125, at 7.

<sup>143</sup> Cassandra B. Romine & Cecil R. Reynolds, *A Model of the Development of Frontal Lobe Functioning: Findings from a Meta-Analysis*, 12 APPLIED NEUROPSYCHOLOGY 190, 190 (2005).

<sup>144</sup> Arain et al., *supra* note 141, at 453, 456.

<sup>145</sup> Josh Gupta-Kagan, *The Intersection Between Young Adult Sentencing and Mass Incarceration*, 2018 WIS. L REV. 669, 678 (quoting JOHN PFAFF, LOCKED IN: THE TRUE CAUSE OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM 190–91 (2017)).



### C. Penological Goals

As with all Eighth Amendment proportionality analyses before the Court, national consensus does not conclude the inquiry on a proper legal threshold of adulthood. Though “evolving standards” and “objective evidence of contemporary values”<sup>146</sup> carry great weight, the Court must also use “its independent judgment.”<sup>147</sup> To make a determination regarding the constitutionality of a punishment, the Court must look to the root of the question that the proportionality analysis poses: is the punishment disproportionate to the crime?<sup>148</sup> The final judgment is informed by precedent and the Court’s “own understanding of the Constitution and the rights it secures.”<sup>149</sup>

Because “the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force.”<sup>150</sup> The Court has labeled its death penalty jurisprudence as “narrowing,” as it “seeks to ensure that only the most deserving of execution are put to death.”<sup>151</sup> As such, to be considered a constitutionally permissible punishment, the death penalty as applied must “measurably contribute[] to one or both” of the penological goals which the death penalty seeks to further; otherwise, the punishment “‘is nothing more than the purposeless and needless imposition of pain and suffering,’ and hence [is] an unconstitutional punishment.”<sup>152</sup>

The Supreme Court’s precedent makes clear that for the same reasons that the state’s penological goals are not furthered by sentencing juveniles to death, they likewise are not furthered by sentencing offenders under the age of twenty-five to death. In *Roper*, the Court pointed to specific differences between juveniles and adults that require juveniles to be excluded from the group of “offenders who commit a narrow category of the most serious crimes” for whom capital punishment is reserved.<sup>153</sup> The Court found that

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<sup>146</sup> *Kennedy v. Louisiana*, 554 U.S. 407, 434, 435 (2008).

<sup>147</sup> *Roper v. Simmons*, 543 U.S. 551, 564, 567 (2005).

<sup>148</sup> *Kennedy*, 554 U.S. at 421.

<sup>149</sup> *Id.* at 435.

<sup>150</sup> *Roper*, 543 U.S. at 568.

<sup>151</sup> *Atkins v. Virginia*, 536 U.S. 304, 319 (2002).

<sup>152</sup> *Enmund v. Florida*, 458 U.S. 782, 798 (1982) (quoting *Coker v. Georgia*, 433 U.S. 584, 592 (1977)).

<sup>153</sup> *Roper*, 543 U.S. at 568.

the presence of characteristics such as “lack of maturity,” “underdeveloped sense of responsibility,” “vulnerab[ility] . . . to negative influences,” and lack of “well formed” character in juveniles “often result in impetuous and ill-considered actions and decisions.”<sup>154</sup> The Court held that because of these differences, juveniles are less culpable offenders, and imposing the death penalty on them would not serve any penological goal.<sup>155</sup>

Because recent studies now clarify that the characteristics that make juveniles less culpable do not fully fade until the age of twenty-five,<sup>156</sup> it follows logically that offenders under the age of twenty-five have diminished culpability.<sup>157</sup> Thus, neither of the death penalty’s penological goals is served when applied to offenders under the age of twenty-five.

Retribution hinges on the culpability of the offender.<sup>158</sup> It 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.”<sup>159</sup> The part of the brain that develops last controls an individual’s ability to resist impulses and the urge to engage in reckless behavior.<sup>160</sup> These are the same characteristics that the Court cited as causing juveniles to be less culpable and thus, the juvenile death penalty less serving of retributive goals.<sup>161</sup>

The goal of deterrence is likewise not met. The *Roper* Court found that “the same characteristics that render juveniles less culpable [make them] less susceptible to deterrence.”<sup>162</sup> In particular, the inability of juveniles to engage in a “cost-benefit analysis” led the Court to find an “absence of evidence of deterrent effect.”<sup>163</sup> Now that research has established that the prefrontal cortex remains

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<sup>154</sup> *Id.* at 569–70.

<sup>155</sup> *Id.* at 571.

<sup>156</sup> See INST. OF MED. NAT’L ACADEMIES, *supra* note 135, at 78.

<sup>157</sup> *Id.*

<sup>158</sup> *Atkins v. Virginia*, 536 U.S. 304, 319 (2002).

<sup>159</sup> *Roper*, 543 U.S. at 571.

<sup>160</sup> 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.

<sup>161</sup> *Roper*, 543 U.S. at 569.

<sup>162</sup> *Id.* at 571.

<sup>163</sup> *Id.* at 571–72 (quoting *Thompson*, 487 U.S. at 837).

underdeveloped “well into the 20s,” the same inability to consider consequences and “take stock of a situation” likely causes offenders under the age of twenty-five to be less responsive to deterrence.<sup>164</sup>

Because brain development occurs gradually as individuals grow closer to the age of twenty-five, they are likely to have a more developed prefrontal cortex and their culpability is less likely to be diminished by “a substantial degree.”<sup>165</sup> Therefore, if the Court raises the minimum death penalty age to twenty-five, there will be some offenders who are able to skirt the death penalty merely because of their age, despite potentially deserving the most severe punishment. Yet, the same was said about eighteen-year-olds when *Roper* was decided.<sup>166</sup>

The Court acknowledged that one of the problems with drawing the categorical line at eighteen is that “some under 18 have already attained a level of maturity some adults will never reach.”<sup>167</sup> As a society, we must ask whether we would rather spare the lives of our nation’s youth, whose underdeveloped brains may have resulted in the commission of a heinous crime, or protect the “express[ion of] the community’s moral outrage” at the risk of killing offenders whose immaturity overshadowed their culpability.<sup>168</sup> National consensus appears to weigh more heavily in favor of the former, and as neither penological goal is served by sentencing offenders under twenty-five to death, the Court should follow that consensus.

Not only does sentencing offenders under the age of twenty-five to death fail to “measurably contribute[] to one or both” of the penological goals, these offenders are also superior candidates for alternative punishments.<sup>169</sup> This age group is at a stage of “heightened plasticity,” which makes them easily influenced by experiences.<sup>170</sup> As a result, they are the most susceptible to the benefits of

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<sup>164</sup> Johnson et al., *supra* note 160, at 217.

<sup>165</sup> *Roper*, 543 U.S. at 571.

<sup>166</sup> *Id.* at 574.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 571.

<sup>169</sup> *Enmund v. Florida*, 458 U.S. 782, 798 (1982).

<sup>170</sup> Laurence Steinberg, *The Case for Delayed Adulthood*, N.Y. TIMES (Sept. 19, 2014), <https://www.nytimes.com/2014/09/21/opinion/sunday/the-case-for-delayed-adulthood.html>.

rehabilitation, a penological goal arguably served by imprisonment, but certainly not by death.<sup>171</sup>

### III. THE COURT SHOULD FIND SENTENCING OFFENDERS UNDER TWENTY-FIVE TO DEATH UNCONSTITUTIONAL—BUT WILL IT?

The addition of two Supreme Court justices in less than two years brings great uncertainty to the future of many controversial topics, including death penalty jurisprudence. How the new Court will decide death penalty cases is of particular intrigue for two reasons. First, Justice Anthony Kennedy's retirement means the loss of the key swing vote in death penalty cases, and second, Justice Brett Kavanaugh's stance cannot be reasonably predicted, as he has yet to directly confront the issue.

#### A. Kennedy's Legacy

Although appointed by a Republican president<sup>172</sup> and considered to be a "lifelong Republican,"<sup>173</sup> Justice Kennedy was "never a reliable conservative."<sup>174</sup> While it is true that he cast more conservative than liberal votes in his three decades on the bench, many landmark cases would not have resulted in liberal decisions absent Justice Kennedy's vote.<sup>175</sup> Death penalty law is one area in which Justice Kennedy cast votes and authored majority opinions that contributed

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<sup>171</sup> Commonwealth v. Bredhold, No. 14-CR-161, 2017 WL 8792559 (Ky. Cir. Ct. Aug. 1, 2017).

<sup>172</sup> Justice Kennedy was nominated to the Court by President Reagan in 1987. Linda Greenhouse, *Reagan Nominates Anthony Kennedy to Supreme Court*, N.Y. TIMES (Nov. 12, 1987), <https://www.nytimes.com/1987/11/12/us/reagan-nominates-anthony-kennedy-to-supreme-court.html>.

<sup>173</sup> *Justice Kennedy: His Departure from the Court and Possible Consequences for Capital Cases*, A.B.A. (Nov. 6, 2018), [https://www.americancanbar.org/groups/committees/death\\_penalty\\_representation/project\\_press/2018/fall/kennedy-in-retrospective/](https://www.americancanbar.org/groups/committees/death_penalty_representation/project_press/2018/fall/kennedy-in-retrospective/).

<sup>174</sup> Michael D. Shear, *Supreme Court Justice Anthony Kennedy Will Retire*, N.Y. TIMES (June 27, 2018), <https://www.nytimes.com/2018/06/27/us/politics/anthony-kennedy-retire-supreme-court.html>.

<sup>175</sup> Adam Feldman, *Empirical SCOTUS: Expect Kavanaugh to Shift the Court Rightward — How Far No One Knows*, SCOTUSBLOG (July 10, 2018, 9:21 PM), <http://www.scotusblog.com/2018/07/empirical-scotus-expect-kavanaugh-to-shift-the-court-rightward-how-far-no-one-knows/>.

to his reputation as “the pivotal swing vote.”<sup>176</sup> Most notably, Justice Kennedy wrote the *Roper* 5–4 majority opinion, which declared the juvenile death penalty unconstitutional.<sup>177</sup> He also wrote the majority opinion that declared the death penalty unconstitutional for non-homicide offenses, also a 5-4 decision.<sup>178</sup> He wrote the *Graham* majority opinion, declaring that life without parole sentences for juveniles who committed non-homicide offenses are unconstitutional.<sup>179</sup> And finally, he provided the swing vote necessary for the Court’s decision that mandatory life without parole sentences for juveniles are unconstitutional.<sup>180</sup>

Notwithstanding the individuals ages eighteen to twenty-five who continue to be sentenced to death and life without parole despite immature brain functioning, without Justice Kennedy, the numbers would be much more alarming. Justice Kennedy’s powerful swing vote essentially granted him the power to control the jurisprudential meaning of the Eighth Amendment.<sup>181</sup> His retirement may also mean the loss of the Court as “a venue for a systemic attack on capital punishment.”<sup>182</sup>

### B. *Kavanaugh’s Future*

It is difficult to predict whether Justice Kennedy’s successor will continue his legacy of supporting defendants’ rights. Justice Kavanaugh did not encounter any death penalty related cases during his twelve years on the D.C. Circuit Court of Appeals, nor was he confronted with any questions regarding his views on the death penalty during the confirmation process.<sup>183</sup> Regardless, many

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<sup>176</sup> Barnes, *supra* note 8.

<sup>177</sup> *Roper v. Simmons*, 543 U.S. 551, 564, 567 (2005).

<sup>178</sup> *Kennedy v. Louisiana*, 554 U.S. 407, 434, 435 (2008).

<sup>179</sup> *Graham v. Florida*, 560 U.S. 48 (2010).

<sup>180</sup> *Miller v. Alabama*, 567 U.S. 460, 483 (2012).

<sup>181</sup> Matt Ford, *America is Stuck with the Death Penalty for (at Least) a Generation*, NEW REPUBLIC (July 19, 2018), <https://newrepublic.com/article/150036/america-stuck-death-penalty-at-least-generation> (“‘In a very real sense, the Eighth Amendment meant whatever Justice Kennedy decided that it meant,’ [said] Robert Dunham, the executive director of the Death Penalty Information Center.”).

<sup>182</sup> *Id.*

<sup>183</sup> AM. CIVIL LIBERTY UNION, REPORT OF THE AMERICAN CIVIL LIBERTIES UNION ON THE NOMINATION OF JUDGE BRETT M. KAVANAUGH TO BE ASSOCIATE

scholars predict that the replacement of Justice Kennedy with “a more doctrinaire law-and-order conservative”<sup>184</sup> is not just a setback for death penalty jurisprudence, but rather “a death knell.”<sup>185</sup> While Justice Kennedy has been described as a “heterodox jurist,” Justice Kavanaugh is considered “a reliably conservative judge.”<sup>186</sup>

Yet contrary to what many scholars are predicting,<sup>187</sup> the Court’s steady trend away from the constitutionality of the death penalty<sup>188</sup> may not be halted by Justice Kavanaugh. Prior to his confirmation to the Supreme Court, Justice Kavanaugh was only involved in one case involving a death row inmate, and it did not involve any Eighth Amendment analysis.<sup>189</sup> Therefore, it is necessary to analyze Justice Kavanaugh’s writings and public speeches to produce an informed projection. This Section will provide two reasons why Justice Kavanaugh should find death sentences unconstitutional for offenders under the age of twenty-five, should the issue come before the Court.

First, Justice Kavanaugh’s views on sentencing inform how he may decide death penalty cases. He has expressed the opinion that courts should return to a mandatory sentencing system, particularly because judges naturally “bring their own personal philosophies [and] their personal views on particular issues into the courtroom.”<sup>190</sup> Because he has expressed concern about disparities that often result from advisory guidelines, he has consistently

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JUSTICE OF THE UNITED STATES SUPREME COURT 21 (2018), [https://www.aclu.org/sites/default/files/field\\_document/final\\_aclu\\_report\\_on\\_judge\\_brett\\_m\\_kavanaugh.pdf](https://www.aclu.org/sites/default/files/field_document/final_aclu_report_on_judge_brett_m_kavanaugh.pdf).

<sup>184</sup> Dylan Matthews, *America Under Brett Kavanaugh*, VOX (Oct. 5, 2018, 3:50 PM), <https://www.vox.com/2018/7/11/17555974/brett-kavanaugh-anthony-kennedy-supreme-court-transform>.

<sup>185</sup> *Kavanaugh, SCOTUS, and Criminal Justice*, DEATH PENALTY FOCUS (Oct. 12, 2018), <https://deathpenalty.org/blog/the-focus/kavanaugh-scotus-criminal-justice/> [hereinafter DEATH PENALTY FOCUS].

<sup>186</sup> Ford, *supra* note 181.

<sup>187</sup> See DEATH PENALTY FOCUS, *supra* note 185.

<sup>188</sup> Richard Wolf, *Death Penalty Sentences, Executions Remain at Near-Record Lows in 2018*, USA TODAY (Dec. 14, 2018, 12:01 AM), <https://www.usatoday.com/story/news/politics/2018/12/14/death-penalty-life-support-sentences-executions-near-record-lows/2303933002/>.

<sup>189</sup> *Roth v. Dep’t of Justice*, 642 F.3d 1161 (D.C. Cir. 2011).

<sup>190</sup> *United States Sentencing Commission Public Hearing*, U.S. SENT’G COMMISSION 40 (2009) (statement of Hon. Brett M. Kavanaugh).

pushed for a mandatory sentencing system.<sup>191</sup> Although Justice Kavanaugh did not refer specifically to death sentences, the death penalty is applied more disparately than any other sentence, with only eight states using the practice in 2018.<sup>192</sup> Because the Supreme Court has already held that mandatory death sentences are unconstitutional, the only solution to this sentencing disparity through implementation of a mandatory system is to make it unconstitutional. If Justice Kavanaugh intends to remain consistent with his jurisprudence on mandatory uniform sentencing guidelines, he would need to either err on the side of eliminating the death penalty, or support making the death penalty mandatory for certain offenses.

Second, Justice Kavanaugh “emphatically” dissented when the majority held that despite the “mandatory thirty-year sentence for any person who carries a machine gun while committing a crime of violence,” the government is not required “to prove that the defendant knew the weapon he was carrying was capable of firing automatically.”<sup>193</sup> In other words, the majority ruled that even if the defendant was not aware that the weapon he was carrying was a machine gun, he must receive this mandatory sentence.<sup>194</sup> Justice Kavanaugh expressed disturbance with the court’s imposition of “an extra 20 years of *mandatory* imprisonment *based on a fact the defendant did not know*.”<sup>195</sup> He called this practice “unjust and incompatible with deeply rooted principles of American law.”<sup>196</sup>

In the same way that it is unjust to imprison a defendant for twenty additional years by “dispensing with *mens rea*,” it is likewise unjust to sentence offenders under the age of twenty-five to death.<sup>197</sup> Discounting *mens rea*, or the intent to commit an act, is analogous to ignoring the fact that eighteen to twenty-five-year-olds lack the physical ability to properly assess options and make decisions,

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<sup>191</sup> *Id.* at 38.

<sup>192</sup> *States with and Without the Death Penalty*, *supra* note 61.

<sup>193</sup> *United States v. Burwell*, 690 F.3d 500, 502 (D.C. Cir. 2012).

<sup>194</sup> *Id.* at 516.

<sup>195</sup> *Id.* at 528 (Kavanaugh J., dissenting).

<sup>196</sup> *Id.* at 553.

<sup>197</sup> *Id.*

exacerbated in the presence of peer pressure or negative emotions, which are often factors in adolescent crime.<sup>198</sup>

Because Justice Kavanaugh stated that “[t]he debate over mens rea is not some philosophical or academic exercise,” as “[i]t has major real-world consequences for criminal defendants,” he should recognize that there should be no debate over sentencing offenders under the age of twenty-five to death—the most severe real-world consequence.<sup>199</sup> This is not a simple policy debate—scientists have proven that individuals under the age of twenty-five lack developed brain functions, making them less capable of having the required *mens rea*, and therefore less culpable. These individuals are not the most culpable offenders, and, therefore, should not be sentenced with the harshest punishment. Justice Kavanaugh similarly concluded that when a defendant lacks *mens rea*, they have a lessened “moral depravity.”<sup>200</sup>

#### CONCLUSION

As society evolves and develops, the barbaric punishments of the past become recognized as such. Legislative trends and actual practices demonstrate the movement against applying the death penalty to offenders who were under the age of twenty-five at the time of the crime and show the favorability of redrawing the line that distinguishes juveniles from adults above age eighteen. Moreover, the nation is not evolving faster than the rest of the world. In fact, the United States is the only country in the western hemisphere that committed executions in 2017.<sup>201</sup> As more countries enact legislation to abolish the death penalty and fewer countries impose and carry out executions, it is clear that “the global trend [is] towards abolition of the death penalty.”<sup>202</sup>

Given the opportunity to decide the question of whether death sentences are a constitutional punishment for offenders under the

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<sup>198</sup> Johnson et al., *supra* note 160, at 217.

<sup>199</sup> *Burwell*, 690 F.3d at 553.

<sup>200</sup> *Id.*

<sup>201</sup> AMNESTY INT’L, DEATH SENTENCES AND EXECUTIONS 2017 6 (2018) <https://www.amnesty.org/download/Documents/ACT5079552018ENGLISH.pdf>.

<sup>202</sup> *Id.* at 5.



age of twenty-five, the Court should consider these trends in its proportionality analysis. Moreover, it should find no reason to disagree with the consensus because of the scientific research on brain development. The Court should rely on the same reasoning it applied in *Roper* and extend the ban to offenders under twenty-five, as science now confirms that the same characteristics that make juveniles less culpable remain until at least the age of twenty-five.<sup>203</sup> Once it recognizes the diminished culpability of offenders under twenty-five, the Court must find that neither retribution nor deterrence justifies sentencing these offenders to death. Thus, the punishment is disproportionate to the crime and must be declared unconstitutional.

Many political tides have turned since 2015 when Justice Scalia said that he “wouldn’t be surprised if the [C]ourt voted to abolish [the death penalty] soon.”<sup>204</sup> With a crucial swing voter gone and the addition of two conservative justices, only time will tell if Justice Scalia’s predictions were accurate. However, if Justice Kavanaugh follows his own logic and precedent, he very well may rule against the death penalty for offenders under twenty-five.

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<sup>203</sup> Malcolm Ritter, *Experts Link Teen Brains’ Immaturity, Juvenile Crime*, ABC NEWS, <https://abcnews.go.com/Technology/story?id=3943187&page=1> (last visited Jan. 28, 2019).

<sup>204</sup> Ford, *supra* note 181.