Washington's Young Offenders: *O'Dell* Demands a Change to Sentencing Guidelines

*Erika Vranizan**

CONTENTS

INTRODUCTION

Since the 1980s, the trend in the United States' criminal justice system has been to punish children harshly and to subject them to the same sentences that adult offenders face.[1] By some estimates, over 200,000

* J.D. 2020, Seattle University School of Law. Thank you to all the passionate attorneys and legal advocates throughout the world working to ensure the rights of youth. Additionally, thank you to Professor Paul Holland for guiding me toward this topic and supporting me in my vision; to the juvenile defense team of the Society of Counsel Representing Accused Persons, specifically Elinor Cromwell, Jonathon Nomamiukor, Harold Palmer, Michael Morris, Scott Schmidt, and Katie Cline,

youth are tried, sentenced, or incarcerated as adults every year.[2] On any given day, adult jails hold more than 4,200 juveniles, while adult prisons hold 1,300.[3] However, in response to a greater understanding of adolescent brain development and maturity, courts have recently begun to acknowledge the differences between youth and adults in terms of culpability.[4] For example, in a trilogy of cases—*Roper v. Simmons*, *Graham v. Florida*, and *Miller v. Alabama*—the U.S. Supreme Court found the differences in culpability were constitutionally significant for the purposes of determining whether a punishment is cruel and unusual.[5] In each of these three cases, the Court's decision turned on attributes or factors inherent in youth, finding those under eighteen less culpable for their crimes under the Eighth Amendment.[6] The factors the Court considered included an offender's (1) lack of maturity and underdeveloped sense of responsibility, (2) vulnerability to negative influences and limited control over the offender's environment, and (3) lack of characteristics that can be rehabilitated.[7] The Court reasoned that when considering such factors, a crime committed as a juvenile cannot be said to be indicative of a youth's individual character or of his or her propensity to commit crimes in the future.[8] Accordingly, scholars argue, sentences that fail to reflect an adolescent's capacity for change should be unconstitutional or, at least, should not be mandatorily imposed.[9]

In response to *Roper*, *Graham*, *Miller*, and recent developments in adolescent brain science, many states have begun to reform their

---

for teaching me and inspiring me with your tireless dedication to the youth of King County; and to my family and friends for always believing in me and fueling my dreams.

1. Nicole Scialabba, *Should Juveniles Be Charged as Adults in the Criminal Justice System?*, A.B.A.: SECTION ON LITIG. (Oct. 3, 2016), https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2016/should-juveniles-be-charged-as-adults/ [https://perma.cc/2NNZ-NNE3].

2. CAMPAIGN FOR YOUTH JUSTICE, KEY FACTS: YOUTH IN THE JUVENILE JUSTICE SYSTEM 3 (2018), http://www.campaignforyouthjustice.org/images/factsheets/KeyYouthCrimeFactsFeb222018Revised.pdf [https://perma.cc/B6NN-FSHZ].

3. *Id.* at 5. Meanwhile, young offenders ages eighteen to twenty-one currently make up nearly two percent of the federal inmate population nationwide. *See Inmate Age*, FED. BUREAU OF PRISONS (Sep. 29, 2018), https://www.bop.gov/about/statistics/statistics_inmate_age.jsp [https://perma.cc/HBF6-ZLWK].

4. *See* Miller v. Alabama, 567 U.S. 460 (2012); Graham v. Florida, 560 U.S. 48 (2010); Roper v. Simmons, 543 U.S. 551 (2005).

5. *Roper*, 543 U.S. at 575; *Graham*, 560 U.S. at 82; *Miller*, 567 U.S. at 489.

6. *See Miller*, 567 U.S. at 471 (citing *Graham*, 560 U.S. at 68; *Roper*, 543 U.S. at 569–70).

7. *Id*.

8. *Id*.

9. *See, e.g.*, Sarah Sloan, Note, *Why Parole Eligibility Isn't Enough: What* Roper, Graham, *and* Miller *Mean for Juvenile Offenders and Parole*, 47 COLUM. HUM. RTS. L. REV. 243, 244 (2015).

sentencing schemes for juvenile offenders.[10] Since 2007, only seven states[11] have failed to change their legislation to grant juvenile justice eligibility to juveniles ages sixteen and seventeen who have previously been automatically included in the criminal justice system as adults.[12] States that have adopted Raise the Age (RTA)[13] legislation have seen a direct causal decrease in incarcerated youth and recidivism.[14] Despite these efforts, none of the current sentencing schemes recognize young adults in any sort of special category that allows for mitigation based on their lack of maturity.[15] The Court itself has previously recognized the "shallow truth of age," holding youth to be "more than a chronological fact" and instead "a time and condition of life when a person may be more susceptible to influence and to psychological damage."[16] Still, no state currently authorizes juvenile jurisdiction[17] past the age of eighteen.[18]

In a recent Washington Supreme Court opinion, *State v. O'Dell*, the court officially recognized that a defendant's youthfulness may support an exceptional sentence below the standard range applicable to an adult felony defendant.[19] The state of Washington charged O'Dell with second degree rape of a child.[20] At sentencing, the defense asked the court to impose an exceptional sentence below the standard range because "[t]he defendant's capacity to appreciate the wrongfulness of his conduct, or to

---

10. Hannah Benton, *Recent U.S. Decisions Suggest that Justice System Should Not Treat Children as Adults*, NAT'L CTR. FOR YOUTH L., https://youthlaw.org/publication/recent-us-sc-decisions-suggest-that-justice-system-should-not-treat-children-as-adults/ [https://perma.cc/5EJY-E5XB].

11. These states include Georgia, Missouri, Michigan, New York, North Carolina, Texas, and Wisconsin. *See* JUST. POL'Y INST., RAISING THE AGE: SHIFTING TO A SAFER AND MORE EFFECTIVE JUVENILE JUSTICE SYSTEM 12 (2017), http://www.justicepolicy.org/uploads/justicepolicy/documents/raisetheagesummary_final_3_6_16.pdf [https://perma.cc/DZH7-3FW3].

12. TEMPLE U. CRIM. JUST. DEP'T, RAISE THE AGE: EXTENDING THE RESTORATIVE REACH OF THE JUVENILE JUSTICE SYSTEM FOR YOUNG ADULTS 1 (2018), https://jjustice.org/wp-content/uploads/JJIssueBrief.pdf [https://perma.cc/M3ZG-S7SN].

13. Raise the Age reform focuses on moving youth under eighteen, who would automatically be treated as adults because of age jurisdiction laws, out of the adult criminal justice system. JUST. POL'Y INST., *supra* note 11, at 3.

14. TEMPLE U. CRIM. JUST. DEP'T, *supra* note 12, at 1.

15. *See generally* Kelsey B. Shust, Comment, *Extending Sentencing Mitigation for Deserving Young Adults*, 104 J. CRIM. L. & CRIMINOLOGY 667 (2014).

16. *Id.* at 669 (quoting Eddings v. Oklahoma, 455 U.S. 104, 115 (1982)).

17. Juvenile jurisdiction refers to the legal authority upon which the court can handle cases in which juveniles are accused of acts that would be crimes if adults committed them. *See* Anne Teigen, *Juvenile Age of Jurisdiction and Transfer to Adult Court Laws*, NAT'L CONF. OF STATE LEGISLATURES (Apr. 7, 2020), https://www.ncsl.org/research/civil-and-criminal-justice/juvenile-age-of-jurisdiction-and-transfer-to-adult-court-laws.aspx [https://perma.cc/E2FV-HWRA]. In forty-five states, the maximum age of juvenile jurisdiction is seventeen. *Id.* All states have transfer laws that allow or require young offenders to be prosecuted as adults for serious offenses, regardless of their age. *Id*.

18. TEMPLE U. CRIM. JUST. DEP'T, *supra* note 12, at 1.

19. State v. O'Dell, 358 P.3d 359, 368 (Wash. 2015).

20. *Id.* at 360.

conform his conduct to the requirements of the law, was significantly impaired by youth."[21] His counsel also argued that "[h]ad the incident happened two weeks prior[,] . . . [O'Dell] would be facing 15–36 weeks in a well-guarded juvenile detention facility. . . rather than 78–102 months in an adult prison."[22] Continuing its argument at the sentencing hearing, the defense cited portions of the U.S. Supreme Court's decision in *Roper v. Simmons*, relying on various medical and psychiatric associations whose research indicated that juveniles are more susceptible to negative influences and impulsive behavior and therefore are less morally culpable for their crimes relative to adults.[23] The trial court acknowledged this argument but ruled that it could not consider age as a mitigating circumstance under the Washington State Court of Appeals decision in *State v. Ha'mim*.[24] The *O'Dell* Court of Appeals affirmed and the Washington Supreme Court granted review. The Washington Supreme Court held that the trial court erred in failing to consider youth as a possible mitigating factor because *O'Dell* satisfied the two-part test the court applies to determine whether a factor legally supports a departure from the standard sentencing range.[25]

This Note argues that the *O'Dell* decision was a watershed moment for criminal justice reform. It argues that the reasoning in *O'Dell* should be seized upon by the legislature to take action to remediate instances in which defendants are legal adults but do not possess the cognitive characteristics of an adult sufficient to justify adult punishment. Given both the scientific impossibility of identifying a precise age at which characteristics of youthfulness end and adulthood begins and the Court's repeated recognition that these very factors impact culpability, the current approach to sentencing young offenders aged eighteen to twenty-five as adults simply because they are of the age of majority cannot stand. Instead, this Note argues that Washington should add to its sentencing guideline departure statute[26] a direct subsection that would require Washington courts to consider a defendant's youthfulness at the time the offense was committed, if the offender falls into the young adult offender category.

---

21. *Id.* at 361.

22. *Id*.

23. *Id.* (citing Roper v. Simmons, 543 U.S. 551, 570 (2005)).

24. *Id.* (citing State v. Ha'mim, 916 P.2d 971 (Wash. Ct. App. 1996)).

25. *Id.* at 363. To satisfy the two-part test, first, "a factor cannot support the imposition of an exceptional sentence if the legislature *necessarily* considered that factor when it established the standard sentencing range." *Id.* Second, "in order to justify an exceptional sentence, a factor must be 'sufficiently substantial and compelling to distinguish the crime in question from others in the same category.'" *Id.* (quoting State v. Alexander, 888 P.2d 1169, 1173 (1995)); *see also Ha'mim*, 916 P.2d 971.

26. *See* WASH. REV. CODE § 9.94A.535 (2019).

Part I of this Note provides background information regarding the relationship between youthfulness and culpability and gives an overview of the historical foundations of juvenile law and its development over time. Part II describes the advancements in neurological and psychological scientific research that courts have begun to use in evaluating the youthfulness of an offender. Furthermore, Part II breaks down the combined immaturities of the brain—distinguishing between behavioral and structural immaturities—and examines how these immaturities present themselves in a young offender. Part III then describes in detail how the U.S. Supreme Court has recognized these advancements in adolescent brain science in their holdings in *Roper, Graham*, and *Miller*. Additionally, Part III examines Washington State's response to these cases and highlights the importance of the findings from *O'Dell* for offenders over the age of eighteen. Finally, Part IV argues that the courts should be afforded the ability to depart from the sentencing guidelines for psychologically and neurologically immature defendants even when those defendants are older than eighteen years of age. Courts should be granted this ability through passage of new laws to amend the sentencing guidelines. Under such a scheme, it would be mandatorily presumed that defendants who fall within this age category meet the court's "youthful" criterion and likewise have a right to a downward departure in the sentence guideline calculation. Further, upon such a finding, a young offender would be permitted to serve his or her time in the appropriate state juvenile detention facility where the offender could participate in programs and policies focusing on rehabilitation and reintegration.

I. CHANGES IN JUVENILE JUSTICE LAWS

Throughout the early 1900s, states began establishing juvenile courts as an alternative means to criminal courts for the handling of cases of young offenders.[27] The juvenile courts were designed to be therapeutic in nature, with the goal of intervening in the life of a troubled child and shifting his or her criminal trajectory.[28] Juvenile courts devised individually tailored, remedial plans for young offenders based on that child's best interest and focused on rehabilitation.[29]

In the 1980s and 1990s, however, concerns about juvenile "super-predators who maim and murder without remorse or fear" became the prevailing societal concern.[30] As the media sensationalized violent crimes

27. Kim Taylor-Thompson, *Minority Rule: Redefining the Age of Criminality*, 38 N.Y.U. REV L. & SOC. CHANGE 101, 150 (2014).

28. *Id.* at 151.

29. *Id.*

30. *Id.* at 152–154.

committed by juveniles, the public began to demand that youth who committed "adult crimes" do "adult time."[31] Legislators, as a result, found it politically advantageous to start cracking down on youth crime, pushing for harsher, more retributive punishments for adolescents.[32]

Many states enacted laws that made it easier, and more often mandatory, to transfer juvenile offenders from juvenile or family court to adult criminal court.[33] Numerous states increased the types of crimes that trigger transfer and most lowered the age at which it could occur.[34] A majority of states passed laws that created a presumption of transfer for juveniles older than twelve or thirteen who committed a serious offense; a third of states also enacted statutes authorizing prosecutorial waiver.[35] Perhaps even more significant, thirteen states lowered the age at which juvenile court jurisdiction ended to fifteen or sixteen.[36] These increases in "processing youth through the adult penal system" quickly proved to "have serious consequences including increased physical and sexual assault in prison against incarcerated youths, the solidification of a criminal justice identity for youths, lack of access to age-appropriate education, and steep financial costs."[37]

Research in the 2000s reflected that juveniles housed in adult jails and prisons were more likely to face physical and sexual victimization than adult inmates.[38] "Despite . . . encompassing less than one percent of jail inmates," studies from the 2005 Bureau of Justice Statistics found that youth made up twenty-one percent of "sexual assault victims for inmate-on-inmate sexual assaults in jails."[39] "Sexually exploited youth," as a result, were often times "placed in solitary confinement, leading to elevated rates of depression and suicide attempts."[40] Further, juveniles held in adult jails or prisons faced suicide rates five times higher than those held in juvenile facilities.[41] These traumas also exposed adolescents to

31. *Id.*

32. *Id.* at 155.

33. *Id.* at 156.

34. ELIZABETH S. SCOTT & LAURENCE STEINBERG, RETHINKING JUVENILE JUSTICE (2008).

35. *Id.*

36. *Id.*

37. Stephanie Tabashneck, *"Raise the Age" Legislation: Developmentally Tailored Justice*, CRIM. JUST. MAG., Winter 2018, at 13, 15, https://www.americanbar.org/content/dam/aba/publications/criminal_justice_magazine/v32/TABASHNECK.authcheckdam.pdf [https://perma.cc/R9D8-V8NK].

38. *Id.*

39. *Id.*

40. *Id.*

41. U.S. DEP'T OF JUST., JUVENILES IN ADULT PRISONS AND JAILS: A NATIONAL ASSESSMENT 7 (2000), https://www.ncjrs.gov/pdffiles1/bja/182503.pdf [https://perma.cc/L42K-3SGB].

long-term effects, "including future adjustment difficulties and mental health issues."[42]

In addition to "threats to physical safety, . . . the processing of youth through adult criminal justice systems . . . [proved to] promote an entrenchment" into the criminal lifestyle for the youth that would otherwise have been seemingly avoided. Essentially during a formative period in life, an incarcerated "youth's peer group becomes exclusively comprised of other [youth and adults] who have broken the law."[43] This "social environment[al]" change shifted "what the youth perceive[d] as honorable, ethical, and moral," and the "lack of exposure to law-abiding peers result[ed] in significant repercussions."[44] Instead, youth who otherwise "would have naturally desisted from criminal behavior continued to maintain contact with the criminal justice system."[45] The environment became "a place where the youth felt most accepted, worthy, and at home," and the result was more criminal behavior in the long run.[46] All of these consequences were a far cry from the "therapeutic" indicatives of juvenile criminal justice reforms set out in the 1990s.[47]

Majority of youth also saw "a disruption of their educational trajectory" as adult prisons do not have "developmentally appropriate courses" available.[48] The resulting lack of access "often compound[s]" because "youth involved with the justice system . . . often already perform[] below grade level" at the time of imprisonment.[49] These "educational setbacks" result in "substantially diminish[ed]" future opportunities for youth to gain lawful post-incarceration employment.[50]

Housing youths in adult criminal systems also proved to be expensive. While these costs "vary from state to state, in all states, this cost [was and continues to be,] a significant expenditure."[51] California, for example, spent as much as $81,000 per inmate per year in 2019.[52] Notably, however, for youth facing less serious charges who remained in juvenile court jurisdiction, diversion programs were far less costly and provided youth with connections to much-needed resources,[53] including mental

42. Tabashneck, *supra* note 37, at 15.
43. *Id*.
44. *Id*.
45. *Id*.
46. *Id*.
47. *Id*.
48. *Id*.
49. *Id*.
50. *Id*.
51. *Id*.
52. *How Much Does It Cost to Incarcerate an Inmate?*, LEGIS. ANALYST'S OFF. (2019), https://lao.ca.gov/PolicyAreas/CJ/6_cj_inmatecost [https://perma.cc/9QW3-DVUE].
53. Tabashneck, *supra* note 37, at 15.

health treatment, educational support, health care, and job training.[54] In comparison to those youth facing detention and incarceration, youth in diversion programs faced better outcomes with diminished recidivism rates and higher rates of educational attainment and employment.[55]

For the last two decades, "juvenile crime rates have steadily decreased, yet the harsh punishments of the 1990s [continue to] remain in many state laws."[56] "With this shift, [the] key distinctive and rehabilitative approaches [that once formed] . . . the juvenile justice system have been lost to the more severe consequences" that come as a result of "criminal justice system involvement."[57] Since 2010, however, "half of the states" that once saw "all [sixteen] and [seventeen]-year-olds" excluded from "juvenile court based solely on their age have [since] changed their laws."[58] Now, unless a juvenile has been charged with or convicted of a serious offense, it is presumed that most "who touch the justice system will fall under juvenile court jurisdiction."[59] Of the seven states remaining who have set the age of jurisdiction below age eighteen, a majority are expected to consider raising the age proposals for certain groups of teenagers.[60] The basis for this "continuing change" reflects the "growing acknowledgement that raising the age is good public policy."[61]

With "increasingly more scientifically proven and cost-effective ways to address delinquency," today's policymakers in the remaining seven states can now change laws governing the age of jurisdiction with a clear roadmap showing how they "can contain costs and enhance public safety while absorbing sixteen and seventeen-year-olds into their youth justice systems."[62] Those states that have already expanded their age jurisdiction requirements have found an increase in community safety, a

54. *Id*.

55. *Id.* For example, after implementing a redirection program that diverts selected youth from residential programs to less costly therapy based community programs, Florida has cumulatively saved $211 million, averaging a savings of $31,000 per graduating youth. KRISTEN STALEY & MICHELLE WEEMHOFF, MI. COUNCIL ON CRIME & DELINQ., THERE'S NO PLACE LIKE HOME: MAKING THE CASE FOR WISE INVESTMENT IN JUVENILE JUSTICE 18 (2013), https://docs.wixstatic.com/ugd/03cb01_314cc9cf69154f0ab8bba66b9323d826.pdf [https://perma.cc/RP8K-UMEA]. Additionally, participating youth are 31% less likely to be arrested after completion and 35% less likely to enter adult prison than non-participating youth. *Id*.

56. *Youth in the Justice System: An Overview*, JUV. L. CTR., https://jlc.org/youth-justice-system-overview [https://perma.cc/7NKV-9DL9].

57. *Id*.

58. JUST. POL'Y INST., *supra* note 11, at 3.

59. *Id*.

60. *Id.* at 4.

61. *Id*.

62. *Id.* at 6.

decrease in long-term trauma and victimization, and a reduction in the disproportionate impact of the justice system for young people of color.[63]

II. ADOLESCENT BRAIN SCIENCE & REDUCED CULPABILITY

In addition to an increased recognition of the above collateral consequences and the shifting dynamics of age in the adult prison system, developments in neuroscience have begun to impact the legal system's understanding of juvenile criminal behavior. Scientists are now able to use "modern medical technology to explore the neurological bases for how adolescents think and what differentiates them from adults."[64] Through these "psychological and neurological advances," scientists have "prove[n] that juveniles act impulsively, react rashly, and engage in risky behavior[] without appreciation for the potential consequences due to psychological and autonomically immaturity."[65]

A. Behavioral Immaturity

Collectively, "adolescents have proven to be generally immature in three separate, but related, ways: (1) adolescents are more likely to engage in risky behavior than adults; (2) adolescents are less capable of controlling their impulses than adults; and (3) adolescents are less capable of regulating their emotional responses than adults."[66] Emerging research explains why "adolescents tend to engage in far more risky behavior than adults." Previously believed to stem from "youthful ignorance," it is more likely that "risk-taking [behavior] comes from a psychological misperception of potential rewards for risky behavior."[67] "Adolescents have a less[er] ability . . . to regulate their emotional responses to stimuli," which can "result in actions being taken without full consideration or appreciation" of the consequences.[68] Adolescents are also more likely to engage in risk-taking behavior when they are in the presence of peers.[69] "This is associated with 'greater neural activity in the areas of the brain associated with reward processing' because 'adolescents appear to place unique reward value on the presence of peers.'"[70]

---

63. *Id.* at 9–10.

64. Cheryl B. Preston & Brandon T. Crowther, *Legal Osmosis: The Role of Brain Science in Protecting Adolescents*, 43 HOFSTRA L. REV. 447, 454 (2014).

65. Nick Straley, Miller*'s Promise: Re-Evaluating Extreme Criminal Sentences for Children*, 89 WASH. L. REV. 963, 970 (2014).

66. Preston & Crowther, *supra* note 64.

67. *Id.* at 456.

68. *Id*.

69. *Id*.

70. *Id*.

Additionally, adolescents are limited in impulse control because they lack the capacity for self-direction.[71] "Without these controls fully developed, adolescents lack a 'cornerstone of cognitive development.'"[72] Regardless of whether "adolescents ha[ve] the cognitive skills to . . . [weigh] the costs and benefits of their actions, their impulsivity . . . [still has the power to] propel them into making unwise decisions."[73]

When it comes to "emotional regulation," a variety of stressors can affect an adolescent's ability to effectively regulate their behavior, leading them "to experience emotional states that are more extreme and more variable than those experienced by adults."[74] These realities render youth "more vulnerable . . . to negative influences and outside pressures," including their families and peers.[75]

B. Structural & Functional Immaturity

The physiological aspects of the adolescent brain are "fundamentally different than they will be later on in adulthood." One of the most noteworthy structural differences lies in the development of the "prefrontal cortex—the region of the brain that controls the 'executive functions,' including emotional regulation, impulse control, working memory, risk assessment, and the ability to evaluate future consequences."[76] Upon reaching its maturity, the "prefrontal cortex . . . [controls] impulsive behavioral" reactions that would otherwise be controlled by "earlier develop[ed] regions of the brain."[77] However, this maturation does not occur until early adulthood, well into the mid-twenties.[78] During formative years, "decision-making and responses to stimuli are largely [controlled] by the amygdala and other more primitive neurological regions."[79] "As the brain [continues to] develop[] through adolescence and into . . . adulthood, the communication between regions of the brain" begin to parallel in improvement.[80] These changes allow "complicated information to flow more freely, and for areas of the brain associated with high-level reasoning to . . . [take] control."[81]

---

71. *Id.*
72. *Id.* at 457.
73. *Id.*
74. *Id.*
75. *Id.* at 463.
76. Straley, *supra* note 65.
77. *Id.* at 970.
78. *Id.* at 971.
79. *Id.*
80. *Id.*
81. *Id.*

Developmental studies also indicate that, "in addition to these structural immaturities, . . . the adolescent brain functions differently than . . . [that of] an adult." Specifically, "adolescents and adults exhibit different patterns of brain activity during decision-making tasks."[82] During structural development, adolescent and "teenage brains . . . produce an imbalance of dopamine and serotonin, the neurotransmitters that regulate pleasure and the desire for rewards."[83] This unstable interplay "causes correspondingly stronger desires for immediate pleasure and gratification . . . while also rendering [adolescents] less able to resist those heightened urges."[84] "These functional differences help explain why 'adolescents experience . . . [increased] motivation for risky and reward-seeking behavior without a corresponding increase in the ability to self-regulate behavior.'"[85]

These "neurological immaturities" are observable in "psychological studies and controlled observations of [adolescent] . . . behavior."[86] "Teenagers [habitually] score significantly lower than adults on assessments" that measure impulse control and the ability to suppress aggression.[87] Additionally, "youth who have developed cognitive abilities similar to adults [still] do not have the same ability to self-regulate their behaviors, modulate their emotions, or [properly] weigh the consequences of their actions."[88] The "combination of a [physically] developing brain and the [neurological] . . . tendency toward risk, impulsivity, and limited judgement often results in criminal conduct."[89]

Statistically, it is typical for an adolescent "to engage in some form of criminal behavior during . . . [adolescence]."[90] Given these statistics, traditional rationales supporting criminal sanctions—retribution, deterrence, incapacitation, and rehabilitation—apply with less force to children and young offenders than to adults.[91] Retribution is less compelling based on a youth's limited ability to control criminal behavior and understand emotional impulses, rendering them less culpable than adults.[92] Similarly, deterrence is less likely to be effective with young adults because "their immaturity, recklessness, and impetuosity . . . make

82. Preston & Crowther, *supra* note 64, at 460.
83. Straley, *supra* note 65, at 971.
84. *Id.* at 971–72.
85. Preston & Crowley, *supra* note 64, at 460.
86. Straley, *supra* note 65, at 972.
87. *Id*..
88. *Id*.
89. *Id*.
90. *Id*.
91. Miller v. Alabama, 567 U.S. 460, 472 (2012).
92. *Id*.

them less likely to consider potential punishment."[93] Furthermore, incapacitation does not justify applying adult penalties to youth, such as life without parole, because "[d]eciding that a 'juvenile offender forever will be a danger to society' would require 'mak[ing] a judgment that [he] is incorrigible'—but 'incorrigibility is inconsistent with youth.'"[94] And finally, long-term sentencing for youth reflects "'an irrevocable judgment about [an offender's] value and place in society,' at odds with a child's capacity for change," "forswear[ing] altogether the rehabilitative ideal" of incarceration.[95]

III. SUPREME COURT RECOGNITION

A. Roper v. Simmons

In 2005, psychological and neurological evidence-based studies on youthfulness found their way into U.S. Supreme Court jurisprudence. In *Roper v. Simmons*, Christopher Simmons sought postconviction relief after he was sentenced to capital punishment for murder.[96] Simmons argued that, despite the severity of his crime, the execution of an individual who committed a crime when he was younger than eighteen years old is prohibited under reasoning in *Atkins v. Virginia*.[97] The U.S. Supreme Court agreed and held that precedent, specifically *Thompson v. Oklahoma*,[98] provided sufficient evidence that society views juveniles as "categorically less culpable than the average criminal."[99]

Specifically, the Court relied on three differences between juveniles and adults in making their decision: lack of maturity, vulnerability to negative influences and outside pressures, and failure to have well-formed characters.[100] These findings, according to the Court, reflected what psychological and neurological studies confirmed—that young offenders were held to be less blameworthy than adults who commit similar crimes,

93. *Id.*

94. *Id.* at 472–73.

95. *Id.* at 473 (quoting Graham v. Florida, 560 U.S. 48, 73 (2010)).

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

97. *Id.* at 559. Simmons was seventeen at the time of the alleged offense. *Id.* at 551. *Atkins v. Virginia* held that the execution of a mentally handicapped individual was cruel and unusual punishment under the Eighth Amendment. *See* Atkins v. Virginia, 536 U.S. 304, 321 (2002). The Court reasoned that mentally handicapped persons do not act with the level of moral culpability that characterizes the most serious adult criminal conduct because of their disabilities in the areas of reasoning, control of impulses, and judgment. *Id.*

98. *See* Thompson v. Oklahoma, 487 U.S. 815, 838 (1988) (holding that the Eighth and Fourteenth Amendments forbid the imposition of the death penalty on offenders who were under the age of sixteen when their crimes were committed).

99. *Roper*, 543 U.S. at 567 (quoting *Atkins*, 536 U.S. at 316).

100. *See id.* at 569–70.

less likely to be deterred by the prospect of death sentences, and less likely to be irretrievably depraved.[101]

While the *Roper* court addressed the psychological and neurological differences between juveniles under eighteen years old and those of adults, it remained firm in its acknowledgement that there must be limitations to its application. Justice Kennedy wrote in the majority opinion that "[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18."[102] Nevertheless, the Court proceeded to conclude that the line for death penalty eligibility should rest squarely with the societal distinction of adulthood.[103] The Court reasoned that because eighteen years is "where society draws the line for many purposes between childhood and adulthood,"[104] so too should it be used as the line where "death eligibility ought to rest."[105] The Court thus rejected use of a case-by-case standard of review in favor of a bright-line rule protecting all offenders below the age of eighteen years old from the death penalty, regardless of culpability.[106]

B. Graham v. Florida

With *Roper* "having banned the use of the death penalty [as a sentence] for juveniles," life without parole remained the "harshest sentence available for offenses committed" by young offenders under eighteen years post-*Roper*.[107] In *Graham v. Florida*, the Court considered a challenge to the mandatory life sentence of seventeen-year-old Terrance Jamar Graham, who had committed a pair of nonhomicide felony offenses.[108] The Court held that Graham's life without parole sentence constituted cruel and unusual punishment, recognizing that "nonhomicide offenses d[id] not warrant the most serious punishment available" for juveniles—a "concept of proportionality . . . central to the Eighth Amendment."[109] In its opinion, written by Justice Kennedy, the Court cited a number of concerns rooted in developmental neuroscience as the basis for its decision: "(1) the offender's limited culpability, (2) the particular severity of life imprisonment without parole, and (3) the failure of

101. *See id.* at 570–71.
102. *Id.* at 574.
103. *Id.*
104. *Id.* at 554.
105. *Id.*
106. *Id.*
107. Josh Rovner, *Juvenile Life Without Parole: An Overview*, THE SENT'G PROJECT (Feb. 25, 2020), https://perma.cc/R9D8-V8NK https://www.sentencingproject.org/publications/juvenile-life-without-parole/ [https://perma.cc/4JP6-UJG7].
108. *See generally* Graham v. Florida, 560 U.S. 48 (2010).
109. Rovner, *supra* note 106.

penological theories of retribution, deterrence, incapacitation, and rehabilitation to justify such punishment."[110]

The Court relied on *Roper*'s reasoning that "juveniles are less culpable and . . . less deserving of the most severe punishments because they lack maturity, are more vulnerable to negative influences and outside pressures" and have yet to fully form their characters.[111] The *Graham* court also noted that no recent data provided a basis to reexamine the sociological and scientific findings used as a foundation for its decision in *Roper*.[112] Instead the Court clarified what it had left ambiguous in *Roper*: that it "believed neuroscience [to be] relevant to general propositions as to the normal developmental course of adolescence."[113]

Regarding the severity of life sentencing, the Court acknowledged the reality that young offenders generally serve more years and a greater percentage of their lives behind bars than adults—"[a] 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only."[114] As a result, the Court acknowledged that imposing such a punishment on younger offenders was especially harsh.[115]

Finally, in considering penological justifications, the Court found that none of the goals of punishment provided an adequate justification for sentencing juvenile nonhomicide offenders to life without parole.[116] The Court ruled out retribution, deterrence, incapacitation, and rehabilitation, finding that Graham's sentence was by its nature disproportionate and failed to pass the Eighth Amendment's cruel and unusual punishment test.[117]

C. Miller v. Alabama

Following the decisions of *Roper* and *Graham*, "approximately 2,500 offenders [remained] serving sentences of life without parole" for homicide-related crimes committed as juveniles.[118] In 2012, deciding *Miller v. Alabama* and *Jackson v. Hobbs* jointly,[119] the Court extended its

110. Shust, *supra* note 15, at 681.

111. *Id.*

112. *Id.* at 682.

113. Terry A. Maroney, *Adolescent Brain Science after* Graham v. Florida, 86 NOTRE DAME L. REV. 765, 766 (2013), https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1067&context=ndlr [https://perma.cc/4ZEU-ZCZ2].

114. *Graham*, 560 U.S. at 70.

115. *Id.*

116. *Id.* at 71–73.

117. *Id.* at 74.

118. Rovner, *supra* note 106.

119. *See* Miller v. Alabama, 567 U.S. 460 (2012) (involving fourteen-year-old defendants who were mandatorily sentenced to life in prison without the possibility of parole for their involvement in homicide offenses).

reliance on the developmental differences between youth and adults, holding that "the Eighth Amendment forbids mandatory sentencing schemes that do not allow judges or juries to consider the mitigating characteristics of youth."[120] The Court used *Roper* and *Graham* as a foundation for its decision, citing that they established a jurisdictional precedent that "children are constitutionally different from adults for purposes of sentencing."[121]

Once again, the Court relied on the developmental distinctions of youth that render them less culpable and impair the traditional penological justifications for punishment.[122] This time, however, the Court combined *Roper* and *Graham*'s focus (prohibiting severe punishments based on reduced culpability)[123] with another jurisdictional precedent that requires sentencing authorities to consider a defendant's specific characteristics when determining punishment.[124] In her opinion, "Justice Kagan emphasized that judges must be able to consider the characteristics of juvenile defendants in order to issue a fair and individualized sentence."[125] The Court noted that "adolescence is marked by 'transient rashness, proclivity for risk, and inability to assess consequences'—all factors that cannot be considered as crime-specific and should be considered when "mitigat[ing] the punishment received by juvenile defendants."[126]

Despite the Court stressing the importance of youthfulness in sentencing determinations, *Miller* firmly limited its application to only those under the age of eighteen.[127] Rather than expanding on the *Miller* Court's reasoning for individualized sentencing considerations, lower courts tend to follow suit, unwilling to blur the distinction between juvenile and adult offenders.[128] In a recent Washington Supreme Court case, however, the Court recognized that the rationale behind *Roper*, *Graham*, and *Miller* could be extended to defendants in their late twenties at the time of their crime.[129]

120. Shust, *supra* note 15, at 683-84.

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

122. *Id*.

123. As discussed, the focus of the Court's reasoning in *Roper* and *Graham* was on prohibiting severe punishments based on reduced culpability. *Id*.

124. *Id.* at 470, 483.

125. Rovner, *supra* note 106.

126. *Id*.

127. Shust, *supra* note 15, at 684.

128. *Id*.

129. *See* State v. O'Dell, 358 P.3d 359, 360 (2015).

D. State of Washington v. O'Dell

In 2015, the Washington Supreme Court issued a 5-4 decision in which it first recognized the research on adolescent brain science that had been relied on by the United States Supreme Court over the last decade. Sean O'Dell[130] was convicted of second-degree rape of a child for having sexual intercourse with a twelve-year-old girl ten days after his eighteenth birthday.[131] The court sentenced him to a "standard range sentence for the offense—ninety-five months—in spite of his lawyer's plea that he receive . . . a sentence below the standard range."[132]

The Washington Sentencing Reform Act statute "allows judges to sentence [defendants] below the presumptive standard sentencing range if the offense is atypical from other offenses resulting in the same conviction, such that there are 'substantial and compelling reasons' justifying an exceptional sentence."[133] The "statute contains a nonexclusive list of circumstances which could justify an exceptional sentence below the standard range, including that the 'defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired.'"[134] "O'Dell argued that his youth[fulness]" fell into this category, which "prevented him from appreciating the wrongfulness of his conduct."[135] The trial court rejected his argument and the Washington State Court of Appeals upheld the ruling.[136] The Washington Supreme Court revisited the issue and reversed the Court of Appeals as to O'Dell's sentence.[137]

The court focused its analysis on determining whether a trial court may consider a defendant's youthfulness as a possible mitigating factor at sentencing.[138] To determine whether such a factor legally supported a departure from the standard sentencing range, the court applied a two-part test:[139]

> First, a factor cannot support the imposition of an exceptional sentence if the legislature necessarily considered that factor when it established the standard sentence range. Second, in order to justify an

130. O'Dell had turned eighteen ten days prior to when he allegedly committed the offense. *Id.*

131. *Id.*

132. David Hammerstad, State v. O'Dell*: Youth and Culpability*, THE L. OFFS. OF DAVID HAMMERSTAD: BLOG (Sept. 10, 2015), http://www.hammerstadlaw.com/state-v-odell-youth-and-culpability/ [https://perma.cc/G6XW-MN9V].

133. *Id.*; *see also* WASH. REV. CODE § 9.94A.535 (2019).

134. Hammerstad, *supra* note 133; *see also* WASH. REV. CODE § 9.94A.535(1)(e) (2019).

135. Hammerstad, *supra* note 133; *see also O'Dell*, 358 P.3d at 360.

136. *O'Dell*, 358 P.3d. at 362.

137. *Id.* at 368.

138. *Id.* at 362.

139. *Id.* at 363; *see also* State v. Ha'mim, 916 P.2d 971 (Wash. Ct. App. 1996).

> exceptional sentence, a factor must be 'sufficiently substantial and compelling to distinguish the crime in question from others in the same category.'[140]

Applying the first prong of the test, the State contended that the legislature "explicitly considered . . . age" when it made the Sentencing Reform Act (SRA) applicable to felony offenders eighteen and older.[141] The court disagreed, finding that this argument failed for two reasons.[142] First, the court found that it had previously held that "when the legislature defines . . . an offense according to the victim's age, [that alone has] . . . not necessarily prevent[ed] a sentencing court from relying on the victim's particular age to impose an exceptional sentence."[143] Second, the court reasoned that,

> when the legislature enacted RCW 9.94A.030(34)—defining an 'offender' subject to the SRA as 'a person who has committed a felony established by state law and is eighteen years of age or older . . . '—it did not have the benefit of the data underlying the decisions in *Roper* [*v. Simmons*], *Graham v. Florida, and Miller v. Alabama*, since the SRA's definition of an 'offender' predates *Roper* by roughly 25 years.[144]

Therefore, "when the legislature enacted RCW 9.94A.030(34), it did not have the benefit of psychological and neurological studies showing that the 'parts of the brain involved in behavior control' continue to develop well into a person's [twenties]."[145] The court concluded that it was precisely those differences that could justify a trial court's finding that the legislature failed to "necessarily consider[] the relationship between age and culpability when it made the SRA applicable to all defendants" over the age of eighteen.[146]

Applying its initial reasoning to this case, the court reasoned that, while the "legislature has determined that all defendants [eighteen] and over are, in general, equally culpable for equivalent crimes, . . . it could not have considered the particular vulnerabilities—for example, impulsivity, poor judgment, and susceptibility to outside influences—of specific individuals."[147] In its application of the second prong of the test, the court held that the past precedent, which denied the application of

---

140. *O'Dell*, 358 P.3d at 363 (quoting State v. Ha'mim, 940 P.2d 633, 636 (Wash. 1997)) (internal citations omitted).

141. *Id.* at 364.

142. *Id.*

143. *Id.*

144. *Id.* (internal citations omitted).

145. *Id.* at 365 (quoting Miller v. Alabama, 567 U.S. 460, 472 (2012)).

146. *Id.*

147. *Id.* at 364.

youthfulness as a non-statutory mitigating factor under the SRA, did not have the benefit of the studies underlying *Miller*, *Roper*, and *Graham*—studies that establish a clear connection between youth and decreased moral culpability.[148] Now having the benefit of those advancements in scientific literature and with the knowledge that age may well mitigate a defendant's culpability, even if that defendant is over the age of eighteen, the court held that a trial court must be allowed to consider youth as a mitigating factor when imposing a sentence on an offender like O'Dell.[149]

IV. INEVITABLE CHANGES AND A PROPOSED SOLUTION

Following *Roper*, courts at both the federal and state levels, including Washington, have begun to consider the implications of the acknowledgment that "[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18"[150] and that the developmental and neurological science factors found applicable to children also apply to young adults.[151] On the state level, some courts have begun to permit a limited consideration of youth through their state statutory guidelines.[152] These statutes recognize the general idea that age-based mitigation may continue past eighteen, but in application, reveal that youth-based mitigation is rarely used when sentencing young adult defendants.[153]

The Eighth Amendment "must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design."[154] To implement this framework, courts must refer to "the evolving standards of decency that mark the progress of a maturing society[.]"[155] Global trends and the advancements in adolescent brain science demand changes be made to existing sentencing schemes, specifically for age and evidence of youthfulness to inform all sentencing determinations.

A. Age-Based Sentencing Statutes and Proposed Applications of Mitigation to Young Adults

Most directly related to the *Roper* line of cases, litigation has begun to question the bright-line rule distinction drawn when an offender hits the

148. *Id*.

149. *See id*.

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

151. *Id*.

152. Josh Gupta-Kagan, *The Intersection Between Young Adult Sentencing and Mass Incarceration*, 2018 WIS. L. REV. 669, 695 (2018).

153. Gupta-Kagan, *supra* note 152, at 695.

154. *Roper*, 543 U.S. at 560.

155. *Id.* at 561 (quoting Trop v. Dulles, 356 U.S. 86, 100–01 (1958)).

age of eighteen—a move that is both timely and necessary to advance juvenile justice reform. State courts have seen an increase in expert testimony, remarking on the development of brain science as it relates to the youthful offender and arguing that, knowing what we know today, the holding in *Roper* should be applied to similar cases for individuals eighteen, nineteen, and even twenty years old.[156]

Broader trends seek to expand youthful offender statutes to include more young adults. As seen in *O'Dell*, youthful offender statutes mitigate sentences for certain crimes up to the age of twenty-five and provide a range of rehabilitative services.[157] These statutes recognize the general idea that young adults should be treated differently than older adults. In recent years, two states—Colorado and Vermont—have expanded their youthful offender statutes to make them presumptively applicable to some young adults.[158]

Several scholars have similarly proposed mechanisms for changes in sentencing that would reflect the consideration of young adult offenders as a special category. Barry Feld's[159] proposal, coined the "youth discount," could significantly reduce sentencing lengths for young adults by giving fractional reductions.[160] Recognizing the lesser culpability of developing young adults, Feld's proposal would create a sliding scale of punishment by using age as a fraction basis of reduction.[161] A young offender could receive no more than a fraction of an adult sentence, with the size of the fraction gradually increasing until the offender reaches a certain cutoff age.[162]

Other reformers propose a more case-by-case approach. Elizabeth Scott and Laurence Steinberg[163] suggest a set of reforms to create a

---

156. *See, e.g.*, Tim Requarth, *Neuroscience Is Changing the Debate over What Role Age Should Play in the Courts*, NEWSWEEK (Apr. 18, 2016), https://www.newsweek.com/2016/04/29/young-brains-neuroscience-juvenile-inmates-criminal-justice-449000.html [https://perma.cc/KL3V-XLFJ].

157. Gupta-Kagan, *supra* note 152, at 683.

158. Colorado expanded its youthful offender statute to include eighteen and nineteen-year-olds. 2009 Colo. Legis. Serv. 278–79 (West). Vermont's legislature expanded youthful offender status to include individuals under twenty-two-years-old at the time of the offense. 2016 Vt. Acts & Resolves. No. 153 §§ 1–2.

159. Barry Feld, Centennial Professor of Law at the University of Minnesota, is an expert in juvenile law, police interrogation practices, and procedural rights. Barry C. Feld, *Curriculum Vitae* (2020), https://www.law.umn.edu/sites/law.umn.edu/files/feld-cv.pdf [https://perma.cc/ZK83-STYP]. Feld served as a visiting scholar at the National Center for Juvenile Justice and has authored several chapters, articles for scholarly journals, and books including *Cases and Materials on Juvenile Justice Administration, Juvenile Justice Administration in a Nutshell, and Justice for Children: The Right to Counsel and Juvenile Courts*. *Id.*

160. Gupta-Kagan, *supra* note 152, at 690.

161. *Id.*

162. *Id.*

163. Elizabeth S. Scott is the Harold R. Medina Professor of Law and Vice Dean for Curriculum at Columbia Law School. Elizabeth Scott, *Curriculum Vitae* (2019), https://www.law.columbia.edu/s

developmental approach to young adult offenders.[164] This approach would expand youthful offender acts and build young-adult-specific prison facilities.[165] Regarding the length of time young adults spend in prison, Scott and Steinberg propose a case-by-case approach.[166] First, they argue that young adults' relative youth should be considered at sentencing and then, once sentenced, that young adult offenders should be able to seek parole earlier than older adults.[167]

While these proposals seek to reform the existing sentencing schemes and take into consideration age-based mitigating information, their controversy centers on whether we should treat young adults differently than adults. The focus should instead be the degree to which we treat young adults like children.

B. A More Robust Sentencing Scheme

While clear in certain respects, the opinion in *O'Dell* left ample room for interpretation and expansion that arguably does not go far enough. In its holding, citing the *Roper* line of case conclusions—that youth have diminished capacity and that youthful features do not disappear at eighteen—the court concluded that age could mitigate culpability and justify a sentence below state guidelines on a case-by-case basis.[168] This begged the question of how frequently future courts would actually apply an exceptional sentence for defendants other than O'Dell.

Just one year later, in *State v. Alden*, the Washington State Court of Appeals refused to apply the ruling in *O'Dell* to mitigate the sentence of a twenty-three-year-old who had "maturity and academic drive."[169] Similarly, in a recent 2019 case, the Court of Appeals rejected the

---

ites/default/files/faculty_profile/files/cv-elizabeth_scott-may_2019.pdf [https://perma.cc/9SJV-E3JM]. From 1995 to 2006, Scott was involved in empirical research on adolescents in the justice system as a member of the MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice. *Id.* In 2008, she published *Rethinking Juvenile Justice* with developmental psychologist Laurence Steinberg. *Id.* The book draws on their collaborative work to offer a framework for juvenile justice policy and received the 2010 Society for Research in Adolescence Social Policy Best Authored Book Award. *Id.* Laurence Steinberg is one of the leading experts on adolescence and is a distinguished professor at Temple University. LAURENCE STEINBERG, https://www.laurence steinberg.com/about [https://perma.cc/PX3Z-YAE3]. He has authored more than 450 articles and essays on development during the teenage years and has been a featured guest on numerous television programs. *Id.* Dr. Steinberg is a former President of the Division of Developmental Psychology of the American Psychological Association and of the Society for Research on Adolescence. *Id.*

164. Gupta-Kagan, *supra* note 152, at 690.

165. *Id.*

166. *Id.*

167. *Id.* at 690–91.

168. State v. O'Dell, 358 P.3d 359, 368 (Wash. 2015).

169. State v. Alden, No. 32695–1–III, 2016 WL 901027, at *14 n.4 (Wash. Ct. App. Mar. 8, 2016).

defendant's request to consider youth as a mitigating factor when his crimes were committed when he was between fourteen and sixteen years old.[170] The court determined that the holding in *O'Dell* did not constitute a significant change in the law and that it did not affect a sentencing imposition that occurred when he was tried for the crimes as an adult.[171]

It thus appears unlikely that the case-by-case statutory scheme that Washington currently has in place in regard to young adult offenders will lead to palpable changes in young adult sentencing. A presumptive sentencing scheme would much better serve criminal sentencing purposes. Just as the U.S. Supreme Court indicated in *Miller*, developmental science has proven that youthful attributions do not disappear the moment an offender turns eighteen.[172] If sentencing schemes took into account the full timeline of human brain development, young adults would receive shorter sentences that would ensure that the penological goals of the justice system are still being met.

In her 2014 article titled *Extending Sentencing Mitigation for Deserving Young Adults*, scholar Kelsey B. Shust argues for the imposition of a nationwide rebuttable presumption when sentencing young adults.[173] Shust maintains that a permissive scheme would allow for defendants up to the age of twenty-five to seek mitigation.[174] Under this design, "[defendants] would have to reasonably show . . . that they (1) lacked maturity and had underdeveloped responsibility, (2) were vulnerable to negative influences and had limited control over their environment, and (3) lacked characters that could be rehabilitated."[175] The prosecution would then have the burden of showing "by a preponderance of the evidence that the defendants were sufficiently mature to be punished according to the legislature's design."[176]

While such a case-by-case permissive presumption would certainly alter sentencing for young offenders across the nation, in light of *O'Dell*, this scheme is not enough for Washington. Instead, a mandatory, rebuttable presumption would much better serve criminal sentencing purposes. In adopting such a structure, a defendant's youthfulness would be an assumed mitigating factor. Like the younger defendants protected by *Roper*, *Graham*, and *Miller*, a young adult would be presumed to lack maturity, be vulnerable to negative influences, and lack developmental

170. *In re* Domingo-Cornelio, No. 50818-4-II, 2019 WL 1093435 (Wash Ct. App. Mar. 8, 2019) (unpublished).

171. *Id.*

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

173. *See* Shust, *supra* note 15, at 699.

174. *Id.* at 698.

175. *Id.*

176. *Id.*

characteristics. The burden would lie with the prosecution to show, by a preponderance of the evidence,[177] that the defendant was sufficiently mature enough to be punished according to the adult sentencing scheme. If the prosecutor can prove that, more likely than not, the young adult offender did not possess the characteristics of youthfulness that would warrant mitigation, adult sentencing guidelines would become available for consideration. If, however, the prosecutor failed to present such rebuttable evidence, the court would be required to apply an exceptional sentence.

There are two reasons to prefer a mandatory rebuttable presumption over the existing "case-by-case basis" sentencing scheme. First is the inability to definitively identify what constitutes adult-like culpability among young adult offenders. Culpability is not an objectively quantifiable object that can be readily measured. Without an initial system of uniformity, one less blameworthy young adult may have age considered as a mitigating factor, while another who is an equally as blameworthy young adult may not. A mandatory presumption reduces the potential for bias and over-punishment for all less-culpable individuals.

Second, adopting a mandatory presumption would combat a judge or jury's inability to fairly weigh the mitigating factor of youthfulness against a charged crime. As recognized by the *Roper* Court, the nature of a particularly violent crime is likely to overpower any mitigating arguments based on age even in cases where the offender's youthfulness would require a reduction in sentencing.[178] A mandatory presumption would help to combat the difficulty a judge or jury might have in distinguishing between a person's responsibility and their related culpability.

A mandatory, rebuttable presumption scheme would offer young offenders the chance to receive categorical reductions from adult sentences while supporting the judicial objective of reducing long term recidivism. Shorter sentencing schemes would allow for young adult offenders to be held accountable for their crimes while also promoting the opportunity for rehabilitation and reintegration into society—the true aims of the criminal justice system.

C. A Change in Correctional Facilities

Promising reforms have been implemented in the juvenile justice system over the past generation which have provided policymakers with

177. A preponderance of the evidence standard, such as is suggested by Shust, would be an appropriate burden for prosecutors to meet because it would balance the importance of preventing over punishment for less culpable offenders while also keeping intact the fundamental judicial basis that backs sentencing authorities.

178. *See* Roper v. Simmons, 543 U.S. 551, 553–54 (2005).

guidance for focusing their work on young adult offenders. While no current blueprint exists for the creation of a specialized facility aimed at young adult offenders in Washington, effective *juvenile* justice programs, policies, and practices are being tailored to include the unique needs of this population.[179] These programs include, for example, multi-systemic therapy, which has been show to effectively reduce recidivism, substance abuse and other mental health services, and social skills training—all proven to be essential components of a successful rehabilitative program.[180]

As the scientific evidence continues to advance in the realm of neuroscience, research supports the creation of a system that recognizes the diminished capacity of young adults while harnessing the opportunities presented by their ability to grow, adapt, and change. As referenced in Part II of this Note, today's neurobiology suggests that young adults ages eighteen to twenty-five are more developmentally akin to juveniles than mature adults and are more apt to reform when presented with the appropriate measures of support.[181]

As the need for distinction between adult and juvenile court remains well-established due to the recognized developmental differences, it must then follow that a substantially different response is necessary for young adults in the justice system. Therefore, upon a judicial finding of youthfulness, a young adult should serve their imposed exceptional sentence in the appropriate state Juvenile Rehabilitation Administration (JRA) facility. Time served in a JRA would provide these young offenders with programs and facilities that would aid in promoting their integration into the larger society as productive adults. With access to the appropriate in-facility programming, such as education, job training, and mental and physical health treatment, a reduction in recidivism rates would likely be seen[182]—a statistic which, based on available data, puts young adults at a staggering seventy-eight percent recidivism rate within three years.[183] Additionally, if young adults were able to avoid exposure to the adult prison system, they would not face the attributable collateral

179. *See generally* COUNCIL FOR STATE GOV'TS JUST. CTR., REDUCING RECIDIVISM AND IMPROVING OTHER OUTCOMES FOR YOUNG ADULTS IN THE JUVENILE AND ADULT CRIMINAL JUSTICE SYSTEM (2015).

180. Elizabeth S. Scott et al., *Young Adulthood as a Transitional Legal Category: Science, Social Change, and Justice Policy*, 85 FORDHAM L. REV. 641, 663 (2016).

181. *See supra* Part II.

182. *See* JUST. POL'Y INST., *supra* note 11, at 22–24 (explaining how implemented raise the age statutes have resulted in a decrease in recidivism rates).

183. VINCENT SCHIRALDI ET AL., COMMUNITY-BASED RESPONSES TO JUSTICE-INVOLVED YOUNG ADULTS 6 (2015), https://www.ncjrs.gov/pdffiles1/nij/248900.pdf [https://perma.cc/ZZW6-AKAM].

consequences, such as laws that limit their ability to get jobs, receive student loans, and live in certain kinds of housing.[184]

While concerns exist regarding the incorporation of young adults in the juvenile system,[185] the proposed model would take into consideration the mental and emotional age of each young adult and evaluate whether the matter should be handled in juvenile or adult detention. Opposition for "raising the age" often challenges the lenient nature of the juvenile system, arguing that the addition of young adult offenders would negatively impact public safety and readily destabilize an existing system.[186] A mandatory presumption would alleviate the preeminent concern over integration and public safety by ensuring that only those with the applicable and necessary characteristics are able to attain the greater benefit of juvenile status.

CONCLUSION

Roper, *Graham*, and *Miller* form a basis for the integration of youthfulness as a mitigating factor in sentencing. *O'Dell* takes it one step further for Washington by allowing youthfulness to be among the considerations eligible as a mitigating factor at sentencing. Based on the developments of adolescent brain science and its application to these Eighth Amendment cases, scholars and courts alike have begun to address age as a proxy for culpability. Culpability, however, is not quantitative and cannot be measured to determine how much a young adult offender possesses. A rebuttable mandatory, presumptive sentencing scheme would combat the unknown nature of culpability, while supporting the current trend of providing greater protections for our nation's young adults. Further, allowing young adults to serve their time in an approved state juvenile facility would lead to palpable changes in recidivism and adolescent growth because of its focus on rehabilitation, confidentiality, and family engagement.

184. JUST. POL'Y INST., *supra* note 11, at 11.

185. *See* Tamar R. Birckhead, *North Carolina, Juvenile Court Jurisdiction, and the Resistance to Reform*, 86 N.C. L. REV. 1443, 1494–99 (2008) (discussing arguments against raising the age of the juvenile justice system); Scott et al., *supra* note 180, at 664–65 (discussing how scientific evidence is not robust enough to support a response of leniency toward young adult offenders).

186. *See* Scott et al., *supra* note 180, at 665.