

A DECENT PROPOSAL: EXEMPTING EIGHTEEN- TO TWENTY-YEAR-OLDS FROM THE DEATH PENALTY

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I.

INTRODUCTION

On May 15, 2015, a jury recommended that Dzhokhar Tsarnaev be sentenced to death for his role in the 2013 Boston Marathon bombings.¹ During his preliminary interrogations, the nineteen-year-old Dzhokhar² stated that his older brother, twenty-six-year-old Tamerlan Tsarnev, was the mastermind of the plot.³ At trial, Dzhokhar’s attorney argued that the teenager was a mere follower.⁴ Three out of twelve jurors believed that Dzhokhar acted under his brother’s influence.⁵ But that belief was not enough to spare him from the death penalty.

Dzhokhar’s crimes were brutal.⁶ However, his life should be spared. This article does not contend that the jury improperly weighed the mitigating factors

1. Penalty Phase Verdict at 21–22, *United States v. Tsarnaev*, No. 13-10200-GAO, 2015 WL 2393773, § VI (D. Mass. May 15, 2015); Katharine Q. Seelye, *Dzhokhar Tsarnaev Given Death Penalty in Boston Marathon Bombing*, N.Y. TIMES (May 15, 2015), http://www.nytimes.com/2015/05/16/us/dzhokhar-tsarnaev-death-sentence.html?_r=1.

2. Dzhokhar Tsarnaev will be referred to by his first name throughout this article in order to clearly distinguish him from his brother, Tamerlan Tsarnaev.

3. Jake Tapper & Matt Smith, *Source: Boston Bomb Suspect Says Brother Was Brains Behind Attack*, CNN (Apr. 22, 2013, 10:42 PM), <http://www.cnn.com/2013/04/22/us/boston-attack/>.

4. Richard A. Serrano, *In Defense of Boston Marathon Bomber, Lawyers Make Case Against Older Brother*, L.A. TIMES (Apr. 27, 2015, 7:36 PM), <http://www.latimes.com/nation/la-na-boston-trial-defense-20150427-story.html>; Ann O’Neill, *The 13th Juror: The Radicalization of Dzhokhar Tsarnaev*, CNN (Mar. 30, 2015, 4:17 PM), <http://www.cnn.com/2015/03/27/us/tsarnaev-13th-juror-jahar-radicalization/>.

5. Penalty Phase Verdict at 16, *Tsarnaev*, 2015 WL 2393773, § V.

6. Dzhokhar and Tamerlan Tsarnaev deployed two explosives that killed three people and wounded 264 others. *Boston Marathon Bombing Victims*, CBS NEWS, <http://www.cbsnews.com/pictures/boston-marathon-bombing-victims/> (last visited Nov. 4, 2015). In addition, the brothers shot and killed an MIT campus police officer three days after the bombing. *Id.*

in Dzhokhar's case. Rather, this article contends that Dzhokhar belongs to a class of offenders that should be categorically exempt from the death penalty: eighteen- to twenty-year-olds. Indeed, this article is not about Dzhokhar Tsarnaev. This article is about all of the offenders on death row who committed their crimes between the ages of eighteen and twenty.

Dzhokhar's life should be spared for the same reasons Lee Boyd Malvo's life was spared. The seventeen-year-old Malvo, along with alleged mastermind forty-one-year-old John Allen Muhammad, killed ten people during the infamous Beltway sniper attacks.⁷ Prosecutors ultimately decided not to pursue the death penalty against Malvo,⁸ basing their decision on the 2005 U.S. Supreme Court case, *Roper v. Simmons*,⁹ which exempted from execution those that had committed crimes while sixteen or seventeen years old.¹⁰ In *Roper*, the Supreme Court concluded that the execution of sixteen- and seventeen-year-olds violated the Eighth Amendment's prohibition of cruel and unusual punishment. The Court provided two reasons for its decision. First, there was a national consensus against the practice, measured by "objective indicia of society's standards, as expressed in pertinent legislative enactments and state practice."¹¹ A majority of states had already banned the execution of sixteen- and seventeen-year-olds, and those that permitted the punishment rarely administered it.¹² Second, executing sixteen- and seventeen-year-olds constituted a punishment that was disproportionate to the culpability of the class of offenders.¹³ The Court reasoned that sixteen- and seventeen-year-olds were too "immature and irresponsible,"¹⁴ too susceptible to negative influences, and too malleable to be deserving of the death penalty.¹⁵

For the same reasons, eighteen- to twenty-year-olds such as Dzhokhar should be spared from the death penalty. First, death row data reveal objective

7. Andrea F. Siegel, *Jury Convicts Malvo in Sniper Shootings*, BALT. SUN (Dec. 19, 2003), <http://www.baltimoresun.com/news/maryland/bal-te.md.malvo19dec19-story.html#page=1>; Editorial, *The Terror Ends*, N.Y. TIMES (Oct. 25, 2002), <http://www.nytimes.com/2002/10/25/opinion/the-terror-ends.html> (reporting Malvo's age as seventeen and Mohammed's as forty-one upon their capture).

8. Jane Roh, *Supreme Court Rules Death Penalty for Youths Unconstitutional*, FOX NEWS (Mar. 2, 2005), <http://www.foxnews.com/story/2005/03/02/supreme-court-rules-death-penalty-for-youths-unconstitutional.html>; see also Siegel, *supra* note 7.

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

10. *Id.* at 578–79.

11. *Id.* at 552 (citation omitted).

12. *Id.* at 564–68.

13. *Id.* at 568–75.

14. The word "immature" often has a negative or demeaning connotation in its everyday, colloquial usage. However, as used in this article, the term is simply intended to connote incomplete development. The term was employed heavily in *Roper*. *Id.* at 569–71.

15. The Court also found "confirmation" for its determination from the fact that the United States was the only country in the world that sanctioned the juvenile death penalty. *Id.* at 575. However, the Court recognized that the death penalty policies of foreign nations are not "controlling, for the task of interpreting the Eighth Amendment remains our responsibility." *Id.*

indicia of a national consensus opposed to the practice. Only fifteen states carried out such executions in the past fifteen years.¹⁶ Four states—Texas, Oklahoma, Virginia, and Ohio—were responsible for seventy-eight percent of the executions; Texas was responsible for a majority of them.¹⁷ Because of the capital punishment practices of a minority of states, over the past fifteen years 130 individuals who committed crimes while eighteen- to twenty-years old lost their lives in a manner that most of the country appears to oppose.¹⁸

Second, the execution of eighteen- to twenty-year-olds constitutes a disproportionate punishment because, as recent scientific research shows, these individuals share many of the same mitigating characteristics as juveniles. They are psychologically predisposed to reckless behavior¹⁹ and they are susceptible to negative peer influences.²⁰ These transient tendencies diminish their

16. The states are Alabama, Arkansas, Delaware, Florida, Georgia, Indiana, Mississippi, Missouri, North Carolina, Ohio, Oklahoma, South Carolina, South Dakota, Texas, and Virginia. See Brian Eschels, *Data & the Death Penalty: Exploring the Question of National Consensus Against Executing Emerging Adults in Conversation with Andrew Michaels' A Decent Proposal: Exempting Eighteen- to Twenty-Year-Olds From the Death Penalty*, 40 N.Y.U. REV. L. & SOC. CHANGE HARBINGER (forthcoming 2016), <http://socialchangenyu.com/volume-40/> (aggregating, reporting, and presenting demographic data representing hundreds of executed persons is beyond the scope of what can be done in a print article. Writing in *The Harbinger*, the online publication of the *N.Y.U. Review of Law & Social Change*, Brian Eschels collects and aggregates this data, drawing statistical conclusions upon which this article relies.).

17. *Id.*

18. *Id.*

19. Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEVELOPMENTAL REVIEW 339, 343 (1992); see also Kathryn L. Modecki, *Addressing Gaps in the Maturity of Judgment Literature: Age Differences and Delinquency*, 32 LAW & HUM. BEHAV. 78, 79 (2008) (“In general, the age curve shows crime rates escalating rapidly between ages 14 and 15, topping out between ages 16 and 20, and promptly deescalating.”) (citing D.P. Farrington, *Age and Crime*, in 7 CRIME & JUSTICE 189, 189–250 (1986)).

20. Graham Bradley & Karen Wildman, *Psychosocial Predictors of Emerging Adults' Risk and Reckless Behaviors*, 31 J. YOUTH & ADOLESCENCE 253, 253–54, 263 (2002) (explaining that, among emerging adults in the eighteen- to twenty-five-year-old age group, reckless behaviors—defined as those actions that are not socially approved—were found to be reliably predicted by antisocial peer pressure and stating that “antisocial peer pressure appears to be a continuing, and perhaps critical, influence upon [reckless] behaviors well into the emerging adult years”); Melissa S. Caulum, *Postadolescent Brain Development: A Disconnect Between Neuroscience, Emerging Adults, and the Corrections System*, 2007 WIS. L. REV. 729, 731 (2007) (“When a highly impressionable emerging adult is placed in a social environment composed of adult offenders, this environment may affect the individual’s future behavior and structural brain development.”) (citing Craig M. Bennett & Abigail A. Baird, *Anatomical Changes in Emerging Adult Brain: A Voxel-Based Morphometry Study*, 27 HUM. BRAIN MAPPING 766, 766–67 (2006)); Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood: An Experimental Study*, 41 DEV. PSYCHOL. 625, 626, 632, 634 (2005) (examining a sample of “306 individuals in 3 age groups—adolescents (13-16), youths (18-22), and adults (24 and older)” and explaining that “although the sample as a whole took more risks and made more risky decisions in groups than when alone, this effect was more pronounced during middle and late adolescence than during adulthood” and that “the presence of peers makes adolescents and youth, but not adults, more likely to take risks and more likely to make risky decisions”); Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 DEVELOPMENTAL REV. 78, 91 (2008) (referring to the 2005 Gardner and Steinberg study and noting

culpability and negate the traditional death penalty justifications of retribution and deterrence.

Critics might contend that the infrequency of young adult executions renders this article's thesis moot. Such an argument is morally repugnant. To suggest that the Court should not overturn a disproportionate punishment because only 130 individuals suffered its extreme consequences over the past fifteen years is to argue that justice should be blind to those individuals. According to this twisted logic, the Court should never have exempted people with mental disabilities or sixteen- and seventeen-year-olds from the death penalty, as only a few states were still executing these individuals prior to the Court's intervention.²¹ Inequities in our legal system should be rectified, not ignored—especially when it comes to matters of life and death.

Ten years after the Beltway sniper attacks, a twenty-seven-year-old Lee Boyd Malvo conceded, "I was a monster . . . I did [accomplice John Muhammad's] bidding just because [he] said so . . . There is no rhyme or reason or sense."²² As retired FBI agent Brad Garrett stated, "When we interviewed [Malvo], our belief was that he was under the spell of Muhammad and that would wear off as time went on . . . He's older, and he understands now how impressionable he was."²³

Similarly, Dzhokhar recently apologized for the crimes he committed as a teenager under the alleged influence of his older brother Tamerlan. At his sentencing on June 24, 2015, Dzhokhar Tsarnaev said to his victims, "Now, I am

that "the presence of friends doubled risk-taking among the adolescents, increased it by fifty percent among the youths, but had no effect on the adults"); *see also* Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence*, 58 AM. PSYCHOLOGIST 1009, 1013, 1016 (2003) ("[T]he results of studies using paper-and-pencil measures of future orientation, impulsivity, and susceptibility to peer pressure point in the same direction as the neurobiological evidence, namely, that brain systems implicated in planning, judgment, impulse control, and decision making continue to mature into late adolescence. . . . Some of the relevant abilities (e.g., logical reasoning) may reach adultlike levels in middle adolescence, whereas others (e.g., the ability to resist peer influence or think through the future consequences of one's actions) may not become fully mature until young adulthood."). *But see* Laurence Steinberg & Kathryn C. Monahan, *Age Differences in Resistance to Peer Influence*, 43 DEV. PSYCHOL. 1531 (2007) (finding that resistance to peer influences increases linearly between ages fourteen and eighteen, but that "there is little evidence for growth in this capacity between ages . . . 18 and 30.").

21. *Atkins v. Virginia*, 536 U.S. 304, 315–16 (2002) ("Moreover, even in those States that allow the execution of mentally retarded offenders, the practice is uncommon. Some States, for example New Hampshire and New Jersey, continue to authorize executions, but none have been carried out in decades . . . [O]nly five [States] have executed offenders possessing a known IQ less than 70 [between June 26, 1989, and June 20, 2002]"); *Roper v. Simmons*, 543 U.S. 551, 564–65 (2005) ("In the present case, too, even in the 20 States without a formal prohibition on executing juveniles, the practice is infrequent . . . In the past 10 years, only three [states] have [executed juveniles]: Oklahoma, Texas, and Virginia.").

22. Josh White, *Lee Boyd Malvo, 10 Years After D.C. Area Sniper Shootings: 'I Was a Monster,'* WASH. POST (Sept. 29, 2012), http://www.washingtonpost.com/local/crime/lee-boyd-malvo-10-years-after-dc-area-sniper-shootings-i-was-a-monster/2012/09/29/a1ef1b42-04d8-11e2-8102-ebee9c66e190_story.html.

23. *Id.*

sorry for the lives that I've taken, for the suffering that I've caused you, for the damage that I've done. Irreparable damage."²⁴ Two years after the Boston bombings, the relative youthfulness of Dzhokhar was apparent. One survivor, twenty-three-year-old Henry Borgard, said that when he locked eyes with Tsarnaev in court, he felt like he saw a boy.²⁵ Borgard explained, "I do know that I believe in second chances. The man, *the boy* who planted that bomb that blew up in front of me is younger than I am."²⁶

Our nation's evolving standards of decency spared people with mental disabilities and sixteen- and seventeen-year-olds from the death penalty. Those evolving standards of decency—shaped by the modern cultural norm of extended adolescence and informed by scientific insights into the neurology and psychology of young adults—now ought to spare eighteen- to twenty-year-olds as well.²⁷

24. Ann O'Neill, Aaron Cooper, & Ray Sanchez, *Boston Bomber Apologizes, Gets Death Sentence*, CNN (June 25, 2015, 9:05 AM), <http://www.cnn.com/2015/06/24/us/tsarnaev-boston-marathon-bombing-death-sentencing/>. Although some have questioned the sincerity of Dzhokhar's apology, his execution may preclude him from ever expressing the kind of remorse that took Malvo ten years to articulate. *Id.* ("Survivor Lynn Julian told reporters outside court that Tsarnaev's 'Oscar-worthy' speech lacked sincerity.")

25. *Id.*

26. *Id.* (emphasis added). Dzhokhar's alleged impressionability is representative of the concerns associated with executing young adults. In addition, his case is typical of a disturbing trend among recent executions of eighteen- to twenty-year-olds. In 2015, five individuals were executed for crimes they committed between the ages of eighteen and twenty, all in the state of Texas: Derrick Dewayne Charles, Licho Escamilla, Juan Martin Garcia, Manuel Garza, Jr., and Arnold Prieto. *Executed Offenders*, TEX. DEP'T OF CRIM. JUST., http://www.tdcj.state.tx.us/death_row/dr_executed_offenders.html (last visited Feb. 11, 2016). Like Dzhokhar, these five men were members of an ethnic minority. Dzhokhar is Chechen, Charles was Black; and Escamilla, Garcia, Garza Jr., and Prieto were Hispanic. *Offender Information: Derrick Dewayne Charles*, TEX. DEP'T OF CRIM. JUST., https://www.tdcj.state.tx.us/death_row/dr_info/charlesderrick.html (last visited Feb. 11, 2016) (listing Charles's race as Black); *Offender Information: Licho Escamilla*, TEX. DEP'T OF CRIM. JUST., https://www.tdcj.state.tx.us/death_row/dr_info/escamillalicho.html (last visited Feb. 11, 2016) (listing Escamilla's race as Hispanic); *Offender Information: Juan Martin Garcia*, TEX. DEP'T OF CRIM. JUST., https://www.tdcj.state.tx.us/death_row/dr_info/garciajuan.html (last visited Feb. 11, 2016) (listing Garcia's race as Hispanic); *Offender Information: Manuel Garza Jr.*, TEX. DEP'T OF CRIM. JUST., https://www.tdcj.state.tx.us/death_row/dr_info/garzamanuel.html (last visited Feb. 11, 2016) (listing Garza Jr.'s race as Hispanic); *Offender Information: Arnold Prieto*, TEX. DEP'T OF CRIM. JUST., https://www.tdcj.state.tx.us/death_row/dr_info/prietoarnold.jpg (last visited Feb. 11, 2016) (listing Prieto's race as Hispanic); see also O'Neill, *supra* note 4 (noting Dzhokhar Tsarnaev's Chechen ethnicity). The sample size is small, but the facts are consistent with studies that have criticized the racially biased manner in which the death penalty is imposed. Steinberg & Scott, *supra* note 20, at 1016 (explaining that there "is a critical concern...that racial and ethnic biases influence attitudes about the punishment of young offenders and that decision makers are more likely to discount the mitigating impact of immaturity when judging the behavior of minority youths") (citing George S. Bridges & Sara Steen, *Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms*, 63 AM. SOC. REV. 554, 554-570 (1998); S. Graham, *Racial Stereotypes in the Juvenile Justice System*, PAPER PRESENTED AT THE BIENNIAL MEETING OF THE AMERICAN PSYCHOLOGICAL-LAW SOCIETY, AUSTIN, TX (2002)).

27. International policy considerations also weigh in support of exempting eighteen- to twenty-year-olds. Just twenty-nine percent of the world's nations retain the death penalty, and only

Part II of this article provides the legal foundation for the argument herein. Over the past twelve years, the Court has exempted people with mental disabilities individuals²⁸ and juveniles²⁹ from the death penalty. These cases, along with a more recent ruling clarifying the bases for categorical exemption,³⁰ provide the Court's rules and justifications for exempting a particular class of offenders.

Part III addresses the modern cultural and legal norm of extended adolescence. Society treats eighteen- to twenty-year-olds as emerging, rather than fully mature, adults. Because several of our nation's laws treat eighteen- to twenty-year-olds differently from older adults,³¹ it makes sense to consider whether these individuals should also be treated differently with respect to death penalty eligibility.

Part IV provides scientific confirmation that eighteen- to twenty-year-olds are similar to juveniles in ways that are directly relevant to culpability, including risk-taking³² and temperance.³³ Neuroscience confirms that the brains of eighteen- to twenty-year-olds are structurally immature³⁴ and are highly

two are major industrialized nations: Japan and the United States. *Abolitionist and Retentionist Countries*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/abolitionist-and-retentionist-countries?scid=30&did=140> (last updated Dec. 31, 2014). Of the minority of countries that still impose the death penalty, the two countries that specifically exempt eighteen- to twenty-year-olds are countries whose human rights policies the United States has historically denounced: Iraq and Cuba. *Death Penalty Database*, DEATH PENALTY WORLDWIDE, <http://www.deathpenaltyworldwide.org/search.cfm> (last visited July 6, 2014) (providing death penalty information for every country); *U.S. Criticizes Cuba on Human Rights*, USA TODAY (Apr. 13, 2005, 12:13 AM), http://usatoday30.usatoday.com/news/world/2005-04-13-us-cuba_x.htm; *Obama Rights Report Criticizes Iraq*, NEWSMAX (Mar. 12, 2010, 9:37 AM), <http://www.newsmax.com/World/GlobalTalk/rights-abuses-regime-global/2010/03/12/id/453428/>.

28. *Atkins v. Virginia*, 536 U.S. 304 (2002).

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

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

31. The Gun Control Act of 1968 prohibits eighteen- to twenty-year olds from purchasing handguns from licensed dealers. Pub. L. No. 90-618, 82 Stat. 1213 (codified at 18 U.S.C. § 922(b)(1), (c)(1) (2012)) [hereinafter Gun Control Act of 1968]. Also, the National Minimum Drinking Age Act of 1984 prohibits eighteen- to twenty-year-olds from purchasing alcohol. National Minimum Drinking Age Act of 1984, Pub. L. No. 98-363, 98 Stat. 437 (codified at 23 U.S.C. § 158 (2012)). Finally, the Foster Care Act of 2008 extends foster care services to eighteen- to twenty-year olds. *Fostering Connections to Success and Increasing Adoptions Act*, Pub. L. No. 110-351, § 201, 122 Stat. 3949 (2008) [hereinafter Foster Care Act of 2008].

32. Elizabeth Cauffman, Elizabeth P. Shulman, Laurence Steinberg, Eric Claus, Marie T. Banich, Sandra Graham, & Jennifer Woolard, *Age Differences in Affective Decision Making as Indexed by Performance on the Iowa Gambling Task*, 46 DEVELOPMENTAL PSYCHOL. 193, 203–04 (2010).

33. Modecki, *supra* note 19, at 85 & tbl.3 (reporting a significant difference between college-aged and adult participants on a temperance measure).

34. Brief for the Am. Medical Ass'n and the Am. Academy of Child and Adolescent Psychiatry as Amici Curiae in Support of Neither Party, *Graham v. Florida*, 560 U.S. 48 (2010) (Nos. 08-7412, 08-7621), at 18 [hereinafter Brief for the AMA] (quoting B.J. Casey, Jay. N. Giedd, & Kathleen M. Thomas, *Structural and Functional Brain Development and Its Relation to Cognitive Development*, 54 BIOLOGICAL PSYCHOL. 241, 244 (2000)); *see also* Jay D. Aronson, *Neuroscience and Juvenile Justice*, 42 AKRON L. REV. 917, 917 (2009) (explaining that “[r]ecent

vulnerable to negative influences such as peer pressure.³⁵ Studies show that adolescents' brains are not fully mature until at least the age of twenty-five.³⁶

Part V concludes that eighteen- to twenty-year-olds should be categorically exempt from capital punishment for two main reasons. First, the rarity of the practice reveals a national consensus opposed to the execution of eighteen- to twenty-year-olds offenders. Second, the psychological and neurological characteristics of eighteen- to twenty-year-olds diminish the retributive and deterrent effects of the death penalty.

advances in the field of neuroscience . . . have already made it clear that the brain typically continues to develop long after the point at which an individual becomes a legal adult (i.e., at age 18"); Jay N. Giedd, Jonathan Blumenthal, Neal O. Jeffries, F. X. Castellanos, Hong Liu, Alex Zijdenbos, Tomas Paus, Alan C. Evans, & Judith L. Rapoport, *Brain Development During Childhood and Adolescence: A Longitudinal MRI Study*, 2 NATURE NEUROSCIENCE 861 (1999); Elizabeth R. Sowell, Paul M. Thompson, Colin J. Holmes, Terry L. Jernigan & Arthur W. Toga, *In Vivo Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions*, 2 NATURE NEUROSCIENCE 859 (1999).

35. Brief for the AMA, *supra* note 34, at 40.

36. Nico U. F. Dosenbach, Binyam Nardos, Alexander L. Cohen, Damien A. Fair, Jonathan D. Power, Jessica A. Church, Steven M. Nelson, Gagan S. Wig, Alecia C. Vogel, Christina N. Lessov-Schlaggar, Kelly A. Barnes, Joseph W. Dubis, Eric Feczko, Rebecca S. Coalson, John R. Pruett, Deanna M. Barch, Steven E. Petersen, & Bradley L. Schlagger, *Prediction of Individual Brain Maturity Using fMRI*, 329 SCIENCE 1358, 1358–59 fig.1 (2010) (reporting that functional brain maturity plateaus around age 25). Both courts and the public have embraced this conclusion and examined its implications. *See* Gall v. U.S., 552 U.S. 38 (2007) (“Recent studies on the development of the human brain conclude that human brain development may not become complete until the age of twenty-five”) (quoting Gall v. U.S., 374 F.Supp.2d 758, n.2 (S.D. Iowa 2005)); Robin M. Henig, *What Is It About 20-Somethings?*, N.Y. TIMES (Aug. 18, 2010), http://www.nytimes.com/2010/08/22/magazine/22Adulthood-t.html?pagewanted=all&_r=0 (“This new understanding comes largely from a longitudinal study of brain development sponsored by the National Institute of Mental Health, which started following nearly 5,000 children at ages 3 to 16 (the average age at enrollment was about 10). The scientists found the children’s brains were not fully mature until at least 25.”); Barbara L. Atwell, *Rethinking the Childhood-Adult Divide: Meeting the Mental Health Needs of Emerging Adults*, 25 ALB. L.J. SCI. & TECH. 1, 20 (2015) (“One way to best serve emerging adults is to recognize that their brain development continues until the age of twenty-five.”) (citation omitted); *see also* Terry A. Maroney, *The False Promise of Adolescent Brain Science in Juvenile Justice*, 85 NOTRE DAME L. REV. 89, 152 (2009) (“Developmental neuroscience consistently indicates that structural brain maturation is incomplete at age eighteen. Though estimates vary, many scientists have opined that structural maturation is not complete until the mid-twenties.”) (internal citations omitted); Vivian E. Hamilton, *Immature Citizens and the State*, 2010 B.Y.U. L. REV. 1055, 1114–15 (2010) (“Brain development continues well into the mid-twenties” and “[h]igher-order executive function, emotional regulation, and impulse control also improve through the mid-twenties”) (internal citations omitted); Modecki, *supra* note 19, at 79 (“[P]hysiological research suggests that age-based brain maturation, which may be linked to maturity of judgment factors, does not occur until the early twenties. Thus college students may not be equipped for mature judgment themselves.”) (internal citations omitted).

II.

THE COURT'S DEATH PENALTY AND CATEGORICAL-EXEMPTION
JURISPRUDENCE

Since the turn of the twenty-first century, the Supreme Court has banned the death penalty for people with mental disabilities³⁷ and juveniles.³⁸ These rulings provide the Court's two-part categorical exemption test: the Court will exempt a class of offenders from execution if it 1) finds a national consensus opposed to the practice; and 2) independently determines that the punishment is disproportionate to the level of culpability exhibited by members of the class.³⁹ The second prong of the test invokes what is commonly referred to as the proportionality principle.⁴⁰

More recently, the Court exempted juvenile offenders from life-without-parole sentences for non-homicide offenses.⁴¹ This ruling provides that objective indicia of a national consensus against a punishment can be found where a majority of states statutorily permits, but rarely implements, the punishment.⁴² Collectively, these cases provide the legal basis for exempting eighteen- to twenty-year-olds from the death penalty.

A. Atkins and Roper: The Court's Articulation of the Two-Part Test for Categorical Exemption

In 2002, in *Atkins v. Virginia*, the Supreme Court prohibited the execution of people with mental disabilities.⁴³ The Court conducted a two-step proportionality analysis to support its holding.⁴⁴ First, the Court emphasized that many states

37. *Atkins v. Virginia*, 536 U.S. 304 (2002).

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

39. In *Roper*, the Court emphasized "that 'the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty.'" *Id.* at 563 (quoting *Atkins*, 536 U.S. at 312). This language suggests that the Court could conceivably exercise its independent proportionality analysis to exempt a group of individuals, even in the face of no clear national consensus on the matter. However, there are no cases of the Court exempting an entire category of offenders from execution absent a finding of national consensus opposed to the practice. In both *Atkins* and *Roper*, the Court, in its independent proportionality analysis, sided with the objective data: A majority of states had prohibited the practice of the death penalty against both the "mentally retarded" and juveniles. *See Roper*, 543 U.S. at 568 ("A majority of States have rejected the imposition of the death penalty on juvenile offenders under 18, and we now hold this is required by the Eighth Amendment."); *Atkins*, 536 U.S. at 314–15 (relying on a national consensus of the fourteen states that rejected capital punishment completely and the nineteen additional states that explicitly banned the execution of people with mental disabilities).

40. *See Atkins*, 536 U.S. at 311 ("We have repeatedly applied this proportionality precept in later cases interpreting the Eighth Amendment.").

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

42. *See id.* at 62–63.

43. *Atkins*, 536 U.S. at 321.

44. *Id.* at 312–13. The Court explained that "it is a precept of justice that punishment for crime should be graduated and proportioned to [the offense]." *Id.* at 311 (internal quotations

were no longer executing the “mentally retarded”,⁴⁵ and that “even in those [s]tates that allow the execution of ‘mentally retarded’ offenders, the practice is uncommon.”⁴⁶ The Court held that “[t]he practice, therefore, has become truly unusual, and it is fair to say that a national consensus has developed against it.”⁴⁷ Second, the Court conducted an independent proportionality analysis and ruled that the execution of people with mental disabilities “will [not] measurably advance the deterrent or the retributive purpose of the death penalty.”⁴⁸ The Court noted, people with mental disabilities “do not act with the level of moral culpability that characterizes the most serious adult criminal conduct.”⁴⁹ Because of “their disabilities in areas of reasoning, judgment, and control of their impulses,”⁵⁰ people with mental disabilities were less deserving of retribution and, as a class of offenders, less likely to be deterred by the prospects of capital punishment.⁵¹ “Construing and applying the Eighth Amendment in light of our ‘evolving standards of decency,’” the Court found the punishment to be “excessive.”⁵²

Three years after *Atkins*, the Court banned the execution of sixteen- and seventeen-year-olds in *Roper*.⁵³ Once again, the Court based its ruling on the Eighth Amendment’s ban on cruel and unusual punishment⁵⁴ and conducted a two-step analysis to reach its decision.⁵⁵ First, the Court emphasized that a national consensus formed in opposition to the execution of these older juveniles. A majority of states prohibited the practice, and those states that permitted the practice administered it infrequently.⁵⁶ Second, the Court conducted an independent proportionality analysis and found the execution of juveniles to be an excessive punishment.⁵⁷ The Court noted that “[c]apital punishment must be limited to those offenders who commit ‘a narrow category of the most serious

omitted). The Eighth Amendment specifically states, “Excessive bail shall not be required, nor excessive fines imposed, no cruel and unusual punishments inflicted.” U.S. CONST. amend. VIII.

45. *Atkins*, 536 U.S. at 314–15. The term “mentally retarded” is the Court’s language. Unless quoting the Court’s language, instead of using this outdated terminology, this author employs the phrase “people with mental disabilities” as a substitute throughout this paper. See *Style Guide*, NAT’L CTR. DISABILITY & JOURNALISM, <http://ncdj.org/style-guide/#M> (last visited Oct. 9, 2015) (“The terms mentally retarded, retard and mental retardation were once common terms that are now considered outdated and offensive.”).

46. *Atkins*, 536 U.S. at 316.

47. *Id.*

48. *Id.* at 321.

49. *Id.* at 306.

50. *Id.*

51. *Id.* at 319–20.

52. *Id.* at 321 (quoting *Ford v. Wainwright*, 477 U.S. 399, 406 (1986)).

53. *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

54. *Id.* at 560–61.

55. *Id.* at 564

56. *Id.* at 564–65. The Court even noted that “the United States is the only country in the world that continues to give official sanction to the juvenile death penalty.” *Id.* at 575.

57. *Id.* at 569.

crimes’ and whose extreme culpability makes them ‘the most deserving of execution.’”⁵⁸ Citing amicus briefs filed by the American Medical Association and the American Psychiatric Association, the Court determined that sixteen- and seventeen-year-olds were too immature, too vulnerable to negative influences, and too malleable in character to be classified among the worst of offenders.⁵⁹ These characteristics of sixteen- and seventeen-year-olds diminished their culpability and, thus, the two main social purposes served by the death penalty—retribution and deterrence—applied with lesser force.⁶⁰ In addition, the Court noted that the risk of executing a juvenile offender of diminished culpability could not be eliminated by an individualized sentencing regime.⁶¹ The Court therefore categorically exempted sixteen- and seventeen-year-olds from the death penalty.

Atkins and *Roper* provide the two-part test for exempting eighteen- to twenty-year-olds from the death penalty. *Graham v. Florida* clarifies the contours of the first part of that test.⁶²

B. Graham: Finding a National Consensus Against a Punishment Based Solely on the Rarity of its Implementation

Five years after *Roper*, in *Graham v. Florida*, the Court categorically exempted juveniles from the punishment of life imprisonment without the possibility of parole for non-homicide offenses.⁶³ *Graham* relied heavily on the reasoning in *Atkins* and *Roper* in exempting an entire category of offenders from a severe punishment. The Court provided the same two justifications for its decision: the finding of a national consensus opposed to the practice and an independent determination that the punishment was disproportionate.⁶⁴

What made *Graham* noteworthy is that the Court found a national consensus existed against a punishment even though it was statutorily permitted by a majority of states. The Court reasoned that “an examination of actual sentencing

58. *Id.* at 578 (quoting *Atkins v. Virginia*, 536 U.S. 304, 319 (2002)). As previously noted, this notion is referred to as the proportionality principle. *Atkins*, 536 U.S. at 311 (“We have repeatedly applied this proportionality precept in later cases interpreting the Eighth Amendment.”).

59. *Roper*, 543 U.S. at 569–70.

60. *Id.* at 571.

61. *Id.* at 572–73 (“An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course....”). An individualized sentencing regime takes into account the mitigating characteristics of offenders on a case-by-case basis by allowing the jury to determine which offenders are deserving of capital punishment based on the unique circumstances of the case. *See id.* at 572.

62. 560 U.S. 48, 61–62 (2010).

63. *Id.* at 74–75

64. *Id.* at 61–62. In its independent proportionality analysis, the Court cited new amici briefs from the American Medical Association and the American Psychological Association, stating that “developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds.” *Id.* at 68.

practices . . . discloses a consensus against its use.”⁶⁵ In the jurisdictions where the sentence was permitted, it was rarely administered.⁶⁶ The Court further noted that just one state imposed the “significant majority” of the sentences,⁶⁷ and that just ten states imposed the remainder.⁶⁸ Although a majority of jurisdictions statutorily permitted the practice, the Court held that actual sentencing practices revealed a national consensus opposed to the sentence of life without parole for juveniles. *Graham* stands for the principle that the mere infrequency of a particular punishment suffices to establish a national consensus against the practice.

Collectively, *Atkins*, *Roper*, and *Graham* provide the legal basis for exempting eighteen- to twenty-year-olds from the death penalty. *Atkins* and *Roper* provide the two-part test for exempting a class of offenders: 1) the finding of a national consensus opposed to the practice and 2) an independent determination by the Court that the punishment is disproportionate. As a clarification of the first prong of the two-part test, *Graham* held that a national consensus against a punishment could exist even where a majority of states statutorily permit the punishment.

Before applying the two-part test (along with the *Graham* clarification) to eighteen- to twenty-year-old offenders, this article addresses why these individuals should be considered for exemption in the first place.

III.

WHY CONSIDER EXEMPTING EIGHTEEN- TO TWENTY-YEAR-OLDS FROM THE DEATH PENALTY?

Eighteen to twenty-year-olds are a readily identifiable class of individuals with unique legal and cultural status in the United States. Although they have attained the age of majority, they are denied some of the privileges enjoyed by older adults. Culturally, they are often perceived and treated as adolescents. Precisely because they are treated differently from older adults on account of their “immaturity”—as the *Roper* Court would say—they should be considered for categorical exemption.

In his majority opinion in *Roper*, Justice Kennedy conceded that “[d]rawing the line at 18 years of age is subject . . . to the objections always raised against categorical rules” and that “[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18.”⁶⁹ However, he explained that nearly all states draw the line between childhood and adulthood at the age of

65. *Id.* at 62. There existed a national consensus against the punishment even though “[t]hirty-seven States, the District of Columbia, and the Federal Government permit[ted]” it. *Id.* at 62.

66. *Id.* at 62–63.

67. *Id.* at 64.

68. *Id.*

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

eighteen for many purposes, including marrying without parental consent, voting, and serving on juries.⁷⁰ Thus, the Court concluded that eighteen is “the age at which the line for death eligibility ought to rest.”⁷¹

Unfortunately, the Court all but ignored the lines society has drawn between eighteen- to twenty-year-olds and older adults. At the time of the Court’s decision, two national laws formally recognized the less than fully mature status of eighteen- to twenty-year-olds: the Gun Control Act of 1968 and the National Minimum Drinking Age Act of 1984. Since *Roper*, yet another law—the Foster Care Act of 2008—has also taken into account the maturity levels of eighteen- to twenty-year-olds. These laws reflect modern cultural perceptions of eighteen- to twenty-year-olds as older adolescents or “emerging adults,” rather than fully mature adults. Because of society’s legal and cultural treatment of eighteen- to twenty-year-olds as less than fully mature adults, and because there is nothing inherently sacred about the age of eighteen, the Court should not be hesitant to apply its two-part exemption analysis to eighteen- to twenty-year-olds.

A. *The Gun Control Act of 1968*

The Gun Control Act of 1968 (GCA) prohibits individuals twenty-years-old and younger from purchasing handguns from Federal Firearms Licensees (FFLs).⁷² The Fifth Circuit’s recent review of the GCA indicates that maturity was one of Congress’s primary reasons for drawing the line of handgun purchasing eligibility at age twenty-one. In a 2012 case challenging the constitutionality of the GCA and, specifically, the prohibition of commercial handgun sales to eighteen- to twenty-year-olds, the Fifth Circuit upheld the ban as rational and cited Congress’s findings that “concealable firearms had been ‘widely sold by federally licensed importers and dealers to emotionally immature, or thrill-bent juveniles and minors prone to criminal behavior.’”⁷³ The reference to “juveniles and minors” is not directed specifically at eighteen- to twenty-year-olds. However, because Congress prohibited *all* those under age twenty-one from purchasing handguns, eighteen- to twenty-year-olds are necessarily part of that group. Given the fact that Congress prohibited eighteen-to twenty-year olds from purchasing guns, Congress clearly determined that group was not mature or responsible enough to do so.

70. *Id.* at 569.

71. *Id.*

72. 18 U.S.C. § 922(b)(1), (c)(1) (1968). These federal laws were enacted as part of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (1968).

73. *Nat’l Rifle Ass’n of Am., Inc. v. ATF*, 700 F.3d 185, 188, 199 (5th Cir. 2012) (quoting § 901(a)(6), 82 Stat. at 226). The Fifth Circuit also cited the Congressional testimony of a law-enforcement official who stated that “[t]he greatest growth of crime today is in the area of *young people*” and “[t]he easy availability of weapons makes their tendency toward *wild, and sometimes irrational behavior* that much more violent, that much more deadly.” *Id.* (quoting *Federal Firearms Act: Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the Sen. Comm. on the Judiciary*, 90th Cong. 57 (1967) (testimony of Sheldon S. Cohen) (emphasis added)).

Moreover, the Fifth Circuit noted that “the Founders would have supported limiting or banning ‘the ownership of firearms by *minors*.’”⁷⁴ And “the term ‘minor’ or ‘infant’—as those terms were historically understood—applied to persons under the age of 21, not only to persons under the age of 18.”⁷⁵ Indeed, “Congress restricted the ability of minors under 21 to purchase handguns because Congress found that they tend to be *relatively immature*,”⁷⁶ and “Congress found that persons under 21 tend to be *relatively irresponsible* and can be prone to violent crime”⁷⁷ The Fifth Circuit concluded that, “Overall, the government has marshaled evidence showing that Congress was focused on a particular problem: *young persons under 21, who are immature* and prone to violence, easily accessing handguns, which facilitate violent crime, primarily by way of FFLs.”⁷⁸

The Fifth Circuit’s reasoning remains undisturbed. The same court denied a petition for rehearing by a full Fifth Circuit panel in 2013,⁷⁹ and the Supreme Court denied a petition to review the case in 2014.⁸⁰ To this day, those under twenty-one years of age are not regarded as full adults according to our nation’s handgun purchasing jurisprudence. But the GCA is not the only law that treats eighteen- to twenty-year-olds differently from older adults.

B. The National Minimum Drinking Age Act of 1984

Just as federal law prohibits eighteen- to twenty-year-olds from purchasing handguns, the National Minimum Drinking Age Act of 1984 (NMDA) effectively prohibits eighteen- to twenty-year-olds from purchasing alcohol.⁸¹ The NMDA provides financial incentives for states to ban the sale of alcohol to eighteen- to twenty-year-olds, and every state in the country has done exactly that. The oft-stated purpose of the NMDA was to reduce traffic fatalities⁸² but the underlying concern was that those fatalities were due to the less than fully mature behavior of eighteen- to twenty-year-olds. As one commentator noted, “Eighteen was long considered the moment when you were transformed into a sober adult who could *maturely* handle your liquor,” but “[d]eaths and

74. *Id.* at 201 (quoting Don B. Kates, Jr., *Second Amendment*, in 4 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1639, 1640 (Leonard W. Levy, Kenneth L. Karst & Dennis J. Mahoney eds., 1986)).

75. *Id.*

76. *Id.* at 203 (emphasis added).

77. *Id.* at 206 (emphasis added).

78. *Id.* at 208 (emphasis added and omitted).

79. *Nat’l Rifle Ass’n, Inc. v. ATF*, 714 F.3d 334 (5th Cir. 2013).

80. *Nat’l Rifle Ass’n, Inc. v. ATF*, 134 S.Ct. 1364 (2014).

81. National Minimum Drinking Age Act, 23 U.S.C. § 158 (2012).

82. *See South Dakota v. Dole*, 483 U.S. 203, 208–09 (1987) (commenting that the law was passed to promote “safe interstate travel”).

dismemberment from drunken teen drivers showed the folly of that notion.”⁸³ As another scholar explained, “lawmakers necessarily determined that individuals between the ages of eighteen and twenty-one were too immature or irresponsible to consume alcoholic beverages.”⁸⁴

The NMDA encouraged states to increase the legal drinking age from eighteen to twenty-one by conditioning the award of federal highway funds upon them doing so.⁸⁵ Although such incentives may have been coercive at the time of the NMDA’s passage, the fact remains that every state currently treats eighteen- to twenty-year-olds as juveniles with respect to the purchase of alcohol.

Furthermore, a majority of states—on their own initiative and not at the behest of the federal government—have enacted dram shop and social host liability laws that impose civil liability on vendors and adults twenty-one and older for serving alcohol to individuals under the age of twenty-one.⁸⁶ These dram shop and social host liability laws provide confirmation that a majority of states consider those under twenty-one to be less than fully mature, such that they should be denied certain societal privileges.

As stated by the Supreme Court of New Jersey, “The Legislature has in explicit terms prohibited sales to minors as a class because it recognizes their *very special susceptibilities* and the intensification of the otherwise inherent dangers when persons *lacking in maturity and responsibility* partake of alcoholic beverages.”⁸⁷ Similarly, the Tennessee Court of Appeals has pointed out, “Our legislature has determined that persons under the age of twenty-one are *incompetent* to responsibly consume alcohol.”⁸⁸ The Tennessee court noted that “[t]hese broad prohibitions . . . are directed to minors as a class in recognition of

83. John Roman, *How Should Young Adults Be Punished for Their Crimes?*, HUFFINGTON POST (Jan. 13, 2014, 5:21 PM), http://www.huffingtonpost.com/john-roman-phd/young-adults-crime_b_4576282.html (emphasis added).

84. Sabrina A. Hall, *Clouded Judgment: The Implications of Smith v. Merritt in the Realm of Social Host Liability and Underage Drinking in Texas*, 30 ST. MARY’S L.J. 207, 208–09 (1998) (emphasis added).

85. 23 U.S.C. § 158(a) (2012).

86. See *Dram Shop and Social Host Liability*, MOTHERS AGAINST DRUNK DRIVING, http://www.madd.org/laws/law-overview/Dram_Shop_Overview.pdf (last visited Jan. 22, 2016) (listing Arizona, Colorado, Connecticut, Georgia, Hawai‘i, Idaho, Indiana, Maine, Michigan, Mississippi, Montana, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, Utah, Vermont, Washington, Wisconsin, and Wyoming as states that impose social host liability for intoxicated minors, and listing Alabama, Illinois, Iowa, Massachusetts, Minnesota, North Carolina, South Carolina, and Texas as providing limited social host liability for intoxicated minors); see also *Do You Know the Social Hosting Laws in Your State?*, DRUGFREE.ORG, <http://socialhost.drugfree.org/> (last visited July 27, 2014).

87. *Steele v. Kerrigan*, 148 N.J. 1, 28 (1997) (emphasis added) (quoting *Rappaport v. Nichols*, 31 N.J. 188, 201 (1959)). The court noted that “a ‘minor’ is defined by the Act as ‘a person under the legal age to purchase and consume alcoholic beverages.’” *Id.* at 27 (quoting the New Jersey Licensed Alcoholic Beverage Server Fair Liability Act, N.J. STAT. ANN. § 2A:22A-3 (West 2010)).

88. *Biscan v. Brown*, No. M2001-02766-COA-R3-CV, 2003 WL 22955933, at *17 (Tenn. Ct. App. 2003).

their *susceptibilities* and the intensification of dangers inherent in the consumption of alcoholic beverages, when consumed by a person *lacking in maturity and responsibility*.”⁸⁹

Meanwhile, according to the Washington Supreme Court, the Washington State Liquor Act “protects a minor’s health and safety interest from the minor’s own *inability to drink responsibly*.”⁹⁰ As the court emphasized, “the Legislature believed that persons under 21 years of age are neither physically *nor mentally equipped* to handle the consumption of intoxicating liquor.”⁹¹

The NMDA and the dram shop and social host liability laws, like the GCA, employ categorical purchasing restrictions to deter dangerous and risk-taking behavior perceived as common among eighteen- to twenty-year-olds. This equates to a nationwide acknowledgment that eighteen- to twenty-year-olds are not yet full adults.

The ability to purchase guns and alcohol are societal privileges bestowed on adults twenty-one years of age and older. Notably, the Supreme Court has recognized a relationship between societal privileges and eligibility for capital punishment. In the 1988 case *Thompson v. Oklahoma*, the Supreme Court prohibited the execution of juveniles whose offenses occurred before their sixteenth birthday.⁹² According to the plurality opinion, “[t]he reasons that juveniles are not trusted with the *privileges and responsibilities* of an adult also explain why their irresponsible conduct is not as morally reprehensible.”⁹³ Similarly, the reasons why eighteen- to twenty-year-olds are not trusted with the privileges and responsibilities of older adults explain why their irresponsible conduct is not as morally reprehensible.

C. The Foster Care Act of 2008

The GCA and the NMDA are not the only laws to formally recognize the immature status of eighteen- to twenty-year-olds. Several states have extended foster care services from the age of eighteen to the age of twenty-one at the behest of Congress, which passed the Fostering Connections to Success and Increasing Adoptions Act (“Foster Care Act”) in 2008 with broad bi-partisan support.⁹⁴

The Foster Care Act provides states with financial incentives to extend the age of eligibility for foster care services to twenty-one.⁹⁵ It permits states to

89. *Id.* (quoting *Brookins v. Round Table, Inc.*, 624 S.W.2d 547, 550 (Tenn. 1981)).

90. *Hansen v. Friend*, 824 P.2d 483, 486 (Wash. 1992) (emphasis added).

91. *Id.*

92. 487 U.S. 815 (1988).

93. *Id.* at 835 (emphasis added).

94. Pub. L. No. 110-351, § 201, 122 Stat. 3949 (2008).

95. *Fostering Connections to Success Act*, CT. APPOINTED SPECIAL ADVOCATES, http://www.casaforchildren.org/site/c.mtJSJ7MPIsE/b.5553303/k.5EAD/Fostering_Connections_to_Success_Act.htm (last visited June 18, 2015).

define a “*child*” as “an individual . . . who has not attained 19, 20, or 21 years of age”⁹⁶ By allowing states to classify eighteen- to twenty-year-olds as children, the Foster Care Act at the very least acknowledges that eighteen- to twenty-year-olds are not fully mature adults. Rather, they are individuals in need of adult support, supervision, and guidance. As stated by the National Resource Center for Permanency and Family Connections (NRCPPFC):

The language used in the Fostering Connections legislation reflects recognition of the positive adult connections and support for youth in early adulthood instead of the push towards early independence that previously dominated legislation. Trends in the general youth population indicate a much later launch into adulthood than previous generations.⁹⁷

The Foster Care Act provides eighteen- to twenty-year-olds with assistance to compensate for their lack of readiness to enter the real world as independent adults. Although it applies only to foster care children, it nevertheless treats eighteen- to twenty-year-olds differently from older adults. Much like the GCA and the NMDA, the Foster Care Act reinforces the notion that there is an adolescent-like quality to eighteen- to twenty-year-olds.

D. The GCA, NMDA, and Foster Care Act Reflect the U.S.’ Cultural Perceptions of Maturity

The GCA, NMDA, and Foster Care Act are not the products of a runaway Congress keen on imposing its perceptions of maturity on the nation. Rather, these three laws reflect modern cultural perceptions of prolonged adolescence. Society treats eighteen- to twenty-year-olds as less than fully mature adults.

In the United States, eighteen- to twenty-year-olds are protected and coddled. “Colleges have begun to re-think their role in loco parentis, placing increased restrictions on those behaviors many young adults would happily engage in if left to their own devices, like binge drinking and hazing.”⁹⁸ The

96. § 201(a), 122 Stat. 3949 (2008) (emphasis added).

97. Melissa Stein, *Extending Foster Care Beyond 18: Improving Outcomes for Older Youth*, NAT’L RESOURCE CTR. FOR PERMANENCY & FAMILY CONNECTIONS 2 (2012), http://www.hunter.cuny.edu/socwork/nrcfcp/downloads/information_packets/ExtendingFosterCareBeyond18ImprovingOutcomesforOlderYouth.pdf. The NRCPPFC’s use of the phrase “youth in early adulthood” is evidence of modern cultural perceptions of eighteen- to twenty-year-olds as less than fully mature adults. *Id.* (emphasis added). Similarly, the Minnesota Department of Human Services website states that “Minnesota regulations have allowed youth in foster care at age 18 the option to remain in foster care to age 21.” *Adolescent Services*, MINN. DEP’T HUM. SERVS., http://www.dhs.state.mn.us/main/ideplg?IdeService=GET_DYNAMIC_CONVERSION&dDocName=dhs16_168015&RevisionSelectionMethod=LatestReleased (last updated Mar. 17, 2015). In addition, the U.S. Department of Health and Human Services repeatedly refers to eighteen- to twenty-year-olds as “youth[s]” in a Foster Care Act program instruction to various federal agencies. *Program Instruction*, ADMIN. FOR CHILDREN & FAMILIES 1 (2010), <http://www.acf.hhs.gov/sites/default/files/cb/pi1011.pdf>.

98. Roman, *supra* note 83.

entire state of Hawai'i and "[a]t least 115 localities in nine states including New York City, Boston, Cleveland and both Kansas Cities, have [recently] raised the tobacco sale age to 21."⁹⁹ Some experts are now calling for a three-tiered justice system that recognizes the adolescent-like nature of young adults: one tier for juveniles seventeen-years-old and younger, the second tier for young adults (eighteen- to twenty-five-year olds), and the third tier for adults twenty-six-years-old and older.¹⁰⁰ Even the National Basketball Association acknowledged concerns with young adults, as the NBA commissioner "made it clear that pushing back the league's age minimum to 20 is at the top of his priority list."¹⁰¹ According to one commentator, "the NBA would prefer that the guys they draft know how to get to practice on time or manage their money a little better, rather than have the coaching staffs feel like they need to be baby sitters."¹⁰²

These recent developments reflect a well known phenomenon: America perceives and treats eighteen- to twenty-year-olds as older adolescents or

99. *Increasing the Sale Age for Tobacco Products to 21*, CAMPAIGN FOR TOBACCO-FREE KIDS, https://www.tobaccofreekids.org/what_we_do/state_local/sales_21 (last visited Feb. 21, 2016) (also noting that "adolescents and young adults are more susceptible to [the] effects [of nicotine] because their brains are still developing"); see also INST. OF MEDICINE, PUBLIC HEALTH IMPLICATIONS OF RAISING THE MINIMUM AGE OF LEGAL ACCESS TO TOBACCO PRODUCTS 2 (2015), http://iom.nationalacademies.org/~media/Files/Report%20Files/2015/TobaccoMinAge/tobacco_mininum_age_report_brief.pdf ("The parts of the brain most responsible for decision making, impulse control, sensation seeking, and susceptibility to peer pressure continue to develop and change through young adulthood, and adolescent brains are uniquely vulnerable to the effects of nicotine"). The actions of these state and municipal governments have come in the wake of the Federal Tobacco Control Act of 2009, which explicitly prohibited the federal government from raising the tobacco sale age to above eighteen nationwide, possibly due to the influence of the tobacco lobby. Lydia Wheeler, *Hillary Pressed to Take on Big Tobacco*, THE HILL, (Apr. 18, 2015), <http://thehill.com/regulation/239289-hillary-pressed-to-take-on-big-tobacco> ("Altria Group Inc., one of the world's largest tobacco companies, said it supports the current minimum age of eighteen for the sale of all tobacco products that's now required by the federal Tobacco Control Act of 2009"); 21 U.S.C. § 387f(d)(3)(A) (2012) ("No restrictions [by the federal government on the sale of tobacco] may establish a minimum age of sale of tobacco products to any person older than 18 years of age").

100. Roman, *supra* note 83; see also Caulum, *supra* note 20, at 755–58 (arguing that the jurisdictional age for juvenile court should be raised to benefit "emerging adults").

101. Brian Windhorst, *Adam Silver: Age Limit Top Priority*, ESPN (Apr. 18, 2014), http://espn.go.com/nba/story/_id/10803355/adam-silver-says-pushing-back-nba-age-limit-top-priority. The NBA commissioner stated, "I think that the extra year in college will be a benefit for these young men to grow and develop as people and basketball players." Lorenzo Reyes, *NBA Commissioner Reiterates Desire to Raise Age Limit*, USA TODAY (Apr. 24, 2014, 1:36 PM) (emphasis added), <http://www.usatoday.com/story/sports/nba/2014/04/24/nba-commissioner-adam-silver-wants-to-change-one-and-done-rule/8099083/>.

102. Kurt Helin, *Adam Silver Makes His Case for Raising NBA Age Limit to 20*, NBC SPORTS (Feb. 15, 2014, 9:41 PM), <http://probasketballtalk.nbcsports.com/2014/02/15/adam-silver-makes-his-case-for-raising-nba-age-limit-to-20/>; see also Russ Wiles, *Pro Athletes Often Fumble the Financial Ball*, USA TODAY (Apr. 22, 2012, 2:12 AM), <http://usatoday30.usatoday.com/sports/story/2012-04-22/Pro-athletes-and-financial-trouble/54465664/1> (explaining that "[w]hen a 21-year-old kid gets such big numbers, they go out and buy the big house and the fancy car. . . . Before they know it, they're out of the league and their income drops significantly").

“emerging adults”¹⁰³—as opposed to fully mature adults. As described by Dr. Jeffrey Arnett, one of the nation’s leading experts on emerging adulthood,¹⁰⁴ adolescence is a culturally defined term, the boundaries of which are informed by social norms related to responsibility.¹⁰⁵ Thus, in our society, adolescence is defined as “the time from the beginning of puberty until adult responsibilities are taken on in the early 20’s.”¹⁰⁶ As Arnett explains, “[i]n our culture, establishing an independent household is delayed until the early 20’s for most people . . . and in general adolescence cannot be said to have been completed until this responsibility is assumed.”¹⁰⁷

The GCA, NMDA, and Foster Care Act reflect and reinforce this cultural phenomenon of extended adolescence. Largely because of the NMDA, twenty-one is an age of special significance in our nation’s conscience. Those twenty-one and older may enter a variety of establishments that those twenty and younger cannot. The term “underage” is often applied to those twenty and younger.¹⁰⁸ The twenty-first birthday is one of the most celebrated birthdays in our country.¹⁰⁹ Accordingly, “[i]ndividuals between the ages of eighteen and twenty are . . . continually labeled as either immature or irresponsible, and thus, in need of protection and guidance.”¹¹⁰

In some ways, American society even continues to treat those twenty-one and older as adolescents. The Affordable Care Act allows young adults to be covered under their parents’ health insurance plans up to the age of twenty-six,¹¹¹ and the Internal Revenue Service considers full-time college

103. See, e.g., Jeffrey Jensen Arnett, *Emerging Adulthood*, 55 AM. PSYCHOLOGIST 469 (2000).

104. Jeffrey Jensen Arnett, AM. PSYCHOL. ASS’N, <http://www.apa.org/action/careers/improve-lives/jensen-arnett.aspx> (last visited June 18, 2015).

105. Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEVELOPMENTAL REV. 339, 340–41 (1992).

106. *Id.* at 340; see also Lucy Wallis, *Is 25 the New Cut-Off Point for Adulthood*, BBC NEWS (Sept. 23, 2013), <http://www.bbc.com/news/magazine-24173194> (explaining that “adolescence now effectively runs up until the age of 25”).

107. *Id.* at 341; see also B.J. Casey, Rebecca M. Jones, & Todd A. Hare, *The Adolescent Brain*, 1124 ANNALS N.Y. ACAD. SCI. 111, 119 (2008) (“In today’s society . . . adolescence may extend indefinitely—with individuals well into their 20s living with their parents, remaining financially dependent, and choosing mates later in life . . .”).

108. Merriam-Webster’s online dictionary’s second definition of “underage” is “done by or involving underage persons < *underage* drinking >.” *Underage*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/underage> (last visited Oct. 11, 2015).

109. See, e.g., Barb Berggoetz, *Milestone Birthdays Worth Celebrating, Not Lamenting*, USA TODAY (July 14, 2013, 12:03 AM), <http://www.usatoday.com/story/news/nation/2013/07/14/milestone-birthdays-worth-celebrating-not-lamenting/2514801/>.

110. Hall, *supra* note 84, at 230–31. In some ways, society even treats those twenty-one and older as being child-like. The Affordable Care Act allows young adults to be covered under their parents’ health insurance plans up to age twenty-six. The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 2714, 124 Stat. 132 (2010).

111. Henig, *supra* note 36.

students to be dependents until age twenty-four.¹¹² But these laws and policies may be rooted more in economic concerns than maturity concerns. Moreover, ages twenty-four, twenty-five, and twenty-six are currently of little cultural import. This article posits that our nation is much more likely to accept the exemption of eighteen- to twenty-year-olds than, for example, eighteen- to twenty-four-year-olds because the age of twenty-one is already a well-defined cultural and legal marker of maturity. The concept of cruel and unusual punishment is culturally defined, as it derives from our nation's evolving standards of decency. Those standards are most likely to be aligned to our cultural perceptions of maturity.¹¹³

Because eighteen- to twenty-year-olds are legally and culturally regarded as less than fully mature, and because immaturity was one of the Court's major bases for exempting juveniles in *Roper*, the Court should consider exempting eighteen- to twenty-year-olds from the death penalty.

E. It is Time To Reconsider Eighteen as the Age of Death Penalty Eligibility

If the U.S. treats eighteen- to twenty-year-olds as adolescents in so many respects, then why do the Supreme Court and legislators insist upon including eighteen- to twenty-year-olds along with older adults in that category of individuals most deserving of capital punishment? Is it simply because the age of eighteen is, rather arbitrarily, the age of majority?¹¹⁴ Some historical perspective may be helpful in reminding us that there is nothing inherently sacred about the age of eighteen and that the Court should not be hesitant, in an appropriate case, to increase the age of death penalty eligibility:

Just look at what happened for teenagers. It took some effort, a century ago, for psychologists to make the case that adolescence was a new developmental stage. Once that happened, social institutions were forced to adapt: education, health care, social services and the law all changed to address the particular needs of 12- to 18-year-olds.¹¹⁵

112. *Id.*

113. Granted, neurological studies indicate that the brain does not fully mature until the age of twenty-five. *See* sources cited *supra* note 36. And most car rental companies will not rent to anyone younger than twenty-five without imposing exorbitant fees, most likely because they are too behaviorally immature to drive safely. *Id.* But until the age of twenty-five attains the same cultural prominence as the age of twenty-one, American society is less likely to support the exemption of twenty-one- to twenty-four-year-olds.

114. Dr. John Roman, a Senior Fellow at the Justice Policy Center at the Urban Institute, has asked the question, "What is so magical about an 18th birthday?," challenging the notion that the age of eighteen confers "mystical adult-defining properties." Roman, *supra* note 83.

115. Henig, *supra* note 36. "An understanding of the developmental profile of adolescence led, for instance, to the creation of junior high schools in the early 1900s, separating seventh and eighth graders from the younger children in what used to be called primary school." *Id.*

The Court may nevertheless hesitate to increase the age of death penalty eligibility for the simple reason that most of our laws still treat eighteen-year-olds as adults. An eighteen-year-old can vote, serve on a jury, and marry without parental consent. One may argue that an eighteen-year-old should therefore be eligible for capital punishment.¹¹⁶

Such reasoning ignores death penalty proportionality jurisprudence, which states that “[c]apital punishment must be limited to those offenders . . . whose extreme culpability makes them ‘*the most* deserving of execution.’”¹¹⁷ Although eighteen- to twenty-year-olds enjoy some privileges afforded to older adults, they are also denied other privileges afforded to older adults. They cannot purchase handguns from FFLs, and they cannot purchase alcohol. They are treated differently from older adults precisely because of their recognized immaturity,¹¹⁸ one of the Court’s main reasons for exempting juveniles from the death penalty.¹¹⁹ Our nation’s age of majority privileges recognize the *growing* maturity of eighteen- to twenty-year-olds, but the GCA, NMDA, and Foster Care Act recognize the *incomplete* maturity of eighteen- to twenty-year-olds. According to the proportionality principle, capital punishment is to be limited to those individuals who are *most* deserving of execution, not *almost* deserving.

Critics of this article’s thesis may point out that by exempting eighteen- to twenty-year-olds from the death penalty, the United States would be taking an unusual legal stance with respect to prevailing international norms. A large majority of nations prohibit the death penalty in its entirety, and a majority of the remainder specifically prohibits the death penalty for offenders seventeen-years-old and younger. However, very few nations draw the line of death penalty eligibility at age twenty-one.¹²⁰ Japan, the only other major first-world industrialized nation besides the U.S. that permits the death penalty, specifically *permits* the execution of eighteen- and nineteen-year-olds, even though it considers these individuals to be juveniles (the age of majority in Japan

116. A similar argument might be made that if an eighteen-year-old is mature enough to serve in the armed forces, then that eighteen-year-old should be mature enough to be eligible for the death penalty. It should be noted, however, that “[y]ou can be a soldier at 18, but not an officer. Society is happy to have teens as grunts, but not as leaders.” Roman, *supra* note 83. The fact that eighteen-year-olds “might be cannon fodder . . . says next to nothing about whether they are fully formed adults.” *Id.*

117. *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (emphasis added) (quoting *Atkins v. Virginia*, 536 U.S. 304, 319 (2002)).

118. *See, e.g., Montgomery v. Orr*, 498 N.Y.S.2d 968, 973 (N.Y. Sup. Ct. 1986) (declaring that an 18-year-old “by reason of his or her *immaturity* is not ‘able bodied’ to be able to drink or to make informed judgments in this regard”) (emphasis added).

119. *Roper*, 543 U.S. at 570–71.

120. Iraq and Cuba are two of the only nations that specifically exempt eighteen- to twenty-individuals up to age twenty. *Death Penalty Database: Cuba*, DEATH PENALTY WORLDWIDE, <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Cuba®ion=&method=> (last visited Sept. 11, 2015); *Death Penalty Database: Iraq*, DEATH PENALTY WORLDWIDE, <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Iraq®ion=&method=> (last visited Sept. 11, 2015).

is twenty).¹²¹ In addition, the United Nations Convention on the Rights of the Child, which was cited as an instructive basis for exempting juveniles in *Roper*, only prohibits the death penalty for criminals under the age of eighteen.¹²² Critics may argue that it would be hypocritical, on the one hand, to cite international legal norms as a basis for exempting juveniles in *Roper* and then, on the other, to ignore international legal norms in arguing for an extension of *Roper* to eighteen- to twenty-year-olds.

Why should the U.S. exempt eighteen- to twenty-year-olds from the death penalty when so few other nations do, and when the U.N. Convention on the Rights of the Child does not even go so far? The reason, as will be made clear throughout this article, is that exempting eighteen- to twenty-year-olds is entirely consistent with the United States' death penalty jurisprudence. As stated by the majority in *Roper*, while "the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition on 'cruel and unusual punishments,'" the laws of other nations do "not become controlling, for the task of interpreting the Eighth Amendment remains our responsibility."¹²³ Justice Scalia, in dissent, took an even more critical stance with respect to international norms, stating that the idea "that American law should conform to the laws of the rest of the world [] ought to be rejected out of hand."¹²⁴ While it is true that the laws of other countries played an instructive role in the Court's decision in *Roper*, both the majority and dissent were in full agreement that such laws did not bind the United States. Thus, the United States should have no qualms about exempting eighteen- to twenty-year-olds from the death penalty.

For those who nevertheless believe that the United States should abide by international norms, they should take note that exempting eighteen- to twenty-year-olds can be viewed as exactly a step in the right direction: exempting these offenders will bring the United States one step closer to joining the more than seventy percent of nations that ban the death penalty in law or practice.¹²⁵

The Court may be reluctant to redraw a line it drew just nine years ago in *Roper*. But recent scientific research on the minds of eighteen- to twenty-year-olds should allay any concerns. The research validates what American society and United States federal laws have already recognized: eighteen- to twenty-

121. Jeffrey Rosen, *Juvenile Logic*, NEW REPUBLIC (Mar. 21, 2005), <http://www.newrepublic.com/article/juvenile-logic>.

122. Convention on the Rights of the Child art. 37, Nov. 20, 1989, 1577 U.N.T.S. 3.

123. *Roper*, 543 U.S. at 575.

124. *Id.* at 624.

125. AMNESTY INTERNATIONAL, DEATH SENTENCES AND EXECUTIONS: 2014, at 64 (2015), <https://www.amnesty.org/en/documents/act50/0001/2015/en/> (listing 140 out of 198 countries, or 70.7%, as being "[t]otal abolitionist in law or practice" for ordinary crimes; conversely, just fifty-eight out of 198 countries, or 29.3%, are listed as "Retentionist Countries," of which the United States is one).

year-olds are not full adults. Therefore, they should not be held to the same standard of culpability as older adults.

IV.

SCIENTIFIC RESEARCH CONFIRMS WHAT SOCIETY ALREADY RECOGNIZES: EIGHTEEN- TO TWENTY-YEAR-OLDS ARE NOT FULLY MATURE ADULTS

Briefs submitted by the American Medical Association and the American Psychiatric Association were influential in the Court's decision in *Roper*. The briefs cited scientific evidence suggesting that sixteen- and seventeen-year-olds were not fully mature adults and laid the foundation for the Court's proportionality analysis in the second part of its two-part exemption analysis. Similarly, recent behavioral, psychological, and neurological research confirms that eighteen- to twenty-year-olds are not fully mature adults. Rather, they are more likely to engage in reckless behavior¹²⁶ than older adults and they are more vulnerable to peer pressure.¹²⁷ These findings lay the foundation for this article's proportionality analysis.¹²⁸

A. Behavioral and Psychological Research

Just as *Roper* noted that a propensity to engage in reckless behavior and susceptibility to peer pressure were two reasons why juveniles could not be classified as among the worst offenders,¹²⁹ behavioral and psychological research reveals similar tendencies on the part of eighteen- to twenty-year-olds¹³⁰ and indicates that they act with diminished culpability.

Eighteen to twenty-year-olds are not fully mature in their ability to anticipate future consequences or differentiate between positive and negative rewards. One study led by Dr. Laurence Steinberg, Distinguished University Professor of Psychology at Temple University,¹³¹ found that eighteen- to twenty-one-year-olds scored lower than older adults on a test that measured anticipation of future consequences.¹³² A separate study on risk-taking found that adults

126. Modecki, *supra* note 19, at 89 (“[T]he finding that adolescents and college students were most delinquent runs parallel to recent physiological research and again emphasizes the potential comparability of adolescents and college students relative to older adults.”) (citing Giedd, *supra* note 34, at 861–63); Arnett, *supra* note 105.

127. Bradley & Wildman, *supra* note 20; Caulum, *supra* note 20; Gardner & Steinberg, *supra* note 20; *see also* Steinberg & Scott, *supra* note 20.

128. *See infra* Part IV.B.

129. 543 U.S. at 569.

130. *See* Modecki, *supra* note 19; Arnett, *supra* note 105; Bradley & Wildman, *supra* note 20; Caulum, *supra* note 20; Gardner & Steinberg, *supra* note 20.

131. Laurence Steinberg, TEMPLE UNIVERSITY, <http://www.cla.temple.edu/psychology/faculty/laurence-steinberg/> (last visited June 18, 2015).

132. Laurence Steinberg, Sandra Graham, Lia O'Brien, Jennifer Woolard, Elizabeth Cauffman, & Marie Banich, *Age Differences in Future Orientation and Delay Discounting*, 80 CHILD DEV. 28, 35 (2009). Age differences in anticipation of future consequences were examined in a sample of 935 individuals between ten and thirty years of age. *Id.* at 32. Eighteen to twenty-

between twenty-two and thirty years of age were more likely to engage in risk-averse behaviors and were more sensitive to negative consequences than those twenty-one and younger.¹³³

With respect to *temperance*, defined as the ability to evaluate a situation before acting, a recent psychological study conducted by Dr. Kathryn Lynn Modecki, found that adolescents (fourteen- to seventeen-years-old) scored 3.22, college-aged adults (eighteen- to twenty-one-years-old) scored 3.29, young adults (twenty-two- to twenty-seven-years-old) scored 3.28, and older adults (twenty-eight- to forty-years-old) scored 3.50 on a five-point scale.¹³⁴ There was no statistically significant difference between college-aged adults and adolescents, but there was a statistically significant difference between college-aged adults and older adults.¹³⁵

The same study conducted by Dr. Modecki also assessed delinquency—defined as involvement in stealing, property, and assault offenses—on a

one-year-olds had a mean score of 3.018 (with a standard error of 0.064) compared to twenty-two- to twenty-five-year-olds, who had a mean score of 3.116 (with a standard error of 0.062), and twenty-six- to thirty-year-olds, who had a mean score of 3.199 (with a standard error of 0.067). *Id.* at 35 tbl.1.

133. Cauffman, Shulman, Steinberg, Claus, Banich, Graham, & Woolard, *supra* note 32; *see also* Steinberg & Scott, *supra* note 20, at 1014 (“Although the identity crisis may occur in middle adolescence, the resolution of this crisis, with the coherent integration of the various retained elements of identity into a developed *self*, does not occur until late adolescence or early adulthood. Often this experimentation involves risky, illegal, or dangerous activities like alcohol use, drug use, unsafe sex, and antisocial behavior.”) (citing Alan S. Waterman, *Identity Development from Adolescence to Adulthood: An Extension of Theory and a Review of Research*, 18 DEVELOPMENTAL PSYCHOL. 341, 341–58 (1982)).

134. Modecki, *supra* note 19, at 85 & tbl.3. An earlier study found no significant difference in temperance between young adults (eighteen to twenty years old) and adults (twenty-one and over). Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, 18 BEHAV. SCI. LAW 741, 754 (2000). However, the data may have been compromised because eighty-three percent of the eighteen- to twenty-year-olds were female, while seventy-three percent of the older adults were female. When gender differences were taken into account, eighteen- to twenty-year-old males were found to have lower psychosocial maturity than older males. *Id.* Because men commit roughly eight times as many murders as women, their psychosocial immaturity at the age of eighteen- to twenty-years-old is of greater relevance to the issues explored in this article. HOWARD N. SNYDER, BUREAU OF JUST. STATISTICS, U.S. DEP’T OF JUSTICE, NJC 289423, ARREST IN THE UNITED STATES, 1990–2010, at 2 (2012), <http://www.bjs.gov/content/pub/pdf/aus9010.pdf>; *see also* Steinberg & Scott, *supra* note 20, at 1013 (“[I]mpulsivity increases between middle adolescence and early adulthood and declines thereafter, and gains in self-management skills take place during early, middle, and late adolescence.”) (citing Ellen Greenberger, *Education and the Acquisition of Psychosocial Maturity*, in THE DEVELOPMENT OF SOCIAL MATURITY 155 (David McClelland ed., 1982); Laurence Steinberg & Elizabeth Cauffman, *Maturity of Judgment in Adolescence: Psychosocial Factors in Adolescent Decision-Making*, 20 L. & HUM. BEHAV. 249 (1996)).

135. Modecki, *supra* note 19, at 85 (“[O]n measures of temperance, adults were significantly more mature than young-adults, college students, and adolescents.”). The fact that young adults (twenty-two- to twenty-seven-years-olds) scored similarly to college-aged adults merely reinforces the notion that full psychological and neurological maturity is not attained until around the mid-twenties. *Id.* at 89 (“[E]motional temperance may continue to improve through the mid to late twenties.”); *see also infra* Part IV.B.

100-point scale.¹³⁶ Adolescents scored 18.93, college-aged adults scored 17.48, young adults scored 12.67, and older adults scored 8.64.¹³⁷ Once again, there was no statistically significant difference between college-aged adults and adolescents, but there was a statistically significant difference between college-aged adults and older adults.¹³⁸

In other words, in terms of both temperance and delinquency, college-aged adults were more similar to adolescents than they were to older adults. These findings were in line with those from another study, which found that eighteen-to twenty-one-year-olds were more similar to ten- to seventeen-year-olds on indices of psychosocial maturity than they were to adults twenty-six years of age and older.¹³⁹

With respect to peer pressure, one study of 380 emerging adults in the eighteen- to twenty-five-year-old age group (with a mean age of twenty years) found that “antisocial peer pressure was a highly significant ($p < 0.001$) predictor of reckless substance use and total recklessness” and “a more marginally significant ($p < 0.05$) predictor of reckless driving and sexual behaviors.”¹⁴⁰ The findings of the study suggested that the reputedly ‘adolescent’ characteristic of peer pressure towards antisocial behaviors continue to have an important influence into emerging adulthood” and that “[p]eer pressure would thus appear to be a suitable target for intervention for all youth, at least until the early-twenties age group.”¹⁴¹

Peer pressure is a type of coercion. “[Y]ouths’ desire for peer approval, or their fear of rejection, may lead them to do things they might not otherwise do.”¹⁴² Susceptibility to peer pressure can make one more prone to engage in violent crime. For those who “live in tough neighborhoods . . . losing face can be not only humiliating but dangerous,” and “[c]apitulating in the face of a challenge can be a sign of weakness, inviting attack and continued persecution.”¹⁴³ According to psychological experts, “[t]o the extent that

136. Modecki, *supra* note 19, at 86.

137. *Id.*

138. *Id.*

139. Lawrence Steinberg, Elizabeth Cauffman, Jennifer Woolard, Sandra Graham, & Marie Banich, *Are Adolescents Less Mature than Adults?: Minors’ Access to Abortion, the Juvenile Death Penalty, and the Alleged APA “Flip Flop,”* 64 AM. PSYCHOL. 583, 591 (2009), http://psych.colorado.edu/~mbanich/p/steinberg2009_are_adolescents.pdf (the graph in Figure 3 compares various age groups). Among both eighteen- to twenty-one-year-olds and ten- to seventeen-year-olds, approximately 20–25 percent of individuals scored at or above the mean for twenty-six- to thirty-year-olds on indices of psychosocial maturity. *Id.* at 591 fig.3 (comparing psychosocial maturity for various age groups).

140. Bradley & Wildman, *supra* note 20, at 257, 263.

141. *Id.* at 263; *see also* Gardner & Steinberg, *supra* note 20, at 634 (explaining that “interventions aimed at reducing risky behavior among adolescents and young adults. . . ought to focus some attention on increasing individuals’ resistance to peer influence”).

142. ADOLESCENT DEV. AND JUVENILE JUST., LESS GUILTY BY REASON OF ADOLESCENCE 3 (2005), http://www.adjj.org/downloads/6093issue_brief_3.pdf.

143. *Id.*

coercion or duress is a mitigating factor,” peer pressure “should lessen . . . culpability.”¹⁴⁴

Taking into account their risk-taking tendencies, their low levels of temperance, and their susceptibility to peer pressure, perhaps it should be no surprise that eighteen- to twenty-year-olds are overrepresented in several categories of reckless behavior. “In general, the age curve shows crime rates escalating rapidly between ages 14 and 15, topping out between ages 16 and 20, and promptly deescalating.”¹⁴⁵ Similarly, heroin use is highest among 18- to 25-year olds, and “use of alcohol, marijuana, and cocaine increases throughout early to mid adolescence and declines sharply only after the early 20s.”¹⁴⁶ According to psychologists, “this criminological trend seems to reflect adolescents’ natural maturation.”¹⁴⁷

In *Roper*, the Court stated that, “adolescents are overrepresented statistically in virtually every category of reckless behavior.”¹⁴⁸ The Court perceived this pattern of behavior to reflect a passing life stage that mitigated juvenile culpability. “[T]he character of a juvenile is not as well formed as that of an adult” and the personality traits of a juvenile “are more transitory [and] less fixed.”¹⁴⁹ The Court noted that “[o]nly a relatively small proportion of adolescents” who engage in illegal activity “develop entrenched patterns of problem behavior.”¹⁵⁰ The Court determined that the malleable nature of juveniles implied greater potential for reform.

The same can be said for eighteen- to twenty-year-olds. Eighteen to twenty-year-olds have a higher propensity to engage in risky behavior than older adults. However, this propensity declines with age. “[T]he prevalence rate of markedly antisocial” behavior among boys increases from 5% at age 11, to 32% at age 15, to 93% at age 18.¹⁵¹ But “[b]y their mid-20s, at least three fourths of these new offenders are expected to cease all offending.”¹⁵²

144. *Id.*

145. Modecki, *supra* note 19, at 79.

146. Arnett, *supra* note 19, at 342.

147. Modecki, *supra* note 19, at 79; *see also* Jeannette Brodbeck, Monica S. Bachman, Anna Brown & Tim J. Croudance, *Comparing Growth Trajectories of Risk Behaviors from Late Adolescence Through Young Adulthood: An Accelerated Design*, 49 DEVELOPMENTAL PSYCHOL. 1732, 1732, 1734 (2013) (“Risk behavior such as . . . deviance is common in adolescence but does not often last beyond young adulthood” where deviance was defined as whether study participants “had engaged in theft, violence, blackmail, or substantial damage to property of others” in the previous 12 months). The Brodbeck study found that “deviance decreased linearly from a 1-year prevalence rate of 40% at age 16 to 11% at age 29” *Id.* at 1736 fig.1, 1737.

148. *Roper v. Simmons*, 543 U.S. 551, 569 (2005) (quoting Arnett, *supra* note 19, at 339).

149. *Roper*, 543 U.S. at 570.

150. *Id.* (quoting Steinberg & Scott, *supra* note 20, at 1014).

151. Terrie E. Moffitt, *Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 PSYCHOL. REV. 674, 686 (1993).

152. *Id.* (citing D. P. Farrington, *Age and Crime*, in CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 189 (Michael Tonry ed., 1986)).

In sum, eighteen- to twenty-year-olds are behaviorally and psychologically different from older adults in several ways. They are less able to anticipate future consequences and they are less able to differentiate between positive and negative rewards. They score low on temperance and high on delinquency. Finally, they are more vulnerable to peer pressure than older adults. As a result of their behavioral predispositions, they are more likely to engage reckless acts. The behavioral and psychological research indicates that eighteen- to twenty-year-olds are less than fully mature. Neurological research, meanwhile, helps to explain why eighteen- to twenty-year-olds have difficulty behaving as fully mature adults.

B. Neurological Research

Neurological research, which focuses on the anatomical structure of the brain, has illuminated the physiological basis for the behavioral differences of eighteen- to twenty-year-olds as compared to older adults. As noted by Dr. Kathryn Modecki, “college-aged individuals may have yet to fully develop neurologically.”¹⁵³ One longitudinal study of brain development sponsored by the National Institute of Mental Health, which tracked 5,000 children, discovered that children’s brains were not fully mature until at least twenty-five years of age.¹⁵⁴ According to the director of the study, Dr. Jay Giedd, “The only people who got this right were the car-rental companies,”¹⁵⁵ which prohibit teens from renting cars and impose higher rental rates for those in their early twenties.¹⁵⁶ Due to the advent of magnetic resonance imaging (MRI) and other advanced diagnostic techniques that provide detailed images of the brain, scientists not only know that the brains of eighteen- to twenty-year-olds are not as developed as those of older adults—they now have a greater understanding as to which specific components of the brain are structurally immature.

Most notably, the prefrontal cortex, the area of the brain “associated with voluntary behavior control, risk assessment, evaluation of reward and punishment, and impulse control”—cognitive abilities linked to a propensity to engage in criminal behavior—is “one of the last brain regions to mature.”¹⁵⁷ The underdevelopment of the prefrontal cortex in eighteen- to twenty-year-olds is particularly evident in two ways.¹⁵⁸

153. Modecki, *supra* note 19, at 79.

154. Henig, *supra* note 36.

155. *Id.*; see also Claudia Wallis, *What Makes Teens Tick*, TIME (May 10, 2004) (“Giedd says the best estimate for when the brain is truly mature is 25, the age at which you can rent a car. ‘Avis must have some pretty sophisticated neuroscientists,’ he jokes.”).

156. Roman, *supra* note 83.

157. Brief for the AMA, *supra* note 34, at 16–17; see also Caulum, *supra* note 20, at 743 (“Evidence shows that the prefrontal cortex does not fully mature until the mid-twenties . . .”) (citing Sowell, *supra* note 35, at 859)

158. Brief for the AMA, *supra* note 34, at 18.

First, the *gray matter* of the brain is not fully mature until after age twenty.¹⁵⁹ Gray matter is a collection of neurons, or brain cells, that carry out the brain's higher functions.¹⁶⁰ Perhaps counter-intuitively, brain maturation is *inversely* related to the volume of gray matter. The amount of gray matter peaks from ages ten- to twenty-years-old, and then, in a process called pruning, decreases after adolescence as the brain matures.¹⁶¹ The pruning of excess neurons increases the efficiency and processing capabilities of the brain, thereby strengthening the brain's reasoning and judgments skills.¹⁶² The prefrontal cortex is "one of the last regions where pruning is complete and this region continues to thin past adolescence."¹⁶³ Thus, "one of the last areas of the brain to reach full maturity . . . is the region most closely associated with . . . the ability to reliably and voluntarily control behavior."¹⁶⁴

Second, the white matter of the brain is not fully mature until after age twenty.¹⁶⁵ White matter is brain tissue that facilitates communication between various components of the brain.¹⁶⁶ Myelin, the fatty white substance that gives white matter its distinctive color, allows brain messages to travel more quickly and reliably.¹⁶⁷ Myelination is the coating of axons with myelin—or neuron subcomponents that transmit electrical messages in the brain—that occurs "through adolescence and into adulthood."¹⁶⁸ Incomplete myelination is believed to make eighteen- to twenty-year-olds more vulnerable to peer pressure. Conversely, "resistance to *peer influence* . . . may be linked to the development of greater connectivity between brain regions,"¹⁶⁹ and according to the American Medical Association, "the development of improved self-regulatory abilities during and after adolescence is positively correlated with white matter maturation through the process of myelination."¹⁷⁰

159. *Id.* at 20.

160. *Id.* at 19.

161. *Id.* at 19–20; *see also* Casey, Jones & Hare, *supra* note 106, at 114 (showing an illustration of gray matter volume maturation from five to twenty years of age).

162. Brief for the AMA, *supra* note 34, at 19–20.

163. *Id.* at 21.

164. *Id.* According to scientist Phillip Shaw, "it does seem that much of the gray matter seems to have completed its most dramatic structural change" by age twenty-five. Henig, *supra* note 36; *see also* Caulum, *supra* note 20, at 743.

165. Adolf Pfefferbaum, Daniel H. Mathalon, Edith V. Sullivan, Jody M. Rawles, Robert B. Zipursky & Kelvin O. Lim, *A Quantitative Magnetic Resonance Imaging Study of Changes in Brain Morphology from Infancy to Late Adulthood*, 51 ARCHIVES NEUROLOGY 874, 885 (1994); Catherine Lebel & Christian Beaulieu, *Longitudinal Development of Human Brain Wiring Continues from Childhood into Adulthood*, 31 J. NEUROSCIENCE 10937, 10939 fig.2 (2011) (reporting a statistically significant white matter volume increase for subjects in the twenty- to twenty-five-year-old age range).

166. Brief for the AMA, *supra* note 34, at 22.

167. *Id.* at 21–22.

168. *Id.* at 22; Caulum, *supra* note 20, at 743.

169. Brief for the AMA, *supra* note 34, at 24.

170. *Id.*

In addition to affecting specific structures like the prefrontal cortex, the underdevelopment of gray matter and white matter has consequences for the brain's functional systems. The underdevelopment of the brain's reward system, which consists of various sub-components and their interaction with hormone pathways, also makes eighteen- to twenty-year olds more vulnerable to peer pressure than older adults. According to neuroscientist Dr. Sandra Aamodt, "[t]he brain's reward system becomes highly active right around the time of puberty and then gradually goes back to an adult level, which it reaches around age 25. . . ." ¹⁷¹ Due to these changes, young adults are much more sensitive to peer pressure than they were as children or will be as adults. ¹⁷² Thus, "a 20 year old is 50 percent more likely to do something risky if two friends are watching than if he's alone." ¹⁷³ Because their neurological development is incomplete, eighteen- to twenty-year-olds are more vulnerable to peer and negative influences than older adults, and may be similarly constrained as children in their ability to remove themselves from precarious home environments and communities. ¹⁷⁴ Perhaps it is no surprise then that young adults are more likely than older adults to be members of gangs and commit crimes in groups. ¹⁷⁵ To cast eighteen- to twenty-year-old offenders in the group most deserving of capital punishment is to turn a blind eye to the realities of their behavioral, psychological, and neurological predispositions. The science merely confirms what society already recognizes: that eighteen- to twenty-year-olds are not fully mature adults. Accordingly, the time has come to consider exempting eighteen- to twenty-year-olds from the death penalty.

171. *Brain Maturity Extends Well Beyond Teen Years*, NPR (Oct. 10, 2011, 12:00 PM), <http://www.npr.org/templates/story/story.php?storyId=141164708>.

172. *Id.*

173. *Id.*

174. One's ability to resist negative influences, of course, is not purely neurological. As the *Roper* Court opined, the vulnerability of juveniles "is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment." *Roper v. Simmons*, 543 U.S. 551, 569 (2005). This is because "[a]s legal minors, [juveniles] lack the freedom that adults have to extricate themselves from a criminogenic setting." *Id.* (quoting Steinberg & Scott, *supra* note 20, at 1014). While it is true that eighteen- to twenty-year-olds have the legal ability to move away from a dysfunctional home or community environment, the reality is that for most this ability is legal only. Due to economic realities and the cultural phenomenon of extended adolescence, approximately fifty-six percent of all eighteen- to twenty-four-year-olds are now living at home with their parents—a record 21.6 million. Richard Fry, *A Rising Share of Young Adults Live in Their Parents' Home*, PEW RES. CTR. (Aug. 1, 2013), <http://www.pewsocialtrends.org/2013/08/01/a-rising-share-of-young-adults-live-in-their-parents-home/>.

175. See *Children and Gangs*, AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY, http://www.aacap.org/aacap/Families_and_Youth/Facts_for_Families/Facts_for_Families_Pages/Children_and_Gangs_98.aspx (last visited Oct. 24, 2015).

V.

APPLYING THE COURT'S TWO-PART EXEMPTION ANALYSIS DEMANDS THAT
EIGHTEEN- TO TWENTY-YEAR-OLDS BE CATEGORICALLY EXEMPT FROM THE
DEATH PENALTY

If there is a national consensus against executing a particular class of offenders, and if the Court finds such executions to be disproportionate to the culpability of the members of that class, then the Court should hold that the practice violates the Eighth Amendment's ban on cruel and unusual punishment. Applying the two-part test to eighteen- to twenty-year-olds leads to the conclusion that they should be exempt from the death penalty.

*A. Part One: There is a National Consensus Against the Execution of Eighteen-to
Twenty-year-olds as Indicated by the Rarity of the Practice*

In the first part of the categorical exemption analysis, the Court determines whether a national consensus against the punishment exists. The Court pays particularly close attention to the "enactments of [state] legislatures that have addressed the question."¹⁷⁶ Because a majority of states had passed laws prohibiting the execution of sixteen- to seventeen-year-olds, and because the punishment was rare in those states that did permit it, the *Roper* Court determined that the nation no longer supported the execution of sixteen- to seventeen-year-olds.¹⁷⁷ Similarly, a review of state practices reveals a national consensus opposed to the execution of eighteen- to twenty-year-olds.

Twenty states and the District of Columbia effectively prohibit the execution of eighteen- to twenty-year-olds by banning the death penalty in general.¹⁷⁸ That

176. *Roper*, 543 U.S. at 564.

177. *Id.* at 564–67. The Court also noted the rate of abolition of the practice and the lack of reinstatement of the practice in those states where it had already been prohibited. *Id.* at 566.

178. Sixteen states and the District of Columbia have banned the death penalty in its entirety. TRACY L. SNELL, BUREAU OF JUST. STATISTICS, U.S. DEP'T OF JUST., NJC 248448, CAPITAL PUNISHMENT, 2013 - STATISTICAL TABLES 1 (2014), <http://www.bjs.gov/content/pub/pdf/cp13st.pdf> (listing Alaska, District of Columbia, Hawai'i, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin as "[j]urisdictions without death penalty" as of December 31, 2013); *Connecticut v. Santiago*, 122 A.3d 1 (Conn. 2015) (holding that, following the legislative repeal of Connecticut's death penalty for prospective offenses, the execution of a person currently under a sentence of death violates the Connecticut state Constitution); John Wagner, *On Last Full Day, O'Malley Issues Orders Commuting Four Death-Row Sentences*, WASH. POST (Jan. 20, 2015), https://www.washingtonpost.com/local/md-politics/on-last-full-day-omalley-issues-orders-commuting-four-death-row-sentences/2015/01/20/0d22c2f4-a10f-11e4-b146-577832eafcb4_story.html (reporting the abolition of the prospective use of Maryland's death penalty and the commutation of Maryland's remaining death sentences). Two states have banned the prospective use of the death penalty, but have not resolved what will happen to people on death row at the time of abolition. *Nebraska's Ban of the Death Penalty Is on Hold*, ECONOMIST (Oct. 21, 2015, 9:27 PM), <http://www.economist.com/blogs/democracyinamerica/2015/10/out-poison> (reporting the abolition of Nebraska's death penalty, that ten inmates remain on death row, and that proponents of the death penalty have secured a ballot referendum contesting repeal for November 2016); Chris McKee & Katherine Mozzone, *Death Row Inmates Ask NM Supreme Court for Life in Prison*,

is less than a majority of the fifty states. But formal prohibition is merely one factor to be analyzed in the Court's exemption analysis. Another factor, the frequency of execution among states that permit the practice, reveals a national consensus opposed to the execution of eighteen- to twenty-year-olds.

The *Roper* court noted that, "even in the 20 States without a formal prohibition on executing juveniles, the practice is infrequent."¹⁷⁹ The Court explained that since the previous case permitting the execution of sixteen- and seventeen-year-olds, only "six States have executed prisoners for crimes committed as juveniles" and "[i]n the past 10 years, only three have done so" ¹⁸⁰ Similarly, the Court in *Atkins* emphasized that only five States had executed mentally disabled offenders since the previous Supreme Court case upholding the practice.¹⁸¹

Statistics on the executions of eighteen- to twenty-year-olds suggest that the practice has become very uncommon. In the past fifteen years, only fifteen states have executed defendants for crimes committed as eighteen- to twenty-year-olds; in the past five years, only nine states have executed such defendants.¹⁸² Moreover, of the defendants executed in the past fifteen years for crimes committed as eighteen- to twenty-year-olds, 55 percent were from the state of Texas alone, and 78 percent were from the states of Texas, Virginia, Oklahoma, and Ohio.¹⁸³ These figures are markedly higher than comparable figures for executions of defendants of all ages. Over the same time period, 40 percent of all U.S. executions occurred in Texas, and 62 percent of all U.S. executions occurred in Texas, Virginia, Oklahoma, and Ohio.¹⁸⁴

A small fraction of states carries out the overwhelming majority of the executions of eighteen- to twenty-year-olds. Such lopsided statistics reveal a strong national consensus against the practice. Texas, Virginia, Oklahoma, and Ohio may find it acceptable to execute in large numbers defendants who were eighteen- to twenty-years-old at the time of their crimes, but this practice violates most states' standards of decency.

KRQE NEWS 13 (Oct. 27, 2014), <http://krqe.com/2014/10/27/convicted-murderers-ask-to-be-taken-off-death-row/> (reporting the prospective repeal of New Mexico's death penalty and that the New Mexico Supreme Court has heard arguments on whether the state may execute the two people on death row at the time of repeal). In addition, one state, New York, has *effectively* banned the death penalty. New York's death penalty statute was found unconstitutional in 2004, *People v. LaValle*, 817 N.E.2d 341 (N.Y. 2004), a ruling that was applied to current death row inmates in 2007. *People v. Taylor*, 878 N.E.2d 969 (N.Y. 2007). New York's last execution was in 1963. Clyde Haberman, *To Execute, or Not to Execute? That Is the Uneasy Question*, N.Y. TIMES (Jan. 19, 2007), http://www.nytimes.com/2007/01/19/nyregion/19nyc.html?_r=0 ("[N]o state inmate has been executed since a murderer named Eddie Lee Mays went to the electric chair in 1963.").

179. *Roper*, 543 U.S. at 564.

180. *Id.* at 564–65.

181. *Atkins v. Virginia*, 536 U.S. 304, 316 (2002).

182. *See* Eschels, *supra* note 16.

183. *Id.* For executions of those over the age of twenty-one, Texas accounts for just 37.5 percent and Texas, Virginia, Oklahoma, and Ohio account for sixty percent. *Id.*

184. *Id.*

These statistics beg the question: When a majority of states statutorily permit the execution of eighteen- to twenty-year-olds, can the mere infrequency of executions establish a national consensus opposed to the practice? According to *Graham v. Florida*, the answer is yes.¹⁸⁵ In *Graham*, the Court found the punishment of life imprisonment without the possibility of parole to be cruel and unusual punishment for non-homicide offenders who were under the age of eighteen at the time of their crimes.¹⁸⁶ The Court came to this conclusion even though the punishment was authorized in thirty-nine jurisdictions.¹⁸⁷ Shifting the national consensus analysis away from mere authorization of punishment, the Court declared, “an examination of *actual sentencing practices* in jurisdictions where the sentence in question is permitted by statute discloses a consensus against its use.”¹⁸⁸ As the Court explained, “[a]lthough these statutory schemes contain no explicit prohibition on sentences of life without parole for juvenile non-homicide offenders, those sentences are most infrequent.”¹⁸⁹

The *Graham* court noted that only 123 incarcerated juveniles were serving life without parole for non-homicide crimes committed as juveniles, and contrasted those figures with statistics showing that nearly 400,000 juveniles were arrested for serious non-homicide offenses in a single year.¹⁹⁰ Given the sentence’s rarity despite the many opportunities to administer it, the Court concluded that there was a national consensus against imposing such a harsh sentence on juveniles.¹⁹¹

The reasoning of *Graham*, the direct progeny of the *Atkins* and *Roper* death penalty categorical exemption cases, should apply to death penalty cases. As Justice Kennedy explained, *Graham* involved “a particular type of sentence as it applies to an entire class of offenders.”¹⁹² Thus, “the appropriate analysis is the one used in [death penalty] cases that involved the categorical approach, specifically *Atkins*, *Roper*, and *Kennedy*.”¹⁹³ Because *Graham* derives from the death penalty categorical exemption cases, there is no reason why its reasoning should not be applied to death penalty categorical exemption cases.

Graham noted that the infrequency of life without parole punishments for juvenile offenders did not stem from lack of opportunity. Likewise, the

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

186. *Id.*

187. *Id.* at 62 (thirty-seven States, the District of Columbia, and Federal law permitted the practice).

188. *Id.*

189. *Id.*

190. *Id.* at 64–65 (380,480 juveniles were arrested for burglary, aggravated assault, forcible rape, robbery, drug offense, or arson in 2007).

191. *Id.* at 67.

192. *Id.* at 61.

193. *Id.* at 61–62. In *Kennedy v. Louisiana*, the Court held that the Eighth Amendment’s cruel and unusual punishment clause did not permit the state of Louisiana to impose the death penalty against a defendant for committing a crime that did not result in the death of the victim. 554 U.S. 407, 419 (2008).

infrequency of the death penalty's use on eighteen- to twenty-year-olds does not stem from lack of opportunity. As the most recent Bureau of Justice Statistics arrest data show, this particular group is, statistically speaking, the most violent.¹⁹⁴ Nineteen-year-olds led all other age groups in murder and non-negligent manslaughter arrests, followed by eighteen-year-olds.¹⁹⁵ Twenty-year-olds were the fourth highest, just below twenty-one-year-olds.¹⁹⁶ To recap: eighteen- to twenty-year-olds (along with twenty-one-year-olds) are statistically the most violent age group, yet only fifteen states have executed such defendants over the past fifteen years, and only eight states have executed such defendants over the past five years.¹⁹⁷

As previously noted, just four states are responsible for seventy-eight percent of the executions of eighteen- to twenty-year-olds.¹⁹⁸ This point should not be taken lightly. In striking down juvenile life without parole sentences, the *Graham* court emphasized that a small number of states were responsible for the majority of such sentences. Specifically, seventy-seven of the nation's 123 juvenile life without parole offenders were serving sentences imposed in Florida.¹⁹⁹ The Court called this "a significant majority." Furthermore, "[t]he other 46 are imprisoned in just 10 States"²⁰⁰ The situation for eighteen- to twenty-year-olds is remarkably analogous to the situation described in *Graham*. In an uncanny similarity, Texas is responsible for seventy-two of the nation's 130 executions of eighteen- to twenty-year-olds since 2001, and the other fifty-eight were executed in just fourteen States.²⁰¹ Simply put, not only do the statistics indicate that the death penalty is rarely imposed on eighteen- to twenty-year-olds. It is imposed disproportionately by a small number of states, and just one state, Texas, is responsible for a majority of the nation's executions of this age group.²⁰² Society's reluctance to impose capital punishment on young

194. Snyder, *supra* note 134, at 17–18.

195. *Id.* Although capital punishment is largely reserved for aggravated first-degree murder, statistics pertaining to all murders and non-negligent homicides provide the closest available proxies.

196. *Id.*

197. See Eschels, *supra* note 16. Professor Terry Maroney argues that, while neuroscience would suggest that the criminal justice system should recognize the brain deficiencies of young adults, doing so would "be politically untenable, particularly because young men between eighteen and twenty-four have a high criminal offense rate." Maroney, *supra* note 35, at 152–53. However, society's reluctance to execute young adults despite their high offense rate demonstrates just the opposite.

198. See Eschels, *supra* note 16.

199. *Graham v. Florida*, 560 U.S. 48, 64 (2010).

200. *Id.*

201. See Eschels, *supra* note 16.

202. Indeed, Texas has led in executions of emerging adults in every year but one since 2000. *Id.* From 2000–2015, Texas was responsible for a majority of *all* adult executions just once, in 2007. *Id.* But it was responsible for a majority of *emerging* adult executions twelve times (2000, 2002, 2004–2009, 2012–2015). *Id.* In 2015, Texas accounted for 100% of emerging adults executed. *Id.*

adults is clear. Such reluctance, meanwhile, does not render this article's thesis moot. So long as the execution of eighteen- to twenty-year-olds is legally permissible, an unacceptable risk of executing a behaviorally immature eighteen-to twenty-year-old exists.

The figures cited above reveal a national consensus opposed to the execution of eighteen- to twenty-year-olds, meeting one of the necessary conditions for their exemption. Part Two of this section lays out why the execution of eighteen- to twenty-year-olds meets the final necessary condition required for its cessation: the disproportionality of the sentence.

B. Part Two: The Execution of Eighteen- to Twenty-year-old Offenders is a Disproportionate Punishment

For the second step of its analysis, the *Roper* Court stated that it "must determine, in the exercise of our own independent judgment, whether the death penalty is a disproportionate punishment for juveniles."²⁰³ In its proportionality analysis, the Court considered, 1) the mitigating characteristics of juveniles, 2) the retributive and deterrent justifications of the death penalty, and 3) the prospects of individualized sentencing.²⁰⁴ The mitigating characteristics of juveniles rendered the traditional justifications moot, and individualized sentencing did not adequately minimize the risk of executing undeserving offenders.²⁰⁵ For the same reasons, the Court should find that the death penalty is a disproportionate punishment for eighteen- to twenty-year-olds.

The Court emphasized three mitigating characteristics of juveniles. First, their natural immaturity, impulsivity, and recklessness diminish their capacity to act reasonably.²⁰⁶ Second, they are highly susceptible to negative peer influences.²⁰⁷ Third, because they are still maturing, any crimes they commit are not as likely to be the result of immutable depravity.²⁰⁸ These three characteristics correspond with three classic justifications for mitigation of punishment: diminished capacity, duress and provocation, and the absence of bad character.²⁰⁹ The Court never stated that all three are required for a finding of disproportionate punishment. But the Court found that the three characteristics diminished the culpability of juveniles and negated the two traditional justifications for the death penalty: retribution and deterrence.²¹⁰

203. *Roper v. Simmons*, 543 U.S. 551, 564 (2005).

204. *Id.* at 569–74.

205. *Id.*

206. *Id.* at 569.

207. *Id.*

208. *Id.* at 573.

209. Barry C. Feld, *A Slower Form of Death: Implications of Roper v. Simmons for Juveniles Sentenced to Life Without Parole*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 9, 20 (2008) (analyzing the Court's proportionality analysis in *Roper*).

210. *Roper*, 543 U.S. at 571.

As noted in Part IV above, eighteen- to twenty-year-olds are prone to reckless behavior and they are highly susceptible to negative peer influences. These young individuals behave in ways they might not in a few years' time. In other words, eighteen- to twenty-year-olds share the very same mitigating characteristics of juveniles. According to *Roper*, “[t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuosity and recklessness that may dominate in younger years can subside.”²¹¹ The Court added, “[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed.”²¹² Similarly, there is little reason to hold a behaviorally, psychologically, and neurologically underdeveloped nineteen-year-old to the same standard of culpability as a behaviorally, psychologically, and neurologically mature twenty-seven-year-old. The nineteen-year-old is at the mercy of biological forces that substantially increase one’s propensity to engage in violent behavior. But in just a few years’ time, those forces will subside.

In the second part of its proportionality analysis, *Roper* declared that, “Once the diminished culpability of juveniles is recognized, it is evident that the penological justifications for the death penalty apply to them with lesser force than to adults.”²¹³ Specifically, the Court recognized that “there are two distinct social purposes served by the death penalty: ‘retribution and deterrence of capital crimes by prospective offenders.’”²¹⁴

Retribution is viewed as either “an attempt to express the community’s moral outrage” or “an attempt to right the balance for the wrong to the victim.”²¹⁵ Either way, “[r]etribution is not proportional if the law’s most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of *youth and immaturity*.”²¹⁶ Behavioral, psychological, and neurological data indicate that eighteen- to twenty-year-olds are not fully mature adults. With respect to traits that bear upon culpability—including risk-taking, temperance, and resistance to peer pressure—eighteen- to twenty-year-olds have been shown to be more similar to juveniles than older adults. These predispositions diminish the blameworthiness of eighteen- to twenty-year-olds. Just as “the case for retribution is not as strong with a minor as with an adult,”²¹⁷ the case for retribution is not as strong with an eighteen- to twenty-year-old as with an older adult.

211. *Id.* at 570 (quoting *Johnson v. Texas*, 509 U.S. 350, 368 (1993)).

212. *Id.*

213. *Id.* at 571.

214. *Id.* (citing *Atkins v. Virginia*, 536 U.S. 304, 319 (2002)).

215. *Roper*, 543 U.S. at 571.

216. *Id.* (emphasis added).

217. *Id.*

As for deterrence, the Court considered it significant that “the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence.”²¹⁸ Similarly, the psychological and neurological makeup of eighteen- to twenty-year-olds suggests that they are less likely to be deterred than older adults. They are less adept at anticipating future consequences than older adults.²¹⁹ They have lower levels of temperance²²⁰ and they are also more likely to engage in risk-taking behavior.²²¹ In addition, the marginal deterrent effect of the death penalty is weak because life imprisonment is a particularly severe sanction for a young adult.

In the third part of its proportionality analysis, the Court examined the prospects of individualized sentencing for juveniles. In her dissent, Justice O’Connor endorsed “the seemingly reasonable conclusion reached by many state legislatures: that at least some 17-year-old murderers are sufficiently mature to deserve the death penalty in an appropriate case.”²²² But the majority disagreed, stating that “[t]he differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability.”²²³

Similarly, the behavioral, psychological, and neurological predispositions of eighteen- to twenty-year-olds are now too well understood to risk subjecting these individuals to the death penalty. Even our nation’s highest court has acknowledged the less than fully developed nature of the emerging adult brain. In 2007, in *Gall v. United States*, the Supreme Court found that “it was not unreasonable” for the Southern District of Iowa to view a twenty-one-year-old offender’s “immaturity” as a mitigating factor for the offense of conspiracy to distribute ecstasy.²²⁴ The Court noted that “[r]ecent studies on the development of the human brain conclude that human brain development may not become complete until the age of twenty-five.”²²⁵

Critics of categorical exemption might contend that *Gall* supports an individualized sentencing approach, for the Court noted that “[w]hile age does not excuse behavior, a sentencing court should account for age when inquiring into the conduct of a defendant.”²²⁶ However, *Gall* was not a death penalty case. To the extent that the Court’s language appears to support an individualized sentencing approach, it only does so in the context of the offense of conspiracy to distribute ecstasy. The more important point for death penalty cases is that the

218. *Id.*

219. Steinberg, Graham, O’Brien, Woolard, Cauffman, & Banich, *supra* note 131.

220. Modecki, *supra* note 19.

221. Cauffman, Shulman, Steinberg, Claus, Banich, Graham, & Woolard, *supra* note 32.

222. *Id.* at 588 (O’Connor, J., dissenting).

223. *Id.* at 572–73.

224. 552 U.S. 38, 58 (2007).

225. *Id.* (quoting *United States v. Gall*, 374 F. Supp. 2d 758, 762 n.2 (S.D. Iowa 2005)).

226. *Gall*, 552 U.S. at 58 (quoting *Gall*, 374 F. Supp. 2d at 762 n.2).

Court acknowledged exactly what this article has emphasized—that human brain development is not complete until after age twenty-one.²²⁷

Some eighteen- to twenty-year-olds may be unusually mature for their age and more deserving of retribution. But an individualized sentencing approach ignores that eighteen- to twenty-year-olds are so dissimilar from older adults that society already treats them differently from older adults *on a categorical basis*. Drawing categorical lines helps society avoid unacceptable risks. By categorically banning eighteen- to twenty-year-olds from purchasing handguns and alcoholic beverages, society minimizes risk to life and limb. This justification for drawing categorical lines applies with particular force to the death penalty. The irreversible, life-or-death consequences of capital punishment are simply too severe “to risk allowing a youthful person to receive the death penalty despite insufficient culpability.”²²⁸

Proponents of individualized sentencing might argue that a psychiatrist can reliably testify whether a particular eighteen- to twenty-year-old’s acts were the result of incomplete psychological development or inherent depravity.²²⁹ But psychiatric testimony does not eliminate the unacceptable risks associated with individualized sentencing. Just because a psychiatrist can differentiate between incomplete psychological development and depravity does not mean the jury will, even upon hearing the psychiatrist’s testimony. “An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments . . . even where the . . . offender’s objective

227. See *Graham v. Florida*, 560 U.S. 48, 68 (2010) (acknowledging that “parts of the brain involved in behavior control continue to mature through late adolescence”).

228. *Roper*, 543 U.S. at 572–73.

229. For example, the psychiatrist might testify that the offender is mature for his age but is afflicted with antisocial disorder, “a disorder also referred to as psychopathy or sociopathy, and which is characterized by callousness, cynicism, and contempt for the feelings, rights, and suffering of others.” *Id.* at 573. The testifying psychiatrist might also point out that eighteen- to twenty-year-olds are mature enough to be reliably diagnosed with antisocial disorder, whereas “the diagnosis of antisocial personality disorder is not made prior to the age of 18.” Steinberg & Scott, *supra* note 20, at 1015 (citing AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 1994)). However, as noted by Laurence Steinberg and Elizabeth Scott, “we currently lack the diagnostic tools to evaluate psychosocial immaturity reliably on an individualized basis or to distinguish young career criminals from ordinary adolescents who will repudiate their reckless experimentation as adults. As a consequence, litigating maturity on a case-by-case basis is likely to be an error-prone undertaking.” Steinberg & Scott, *supra* note 20, at 1016. Although these statements were made with respect to juveniles, Laurence Steinberg confirmed in correspondence with the author of this article that “the same concern applies to young adults.” Email from Laurence Steinberg, Professor of Psychology, Temple Univ., to Andrew Michaels (Jan. 11, 2016, 10:48 PM PST) (on file with author); see also Modecki, *supra* note 19, at 89 (explaining that “college students and young adults may be more akin to adolescents than adults in their inclination to engage in antisocial decision making” and “the current study’s results are in-line with psychological and sociological research which suggests that some individuals may be prone to engage in antisocial decision making through their early twenties”) (internal citations omitted).

immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death.”²³⁰

Because of their diminished culpability, the penological justifications of retribution and deterrence apply with lesser force to eighteen- to twenty-year-olds. In addition, the risks of individualized sentencing do not outweigh its benefits. For the same reasons the Court found the juvenile death penalty to be disproportionate, the Court should find the execution of eighteen- to twenty-year-olds to be disproportionate. Because there is a national consensus against the execution of eighteen- to twenty-year-olds, and because the punishment is disproportionate, these offenders should be categorically exempt from the death penalty.

C. Exemption is Not Exoneration

This article’s emphasis on the diminished culpability of eighteen- to twenty-year-old offenders is not intended to suggest that their incomplete development *excuses* their illegal acts. Excuse signifies that the perpetrator is entirely free of blame.²³¹ Without doubt, eighteen- to twenty-year-olds who commit aggravated murder are blameworthy. But it is one’s degree of culpability that matters with respect to our nation’s death penalty jurisprudence.²³² Only those who act with extreme culpability may be eligible for the death penalty.²³³

No eighteen- to twenty-year-old should immediately be able to walk the streets after committing aggravated murder. Nor should an eighteen- to twenty-year-old homicide offender be sentenced to death. Fortunately, when it comes to aggravated murder, the criminal justice system is not binary. There are options besides capital punishment and total exoneration. A lengthy prison sentence is one possible alternative for an eighteen- to twenty-year-old convicted of aggravated murder.²³⁴

230. *Roper*, 543 U.S. at 573; see also Steinberg & Scott, *supra* note 20, at 1016 (“Without such a commitment [to taking into account immaturity on a categorical basis], immaturity often may be ignored when the exigencies of a particular case engender a punitive response, as in the case of the accused sniper Lee Malvo. Indeed, absent such a commitment, immaturity is likely to count as mitigating only when the [offender] otherwise presents a sympathetic case or when other, irrelevant factors, such as a childlike physical appearance, lead others to view the offender as relatively less blameworthy.”)

231. Sanford H. Kadish, *Excusing Crime*, 75 Cal. L. Rev. 257, 289 (1987); see also JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 211–215 (5th ed., 2009) (explaining that an excuse defense “is in the nature of a claim that although the actor has harmed society, she should not be blamed or punished for causing that harm”).

232. *Roper*, 543 U.S. at 568.

233. *Id.*

234. In 2012, the Supreme Court held that mandatory life imprisonment without the possibility of parole was cruel and unusual punishment for juvenile homicide offenders. *Miller v. Alabama*, 132 S.Ct. 2455, 2475 (2012). After *Miller*, there is a possibility that juveniles could still be sentenced to life imprisonment without the possibility of parole, but only if the court focuses on the particular facts and circumstances of each case and determines that a life without parole sentence is a “proportional” penalty in that individual case. The proportionality analysis of this

Unfortunately, even Supreme Court justices fall victim to the binary fallacy. In the 1989 case *Stanford v. Kentucky*, which upheld the execution of sixteen- and seventeen-year-old offenders and was overruled sixteen years later by *Roper*, Justice Scalia stated that it is “absurd to think that one must be mature enough to

article strongly suggests that mandatory life imprisonment without the possibility of parole is cruel and unusual punishment for eighteen- to twenty-year-old homicide offenders as well. In addition, just as *Graham* found life imprisonment without the possibility of parole (whether mandatory or not) to be cruel and unusual punishment for *non-homicide* juvenile offenders, the arguments contained herein strongly suggest that this punishment is cruel and unusual for non-homicide eighteen- to twenty-year-old offenders. However, before concluding that these punishments are in fact cruel and unusual under the Court’s two-pronged approach, one must first research actual sentencing practices to determine whether a national consensus opposed to such punishments exists with respect to eighteen- to twenty-year-olds. Such research is beyond the scope of this article, but should be explored in future scholarship.

The Court recently decided that *Miller* must be applied retroactively. *Montgomery v. Louisiana*, No. 14-280, 2016 WL 280758, at *7 (U.S. Jan. 25, 2016) (“The court now holds that when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule.”). Thus, any extension of *Miller* and *Graham* to eighteen- to twenty-year-old offenders would have immediate consequences for many offenders currently serving life sentences. Nearly 200 offenders would likely be affected by an extension of *Graham* alone. According to a 2013 ACLU survey of 355 prisoners who ranged in age from eighteen to fifty-seven when they were arrested for the nonviolent offense for which they were sentenced to LWOP, approximately 5.4% were twenty years old or younger at the time of the nonviolent crime. ACLU, A LIVING DEATH: LIFE WITHOUT PAROLE FOR NONVIOLENT OFFENSES 26 & tbl.7 (2013), <https://www.aclu.org/files/assets/111813-lwop-complete-report.pdf>. At the time of the study, 3,278 prisoners were serving LWOP for nonviolent offenses. *Id.* at 2. If the survey data accurately reflects the entire population of nonviolent LWOP offenders, such that 5.4% of those 3,278 individuals were between eighteen- to twenty-year-old at the time of their crimes, then that would equate to approximately 177 nonviolent LWOP offenders.

Perhaps one day government officials might even consider banning solitary confinement of eighteen- to twenty-year-old offenders. President Obama recently banned the practice of holding juveniles in solitary confinement in federal prisons, explaining in an op-ed article published by The Washington Post that it could lead to “devastating, lasting psychological consequences.” Barack Obama, Op-Ed, *Barack Obama: Why We Must Rethink Solitary Confinement*, WASH. POST (Jan. 25, 2016), https://www.washingtonpost.com/opinions/barack-obama-why-we-must-rethink-solitary-confinement/2016/01/25/29a361f2-c384-11e5-8965-0607e0e265ce_story.html?tid=a_inl. The New York City Department of Correction (NYC DOC), meanwhile, has already reformed its policies so as to reduce the number of eighteen- to twenty-one-year olds in punitive segregation (i.e. solitary confinement) by eighty-four percent. NYC DEP’T OF CORRECTION, NYC DEPARTMENT OF CORRECTION - YOUNG ADULT PLAN UPDATE 2016, at 1 (2016), http://www.nyc.gov/html/boc/downloads/pdf/Variance_Documents/20160112/NYC%20Department%20of%20Correction%20-%20Young%20Adult%20Plan%20Update%202016.pdf (“In developing this plan [the] DOC has been focused on balancing safety and disciplinary concerns with brain research demonstrating that while Young Adults have a greater propensity for impulsivity and rash decision-making, they also have the capacity for behavioral change.”) The NYC DOC’s logic closely aligns with this article’s reasoning in Parts III and IV, and undercuts any claim that this article is posing a radical idea in suggesting that the United States penal system should treat eighteen- to twenty-year-olds differently from older adults; see also Michael Winerip & Michael Schwirtz, *Rikers to Ban Isolation for Inmates 21 and Younger*, N.Y. TIMES (Jan. 13, 2015), http://www.nytimes.com/2015/01/14/nyregion/new-york-city-to-end-solitary-confinement-for-inmates-21-and-under-at-rikers.html?_r=0 (explaining that “[a] large body of scientific research indicates that solitary confinement is particularly damaging to adolescents and young adults because their brains are still developing”).

drive carefully, to drink responsibly, or to vote intelligently, in order to be mature enough to understand that murdering another human being is profoundly wrong, and to conform one's conduct to that most minimal of all civilized standards."²³⁵

Justice Scalia's commentary misses the point. While a "right-versus-wrong" analysis is relevant to the determination of blameworthiness, and especially to the decision of conviction versus total exoneration, it is the wrong analysis to apply in the context of categorical exemption. As the Court's death penalty jurisprudence makes clear, the proper question for the purposes of categorical exemption is whether a particular class of offenders can be said to have acted with extreme culpability. Only those who act with "extreme culpability" are eligible for capital punishment.²³⁶ The point is that an eighteen- to twenty-year-old can understand that murder is wrong and, at the same time, be lacking in extreme culpability.

Because their incomplete development diminishes their culpability, eighteen- to twenty-year-old offenders cannot be placed at the "extreme culpability" end of the culpability continuum. They should be eligible for alternative punishments but not capital punishment.

VI. CONCLUSION

In the last twelve years, the Supreme Court exempted people with mental disabilities and sixteen- and seventeen-year-olds from the death penalty. In 2002, the Court emphasized that many states were no longer executing people with mental disabilities and the practice was rare even where it was permitted. The Court further determined that the cognitive deficiencies diminish the culpability of people with mental disabilities. Because of their cognitive deficiencies and diminished culpability, the penological justifications of retribution and deterrence applied with lesser force to these individuals.

In the 2005 case *Roper v. Simmons*, the Court stressed that the majority of states were no longer executing juveniles and that the practice was infrequent even where allowed. Moreover, the Court held that juvenile offenders are less culpable than adult offenders because they are immature, they are more vulnerable to negative influences, and their character is not fully formed. Thus, the Court exempted juveniles from the death penalty.

235. 492 U.S. 361, 374 (1989) (Scalia, J., concurring). Justice Scalia's analysis is consistent with that of legal scholars who "emphasize[] that the mental quality that is the *sine que non* of criminal responsibility is the capacity to distinguish right from wrong." JOSHUA DRESSLER & STEPHEN P. GARVEY, *CASES AND MATERIALS ON CRIMINAL LAW* 654 (6th ed. 2012). As noted in one treatise, "A child is not criminally responsible unless he is old enough, and intelligent enough, to be capable of entertaining a criminal intent; and to be capable of entertaining a criminal intent he must be capable of distinguishing between right and wrong as to the particular act." *A TREATISE ON THE LAW OF CRIMES: CLARK AND MARSHALL* 391 (Wingersky ed., 6th ed. 1958).

236. *Roper*, 543 U.S. at 568 (quoting *Atkins v. Virginia*, 536 U.S. 304, 319 (2002)).

Five years later in *Graham*, the Court held that the mere infrequency of a punishment established a national consensus opposed to the practice, even if statutorily permitted by a majority of states. Because *Graham* was a categorical exemption case derived from death penalty jurisprudence, its reasoning applies to future death penalty exemption cases.

Exempting eighteen- to twenty-year-olds from the death penalty is the logical extension of this nation's evolving standards of decency and the Court's death penalty jurisprudence. These individuals should be considered for exemption because society already treats them different from older adults both legally and culturally. The GCA prohibits their purchase of handguns and the NMDA prohibits their purchase of alcohol. National law permits states to extend foster care benefits to the age of twenty-one. These laws reflect society's perceptions of eighteen- to twenty-year-olds as emerging adults rather than full adults. Scientific research, meanwhile, confirms that eighteen- to twenty-year-olds are not fully developed behaviorally, psychologically, or neurologically.

Applying the Court's two-part exemption analysis to eighteen- to twenty-year-olds reveals that they should be exempt from capital punishment. First, death row data reveal a national consensus opposed to the execution of eighteen- to twenty-year-olds. A minority of states carry out such executions, and only a very few states carry out the overwhelming majority of them. Second, the execution of eighteen- to twenty-year-olds constitutes a disproportionate punishment. They are prone to reckless behavior and negative influences, thereby diminishing both their culpability and any retributive or deterrent value of the death penalty. These individuals must be categorically exempt from the death penalty to assure that society does not execute an adolescent-like individual who has significant potential for reform.

Some may feel that eighteen-year-olds are adults and that they should be eligible for the death penalty. Such sentiments reflect traditional, but increasingly outdated, notions of maturity. Scientific research changes our conceptions of human nature. Cultural norms shift. Standards of decency evolve.²³⁷ Our death penalty jurisprudence should reflect our modern understandings of the human condition, not our obsolete ideas of the past. The scientific research has confirmed what our society already recognizes: eighteen- to twenty-year-olds are not fully mature adults. The nation opposes their execution. And because of their diminished culpability, they should not be included in that category of offenders most deserving of capital punishment. The time has come to exempt eighteen- to twenty-year-olds from the death penalty.

237. See, e.g., *Graham v. Florida*, 560 U.S. 48, 85 (2010). ("Society changes. Knowledge accumulates. We learn, sometimes from our mistakes. Punishments that did not seem cruel and unusual at one time may, in the light of reason and experience, be found cruel and unusual at a later time . . . Standards of decency have evolved . . . They will never stop doing so." (Stevens, J., concurring)).