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Eighteen Is Not a Magic Number: Why the Eighth Amendment Requires Protection for Youth Aged Eighteen to Twenty-Five

Tirza A. Mullin

University of Michigan Law School

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EIGHTEEN IS NOT A MAGIC NUMBER: WHY THE EIGHTH AMENDMENT REQUIRES PROTECTION FOR YOUTH AGED EIGHTEEN TO TWENTY-FIVE

Tirza A. Mullin*

ABSTRACT

The Eighth Amendment protects a criminal defendant's right to be free from cruel and unusual punishment. This Note argues that any punishment of eighteen- to twenty-five-year-olds is cruel and unusual without considering their youthfulness at every stage of the criminal process, and that it is unconstitutional under the Eighth Amendment for these youths to be automatically treated as fully-developed adults. This Note will explore in depth how juveniles differ from adults, both socially and scientifically, and how the criminal justice system fails every youth aged eighteen- to twenty-five by subjecting them to criminal, rather than juvenile, court without considering their youthfulness and diminished capacity. This Note proposes three reforms that, implemented together, aim to remedy this Eighth Amendment violation. First, the Supreme Court should apply the seminal cases of Miller, Roper, and Graham to eighteen- to twenty-five-year-olds. Second, all states should extend the age of juvenile jurisdiction to twenty-five, processing offenders twenty-five and younger through the juvenile system accordingly. Finally, every actor in the system—including courts, lawyers, and legislatures—should label eighteen- to twenty-five-year-olds as “youth” and consider their age at every stage of the criminal system.

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INTRODUCTION

Today’s American culture tells us that one becomes an adult upon the eighteenth birthday, which is why the criminal justice system has traditionally set the age of juvenile majority at eighteen. In *Roper v. Simmons*,¹ the U.S. Supreme Court acknowledged this line may be over or under-inclusive but stated a “line must be drawn.”² A line must be drawn, but that line must be changed if it is unconstitutional.

States are responsible for setting the upper juvenile jurisdiction age limit, and the maximum age is eighteen or lower in forty-nine states.³ Vermont recently raised their majority youthful offender status age to twenty-one—the highest age of majority in the country.⁴ Scientific research, however, suggests that the human brain does not fully develop until age twenty-five.⁵ This arbitrary state-drawn line leaves youths aged eighteen- to twenty-five vulner-

1. 543 U.S. 551 (2005).

2. *Id.* at 574.

3. John Kelly, *In Another Big Year for “Raise the Age” Laws, One State Now Considers All Teens as Juveniles*, CHRON. SOC. CHANGE (June 25, 2018), <https://chronicleofsocialchange.org/youth-services-insider/juvenile-justice-raise-the-age-vermont-missouri-state-legislation>.

4. *Id.*; see also *Governor Signs Law Creating More Rational Juvenile Justice Policies in Vermont*, DEP’T FOR CHILD. & FAMS.: DCF BLOG (June 1, 2016), <https://dcf.vermont.gov/dcf-blog/governor-signs-law-creating-more-rational-juvenile-justice-policies-vermont>.

5. Although there is some debate on the exact age, most research indicates that the brain continues to develop into the mid-twenties up to age twenty-five. See Mariam Arain et al., *Maturation of the Adolescent Brain*, NEUROPSYCHIATRIC DISEASE & TREATMENT 449, 449–61 (2013); Jeffrey Jensen Arnett, *Emerging Adulthood: A Theory of Development from the Late Teens Through the Twenties*, 55 AM. PSYCHOLOGIST 469 (2000); David Pimentel, *The Widening Maturity Gap: Trying and Punishing Juveniles As Adults in an Era of Extended Adolescence*, 46 TEX. TECH L. REV. 71, 73 (2013); Kevin J. Holt, *The Inbetweens: Standardizing Juvenileness and Recognizing Emerging Adulthood for Sentencing Purposes After Miller*, 92 WASH. U.L. REV. 1393, 1412 (2015).

able to the harsh contours of the adult criminal system instead of the juvenile system where they belong.

The distinction between the juvenile and adult criminal system is important. The juvenile justice system is focused on rehabilitation, while the adult criminal system is shaped primarily by punitive ideologies. The Supreme Court treats youth “delinquents” differently than their adult “criminal” counterparts, placing delinquents in detention centers whose mission is to rehabilitate, not to punish.⁶ The Court has recognized that rather than a “right to be punished, young people, specifically adolescents, instead uniquely possess the quite different—indeed in many ways antithetical—constitutional ‘right to a meaningful opportunity to be rehabilitated.’”⁷ A primary justification behind the rehabilitative focus of the juvenile system is that “kids are different.”⁸ The Supreme Court has indicated that “juveniles are generally—though not necessarily in every case—less morally culpable than adults who commit the same crimes.”⁹ This reduced culpability does not magically vanish at age eighteen. In fact, scientific research suggests that the differences between children and adults that render children less morally culpable persist until approximately age twenty-five.¹⁰

Part I of this Note will outline the scientific and societal support for the notion that eighteen- to twenty-five-year-olds are, in many ways, more similar to children than adults. Part II will explain how automatically treating these individuals as adults without consideration of their youthfulness violates the Eighth Amendment’s ban on excessive punishments. The final part of this Note, Part III, will propose three reforms to remedy this Eighth Amendment violation. These solutions, working in tandem, would mandate individualized consideration of eighteen- to twenty-five-year-olds’ age throughout their interactions with the criminal justice system.

6. See *In re Gault*, 387 U.S. 1, 14–18 (1967) (describing the rehabilitative history of juvenile court laws).

7. *Graham v. Florida*, 560 U.S. 48, 75 (2010); see also *Roper v. Simmons*, 543 U.S. 551, 570 (2005) (claiming that from “a moral standpoint it would be misguided to equate the failings of a minor with those of an adult” because a juvenile’s irresponsible acts are less morally reprehensible).

8. See *Roper*, 543 U.S. at 526.

9. Martin Guggenheim, *Graham v. Florida and a Juvenile’s Right to Age-Appropriate Sentencing*, 47 HARV. L. REV. 457, 499 (2012) (quoting *Graham*, 560 U.S. at 88 (Roberts, C.J., concurring)).

10. See, e.g., Pimentel, *supra* note 5, at 73.

I. EIGHTEEN IS NOT A MAGIC NUMBER

A. *Miller* Line of Cases

Courts have recognized the differences in culpability between young offenders and fully mature adults for decades. The Supreme Court issued a series of landmark decisions regarding juvenile culpability in *Roper v. Simmons*,¹¹ *Graham v. Florida*,¹² and *Miller v. Alabama*.¹³ In each case, the Court found three differences between juveniles and adults: juveniles (1) have a “lack of maturity and an underdeveloped sense of responsibility,” often resulting in “impetuous and ill-considered actions and decisions”; (2) are “more vulnerable or susceptible to negative influences and outside pressures, including peer pressure”; and (3) “the character of a juvenile is not as well formed as that of an adult.”¹⁴ These key differences suggest that youth are less culpable for their actions than their adult counterparts, and therefore the traditional justifications for criminal punishment—retribution, deterrence, and incapacitation—are less applicable to young criminal defendants. The Court decided to focus on rehabilitative rationales accordingly, which do not result in the death penalty or automatic life without the possibility of parole.¹⁵ Rehabilitation is considered more fitting for juvenile offenders because they have “greater prospects for reform.”¹⁶ In each of these groundbreaking Supreme Court decisions, however, the juvenile before the justices was under the age of eighteen, and therefore the corresponding juvenile protections are limited to defendants under that age of majority.¹⁷ The Supreme Court has yet to confront a case that would allow it to directly reconsider extending *Roper*’s protections to defendants older than eighteen.

In 2005, the Supreme Court ruled in *Roper v. Simmons*, that the death penalty for juveniles younger than eighteen was categorically unconstitutional under the Eighth Amendment’s prohibition of cruel and unusual punishment.¹⁸ The *Roper* Court recognized that

11. 543 U.S. 551 (2005).

12. 560 U.S. 48 (2010).

13. 567 U.S. 460 (2012).

14. *Roper*, 543 U.S. at 569–70 (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)); *see also Graham*, 560 U.S. at 68 (quoting *Roper*, 543 U.S. at 569); *Miller*, 567 U.S. at 471–72 (quoting *Roper*, 543 U.S. at 570).

15. *Graham*, 560 U.S. at 71–74; *Roper*, 543 U.S. at 572.

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

17. In *Roper*, the defendant was seventeen years old. 543 U.S. at 556. In *Graham*, the defendant was sixteen years old. 560 U.S. at 53. In *Miller*, the defendants were fourteen years old. 567 U.S. at 465.

18. *Roper*, 543 U.S. at 572.

the “qualities that distinguish juveniles from adults do not disappear when an individual turns eighteen,” but nonetheless stated that a line needed to be drawn somewhere.¹⁹ The *Roper* Court chose to draw the line at eighteen because it is “the point where society draws the line for many purposes between childhood and adulthood.”²⁰ However, the Court did not have access to today’s neuroscience research regarding adolescent brain development.²¹

Then, the Court decided *Graham v. Florida* in 2010 ruling that life imprisonment for juvenile non-homicide offenders was unconstitutional under the Eighth Amendment.²² The Court noted the same differences between children and adults as the *Roper* Court and determined that “these differences render suspect any conclusion that a juvenile falls among the worst offenders.”²³

The *Graham* Court noted three significant developmental gaps between adolescents and adults: impulsivity linked to developmental factors, susceptibility to external pressures, and a still-developing identity. Indeed, what made these youthful traits salient in the justice context, according to the Court, was that they at once lessened a child’s “moral culpability” and increased the probability that with time and attendant neurological development, the child’s “deficiencies will be reformed.”²⁴

The Supreme Court then borrowed the *Roper* Court’s age cut-off to prohibit mandatory life without parole sentences for juvenile offenders under the age of eighteen in *Miller v. Alabama*.²⁵ The Court did not bar *discretionary* life without parole sentences for juveniles, but rather “mandate[d] only that a sentence follow a certain process—considering an offender’s youth and attendant circumstances—before imposing a particular penalty.”²⁶ It adopted the foundational principles of *Roper* and *Graham*, holding that severe sentences could not be imposed on juveniles “as though they were not children,” and therefore mandatory life without parole sentences were unconstitutional under the Eighth Amendment.²⁷

19. *Id.* at 574.

20. *Id.*

21. Cruz v. United States, No. 11-CV-787, 2018 WL 1541898, at *25 (D. Conn. Mar. 29, 2018).

22. *Graham*, 560 U.S. at 74.

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

24. Alexandra O. Cohen et al., *When Does A Juvenile Become an Adult? Implications for Law and Policy*, 88 TEMP. L. REV. 769, 774 (2016) (quoting *Graham*, 560 U.S. at 68–69).

25. *Miller*, 567 U.S. at 465.

26. *Id.* at 483.

27. *Id.* at 474.

Again, the Court defined “juvenile” as those under eighteen without considering moving the arbitrary line or providing evidence to support its adoption.²⁸

B. Brain Development

The underlying concerns about the developmental differences between adults and youths that animated these landmark decisions extend beyond age eighteen. The traditional age cut-off at eighteen is a social construction, rather than a scientific one. In *Roper v. Simmons*, the Court acknowledged this by stating, “[t]he age of [eighteen] is the point where *society* draws the line for many purposes between childhood and adulthood.”²⁹ Additionally, in the seminal case of *Miller v. Alabama*, when the Supreme Court asked counsel where to draw the line between juveniles and adults, counsel answered, “I would draw it at eighteen . . . because we’ve done that previously; we’ve done that consistently.”³⁰ This social construction is actually rather inconsistent, considering one is not allowed to drink alcohol until age twenty-one, cannot rent a car until age twenty-five, and is not required to obtain personal health insurance until age twenty-six.³¹ These varying age restrictions make it clear that our society does not agree on an age that marks the onset of adulthood. Scientific research provides a more compelling answer.

Recent brain studies reveal that youths aged eighteen- to twenty-five have many of the same characteristics that make children less culpable for criminal behavior. There have been a substantial number of recently-published psychological studies and legal scholarship recognizing that the brain, most importantly the prefrontal cortex, continues developing until the mid-twenties, rather than stopping at age eighteen.³² The prefrontal cortex is essential for both impulse control and decision-making in complex or high-stress situations and “[t]he fact remains that young people between the ages of eighteen and twenty-five do not have fully-developed capacity to control impulses and make rational choices.”³³

28. See *id.*; *Cruz*, 2018 WL 1541898, at *17–18.

29. *Roper*, 543 U.S. at 574 (emphasis added).

30. Transcript of Oral Argument at 10, *Miller*, 567 U.S. 460 (No. 10-9646).

31. Pimentel, *supra* note 5, at 83–85.

32. *Id.* at 84; see Arain et al., *supra* note 5; see generally Arnett, *supra* note 5.

33. Pimentel, *supra* note 5, at 84.

Reduced juvenile culpability has commonly been attributed to the underdevelopment of the pre-frontal cortex.³⁴ Children and youth are less culpable than fully-developed adults because their delayed brain development makes them prone to poor-decision making and peer pressure, reduces their understanding of long-term consequences of their behavior, and means they lack the self-control to refrain from engaging in risky behavior.³⁵ This is because “[t]he prefrontal cortex is central to what psychologists call ‘executive functions,’ advanced thinking processes that are employed in planning ahead and controlling impulses, and in weighing the costs and benefits of decisions before acting.”³⁶ The less mature parts of the prefrontal cortex have been shown to influence youth’s actions by “diminish[ing] [the] capacity to exercise self-control to inhibit inappropriate actions, desires, and emotions in favor of appropriate ones.”³⁷ Studies show that this part of the brain causes youth to rely on “gut reactions, instinct, and overall emotional responses” in contrast to adults who rely on “judgment, reason, and planning” when they act.³⁸ As the prefrontal cortex develops, this diminished capacity will fade and socially acceptable behavior will override emotionally driven behavior.³⁹ In this way, before the brain fully matures, a youth will likely “grow out of anti-social behavior patterns” which “renders him susceptible to rehabilitation”⁴⁰ and thus renders the personalities of those aged eighteen- to twenty-five “more transitory, less fixed.”⁴¹

Since these characteristics make eighteen- to twenty-five-year-olds “in many respects . . . more similar to juveniles than to adults,”⁴² they are more receptive to rehabilitation just like juve-

34. See Elizabeth R. Sowell et al., *In Vivo Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions*, 2 NATURE NEUROSCI. 859, 860 (1999); see generally Elizabeth C. Kingston, *Validating Montgomery’s Recharacterization of Miller: An End to LWOP for Juveniles*, 38 U. LA VERNE L. REV. 23 (2016).

35. See Alex A. Stamm, *Young Adults are Different Too: Why and How We Can Create a Better Justice System for Young People Age 18 to 25*, 95 TEX. L. REV. 72, 74 (2017); see generally Kingston, *supra* note 34; JUVENILE JUSTICE CTR., *Adolescence, Brain Development and Legal Culpability*, A.B.A. (Jan. 2004), <http://www.abanet.org/crimjust/juvjus/Adolescence.pdf>.

36. ELIZABETH S. SCOTT & LAURENCE STEINBERG, *RETHINKING JUVENILE JUSTICE* 44 (2008).

37. Cohen et al., *supra* note 24, at 783. “Taken together, the findings suggest that young adulthood is a developmental period when cognitive capacity is still vulnerable to negative emotional influences.” *Id.* at 787.

38. Melissa S. Caulum, *Postadolescent Brain Development: A Disconnect Between Neuroscience, Emerging Adults, and the Corrections System*, 2007 WIS. L. REV. 729, 741 (discussing Sarah Spinks, *One Reason Teens Respond Differently to the World: Immature Brain Circuitry*, <https://www.pbs.org/wgbh/pages/frontline/shows/teenbrain/work/onereason.html>).

39. Cohen et al., *supra* note 24 at 784.

40. Stamm, *supra* note 35, at 74.

41. *Roper v. Simmons*, 543 U.S. 551, 570 (2005).

42. JAMES C. HOWELL ET AL., BULLETIN 5: YOUNG OFFENDERS AND AN EFFECTIVE RESPONSE IN THE JUVENILE AND ADULT JUSTICE SYSTEMS: WHAT HAPPENS, WHAT SHOULD

niles. A child without a fully-developed brain is better suited for rehabilitation because “with time and attendant neurological development,” the child’s “deficiencies will be reformed.”⁴³ Additionally, because their unformed character is easily malleable—especially by social and peer influence—they are “better candidates for rehabilitation.”⁴⁴ In fact, “there is a growing consensus that adolescence is likely to be a period of heightened brain plasticity—the capacity of the brain to change in response to experience—not unlike the first few years of life.”⁴⁵ Youth are more likely to remold their behaviors as they fully develop since “the same peak in dopamine that makes dangerous behaviors so appealing also increases an adolescent’s ability to learn and to rehabilitate.”⁴⁶ Some studies suggest that focusing on rehabilitation for youth in this age group decreases recidivism rates, highlighting one of the many potential benefits of a rehabilitative approach.⁴⁷

The final stages of brain maturation typically occur around age twenty-five.⁴⁸ Until offenders are developmentally mature, they cannot be fully accountable for their actions.⁴⁹ They are therefore similarly situated to a child when considering diminished criminal

HAPPEN, AND WHAT WE NEED TO KNOW 24 (2013), <https://www.ncjrs.gov/pdffiles1/nij/grants/242935.pdf>.

43. Cohen et al., *supra* note 24 at 774; *Roper*, 543 U.S. at 570.

44. Elizabeth S. Scott et al., *Young Adulthood as a Transitional Legal Category: Science, Social Change, and Justice Policy*, 85 *FORDHAM L. REV.* 641, 647 (2016). *See also Roper*, 543 U.S. at 569 (explaining that “juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure”); Carly Loomis-Gustafson, *Adjusting the Bright-Line Age of Accountability Within the Criminal Justice System: Raising the Age of Majority to Age 21 Based on the Conclusions of Scientific Studies Regarding Neurological Development and Culpability*, 55 *DUQ. L. REV.* 221, 237 (2017) (“The juvenile brain’s sensitivity to social influences makes the focus on rehabilitation in these years the key to encouraging substantive behavioral changes.”).

45. Scott et al., *supra* note 44, at 652.

46. *See* Loomis-Gustafson, *supra* note 44, at 233.

47. Scott et al., *supra* note 44, at 663 n.144 (explaining that Colorado’s Youthful Offender Service houses youth aged eighteen and nineteen in facilities which provide “specially designed programs and services that focus on academics, rehabilitation, and the development of prosocial behaviors and reentry planning. The recidivism rates of offenders who successfully complete the YOS program (most offenders) is far better than comparable offenders.”).

48. *See* Arain et al., *supra* note 5; Pimentel, *supra* note 5, at 85. *See generally* Arnett, *supra* note 5.

49. It is true that developmental maturity is a process, not a specific point in time. This is why it is important to emphasize that some eighteen- to twenty-five-year-olds, just like some children under the age of eighteen, achieve developmental maturity much earlier than others. If an individualized consideration reveals that this is the case, the youth can still be waived to adult court just like our current juvenile system already allows. *See* Caulum, *supra* note 38, at 748 (“[W]aiver is based on a flexible approach to sentencing and a determination of the juvenile’s capacity for rehabilitation.”).

culpability.⁵⁰ This diminished capacity is supported by neuroscience which “tells us that we should expect some irrational, emotion-driven behavior from emerging adults, those aged eighteen to twenty-five, and that it is not until their late twenties that it is reasonable to expect them to have the brain development necessary to behave like fully rational adults.”⁵¹ This growing research on brain development should be considered when determining appropriate punishments for criminal defendants under twenty-five.

Research shows that once the brain is fully developed, criminal behavior significantly decreases. This is what many researchers refer to as the “age-crime curve.”⁵² The age-crime curve tells us that, in general, a person’s propensity for criminal behavior begins around “puberty, peaks at age twenty, and then decreases” significantly during the mid-twenties.⁵³ Therefore, “adolescents and individuals in their early twenties are more likely than either children or adults to engage in risky behavior.”⁵⁴ The peak age for crime involvement is younger than twenty-five for most types of crime.⁵⁵ Although we see a high amount of crime committed prior to age twenty-five, the age-crime curve indicates that most will desist from crime either in late adolescence or early adulthood.⁵⁶ Only an estimated five percent of youth offenders will continue committing crimes in adulthood.⁵⁷ This is because adolescent experimentation in risk-taking is transient for most individuals.⁵⁸

Given this behavioral trend, by sentencing youth aged eighteen to twenty-five to the same lengthy sentences as adults, too many young offenders are sitting in prisons when they likely no longer pose a danger to society.⁵⁹ These offenders tend to abstain from

50. See *id.* at 743 (“Because the prefrontal cortex governs impulsivity, judgment, planning for the future, and foresight of consequences, it is responsible for the very characteristics that may make one morally culpable.”).

51. Pimentel, *supra* note 5, at 84.

52. *E.g.*, SCOTT & STEINBERG, *supra* note 36, at 53.

53. Laurence Steinberg, *The Influence of Neuroscience on US Supreme Court Decisions About Adolescents’ Criminal Culpability*, 14 NATURE REVS.: NEUROSCI. 513, 515 fig.1 (2013). See also Liza Little, *Miller v. Alabama: A Proposed Solution for a Court that Feels Strongly Both Ways*, 88 S. CAL. L. REV. 1493, 1505 (2015).

54. Steinberg, *supra* note 53, at 515.

55. Jeffery T. Ulmer & Darrell Steffensmeier, *The Age and Crime Relationship: Social Variation, Social Explanations*, in THE NURTURE VERSUS BIOSOCIAL DEBATE IN CRIMINOLOGY: ON THE ORIGINS OF CRIMINAL BEHAVIOR AND CRIMINALITY 377, 377 (Kevin M. Beaver et al. eds., 2014), https://www.sagepub.com/sites/default/files/upm-binaries/60294_Chapter_23.pdf.

56. SCOTT & STEINBERG, *supra* note 36, at 53.

57. *Id.*

58. L.P. Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 NEUROSCI. & BIOBEHAV. REVS. 417, 421 (2000).

59. See Stamm, *supra* note 35, at 75 (“A large longitudinal study of serious young offenders aged 14 to 25 found no difference in recidivism rates (among comparable youth) from imprisonment instead of probation, or from longer terms of imprisonment.”).

crime as their brains develop, “reducing any incapacitation benefits of long sentences.”⁶⁰ Additionally, “aging out” of crime is much more likely if the youth has “enhanced social connections” with the opportunity to develop “an identity, sense of purpose, or self-awareness” which is improbable if the youth is in a prison cell.⁶¹ Placing youth of this age group into the punitive adult system can actually increase the probability of recidivism because “the susceptibility of the juvenile brain to peer influences that makes rehabilitation so effective may backfire when the youth is placed in a negative environment, such as the adult prison system.”⁶² Since the neurological research and age-crime curve shows that youths aged eighteen- to twenty-five are likely to be rehabilitated back to a crime-free life, focusing on treatment instead of punishment has the potential to benefit the offender and society in general to give youth a chance to redeem themselves by becoming productive adults.

C. Evolving Trends of Raising the Age

These recent breakthroughs in brain research have contributed to the legal community’s increasing support for raising the juvenile age beyond eighteen. In 2018, the District Court of Connecticut held in *Cruz v. United States* that *Miller* applied to eighteen-year-olds.⁶³ Significantly, though in dicta, the court recognized there could be a justification for *Miller* and *Roper* to extend beyond age eighteen.⁶⁴ The court found the consistent trend acknowledging that adolescents over age eighteen are different from fully-developed adults to be persuasive.⁶⁵ It noted that a Kentucky state court ruled the death penalty unconstitutional “as applied” to those under twenty-one based on a “consistent direction of change” showing that the “national consensus is growing more and more opposed to the death penalty as applied to defendants eighteen (18) to twenty-one (21).”⁶⁶ The Kentucky Court concluded this

60. Josh Gupta-Kagan, *The Intersection Between Young Adult Sentencing and Mass Incarceration*, 2018 WIS. L. REV. 669, 714.

61. See DANIEL P. KEATING, SUMMARY OF DEVELOPMENTAL SCIENCE REGARDING THE IMPACT OF EARLY TRAUMA ON ADOLESCENT BRAIN DEVELOPMENT AND RISK BEHAVIOR 9 (Aug. 2018).

62. Loomis-Gustafson, *supra* note 44, at 239.

63. *Cruz v. United States*, No. 11-CV-787, 2018 WL 1541898, at *25 (D. Conn. Mar. 29, 2018) (holding that mandatory life without parole sentences were unconstitutional for eighteen-year-old offenders).

64. *Id.*

65. *Id.* at *21.

66. *Id.* (quoting Order Declaring Kentucky’s Death Penalty Statute as Unconstitutional, No. 14-CR-161, 2017 WL 8792559, at *3 (Ky. Cir. Ct. 7th Div. Aug. 1, 2017)).

based on the fact that since *Roper*, there has not only been an increased abolition of the death penalty in general but that seven states now have a de facto prohibition on executing youth under age twenty-one.⁶⁷

The *Cruz* court also noted that all fifty states and the District of Columbia now recognize an extended age jurisdiction for juvenile courts beyond age eighteen.⁶⁸ Additionally, it found persuasive that the American Bar Association urged the death penalty be ruled unconstitutional for individuals under twenty-one due to the “scientific understanding of adolescent brain development” and “legislative developments in the legal treatment of individuals in late adolescence.”⁶⁹ The court acknowledged the scientific research showing the brain is not fully developed until early to mid-twenties.⁷⁰ Testimony from adolescent development expert Dr. Laurence Steinberg⁷¹ revealed that an individual’s impulse control as well as emotional regulation continues to develop until the mid-twenties.⁷² Dr. Steinberg’s research showed greater risk-taking and reward-sensitive behavior among youths when in company of their peers up until about age twenty-four.⁷³ He noted that after age twenty-four, adults begin to refrain from this behavior and behave in a similar capacity whether they are alone or in the company of peers.⁷⁴

In conformity with progressive caselaw, multiple states have been experimenting with different reforms to account for the harmful gap in protections for eighteen- to twenty-five-year-olds in the criminal system. For example, in 2016, Vermont’s governor signed a bill making any juvenile under twenty-one charged with a nonviolent crime eligible for juvenile offender status.⁷⁵ It also requires the Department of Corrections to provide separate facilities for any offender age twenty-five and below, meaning eighteen- to twenty-five-year-olds may only be housed in facilities specifically designated for youths.⁷⁶ The bill was motivated by scientific research revealing that the brain is not fully developed until the mid-twenties and that “[t]he eighteenth birthday is not magical; you do not suddenly be-

67. Order Declaring Kentucky’s Death Penalty Statute as Unconstitutional, 2017 WL 8792559, at *2.

68. *Cruz*, 2018 WL 1541898, at *22.

69. *Id.* at *21.

70. *Id.* at *22.

71. More information about Dr. Steinberg can be found on his website. LAURENCE STEINBERG, <https://laurencesteinberg.com/> (last visited Aug. 4, 2020).

72. *Id.* at *23.

73. *Id.* at *24.

74. *Id.*

75. H. 96, 2015 Gen. Assemb., Reg. Sess. (Vt. 2016).

76. *Id.* See also DEP’T FOR CHILD. & FAMS.: DCF BLOG, *supra* note 4.

come a full-fledged adult.⁷⁷ Vermont hopes to emphasize rehabilitation for these older offenders to prevent them from committing future crimes and assisted them in aging out of criminal behavior.⁷⁸ Additionally, there have been bills proposed in Illinois, Connecticut, and Massachusetts to raise the juvenile jurisdiction age to twenty-one.⁷⁹ Both Brooklyn and San Francisco have recently experimented with separate court systems for youths aged sixteen to twenty-four focusing on the developmental and neuroscience-based factors that make children different from adults.⁸⁰ In these unique court systems, there are dedicated defense attorneys, prosecutors, judges, and social workers who are trained on neuroscience developments by experts in the field.⁸¹

Connecticut has also recently developed a new repurposed housing unit called Cheshire Correctional Institute, where staff members work with men aged eighteen- to twenty-five-year-olds and focus on reintegration and rehabilitation.⁸² The Institute uses a program called Truthfulness, Respect, Understanding, and Elevating (TRUE) which is “designed specifically to address the needs of eighteen- to twenty-five-year-old offenders” and helps inmates develop through family programs, education, and mentorship.⁸³ These housing units were created because “[y]ounger criminals often act on impulse and are better served by a nurturing, supportive environment, rather than one that is strictly punitive.”⁸⁴ Research is still in progress regarding the effect of the program on recidivism, but “disciplinary issues inside the TRUE unit are virtually nonexistent” while outside the unit, “[y]ounger inmates account for about twenty-five percent of disciplinary incidents.”⁸⁵ As a result of the program’s success, Connecticut is hoping to expand the housing throughout the state and across genders.⁸⁶

Many other countries are following this trend. Young people can be treated as juveniles up to age twenty-one in Germany, twenty-

77. David Jordan, *Vermont Rolls Out a New Idea to Rehabilitate Young Offenders*, THE CHRISTIAN SCI. MONITOR (July 6, 2018), <https://www.csmonitor.com/USA/Justice/2018/0706/Vermont-rolls-out-a-new-idea-to-rehabilitate-young-offenders>.

78. *Id.*

79. Kelly, *supra* note 3.

80. Tim Requarth, *Neuroscience is Changing the Debate over what Role Age Should Play in the Courts*, NEWSWEEK (Apr. 18, 2016 10:01 AM), <https://www.newsweek.com/2016/04/29/young-brains-neuroscience-juvenile-inmates-criminal-justice-449000.html>.

81. *Id.*

82. *Prison Unit for Young Inmates Seen as National Model*, WTNH NEWS (May 31, 2018 03:42 AM), <https://www.wtnh.com/news/connecticut/prison-unit-for-young-inmates-seen-as-national-model/1209960110>.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

three in the Netherlands, and twenty-five in Switzerland.⁸⁷ The Netherlands even uses forensic and probation psychologists to evaluate and recommend whether the youth should be treated as a juvenile or an adult.⁸⁸ Additionally, the Sentencing Advisory Council of Victoria in the United Kingdom has advocated for a separate system for youths up to age twenty-five that focuses more on “specific developmental needs in order to help the offender’s rehabilitation and re-integration.”⁸⁹ Trends in the United States and in foreign countries recognize that eighteen- to twenty-five-year-olds would benefit from a more rehabilitative criminal justice system.

II. ACCOUNTING FOR YOUTHFULNESS UNDER THE EIGHTH AMENDMENT

A. Kids Must Be Treated like Kids

Roper, *Graham*, and *Miller* all establish a constitutional principle that children are unique, and therefore must be treated differently from adults in the context of punishment and sentencing. The Court in *Graham* stated that “[a]n offender’s age is relevant to the Eighth Amendment” so “criminal procedure laws that fail to take defendants’ youthfulness into account at all would be flawed.”⁹⁰ Although these cases defined “children” as persons under age eighteen, the Court’s reasoning applies to eighteen- to twenty-five-year-olds as well, as discussed in Part I. Therefore, to not treat eighteen- to twenty-five-year-olds as youths violates Eighth Amendment principles. The Court needs to revisit the age cutoff, or else it risks perpetuating constitutional violations against this group of offenders. There have been numerous articles arguing that drawing the line at eighteen is problematic.⁹¹ This Note agrees with that proposition, but further argues that it is required by the Eighth Amendment for individuals under the age of twenty-five to have their youthfulness considered at every stage of the criminal process

87. Jordan, *supra* note 77.

88. Vincent Schiraldi, *Raising Age to 23: It Works for the Dutch*, CRIME REP. (Mar. 27, 2018), <https://thecrimereport.org/2018/03/27/raising-juvenile-age-to-23-produces-promising-results-for-dutch-us-researchers>.

89. KING’S COLLEGE LONDON, *Young Adults and Criminal Justice: International Norms and Practices* (2011), <https://www.t2a.org.uk/wp-content/uploads/2011/09/T2A-International-Norms-and-Practices.pdf>.

90. *Graham v. Florida*, 560 U.S. 48, 76 (2010).

91. See Kevin J. Holt, *The Inbetweens: Standardizing Juvenileness and Recognizing Emerging Adulthood for Sentencing Purposes After Miller*, 92 WASH. U.L. REV. 1393, 1396 (2015). See also Kelsey B. Shust, *Extending Sentencing Mitigation for Deserving Young Adults*, 104 J. CRIM. L. & CRIMINOLOGY 667 (2014); Stamm, *supra* note 35.

in order to avoid excessive punishments. It is unconstitutional under the Eighth Amendment for these youths to be automatically treated as if they were adults, and each eighteen- to twenty-five-year-old requires individualized consideration of their youthfulness and developmental capacity prior to conviction.⁹²

Juveniles do not have a constitutional right to be tried in juvenile courts. The Eighth Amendment does, however, require that youthful defendants receive age-appropriate punishment proportional to his or her culpability. If the defendant has diminished culpability because of his or her young age and is receptive to rehabilitation, the court is obligated to treat the youthful defendant differently than an adult and take youthfulness into account at *every stage* of the process, not just at sentencing. This includes eighteen- to twenty-five-year-olds.

B. The Eighth Amendment's Ban on Excessive Punishments

Currently, eighteen- to twenty-five-year-olds are typically tried and punished in our criminal justice system without consideration of their lessened culpability due to age.⁹³ The United States Constitution prohibits this; more specifically, the Eighth Amendment prohibits punishments that are excessive in relation to the moral culpability of the offender.⁹⁴ The Court decides whether the Eighth Amendment is violated by viewing proportionality "according to the evolving standards of decency that mark the progress of a maturing society."⁹⁵ The Court determined in *Roper*, *Graham*, and *Miller* that the necessary age cutoff should remain at eighteen because that has usually been the line drawn in society between childhood and adulthood.⁹⁶ The Court must reexamine this premise and update its previous Eighth Amendment holdings given the constantly developing neuroscience research and society's evolving views of acceptable punishments for youths.⁹⁷

92. Although some eighteen- to twenty-five-year-olds may have the requisite developmental maturity to be fully culpable for their crimes, that is a determination for the jury or judge to decide. The burden should be on the prosecutor to show an eighteen- to twenty-five-year-old has the developmental capacity of an adult.

93. See Kelsey B. Shust, *Extending Sentencing Mitigation for Deserving Young Adults*, 104 J. CRIM. L. & CRIMINOLOGY 667, 701 (2014) (advocating for a case-by-case evaluation of a defendant's youthfulness for defendants under age twenty-five).

94. *Roper v. Simmons*, 543 U.S. 551, 560 (2005).

95. *Miller v. Alabama*, 567 U.S. 460, 469 (2012).

96. See *Miller*, 567 U.S. 460; *Graham v. Florida*, 560 U.S. 48 (2010); *Roper*, 543 U.S. 551.

97. The Court regularly engages in this sort of reexamination. See, e.g., *Graham*, 560 U.S. 48 (holding the Eighth Amendment categorically bans juvenile nonhomicide offenders from receiving mandatory life without the possibility of parole); *Miller*, 567 U.S. 460 (extending *Graham's* previous holding to include juvenile homicide crimes due to evolving stand-

1. *Why the Eighth Amendment Requires Miller, Graham, and Roper to Apply to Eighteen- to Twenty-Five-Year-Olds*

As previously indicated, youth is a major factor in deciding whether a punishment is constitutionally excessive under the Eighth Amendment. Justice Roberts stated in *Graham*, “an offender’s juvenile status can play a central role in considering a sentence’s proportionality.”⁹⁸ In *Roper, Graham, and Miller*, the Court looked at and relied heavily on brain science to determine that juveniles have diminished culpability.⁹⁹ This research found youth have certain characteristics that make harsh punishments disproportionate, and therefore violate the Eighth Amendment. These characteristics include diminished maturity and responsibility that leads to risk-taking behavior, vulnerability to peer pressure, and underdeveloped character that is more prone to rehabilitation.¹⁰⁰ According to the Court, each of these characteristics demonstrate an ability to be rehabilitated.

The Court has been reluctant to impose irrevocable sentences on a group that has a high propensity for change after neurological development, precisely because the punishment then becomes disproportionate and constitutionally excessive.¹⁰¹ Since we cannot be sure of a youth’s potential, cutting off the prospect of growth defies our sense of morals:

“[T]he malleability of adolescence” offers the prospect that an adolescent offender can alter his life course and develop a moral character as an adult. Executing a juvenile before he is a fully formed person and before we can reliably predict what sort of adult he will become forecloses the chance for this development and thus cannot be a reasoned moral response to the defendant’s character.¹⁰²

As argued in Part I, current research shows the brain is underdeveloped until age twenty-five, resulting in an inability to fully assess

ards of decency). *See also* *Penry v. Lynaugh*, 492 U.S. 302 (1989) (denying a categorical exemption from the death penalty for the intellectually disabled); *Atkins v. Virginia*, 536 U.S. 304 (2002) (rejecting *Penry* and holding the Eighth Amendment categorically bans intellectually disabled offenders from receiving the death penalty in light of society’s evolving standards of decency); *Hall v. Florida*, 572 U.S. 701 (2014) (updating the definition of intellectual disability due to evolving standards of decency in the medical and social community).

98. *Miller*, 567 U.S. at 474.

99. *See Miller*, 567 U.S. 460; *Graham*, 560 U.S. 48; *Roper*, 543 U.S. 551.

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

101. *See Miller*, 567 U.S. 460.

102. Brief for Respondent at 27, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-633).

consequences, diminished capacity to make rational decisions, and increased susceptibility to peer pressure.¹⁰³ Youths under twenty-five therefore possess the same characteristics and potential for reform that the Court found persuasive in *Miller*, *Graham*, and *Roper*, finding Eighth Amendment violations and banning the death penalty and mandatory life without parole sentences for juveniles.¹⁰⁴ Therefore, handing out these sentences to offenders aged eighteen- to twenty-five must also violate the Eighth Amendment.¹⁰⁵

The death penalty and mandatory life without parole are sentences that offer “no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope”¹⁰⁶—a flat out rejection of rehabilitation with no possibility of reintegration into society. It is impossible to close off the possibility of a youth offender transitioning into a reformed adult who will not commit crimes upon release given their incomplete brain development. These sentences deny the possibility of release even though research shows the propensity to commit crime significantly decreases after age twenty-five.¹⁰⁷ The finality of these sentences takes away all possibility of growth and development, violating the Eighth Amendment rights of not only juveniles, but also eighteen- to twenty-five-year-olds with those same prospects of rehabilitation and reform.

2. *Why the Eighth Amendment Requires Kids To Be Labeled as Kids*

The Eighth Amendment also requires eighteen- to twenty-five-year-olds to be labeled as youths throughout criminal proceedings. The discussion above shows that the sentencing decisions in *Roper*, *Graham*, and *Miller* should also apply to eighteen- to twenty-five-year-olds. However, the sentence itself is not the only stage of criminal procedure that must be critically examined to prevent excessive youth punishment. Justice Kagan suggested this in her *Miller* opinion, noting that treating children like adults *throughout* their criminal proceedings “ignores that [the offender] might have been

103. See *supra* Part I Section II pp. 106–07.

104. Although some of this research was available at the time of these groundbreaking Supreme Court cases, those Courts were only asked to address youth under age eighteen.

105. As previously mentioned, there is a variation in developmental capacities among eighteen- to twenty-five-year-olds, but the same is true for those under eighteen and the Supreme Court had decided, as a class, juveniles under eighteen cannot receive these sentences because they are so severe, even if that is over-inclusive. Therefore, these sentences are unconstitutional applied to a class that as a whole, generally, has an underdeveloped neurological system.

106. *Graham v. Florida*, 560 U.S. 48, 79 (2010).

107. See *supra* Part I Section II pp. 107–08.

charged and convicted of a lesser offense if not for incompetencies associated with youth.”¹⁰⁸

Unlike juveniles, eighteen- to twenty-five-year-olds are entitled to a jury trial. If juries do not consider the defendant’s youthfulness and diminished culpability, the defendant is more likely to be convicted for crimes that carry excessive sentences. The judge at sentencing may have little discretion to lower sentences for these severe crimes, especially if mandatory minimums apply. Additionally, it is typically juries who make sentencing determinations in death penalty cases. If age is not considered throughout the process, the ability to be charged and convicted of a lesser offense, or to not receive a death sentence, may vanish. To prevent this, eighteen- to twenty-five-year-olds must be labeled as *youth* (or even *children*, *kids*, *emerging adults*) from the outset, not as adults or even young adults, and scientific evidence must be given to juries in support of this label in order to avoid disproportionate punishments.¹⁰⁹

From the moment a youthful offender comes into contact with the criminal justice system, their age must play a role in their case. This is true for juvenile defendants under age eighteen,¹¹⁰ because “the features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings.”¹¹¹ Youths are at high risk for erroneous convictions and excessive punishments because of their limited understanding of the system, unwillingness to cooperate due to wariness of trust in adults, and their lack of maturity. Youthful defendants have a special difficulty with legal representation, because “[t]hey are less likely than adults to work effectively with their lawyers to aid in their defense.”¹¹² This may diminish the quality of the defendant’s representation, and a court or jury may be more likely to convict or provide an undeserving punishment. If counsel, the judge, and the jury were required to consider the defendant’s youthfulness and immaturity, these risks could be mitigated.

108. *Miller v. Alabama*, 567 U.S. 460, 477 (2012).

109. The labeling theory in criminology studies has proven that labels can have highly influential effects on persons’ mindsets and behavior. See Charles W. Thomas & Donna M. Bishop, *The Effect of Formal and Informal Sanctions on Delinquency: A Longitudinal Comparison of Labeling and Deterrence Theories*, 75 J. CRIM. L. & CRIMINOLOGY 1222 (1984).

110. Though, again, there is considerable developmental variation among eighteen- to twenty-five-year-olds, the same goes for those under age eighteen. See *infra* note 108. That is why youth should be a *considered* factor, not determinative, and it should be the burden of the prosecution to show why the particular youthful defendant is developmentally mature and should be treated as an adult.

111. *Graham*, 560 U.S. at 78.

112. *Id.*

Youths are also vulnerable when they are given their *Miranda* rights and are more likely to give confessions under pressure.¹¹³ This is why the Court ruled in *J.D.B. v. North Carolina* that a juvenile's age should be considered in the *Miranda* custody analysis.¹¹⁴ The Court reasoned that the particular susceptibilities stemming from a child's age requires treating the youth's confession differently than an adult's confession.¹¹⁵ Court's performing a *Miranda* custody analysis ask whether an objectively reasonable officer would have known of the child's youth and particular susceptibility.¹¹⁶ Eighteen- to twenty-five-year-olds, who have the same "particular susceptibilities," are automatically excluded from *J.D.B.*'s protections. By not labeling these offenders as children, courts can ignore age during the custody analysis and erroneously admit an innocuous confession, resulting in an unfair conviction and sentence. Youthfulness is considered in other similar totality-of-the-circumstances tests, such as those assessing consent and lineups. These various stages throughout the criminal procedure process can significantly impact the youth's eventual punishment.

It follows that if eighteen- to twenty-five-year-olds are not labeled as youths, the sentencer will be inclined to impose a stricter sentence. Without this label, they will be less likely to believe the defendant can be rehabilitated and will focus instead on the ideologies of deterrence, incapacitation, and retribution. The Court in *Roper*, *Graham*, and *Miller* determined that these penological justifications for punishments are less applicable to juvenile offenders because of their diminished culpability.¹¹⁷ Retribution is less compelling because youth are less blameworthy.¹¹⁸ Deterrence cannot justify punishment since youth's inability to fully assess consequences means they are less likely to consider punishment before committing a crime.¹¹⁹ Lastly, incapacitation is irrelevant because "[d]eciding that a 'juvenile offender forever will be a danger to society' would require 'mak[ing] a judgment that [he] is incorrigible'—but 'incorrigibility is inconsistent with youth.'"¹²⁰ Therefore, judges sentencing juveniles focus on rehabilitation and will usually look for alternatives to incarceration. When sentencing defendants over the age of eighteen, rehabilitation is typically not the focus

113. *J.D.B. v. North Carolina*, 564 U.S. 261 (2011).

114. *Id.* at 281.

115. *See id.* at 272–73.

116. *See id.* at 274.

117. *See generally* *Miller v. Alabama*, 567 U.S. 460 (2012); *Graham v. Florida*, 560 U.S. 48 (2011); *Roper v. Simmons*, 543 U.S. 551 (2005).

118. *Miller*, 567 U.S. at 472.

119. *Id.*

120. *Id.* at 472–73 (quoting *Graham*, 560 U.S. at 72–73).

and the other justifications for punishment come to the forefront. Youth aged eighteen- to twenty-five have a similar diminished culpability and should receive the same focus on rehabilitation as juveniles. Labeling them as youths will promote rehabilitation-motivated sentencing.

It is also likely that jurors will be more sympathetic toward the defendant if they are properly informed of the defendant's diminished culpability. It is a widely-held proposition that scientific research is significantly persuasive for juries,¹²¹ and scientific research on youths' underdeveloped brains and diminished culpability could significantly impact jury deliberation. Without being sufficiently informed of this research, jurors might not be able to appropriately consider the youthfulness of eighteen- to twenty-five-year-old offenders. *Roper*, *Graham*, and *Miller* all suggest that this sort of uninformed jury deliberation is prohibited by the Eighth Amendment.¹²²

The role of the jury is especially important to Eighth Amendment challenges in death penalty cases, because in looking at evolving standards of decency, "the jury . . . is a significant and reliable objective index of contemporary values because it is so directly involved."¹²³ Jury decisions are therefore a compelling indicator of society's acceptance of certain types of punishment for particular groups of offenders. Jury-imposed death penalty sentences are particularly reflective, because these require a case-by-case sentencing decision. This is because "[a] central feature of death penalty sentencing is a particular assessment of the circumstances of the crime and the characteristics of the offender. The system is designed to consider both aggravating and mitigating circumstances, including youth, in every case."¹²⁴ Before the categorical ban announced in *Roper*, the jury still considered youth as a mitigating factor when imposing the death penalty for eligible juveniles when that mitigation evidence was presented.¹²⁵ It was thus valid to infer that, in those cases, the jury's decision reflected their acceptance of capital

121. See, e.g., John William Strong, *Language and Logic in Expert Testimony: Limiting Expert Testimony by Restrictions of Function, Reliability, and Form*, 71 OR. L. REV. 349, 367 (1992) ("[I]t is widely agreed that propositions perceived as 'scientific' by the jury possess an unusually high degree of persuasive power."). "There is virtual unanimity among courts and commentators that evidence perceived by jurors to be 'scientific' in nature will have particularly persuasive effect." *Id.* at 367 n.91 (citing *United States v. Addison*, 498 F.2d 741, 744 (D.C. Cir. 1974)).

122. See *Miller*, 567 U.S. 460; *Graham*, 560 U.S. 48 (2010); *Roper*, 543 U.S. 551 (2005).

123. *Enmund v. Florida*, 458 U.S. 782, 794 (1982) (quoting *Coker v. Georgia*, 433 U.S. 584, 596 (1977)).

124. *Roper*, 543 U.S. at 572.

125. See Seung Oh Kang, *The Efficacy of Youth as a Mitigating Circumstance: Preservation of the Capital Defendant's Constitutional Rights Pursuant to Traditional Eighth Amendment Jurisprudence*, 28 SUFFOLK U. L. REV. 747, 748 (1994).

punishment for that particular age group. Because our current criminal procedure processes do not account for eighteen- to twenty-five-year-olds' diminished culpability, however, death penalty sentences for eighteen- to twenty-five-year-olds are inherently less reflective of contemporary values and do not properly reflect the jury's true acceptance of the death penalty for this particular age group. The *Roper* decision's categorical ban on death penalty sentences for offenders under age eighteen does not extend to those twenty-five and younger.¹²⁶ Additionally, juries are not properly informed of mitigation evidence showing neurological similarities of youth aged eighteen- to twenty-five with children under eighteen and the jury thus will not consider age or youth as a mitigating factor.

Furthermore, it is not sufficient to assume that jurors, as reflections of society's evolving standards of decency, are already considering eighteen- to twenty-five-year-olds as youths. In juvenile death penalty cases such as *Roper*, the trial judge instructs the jury to consider youth as a mitigating factor. This judicial instruction is absent in cases involving eighteen- to twenty-five-year-olds.¹²⁷ It is not the jury's responsibility to study the intricacies of complicated brain research or to understand legally-accepted mitigating factors. It is the system's duty to communicate this essential information to the jury and let them decide how the mitigating factor will impact their sentencing analysis.

By automatically treating youth aged eighteen- to twenty-five as adults, our system sends a clear message that this group has equivalent moral culpability and should be eligible for our society's harshest sentences. With scientific research changing our understanding of neurodevelopment and decision-making processes, the Supreme Court must repudiate this message by updating the definition of "youth," or else risk continued violations of the Eighth Amendment.

III. COORDINATING REFORM THROUGH THE JUDICIARY, STATE GOVERNMENTS, AND CONGRESS

The Eighth Amendment violations stemming from our system's failure to consider the youthfulness of youth aged eighteen- to twenty-five can and should be remedied by raising the upper age of

126. *Roper*, 543 U.S. at 574.

127. See, e.g., *Roper*, 543 U.S. at 558 ("During closing arguments, both the prosecutor and defense counsel addressed Simmons' age, which the trial judge had instructed the jurors they could consider as a mitigating factor.").

juvenile jurisdiction to age twenty-five. In order for this reform to be effective, courts, state governments, and Congress should implement reforms designed to work in tandem. If these efforts are unsuccessful, these violations can still be addressed by mandating adequate consideration of eighteen- to twenty-five-year-olds' diminished culpability throughout criminal proceedings.

A. Remediating the Violation by Raising the Upper Age of Juvenile Jurisdiction to Twenty-Five

1. *The Court's Role*

The Supreme Court must extend *Miller*, *Roper*, and *Graham* to offenders age twenty-five and younger to stop repeated violations of their Eighth Amendment rights. Both the Eighth Amendment and the *Miller* line of cases support this reform. Such a holding would incentivize state governments to raise the upper age of juvenile jurisdiction to twenty-five. The Court would make it clear across jurisdictions that treating eighteen- to twenty-five-year-olds as pure adults in our criminal justice system offends our Constitution, and that the Eighth Amendment requires an acknowledgment of eighteen- to twenty-five year-olds' youthfulness and lessened culpability throughout their interactions with the criminal justice system.

2. *The Role of State Governments*

As discussed above, one of the most crucial reforms to aid in protecting this class is labeling eighteen- to twenty-five-year-olds as *youth* (or even *children*, *kids*, or *emerging adults*) so that youthfulness is considered at every stage of the process. The most practical and effective way to do this is by states extending the juvenile jurisdiction majority age to twenty-five.¹²⁸ This will send an unambiguous message that those under twenty-five years old are children who are less morally culpable than their adult counterparts and will significantly lessen the risk of disproportionate punishments.

A Supreme Court holding extending the protections of the *Miller* line of cases to eighteen- to twenty-five year-olds will support this state-level reform. This doctrinal change will spark the conversa-

128. Once this change happens, states can then decide how best to effectuate the change. That may mean having a separate juvenile courtrooms, proceedings, procedures, jails and prisons for eighteen- to twenty-five-year-olds or treating them the same as younger children.

tion among state legislatures and courts, thus encouraging states to pass legislation to protect this class and try eighteen- to twenty-five-year-olds in juvenile courts. If states continued to try eighteen- to twenty-five-year-olds in adult court after this sort of Supreme Court holding, they would face practical and administrative challenges of accommodating the *Miller*, *Graham*, and *Roper* protections ad hoc to this specific group of defendants. This category of offenders would now require individualized consideration prior to receiving mandatory life without parole sentences and also would not be able to receive death penalty sentences. This patchwork of protections in adult court runs the risk of confusion, error, and mistaken sentencing, requiring additional judicial oversight to prevent Eighth Amendment violations. These practical challenges will incentivize states to automatically place eighteen- to twenty-five-year-olds into the juvenile courts to promote fairness and judicial efficiency.

To be clear, this solution will not preclude eighteen- to twenty-five-year-olds from being tried in adult court. If a state raises the majority age of juvenile jurisdiction to age twenty-five, all eighteen- to twenty-five-year-olds will then be considered a juvenile and initially charged in the juvenile court. However, the current juvenile system process will not change. A charged youth can still be transferred to adult court if the judge finds it reasonable to do so under the rules of that specific jurisdiction. Again, the Eighth Amendment violation lies in the failure to *consider age at all* for eighteen- to twenty-five-year-olds in the criminal system, which inherently leads to excessive punishments. If a youth's age and requisite maturity level are considered prior to the transfer to adult court and still taken into account throughout the process, this will avoid unwarranted and undeserved punishment.

There are potential administrability concerns with this remedy. Given that eighteen- to twenty-five-year-olds constitute a majority of criminal charges,¹²⁹ requiring individualized review for every one of them prior to transfer is bound to be a burdensome task for judges. It also generally costs more to try defendants in the juvenile system than in the criminal system.¹³⁰ However, the benefits of protecting this class from undeserved punishments far outweigh the possible costs to the system. We cannot allow repeated constitutional violations for administrative benefit.¹³¹

129. See SCOTT & STEINBERG, *supra* note 36, at 53.

130. Stamm, *supra* note 35, at 102.

131. See *Fronterio v. Richardson*, 411 U.S. 677, 684 (1973).

3. *The Congressional Role*

The states are entitled to choose the majority age of juvenile jurisdiction. Therefore, there will need to be additional incentive for states to raise the majority age to twenty-five, rather than choosing another alternative. Congress should incentivize states to adopt this new uniform majority jurisdictional age by using their spending power. Criminal law has historically been left to the states,¹³² and Congress lacks the power to impose a nationwide jurisdictional age of majority. However, Congress does have the power to incentivize states to adopt a law or provision through the Spending Clause by attaching “conditions on the receipt of federal funds.”¹³³ In *South Dakota v. Dole*, the Supreme Court upheld Congress conditioning highway funds on states setting the drinking age at twenty-one.¹³⁴ Not only was this congressional tactic constitutional, it was effective.¹³⁵ Here, Congress could condition funds for the criminal system, such as those given for courts and prisons, on setting the floor for adult jurisdiction at age twenty-five. The Record Expungement Designed to Enhance Employment Act of 2017 (REDEEM Act), recently re-introduced to the House in 2019, provides an informative example.¹³⁶ The Act incentivizes states to raise the age of adult criminal responsibility to eighteen by giving preference to state grant applications for certain funding programs to those “that have set [eighteen] or older as the age of original jurisdiction for adult criminal courts.”¹³⁷ Although this Act has not yet been passed, it shows how Congress can incentivize states to raise the jurisdictional age minimums.

Congressional incentives must pass constitutional scrutiny. Congress’ spending powers are not unlimited but instead are subject to restrictions set forth in *Dole*.¹³⁸ These restrictions require conditional spending measures to be in pursuit of the general welfare, unambiguous as to the funding’s conditions, conditioned by matters related to the national concern, not coercive, and not barred by any other Constitutional provision.¹³⁹ Using the Spending Power

132. See *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995) (“Under our federal system, the ‘States possess primary authority for defining and enforcing the criminal law.’” (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993))).

133. *South Dakota v. Dole*, 483 U.S. 203, 206 (1987).

134. *Id.*

135. *Id.* at 211.

136. REDEEM Act, H.R. 2410, 116th Cong. (2019).

137. See Press Release, House Committee on the Judiciary, Cummings, Nadler, Bass, and Booker Reintroduce the REDEEM Act (Apr. 30, 2019), <https://www.booker.senate.gov/?p=general&id=33>.

138. *Dole*, 483 U.S. 203.

139. *Id.* at 203.

to incentivize states to increase the age of juvenile jurisdiction satisfies each of these requirements.

First, protecting eighteen- to twenty-five-year-olds in the criminal justice system is unquestionably in pursuit of the general welfare. In determining whether a congressional spending measure is “in pursuit of the general welfare,” reviewing courts only need to find that the legislation is “reasonably calculated to advance the general welfare.”¹⁴⁰ Courts defer substantially to Congress’ judgment in answering this question.¹⁴¹ As set forth in Parts I and II of this Note, subjecting eighteen- to twenty-five-year-olds to excessive punishments is morally and constitutionally problematic. If Congress finds that incentivizing the states to protect this class will reduce recidivism, keep children from a life of crime, improve economic output, save money by driving down incarceration rates, and make our communities safer—all of which would clearly advance the general welfare—then the courts should defer to that judgment.

Second, the unambiguous requirement can be addressed at the drafting stage. Congress must simply write the statute to ensure states know the consequences of their participation in the funding plan, or lack thereof.¹⁴²

Third, the requirement that the spending’s “condition” be directly related to a national concern is easily satisfied. The condition here is prohibiting excessive punishments for youthful offenders in violation of the Eighth Amendment. This condition will ensure youth are protected from unwarranted criminal punishments by placing them in the correct court system—the juvenile system that focuses on rehabilitation rather than punishment.

Fourth, Congress can meet the “coercion” prong by limiting the amount of funds withheld from states who do not adopt the condition. The withholding amount must be small enough to constitute a “mild encouragement,” rather than being so excessive that “pressure turns into compulsion.”¹⁴³

Lastly, states adopting twenty-five as the floor for adult jurisdiction meets the “unexceptional proposition” in third prong as it does not independently violate any constitutional rights.¹⁴⁴

140. *Id.* at 208.

141. *Id.* at 207.

142. *Id.* at 203.

143. *Id.* at 211 (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937)).

144. *South Dakota v. Dole*, 483 U.S. 203, 210 (1987) (“[T]he [third prong] . . . stands for the unexceptionable proposition that the [spending] power may not be used to induce the States to engage in activities that would themselves be unconstitutional.”).

B. Remedying the Violation by Considering Age Throughout the Criminal Process

If states do not increase their age of majority to twenty-five, alternative safeguards will be necessary to protect against excessive punishments. At the bare minimum, age needs to be a considered factor for eighteen- to twenty-five-year-olds throughout their time with the adult criminal justice system to avoid Eighth Amendment violations. This will be more of a practical shift than a doctrinal one. State judicial systems will need to expand their definition of “youth” to include those twenty-five and younger, and defendants under twenty-five should receive enhanced protections throughout their criminal proceedings, from bail to sentencing.¹⁴⁵ District attorneys would be required to consider these defendants’ youthfulness in all prosecutorial decisions, and defense attorneys could use it to advocate for their client. Even if states do extend the majority age of jurisdiction to twenty-five, this proposed reform should still apply if juveniles are transferred to adult court.

Additionally, every criminal justice professional involved in juvenile cases should be required to complete trainings on the differences between juveniles and adults, with up-to-date scientific research explaining how the human brain begins to reach adult maturity at age twenty-five. Throughout these trainings, eighteen- to twenty-five-year-olds should be labeled as “youths” and participants should be instructed to treat them as juveniles throughout their interactions with the criminal justice system accordingly. It should be made unmistakably clear that these individuals’ brains are still developing, which contributes to reduced culpability. Defense attorneys should be informed that their client’s youth may make them distrustful or uncooperative, and that he or she will need to put in more work to gain his or her client’s trust.

Police officers should take age into account when conducting interrogations, and must understand that youths are more vulnerable to pressure and may produce false confessions. The judiciary should also take account of age and corresponding immaturity level at every stage of the criminal justice process, including pleas, bail, and sentencing. Age should also be taken into account when reviewing the interrogations, similar to the standard set forth in *JDB v. California*.¹⁴⁶ Judges should be sure to label eighteen- to

145. See Cynthia Soohoo, *You Have the Right to Remain a Child: The Right to Juvenile Treatment for Youth in Conflict with the Law*, 48 COLUM. HUM. RTS. L. REV. 1, 15 (2017) (explaining that other countries outside the United States “provide youth with enhanced protections in the adult system that take their age into account”).

146. *J.D.B. v. North Carolina*, 564 U.S. 261, 273 (U.S. 2011).

twenty-five-year-olds as youths in opinions, sending the message to society that this is a less culpable group of individuals. Age and developmental maturity should be thoroughly considered prior to handing out a sentence and should be an explicit, required consideration in sentencing guidelines. Prior to sentencing, juries should have access to the neurological research and receive a clear instruction to consider said research during the trial stage. Juries should be instructed to consider youthfulness as a mitigating factor for sentencing purposes. Taken together, these efforts to include eighteen- to twenty-five-year-olds as youths, and not adults, will afford them appropriate treatment throughout the criminal justice process and will protect against excessive punishments, thus avoiding Eighth Amendment violations.

CONCLUSION

Defendants between ages eighteen- to twenty-five are inadequately protected in the criminal justice system. By automatically treating this class as “adults,” despite the fact that research suggests the contrary, these individuals are vulnerable to excessive punishments in violation of their Eighth Amendment rights. This Note advocates for three remedies, which ideally would be implemented together, to protect against cruel and unusual punishments for eighteen- to twenty-five-year-olds. First, the Supreme Court must extend the holdings of *Miller*, *Roper*, and *Graham* to offenders below age twenty-five. Second, every state should increase their upper age of juvenile jurisdiction to twenty-five. Third, Congress should use their spending power to incentivize states to increase their upper age of juvenile jurisdiction to twenty-five. If states do not implement these reforms, or even if they do, systemic safeguards should be implemented at every stage in the criminal process to ensure age is a considered factor.