NOTE

LIFE OR DEATH: EMPLOYING STATE CONSTITUTIONAL PRINCIPLES OF PROPORTIONALITY TO COMBAT THE EXTREME SENTENCING OF EMERGING ADULTS

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The U.S. Supreme Court has repeatedly held that, when facing criminal punishment, juvenile offenders must be treated differently from adults. Because those under the age of eighteen lack maturity, have heightened vulnerability to external influence, and possess a unique capacity for rehabilitation, the imposition of extreme sentences—including the death penalty, mandatory life without parole, and discretionary life without parole for non-homicide offenses—is disproportionate and unconstitutional under the Eighth Amendment.

Emerging neuroscientific research strongly indicates that the immaturity, impressionability, and corrigibility of juveniles are also characteristics of emerging adults, defined here as individuals ages eighteen through twenty. Courts, however, have consistently resisted extending Federal Eighth Amendment protections to this demographic. This Note therefore proposes challenging the extreme sentencing of emerging adults under state, instead of federal, constitutional law. All fifty states prohibit cruel and/or unusual punishment, or its equivalent, in their state constitution. Further, recent litigation in Washington and Illinois demonstrates how successful challenges to disproportionate emerging-adult sentencing under state constitutional law can be achieved. This Note advocates that litigants launch facial challenges, in particular, under state constitutional provisions as a desirable mechanism for change.

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INTRODUCTION

In 2015, Jonas David Nelson was convicted of first-degree murder for the premeditated shooting of his father.[1] On the day of the offense, Mr. Nelson was eighteen years and one week old.[2] He was subsequently sentenced to a mandatory term of life imprisonment without the possibility of parole, in accordance with Minnesota law.[3] Despite the fact that the record was "replete with evidence of [Mr.] Nelson's cognitive and

[1] Nelson v. State, 947 N.W.2d 31, 33 (Minn. 2020), *cert. denied*, 141 S. Ct. 2518 (2021).
[2] Id.
[3] Id. at 34.

social delays and years of psychological and emotional abuse,"[4] the Minnesota Supreme Court upheld his mandatory-life-without-parole sentence on both direct appeal and upon request for postconviction relief.[5] As powerfully noted by Justice Chutich in dissent, Mr. Nelson was given "the functional equivalent of a death sentence, without any consideration of him, his personality, his upbringing, or his psychological attributes, solely because the offense occurred seven days after his eighteenth birthday."[6]

The U.S. Supreme Court has repeatedly held that, when facing criminal punishment, juvenile offenders—i.e., those under the age of eighteen—must be treated differently from adults.[7] Juveniles lack maturity, have heightened vulnerability to external influence, and possess a unique capacity for rehabilitation.[8] Given this reality, the imposition of extreme sentences—including the death penalty, mandatory life without parole ("LWOP"), and discretionary LWOP for non-homicide offenses—on juveniles in criminal court is disproportionate and unconstitutional under the Eighth Amendment.[9] But these constitutional protections cease to exist the day one turns eighteen. Despite referring to Mr. Nelson's case as "extremely tragic," the Minnesota Supreme Court felt bound to follow U.S. Supreme Court precedent that "clearly limited [Eighth Amendment protection] to juvenile offenders *under* the age of 18 at the time of the offense."[10] Had Mr. Nelson been eight days younger, the mandatory LWOP sentence that he received would have been unconstitutional as applied to him.

Emerging neuroscientific research, however, strongly indicates that the hallmark characteristics of youth—immaturity, impressionability, and corrigibility—are present in individuals older than eighteen, too.[11] Cognitive development continues well into a young person's twenties,

[4] Id. at 40.

[5] Id. at 34, 40.

[6] Id. at 41 (Chutich, J., dissenting).

[7] See, e.g., Roper v. Simmons, 543 U.S. 551, 572 (2005) (describing the "differences between juvenile and adult offenders" as "marked and well understood" and thus holding unconstitutional the imposition of the death penalty on juvenile offenders).

[8] See infra Part I.

[9] The Supreme Court has held that sentencing a juvenile to death, *Roper*, 543 U.S. at 574–75, as well as imposing discretionary LWOP for non-homicide offenses, Graham v. Florida, 560 U.S. 48, 82 (2010), and mandatory LWOP for any offense, Miller v. Alabama, 567 U.S. 460, 479 (2012), violates the Eighth Amendment to the U.S. Constitution.

[10] *Nelson*, 947 N.W.2d at 40 (emphasis added).

[11] See infra Subsection II.B.1.

and society recognizes the relative immaturity of this demographic through prohibitions on activities such as drinking and firearm possession.[12] As a consequence, the proportionality considerations relevant for those under eighteen are arguably as compelling for "emerging adults"—defined here as those ages eighteen, nineteen, and twenty—as they are for juveniles. Despite this reality, emerging adults have not been granted protection against the harshest of criminal sentences under the Federal Constitution, and claims of disproportionality under the Eighth Amendment have been universally quashed.[13] Given the current composition of the Supreme Court, seeking federal constitutional protection against disproportionately harsh sentences for emerging adults seems futile.[14] The more effective realm for such advocacy, this Note posits, is in the states.

This Note proposes that advocates redirect focus and challenge the extreme sentencing of emerging adults as disproportionate under state, instead of federal, constitutional law. All fifty states prohibit cruel and/or unusual punishment, or its equivalent, in their state constitutions.[15] Further, many have interpreted these clauses to be broader and more protective than the Federal Eighth Amendment.[16] Attention should therefore be directed toward challenging extreme sentences for emerging adults under these provisions.

Recent litigation in Washington and Illinois illustrates how this can be achieved. In 2021, the Washington Supreme Court held that imposing mandatory-LWOP sentences on those ages eighteen through twenty violates the state's constitutional provision against cruel punishment.[17] Over the last few years, Illinois state courts have also struck down the harshest criminal sentences as applied to emerging adults, holding that they violate the state constitution's proportionate penalties clause.[18]

[12] See Elizabeth S. Scott, Richard J. Bonnie & Laurence Steinberg, Young Adulthood as a Transitional Legal Category: Science, Social Change, and Justice Policy, 85 Fordham L. Rev. 641, 645 (2016); Karen U. Lindell & Katrina L. Goodjoint, Juv. L. Ctr., Rethinking Justice for Emerging Adults: Spotlight on the Great Lakes Region 11–12 (2020), https://jlc.org/sites/default/files/attachments/2020-09/JLC-Emerging-Adults-9-2.pdf [https://perma.cc/U8GG-PBR9].

[13] See infra Part III.

[14] See infra Part III.

[15] See infra Section IV.A.

[16] See infra Section IV.A.

[17] See infra Section IV.B.

[18] See infra Section IV.C.

Challenging emerging-adult sentencing in these ways is a promising strategy for future advocacy efforts across the country.

The contributions of this Note are threefold. First, while theories about emerging adulthood have existed for two decades, they have only recently been argued in court.[19] This Note comprehensively surveys recent cases from both state and federal courts and synthesizes the arguments that have—and have not—been successful, a notable contribution to the literature. Second, academics and scholars have advocated generally for the consideration of proportionality in sentencing[20] and explored how state constitutional provisions could be utilized to further such aims.[21] However, none have applied these principles to the extreme sentencing of emerging adults, and this Note will be the first to advocate for such a path forward nationwide. Finally, the power of state constitutional law is significantly underappreciated in academic literature,[22] despite the fact that it has profound and direct impact on those prosecuted in state courts across the nation. This Note contributes to the academic conversation by explaining how state constitutional law can be used as a powerful tool to inspire positive, tangible change, helping advocates structure their thinking and supplying them with arguments for state court practice.

This argument proceeds in five Parts. Part I considers proportionality as a philosophical concept, documenting its use in federal constitutional law to date, and reviews the Supreme Court's Eighth Amendment jurisprudence as it relates to juveniles. Part II explains why the Supreme Court has remained faithful to the age of eighteen as a cutoff for constitutional protection against extreme sentencing but challenges the justifications provided by the Court in light of modern developments in neuroscience and social science. Part III surveys the failed efforts to gain federal constitutional protection for emerging adults, and Part IV explains

[19] See Jeffrey J. Arnett, Emerging Adulthood: A Theory of Development from the Late Teens Through the Twenties, 55 Am. Psych. 469, 469 (2000).

[20] See, e.g., Jim Staihar, Proportionality and Punishment, 100 Iowa L. Rev. 1209, 1222–23 (2015) (arguing that those who commit more serious crimes deserve more severe punishments).

[21] See, e.g., Gregory S. Schneider, Sentencing Proportionality in the States, 54 Ariz. L. Rev. 241, 273–74 (2012) (discussing how state judiciaries could engage in proportionality review under state constitutional law).

[22] See Gary S. Gildin & Jamison E. Colburn, Introduction: State Constitutionalism in the 21st Century, 115 Pa. St. L. Rev. 779, 781 (2011) ("State constitutional law is a vibrant, albeit still underappreciated, area of legal study."); Richard S. Frase, Limiting Excessive Prison Sentences Under Federal and State Constitutions, 11 U. Pa. J. Const. L. 39, 64 (2008) (encouraging "litigators, courts, and scholars to be less 'Fed-centric'").

why the most effective route forward for emerging adult justice will instead be under state constitutional law, highlighting Washington and Illinois as case studies of success. Part V recommends that litigants seek facial, as opposed to as-applied, protection of emerging adults and addresses counterarguments to that proposal.

I. PROPORTIONALITY AND SUPREME COURT PRECEDENT

Proportionality, as a philosophical concept, underlies systems of criminal punishment and justice.[23] When individuals engage in deviant behavior, penalties are imposed to accomplish both utilitarian goals (denunciation, deterrence, incapacitation, and rehabilitation) as well as nonutilitarian goals (retribution and uniformity in sentencing).[24] Proportionality counterbalances punishment-oriented values by requiring that, the more substantial the harm imposed by the government on an individual through punishment, the more blameworthy the offender ought to have been in order to justify the harm.[25] Such a maxim underlies ancient rules of law, including the Code of Hammurabi and the Mosaic Codes of the Old Testament,[26] as well as systems of law across the globe today.[27]

[23] See Vicki C. Jackson, Constitutional Law in an Age of Proportionality, 124 Yale L.J. 3094, 3096 (2015).

[24] Richard S. Frase, Punishment Purposes, 58 Stan. L. Rev. 67, 70, 73–74 (2005); Kent Greenawalt, Punishment, *in* Encyclopedia of Crime & Justice 1282, 1284–87 (Joshua Dressler ed., 2d ed. 2002).

[25] Frase, supra note 24, at 68 ("[S]anctions should be scaled in proportion to each offender's blameworthiness . . . ."). There is a fascinating body of literature on the philosophical justifications underpinning proportionality. According to Professor Frase, proportionality is relevant under three philosophical models: (1) Retributive (or just deserts) theories, (2) utilitarian ends-benefits analyses (á la Cesare Beccaria or Jeremy Bentham), and (3) consequentialist alternative-means theories ("[A]mong equally effective means to achieve a given end, those that are less costly or burdensome should be preferred."). Frase, supra note 22, at 40–46.

[26] See Thomas A. Balmer, Some Thoughts on Proportionality, 87 Or. L. Rev. 783, 784 (2008).

[27] Moshe Cohen-Eliya & Iddo Porat, The Hidden Foreign Law Debate in *Heller*: The Proportionality Approach in American Constitutional Law, 46 San Diego L. Rev. 367, 369 (2009) ("The tremendous influence and importance of the doctrine of proportionality in European constitutional law, as well as many other constitutional systems, cannot be overstated."); Francis G. Jacobs, Foreword *to* Nicholas Emiliou, The Principle of Proportionality in European Law: A Comparative Study, at xi, xi (1996) (discussing the principle of proportionality as "a cardinal principle of German public law, . . . firmly established in French law and, perhaps remarkably, . . . frequently invoked even in English courts").

Though the United States is not renowned for its integration of proportionality principles in criminal sentencing,[28] the Supreme Court has, in some instances, invoked the Cruel and Unusual Punishments Clause of the Eighth Amendment to hold that a sentence is disproportionate to the culpability of the offender and therefore unconstitutional.[29] As the Framers did not delineate what does and does not constitute such excessive punishment, judges are left responsible for making proportionality determinations based on the "evolving standards of decency that mark the progress of a maturing society."[30] As early as 1910, the Court concluded that *cadena temporal* (a punishment involving hard labor for at least twelve years and a day, loss of civil rights, and lifetime surveillance) was a disproportionate and therefore cruel and unusual form of penalty under the Eighth Amendment when the individual had been convicted of falsifying a public document.[31] In 1982, the Court held the imposition of capital punishment on a defendant was disproportionate when the trial court had not inquired into the individual's intent to kill.[32] One year later, the Court affirmed "as a matter of principle that a criminal sentence must be proportionate to the crime for which the defendant has been convicted," a principle which was violated when a nonviolent offender engaging in "relatively minor criminal conduct" was sentenced to LWOP.[33] In a 1991 case involving a Michigan statute mandating LWOP for possession of drugs, a majority of the Court

[28] See Jackson, supra note 23, at 3096 ("The United States is often viewed as an outlier in this transnational embrace of proportionality in constitutional law.").

[29] The Eighth Amendment reads: "Excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted*." U.S. Const. amend. VIII (emphasis added). See generally John F. Stinneford, Rethinking Proportionality Under the Cruel and Unusual Punishments Clause, 97 Va. L. Rev. 899, 961 (2011) ("The Supreme Court's decision to engage in proportionality review under the Cruel and Unusual Punishments Clause is well-founded as a textual and historical matter."); Kathi A. Drew & R.K. Weaver, Disproportionate or Excessive Punishments: Is There a Method for Successful Constitutional Challenges?, 2 Tex. Wesleyan L. Rev. 1, 4–19 (1995) (exploring the Supreme Court's invocation of proportionality throughout the twentieth century).

[30] Thompson v. Oklahoma, 487 U.S. 815, 821 (1988) (plurality opinion) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion) (Warren, C.J.)).

[31] Weems v. United States, 217 U.S. 349, 350–51, 364 (1910); see also id. at 366–67 ("Such penalties for such offenses amaze those who have formed their conception of the relation of a state to even its offending citizens . . . [on] a precept of justice that punishment for crime should be graduated and proportioned to offense.").

[32] Enmund v. Florida, 458 U.S. 782, 796 (1982).

[33] Solem v. Helm, 463 U.S. 277, 279, 290, 303 (1983); see also id. at 286 ("The constitutional principle of proportionality has been recognized explicitly in this Court for almost a century.").

acknowledged that there is a proportionality component to the Eighth Amendment.[34] And, as recently as 2002, the Court concluded that the execution of individuals with intellectual disabilities constituted disproportionate, and therefore cruel and unusual, punishment under the Eight Amendment, given the offenders' lessened culpability.[35]

Nowhere is the Court's commitment to proportionality clearer than in the context of juvenile sentencing. Since the turn of the century, the Court has repeatedly held that certain forms of extreme punishment—specifically the death penalty,[36] mandatory LWOP,[37] and discretionary LWOP for non-homicide offenses[38]—are disproportionate when imposed on those under the age of eighteen. Per the Court, since "[t]he concept of proportionality is central to the Eighth Amendment,"[39] and since "children are constitutionally different from adults for purposes of

[34] Harmelin v. Michigan, 501 U.S. 957, 961 n.1 (1991). Justice Scalia (author of the majority opinion) and Chief Justice Rehnquist expressly disavowed proportional punishment as a right guaranteed under the Eighth Amendment. See id. at 985 ("[T]hose who framed and approved the Federal Constitution chose, for whatever reason, not to include within it the guarantee against disproportionate sentences . . . ."). However, the remaining seven Justices declared proportionality to be an underlying right guaranteed by the Eighth Amendment. See id. at 996 (Kennedy, J., concurring in part) ("[*S*]*tare decisis* counsels our adherence to the narrow proportionality principle that has existed in our Eighth Amendment jurisprudence for 80 years."); id. at 1009 (White, J., dissenting) (finding it "[not] unreasonable to conclude that it would be both cruel and unusual to punish overtime parking by life imprisonment or, more generally, to impose any punishment that is grossly disproportionate to the offense for which the defendant has been convicted" (citations omitted)); id. at 1027 (Marshall, J., dissenting) ("[T]he Eighth Amendment requires comparative proportionality review of capital sentences."); id. at 1029 (Stevens, J., dissenting) ("[T]he notion that this sentence satisfies any meaningful requirement of proportionality is itself both cruel and unusual."); see also Note, The Eighth Amendment, Proportionality, and the Changing Meaning of "Punishments", 122 Harv. L. Rev. 960, 981 (2009) ("If the Framers said nothing about proportionality in incarceration, [it] does not necessarily mean that allowing unfettered discretion in setting prison sentences would comport with original intent.").

[35] Atkins v. Virginia, 536 U.S. 304, 318, 320–21 (2002) (confirming that people with intellectual disabilities exhibit "subaverage intellectual functioning, . . . significant limitations in adaptive skills such as communication, self-care, and self-direction . . . [and] diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others" and are thus less blameworthy for their participation in criminal activity).

[36] Roper v. Simmons, 543 U.S. 551, 568 (2005).

[37] Miller v. Alabama, 567 U.S. 460, 479 (2012); see also Montgomery v. Louisiana, 577 U.S. 190, 212 (2016) (finding *Miller*'s guarantee to be a substantive rule of law and thus retroactive in its application).

[38] Graham v. Florida, 560 U.S. 48, 74 (2010).

[39] Id. at 59.

sentencing,"[40] imposing the harshest punishments on them violates the Federal Constitution's prohibition of cruel and unusual punishment.

The Court's assertion that children are different rests on three main justifications. First, as is confirmed by both scientific study and common-sense intuition, juveniles lack the psychological development of adults and are therefore more likely to engage in reckless or risk-seeking activities.[41] Early Courts reasoned that this behavior was the product of a lack of maturity.[42] Later Courts articulated more explicitly that this irresponsibility is not only the product of rash juvenile decision making, but also natural human development; juvenile brains are physically underdeveloped at this phase of life, and young people are therefore neurologically incapable of making reasoned and rational decisions like their adult counterparts.[43]

Second, young people tend to be more susceptible to peer pressure and other negative stimuli than adults.[44] Juveniles are uniquely vulnerable to their surroundings but lack the control to meaningfully change them; as a consequence, they are particularly at risk of succumbing to negative influences.[45]

[40] *Miller*, 567 U.S. at 471.

[41] *Roper*, 543 U.S. at 569 (quoting Jeffrey Arnett, Reckless Behavior in Adolescence: A Developmental Perspective, 12 Developmental Rev. 339, 339 (1992)).

[42] Id. ("A lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young." (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993))).

[43] *Graham*, 560 U.S. at 68 ("[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds.") (first citing Brief from the American Medical Association and the American Academy of Child and Adolescent Psychiatry as Amici Curiae in Support of Neither Party at 16–24, Graham v. Florida, 560 U.S. 48 (2010) (Nos. 08-7412, 08-7621); and then citing Brief from the American Psychological Association, American Psychiatric Association, National Association of Social Workers, and Mental Health America as Amici Curiae Supporting Petitioners at 22–27, *Graham*, 560 U.S. 48 (Nos. 08-7412, 08-7621)); *Miller*, 567 U.S. at 472 n.5 (first citing Brief for the American Psychological Association, American Psychiatric Association, and National Association of Social Workers as Amici Curiae Supporting Petitioners at 3–4, *Miller*, 567 U.S. 460 (Nos. 10-9646, 10-9647); and then citing Brief of J. Lawrence Aber et al. Supporting Petitioners at 12–28, *Miller*, 567 U.S. 460 (Nos. 10-9646, 10-9647)).

[44] *Roper*, 543 U.S. at 569; see also Eddings v. Oklahoma, 455 U.S. 104, 115 (1982) ("[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage.").

[45] *Roper*, 543 U.S. at 570; *Miller*, 567 U.S. at 477 (underscoring juveniles' vulnerability to "the family and home environment that surrounds [them]—and from which [they] cannot usually extricate [themselves]—no matter how brutal or dysfunctional").

And third, juveniles' characters are "not as well formed," and this demographic is therefore far "more capable of change" and rehabilitation than adults.[46] The Court, in fact, thought it "rare" that any juvenile's offense "reflects irreparable corruption,"[47] and as a result, concluded that extreme sentences such as the death penalty are "disproportionate punishment for [all juvenile] offenders."[48] In recognition of these mitigating factors, the Court has conclusively and repeatedly held that youth under age eighteen exhibit diminished culpability when compared to adults.[49]

Under proportional sentencing principles, an offender's blameworthiness must be weighed against the relative severity of their crime in order to determine an appropriate punishment.[50] The Eighth Amendment applies "with special force" to the most severe punishments, and juveniles as a class comprise some of the most vulnerable and least culpable offenders.[51] Thus, according to the Supreme Court, the Constitution requires that they are categorically excluded from receiving certain extreme sentences, as the "penological justifications" underpinning those sentences (particularly retribution and deterrence) apply to those under age eighteen "with lesser force than to adults."[52] Further, since the differences between youth and adults are stark and well-

[46] *Graham*, 560 U.S. at 68; *Roper*, 543 U.S. at 570 ("Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood." (quoting Laurence Steinberg & Elizabeth S. Scott, Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 Am. Psych. 1009, 1014 (2003))); *Miller*, 567 U.S. at 473.

[47] *Roper*, 543 U.S. at 573.

[48] Id. at 575.

[49] Montgomery v. Louisiana, 577 U.S. 190, 206–07 (2016) ("*Miller* took as its starting premise the principle established in *Roper* and *Graham* that 'children are constitutionally different from adults for purposes of sentencing' [and] [t]hese differences result from children's 'diminished culpability and greater prospects for reform.'" (quoting *Miller*, 567 U.S., at 471)).

[50] See discussion supra notes 23–27; see also *Graham*, 560 U.S. at 67 ("The judicial exercise of independent judgment requires consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question.").

[51] *Roper*, 543 U.S. at 568–69.

[52] Id. at 571–72. The Court in *Roper* was specifically discussing the imposition of the death penalty; however, subsequent courts have applied this reasoning to other extreme sentences. See supra notes 36–40.

understood, to not draw a categorical line would "risk allowing a youthful person to receive the death penalty despite insufficient culpability."[53]

II. THE IMPORTANCE OF EIGHTEEN

In each of the aforementioned "youth are different" cases, the Supreme Court restricted its analysis to consider only youth under age eighteen. According to the Court, biological and social markers of maturity—as well as practical necessity—compelled this result.[54] However, recent developments in neuroscience and sociology have confirmed that the scientific and sociological indicators of youth that the Court found relevant to juveniles are, in fact, applicable to young adults ages eighteen and older, too.[55] As a consequence, this Note argues that emerging adults—defined as individuals ages eighteen through twenty—should receive equal protection against extreme sentences including death, mandatory LWOP, and discretionary LWOP for non-homicide offenses.

A. The Supreme Court and "Age of Majority"

The Court's selection of eighteen as the age separating juveniles from adults is due, in part, to the biological significance of youth. As described above, the Court has underscored that juveniles are particularly immature and impressionable, yet corrigible enough to achieve reform.[56] In support of this finding, the Court in *Roper v. Simmons* highlighted how psychiatrists could not diagnose those under eighteen with antisocial personality disorder, since for some, characteristics of this disorder are present in youth yet do not persist into adulthood: "If trained psychiatrists with the advantage of clinical testing and observation refrain, despite diagnostic expertise, from assessing any juvenile under 18 as having antisocial personality disorder, we conclude that States should refrain from asking jurors to issue a far graver condemnation—that a juvenile offender merits the death penalty."[57] The Court in *Graham v. Florida* similarly emphasized that "parts of the brain involved in behavior control

[53] *Roper*, 543 U.S. at 572–73. The court evinced a particular fear that the gruesome nature of some juvenile crime would persuade a jury to sentence the offender to death despite known mitigating characteristics. Id. at 573.

[54] See infra Section II.A.

[55] See infra Section II.B.

[56] See supra Part I.

[57] *Roper*, 543 U.S. at 573 (citing Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 701–06 (4th ed. 2000)).

continue to mature through late adolescence."[58] And the Court in *Miller v. Alabama* agreed, positing that "the science and social science supporting *Roper*'s and *Graham*'s conclusions have become even stronger."[59]

But in addition to its biological relevance, the Court also found the age of eighteen to have social and legal significance. Those under eighteen cannot vote, cannot serve on juries, and cannot marry without parental consent.[60] In short, eighteen is "where society draws the line for many purposes between childhood and adulthood."[61] And, at its own admittance, the Supreme Court simply had to draw the line somewhere. "The qualities that distinguish juveniles from adults do not disappear when an individual turns 18," acknowledged the Court in *Roper*.[62] Nevertheless, "a line must be drawn."[63]

B. New Understandings of Emerging Adulthood

Despite the Supreme Court's findings, academics and activists have argued forcefully in recent years that these stated justifications apply with equal merit to individuals beyond the age of majority, reaching those in their mid-twenties. A growing body of literature documents the ways in which those ages eighteen and above possess neurological, social, and legal characteristics that more closely resemble those of juveniles than of adults. In recognition of this reality, some advocate for extending categorical constitutional protection against extreme sentences to emerging adults.

1. Psychological and Neurological Evidence

The most important developments in academic thought on this subject have involved the psychology and neurology of emerging adulthood. Described as the "asynchronous nature of psychological maturation," development happens more quickly in young people's cognitive abilities

[58] 560 U.S. 48, 68 (2010).
[59] 567 U.S. 460, 472 n.5 (2012).
[60] *Roper*, 543 U.S. at 569; see also U.S. Const. amend. XXVI, § 1 ("The right of citizens . . . eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.").
[61] *Roper*, 543 U.S. at 574.
[62] Id.
[63] Id.

than in their psychosocial functioning.[64] Therefore, while emerging adults exhibit similar functioning to adults when completing purely cognitive tasks under neutral emotional conditions,[65] they exhibit diminished cognitive control and increased impulsivity characteristic of teenagers in situations of negative emotional arousal.[66] In other words, while emerging adults are able to engage in reasoned judgment while calm ("cold cognition"), they are not when stimulated ("hot cognition").[67] As a consequence, individuals in their early twenties exhibit difficulty with self-restraint and control in ways similar to their juvenile counterparts.[68] This is particularly true when emerging adults are around their peers.[69] Studies show the mere presence of peers—even if those individuals are anonymous[70]—prompts emerging adults to engage in more risk-taking activity than they would if they were alone, a phenomenon not prevalent in adults.[71]

[64] Laurence 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. Psych. 583, 592–93 (2009).

[65] Elizabeth Cauffman, Adam Fine, Alissa Mahler & Cortney Simmons, How Developmental Science Influences Juvenile Justice Reform, 8 U.C. Irvine L. Rev. 21, 23 (2018) (citing Daniel P. Keating, Cognitive and Brain Development, *in* Handbook of Adolescent Psychology 45–84 (Richard M. Lerner & Laurence Steinberg eds., 2d ed. 2004)).

[66] Alexandra O. Cohen et al., When is an Adolescent an Adult?: Assessing Cognitive Control in Emotional and Nonemotional Contexts, 27 Psych. Sci. 549, 559–60 (2016).

[67] Laurence Steinberg, Cognitive and Affective Development in Adolescence, 9 Trends Cognitive Sci. 70, 72–73 (2005).

[68] Marc D. Rudolph et al., At Risk of Being Risky: The Relationship Between "Brain Age" Under Emotional States and Risk Preference, 24 Developmental Cognitive Neuroscience 93, 102 (2017) ("[I]ndividuals in the young adult period (i.e., ages 18–21) [are] at the greatest risk to be risky." (emphasis omitted)); Kathryn L. Modecki, Addressing Gaps in the Maturity of Judgment Literature: Age Differences and Delinquency, 32 Law & Hum. Behav. 78, 89 (2008) (finding that "emotional temperance may continue to improve through the mid to late twenties"); Laurence Steinberg & Elizabeth Cauffman, Maturity of Judgment in Adolescence: Psychosocial Factors in Adolescent Decision Making, 20 Law & Hum. Behav. 249, 260 (1996) (describing how impulsivity increases between middle adolescence and early adulthood and declines thereafter).

[69] Scott et al., supra note 12, at 649; Vivian E. Hamilton, Immature Citizens and the State, 2010 B.Y.U. L. Rev. 1055, 1115.

[70] Alexander Weigard, Jason Chein, Dustin Albert, Ashley Smith, & Laurence Steinberg, Effects of Anonymous Peer Observation on Adolescents' Preference for Immediate Rewards, 17 Developmental Sci. 71, 71 (2013).

[71] Margo Gardner & Laurence Steinberg, Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood: An Experimental Study, 41 Developmental Psych. 625, 625 (2005) ("[P]eer effects on risk taking and risky decision making were stronger among adolescents [ages thirteen to sixteen] and youths [ages eighteen to twenty-two] than adults.").

These findings accord with emerging neurological research, which has found that relevant forms of brain development continue past the age of eighteen. The prefrontal cortex, which is responsible for risk control, does not fully develop until a young person reaches their mid-twenties.[72] Similarly, myelinated white matter in brains increases while grey matter decreases throughout emerging adulthood, a phenomenon associated with maturation.[73] Scholars have found that emerging adults' decreased self-control, in particular, is the product of insufficient neuro-connectivity between the prefrontal cortex and other brain regions responsible for responding to stimuli; this phase of development is not complete until one reaches their mid-twenties.[74] Thus, neuroscience explains why the characteristic immaturity, impressionability, and corrigibility of juveniles—as acknowledged by the Supreme Court—is similarly represented in emerging adults.

2. Sociological Support

Sociological research further confirms the similarities between juveniles and emerging adults. Contrary to the Supreme Court's findings, emerging adults engage in risk-taking activities—including criminal activity—at notably higher rates than older adults and at rates more similar to those of juveniles.[75] Sociologists find that emerging adults struggle "to evaluate the consequences of different courses of action before making a decision to act" and therefore engage in poor decision making.[76] As a result, emerging adults engage in specific forms of hazardous conduct—such as unprotected sex, substance use, and dangerous driving—at rates higher than any other age group, including juveniles.[77] This is corroborated by data showing that emerging adults are disproportionately represented in all stages of the criminal legal process,

[72] Melissa S. Caulum, Postadolescent Brain Development: A Disconnect Between Neuroscience, Emerging Adults, and the Corrections System, 2007 Wis. L. Rev. 729, 743.

[73] Catherine Lebel & Christian Beaulieu, Longitudinal Development of Human Brain Wiring Continues from Childhood into Adulthood, 31 J. Neuroscience 10937, 10943 (2011).

[74] Laurence Steinberg, A Social Neuroscience Perspective on Adolescent Risk-Taking, 28 Developmental Rev. 78, 94–95 (2008); Nico U.F. Dosenbach et al., Prediction of Individual Brain Maturity Using fMRI, 329 Sci. 1358, 1359–60 (2010).

[75] Scott et al., supra note 12, at 645.

[76] David Prior et al., Maturity, Young Adults, and Criminal Justice: A Literature Review 10–11 (2011).

[77] Arnett, supra note 19, at 474–75.

from arrest to correctional placement.[78] And, as highlighted by social-learning-theory research, emerging adults more frequently engage in these antisocial behaviors when in the presence of similarly-inclined peers.[79]

Juveniles and emerging adults also resemble one another in their capacity for rehabilitation. According to a study conducted by the National Institute of Justice, "many young people who offend at ages 18–20 . . . would have been likely to desist naturally in the next few years" had they not come in contact with the criminal justice system.[80] "[W]ith respect to their offending, maturation and life circumstances," the study noted, emerging adults "are more similar to juveniles than to adults."[81] This is confirmed by research showing that rates of offending for both juveniles and emerging adults drop precipitously as factors related to youth—including exposure to antisocial peers, peer pressure, life strain,

[78] Ctr. for Crim. Just. Rsch., Pol'y & Prac., Loy. Univ. Chi., Emerging Adults and the Criminal Justice System: Specialized Policies, Practices & Programs 3 (2017), https://www.luc.edu/media/lucedu/criminaljustice/pdfs/National-Scan-of-Emerging-Adult-Policy-Practice-and-Programs.pdf [https://perma.cc/F5EK-ESXG]; see also Vincent Schiraldi, Bruce Western & Kendra Bradner, Community-based Responses to Justice-Involved Young Adults 1 (2015), https://www.ojp.gov/pdffiles1/nij/248900.pdf [https://perma.cc/9TEG-NBZZ] ("Young adults comprise a disproportionately high percentage of arrests and prison admissions, and about half of all young adults return to prison within three years following release.").

[79] Jessica M. Craig & Alex R. Piquero, Crime and Punishment in Emerging Adulthood, *in* The Oxford Handbook of Emerging Adulthood 543, 547–48 (Jeffrey J. Arnett ed., 2015).

[80] Rolf Loeber, David P. Farrington & David Petechuk, Bulletin 1: From Juvenile Delinquency to Young Adult Offending 7 (2013), https://www.ojp.gov/pdffiles1/nij/grants/242931.pdf [https://perma.cc/5B6S-PV37]. The study further explained that "developmental studies of the persistence in and desistance from offending between adolescence and early adulthood do not support the notion that there is any kind of naturally occurring break in the prevalence of offending at age 18." Id. There exists a rich literature on what is known as the "age-crime-curve" and how desistance from criminal activity becomes more common as one reaches late emerging adulthood. While the general trend shows increased prevalence of crime through individuals' mid-teens and decline starting in their early twenties, these statistics vary based on type of crime (e.g., violent crime versus property crime), gender, race, and socio-economic status, among other factors. Id. at 3–4. For a comprehensive discussion, see generally Alex R. Piquero, J. David Hawkins & Lila Kazemian, Criminal Career Patterns, *in* From Juvenile Delinquency to Adult Crime 14, 14–46 (Rolf Loeber & David P. Farrington eds., 2012) (reviewing relevant age-crime research and discussing their findings for juvenile and emerging-adult populations).

[81] Loeber et al., supra note 80, at 20; see also Terence P. Thornberry et al., Bulletin 3: Explanations for Offending 28 (2013), https://www.ojp.gov/pdffiles1/nij/grants/242933.pdf [https://perma.cc/6DQR-CGRV] ("To the extent that we can observe and explain malleability or change in criminal behavior during the teens and twenties, it becomes progressively more difficult to justify applying permanent or long sanctions to young offenders.").

poor impulse control, reduced psychosocial maturity, and high perception of rewards of crime—diminish with development.[82] In reality, "relatively few justice-involved individuals commit their first offense past the age of 25."[83]

Finally, scholars note that emerging adults lack many of the social indicators associated with adulthood.[84] While the legal age of majority was twenty-one for much of American history, it was lowered to eighteen in 1942 in response to the conscription of boys during World War II, as "[t]he obligation of military service . . . has long been linked to the right to political participation."[85] The use of eighteen as a marker of adulthood was thus constructed, to some extent, in service to the national interest and without deference to the psychological or neurological realities of development.

In recent decades, young people are, on average, much older when they marry or have children, in comparison to historical practices.[86] Emerging adults also increasingly rely on their parents, especially financially,[87] due to a lack of access to long-term employment[88] and their continued eligibility for entitlement privileges like healthcare,[89] among other factors. Simultaneously, national "labor market participation among 18-

[82] Gary Sweeten, Alex R. Piquero & Laurence Steinberg, Age and the Explanation of Crime, Revisited, 42 J. Youth Adolescence 921, 935 (2013). The authors further found that these influences are both less prevalent and less salient as emerging adults reach the age of twenty-five. Id. at 921.

[83] Schiraldi et al., supra note 78, at 6.

[84] For a comprehensive discussion of this topic, see generally Vivian E. Hamilton, Adulthood in Law and Culture, 91 Tul. L. Rev. 55, 57 (2016) ("[S]etting the age of majority at eighteen fails to accord with the trajectory of individual development, the time necessary to acquire the skills and abilities demanded of individuals in the modern labor market and broader socio-economic context, and even the social experiences of young people coming of age in modern American culture.").

[85] Id. at 64–65.

[86] Jeffrey J. Arnett, Emerging Adulthood and Social Class: Rejoinder to Furstenberg, Silva, and du Bois-Reymond, 4 Emerging Adulthood 244, 246 (2016).

[87] Nat'l Poverty Ctr., Univ. of Mich., Family Support during the Transition to Adulthood 1 (2004), http://www.npc.umich.edu/publications/policy_briefs/brief3/brief3.pdf [https://perma.cc/2K5V-WDJW]; Karen L. Fingerman, Millennials and Their Parents: Implications of the New Young Adulthood for Midlife Adults, 1 Innovation Aging 1, 2 (2017).

[88] The Council of State Gov'ts Just. Ctr., Reducing Recidivism and Improving Other Outcomes for Young Adults in the Juvenile and Adult Criminal Justice Systems 1, 4 (2015), https://csgjusticecenter.org/wp-content/uploads/2020/01/Transitional-Age-Brief.pdf [https://perma.cc/9VT8-GTJU].

[89] Hamilton, supra note 84, at 79–80.

to 24-year-olds is at a historic low . . . ."[90] And other prohibitions imposed on juveniles extend beyond age eighteen, too: the minimum age for controlled substance use (alcohol, tobacco, and marijuana where relevant), firearm ownership, and access to credit (independent of a cosigner) is twenty-one, while the minimum age for certain driving privileges, such as car rental, can extend to twenty-five.[91] In many ways, the rights and responsibilities of emerging adults resemble those of juveniles more closely than they do those of adults. Thus, while eighteen is "where society draws the line for many purposes"[92] as the Supreme Court has acknowledged, twenty-one is the more sociologically appropriate place.

3. Other Practical Justifications

Finally, recognizing emerging adults as a distict demographic within the criminal legal system would better align practice in the United States with international sentiment, as well as advance efforts toward racial justice and decarceration. First, such a change is supported by domestic and international standard-setting bodies. In 2018, the American Bar Association passed a resolution calling for states to "prohibit the imposition of a death sentence on or execution of any individual who was 21 years old or younger at the time of the offense."[93] The United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") require that efforts "be made to extend the principles embodied in the Rules [which include commitments to rehabilitation and proportionality] to young adult offenders" as well as juveniles.[94] And, the United Nations Office on Drugs and Crime has highlighted that "a majority of European States have extended the applicability . . . of their juvenile justice laws to the age of 21 . . . ."[95]

[90] The Council of State Governments Justice Center, supra note 88, at 4.

[91] Lindell & Goodjoint, supra note 12, at 11–12.

[92] Roper v. Simmons, 543 U.S. 551, 574 (2005).

[93] Resolution 111, Am. Bar Ass'n (2018), https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/2018_my_111.pdf [https://perma.cc/3U4V-SBXW].

[94] G.A. Res. 40/33, United Nations Standard Minimum Rules for the Administration of Juvenile Justice 207–08, 212 (Nov. 29, 1985).

[95] U.N. Off. on Drugs & Crime, Justice in Matters Involving Children in Conflict with the Law: Model Law on Juvenile Justice and Related Commentary 57 (2013), https://www.unodc.org/documents/justice-and-prison-reform/Justice_Matters_Involving-Web_version.pdf [https://perma.cc/E4LA-9CWG]; see also Sibella Matthews, Vincent Schiraldi & Lael

Second, reorienting the criminal legal system's approach to emerging adults would encourage, not stunt, emerging adults' psychological development and help prevent future recidivism.[96] Third, focusing on the rehabilitation, instead of the punishment, of emerging adults would reduce racial and ethnic disparities in the criminal legal system[97] and decrease the costs imposed on taxpayers for their prolonged detention.[98] It would also help reduce the United States' high rate of imprisonment, thereby disentangling one of the many components of mass incarceration.[99]

III. FAILED DEMANDS FOR EMERGING-ADULT PROTECTION UNDER FEDERAL CONSTITUTIONAL LAW

In response to these findings, scholars and activists have called for change regarding the criminal legal system's treatment of emerging adults. Some advocate for increasing community support measures for

Chester, Youth Justice in Europe: Experience of Germany, the Netherlands, and Croatia in Providing Developmentally Appropriate Responses to Emerging Adults in the Criminal Justice System, 1 Just. Evaluation J. 59, 64 (2018) (discussing youth criminal justice reforms in Europe, including the extension of such reforms to emerging adults).

[96] Lindell & Goodjoint, supra note 12, at 10.

[97] Schiraldi et al., supra note 78, at 7; Just. Pol'y Inst., Rethinking Approaches to Over Incarceration of Black Young Adults in Maryland 4 (2019), https://justicepolicy.org/wp-content/uploads/justicepolicy/documents/Rethinking_Approaches_to_Over_Incarceration_MD.pdf [https://perma.cc/UR9B-RJY7]; Marc Schindler & Jeremy Kittredge, A Crisis Within a Crisis: Police Killings of Black Emerging Adults, Brookings (Dec. 2, 2020), https://www.brookings.edu/blog/how-we-rise/2020/12/02/a-crisis-within-a-crisis-police-killings-of-black-emerging-adults/ [https://perma.cc/L3A3-87P2]. According to Nazgol Ghandnoosh, "over three-quarters of people serving a life sentence (including virtual life) for a juvenile offense [are] people of color." Cf. Nazgol Ghandnoosh, The Sent'g Project, The Next Step: Ending Excessive Punishment for Violent Crimes 25 (2019), https://www.sentencingproject.org/wp-content/uploads/2019/04/The-Next-Step.pdf [https://perma.cc/F2UC-D7F8].

[98] See, e.g., Rebecca Ballard DiLoreto, Shared Responsibility: The Young Adult Offender, 41 N. Ky. L. Rev. 253, 256–62 (2014); Justice Policy Institute, supra note 97, at 9; Kanako Ishida, Juv. Just. Initiative, Young Adults in Conflict with the Law: Opportunities for Diversion 1 (2015), https://jjustice.org/wp-content/uploads/Young-Adults-in-Conflict-with-the-Law-Opportunities-for-Diversion.pdf [https://perma.cc/B2TU-4255] (arguing that processing emerging adults through the adult system "leads to high recidivism rates, and high jail and prison populations, and increased costs to society through subsequent incarceration and unemployment").

[99] Selen Siringil Perker & Lael Chester, Emerging Adults: A Distinct Population that Calls for an Age-Appropriate Approach by the Justice System 2 (2017), https://scholar.harvard.edu/files/selenperker/files/emerging_adult_justice_issue_brief_final.pdf [https://perma.cc/KUC5-9WTU].

this demographic.[100] Others support raising the age of juvenile court jurisdiction,[101] treating age as a mitigating factor for emerging-adult sentencing in criminal court,[102] or creating a separate justice system for emerging adults.[103] Progress, however, has been ad hoc. Programs and initiatives of these kinds are generally local, without statewide or national engagement, and they fail to have widespread impact as a result.[104] Further, these policies often exclude offenders who commit the most violent offenses and who consequently receive the harshest and most concerning criminal penalties.[105]

[100] Leah Sakala, Leigh Courtney, Andreea Matei & Samantha Harvell, The Urban Inst., A Guide to Community Strategies for Improving Emerging Adults' Safety and Well-Being 6 (2020), https://www.urban.org/sites/default/files/publication/101838/a20guide20to20community20strategies20for20improving20emerging20adults2720safety20an_0.pdf [https://perma.cc/7CPY-RUJ2].

[101] Schiraldi et al., supra note 78, at 8–9; Loeber et al., supra note 80, at 20–21. But see Scott et al., supra note 12, at 643–44 ("[W]e are skeptical on both scientific and pragmatic grounds about the merits of the proposal by some advocates that juvenile court jurisdiction should be categorically extended to age twenty-one.").

[102] Just. Pol'y Inst., supra note 97, at 11–12; Kelsey B. Shust, Extending Sentencing Mitigation for Deserving Young Adults, 104 J. Crim. L. & Criminology 667, 698–99, 703 (2014) (positing that "[i]f the solution to address the increasingly punitive orientation of criminal justice remains one of protecting youthful defendants through the Eighth Amendment, then courts must also consider defendants' youthfulness when eighteen- to twenty-five-year-olds face irrevocable sentences" and advocating for the adoption of a permissive but rebuttable presumption of youthfulness for those up to age twenty-five); Kevin J. Holt, Note, The Inbetweeners: Standardizing Juvenileness and Recognizing Emerging Adulthood for Sentencing Purposes After *Miller*, 92 Wash. U. L. Rev. 1393, 1397 (2015) ("[C]ourts should recognize an age group between the ages of eighteen and twenty-five, called 'emerging adulthood,' during which judges would potentially consider a defendant's youthful characteristics, capacity for change, and culpability in deciding whether to give the defendant a sentence as harsh as his or her fully formed adult counterparts.").

[103] Alex A. Stamm, Note, Young Adults Are Different, Too: Why and How We Can Create a Better Justice System for Young People Age 18 to 25, 95 Tex. L. Rev. 72, 88–94 (2017); Tracy Velázquez, Young Adult Justice: A New Frontier Worth Exploring 7 (2013); Fair & Just Prosecution, Young Adults in the Justice System 14 (2019), https://www.fairandjustprosecution.org/staging/wp-content/uploads/2019/01/FJP_Brief_YoungAdults.pdf [https://perma.cc/Y8CZ-8EZM].

[104] Connie Hayek, Nat'l Inst. of Just., Environmental Scan of Developmentally Appropriate Criminal Justice Responses to Justice-Involved Young Adults 20 (2016), https://www.ncjrs.gov/pdffiles1/nij/249902.pdf [https://perma.cc/VU26-5993].

[105] See Scott et al., supra note 12, at 661 ("For young adults who commit serious violent offenses, young offender status is unlikely to be deemed sufficiently protective of public safety."); James Forman Jr., Locking Up Our Own: Crime and Punishment in Black America 228–31 (2017) (discussing the non-violent-offenders-only approach and criticizing how it neglects to allow for individualized review of cases or mitigation, thus "ensur[ing] that we will never get close to resolving the human rights crisis that is 2.2 million Americans behind bars"); Bianca E. Bersani, John H. Laub & Bruce Western, Emerging Adult Just. Learning

In order to categorically protect eighteen- through twenty-year-olds (especially those convicted of serious offenses) against extreme punishment, many have requested that Eighth Amendment protection against death, mandatory LWOP, and discretionary LWOP for non-homicide offenses be extended to emerging adults.[106] In the view of these advocates, the line drawn by the Supreme Court was placed at too young an age,[107] and for reasons explained above, the factors influencing the Supreme Court's constitutional line drawing in *Roper v. Simmons* and beyond are as applicable to those under twenty-one as they are to juveniles. Not only is twenty-one a more neurologically appropriate age at which maturity can be presumed, but it is also an already-recognized social designator.[108] Extending the age of constitutional proportionality protection to this population would thus be a natural and logical step.[109]

Extant Supreme Court case law provides a suitable roadmap to determine which sentences would be constitutionally disproportionate for emerging adults. As a categorical measure, the death penalty and most LWOP sentences would be barred.[110] Open questions would remain, as

Cmty., Thinking About Emerging Adults and Violent Crime 7 (2019), https://justicelab.columbia.edu/sites/default/files/content/EAJLC_YouthViolentCrime_final.pdf [https://perma.cc/U7MC-Y26N] (disputing the notion "that people who commit violent crime are fundamentally different and are not worthy of consideration when contemplating criminal justice reforms").

[106] See, e.g., Brief for the Juvenile Law Center & ACLU of Michigan as Amici Curiae Supporting Appellant at 12, People v. Manning, 949 N.W.2d 277 (Mich. 2020) (No. 160034), 2020 WL 4455337 ("[M]andatory imposition of a sentence of life without parole on an 18-year-old defendant, without any ability for a sentencing court to consider the mitigating qualities of youth, is unconstitutional under *Miller*." (internal quotation marks omitted)); Andrew Michaels, A Decent Proposal: Exempting Eighteen- to Twenty-Year-Olds From the Death Penalty, 40 N.Y.U. Rev. L. & Soc. Change 139, 141 (2016) (arguing that eighteen- to twenty-year-olds should be categorically exempt from the death penalty); Emily Powell, Comment, Underdeveloped and Over-Sentenced: Why Eighteen- to Twenty-Year-Olds Should Be Exempt from Life Without Parole, 52 U. Rich. L. Rev. Online 83, 85 (2018) (same).

[107] This is, in part, an inevitable criticism of categorical rulemaking. Kenneth Gilbert, Opinion, Kenneth Gilbert: Maturity Isn't Automatic at 18. But Life Without Parole Sure Is., St. Louis Post-Dispatch (Nov. 24, 2020), https://www.stltoday.com/opinion/columnists/kenneth-gilbert-maturity-isnt-automatic-at-18-but-life-without-parole-sure-is/article_31dfddeb-0001-56a6-b7d6-b1809492ea4c.html [https://perma.cc/NC26-6BAJ] ("My friend Gary committed his crime four days after his 18th birthday. What was supposed to have changed in his character, his maturity, and his decision-making in four days?"). However, this objection runs deeper; not only was this line-drawing somewhat arbitrary (it always will be), but it was also substantively misguided. See generally supra Part II.

[108] See, e.g., Powell, supra note 106, at 85 n.16.

[109] See discussion infra Part V.

[110] See supra note 9.

they do now for juveniles, regarding de facto life sentences or other lengthy forms of punishment.[111] Less severe and lengthy sentences would remain, unless found to be grossly disproportionate to an individual defendant's culpability, in which case an as-applied challenge may be appropriate.

Through litigation, advocates have presented these arguments to tribunals around the country, but their efforts have been met with little success. Courts at both the federal[112] and state[113] levels have refused to

[111] Some states have adopted more generous protections than the U.S. Supreme Court. For example, the Illinois Supreme Court has held that de facto life sentences (i.e., sentences of forty years or more) violate the Eighth Amendment, since a "mandatory term-of-years sentence that cannot be served in one lifetime has the same practical effect," as "[i]n either situation, the juvenile will die in prison." People v. Reyes, 63 N.E.3d 884, 888 (Ill. 2016); People v. Buffer, 137 N.E.3d 763, 774 (Ill. 2019). The Illinois Supreme Court has also extended *Miller v. Alabama*, which prohibited mandatory LWOP sentences, to discretionary LWOP sentences. People v. Holman, 91 N.E.3d 849, 861–62 (Ill. 2017).

[112] See, e.g., United States v. Sierra, 933 F.3d 95, 96 (2d Cir. 2019) (rejecting challenge to mandatory life sentences of defendants ages eighteen to twenty-two at the time of the offense), *cert. denied*, 140 S. Ct. 2541 (2020); United States v. Reingold, 731 F.3d 204, 206 (2d Cir. 2013) (vacating sentence of nineteen-year-old that fell below the five-year mandatory minimum); United States v. Chavez, 894 F.3d 593, 609 (4th Cir. 2018) (rejecting challenge to mandatory life sentences of defendants ages eighteen and nineteen at the time of the offense), *cert. denied*, 139 S. Ct. 278 (2018); United States v. Marshall, 736 F.3d 492, 494 (6th Cir. 2013) (rejecting challenge to five-year-mandatory-minimum sentence of twenty-year-old at the time of the offense); see also id. at 498, 500 (noting "the crucial role that chronological age plays in our legal system and in the Supreme Court's jurisprudence" and emphasizing that, since "[c]onsiderations of efficiency and certainty require a bright line separating adults from juveniles[,] [f]or purposes of the Eighth Amendment, an individual's eighteenth birthday marks that bright line"); United States v. Williston, 862 F.3d 1023, 1039–40 (10th Cir. 2017) (rejecting challenge to mandatory life sentence of an eighteen-year-old at the time of the offense); Heard v. Snyder, No. 16-14367, 2018 WL 2560414, at *1 (E.D. Mich. June 4, 2018) (rejecting challenge to LWOP sentences of defendants ages eighteen and nineteen at the time of the offense).

[113] See, e.g., People v. Montelongo, 269 Cal. Rptr. 3d 883, 886 (Cal. Ct. App. 2020) (rejecting challenge to LWOP sentence of eighteen-year-old at the time of the offense); Haughey v. Comm'r of Corr., 164 A.3d 849, 852 (Conn. App. Ct. 2017) (rejecting challenge to mandatory LWOP sentence of twenty-five-year-old at the time of the offense); Zebroski v. State, 179 A.3d 855, 860–62 (Del. 2018) (rejecting challenge to LWOP sentence of eighteen-year-old at the time of the offense); Branch v. State, 236 So. 3d 981, 987 (Fla. 2018) (denying habeas petition regarding death sentence of defendant who was over eighteen at the time of the offense); Commonwealth v. Garcia, 123 N.E.3d 766, 768 (Mass. 2019) (rejecting challenge to LWOP sentence of nineteen-year-old at the time of the offense); People v. Hassel, No. 346378, 2020 WL 4248436, at *11–12 (Mich. Ct. App. July 23, 2020) (rejecting challenge to LWOP sentence of nineteen-year-old at the time of the offense); Nelson v. State, 947 N.W.2d 31, 33, 40 (Minn. 2020) (rejecting challenge to mandatory LWOP sentence of boy eighteen-years and one-week old at the time of the offense); State v. Barnett, 598 S.W.3d 127, 128 (Mo. 2020) (rejecting challenge to LWOP sentence of nineteen-year-old at the time of the

extend the logic of *Roper v. Simmons*, *Graham v. Florida*, *Miller v. Alabama*, and *Montgomery v. Louisiana* to conclude that the Cruel and Unusual Punishments Clause of the U.S. Constitution prohibits the extreme sentencing of emerging adults. An empirical study published by the *New York University Law Review* compiled hundreds of cases in which neuroscientific evidence was used to argue for the extension of such Eighth Amendment protections to those ages eighteen and older; however, "none of the 494 petitions identified . . . were ultimately successful."[114]

The first and most straightforward justification provided by courts has been on stare decisis grounds: the Supreme Court set this line at age eighteen, and as a consequence, that rule must be followed. In a variety of phrasings, courts have stated unequivocally that, "binding precedent [obligates them] to treat chronological age and the eighteenth birthday as the bright line."[115] Thus, just as juveniles do not lose their heightened Eighth Amendment protection if they are particularly mature, emerging

offense); State v. Ware, 870 N.W.2d 637, 638–40 (Neb. 2015) (rejecting challenge to life sentence of eighteen-year-old at the time of the offense); Otte v. State, 96 N.E.3d 1288, 1291–93 (Ohio Ct. App. 2017) (upholding death sentence of under-twenty-one-year-old at the time of the offense); Commonwealth v. Turner, No. 3480 EDA 2018, 2020 WL 90033, at *2 (Pa. Super. Ct. Jan. 7, 2020) (rejecting challenge to mandatory LWOP sentence of twenty-one-year-old at the time of the offense); Martinez v. State, No. 01-14-00130-CR, 2016 WL 4447660, at *1, *13–16 (Tex. Crim. App. Aug. 24, 2016) (rejecting challenge to LWOP sentence of individual with intellectual disability who was twenty-one years old at the time of the offense); State v. Thompson, No. 47229-5-II, 2016 WL 3264369, at *2–3, *6 (Wash. Ct. App. June 14, 2016) (rejecting challenge to mandatory LWOP sentence of thirty-year-old under three strikes law, whose first strike was from an offense committed at age twenty); State v. Hart, 353 P.3d 253, 257–58 (Wash. Ct. App. 2015) (rejecting challenge to mandatory LWOP sentence under three strikes law, where the first strike was from an offense committed at age twenty).

[114] Francis X. Shen et al., Justice for Emerging Adults After *Jones*: The Rapidly Developing Use of Neuroscience to Extend Eighth Amendment *Miller* Protections to Defendants Ages 18 and Older, 97 N.Y.U. L. Rev. Online 101, 108 (2022).

[115] *Heard*, 2018 WL 2560414, at *3; see also *Sierra*, 933 F.3d at 97 (asserting "a line must be drawn" and that "the Supreme Court has repeatedly chosen in the Eighth Amendment context to draw that line at the age of 18" (internal quotation marks omitted)); *Montelongo*, 269 Cal. Rptr. 3d at 903 (Segal, J., concurring) ("[W]e are stuck with the line that the United States Supreme Court drew at 18 years old . . . ."); *Hassel*, 2020 WL 4248436, at *11 ("[T]he Supreme Court of the United States specifically stated in *Miller* that the categorical ban applied only to juvenile offenders who committed their crimes before turning 18 years of age."); Munt v. State, 880 N.W.2d 379, 383 (Minn. 2016) (''The Supreme Court's holding in *Miller* is plainly limited to juvenile offenders and does not apply to [those eighteen-years-old or over]."); *Barnett*, 598 S.W.3d at 133 ("This Court is guided by Supreme Court precedent, which clearly defines a juvenile as an individual younger than 18 years of age for purposes of the considerations [defendant] seeks.").

adults cannot receive less harsh sentences as a benefit of their childishness.[116] Additionally, for those petitioning for habeas review, scientific research involving emerging adult "brain development does not qualify as newly discovered evidence."[117]

Other courts have justified the substance of the rule, in addition to its form. According to the Delaware Supreme Court, neuroscience alone was not what compelled the U.S. Supreme Court's line drawing at eighteen. Instead, "it was society's collective judgment about when the rights and responsibilities of adulthood should accrue."[118] And, since "society [still] draws the line for many purposes between childhood and adulthood" at eighteen, the rule should stand.[119] Alternatively, the U.S. Court of Appeals for the Sixth Circuit justified the Supreme Court's directive on practical grounds, alleging that a system based on something other than chronological age would be "essentially unmanageable."[120] This consideration, in the court's assessment, justified drawing the line at eighteen.

[116] *Marshall*, 736 F.3d at 499. It is worth nothing that, on this point, the U.S. Court of Appeals for the Sixth Circuit's reasoning is shortsighted. The majority claims that "an approach that ignores chronological age in favor of other aspects of maturity should cut both ways," which, in their estimation, would require that "[i]ndividuals under 18 with the mental maturity of adults . . . be classified as adults for purposes of the Eighth Amendment." Id. This does not have to be the case, though; if the Court's categorical rule were expanded to include emerging adults under the age of twenty-one, case-by-case assessments of this nature would not be required, and thus the maturity of particular juveniles could not be employed to their constitutional disadvantage.

[117] Branch v. State, 236 So. 3d 981, 986 (Fla. 2018).

[118] Zebroski v. State, 179 A.3d 855, 862 (Del. 2018).

[119] Id. (quoting Roper v. Simmons, 543 U.S. 551, 574 (2005)). In its opinion, the court cites a paper by Emily Buss to support the proposition that the Supreme Court "retreat[ed] from the science to [a] more conventional, law-controlled analysis" when deciding *Roper*. Id. (quoting Emily Buss, What the Law Should (and Should Not) Learn from Child Development Research, 38 Hofstra L. Rev. 13, 40 (2009) (alterations in original) (internal quotation marks omitted)). It consequently posited that "[a]lthough *Roper*, *Miller*, and *Graham* were all rooted in psychology and brain science, *Roper*'s choice to divide childhood from adulthood at age 18 was not based solely—and perhaps not even primarily—on scientific evidence." Id. (internal quotation marks and citations omitted). However, this claim is untenable. Buss acknowledges in her paper that the Court's language "reads, at first, like a rejection of all the developmental analysis." Buss, supra, at 40. However, one page later, she disavows this misreading and insists that "there is no evidence that *Roper* is actually taking this approach." Id. at 41. Instead, "[t]he thrust of the [Court's] analysis clearly focuses on the developmental findings, not on legal or cultural conventions." Id. This conclusion was notably omitted by the Delaware Supreme Court in its analysis and ultimate decision.

[120] *Marshall*, 736 F.3d at 499. But see supra note 116 for a criticism of this analysis.

However, not all courts fully endorse this view. Implicit in the language employed by some courts is discomfort with the usage of eighteen as an age-based marker of adulthood. In one recent case, the Tenth Circuit commented that "[t]he Supreme Court's decision to separate juvenile and adult offenders using [a bright-line rule] necessitates some element of arbitrariness in Eighth Amendment jurisprudence in this area. But such is the law."[121] Similarly, judges on the Fourth Circuit noted that "[i]ndividual differences in maturity will necessarily mean that age-based rules will have an element of arbitrariness, particularly when they have such stark differences in effect between those just one week below the cut-off and those just one week above."[122] Numerous courts have adopted this tone of unease in their rulings,[123] and some have directed defendants to the legislature for redress.[124]

Select judges have gone so far as to oppose the logic of these cases outright. In her *Nelson v. State* dissent, Justice Chutich of the Minnesota Supreme Court criticized the majority for their "uncompromising" interpretation of the Eighth Amendment.[125] She rejected the premise that the eighteen-year-old defendant could be prohibited from engaging in "risky behaviors" through the age of twenty-one yet also be enough of an

[121] United States v. Williston, 862 F.3d 1023, 1040 (10th Cir. 2017); see also In re Jones, 255 Cal. Rptr. 3d 571, 575 (Cal. Ct. App. 2019) (Pollack, J., concurring) ("[T]he exclusion of LWOP offenders between the ages of 18 and 25 from the right to a youthful offender parole hearing . . . does not necessarily withstand scrutiny under [equal protection] principles.").

[122] United States v. Chavez, 894 F.3d 593, 609 (4th Cir. 2018).

[123] See, e.g., *Marshall*, 736 F.3d at 498 (describing the use of chronological age for line-drawing purposes as a "not-entirely-desirable but nonetheless necessary approach"); People v. Hill, No. A148947, 2017 WL 4082072, at *5 (Cal. Ct. App. Sept., 15, 2017) ("Regardless of the merit of the suggestion that young adults *should* be treated as juveniles for purposes of sentencing, this court is without authority to modify the line drawn by the Supreme Court.").

[124] See, e.g., *Marshall*, 736 F.3d at 508 (Lawson, J., concurring) ("If there is to be relief for the occasional defendant . . . for whom a mandatory minimum sentence is excessive, unjust, and greater than necessary, it must come from Congress." (internal quotation marks and citation omitted)); People v. Montelongo, 269 Cal. Rptr. 3d 883, 896 (Cal. Ct. App. 2020) ("Unless and until the United States Supreme Court, the California Supreme Court, the Legislature, or the voters by initiative change the law, we are bound to apply it."); State v. Barnett, 598 S.W.3d 127, 133 (Mo. 2020) ("[Defendant's] policy considerations are better addressed to the legislature."); *Jones*, 255 Cal. Rptr. 3d at 578 (Pollak, J., concurring) ("[T]here is good reason for legislative reconsideration of the exclusion of young adults serving LWOP sentences from the scope of the [state's youthful offender parole hearing] statute.").

[125] Nelson v. State, 947 N.W.2d 31, 41 (Minn. 2020) (Chutich, J., dissenting).

adult in the eyes of the law to receive an unmitigated life sentence.[126] Chief Judge Bjorgen of the Washington Court of Appeals lodged similar criticisms in his *State v. Thompson* concurrence;[127] from his perspective, "[t]he thread joining *Roper*, *Graham*, and *Miller* is a willingness to abandon or extend prior holdings when needed to serve their underlying rationale: a willingness informed by advancing neurological and psychological knowledge, as well as ascending standards of decency."[128] In her concurrence in *Pike v. Gross*, Judge Stranch of the Sixth Circuit advanced "that society's evolving standards of decency likely do not permit the execution of individuals who were under 21 at the time of their offense."[129] And finally, Judge McCormack of the Ohio Court of Appeals posited that, "as major[] medical, academic, and legal studies move forward and . . . scientific evidence concerning youth brain development continues to evolve," justice may best be served "by openly considering physical and mental youthfulness at the time of violations."[130] Despite these jurists' rejoinders, however, each court ultimately held that the Eighth Amendment's categorical protection of juveniles does not extend to individuals ages eighteen or above.[131]

This trend of rejecting emerging-adult proportionality claims under the Eighth Amendment has been sweeping, with the exception of one notable—and ultimately overturned—federal court decision. In 2018, the U.S. District Court for the District of Connecticut held in *Cruz v. United States* that an eighteen-year-old's mandatory-LWOP sentence was unconstitutional under the Eighth Amendment.[132] It based its decision on two rationales: first, that an emerging national consensus "recogniz[ed] that 18-year-olds should be treated different from fully mature adults,"[133]

[126] Id. at 43–45; see also id. at 43 ("Time and again, the Court has looked beyond simply chronological age to *define* youth.").

[127] State v. Thompson, 194 Wash. App. 1031, No. 47229-5-II, 2016 WL 3264369, at *3–4 (Wash. Ct. App. June 14, 2016) (Bjorgen, J., concurring).

[128] Id. at *5.

[129] 936 F.3d 372, 385 (6th Cir. 2019) (Stranch, J., concurring).

[130] Otte v. State, 96 N.E.3d 1288, 1294 (Ohio Ct. App. 2017) (McCormack, J., concurring); see also People v. Montelongo, 269 Cal. Rptr. 3d 883, 902 (Cal. Ct. App. 2020) (Segal, J., concurring) ("[T]he changes in the legal and scientific landscape since the United States Supreme Court decided *Roper* . . . suggest we should reconsider the propriety, wisdom, and perhaps even the constitutionality of imposing a mandatory sentence of life without the possibility of parole on an 18-year-old.").

[131] See supra note 113.

[132] No. 11-CV-787, 2018 WL 1541898, at *25 (D. Conn. Mar. 29, 2018) (internal quotation marks omitted), *rev'd*, 826 F. App'x 49 (2d Cir. 2020), *cert. denied* 141 S. Ct. 2692 (2021).

[133] Id. at *22.

and second, that scientific evidence since *Roper* strongly indicated that the "hallmark characteristics of juveniles that make them less culpable also apply to 18-year-olds."[134] However, the Second Circuit disagreed, vacating the judgment on the grounds that the Supreme Court had "dr[awn] a categorical line at age eighteen between adults and juveniles," and thus Eighth Amendment protection did not extend to the defendant, who was eighteen years and five months old at the time of his offense.[135]

The district court's decision in *Cruz* (before reversal by the court of appeals) was the only occasion to date in which emerging adults were found to have legitimate claims to Eighth Amendment proportionality protection against extreme sentencing. No court has otherwise extended *Roper*, *Graham*, *Miller*, or *Montgomery* to protect those ages eighteen or above, despite encouragement from judges in concurrence or dissent to do so,[136] and despite majorities' acknowledgements of how modern science has identified the unique vulnerabilities of emerging adults.[137] These trends suggest there is little hope that lower courts will, without Supreme Court encouragement, recognize such Eighth Amendment rights for this population.

Further, if the current U.S. Supreme Court were to grant certiorari on this issue, the Justices would be unlikely to extend proportionality protection to emerging adults. Of the Court's current members, one (Justice Thomas) dissented in *Roper*,[138] two (Justices Thomas and Alito)

[134] Id. at *25.

[135] Cruz v. United States, 826 F. App'x 49, 52 (2d Cir. 2020) (summary order); see also United States v. Sierra, 933 F.3d 95, 96–97 (2d Cir. 2019) (holding that the Supreme Court set the age at eighteen, and thus no challenges could be made against mandatory minimum life sentences imposed on those age eighteen or older at the time of their offense under the Eighth Amendment).

[136] See supra notes 125–30.

[137] See People v. Montelongo, 269 Cal. Rptr. 3d 883, 896 (Cal. Ct. App. 2020) (noting the "bevy of recent scientific and legal developments" presented by the defendant); Haughey v. Comm'r of Corr., 164 A.3d 849, 856 (Conn. App. Ct. 2017) ("[E]vidence presented by the petitioner suggests that some youthful characteristics remain present after an individual reaches the age of eighteen."); Commonwealth v. Garcia, 123 N.E.3d 766, 771 (Mass. 2019) (confirming that "[s]cientific and social science research on adolescent brain development . . . continues" and that some "brain functions are not likely to be fully matured until around age twenty-two").

[138] Roper v. Simmons, 543 U.S. 551, 607–30 (2005) (Scalia, J., joined by Rehnquist, C.J. & Thomas, J., dissenting); see id. at 608 ("Because I do not believe that the meaning of our Eighth Amendment, any more than the meaning of other provisions of our Constitution, should be determined by the subjective views of five Members of this Court and like-minded foreigners, I dissent.").

dissented in *Graham*[139] and *Montgomery*,[140] and three (Chief Justice Roberts, along with Justices Thomas and Alito) filed dissenting opinions in *Miller*.[141] Throughout these cases, the crux of the Justices' opposition was on separation of power grounds; sentencing "presents grave and challenging questions of morality and social policy," but the Court's role is not to prescribe legislative mandates—it is simply "to apply the law."[142] Instead, "[t]he question of what acts are deserving of what punishments [is], almost by definition, a question for legislative resolution."[143] Chief Justice Roberts and Justices Thomas and Alito also evince a skepticism of these cases' constitutional groundings, finding that decisions like *Miller*, in particular, were not rooted in the text and history of the Eighth Amendment, but rather on precedent.[144] Finally, they fear a slippery slope

[139] Graham v. Florida, 560 U.S. 48, 97–124 (2010) (Thomas, J., dissenting); id. at 124–25 (Alito, J., dissenting).

[140] Montgomery v. Louisiana, 577 U.S. 190, 213–27 (2016) (Scalia, J., joined by Thomas & Alito, JJ., dissenting); id. at 227–36 (Thomas, J., dissenting).

[141] Miller v. Alabama, 567 U.S. 460, 493–502 (2012) (Roberts, C.J., dissenting); id. at 502–09 (Thomas, J., dissenting); id. at 509–15 (Alito, J., dissenting).

[142] *Miller*, 567 U.S. at 493 (Roberts, C.J., dissenting); see also id. at 500 (describing the decision as a "path to further judicial displacement of the legislative role in prescribing appropriate punishment for crime").

[143] *Graham*, 560 U.S. at 120 (Thomas, J., dissenting) (internal quotation marks omitted); see also *Miller*, 567 U.S. at 504 (Thomas, J., dissenting) ("The legislatures of Arkansas and Alabama . . . have determined that all offenders convicted of specified homicide offenses, whether juveniles or not, deserve a sentence of life in prison without the possibility of parole. Nothing in our Constitution authorizes this Court to supplant that choice."); Randy Clapp, Eighth Amendment Proportionality, 7 Am. J. Crim. L. 253, 276 (1979) ("The limitations imposed by the eighth amendment must not be interpreted to allow the courts to inject themselves too deeply into this legislative process, thereby violating the basic tenets of separation of powers."). But see Bruce W. Gilchrist, Note, Disproportionality in Sentences of Imprisonment, 79 Colum. L. Rev. 1119, 1167 (1979) ("[I]t should be kept in mind that the eighth amendment and its state counterparts, like the other guarantees surrounding the criminal process, were adopted to guard against isolated excesses of majoritarian zeal and the too vigorous pursuit of social benefit at the expense of undeserved individual suffering.").

[144] *Miller*, 567 U.S. at 499 (Roberts, C.J., dissenting) ("Because the Court does not rely on the Eighth Amendment's text or objective evidence of society's standards, its analysis of precedent alone must bear the 'heavy burden [that] rests on those who would attack the judgment of the representatives of the people.' If the Court is unwilling to say that precedent compels today's decision, perhaps it should reconsider that decision." (citation omitted) (quoting Gregg v. Georgia, 428 U.S. 153, 175 (1976))); id. at 502 (Thomas, J., dissenting) ("To reach [the Court's] result, [it] relies on two lines of precedent. . . . Neither line is consistent with the original understanding of the Cruel and Unusual Punishments Clause."); id. at 514 (Alito, J., dissenting) ("Our Eighth Amendment case law is now entirely inward looking.").

and that future Eighth Amendment decisions may become untethered from the Amendment's original meaning.[145]

Justice Thomas, in particular, categorically rejects the imposition of proportionality review by the Court.[146] According to him, "the Cruel and Unusual Punishments Clause was originally understood as prohibiting torturous '*methods* of punishment'" that are "akin to those that had been considered cruel and unusual at the time the Bill of Rights was adopted."[147] To him, this analysis should take into account only the nature of the punishment in question, not the culpability of the offender nor the appropriateness of applying the particular punishment to them. In fact, he claims the Clause "does not contain a proportionality principle" at all.[148] As such, "Proportionality review is not constitutionally required in any form."[149]

Since deciding *Montgomery* in 2015, the Court gained three conservative Justices—Gorsuch, Kavanaugh, and Barrett—all of whom are inclined to agree with existing precedent.[150] In 2021, the Court—led by Justice Kavanaugh; joined by Chief Justice Roberts and Justices Alito, Gorsuch, and Barrett; and supported by Justice Thomas in his concurrence—refused to extend Eighth Amendment protection to juveniles who had been discretionarily sentenced to LWOP, but who had not been expressly found "permanently incorrigible."[151] Further, Justices Gorsuch and Kavanaugh have not looked favorably on Eighth Amendment challenges during their tenure on the Court,[152] and the

[145] As Chief Justice Roberts commented in *Miller*, "This process has no discernible end point—or at least none consistent with our Nation's legal traditions." 567 U.S. at 501 (Roberts, C.J., dissenting); see also id. at 515 (Alito, J., dissenting) ("Unless our cases change course, we will continue to march toward some vision of evolutionary culmination that the Court has not yet disclosed. The Constitution does not authorize us to take the country on this journey.").

[146] *Graham*, 560 U.S. at 99 (Thomas, J., dissenting) (describing the Court's proportionality review as "entirely the Court's creation").

[147] Id. at 99 (Thomas, J., dissenting) (internal quotation marks omitted) (quoting Harmelin v. Michigan, 501 U.S. 957, 979 (1991)).

[148] *Miller*, 567 U.S. at 503–04 (Thomas, J., dissenting) (internal quotation marks omitted).

[149] Walker v. Georgia, 555 U.S. 979, 987 (2008) (Thomas, J., concurring in denial of certiorari).

[150] See Current Members, Sup. Ct. of the U.S., https://www.supremecourt.gov/about/biographies.aspx [https://perma.cc/G92J-VXD3].

[151] Jones v. Mississippi, 141 S. Ct. 1307, 1311 (2021).

[152] See, e.g., Bucklew v. Precythe, 139 S. Ct. 1112, 1112–13, 1124 (2019) (Gorsuch, J.) (upholding Missouri's method of lethal injection and commenting that "the Eighth Amendment does not guarantee a prisoner a painless death"); id. at 1135–36 (Kavanaugh, J., concurring) (emphasizing the ability of petitioner to identify an alternative form of execution).

Court's second-newest member does not seem so inclined either. Justice Barrett heard only one Eighth Amendment case—an excessive force claim—while on the Seventh Circuit, and while the panel voted 2-1 to vacate the district court's grant of summary judgment (a decision that favored the incarcerated plaintiffs), she dissented.[153] While Justice Barrett has previously written on her belief "that Catholic judges (if they are faithful to the teaching of their church) are morally precluded from enforcing the death penalty,"[154] she conflictingly voted to lift a stay on the execution of a federal inmate in November 2020 (who was subsequently put to death).[155] As predicted by the Juvenile Law Center's Chief Legal Officer and Managing Director in an op-ed piece, "Barrett is widely seen as Scalia's heir on the Supreme Court given her adherence to

Upon reviewing the case law, the Court has heard argument in only three Eighth Amendment cases since deciding *Bucklew*, two of which concerned juvenile LWOP. See supra note 151 (discussing Jones v. Mississippi, 141 S. Ct. 1307, 1311 (2021)); see also Mathena v. Malvo, 140 S. Ct. 919, 919 (2020) (dismissing case); Letter from Toby J. Heytens & Danielle Spinelli, Couns. of Rec. for Petitioner and Respondent (respectively), to Hon. Scott S. Harris, Clerk of the Ct., Sup. Ct. of the U.S. (Feb. 24, 2020) (stipulating voluntary dismissal of *Mathena v. Malvo*), https://www.supremecourt.gov/DocketPDF/18/18-217/133958/20200224132941465_Rule%2046.1%20Dismissal.pdf [https://perma.cc/NSS9-SRNX]; Amy Howe, Justices Grant Replacement for D.C. Sniper Case, SCOTUS Blog (Mar 9, 2020), https://www.scotusblog.com/2020/03/justices-grant-replacement-for-d-c-sniper-case/ [https://perma.cc/JU27-HXD2] (explaining that *Malvo* was dismissed following oral argument because a law was passed in Virginia automatically making juveniles sentenced to life in prison parole-eligible after serving twenty-six years, but that the petition filed by Brett Jones would be taken up in its place); Kahler v. Kansas, 140 S. Ct. 1021 (2020) (discussing the insanity defense).

[153] McCottrell v. White, 933 F.3d 651, 671 (7th Cir. 2019) (Barrett, J., dissenting) (arguing that, while "[t]he guards may have acted with deliberate indifference to inmate safety by firing warning shots into the ceiling of a crowded cafeteria in the wake of the disturbance," such deliberate indifference was not enough to prove a constitutional violation); Joanna R. Lampe, Cong. Rsch. Serv., LSB10548, *Jones v. Mississippi*: Juvenile Life Without Parole Back at the Supreme Court 4 (2020).

[154] John H. Garvey & Amy V. Coney, Catholic Judges in Capital Cases, 81 Marq. L. Rev. 303, 305 (1998). Note, however, that she and her co-author acknowledge that the question of whether judges may affirm lower-court orders of death "is a question we have the most difficulty in resolving." Id.

[155] Order in Pending Case, Barr v. Hall, (No. 20A102), (Nov. 19, 2020), https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/20a102.html [https://perma.cc/784V-VTM5] (order vacating Hall's stay of execution in which Justice Barrett is not among the dissenters); see also Robert Barnes, Supreme Court Continues Capital Punishment Trend with Barrett on the Bench, Wash. Post (Nov. 20, 2020), https://www.washingtonpost.com/politics/courts_law/amy-coney-barrett-orlando-hall-execution/2020/11/20/ba28d3c6-2b47-11eb-9b14-ad872157ebc9_story.html [https://perma.cc/5MRD-BXFG] (describing the facts of Hall's case and eventual execution).

his originalist philosophy," and put bluntly, "Her appointment puts in danger the constitutional rights of children and youth."[156]

It thus appears that appeal to the U.S. Constitution for the protection of emerging adults against extreme sentencing would be fruitless. Instead, though, state constitutions may provide a fruitful avenue for potential reform.

IV. CONSIDERING EMERGING-ADULT SENTENCES UNDER STATE CONSTITUTIONAL LAW

While there is little hope for challenging the extreme sentencing of emerging adults under the Eighth Amendment, there is substantial promise for these claims under state constitutional law. Every state constitution in the country contains a provision barring the harsh, cruel, unusual, or disproportionate punishment of offenders. This Part argues that state courts should rely upon these provisions to review sentences of death, mandatory LWOP, or discretionary LWOP for non-homicide offenses as imposed on emerging-adult offenders, using Washington and Illinois as models.

A. State Constitutional Proportionality Provisions

State constitutions across the country limit the imposition of harsh, cruel, unusual, and disproportionate sentences on offenders. The vast majority of states prohibit either "cruel" (six states),[157] "cruel *and* unusual" (twenty-one states),[158] or "cruel *or* unusual" (twenty states)[159]

[156] Marsha Levick & Riya S. Shah, Opinion, Will Amy Coney Barrett Protect the Constitutional Rights of Children and Youth?, Pa. Cap.-Star (Oct. 25, 2020), https://www.penncapital-star.com/commentary/will-amy-coney-barrett-protect-the-constitutional-rights-of-children-and-youth-opinion/ [https://perma.cc/5UCB-59KG]. For a comprehensive exploration of Justice Scalia's originalist lens on the Eighth Amendment, see Craig S. Lerner, Justice Scalia's Eighth Amendment Jurisprudence: The Failure of Sake-of-Argument Originalism, 42 Harv. J. L. & Pub. Pol'y 91 (2019).

[157] Del. Const. art. I, § 11; Ky. Const. § 17; Pa. Const. art. I, § 13; R.I. Const. art. I, § 8; S.D. Const. art. VI, § 23; Wash. Const. art. I, § 14.

[158] Alaska Const. art. I, § 12; Ariz. Const. art. II, § 15; Colo. Const. art. II, § 20; Fla. Const. art. I, § 17; Ga. Const. art. I, § I, para. 17; Idaho Const. art. I, § 6; Ind. Const. art. I, § 16; Iowa Const. art. I, § 17; Mo. Const. art. I, § 21; Mont. Const. art. II, § 22; Neb. Const. art. I, § 9; N.J. Const. art. I, para. 12; N.M. Const. art. II, § 13; N.Y. Const. art. I, § 5; Ohio Const. art. I, § 9; Or. Const. art. I, § 16; Tenn. Const. art. I, § 16; Utah Const. art. I, § 9; Va. Const. art. I, § 9; W. Va. Const. art. III, § 5; Wis. Const. art. I, § 6.

[159] Ala. Const. art. 1, § 16; Ark. Const. art 2, § 9; Cal. Const. art. I, § 17; Haw. Const. art. I, § 12; Kan. Const. Bill of Rts., § 9; La. Const. art. I, § 20 ("cruel, excessive, or unusual"); Me.

punishments in their constitutions. Of the three states that do not have this language, two (Illinois and Vermont) have constitutional proportionality provisions that require any penalties imposed be proportionate to the offense.[160] The other, Connecticut, "impliedly prohibit[s] punishment that is cruel and unusual" through its due process clauses.[161]

These provisions are not simply state corollaries to the Federal Eighth Amendment. On the contrary, numerous state constitutional provisions—

Const. art. I, § 9 ("nor cruel nor unusual"); Md. Const. Decl. of Rts., art. XXV; Mass. Const. pt. 1, art. XXVI; Mich. Const. art. I, § 16; Minn. Const. art. I, § 5; Miss. Const. art. III, § 28; Nev. Const. art. I, § 6; N.C. Const. art. I, § 27; N.H. Const. pt. 1, art. XXXIII; N.D. Const. art. I, § 11; Okla. Const. art. II, § 9; S.C. Const. art. I, § 15 ("nor shall cruel, nor corporal, nor unusual punishment be inflicted"); Tex. Const. art. I, § 13; Wyo. Const. art. I, § 14.

[160] See Ill. Const. art. I, § 11 ("All penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship."). This clause is consistently referred to as the "proportionate penalties clause" of the Illinois Constitution. People v. Miller, 781 N.E.2d 300, 310 (Ill. 2002). See also Vt. Const. ch. II, § 39 ("And all fines shall be proportioned to the offences."). This, too, has been interpreted to require proportionality for all punishments. State v. Bacon, 702 A.2d 116, 122 (Vt. 1997). Nine other states have similar express or implied proportionality provisions. See Ind. Const. art. I, § 16 ("All penalties shall be proportioned to the nature of the offense."); La. Const. art. I, § 20 ("No law shall subject any person to euthanasia, to torture, or to cruel, *excessive*, or unusual punishment." (emphasis added)); Me. Const. art. I, § 9 ("[A]ll penalties and punishments shall be proportioned to the offense . . . ."); Neb. Const. art. I, § 15 ("All penalties shall be proportioned to the nature of the offense . . . ."); N.H. Const. pt. 1, art. XVIII ("All penalties ought to be proportioned to the nature of the offense."); Or. Const. art. I, § 16 ("[A]ll penalties shall be proportioned to the offense."); R.I. Const. art. 1, § 8 ("[A]ll punishments ought to be proportioned to the offense."); Wash. Const. art. I, § 14 ("Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted."); see also State v. Fain, 617 P.2d 720, 725 (Wash. 1980) (en banc) (noting that the proportionality principle was implied in Washington case law and expressly adopted by the Washington State Legislature); W. Va. Const. art. III, § 5 ("Penalties shall be proportioned to the character and degree of the offence.").

[161] State v. Ross, 646 A.2d 1318, 1355 (Conn. 1994). The due process clauses of the Connecticut Constitution are art. I, § 8 ("No person shall . . . be deprived of life, liberty or property without due process of law . . . .") and art. I, § 9 ("No person shall be arrested, detained or punished, except in cases clearly warranted by law.").

including those of California,[162] Illinois,[163] Indiana,[164] Louisiana,[165] Maine,[166] Minnesota,[167] and Washington[168]—have been interpreted to provide broader protection in general than the Federal Eighth Amendment.[169] In addition, some state courts have provided more generous protection in particular circumstances under their state constitutions, including Iowa (holding unconstitutional "all mandatory minimum sentences of imprisonment for youthful offenders"),[170] Kentucky (holding unconstitutional LWOP sentences for juveniles convicted of rape),[171] and Michigan (holding unconstitutional mandatory

[162] People v. Smithey, 978 P.2d 1171, 1225 n.1 (Cal. 1999) (Mosk, J., concurring) ("The state constitutional provision is broader than its federal constitutional counterpart."); People v. Baker, 229 Cal. Rptr. 3d 431, 442 (Cal. Ct. App. 2018) (confirming courts "construe the state constitutional provision separately from its counterpart in the federal Constitution").

[163] People v. Clemons, 968 N.E.2d 1046, 1056–57 (Ill. 2012) (emphasizing the proportionate penalties clause "provide[s] a limitation on penalties beyond those afforded by the eighth amendment").

[164] Conner v. State, 626 N.E.2d 803, 806 (Ind. 1993) (affirming art. 1, § 16 of the Indiana Constitution "goes beyond the protection against cruel and unusual punishment contained in the Eighth Amendment to the U.S. Constitution" (citing Taylor v. State, 511 N.E.2d 1036 (Ind. 1987))).

[165] State v. Perry, 610 So. 2d 746, 762 (La. 1992) ("The most significant example of expansion is the deliberate inclusion of a prohibition against 'excessive' punishment, which has been interpreted to add a protection of individual liberty surpassing that provided by the Eighth Amendment."); see also Lee Hargrave, The Declaration of Rights of the Louisiana Constitution of 1974, 35 La. L. Rev. 1, 63 (1974) ("[The 'excessive punishment' clause] gives the courts . . . a basis for determining that sentences, whether fine, imprisonment or otherwise, though not cruel or unusual, are too severe as punishment for certain conduct and thus unconstitutional. It is a basis for extending the court's control over the entire sentencing process.").

[166] State v. Stanislaw, 65 A.3d 1242, 1250 (Me. 2013) ("[T]he Maine Constitution anticipates a broader proportionality review than the Eighth Amendment.").

[167] State v. McDaniel, 777 N.W.2d 739, 753 (Minn. 2010) ("[T]he Minnesota Constitution provides more protection than the U.S. Constitution." (citing State v. Mitchell, 577 N.W.2d 481, 488 (Minn. 1998))).

[168] State v. Manussier, 921 P.2d 473, 483–84 (Wash. 1996) (en banc) ("[T]he state constitutional proscription against cruel punishment affords greater protection than its federal counterpart." (citing State v. Fain, 617 P.2d 720, 723 (1980))).

[169] The U.S. Supreme Court has recognized this fact. See Harmelin v. Michigan, 501 U.S. 957, 982 (1991) (Scalia, J.) (listing six state constitutions that "require[] *all* punishments to be proportioned to the offense," in contrast with the Federal Constitution).

[170] State v. Lyle, 854 N.W.2d 378, 400 (Iowa 2014); see also id. at 405 (Waterman, J., dissenting) (admonishing the court for not "follow[ing] Eighth Amendment decisions of our nation's highest court when applying the cruel-and-unusual-punishment provision of the Iowa Constitution").

[171] Workman v. Commonwealth, 429 S.W.2d 374, 378 (Ky. 1968) (determining that "life imprisonment without benefit of parole for [juveniles convicted of rape] shocks the general

LWOP sentences for those convicted of cocaine possession).[172] But broader constitutional scope, while helpful, is not necessary in order to extend proportionality review to emerging-adult sentencing. For states in which this is a matter of first impression, state supreme courts could consider recent neurological and sociological evidence on emerging adulthood and apply the same reasoning as found in *Roper* and its progeny to conclude that those under age twenty-one, not eighteen, deserve protection under state constitutional law. Relying on harsh, cruel, unusual, or disproportionate penalties clauses, state courts can adopt a prohibition on extreme sentencing for emerging adults.

B. A Successful Facial Challenge in Washington

Success in challenging extreme sentences under state constitutional law has recently been achieved in the State of Washington. Article I, Section 14 of the Washington Constitution prohibits the imposition of "cruel punishment,"[173] and the Washington Supreme Court has interpreted this provision to "afford[] greater protection than" the Federal Eighth Amendment.[174] In 2021, the Washington State Supreme Court held in *In re Monschke & Bartholomew* that this provision barred the imposition of mandatory-LWOP sentences on those under age twenty-one.[175] In doing so, the court effectively extended *Miller v. Florida* protection to emerging adults under state, instead of federal, constitutional law.

In *Monschke*, two emerging adults, ages nineteen and twenty, had been convicted of aggravated first-degree murder and sentenced to "a

conscience of society today and is intolerable to fundamental fairness" and thus violates the Kentucky cruel punishments clause).

[172] People v. Bullock, 485 N.W.2d 866, 866, 872, 877 (Mich. 1992) ("The very purpose of a constitution is to subject the passing judgments of temporary legislative or political majorities to the deeper, more profound judgment of the people reflected in the constitution, the enforcement of which is entrusted to our judgment."). Contra *Harmelin*, 501 U.S. at 957, 994–95 (holding that the Eighth Amendment does not prohibit the imposition of mandatory LWOP for drug possession); see also Recent Case, State Constitutions—Cruel or Unusual Punishment—Michigan Supreme Court Casts Doubt on Its Commitment to Adhere to Federal Interpretations of Parallel Constitutional Provisions—*People v. Bullock*, 485 N.W.2d 866 (Mich. 1992), 106 Harv. L. Rev. 1230, 1230–31 (1993) (discussing *Harmelin* and *Bullock*).

[173] Wash. Const. art. I, § 14.

[174] State v. Manussier, 921 P.2d 473, 483–84 (Wash. 1996) (en banc) ("[T]he state constitutional proscription against cruel punishment affords greater protection than its federal counterpart." (citing State v. Fain, 617 P.2d 720, 723 (1980) (en banc))).

[175] 482 P.3d 276, 279, 288 (Wash. 2021).

mandatory, nondiscretionary sentence" of LWOP.[176] Both individuals argued on a petition for postconviction relief that "the protection against mandatory LWOP for juveniles should extend to them because they were essentially juveniles in all but name at the time of their crimes."[177] The Washington Supreme Court agreed, vacating their sentences and remanding the case for a new sentencing hearing.[178]

The court based its decision predominantly on four factors. First, the court highlighted how age-based protections under federal law have evolved over time. Twenty-one was the "near universal" age of majority until "wartime needs" inspired Congress to change the age to eighteen, in order for men to be conscripted.[179] Further, the Eighth Amendment barred the imposition of capital punishment on those ages fifteen or under until, almost two decades later, the Court extended such protection to age eighteen.[180] The law regarding execution of individuals with intellectual disabilities took a similarly indirect path.[181] As a consequence, the Washington Supreme Court concluded, "Clearly, bright constitutional lines in the cruel punishment context shift over time in order to accord with the 'evolving standards of decency that mark the progress of a maturing society.'"[182]

Second, the court confirmed that bright lines drawn by legislatures can still run afoul of individual constitutional guarantees. The court highlighted an example from Florida, where the state legislature had required defendants to produce a low intelligence quotient ("IQ") test score in order to receive protection against the death penalty on the grounds of incapacity.[183] The U.S. Supreme Court concluded that such a requirement—which disregarded other "substantial and unchallenged evidence of intellectual disability" from the defendant—was unconstitutional under the Eighth Amendment.[184] The same could be true, the Washington Supreme Court explained, of the statute at issue in this case; though the legislature desired that all non-juveniles convicted of aggravated murder receive mandatory LWOP sentences, such a cutoff

[176] Id. at 277.
[177] Id. at 280.
[178] Id. at 288.
[179] Id. at 281 (quoting Hamilton, supra note 84, at 64).
[180] Id.
[181] Id. at 282.
[182] Id. (quoting Trop v. Dulles, 356 U.S. 86, 100–01 (1958) (plurality opinion)).
[183] Id. at 283; see Hall v. Florida, 572 U.S. 701, 701 (2014).
[184] *Hall*, 572 U.S. at 701, 705.

would "disregard[] many scientific indicia of youthfulness" that, under the state constitution, must be considered before imposing such a sentence on emerging adults.[185]

Third, the court emphasized that "the concept of an age of majority is inherently and necessarily flexible."[186] Washington's age of majority is eighteen "[e]xcept as otherwise specifically provided by law," and such exceptions "abound."[187] Under state criminal law, fifteen-year-olds can be transferred to adult court for serious violent offenses; however, juvenile court, in some cases, can maintain jurisdiction over a juvenile until they reach twenty-five.[188] Sixteen-year-olds can receive a driver's license, but "juvenile driving privileges" can be suspended up to age twenty-one.[189] In fact, the time at which adult rights and responsibilities are granted to individuals ranges from ages fourteen to twenty-six, depending on the context.[190] Such variation, though, does not indicate inconsistency, per the court. Rather, it shows "the need for flexibility in defining the nebulous concept of 'adulthood' or 'majority,'" depending on the context in which the construct is applied.[191]

Finally, the court quite emphatically declared that "no meaningful developmental difference exists between the brain of a 17-year-old and the brain of an 18-year-old."[192] Extensive scientific evidence has come to show that "biological and psychological development continues into the early twenties, well beyond the age of majority."[193] And while this reality may not yet be understood by state legislatures, it remains true that the difference between emerging adults and adults "with fully developed

[185] *Monschke*, 482 P.3d at 286, 283.

[186] Id. (internal quotation marks omitted).

[187] Id. at 283–84 (quoting Wash. Rev. Code § 26.28.010).

[188] Id. at 284 (citing Wash. Rev. Code § 13.40.110(1)(a)–(b); Wash. Rev. Code § 13.04.030(1)(e)(v)(C)(II)).

[189] Id. (citing Wash. Rev. Code § 46.20.031(1); Wash. Rev. Code § 46.20.265(2)).

[190] Id. (referencing "[Wash. Rev. Code] § 70.24.110 (allowing those 14 or older to obtain medical care for sexually transmitted diseases without parental consent); [Wash. Rev. Code] § 74.13.031(12) (providing government authority for adoption support benefits, or relative guardianship subsidies on behalf of youth ages eighteen to twenty-one years who meet certain conditions), (16) (providing government authority to provide independent living services to youths, including individuals who have attained eighteen years of age, and have not attained twenty-three years of age); [and] 42 U.S.C. § 18014(d)(2)(E) (providing Affordable Care Act medical coverage to adult children through age 26)" (internal quotation marks omitted)).

[191] Id.

[192] Id.

[193] Id. at 285 (quoting Scott et al., supra note 12, at 642).

brains" is "constitutionally significant."[194] As such, "sentencing courts must have discretion to take the mitigating qualities of youth . . . into account" for any defendant under age twenty-one.[195]

The State, in the case, argued that categorical line drawing of any kind is necessarily over- and under-inclusive, and such an exercise is therefore best left to state legislatures.[196] However, the court responded: while line drawing may "no[t] account[] for the brain development and maturity of *particular* individuals," to not draw such a line would "abdicate our responsibility to interpret the constitution."[197] Overwhelming evidence indicates that, as a general matter, emerging adults lack the maturity of their adult counterparts.[198] Thus, "the variability in individual attributes of youthfulness are *exactly why* courts must have discretion to consider those attributes as they apply to each individual youthful offender . . . [and] why mandatory sentences for youthful defendants are unconstitutional."[199] As a result, the court concluded that sentencing an individual under twenty-one years of age to a mandatory term of LWOP runs afoul of the state's cruel punishment clause. "Just as courts must exercise discretion before sentencing a 17-year-old to die in prison, so must they exercise the same discretion when sentencing an 18-, 19-, or 20-year-old."[200]

C. Illinois's Model of As-Applied Challenges

Alternatively, recent litigation in Illinois provides an example of how successful as-applied constitutional challenges can be brought in practice.[201] In 2018, the Illinois Supreme Court recognized in *People v. Harris* that the Eighth Amendment of the U.S. Constitution does not protect emerging adults, defined in the case as those ages eighteen

[194] Id. at 286.
[195] Id. at 287.
[196] Id. at 285.
[197] Id. (emphasis added).
[198] Id.
[199] Id. (emphasis added).
[200] Id. at 288.
[201] With slight exception, this evolution has received little attention in academic literature. But see Sarah Sewell, In the Courts: Extending Sentencing Protections for Young Offenders, 39 Child. Legal Rts. J. 164, 164–66 (2019); Shen et al., supra note 114, at 114–15.

through twenty, against extreme sentencing.[202] However, the Illinois lower courts have interpreted *Harris* to "pointedly le[ave] open the applicability of the Illinois Constitution" to such claims.[203]

The Illinois Constitution provides that "[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship."[204] This proportionate penalties clause has been interpreted to require that individuals convicted of crimes receive sentences that are balanced in relation to the underlying offense and the person's culpability, as measured by the "community's evolving standard of decency."[205] While facial challenges require a showing that a sentencing practice is unconstitutional under any set of facts, a showing that has not yet been made in Illinois, as-applied challenges only require proving that the practice is unconstitutional under the facts and circumstances of the defendant's case.[206] Since the 2010s, Illinois courts have heard and upheld dozens of as-applied challenges from emerging adults facing particularly lengthy sentences under the state's proportionate penalties clause.[207]

For example, as early as 2015, an Illinois appellate court held that imposing a sentence of mandatory life on a nineteen-year-old for murder, without taking into account mitigating circumstances and the defendant's youth, violated the state constitution's proportionality requirement.[208] Per

[202] 120 N.E.3d 900, 914 (Ill. 2018) (foreclosing Eighth Amendment challenge to aggregate sentence of seventy-six years imposed on eighteen-year-old because he "falls on the adult side of [the] line" established in *Miller* and affirmed in subsequent cases).

[203] See People v. Johnson, 170 N.E.3d 1027, 1032 (Ill. App. Ct. 2020), *overruled on other grounds by* People v. Wimberly, No. 1-21-1464, 2022 WL 4004156 (Ill. App. Ct. Sept. 2, 2022).

[204] Ill. Const. art. I, § 11.

[205] People v. Miller, 781 N.E.2d 300, 307–08 (Ill. 2002).

[206] People v. Thompson, 43 N.E.3d 984, 991 (Ill. 2015).

[207] See infra notes 208–29.

[208] People v. House (*House I*), 72 N.E.3d 357, 388–89 (Ill. App. Ct. 2015); *vacated*, 111 N.E.3d 940, 940 (Ill. 2018) ("The appellate court is directed to consider the effect of this court's opinion in *People v. Harris* on the issue of whether defendant's sentence violates the Proportionate Penalties Clause of the Illinois Constitution." (citation omitted)); *reconsidered* People v. House (*House II*) 142 N.E.3d 756, 774 (Ill. App. Ct. 2019) ("Given defendant's age, his family background, his actions as a lookout as opposed to being the actual shooter, and lack of any prior violent convictions, we find that defendant's mandatory sentence of natural life shocks the moral sense of the community . . . [and] hold that defendant's sentence violates the proportionate penalties clause of the constitution as applied to him."), *rev'd*, People v. House, 185 N.E.3d 1234 (Ill. 2021) (reversing with respect to the as-applied proportionate penalties clause claim because the trial court did not make factual findings of whether the

the court, the "defendant's age, his family background, his actions as a lookout as opposed to being the actual shooter, and lack of any prior violent convictions" diminished his individual culpability.[209] As such, a mandatory life sentence would "shock[] the moral sense of the community" and could not be imposed.[210] Since this time, Illinois courts have "[made] clear that an as-applied, youth-based sentencing challenge by a young-adult offender pursuant to the proportionate penalties clause" is a legitimate claim for emerging adult defendants.[211]

Illinois courts, in general, rely on four reasons for why the extreme sentencing of emerging adults violates the state's constitution. The first is that, as discussed in Part II, advances in neuroscience and social science have proven that emerging adults exhibit similar immaturities and developmental deficiencies to those under age eighteen.[212] The courts acknowledge that "[r]esearch in neurobiology and developmental psychology has shown that the brain doesn't finish developing until the mid-20s,"[213] and as such, "the designation that after age 18 an individual is a mature adult appears to be somewhat arbitrary."[214] Because of this, Illinois courts allow emerging adults to "rely on the evolving neuroscience and societal standards" in challenging their sentences.[215]

neurological science applied to petitioner specifically, and remanding for reconsideration on that point).

[209] *House I*, 72 N.E.3d at 389.

[210] Id.

[211] People v. Daniels, 163 N.E.3d 1216, 1225 (Ill. App. Ct. 2020).

[212] See, e.g., People v. Suggs, 146 N.E.3d 892, 900 (Ill. App. Ct. 2020) ("[D]efendant suggests that the legal definition of 'youth' is expanding to cover increasingly older individuals. We agree that this is occurring."); id. at 902 ("There is support for extending the treatment of juveniles to young adults because neurological development seems to continue into the mid-twenties." (citing Holt, supra note 102, at 1410–17)).

[213] *House II*, 142 N.E.3d at 771 (quoting Vincent Schiraldi & Bruce Western, Opinion, Why 21 Year-Old Offenders Should be Tried in Family Court, Wash. Post (Oct. 2, 2015), www.washingtonpost.com/opinions/time-to-raise-the-juvenile-age-limit/2015/10/02/948e317c-6862-11e5-9ef3-fde182507eac_story.html [https://perma.cc/F7W7-PA5Q]).

[214] Id.

[215] *Daniels*, 163 N.E.3d at 1222; see also People v. Johnson, 170 N.E.3d 1027, 1036 (Ill. App. Ct. 2020) ("We find Johnson's claim that developing brain science may apply to his specific circumstances to be sufficiently supported by the materials attached to his petition—at least, sufficiently supported to warrant further proceedings."), *overruled on other grounds by* People v. Wimberly, No. 1-21-1464, 2022 WL 4004156 (Ill. App. Ct. Sept. 2, 2022); People v. Ruiz, 165 N.E.3d 36, 49–50 (Ill. App. Ct. 2020) (discussing emerging adult development), *overruled on other grounds by* People v. Wimberly, No. 1-21-1464, 2022 WL 4004156 (Ill. App. Ct. Sept. 2, 2022); People v. Bickham, No. 1-18-1883, 2020 WL 6784266, at *10 (Ill. App. Ct. Nov. 17, 2020) (same).

Second, Illinois courts often highlight the diminished culpability of defendants in emerging-adult cases. Some judges highlight the circumstances surrounding the offense that make a given defendant less blameworthy,[216] though as one appellate court has clarified, even emerging adults who were directly involved in or responsible for the conduct deserve to have their guilt mitigated by their youth.[217] Courts also emphasize when a juvenile lacked a history of violent behavior,[218] came from a fragmented family background,[219] or suffered from behavioral or emotional disorders that inhibited their maturation.[220]

The potential for rehabilitation of emerging adults is a third important factor in Illinois judges' decision making. Just as is the case for juveniles, "the ongoing development of [emerging adults'] brains means they have a high capacity for reform."[221] If an emerging adult's misbehavior was the product of immaturity instead of incorrigibility, courts will be more inclined to grant constitutional protection.[222] Age is therefore an important mitigating factor, per the court, because life sentences without the possibility of parole "should be reserved [only] for those rare

[216] *House II*, 142 N.E.3d at 768 (finding that imposing "the same sentence [to the lookout as] the person who pulled the trigger" is unfair and disproportionate); People v. Bland, 158 N.E.3d 338, 341–42 (Ill. App. Ct. 2020) (identifying that the defendant had been found guilty under a theory of accountability as important). Contra People v. Suggs, 146 N.E.3d 892, 901–02 (Ill. App. Ct. 2020) (claiming defendant's criminal activity was "inconsistent with the signature qualities of youth" because it was strategized in advance and committed alone).

[217] People v. Ruiz, 165 N.E.3d 36, 46 (Ill. App. Ct. 2020) ("To prevent [emerging] adult offenders from relying on the mitigating circumstance of their youth simply because they more directly participated in the offense would be error."), *overruled on other grounds by* People v. Wimberly, No. 1-21-1464, 2022 WL 4004156 (Ill. App. Ct. Sept. 2, 2022); People v. Daniels, 163 N.E.3d 1216, 1225 (Ill. App. Ct. 2020) ("Nowhere did the *Harris* court suggest—and nowhere does *House* suggest, we might add—that a defendant's degree of participation in a crime or discretionary sentence should utterly disqualify him or her from raising such a claim.").

[218] *House II*, 142 N.E.3d at 774.

[219] Id.

[220] *Bland*, 158 N.E.3d at 341 (finding important that the defendant "had been diagnosed with an antisocial personality disorder that exhibited symptoms similar to characteristics of juveniles"); People v. Savage, 178 N.E.3d 221, 232 (Ill. App. Ct. 2020) ("Although defendant was seven months past his 21st birthday at the time of the offense, his argument that mental health issues may lower a defendant's functional age finds support in recent case law.").

[221] *House II*, 142 N.E.3d at 771–72 (quoting Ishida, supra note 98, at 1).

[222] Cf. *Daniels*, 163 N.E.3d at 1224–25 (insinuating that a defendant may receive *Miller* protection if the mental health conditions that led to his offense "are of a nature that he can and will outgrow them").

offenders who are beyond hope of redemption."[223] As such, under the proportionate penalties clause of the Illinois Constitution, the "youthfulness" of emerging adults must be taken into account during sentencing.[224]

Finally, courts note that the Illinois legislature has affirmatively indicated support for extending constitutional protection to emerging adults, as "Illinois law treats adults under 21 years of age differently than adults."[225] For example, effective June 2019, the Illinois General Assembly provided parole eligibility to individuals convicted of first-degree murder who were under the age of twenty-one at the time of their offense, thus "endors[ing] the special consideration of the youth of offenders" and heightening protections for emerging adults, in particular.[226] While promoting the passage of the bill, the House Majority Leader herself referred to under-twenty-one-year-olds as "young people."[227] As further evidence, Illinois courts note that emerging adults face numerous legal prohibitions, like drinking alcohol or buying a firearm, due to their age.[228] Additionally, the State's Juvenile Court Act uses the age of twenty-one as the jurisdictional boundary for adjudication in juvenile, instead of adult criminal, court.[229]

To date, the Illinois Supreme Court has not extended such constitutional protection to emerging adults as a class. As recently as

[223] People v. Franklin, 171 N.E.3d 971, 981–82 (Ill. App. Ct. 2020), *overruled on other grounds by* People v. Wimberly, No. 1-21-1464, 2022 WL 4004156 (Ill. App. Ct. Sept. 2, 2022).

[224] *House II*, 142 N.E.3d at 774; see also *Franklin*, 171 N.E.3d at 983 (explaining that the trial court failed to take into account defendant's youthful characteristics in a death-penalty case); People v. Bickham, No. 1-18-1883, 2020 WL 6784266, at *8–9 (Ill. App. Ct. Nov. 17, 2020) (describing previous courts' reversals of trial court decisions that did not consider a defendant's youth and rehabilitative potential).

[225] *Savage*, 178 N.E.3d at 232; see also People v. Suggs, 146 N.E.3d 892, 901 (Ill. App. Ct. 2020) (describing legislation that makes emerging adults eligibile for parole review under certain conditions).

[226] *Suggs*, 146 N.E.3d at 901; An Act Concerning Criminal Law, Pub. Act 100-1182, Sec. 5/54.5-110(b), 2018 Ill. Laws 8923, 8938 (codified at 730 Ill. Comp. Stat. 5/5-4-5-115).

[227] *Franklin*, 171 N.E.3d at 982 (internal quotation marks omitted) (quoting 100th Gen. Assem., House Proceedings, (Ill. Nov. 28, 2018), at 48–49 (statement of Rep. Barbara Flynn Currie), https://www.ilga.gov/house/transcripts/htrans100/10000150.pdf [https://perma.cc/3BH5-SJ34]).

[228] Id. at 982; *Savage*, 178 N.E.3d at 232; People v. Minniefield, 155 N.E.3d 1166, 1174 (Ill. App. Ct. 2020), *overruled on other grounds by* People v. Wimberly, No. 1-21-1464, 2022 WL 4004156 (Ill. App. Ct. Sept. 2, 2022).

[229] *Franklin*, 171 N.E.3d at 982 (quoting 705 Ill. Comp. Stat. 405/1-3(2), 405/1-3(10), 405/5-105(10)).

October 2021, the court confirmed that emerging adult defendants must supply "evidence relating to how the evolving science on juvenile maturity and brain development applies to [their] specific facts and circumstances."[230] As a result, to make a successful claim, emerging adults must go beyond "maintain[ing] that the evolving science on juvenile maturity and brain development highlighted in *Miller* applie[s] . . . [to emerging adults] between the ages of 18 and 21" and instead demonstrate "how that science applies to the circumstances of [the] defendant's case."[231]

D. Indications Nationwide

These arguments raised in Washington and Illinois could be easily replicated in jurisdictions around the country.[232] At least seven states have expressly interpreted their state constitutions to provide broader, more generous protection than the Federal Eighth Amendment.[233] And there is reason to think more state courts would be receptive to such argumentation. A New York Superior Court recently expressed hesitancy about maintaining the traditional, age-based boundary between juveniles and adults at age eighteen; per the court, doing so "presents an unjustifiable risk that it will exclude offenders who present the same brain development issues as minors under 18."[234] The Massachusetts Supreme Judicial Court seems to agree, crediting the fact that some "brain functions are not likely to be fully matured until around age twenty-two"[235] and concluding that "it likely is time for us to revisit the boundary between defendants who are seventeen years old and thus shielded from the most severe sentence . . . and those who are eighteen years old and therefore exposed to it."[236] One Massachusetts Superior Court judge

[230] People v. House (*House II*), 185 N.E.3d 1234, 1240 (Ill. 2021).

[231] People v. Harris, 120 N.E.3d 900, 910 (Ill. 2018) (quoting People v. Holman, 91 N.E.3d 849, 858 (Ill. 2017)).

[232] See supra Section IV.A.

[233] See supra Section IV.A.

[234] People v. Sanchez, 63 Misc. 3d 938, 946 (N.Y. Sup. Ct. 2019) (LWOP sentence for eighteen-year-old).

[235] Commonwealth v. Garcia, 123 N.E.3d 766, 771 (Mass. 2019). Due to the small amount of evidence presented in this case, though, the justices felt unable "to reach an informed conclusion on whether individuals in their late teens or early twenties should be given the same constitutional protections as juveniles." Id.

[236] Commonwealth v. Watt, 146 N.E.3d 414, 428 (Mass. 2020). The court, again, did not answer the question in this case, because the record was insufficiently developed. Id.

recently heeded this invitation, holding that "Article 26 of the Massachusetts Declaration of Rights[, which] includes the Commonwealth's constitutional ban on cruel or unusual punishments," prohibits the mandatory LWOP sentencing of emerging adults, defined in the case as those "who were 18 through 20 years old at the time of their crimes."[237] Finally, a circuit court in Kentucky declared unconstitutional the imposition of the death penalty on any defendant younger than twenty-one.[238] While the state supreme court later held the question to be nonjusticiable and thus vacated the lower court's judgment,[239] this decision—as well as those from other state courts—indicates an eagerness to extend constitutional protection against extreme sentencing to emerging adults.[240] These show that at least some states with Eighth Amendment analogues are willing to embrace the principles of proportionate sentencing on which Illinois and Washington have relied in their own case law.

V. GRANTING FACIAL PROTECTION TO EMERGING ADULTS

A. Proposal

Today, there exists a window of opportunity for industrious lawyers to advocate for the protection of emerging adults using state, instead of federal, constitutional law.[241] Specifically, litigators should argue for the categorical protection of emerging adults under state constitutional provisions prohibiting harsh, cruel, unusual, and disproportionate punishment. This would include a categorical prohibition against imposing capital punishment, mandatory LWOP, and discretionary

[237] Commonwealth v. Robinson, Mattis, Nos. 0084CR10975, 1184CR11291 at *2 (Mass. Sup. Ct. July 20, 2022) (internal quotation marks omitted), [https://perma.cc/T78B-FZLS].

[238] Commonwealth v. Bredhold, No. 14-CR-161, 2017 WL 8792559, at *6 (Ky. Cir. Ct. Aug. 1, 2017), *vacated*, 599 S.W.3d 409 (Ky. 2020), *cert. denied sub nom.* Diaz v. Kentucky, 141 S. Ct. 1223 (2021).

[239] Commonwealth v. Bredhold, 599 S.W.3d 409, 412 (Ky. 2020), *cert. denied sub nom.* Diaz v. Kentucky, 141 S. Ct. 1223 (2021).

[240] And industrious attorneys have been, and are, bringing these claims. See, e.g. Brief of Juvenile Law Center & Youth Sentencing and Reentry Project as Amici Curiae in Support of Petitioners at 3, Cox v. Commonwealth, 655 Pa. 406 (2019) (Nos. 102 EM 2018 & 103 EM 2018) ("highlight[ing] concerns about the constitutionality of Pennsylvania's death penalty under Article I, Section 13, of the Pennsylvania Constitution" and "underscor[ing] the overall arbitrary and disproportionate nature of the death penalty in this Commonwealth").

[241] See supra Section IV.A.

LWOP for non-homicide offenses on those under age twenty-one at the time of their offense.

The Supreme Court's case law regarding juveniles demonstrates that it is possible and desirable to protect a class based on age. *Roper v. Simmons*, *Graham v. Florida*, *Miller v. Alabama*, and *Montgomery v. Louisiana* each conclude that juveniles, as a demographic, "have diminished culpability and greater prospects for reform" because of their youth and immaturity and thus "are less deserving of the most severe punishments."[242] As a consequence, sentences of death, mandatory LWOP, and discretionary LWOP for non-homicide offenses are categorically unconstitutional as applied to juveniles, and their youth must be taken into account when discretionarily sentencing them to LWOP following a homicide conviction.[243]

The Supreme Court has also extended other "categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty."[244] As two examples referenced in *Miller*, the Court has held that individuals who commit non-homicide crimes or defendants with intellectual disabilities are categorically ineligible to receive the death penalty under the Eighth Amendment.[245] These holdings must be followed by state courts, too, so state court judges are already accustomed to following such categorical rules when sentencing defendants who fall into the relevant classes.

And, importantly, the Washington Supreme Court has paved a path, showing how understandings of emerging adult culpability can be integrated into a court's interpretation of state constitutional law. "[N]o meaningful developmental difference exists between the brain of a 17-year-old and the brain of an 18-year-old,"[246] and as such, emerging adults should be granted constitutional protection, too.

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[242] Miller v. Alabama, 567 U.S. 460, 471 (2012) (quoting Graham v. Florida, 560 U.S. 48, 68 (2010)); see also Montgomery v. Louisiana, 577 U.S. 190, 208 (2016) (explaining that it will be uncommon for a juvenile offender to exhibit "irretrievable depravity [such] that rehabilitation is impossible and life without parole is justified"); *Graham*, 560 U.S. at 68 (describing the differences in culpability between juveniles and adults); Roper v. Simmons, 543 U.S. 551, 570 (2005) (same).

[243] See cases cited supra notes 36–40.

[244] *Miller*, 567 U.S. at 470.

[245] Id. (first citing Kennedy v. Louisiana, 554 U.S. 407 (2008); and then citing Atkins v. Virginia, 536 U.S. 304 (2002)).

[246] In re Monschke & Bartholomew, 482 P.3d 276, 284 (Wash. 2021).

While the Illinois courts provide another example for how such protections can be extended, when done on an as-applied basis, progress is more limited. Therefore, while the courts' developments have certainly been positive, mounting a successful facial challenge would provide more expansive and appropriate protection.

The proposal advanced in this Note simply extends and applies the case law recognizing that juveniles are different in a logical, appropriate way. As argued above, there is substantial scientific and sociological evidence justifying why emerging adults more closely resemble juveniles than adults.[247] Therefore, the standards used and protections extended when sentencing juveniles should, as a logical and normative matter, be available for all emerging adults sentenced under state law. In order to move the needle under state constitutional law, litigators should proactively bring these facial challenges against extreme sentences imposed on emerging adults.

B. Rebutting Arguments

Those who challenge this Note's proposal likely dissent on three grounds. First, some believe that, contrary to the scientific evidence, emerging adults should not be recognized as a separate class and are, instead, adults. Others may advocate the opposite, arguing that emerging adulthood should include those over the age of twenty-one, too. Finally, some, on practical grounds, may advocate for the advancement of an as-applied strategy, instead of a facial one. Each argument is addressed in the Subsections that follow.

1. Arguments Against Emerging Adulthood as a Construct

Plausible, but ultimately unpersuasive, arguments exist for why constitutional protection against extreme sentencing should only be granted to those ages eighteen and under. The Delaware Supreme Court, for example, referenced "society's collective judgment about when the rights and responsibilities of adulthood should accrue" in justifying why the Supreme Court drew the line of Eighth Amendment protection at eighteen.[248] The Delaware court's assessment is partially true, for example, in areas such as voting, employment, contract rights, and

[247] See supra Section II.B.
[248] Zebroski v. State, 179 A.3d 855, 862 (Del. 2018).

freedom from parental custody.[249] However, as discussed above, there are also many exceptions to this general understanding. In recognition of the relative immaturity of emerging adults and their propensity to engage in risk-taking behaviors, the minimum age for controlled substance use (alcohol, tobacco, and marijuana where relevant), firearm ownership, and access to credit (independent of a cosigner) is twenty-one, and the minimum age for certain driving privileges (e.g., car rental) can extend to twenty-five.[250] Further, young people take longer to reach other milestones of adulthood today than they have historically, including marriage[251] and becoming financially self-sufficient.[252] And, in fact, the legal age of majority was twenty-one for much of American history, until the conscription of eighteen-year-old boys began during World War II.[253] Thus, as many have argued, "[t]he state-established age of legal majority stands in marked contrast to this gradual and prolonged process" of development.[254]

Importantly, the use of eighteen as a marker of adulthood was also constructed without the benefit of modern psychological and neurological research, which has shed light on the realities of human development. The neurological maturity of twenty-one-year-olds, according to modern science, more closely resembles that of seventeen-year-olds than that of adults, as they still exhibit the immaturity, impressionability, and corrigibility of youth.[255] Thus, extending state constitutional protection against extreme sentencing to emerging adults would better align our criminal legal practices with this emerging neuro-biological research. It would also help state courts impose sentences that are more proportionate and appropriate, given the lessened culpability of emerging adults that is the product of their lessened maturity. In sum, as the neurological rationales for protecting juveniles apply equally to emerging adults, emerging adults should be afforded the same protection.

Alternatively, the Sixth Circuit has justified maintaining the age of eighteen on practical grounds, alleging that a system based on something

[249] Hamilton, supra note 84, at 68, 70, 72–74.
[250] Lindell & Goodjoint, supra note 12, at 11–12.
[251] Arnett, supra note 86, at 246.
[252] Fingerman, supra note 87, at 2.
[253] Hamilton, supra note 84, at 64–65.
[254] Id. at 55.
[255] See supra Section II.B.

other than chronological age would be "essentially unmanageable."[256] Consistent with such an understanding, this Note does not advocate for a system that grants constitutional protection based on individualized characteristics and assessments of maturity. Instead, this Note posits that considerations of proportionality should extend categorically up to age twenty-one in order to better align sentencing practices with both neuro-biological realities of human development and modern, socio-cultural conceptions of youth. As confirmed by the Fourth Circuit, it is true that "[i]ndividual differences in maturity will necessarily mean that age-based rules will have an element of arbitrariness, particularly when they have such stark differences in effect between those just one week below the cut-off and those just one week above."[257] But, if a line must be drawn, using the age of twenty-one is a more accurate benchmark of maturity, and thus a more appropriate and less arbitrary choice of where to extend constitutional protection, than the age of eighteen.

2. Arguments in Favor of a More Expansive Understanding of Emerging Adulthood

On the other hand, some advocates may argue that extending emerging adult protection to only age twenty-one is insufficient.[258] Scientific literature indicates that neurological development extends into individuals' mid-twenties.[259] Additionally, those under age twenty-five exhibit sociological characteristics—including patterns of offending—that are more similar to juveniles than to adults.[260] Thus, while this Note's proposal would better protect *some* emerging adults, it would not protect all individuals who are still developing in maturity and neurological ability.

The same criticism could be lodged of the doctrine in Washington and Illinois; while their state constitutional law is slightly more protective of emerging adults than that in other parts of the country, those courts only

[256] United States v. Marshall, 736 F.3d 492, 499 (6th Cir. 2013); see supra note 116 for a criticism of this analysis.

[257] United States v. Chavez, 894 F.3d 593, 609 (4th Cir. 2018).

[258] See, e.g., Shust, supra note 102, at 699–700 (arguing that twenty-five is a more appropriate age at which to draw the line for emerging adult protection).

[259] Caulum, supra note 72, at 743; Dosenbach et al., supra note 74, at 1361.

[260] Loeber et al., supra note 80, at 20 (indicating that offenders through age twenty-four "are more similar to juveniles than to adults with respect to their offending, maturation and life circumstances").

extend protection against extreme sentences to those under age twenty-one, not twenty-five or older.[261]

This Note limits its proposal to those ages twenty-one and under because this line is best supported by case law in Washington and Illinois and thus easiest to justify. Additionally, extant laws recognize twenty-one as a socially significant age of maturity.[262] While it may be the case that twenty-five would be a more neurologically appropriate age, it is a harder argument to make legally.[263]

However, this body of law is only in its "developmental stage[s]," and there appears to be substantial room for future growth.[264] Thus, while this Note advocates that twenty-one should be the first age-based milestone at which constitutional protection against extreme sentences is extended to emerging adults, it will hopefully not be the last. Future litigation on the issue will open up further conversation around what age—perhaps twenty-five, or even older—would be most appropriate given modern neurological and socio-cultural understandings of development. However, twenty-one provides a starting point for a conversation that is currently impossible under the Federal Constitution, and thus, would enable positive first steps.

3. Arguments in Favor of As-Applied, Versus Facial, Challenges

Finally, some may argue that combatting extreme sentences as applied to particular defendants, as done in Illinois, would be a more practical and appropriate form of advocacy than arguing for facial protection of emerging adults as a class, as done in Washington. This Note agrees that, when compared to extant law, this would be a useful development. But, for two reasons, this Note advocates for a more expansive change in law than an as-applied approach would allow.

First, an as-applied strategy would be less protective for emerging adults. It will always be the case that categorical rules are under- and over-

[261] See, e.g., In re Monschke & Bartholomew, 482 P.3d 276, 284, 288 (Wash. 2021) (extending protections to eighteen-, nineteen-, and twenty-year-olds but not twenty-one-year-olds); People v. Green, 161 N.E.3d 1045, 1053, 1056 (Ill. App. Ct. 2020) (twenty-two-year-old offender); People v. Hoover, 131 N.E.3d 1085, 1093 (Ill. App. Ct. 2019) (twenty-two-year-old offender); People v. Humphrey, 169 N.E.3d 1078, 1087 (Ill. App. Ct. 2020) (twenty-one-year-old offender).

[262] See supra note 91.

[263] See Powell, supra note 106, at 85 n.16.

[264] People v. Franklin, 171 N.E.3d 971, 983 (Ill. App. Ct. 2020), *overruled on other grounds by* People v. Wimberly, No. 1-21-1464, 2022 WL 4004156 (Ill. App. Ct. Sept. 2, 2022).

inclusive; many individuals under age eighteen, for example, may never engage in violent crime, in part because of their heightened maturity in comparison to peers. But the neurological development of juveniles *on average* justifies a categorical rule protecting them against extreme sentences. The same is true of emerging adults.

The evidence provided above demonstrates that, overall, emerging adults more closely resemble juveniles in their maturity and development; this manifests in a lessened ability to control impulse, evaluate risk, and reject peer pressure. Thus, as advanced by the *Roper* Court, to not draw a categorical line would "risk allowing a youthful person"—here, an emerging adult—"to receive [an extreme sentence] despite insufficient culpability."[265]

Such a danger has already materialized in practice in Illinois. Courts have been loath to grant emerging adult protection to offenders whose crimes, for example, are premeditated or particularly violent.[266] However, the facts of an offense do not necessarily correspond with the relevant emerging adult's maturity—in fact, it may indicate the opposite. Therefore, as a class, emerging adults should be extended categorical protection against extreme sentences, just as their juvenile counterparts have been granted.

The advantage to an as-applied approach, of course, would be that those emerging adults who *are* sufficiently mature, unimpressionable, and incorrigible do not receive protection against extreme sentencing following criminal prosecution. As expressed by Justice O'Connor in her *Roper* dissent, some may believe "that at least some 17–year–old [the age at issue in this case] murderers are sufficiently mature to deserve the death penalty."[267] But this Note posits that such analysis should not be

[265] Roper v. Simmons, 543 U.S. 551, 572–73 (2005).

[266] See, e.g., People v. Braboy, No. 1-18-1568, 2020 WL 6927276, at *12 (Ill. App. Ct. Nov. 24, 2020) (dismissing petitioner's claim that his sentence violated the proportionate penalties clause because he was an active participant, his sentence was discretionary, and mitigating factors were considered). But see id. at *13 (Pucinski, J., dissenting) (insisting "we must still account for all of the new research on emerging adults"). See also People v. Rivera, 174 N.E.3d 92, 98–99 (Ill. App. Ct. 2020) (dismissing claim from twenty-four-year-old individual convicted of participation in a "carefully planned and staged robbery"); People v. Guye, No. 1-17-0136, 2019 WL 7246447, at *11 (Ill. App. Ct. Dec. 26, 2019) (denying petition because the defendant was directly responsible for the offense); People v. Pittman, 104 N.E.3d 485, 497 (Ill. App. Ct. 2018) (referencing the "the violent and serious nature" of the offense).

[267] *Roper*, 543 U.S. at 588 (O'Connor, J., dissenting). As a result, she believed that such a determination should be left to legislatures. Id. But see supra Section IV.B for the Washington Supreme Court's analysis of why this is not the case.

necessary. As the Washington Supreme Court has made abundantly clear, class-based protection of emerging adults is desirable because of the characteristics of the class as a whole.[268] The limited development of emerging adults, as well as their capacity for change with age, makes them a suitable class for protection.

Second, implementing a system of as-applied challenges would be substantially more cumbersome for courts to administer—and unnecessarily so. The as-applied regime of Illinois described above requires courts to consider each defendant's individualized characteristics—in particular, those related to age and maturity—in considering whether or not an extreme sentence is appropriate in a given case.[269] Such an approach would be more taxing on lawyers, who would have to compile evidence relating to the neurological development of each of their clients, as well as judges, who would then need to evaluate how such evidence relates to the defendant's commitment of the offense. A categorical rule would thus provide simplicity and, in general, accurate assessments regarding an emerging adult's neurological capacity and culpability.

Finally, to the extent that advocates believe lodging as-applied challenges is a more feasible first step forward: it does no harm to advance this argument alongside arguments for facial protection, too. But for reasons listed above, litigants should recognize the benefits of and justifications for extending facial protection to all emerging adults, and courts should be wary of "abdicat[ing] [their] responsibility to interpret the constitution"[270] in favor of smaller, more individualized action.

CONCLUSION

While "the law must often play catch-up to other fields of empirical study,"[271] that gap is closing with respect to understandings of emerging adulthood. Advocates across the country have successfully argued that the traits characteristic of juveniles—immaturity, impressionability, and corrigibility—are also exhibited by emerging adults, and state courts have taken note. By lending constitutional protection against extreme

[268] In re Monschke & Bartholomew, 482 P.3d 276, 281 (Wash. 2021).
[269] See People v. House (*House II*), 185 N.E.3d 1234, 1240 (Ill. 2021).
[270] *Monschke*, 482 P.3d at 285.
[271] People v. Johnson, 170 N.E.3d 1027, 1037 (Ill. App. Ct. 2020), *overruled on other grounds by* People v. Wimberly, No. 1-21-1464, 2022 WL 4004156 (Ill. App. Ct. Sept. 2, 2022).

sentencing to emerging adults, as courts have done in Illinois and Washington, the law will better align with neurological realities of human development, better promote rehabilitation of individual offenders, and ultimately, better support social well-being. Thus, under state constitutional provisions, litigators should advocate for the constitutional protection of emerging adults against the harshest of criminal punishments. While it is true, as the *Roper* Court confirmed, that "a line must be drawn,"[272] this Note advocates that such a line should be drawn at the age of twenty-one.

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