

## UNDERDEVELOPED AND OVER-SENTENCED: WHY EIGHTEEN- TO TWENTY-YEAR-OLDS SHOULD BE EXEMPT FROM LIFE WITHOUT PAROLE

Reynolds Wintersmith was just twenty years old when he learned he may spend the rest of his life in prison.<sup>1</sup> In 1994, he was sentenced to life without the possibility of parole for a nonviolent drug crime.<sup>2</sup> It was his first conviction.<sup>3</sup>

When United States District Judge Philip Reinhard was sentencing Reynolds, he struggled with the mandatory minimum requirements:<sup>4</sup>

Under the federal law I have no discretion in my sentencing. Usually a life sentence is imposed in state courts when somebody has been killed or severely hurt, or you got a recidivist . . . . [T]his is your first conviction, and here you face life imprisonment . . . . [I]t gives me pause to think that that was the intent of Congress, to put somebody away for the rest of their life.<sup>5</sup>

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1. *Reynolds Wintersmith*, FAMM, <http://famm.org/reynolds-wintersmith/> (last visited Mar. 1, 2018) [hereinafter FAMM].

2. *Id.*

3. *Id.* Reynolds's involvement with drugs was unsurprising, given his childhood. As a child, Reynolds was surrounded by drugs. John Kuhn, *From the War on Drugs, a Story of Redemption*, CHI. REP. (Aug. 19, 2014), <http://chicagoreporter.com/war-drugs-story-redemption/>. When he was eleven years old, he watched his mother die of a heroin overdose. *Id.* After her death, he lived with his drug-dealing grandmother and was constantly amid gang violence. *Id.*; Annie Sweeney, *Year After Obama-Ordered Prison Release, Ex-Drug Dealer Finds Career*, CHI. TRIB. (Jan. 1, 2015), <http://chicagotribune.com/news/ct-life-after-prison-met-20141229-story.html>. After his grandmother was sent to prison, Reynolds began to sell drugs to provide for his younger siblings when he was seventeen years old. Kuhn, *supra*; Sweeney, *supra*. It was not long before the adults in the gang brought him further into the drug ring as a leader. Kuhn, *supra*; FAMM, *supra* note 1. He was arrested when he was nineteen years old and convicted on four counts as part of a conspiracy to possess crack cocaine with intent to distribute. ACLU, A LIVING DEATH: LIFE WITHOUT PAROLE FOR NONVIOLENT OFFENSES 67 (2013), <https://www.aclu.org/files/assets/111813-lw-op-complete-report.pdf>; Kuhn, *supra*.

4. Kuhn, *supra* note 3. To calculate his sentence, Reynolds's crimes were run through a formula that considered several factors, which resulted in a sentence of life plus forty years in federal prison. *Id.* Reynolds was effectively sentenced to life without parole because the federal government abolished parole in the 1980s. See *infra* note 107.

5. FAMM, *supra* note 1.

This comment contends that Reynolds Wintersmith belonged to a class of offenders who should be categorically exempt from sentences of life imprisonment without the possibility of parole. Sentencing eighteen- to twenty-year-olds to life without parole should be considered cruel and unusual because it is disproportionate to this class of offenders' culpability.

The United States Supreme Court has categorically exempted classes of offenders from punishment before.<sup>6</sup> In *Roper v. Simmons*, the Court held that sentencing juveniles to death violated the Eighth Amendment's ban on cruel and unusual punishment.<sup>7</sup> The Court also held in *Graham v. Florida* that juveniles were categorically exempted from life imprisonment without the possibility of parole for non-homicide offenses.<sup>8</sup> In coming to these decisions, the Court has given the same two reasons for categorically banning particular sentences for classes of offenders: (1) a national consensus has formed against the sentence for the class of offenders, and (2) the sentence is disproportionate to the culpability of the class of offenders.<sup>9</sup>

This comment argues that eighteen- to twenty-year-olds should be categorically spared from life without parole for these same two reasons.<sup>10</sup> First, sentencing data suggests only a small portion of those sentenced to life without parole were between eighteen and twenty years old at the time of their crimes.<sup>11</sup> This low rate illustrates that the country appears to oppose sentencing eighteen- to twenty-year-olds to prison for the rest of their lives without any opportunities for release. Second, sentencing eighteen- to twenty-year-olds to life without parole is a disproportionate punishment because scientific research shows that this class of individuals shares the same mitigating characteristics as juvenile offenders.<sup>12</sup>

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6. See, e.g., *Graham v. Florida*, 560 U.S. 48, 74 (2010); *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

7. See *Roper*, 543 U.S. at 578.

8. *Graham*, 560 U.S. at 74–75.

9. See *id.* at 60–61; *Roper*, 543 U.S. at 564–68.

10. Though beyond the scope of this comment, this class of offenders should also be categorically spared from the death penalty. See generally Andrew Michaels, *A Decent Proposal: Exempting Eighteen- to Twenty-Year-Olds From the Death Penalty*, 40 N.Y.U. L. & SOC. CHANGE 139 (2016).

11. See ACLU, *supra* note 3, at 26 tbl.7; E. ANN CARSON & WILLIAM J. SABOL, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, AGING OF THE STATE PRISON POPULATION, 1993–2013, at 21 tbl.15 (2016) (basing data on prisoners sentenced to more than one year in state prison on new court commitments).

12. See, e.g., Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEVELOPMENTAL REV. 339, 343 (1992) [hereinafter Arnett, *Reckless Behavior*]

These characteristics diminish culpability and thus make life without parole a disproportionate sentence for these offenders.

Part I of this comment describes the legal foundation for establishing categorical sentencing exemptions for classes of offenders, discussing the Supreme Court's decisions in *Roper*,<sup>13</sup> *Graham*,<sup>14</sup> and *Miller*.<sup>15</sup> Part II outlines the behavioral, psychological, and neurological research surrounding the culpability of eighteen- to twenty-year-olds, arguing that there is scientific confirmation that eighteen- to twenty-year-olds' brains are similar to those of juveniles. Part III applies the Court's categorical exemption test and concludes that eighteen- to twenty-year-olds should be exempt from life without parole.<sup>16</sup> In the end, eighteen- to twenty-year-olds have more to offer the world in the long lives they have ahead of them.

#### I. THE SUPREME COURT'S CATEGORICAL EXEMPTION JURISPRUDENCE

The Supreme Court created a test to categorically exempt offenders from sentences,<sup>17</sup> and has applied this test to the death penalty with regard to mentally disabled offenders and defendants under eighteen years of age at the time of their crimes.<sup>18</sup> The Court has also applied the test to life without parole for non-homicide

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(reckless behavior); Graham Bradley & Karen Wildman, *Psychosocial Predictors of Emerging Adults' Risk and Reckless Behaviors*, 31 J. YOUTH & ADOLESCENCE 253, 253–54, 263 (2002) (peer pressure).

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

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

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

16. While exempting twenty-four- and twenty-five-year-olds from life without parole would be ideal, this paper posits that our country is much more likely to accept the categorical exemption of eighteen- to twenty-year-olds than of eighteen- to twenty-five-year-olds. Twenty-one years of age is already a culturally significant marker of maturity. See Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (codified at 18 U.S.C. § 922(b)(1), (c)(1) (2012)) (prohibiting anyone under twenty-one years of age from purchasing handguns from Federal Firearms Licensees); National Minimum Drinking Age Act of 1984, Pub. L. No. 98-363, 98 Stat. 437 (codified at 23 U.S.C. § 158 (2012)) (prohibiting anyone under twenty-one years of age from purchasing alcohol); Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, § 201, 122 Stat. 3949 (2008) (providing states with financial incentives to extend the age of eligibility for foster care services to twenty-one years of age). Twenty-two, twenty-three, twenty-four, and twenty-five are not culturally significant ages. Until twenty-five years of age reaches the same cultural significance as twenty-one, society will likely be less willing to support the categorical exemption of twenty-one to twenty-five-year-olds.

17. See, e.g., *Atkins v. Virginia*, 536 U.S. 304, 312–13 (2002) (describing the categorical tests).

18. *Id.* at 321 (mentally disabled offenders); *Roper*, 543 U.S. at 578 (juvenile offenders).

juvenile offenders.<sup>19</sup> While the Court held it is unconstitutional to sentence juveniles to *mandatory* life without parole in homicide cases, it bypassed the categorical exemption test because it was not necessary to decide the case in question.<sup>20</sup> This part discusses the Court's categorical exemption test and the relevant cases in which it has been implemented.

#### A. *Atkins and Roper: The Supreme Court's Two-Part Categorical Exemption Test*

In 2002, the Supreme Court held in *Atkins v. Virginia* that the execution of defendants with mental disabilities violated the Eighth Amendment.<sup>21</sup> To support its holding, it engaged in a two-part analysis.<sup>22</sup> First, the Court recognized that numerous states were no longer executing those with mental disabilities, and "even in those [s]tates that allow the execution of mentally [disabled] offenders, the practice is uncommon."<sup>23</sup> The Court found that because the practice had become so unusual, "a national consensus [had] developed against it."<sup>24</sup>

Second, the Court engaged in an independent proportionality inquiry and held that executing those with mental disabilities "will [not] measurably advance the deterrent or the retributive purpose of the death penalty."<sup>25</sup> The Court recognized that those with mental disabilities "do not act with the level of moral culpability that characterizes the most serious adult criminal conduct."<sup>26</sup> People with mental disabilities are less likely to be deterred by capital punishment because of "their disabilities in areas of reasoning, judgment, and control of their impulses."<sup>27</sup> Therefore, the Court found capital punishment was "excessive" after "[c]onstruing and

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19. *Graham*, 560 U.S. at 74–75.

20. *Miller*, 567 U.S. at 479.

21. *Atkins*, 536 U.S. at 321. The Court emphasized it had repeatedly held that "it is a precept of justice that punishment for crime should be graduated and proportioned to [the] offense." *Id.* at 311 (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)). The Eighth Amendment states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

22. *Atkins*, 536 U.S. at 312–13.

23. *Id.* at 314–16.

24. *Id.* at 316.

25. *Id.* at 321. The second prong of this test invokes what is known as the proportionality principle. *See id.* at 311 ("We have repeatedly applied this proportionality precept in later cases interpreting the Eighth Amendment.").

26. *Id.* at 306.

27. *Id.* at 306, 319–20.

applying the Eighth Amendment in the light of our ‘evolving standards of decency.’”<sup>28</sup>

Three years later, in *Roper v. Simmons*, the Court held that the execution of defendants younger than eighteen years of age at the time of their crimes violated the Eighth Amendment.<sup>29</sup> In reaching its decision, the Court engaged in its two-part analysis from *Atkins*.<sup>30</sup> It held that a national consensus had formed in opposition to executing juveniles, which was evidence that society views juveniles as “categorically less culpable than the average criminal.”<sup>31</sup>

The Court then engaged in its independent proportionality inquiry and held the death penalty was an excessive punishment for juveniles under the Eighth Amendment.<sup>32</sup> The Court reasoned that “[c]apital punishment must be limited to those offenders who commit ‘a narrow category of the most serious crimes’ and whose extreme culpability makes them ‘the most deserving of execution.’”<sup>33</sup> It reasoned that juveniles cannot be classified among the worst of offenders because they differ from adults in three meaningful ways: (1) they lack maturity and a developed sense of responsibility; (2) they are “susceptible to negative influences and outside pressures, including peer pressure;” and (3) their character is not as well-formed.<sup>34</sup> The Court concluded these characteristics diminished culpability, and the two clear social purposes served by the death penalty—retribution and deterrence—were therefore not as adequate of justifications with regard to juveniles as they are with adults.<sup>35</sup>

While the Court acknowledged that “[t]he qualities that distinguish juveniles from adults do not disappear when an individual

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

29. *Roper v. Simmons*, 543 U.S. 551, 578 (2005). *Roper* extended the protection to sixteen- and seventeen-year-olds as the Court had already provided for those under sixteen years of age. *Id.* at 570–71; see *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988).

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

31. *Id.* at 567–68. The Court even recognized that “the United States is the only country in the world that continues to give official sanction to the juvenile death penalty.” *Id.* at 575.

32. *Id.* at 568–75.

33. *Roper*, 543 U.S. at 568 (quoting *Atkins*, 536 U.S. at 319).

34. *Id.* at 569–70. The Court cited Arnett, *Reckless Behavior*, *supra* note 12, for the first finding; Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOL. 1009, 1014 (2003), for the second finding; and ERIK H. ERIKSON, *IDENTITY: YOUTH AND CRISIS* 26–28 (1968), for the third finding. The Court noted these differences reflected both what “any parent knows” and what scientific and sociological studies tend to confirm. *Roper*, 543 U.S. at 569.

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

turns 18,” it decided that a bright line needed to be drawn.<sup>36</sup> After recognizing that logic previously used to exclude offenders under age sixteen from the death penalty<sup>37</sup> could be extended to those under eighteen, the Court concluded that because eighteen years of age was “where society draws the line for many purposes between childhood and adulthood,” this is also where “the line for death eligibility ought to rest.”<sup>38</sup> As the risk of executing juvenile offenders with diminished culpability could not be remedied by an individualized sentencing regime, offenders under eighteen years old are categorically exempt from the death penalty.<sup>39</sup>

B. *Graham: Analyzing Actual Sentencing Practices to Find a National Consensus Against a Punishment*

While *Atkins* and *Roper* provided the two-part categorical exemption test,<sup>40</sup> *Graham* clarified the first prong of the test in 2010.<sup>41</sup> In *Graham*, the Court applied the two-part test and held that juveniles were categorically exempted from life without parole for non-homicide offenses.<sup>42</sup> It found that a national consensus existed against this punishment even though the majority of states permitted it.<sup>43</sup> After considering the practices of states where the sentence was permitted, the Court found the punishment was rarely utilized.<sup>44</sup> For this reason, “an examination of actual sentencing practices . . . discloses a consensus against its use.”<sup>45</sup> The Court went on to note that only one state imposed the “significant

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36. *Id.* at 574.

37. *Thompson v. Oklahoma* held that offenders under sixteen years of age could not be sentenced to the death penalty. 487 U.S. 815, 838 (1988).

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

39. *Id.* at 572–73. There is an American Psychiatric Association rule forbidding psychiatrists from diagnosing juveniles with antisocial personality disorder, otherwise known as psychopathy or sociopathy. *Id.* at 573 (citing AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 701–06 (4th ed. text rev. 2000)). The Court argued that “[i]f 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, . . . [s]tates should refrain from asking jurors to issue a far graver condemnation—that a juvenile offender merits the death penalty.” *Id.*

40. *Id.* at 564; *Atkins v. Virginia*, 536 U.S. 304, 312–13 (2002).

41. *Graham v. Florida*, 560 U.S. 48, 61–62 (2010).

42. *Id.* at 74–75.

43. *Id.* at 62.

44. *Id.*

45. *Id.*

majority” of the sentences, and only ten states imposed the remainder.<sup>46</sup> *Graham* therefore clarified that a national consensus against a practice can be established by the mere infrequency of the particular sentence.<sup>47</sup>

When applying the second prong of the categorical exemption test, the Court held that life without parole is a violation of the Eighth Amendment when imposed on juvenile offenders for non-homicide offenses for three reasons: (1) the offender’s lessened culpability;<sup>48</sup> (2) the severity of life without parole;<sup>49</sup> and (3) the lack of any legitimate penological justification—such as retribution, deterrence, incapacitation, or rehabilitation—to justify the sentence.<sup>50</sup>

For the first concern, the Court reiterated the same three mitigating characteristics outlined in *Roper*.<sup>51</sup> It also emphasized that “[a] sentence lacking any legitimate penological justification is by its nature disproportionate to the offense.”<sup>52</sup> The Court continued to recognize that “because juveniles have lessened culpability they are less deserving of the most severe punishments.”<sup>53</sup> Furthermore, the Court pointed out that “developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds,”<sup>54</sup> including that “parts of the brain involved in behavior control continue to mature through late adolescence.”<sup>55</sup>

When discussing its second concern—the severity of life without parole—the Court noted the sentence shares characteristics with

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46. *Id.* at 64. Florida imposed the significant majority of sentences, and California, Delaware, Iowa, Louisiana, Mississippi, Nebraska, Nevada, Oklahoma, South Carolina, and Virginia imposed the remainder. *Id.* at 63–65 (citations omitted).

47. *See id.* at 62.

48. *Id.* at 68–69.

49. *Id.* at 69–71.

50. *Id.* at 71–74.

51. *Id.* at 68 (citing *Roper v. Simmons*, 543 U.S. 551, 569–70 (2005)). The Court cited juveniles’ (1) “lack of maturity and . . . underdeveloped sense of responsibility;” (2) vulnerability “to negative influences and outside pressures, including peer pressure;” and (3) character being “not as well formed” as adults’ character. *Id.* (quoting *Roper*, 543 U.S. at 569–70).

52. *Id.* at 71.

53. *Id.* at 68 (citing *Roper*, 543 U.S. at 569).

54. *Id.*

55. *Id.* (citing Brief for the Am. Med. Ass’n et al. as Amici Curiae in Support of Neither Party at 16–24, *Graham v. Florida*, 560 U.S. 48 (2010) (Nos. 08-7412, 08-7621), 2009 WL 2247127 [hereinafter Brief for the AMA]); Brief for the Am. Psychological Ass’n et al. as Amici Curiae Supporting Petitioners at 22–27, *Graham v. Florida*, 560 U.S. 48 (2010) (Nos. 08-7412, 08-7621), 2009 WL 2236778).

the death penalty that other sentences do not.<sup>56</sup> For instance, the Court recognized the only hope offenders have in the restoration of their most basic liberties is the remote chance of executive clemency, “which does not mitigate the harshness of the sentence.”<sup>57</sup> Furthermore, the Court emphasized the importance of time when it reasoned that after imposition of this sentence, “a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender.”<sup>58</sup> Therefore, imposing life without parole on juvenile offenders was especially severe.<sup>59</sup>

Finally, the Court examined four penological justifications for sentencing juveniles to life without parole for non-homicide offenses and found that none of them adequately justified the sentence.<sup>60</sup> The Court ruled out (1) retribution because of juvenile offenders’ lessened culpability,<sup>61</sup> (2) deterrence because of juveniles’ impulsiveness,<sup>62</sup> (3) incapacitation because of their capacity for change,<sup>63</sup> and (4) rehabilitation because the sentence itself is contradictory to the rehabilitative ideal.<sup>64</sup> Due to the lack of legitimate justification for sentencing juveniles to life without parole for non-homicide offenses, the Court held the sentence was disproportionate and therefore violated the Eighth Amendment.<sup>65</sup>

### C. Miller: *Bypassing the Categorical Exemption Test*

The Supreme Court continued to rely on juvenile development as a justification for exempting categories of juvenile offenders when it decided *Miller v. Alabama* in 2012.<sup>66</sup> The Court held it is unconstitutional to sentence juveniles to mandatory life without parole for homicide cases because mandatory sentencing schemes do not allow judges or juries to consider the characteristics of youth as mitigating factors.<sup>67</sup> According to the Court, this mandatory

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56. *Id.* at 69.

57. *Id.* at 69–70.

58. *Id.* at 70. The Court reasoned that “[a] 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only.” *Id.* (citation omitted).

59. *Id.*

60. *Id.* at 71–74.

61. *Id.* at 71–72.

62. *Id.* at 72.

63. *Id.* at 72–73.

64. *Id.* at 73–74.

65. *Id.* at 74.

66. *See Miller v. Alabama*, 567 U.S. 460, 471–73, 477, 479 (2012).

67. *Id.* at 474. The Court reasoned that precedent had established that “children are constitutionally different from adults for purposes of sentencing.” *Id.* at 471.

sentencing scheme posed “too great a risk of disproportionate punishment” because it made “youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence.”<sup>68</sup>

The Court did not rely on the two-part categorical exemption test in its holding.<sup>69</sup> Rather, it combined its reasoning in *Roper* and *Graham* regarding juvenile culpability with precedent requiring individualized sentencing when imposing capital punishment.<sup>70</sup> The Court noted that life without parole should be treated similarly to capital punishment when the offenders are juveniles because it is such a severe sentence.<sup>71</sup> Therefore, because youth is significant in sentencing, the Court held that “a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles.”<sup>72</sup>

## II. SCIENTIFIC FINDINGS SURROUNDING THE CULPABILITY OF YOUNG ADULTS

This Part outlines the behavioral, psychological, and neurological research surrounding the culpability of eighteen- to twenty-year-olds. As it will show, eighteen- to twenty-year-olds’ brains are similar to those of juveniles. Therefore, they should be viewed similarly to adolescents in terms of culpability due to the seriousness of life without parole.<sup>73</sup>

### A. Behavioral and Psychological Research

Behavioral and psychological research reveal eighteen- to twenty-year-olds are more similar to adolescents than older

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68. *Id.* at 479.

69. *See id.* at 480, 482–83. Although the Court discussed “objective indicia” in regards to the first prong of the categorical exemption test, *id.* at 482–83, the crux of the holding relied on a line of precedent mandating individualized sentencing, *id.* at 483, 485 n.11.

70. *See id.* at 470–71.

71. *See id.* at 474.

72. *Id.* at 489. The Court pointed out that the “distinctive (and transitory) mental traits and environmental vulnerabilities” of juveniles are not crime-specific. *Id.* at 473. However, the Court still limited its holding to juveniles convicted of homicide offenses. *Id.* at 479–80. One of the petitioners’ arguments was that the Eighth Amendment requires a categorical ban on life without parole for all juveniles, regardless of the crime, at least for those under fourteen years old. *Id.* at 479. The Court declined to consider the argument because it reasoned it could sufficiently decide *Miller* by holding that life without parole cannot be mandatory for juvenile homicide offenders. *Id.* at 479–80.

73. This comment posits that our country is much more likely to accept the categorical exemption of eighteen- to twenty-year-olds than of eighteen- to twenty-five-year-olds. *See supra* note 16.

adults.<sup>74</sup> For example, research shows impulsiveness increases until early adulthood and subsequently declines.<sup>75</sup> Eighteen- to twenty-year-olds score lower than older adults on a test measuring the anticipation of consequences,<sup>76</sup> and those under twenty-one years of age are more likely to engage in risky behavior and less likely to be sensitive to negative consequences than those between twenty-two and thirty years of age.<sup>77</sup> One study showed college-aged adults had a lesser ability to evaluate a situation before acting when compared to older adults, but there was no statistically significant difference in this ability when college-aged adults were compared to adolescents.<sup>78</sup> In regards to delinquency, there was no statistically significant difference in rates of offenses between college-aged adults and adolescents, but there was a difference between college-aged adults and older adults.<sup>79</sup> Furthermore, eighteen- to twenty-one-year-olds were more similar to ten- to seventeen-year-olds in a study measuring psychosocial maturity than they were to those who were at least twenty-six years old.<sup>80</sup>

Research suggests eighteen- to twenty-year-olds are also highly susceptible to peer pressure.<sup>81</sup> One study of 380 eighteen- to

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74. See, e.g., Jeffrey Jensen Arnett, *Emerging Adulthood: A Theory of Development from the Late Teens Through the Twenties*, 55 AM. PSYCHOLOGIST 469, 469 (2000); Bradley & Wildman, *supra* note 12, at 253–54, 263; Kathryn L. Modecki, *Addressing Gaps in the Maturity of Judgment Literature: Age Differences and Delinquency*, 32 L. & HUM. BEHAV. 78, 85 tbl.3 (2007) (reporting a distinct difference between college-aged and older adult participants on measures of temperance).

75. Steinberg & Scott, *supra* note 34, at 1013 (citing Laurence Steinberg & Elizabeth Cauffman, *Maturity of Judgment in Adolescence: Psychosocial Factors in Adolescent Decision Making*, 20 L. & HUM. BEHAV. 249, 260 (1996)) (“[I]mpulsivity increases between middle adolescence and early adulthood and declines thereafter . . .”).

76. Laurence Steinberg et al., *Age Differences in Future Orientation and Delay Discounting*, 80 CHILD DEV. 28, 35 tbl.1 (2009) [hereinafter Steinberg et al., *Age Differences*].

77. See Elizabeth Cauffman et al., *Age Differences in Affective Decision Making as Indexed by Performance on the Iowa Gambling Task*, 46 DEVELOPMENTAL PSYCHOL. 193, 203–04 (2010).

78. Modecki, *supra* note 74, at 85 (“[O]n measures of temperance, adults were significantly more mature than young-adults, college students, and adolescents.”). While this study recognizes that young adults, who are between the ages of twenty-two and twenty-seven, scored similarly to college-aged adults, this simply reinforces the claim that full maturity, both psychological and neurological, is not attained until the mid- to late-twenties. *Id.* at 89 (“[E]motional temperance may continue to improve through the mid to late twenties.”).

79. See *id.* at 86 (“[A]dults showed less delinquency than the adolescent, college student, and young-adult samples, whereas young-adults showed less delinquency than adolescents or college students.”). Modecki examined three different areas of delinquency in her research: “stealing offenses, property offenses, and assault offenses.” *Id.* at 84.

80. See Laurence Steinberg et al., *Are Adolescents Less Mature Than Adults?: Minors’ Access to Abortion, the Juvenile Death Penalty, and the Alleged APA “Flip Flop,”* 64 AM. PSYCHOLOGIST 583, 591 fig.3 (2009).

81. See, e.g., Bradley & Wildman, *supra* note 12, at 263.

twenty-five-year-olds, with a mean age of twenty,<sup>82</sup> found that “antisocial peer pressure was a highly significant ( $p < 0.001$ ) predictor of reckless substance use and total recklessness . . . [and] . . . a more marginally significant ( $p < 0.05$ ) predictor of reckless driving and sexual behaviors.”<sup>83</sup> This indicates that “the reputedly ‘adolescent’ characteristic of peer pressure towards antisocial behavior continues to have an important influence into emerging adulthood” and thus “[p]eer pressure would . . . appear to be a suitable target for intervention for all youth, at least until the early-twenties age group.”<sup>84</sup>

### B. *Neurological Research*

Neurological research also highlights how eighteen- to twenty-year-olds differ from older adults. Research has shown that human brains are not fully mature until at least the age of twenty-five.<sup>85</sup> It has been recognized that “college-aged individuals may have yet to fully develop neurologically . . . and thus may not be equipped for mature judgment,”<sup>86</sup> and that “[h]igher-order executive function, emotional regulation, and impulse control also improve through the mid-twenties.”<sup>87</sup>

The prefrontal cortex, which is the area of the brain “associated with voluntary behavior control and inhibition such as risk assessment, evaluation of reward and punishment, and impulse control,” is “one of the last brain regions to mature.”<sup>88</sup> Eighteen- to twenty-year-olds’ prefrontal cortexes are undeveloped in two ways.<sup>89</sup> First,

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82. *Id.* at 257.

83. *Id.* at 263.

84. *Id.*

85. See, e.g., Barbara L. Atwell, *Rethinking the Childhood-Adult Divide: Meeting the Mental Health Needs of Emerging Adults*, 25 ALB. L.J. SCI. & TECH. 1, 20 (2015) (“One way to best serve emerging adults is to recognize that their brain development continues until the age of twenty-five.”); Nico U. F. Dosenbach et al., *Prediction of Individual Brain Maturity Using fMRI*, 329 SCI. 1358, 1359 fig.1 (2010) (reporting that functional brain maturity levels out around twenty-five years of age); Robin Marantz Henig, *What Is It About 20-Somethings?*, N.Y. TIMES (Aug. 18, 2010), <http://www.nytimes.com/2010/08/22/magazine/22Adulthood-t.html> (“This new understanding comes largely from a longitudinal study of brain development sponsored by the National Institute of Mental Health, which started following nearly 5,000 children at ages 3 to 16 . . . . The scientists found the children’s brains were not fully mature until at least 25.”).

86. Modecki, *supra* note 74, at 79.

87. Vivian E. Hamilton, *Immature Citizens and the State*, 2010 B.Y.U. L. REV. 1055, 1115 (2010).

88. Brief for the AMA, *supra* note 55, at 16–18 (internal citations omitted).

89. *Id.* at 18.

the gray matter of the brain has not fully matured until after age twenty.<sup>90</sup> Through a process called pruning, gray matter decreases as the brain matures.<sup>91</sup> Pruning is a process that enhances overall brain function because it “leads to greater efficiency of neural processing and strengthens the brain’s ability to reason and consistently exercise good judgment.”<sup>92</sup> The prefrontal cortex is “one of the last regions where pruning is complete and this region continues to thin past adolescence.”<sup>93</sup> Therefore, “one of the last areas of the brain to reach full maturity . . . is the region most closely associated with . . . the ability to reliably and voluntarily control behavior.”<sup>94</sup>

Second, the white matter of the brain does not fully mature until after age twenty.<sup>95</sup> White matter facilitates communication between different parts of the brain in a fast and reliable manner.<sup>96</sup> According to the American Medical Association, “resistance to peer influence . . . may be linked to the development of greater connectivity between brain regions,” and “the development of improved self-regulatory abilities during and after adolescence is positively correlated with white matter maturation through the process of myelination.”<sup>97</sup>

The underdevelopment of gray and white matter also impacts the brain’s reward system, which makes eighteen- to twenty-year-olds more susceptible to outside pressures than older adults.<sup>98</sup> According to one neuroscientist, “[t]he brain’s reward system becomes highly active right around the time of puberty and then gradually

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90. See *id.* at 20. Gray matter is comprised of “neurons that perform the brain’s tasks, such as the higher functions that are carried out in the prefrontal cortex.” *Id.* at 19.

91. *Id.*

92. *Id.*

93. *Id.* at 21.

94. *Id.*

95. Catherine Lebel & Christian Beaulieu, *Longitudinal Development of Human Brain Wiring Continues from Childhood into Adulthood*, 31 J. NEUROSCIENCE 10937, 10939 fig.2 (2011) (reporting a statistically significant increase in white brain matter volume for subjects between twenty and twenty-five years old); Adolf Pfefferbaum et al., *A Quantitative Magnetic Resonance Imaging Study of Changes in Brain Morphology From Infancy to Late Adulthood*, 51 ARCHIVES NEUROLOGY 874, 885 (1994) (reporting that after age twenty, white matter volume did not change until about approximately age seventy).

96. Brief for the AMA, *supra* note 55, at 21–22, 22 n.67.

97. *Id.* at 24. Myelin, a fatty white substance, insulates the pathways in which neural signals travel. *Id.* at 21–22. Myelination is the process by which these pathways are coated with myelin, and this process “continues through adolescence and into adulthood.” *Id.* at 22.

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

goes back to an adult level, which it reaches around age 25.”<sup>99</sup> Due to these changes, “young adults become much more sensitive to peer pressure than they were earlier or will be as adults. . . . [A] 20 year old is 50 percent more likely to do something risky if two friends are watching than if he’s alone.”<sup>100</sup> This neurological research, in addition to the behavioral and psychological research discussed above, supports the conclusion that eighteen- to twenty-year-olds lack the culpability for their crimes necessary to sentence them to life without parole.

### III. APPLICATION OF THE COURT’S TWO-PART CATEGORICAL EXEMPTION TEST

This Part argues that the categorical exemption test should be extended to eighteen- to twenty-year-olds for life without parole.<sup>101</sup> If there is a national consensus against this sentencing practice, and if such a sentence is disproportionate to the culpability of this class of offenders, then the Court should hold that the Eighth Amendment categorically bans the sentencing of eighteen- to twenty-year-olds to life without parole.<sup>102</sup> Applying the Court’s categorical exemption test leads to the conclusion that eighteen- to twenty-year-olds should be excluded from life without parole sentences.

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99. *Id.*

100. *Id.*

101. While the Supreme Court has held that juveniles are categorically exempt from life without parole, mandatory or discretionary, for non-homicide offenses, *Graham v. Florida*, 560 U.S. 48, 74–75 (2010), it has declined to rule on whether juveniles should be categorically exempt from life without parole for all crimes, *Miller v. Alabama*, 567 U.S. 460, 479–80 (2012). Others have argued the Eighth Amendment should be interpreted to categorically exempt all juveniles from life without parole, whether mandatory or discretionary. *See generally* Mary Berkheiser, *Developmental Detour: How the Minimalism of Miller v. Alabama Led the Court’s “Kids Are Different” Eighth Amendment Jurisprudence Down a Blind Alley*, 46 AKRON L. REV. 489 (2013) (criticizing *Miller* for failing to hold that the Eighth Amendment categorically bans the imposition of life without parole on juveniles, regardless of the crime). While it is beyond the scope of this comment, it is the author’s position that the Eighth Amendment should in fact be interpreted to require a categorical ban on life without parole for juvenile offenders, regardless of the crime or whether the sentence is mandatory. This Part therefore assumes the categorical exemption test is extended to all juveniles with regard to life without parole and to eighteen- to twenty-year-olds with regard to the death penalty. *See generally* Michaels, *supra* note 10.

102. *See, e.g., Roper v. Simmons*, 543 U.S. 551, 567–75 (2005).

A. *Part One: There is a National Consensus Against Sentencing Eighteen- to Twenty-Year-Olds to Life Without Parole*

The first part of the Court's categorical exemption analysis requires determining whether a national consensus against the sentencing practice exists.<sup>103</sup> In doing so, the Court first considers "objective indicia of society's standards, as expressed in legislative enactments and state practice."<sup>104</sup> However, the Court has recognized "actual sentencing practices" are also integral when inquiring into national consensus.<sup>105</sup> A review of sentencing practices suggest there is a national consensus opposed to sentencing eighteen- to twenty-year-olds to life without parole.

Few statistics exist on the subject,<sup>106</sup> but it is clear the imposition of life imprisonment in the federal criminal justice system<sup>107</sup> is rare, regardless of age.<sup>108</sup> In 2013, only 153 offenders were sentenced to life imprisonment in the federal system.<sup>109</sup> There are at least 45 federal statutes requiring life imprisonment as a minimum sentence, and 69 of those 153 offenders were subject to this mandatory minimum.<sup>110</sup> Of the remaining 84 cases, 79.8% were subjected to guidelines where a life sentence was the only term of imprisonment provided.<sup>111</sup> The United States Sentencing Commission (the "Commission") specifically provides for life imprisonment in only four of the over 150 guidelines in the Commission's *Guidelines Manual*.<sup>112</sup> Even though life imprisonment is possible at the high end of sentencing ranges for other offenses, life sentences

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103. *Graham*, 560 U.S. at 61.

104. *Roper*, 543 U.S. at 563.

105. *Graham*, 560 U.S. at 62.

106. While it is beyond the scope of this paper, further scholarly study should address why there is a lack of information regarding sentencing practices unless they involve juveniles or the death penalty, and how this lack of transparency could potentially decrease the public's confidence in the criminal justice system.

107. Federal life imprisonment is effectively "life without parole" because federal parole was abolished in the 1980s. See U.S. SENTENCING COMM'N, GUIDELINES MANUAL 2016 2 (2016), <http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2016/GLMFull.pdf>.

108. GLENN R. SCHMITT & HYUN J. KONFRST, U.S. SENTENCING COMM'N, LIFE SENTENCES IN THE FEDERAL SYSTEM 1 (2015), [http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20150226\\_Life\\_Sentences.pdf](http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20150226_Life_Sentences.pdf).

109. *Id.*

110. *Id.*

111. *Id.* at 9.

112. *Id.* at 3. These guidelines are for offenses involving "murder, treason, certain drug trafficking offenses, and certain firearms offenses committed by career offenders." *Id.*

“generally occur only in cases where multiple sentencing enhancements in the guidelines had applied and where the offender had a significant prior criminal record.”<sup>113</sup> As of January 2015, there were 4436 federal prisoners serving life sentences, which is only 2.5% of the offenders in the Federal Bureau of Prisons’ system.<sup>114</sup>

Statistics specifically involving eighteen- to twenty-year-olds suggest that sentencing this class of offenders to life without parole is uncommon. The ages of the 153 federal offenders sentenced to life imprisonment in 2013 ranged between twenty- and eighty-years-old, with an average age of thirty-seven.<sup>115</sup> This means that of the few people sentenced to life in prison in federal court, no eighteen- or nineteen-year-olds were sentenced to federal life imprisonment in 2013.<sup>116</sup>

Even studies broadly examining the ages of offenders suggest that young adults are rarely sentenced to life without parole. A Bureau of Justice Statistics study concluded that in 2013, only one percent of eighteen- to thirty-nine-year-olds were sentenced to life, life without parole, life plus additional years, or death.<sup>117</sup> While this study examined an extremely large age bracket that included four different types of sentences, this data supports the notion that there is a national consensus against sentencing eighteen- to twenty-year-olds to life without parole. If only one percent of offenders in an age bracket spanning twenty-one years was sentenced to the harshest punishments in the criminal justice system, then it is likely that only a tiny portion of this already small statistic was between eighteen and twenty years old when they were sentenced to life without parole in 2013.<sup>118</sup>

Reading these Bureau of Justice statistics alongside a smaller, sentence-specific study further supports the idea that there is a national consensus against this sentencing practice. Out of 355 prisoners ranging from eighteen to fifty-seven years old at the time of arrest, who were sentenced to life without parole for nonviolent

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113. *Id.* at 3–4.

114. *Id.* at 4.

115. *Id.* at 7.

116. *See id.*

117. CARSON & SABOL, *supra* note 11, at 21 tbl.15.

118. The author recognizes that this conclusion is based on inferences. However, because of the lack of data on this subject, these are some of the only viable statistics available that contribute to the national consensus discussion required by the first part of the Court’s categorical exemption test. *See supra* note 106.

offenses, only 5.4% were twenty years old or younger.<sup>119</sup> If the American Civil Liberties Union's data is an accurate reflection of the entire prison population serving life without parole sentences for nonviolent crimes, then only roughly 5.4% of these prisoners were between eighteen and twenty years old when they committed their crimes.<sup>120</sup>

While sentencing eighteen- to twenty-year-olds to life without parole is not statutorily barred, "those sentences are most infrequent" according to the few statistics that exist.<sup>121</sup> The *Graham* Court concluded there was a national consensus against imposing life without parole on juvenile nonviolent offenders because the sentence was so rare, despite the numerous opportunities to administer it.<sup>122</sup> Similarly, the infrequency of sentencing eighteen- to twenty-year-olds to life without parole does not stem from a lack of opportunity, as this age group is statistically the most violent.<sup>123</sup> The top four individual age groups arrested for murder and non-negligent manslaughter in 2010 were nineteen-year-olds, eighteen-year-olds, twenty-one-year-olds, and twenty-year-olds, respectively.<sup>124</sup> While eighteen- to twenty-year-olds—along with twenty-one-year-olds—are statistically the most violent,<sup>125</sup> only one percent of eighteen- to thirty-nine-year-olds were sentenced to life, life without parole, life plus years, or death in 2013.<sup>126</sup>

Even though sentencing this class of offenders to life without parole is rare, so long as it is legally permissible, there is an intolerable risk of sentencing an eighteen- to twenty-year-old to life without parole when he or she lacks the culpability to deserve such an extreme sentence. While the statistics cited above are not conclusive, they facially satisfy the first of the Court's two necessary conditions for categorical exemption because there appears to be a national consensus against sentencing eighteen- to twenty-year-olds to life without parole.

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119. ACLU, *supra* note 3, at 26 tbl.7.

120. Again, the author recognizes this is far too small of a sample size to conclusively claim that the ACLU's data is reflective of the entire prison population. *See supra* note 106.

121. *See Graham v. Florida*, 560 U.S. 48, 62 (2010).

122. *Id.* at 67.

123. *See* HOWARD N. SNYDER, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, ARREST IN THE UNITED STATES, 1990–2010, at 17–18 tbl. 3 (2012), <https://www.bjs.gov/content/pub/pdf/aus9010.pdf>.

124. *Id.*

125. *See id.*

126. CARSON & SABOL, *supra* note 11, at 21 tbl.15.

B. *Part Two: Life Without Parole is a Disproportionate Punishment for Eighteen- to Twenty-Year-Olds*

The second prong of the Court's categorical exemption test requires determining whether sentencing eighteen- to twenty-year-olds to life without parole violates the Eighth Amendment.<sup>127</sup> This analysis 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" and whether the practice serves legitimate penological goals.<sup>128</sup> Using the Court's logic, sentencing eighteen- to twenty-year-olds to life without parole is a disproportionate punishment, regardless of the crime, and the three mitigating characteristics recognized of juveniles negate the penological justifications for sentencing eighteen- to twenty-year-olds to life without parole.<sup>129</sup>

1. The Lack of Culpability of Eighteen- to Twenty-Year-Olds

As discussed above, eighteen- to twenty-year-olds are similar to juveniles in that they are prone to risky behavior<sup>130</sup> and susceptible to negative outside influences.<sup>131</sup> According to the Court, "[t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside."<sup>132</sup> However, the mitigating qualities the Court was referring to have not yet subsided by age eighteen, and even the Court has recognized this.<sup>133</sup> The Court has also acknowledged that "[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies

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127. *See Graham*, 560 U.S. at 61.

128. *Id.* at 67.

129. *See id.* at 68, 74, 77–78 (holding that juveniles' mitigating characteristics rendered penological justifications inadequate to justify the severity of life without parole for juvenile non-homicide offenders, and discretionary sentencing of juveniles to life without parole was too dangerous of a risk to allow).

130. *See, e.g.,* Cauffman et al., *supra* note 77, at 203–04.

131. *See, e.g.,* Bradley & Wildman, *supra* note 12, at 263.

132. *Roper v. Simmons*, 543 U.S. 551, 570 (2005) (quoting *Johnson v. Texas*, 509 U.S. 350, 368 (1993)).

133. *Id.* at 574 ("The qualities that distinguish juveniles from adults do not disappear when an individual turns 18.").

will be reformed.”<sup>134</sup> For this same reason, the criminal justice system should not hold psychologically and neurologically immature eighteen- to twenty-year-olds to the same standard of culpability as thirty-year-olds.

## 2. The Severity of Life Without Parole

The Court recognized that “life without parole is ‘the second most severe penalty permitted by law.’”<sup>135</sup> Life without parole “deprives the convict of the most basic liberties without giving hope of restoration.”<sup>136</sup> It stands for a “denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days.”<sup>137</sup> The Court acknowledged that life without parole is an especially severe punishment for juveniles because “a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender. A 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only.”<sup>138</sup>

Similarly, an eighteen- to twenty-year-old and a seventy-five-year-old would receive the same punishment in name only. There is little difference between sixteen years of age and twenty years of age when one is framing the discussion around the years of life ahead of them. Eighteen- to twenty-year-olds still have numerous years and a greater percentage of their lives ahead of them than older offenders. For this reason, life without parole is equally severe for eighteen- to twenty-year-olds as it is for juveniles.

## 3. The Inadequacy of Penological Justifications for Life Without Parole

The Court has considered each traditional penological justification and held that they are inadequate to support sentencing juvenile non-homicide offenders to life without parole.<sup>139</sup> The Court’s

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134. *Id.* at 570.

135. *Graham v. Florida*, 560 U.S. 48, 69 (2010) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring)).

136. *Id.* at 69–70.

137. *Id.* at 70 (citation omitted).

138. *Id.*

139. *Id.* at 74.

reasoning for each penological justification applies to eighteen- to twenty-year-olds. The first justification, retribution, is “an attempt to express the community’s moral outrage or . . . an attempt to right the balance for the wrong to the victim.”<sup>140</sup> However, while retribution is a legitimate penological justification for punishment, “[t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender.”<sup>141</sup> Behavioral, psychological, and neurological research indicate eighteen- to twenty-year-olds are more similar to juveniles than to older adults in regards to traits that influence culpability, including risk-taking,<sup>142</sup> temperance,<sup>143</sup> and susceptibility to peer pressure.<sup>144</sup> Just as “retribution does not justify imposing the second most severe penalty on the less culpable juvenile nonhomicide offender,”<sup>145</sup> it does not justify imposing this sentence on eighteen- to twenty-year-olds who lack the culpability of older adults.

The second justification, deterrence, should also be discounted. The *Graham* Court noted that “the same characteristics that render juveniles less culpable than adults suggest . . . that juveniles will be less susceptible to deterrence.”<sup>146</sup> Similarly, eighteen- to twenty-year-olds are less likely to be deterred because they lack culpability. They lack the ability to anticipate future consequences,<sup>147</sup> have lower levels of temperance,<sup>148</sup> and are more likely to engage in risky behavior.<sup>149</sup>

Third, incapacitation does not justify sentencing eighteen- to twenty-year-olds to life without parole. Just as “[a] life without parole sentence improperly denies the juvenile offender a chance to demonstrate growth and maturity,”<sup>150</sup> it also disregards eighteen- to twenty-year-olds. The neurological processes that lead to the maturation of the brain have not yet matured by eighteen years

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140. *Roper v. Simmons*, 543 U.S. 551, 571 (2005).

141. *Graham*, 560 U.S. at 71 (quoting *Tison v. Arizona*, 481 U.S. 137, 149 (1987)) (alteration in original).

142. Cauffman et al., *supra* note 77, at 204.

143. Modecki, *supra* note 74, at 85.

144. Bradley & Wildman, *supra* note 12, at 263.

145. *Graham*, 560 U.S. at 72.

146. *Id.* (quoting *Roper v. Simmons*, 543 U.S. 551, 571 (2005)).

147. Steinberg et al., *Age Differences*, *supra* note 76, at 35 & tbl.1.

148. Modecki, *supra* note 74, at 85.

149. Cauffman et al., *supra* note 77, at 204.

150. *Graham*, 560 U.S. at 73.

old,<sup>151</sup> and “[h]igher-order executive function, emotional regulation, and impulse control . . . improve through the mid-twenties.”<sup>152</sup> Life without parole sentences impair eighteen- to twenty-year-olds’ abilities to demonstrate they will not be risks to society for the rest of their lives.<sup>153</sup>

The fourth and final justification, rehabilitation, was discounted by the Court because “[t]he penalty forswears altogether the rehabilitative ideal.”<sup>154</sup> Denying an eighteen- to twenty-year-old’s “right to reenter the community . . . makes an irrecoverable judgment about that person’s value and place in society.”<sup>155</sup> As discussed above, these offenders’ brains still need time to mature.<sup>156</sup> Life without parole assumes eighteen- to twenty-year olds are irredeemable, and therefore does not give them the chance to reenter society and prove they are rehabilitated. Consequently, following the Court’s proportionality analysis in *Graham*,<sup>157</sup> there is no penological theory that justifies life without parole for eighteen- to twenty-year-olds.

#### 4. The Risks of Discretionary Life Without Parole

The Court has also addressed individualized sentencing of juveniles.<sup>158</sup> The *Graham* Court held that “[t]he differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive a sentence of life without parole for a nonhomicide crime ‘despite insufficient culpability.’”<sup>159</sup> Similarly, the psychological and neurological predispositions of eighteen- to twenty-year-olds are too well known to ignore. There is too great a risk that “the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the . . . offender’s objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe” than life without parole.<sup>160</sup> Due to these risks, individualized sentencing is insufficient for a

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151. See Brief for the AMA, *supra* note 55, at 16–24.

152. Hamilton, *supra* note 87, at 1115.

153. See *Graham*, 560 U.S. at 73.

154. *Id.* at 74.

155. See *id.*

156. See Brief for the AMA, *supra* note 55, at 16–24.

157. 560 U.S. at 74.

158. *Id.* at 77–79.

159. *Id.* at 78 (quoting *Roper v. Simmons*, 543 U.S. 551, 572–73 (2005)).

160. See *Roper*, 543 U.S. at 573.

class of individuals who lack the culpability to warrant such a harsh sentence.<sup>161</sup> The Court should go as far as holding that life without parole is a disproportionate sentence for eighteen- to twenty-year-olds under the Eighth Amendment.

### CONCLUSION

Reynolds Wintersmith did not think he would die in prison, but rather thought his sentence was so unjust that it would inevitably be corrected.<sup>162</sup> He decided to take the advice of a fellow inmate: “You can do prison two ways. You can come here and die mentally or physically—you can make it your graveyard. Or, you can use it as a school and you can learn things that you could never learn anywhere else that will help you better your life.”<sup>163</sup> While Reynolds was incarcerated, he completed a 4100-hour teaching apprenticeship program in order to gain the necessary qualifications to teach.<sup>164</sup> He also counseled fellow inmates who struggled emotionally with their incarceration.<sup>165</sup> Even though he was sentenced to life without parole, he led a re-entry program that helped inmates prepare for their release from prison.<sup>166</sup>

President Obama commuted Reynolds’s sentence on December 19, 2013, and Reynolds was released on April 17, 2014.<sup>167</sup> He had served more than twenty years of his life sentence for a nonviolent crime.<sup>168</sup> Now, Reynolds has found a career as a counselor at an alternative Chicago high school.<sup>169</sup> He counsels students who face significant barriers, such as working, paying rent, and raising children, while trying to finish high school.<sup>170</sup>

Reynolds is a success story. A mandatory sentence wrote Reynolds off as irredeemable without giving him the chance to show he would not always be a risk to society.<sup>171</sup> He is able to prove himself now that he is free, but there are others still in prison who, under

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161. Again, while it is beyond the scope of this comment, the Court should apply this same logic to juvenile homicide offenders. *See supra* note 101.

162. *See Sweeney, supra* note 3.

163. Kuhn, *supra* note 3.

164. *Id.*

165. *Id.*

166. Famm, *supra* note 1.

167. *Id.*

168. Kuhn, *supra* note 3.

169. Sweeney, *supra* note 3.

170. *Id.*

171. *See* Kuhn, *supra* note 3.

the current doctrine, will never get the chance to redeem themselves. The current doctrine does not reflect the value of rehabilitating offenders so they can once again be productive members of society. If offenders are imprisoned for lacking the requisite culpability for one of the harshest sentences available, the public could lose faith in the legitimacy of the criminal justice system.

The Supreme Court should interpret the Eighth Amendment to categorically exempt eighteen- to twenty-year-olds from life without parole. While the statistics addressed in this comment were not conclusive, they did suggest there is a national consensus against sentencing eighteen- to twenty-year-olds to life without parole. Furthermore, behavioral, psychological, and neurological research indicate eighteen- to twenty-year-olds lack the requisite culpability to be sentenced to such an extreme punishment. The Court should therefore apply its categorical exemption test and hold that the Eighth Amendment categorically bans the imposition of life without parole on eighteen- to twenty-year-old offenders.

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\* J.D. Candidate, 2018, University of Richmond School of Law. B.A., 2015, University of Virginia. I wish to express my sincere gratitude to Professors Mary Kelly Tate and Corinna Barrett Lain for their guidance and expertise. I would also like to thank the *University of Richmond Law Review* staff and editors for their assistance in preparing this comment for publication. I also wish to thank my parents, Michael and Kathleen Powell, for their unconditional love and support. Finally, I wish to convey appreciation for my fiancé, Chris Plavcan, for his unending love and encouragement; without him, I would still be without a title for this piece.