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The human brain continues to mature well into a person's mid-twenties.[1] A growing consensus supports the idea that eighteen- to twenty-five-year-olds who were once seen as legal adults actually exhibit a degree of impulse control closer to that of mid-adolescents between the ages of thirteen to seventeen.[2]

Governor Jay Inslee of Washington State acknowledged this scientific development when he signed a key piece of legislation extending juvenile jurisdiction to the age of twenty-five years old.[3] Under this new bill, the Department of Corrections now houses incoming youth at juvenile facilities up to the age of twenty-five, before they are sent to an adult prison.[4] This is a step in the right direction.

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[1] KINSCHERFF ET AL., WHITE PAPER ON THE SCIENCE OF LATE ADOLESCENCE: A GUIDE FOR JUDGES, ATTORNEYS, AND POLICY MAKERS 10–11 (2022), https://clbb.mgh.harvard.edu/wp-content/uploads/CLBB-White-Paper-on-the-Science-of-Late-Adolescence-3.pdf [https://perma.cc/E2C2-F73U].

[2] *Id.* at 2.

[3] S.B. 6160, 65th Leg., Reg. Sess. (Wash. 2018).

[4] *Id.*

Why, then, has the Washington State Legislature made provisions for eighteen- to twenty-five-year-olds who are only now entering the criminal justice system without considering the exact same segment of the population that is still incarcerated? This forgotten segment of the population has borne the brunt of being considered fully culpable, placed in the same category as those over the age of twenty-five.

The lines are blurred. New protections are now in place to prevent injustice in this current generation of youth. These protections acknowledge that youth are less culpable than adults over the age of twenty-five. However, the same compelling science used to expose this great injustice does not apply retroactively to a prior generation still rotting in prisons around the state without an opportunity for release or meaningful review. In light of this knowledge, Washington State should immediately legislate a remedy for those serving sentences longer than fifteen years, who were initially incarcerated between the ages of eighteen to twenty-five.

I. PROGRESSIVE RACISM

Washington, a supposed progressive state, abandoned parole in 1981 in favor of the Sentencing Reform Act (SRA).[5] The SRA is a set of archaic laws that began with the promise of equal justice—an alternative to the prior racist parole system where Black and Brown people and people from poor communities were disproportionately kept in prison, while white people with privilege were granted parole.[6] What began as equal justice soon became equal misery and injustice as the SRA was amended dozens of times over the next four decades with laws that once again

[5] Sentencing Reform Act of 1981, Wash. Rev. Code §§ 9.94A.010–9.94B.090; *see* State v. Rice, 98 Wash.2d 384, 392–93 (1982).

[6] Dan Berger, *Introduction in* John McCoy & Ethan Hoffman, *Concrete Mama: Prison Profiles from Walla Walla* (2d ed. Univ. of Wash. Press 2018), *reprinted in* Dan Berger, *The History and Failure of Prison in Washington*, AFR. AM. INTELL. HIST. SOC'Y (Feb. 5, 2019), https://www.aaihs.org/the-history-and-failure-of-prison-in-washington/ [https://perma.cc/4BVN-M5UU].

disproportionately impact those from Black, Brown, and poor communities.[7] This is evidenced by the reality that Black people make up 5% of the State population but represent 11% of jail residents and 18% of the prison population.[8] The Washington legislature replaced the prior indeterminate parole system with a determinate system, the SRA. Equal justice is its talking point, but punishment is its primary purpose.[9]

The pre-1981 system of parole had the framework of a rehabilitation-oriented system. That is the entire premise of parole—do well, rehabilitate, and have a strong possibility for early release. It is an incentive-based system that human beings thrive in. Sadly, the positive design of this incentive-based parole system was nullified for many, paralyzed by the racism of a carceral system designed like plantations of old. Yes, racism exists in not only a northern state, but also one of the most progressive states. The only thing that progresses in the justice system is racism. This is one history that cannot be revised. The proof is seen in the prison population, which is disproportionately made up of Black and Brown people from our poorest communities. This new system was heralded as superior and proportionate. Instead of incentive-based rehabilitation, retribution was seen as meeting the ends of justice for all those over the age of eighteen.[10]

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[7] Andrea Berg, *Caught Between Rehabilitation and Punishment: A Look at the Sentencing Reform Act from Behind Bars*, WASH. PRISON HIST. PROJECT, https://waprisonhistory.org/archive/washington-state-sentencing-reform-act/ [https://perma.cc/4P2Q-Y4GY].

[8] *Incarceration Trends: Washington*, VERA INST. JUST. (Feb. 14, 2023, 7:46 PM), https://trends.vera.org/state/WA [https://perma.cc/LL5H-4E68].

[9] State v. Barnes, 117 Wash.2d 701, 709–710 (1991).

[10] WASH. REV. CODE § 9.94A.010; *see also* WASHINGTON SENTENCING REFORM ACT AT CENTURIES END: AN ASSESSMENT OF ADULTS FELONY SENTENCING PRACTICES IN THE STATE OF WASHINGTON, Report to Governor and Legislature 4 (Jan. 2000).

II. A GENERATION LOST TO DEATH BY INCARCERATION

What followed is tragic. For decades, our youth were punished without rehabilitation in mind as if they were adults set in their ways with no hope or ability to change. They were not sentenced proportionate to their culpability but to the act itself. "Youth" was oftentimes used as an aggravating factor in sentencing those found guilty of violent offenses—forswearing the concept of rehabilitation. Instead of a holistic approach, being mindful of crime victims and the community, and addressing underlying trauma or needs of incarcerated individuals—as seen in restorative justice models—"proportionality" became the model.

Proportionality became a death sentence. Proportionality meant life in prison without the possibility of parole.[11] Proportionality meant eighteen- to twenty-five-year-olds who committed certain offenses would receive decades of incarceration without any review process to evaluate rehabilitation and the development of natural maturation.[12] Retribution was the focus, proportionality the model.

III. A GLIMMER OF HOPE, YEARS IN THE MAKING

A once-promising justice model, the SRA regressed into injustice, plagued with the very issues of its predecessor—racism and classism. As thousands of new prisoners in Washington State sat under this regressive and archaic sentencing scheme waiting for the pendulum to swing in the direction of justice, a glimmer of hope emerged in the 2005 U.S. Supreme Court case, *Roper v. Simmons*.[13] In *Roper*, the Court overturned the death penalty for those under eighteen holding that punishment violates an individual's Eighth Amendment right to be free from cruel and unusual punishment.[14] *Graham v. Florida* followed, in which the U.S. Supreme

[11] WASH. REV. CODE § 9.94A.510.
[12] *See id.*
[13] Roper v. Simmons, 543 U.S. 551 (2005).
[14] *Id.* at 568.

Court held that those under the age of eighteen cannot be given life in prison without the possibility of parole for non-homicide convictions.[15] In 2012, *Miller v. Alabama* was decided; it forbade a sentencing scheme mandating life in prison without the possibility of parole.[16] This decision set forth new constitutional requirements that necessitated changes in Washington State's sentencing laws for people sentenced in their youth.

The reason for this change seems like common sense. Citing *Roper*, the *Miller* Court noted that "children have a 'lack of maturity and an underdeveloped sense of responsibility,' leading to recklessness, impulsivity, and needless risk-taking."[17] Children are "more vulnerable . . . to negative influences and outside pressures, including from their family and peers; they have limited control over their environment and lack ability to extricate themselves from horrific, crime-producing settings."[18] In addition, "a child's character is not as well formed as an adult's" as personality traits are "less fixed" and behavioral actions are "less likely to be evidence of irretrievable depravity."[19]

In response, the Washington State Legislature created RCW 9.94A.730, a parole statute known as the *Miller*-fix, that presumably releases minors after they have served twenty years.[20] Unless the Indeterminate Sentencing Review Board, also known as the parole board, finds that petitioners are more likely than not to commit a future crime if released, the *Miller*-fix statute requires eligible petitioners be released.[21]

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[15] Graham v. Florida, 560 U.S. 48, 82 (2010).
[16] Miller v. Alabama, 567 U.S. 460, 479 (2012).
[17] *Id.* at 471 (citing *Roper*, 543 U.S. at 569).
[18] *Id.*
[19] *Id.*
[20] WASH. REV. CODE § 9.94A.730(1) (stating that "any person convicted of one or more crimes committed prior to the person's eighteenth birthday may petition the indeterminate sentence review board for early release after serving no less than twenty years of total confinement" provided the person has not been convicted of subsequent crimes).
[21] WASH. REV. CODE § 9.94A.730(3) ("The board shall order the person released under such affirmative and other conditions as the board determines appropriate, unless the

IV. AN INJUSTICE REMAINS

Without legislative intervention, securing these same protections for former eighteen- to twenty-five-year-olds has been left up to the Washington State Supreme Court. With a narrow scope, and unable to legislate from the bench, our State Supreme Court has built upon the *Miller*-fix by acknowledging brain science.[22] In *State v. O'Dell*, a case of first impression applying the brain science regarding youthfulness to the idea that an eighteen- to twenty-five-year-old could be as limited from culpability as someone younger than eighteen,[23] the court has appropriately prompted our legislature to act on this long-delinquent injustice.

One current debate asks, at what age should we draw the line between childhood mistake and full adult culpability.[24] The science tells us that the line is no longer at eighteen but somewhere around twenty-five.[25] Science often works in degrees instead of hard lines. However, legislatures almost always establish boundaries in the form of hardline positions.

More importantly, what remedy is necessary to provide opportunity and relief to the decades of youth who were sentenced as adults without the benefit of now-known brain science at the time of their conviction, who have served more time in prison than they have lived in society? The simple remedy is an amendment to our *Miller*-fix statute. A version of this bill was sponsored in recent years, both in the state house and senate, but sadly, each year it dies in the committees without receiving a vote on the floor. Most years, our representatives fail to give the bill a hearing, preventing the

board determines by a preponderance of the evidence that, despite such conditions, it is more likely than not that the person will commit new criminal law violations if released.").

[22] State v. O'Dell, 183 Wash.2d 680 (2015).

[23] *Id.* at 694–97.

[24] Elizabeth S. Scott et al., *Young Adulthood as a Transitional Legal Category: Science, Social Change, and Justice Policy*, 85 FORDHAM L. REV. 641 (2016).

[25] B.J. Casey et al., *Making the Sentencing Case: Psychological and Neuroscientific Evidence for Expanding the Age of Youthful Offenders*, 5 ANN. REV. CRIMINOLOGY 321 (2022).

merits from being heard and placed on the record. However, the bill saw the most support in the 2023 session. After the bill died in Representative Roger Goodman's House Public Safety Committee, Senator Dhingra allowed a companion bill, SB 5451, into the Senate Law and Justice Committee. A hearing was granted, and the testimony was electric. Powerful support and gripping accounts sparked a glimmer of hope that maybe this year would be different. The results? Another year of disappointment with the bill dying in committee.[26] If there was any silver lining, it is that for the first time, Republicans led by Senator Padden put forth an amendment that would have provided review for eighteen- to twenty-year-olds.[27] But—and there is always a "but"—it seems certain crimes would prevent review for many eighteen- to twenty-year-olds, and would also leave behind anyone over twenty-one years old.[28] This is not something that collective supporters could stomach. The brain science exists. The injustice remains. Nobody should be left behind!

If the bill is passed, parole will become available again for a person represented in this group after they have served fifteen- to twenty-five years, depending on the crime committed.[29] Like the *Miller*-fix, this review process gauges rehabilitative efforts, risk of reoffending, and whether the person is fit for society.[30] It does not guarantee release.[31] There is hope that this new review system will exclude the racism once found in the pre-SRA system.

V. Bridging the Gap, Piece by Piece

In the *Monschke* decision of 2021, the Washington State Supreme Court addressed the question of whether eighteen- to twenty-year-olds could be

[26] S.B. 5451, 68th Leg., Reg. Sess. (Wash. 2023).
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*

given a mandatory life in prison without parole sentence.[32] In short, the court followed the science and found that the development process of eighteen- to twenty-year-old brains was less like that of fully developed brains and closer to that of children under eighteen.[33] In addition, judges must be provided full discretion to acknowledge this fact in sentencing.[34]

This decision added a new subset to state and federal constitutional protections under *Miller,*[35] which led to the *Miller*-fix statute offering parole to these youthful individuals who are eighteen to twenty years old. These are the same constitutional protections under Article I, Section 14 of the Washington State Constitution for sentencing purposes as those for thirteen- to seventeen-year-olds.

Most telling in the *Monschke* decision is that the court did not specify at what age a person is legally an adult. Rather, the court merely provided information on the issue now facing the legislature.

VI. A PROGRESSIVE APPROACH: REPLACING TRADITION WITH SCIENCE

Many traditions and cultural values can give way to the emergence of scientific data that disproves one method in favor of another. For some, the idea of moving the goal posts of adulthood is understandably difficult to absorb. Furthermore, strident political talking points can drown out the actual injustice at hand in attempting to shape public perspective. "Tough-on-crime" talking points often lack substance and ignore decades of

[32] In re Monschke, 197 Wash.2d 305, 306 (2021).
[33] *Id.* at 324–25 ("While not yet widely recognized by legislatures, we deem these objective scientific differences between 18- to 20-year-olds . . . on the one hand, and persons with fully developed brains on the other hand, to be constitutionally significant . . .").
[34] *Id.* at 329.
[35] *Id.* at 326–27.

compelling data opposing the practice of incarcerating youthful individuals for decades without a review process.[36]

We are not advocating for a lack of accountability nor opposing long sentences. To the contrary, we support holding people accountable for their actions. Yet, we also acknowledge that there can be mitigating circumstances stemming from traumatic upbringings like addiction, homelessness, abuse, gang influence, and trouble in school and home life.[37] These mitigating factors mixed with an underdeveloped brain are grounds for diminished culpability, especially for those who are eighteen to twenty-five. These matters often involve underlying trauma, unaddressed environmental factors, and ignored red flags, many of which are often seen in the school-to-prison pipeline.[38]

Many have reduced the conversation of justice reform to the duality of being either "soft" or "tough on crime."[39] Sadly, this is a common oversimplification of a complex matter. We do not advocate a "soft on crime" approach, but neither do we believe that locking up youthful individuals for decades makes our communities safer. Too often, we lock up young people who are just learning how to function in an adult world,

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[36] John Gramlich, *U.S. Public Divided Over Whether People Convicted of Crimes Spend Too or Too Little Time in Prison*, PEW RSCH. CTR. (Dec. 6, 2021), https://www.pewresearch.org/fact-tank/2021/12/06/u-s-public-divided-over-whether-people-convicted-of-crimes-spend-too-much-or-too-little-time-in-prison/ [https://perma.cc/G2XQ-XPEX].

[37] *See Made In Prison Podcast: Episodes 1–40*, AARON OLSON (Jan. 30, 2022–Mar. 7, 2023), (available at https://www.patreon.com/madeinprison [https://perma.cc/KFA7-LS39]).

[38] *See* Christopher Blackwell & Nick Hacheney, *'When You Don't Learn, You Return': How Education in Prison Reduces Recidivism*, PROGRESSIVE MAG. (Apr. 11, 2022, 2:25 PM), https://progressive.org/latest/when-you-learn-you-dont-return-education-prison-recidivism-blackwell-220411/ [https://perma.cc/CRV5-JMWE].

[39] Ed Chung, *Smart on Crime: An Alternative to the Tough vs. Soft Debate*, CTR. FOR AM. PROGRESS (May 12, 2017), https://www.americanprogress.org/article/smart-crime-alternative-tough-vs-soft-debate/ [https://perma.cc/BV53-54ZU].

most of whom already come from toxic environments.[40] We force them into a system that does not teach them what they need to know in order to be productive citizens, putting them at a double disadvantage.[41] This system is often worse than the environment they came from: an environment ripe with violence and toxic masculinity.[42]

Recent court decisions and piecemeal legislation reveal what every parent already knew; it was the new understandings of brain science and social science that took centuries to catch up. This science declares that those under the age of twenty-five are most influenced by external factors yet are also most likely to self-desist from crime as they age.[43] This substantiating evidence shows that our youth have the highest capacity for change and are less deserving of the most severe punishments.[44]

VII. FINAL THOUGHTS

When it comes to crime, we expect accountability, punishment, restitution, and reform. We call this justice. Sadly, Washington State has not achieved justice for youthful individuals between eighteen and twenty-five years old.

As Justice Stevens recognized in his concurring opinion in *Roper v. Simmons*, when the Supreme Court continued its tradition of raising the age

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[40] *See* KATHERINE BECKETT & HEATHER D. EVANS, ABOUT TIME: HOW LONG AND LIFE SENTENCES FUEL MASS INCARCERATION IN WASHINGTON STATE 27–29 (Feb. 25, 2020), https://www.aclu-wa.org/docs/about-time-how-long-and-life-sentences-fuel-mass-incarceration-washington-state [https://perma.cc/4AJ4-XEF7]; *see also* Christopher Blackwell, *Restorative Justice Circles Help Many Address Violence, Trauma,* PRISON JOURNALISM PROJECT (May 3, 2022), https://prisonjournalismproject.org/2022/05/03/restorative-justice-circles-help-many-address-violence-trauma/ [https://perma.cc/BZH7-8DGW].

[41] *See* Christian Jarrett, *How Prison Changes People*, BBC (May 1, 2018), https://www.bbc.com/future/article/20180430-the-unexpected-ways-prison-time-changes-people [https://perma.cc/HY3N-4Y4L].

[42] Blackwell & Hacheney, *supra* note 38.

[43] KINSCHERFF ET AL., *supra* note 1, at 40–41.

[44] *Id.* at 10–12.

at which the Eighth Amendment protections against cruel and unusual punishment are applied, the holding reaffirmed the principle that "evolving standards of decency . . . have driven [the Court's] construction of this critically important part of the Bill of Rights," and recognized "if the meaning of that Amendment had been frozen when it was originally drafted, it would impose no impediment to the execution of seven-year-old children today."[45] Washington State's Chief Justice Gonzáles raised similar sentiments in his dissent in *State v. Anderson*, "All too often we have decided that some disfavored group is not due full protections our founding documents' promise. We have shrugged our robed shoulders at cruelties embodied in law."[46]

When it comes to our young people, we must be better and not feign ignorance, especially when research establishes that youthful individuals have a high capacity for change and self-desistance from criminal activity. With both the executive and judicial branches of government having already acted, it is the state legislature that now has the obligation and duty to respond to recent decisions firmly rooted in undeniable science. Will our representatives respond with courage to the longstanding science,[47] or will they cower in acquiescence, motivated only to continue kicking the proverbial can down the road, denying hundreds of youthful individuals a review process and a meaningful life in society?

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[45] Roper v. Simmons, 543 U.S. 551, 568 (2005) (Stevens, J., concurring).
[46] State v. Anderson, 200 Wash.2d 266, 293 (2022) (Gonzales, C.J., dissenting).
[47] *See* Nick Straley, *Miller's Promise: Reevaluating Extreme Criminal Sentences for Children*, 89 WASH. L. REV. 963, 970 (2014).