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Emerging Adulthood and the Criminal Justice System: #Brainnotfullycooked #Can'tadultyet #Yolo

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**EMERGING ADULTHOOD AND
THE CRIMINAL JUSTICE SYSTEM:
#BRAINNOTFULLYCOOKED #CAN'TADULTYET
#YOLO**

Christine E. Fitch*

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“I’m an adult, but not like a real adult.”
—Anyone between the ages of 18 and 25¹

INTRODUCTION

Ah, young adulthood. The age where we often start college or enter the workforce; where we experience new things and meet new people; where most of us make incredibly stupid decisions, some of which leads to criminal prosecutions. For example, twenty-five-year-old Kathryn Knott, the daughter of the Pennsylvania Bucks County police chief, was convicted of simple assault, reckless endangerment, and conspiracy to commit simple assault after a violent attack on a gay couple in Philadelphia’s Center City.² Knott tweeted the night of the incident that “the ppl we were just dancing with just turned and mafe out with each other #gay #ew” and “My cab driver starting shouting some jihad s[redacted] so I starting singing America the beautiful #merrica.”³

An eighteen-year-old Radford University freshman business major earned a thirty-five-year prison sentence—reduced to less than four years with time served—for running a mini drug syndicate.⁴ He said he was “ensnared by fast money.”⁵ The prosecutor said he was a major drug player.⁶ His lawyer said he “was simply young and stupid.”⁷

Similarly young and likewise stupid, upon release from custody for a misdemeanor trespassing charge, twenty-three-year-old Frank Singleton stole a woman’s car with her still inside in the Palm Beach County Jail’s visitation parking lot.⁸ He explained that “he tried to take the car because he didn’t feel like walking to his home about 6 miles

1. *Turtletotem*, TUMBLR (Sept. 25, 2015), <http://turtletotem.tumblr.com/post/129888014311/im-an-adult-but-not-like-a-real-adult> (quoting prettyboystyles).

2. Crimesider Staff, *Police Chief’s Daughter Guilty of Assault in Gay Couple Attack*, CBS NEWS (Dec. 18, 2015, 1:33 PM), <http://www.cbsnews.com/news/police-chiefs-daughter-guilty-of-assault-in-gay-couple-attack/>.

3. The Associated Press, *Police Chief’s Daughter Gets 5 to 10 Months Jail for Attacking Gay Couple in Philadelphia*, NY DAILY NEWS (Feb. 8, 2016, 5:38 PM), <http://www.nydailynews.com/news/crime/pa-police-chief-daughter-jail-bashing-gay-couple-article-1.2524637> (typographical errors in the original).

4. *Freshman Business Major Gets 4 Years for Drug Start-Up*, AP NEWS (Jan. 29, 2018), <https://apnews.com/7eefb9a0817a477392a18569661d58a9/Freshman-business-major-gets-4-years-for-drug-start-up> (with information from RICHMOND TIMES-DISPATCH, <http://www.richmond.com>).

5. *Id.*

6. *Id.*

7. *Id.*

8. Julius Whigham, *West Palm Beach Man Who Carjacked Woman in Jail Parking Lot Sentenced to 6 Years*, PALM BEACH POST (Oct. 1, 2010, 6:20 PM), <http://www.palmbeachpost.com/news/crime--law/west-palm-beach-m...woman-jail-parking-lot-sentenced-years/rPnE0huazTD0Ic2UCQa1AK/>.

away.”⁹

And then there is twenty-three-year-old Michael Joseph Oleksik, who caused \$5,000 of damage to a Wells Fargo Bank ATM.¹⁰ Oleksik attacked the machine out of anger when it gave him too much money.¹¹

These are just a few colorful examples. Police blotters are filled with crimes committed by young adults, ranging from the completely stupid to the most heinous. For example, on 20 July 2012, James Holmes open fired on the midnight showing of *The Dark Knight Rises*, killing twelve people; he was twenty-four years old at the time.¹² Lawrence “Benny” Walker, twenty-two, was sentenced to seven years and four months for killing a mother of four while drunk driving.¹³ And twenty-two-year-old Troy Patrick Brown received more than 178 years in prison after committing twenty-five robberies in Colorado Springs.¹⁴ His conviction was announced on the 4th Judicial DA’s Twitter page, complete with its own hashtag—#2016CR6712.¹⁵

This Note discusses whether these perpetrators and other young adults like them should be held to the same standard as their adult counterparts given the current research.

Recent neurological studies establish that the human brain is not fully developed until approximately age twenty-five.¹⁶ Nevertheless, the American criminal justice system holds defendants younger than that to the same level of culpability as much older adults.¹⁷ This Note begins with a brief overview of human brain development and presents the current research on when the brain reaches full maturation.¹⁸ Then an examination follows of how the United States Supreme Court has used

9. *Id.*

10. The Associated Press, *Man Says He Punched ATM Because It Gave Out Too Much Cash*, SUNSENTINEL (Dec. 27, 2017, 9:20 AM), <http://www.sun-sentinel.com/news/florida/fl-reg-man-punched-20171227-story.html>.

11. *Id.* (“An arrest report says that Oleksik told a bank manager he was angry that the machine was giving him too much money and he didn’t know what to do because he was in a hurry for work.”).

12. *Colorado Theater Shooting Fast Facts*, CNN (Nov. 30, 2017, 2:18 PM), <https://www.cnn.com/2013/07/19/us/colorado-theater-shooting-fast-facts/index.html>.

13. Sontaya Rose, *22-Year-Old Sentenced to Over 7 Years in Prison for DUI Crash that Killed Kelly Phetxoumphone*, ABC 30 (Sept. 22, 2017), <http://abc30.com/22-year-old-sentenced-to-over-7-years-in-prison-for-dui-crash-that-killed-kelly-phetxoumphone/2444429/>.

14. *Man Sentenced to More than 170 Years in Prison*, KOAA NEWS 5 (Jan. 5, 2018, 9:41 PM), <http://www.koaa.com/story/37204274/man-sentenced-to-more-than-170-years-in-prison>.

15. *Id.*

16. *Infra* note 40.

17. *Infra* Part III.A.

18. *See infra* Part II and III.

psychological, behavioral, and cognitive-brain development research in rendering its holdings, specifically in death penalty cases.¹⁹ From there, this Note discusses how the Supreme Court's analysis of juveniles and the mentally retarded left the door open for emerging adults to likewise be considered less culpable.²⁰ The last part of this Note assesses the available systems and concludes that, in terms of incarceration, emerging adults are best served with a program similar to a juvenile detention center.²¹

I. THE INTERMEDIATE STAGE OF MATURATION KNOWN AS "EMERGING ADULthood"

The age of majority has not always been eighteen. In thirteenth century England, the age of majority was amended from fifteen to twenty-one, as men of the latter age were better able to wear armor and fight on horseback.²² With seemingly less reason, the Supreme Court in *Roper v. Simmons*²³ acknowledged that a line must be drawn and then drew it at eighteen:

Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach. For the reasons we have discussed, however, a line must be drawn.²⁴

In his *Stanford v. Kentucky*²⁵ dissent, Justice Brennan acknowledged that age eighteen is arbitrary and perhaps not the most accurate gauge of adulthood:

Insofar as age 18 is a necessarily arbitrary social choice as a point at which to acknowledge a person's maturity and responsibility, given the different developmental rates of individuals, it is in fact 'a conservative estimate of the dividing line between adolescence and adulthood. Many of the psychological and emotional changes that an

19. See *infra* Part IV.A.

20. See *infra* Part IV.A.

21. See *infra* Part IV.B.

22. Sara B. Johnson et al., *Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy*, 45 J. ADOLESCENT HEALTH 216, 217 (2009); see also Elizabeth S. Scott, *The Legal Construction of Adolescent*, 29 HOFSTRA L. REV. 547, 558 (2000) (internal citation removed) [hereinafter Scott, *The Legal Construction of Adolescent*].

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

24. *Id.* at 574.

25. *Stanford v. Kentucky*, 492 U.S. 361 (1989).

adolescent experiences in maturing do not actually occur until the early 20s.²⁶

Justice Brennan acknowledges the legal system's problem of recognizing eighteen as the age of majority since "research suggests that, structurally, the human brain is not aware of this societal milestone"²⁷ and "there is little empirical evidence to support age 18, the current legal age of majority, as an accurate marker of adult capacities."²⁸

And eighteen is not the magic number for all "adult" activities. For example, sixteen-year-olds are permitted a driver's license,²⁹ but most car rental companies will not serve those under twenty-five.³⁰ In California, a person under age eighteen requires a court order or parental consent to be married whereas New York prohibits marriage if either party is under age fourteen.³¹ In terms of statutory rape, California makes it a misdemeanor for anyone to engage in sexual intercourse with a minor (i.e. a non-spouse under the age of eighteen) if said minor is not more or less than three years in age from the perpetrator.³² The statute also says, in part, that "[a]ny person who engages in an act of unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator is guilty of either a misdemeanor or a felony"³³ and "[a]ny person 21 years of age or older who engages in an act of unlawful sexual intercourse with a minor who is under 16 years of age is guilty of either a misdemeanor or felony. . . ."³⁴ Rape in the third degree in New York is a class E felony when someone twenty-one or older engages in sexual

26. *Id.* at 396 (Brennan, J., dissenting) (quoting Brief for American Society for Adolescent Psychiatry et al. as *Amici Curiae* 4).

27. Melissa S. Caulum, *Postadolescent Brain Development: A Disconnect Between Neuroscience, Emerging Adults, and the Corrections System*, 2007 WIS. L. REV. 729, 731 (2007); see also *infra* Part II.B.

28. Johnson et al., *supra* note 22, at 217.

29. California Driver Handbook, *Minors' Permit Requirements*, CA DMV, www.dmv.ca.gov/portal/dmv/detail/pubs/hdbk/minors [hereinafter California Driver Handbook] (last visited Mar. 23, 2018).

30. David Pimentel, *The Widening Maturity Gap: Trying and Punishing Juveniles As Adults in an Era of Extended Adolescence*, 46 TEX. TECH L. REV. 71, 84 (2013) (citing Molly Feltner, *Renting a Car Under 25 Is Possible But Pricey*, SMARTER TRAVEL (Jun. 27, 2006), <http://www.smartertravel.com/travel-advice/renting-a-car-under-age-25-is-possible-but-pricey.html?id=1262493> ("Youth can be a paradox: If you're age 18 or older you're considered mature enough to be able to vote, pay taxes, and even go to war. But, until recently, if you were under 25, many rental car companies wouldn't trust you to drive their vehicles.")).

31. Sarah J. Baldwin, *Choosing a Home: When Should Children Make Autonomous Choices About Their Home Life?*, 46 SUFFOLK U.L. REV. 503, 525 (2013) (citing CAL. FAM. CODE § 302 (West 2012) and N.Y. DOM. REL. LAW §§ 15, 15-a (McKinney 2013)).

32. CAL. PEN. CODE, § 261.5(b) (Deering 2018).

33. CAL. PEN. CODE, § 261.5(c) (Deering 2018).

34. CAL. PEN. CODE, § 261.5(d) (Deering 2018).

intercourse with someone younger than seventeen.³⁵ The state likewise makes an individual guilty of rape in the first degree (a class B felony) when he or she engages in sex with someone less than eleven years old or with someone who is less than thirteen years old when the perpetrator is eighteen or older.³⁶

Persons under age twenty-one cannot buy tobacco or smoking-related paraphernalia in California unless they are active duty military personnel over age eighteen.³⁷ California also prohibits the sale, furnishing, or giving of alcohol to anyone under age twenty-one.³⁸ On the other hand, the Internal Revenue Service allows filers to claim student dependents up to age twenty-four³⁹ and the Affordable Care Act allows dependents to remain on their parents' plan until age twenty-six.⁴⁰

These divisions are not necessarily inherently wrong or artificial. But a problem arises when society incorrectly assumes that just because a given generation has reached a legally-recognized age that they are suddenly developmentally mature enough to undertake the prescribed activity.⁴¹ Moreover, these varying age requirements show that there is no crisp line of demarcation between childhood and adulthood. This intermediate stage of maturation is often referred to as "emerging adulthood" and is bookended by ages eighteen and twenty-five;⁴² or "young adulthood," which spans ages eighteen to twenty-six⁴³ or seventeen to twenty-four;⁴⁴ or "adolescence," encapsulating those ages ten to twenty-four.⁴⁵ For the purposes of this Note, individuals between

35. N.Y. PEN. LAW § 130.25 (McKinney 2018).

36. N.Y. PEN. LAW § 130.35 (McKinney 2018).

37. CAL. PEN. CODE § 308(a)(1)(A)(i)–(ii) (Deering 2018).

38. CAL. BUS. & PROF. CODE § 25658 (Deering).

39. Pimentel, *supra* note 30, at 85 (citing *Publication 17 (2017), Your Federal Income Tax*, IRS, http://www.irs.gov/publications/p17/ch03.html#en_US_2012_publink1000170876 (follow "Chapter 3" hyperlink) (last visited Mar. 23, 2018)).

40. *Id.* (citing *Young Adults and the Affordable Care Act: Protecting Young Adults and Eliminating Burdens on Businesses and Families*, U.S. DEP'T LAB., <https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/faqs/young-adult-and-aca> (last visited Mar. 23, 2018)).

41. Johnson et al., *supra* note 22, at 217.

42. Jennifer Lynn Tanner & Jeffrey Jensen Arnett, *The Emergence of 'Emerging Adulthood'*, in HANDBOOK OF YOUTH AND YOUNG ADULTHOOD 39, 39 (Andy Furlong ed., 2009), <http://www.jeffreyarnett.com/arnett2009theemergenceofmergingadulthood.pdf>.

43. COMMITTEE ON IMPROVING THE HEALTH, SAFETY AND WELL-BEING OF YOUNG ADULTS ET AL., INVESTING IN THE HEALTH AND WELL-BEING OF YOUNG ADULTS xv (Richard J. Bonnie et al., eds. 2015), <https://www.ncbi.nlm.nih.gov/books/NBK284782/> [hereinafter INVESTING IN THE HEALTH AND WELL-BEING OF YOUNG ADULTS].

44. Kenneth M. Streit & John T. Chisholm, *Expand Sentencing Options for Young Adults*, 86 WIS. LAW. 38, 39 (2013).

45. Mariam Arain et al., *Maturation of the Adolescent Brain*, 9 NEUROPSY. DISEASE & TREATMENT 449 (2013).

the ages of eighteen and twenty-five will be referred to as “emerging adults.”⁴⁶

II. THE PREFRONTAL CORTEX: BOSS OF THE EXECUTIVE FUNCTION

Initially, it was thought that the brain reached maturity at age twelve.⁴⁷ Thanks to modern magnetic resonance imaging (MRI) studies, scientists now know that behavioral and cognitive development occurs throughout emerging adulthood.⁴⁸ Longitudinal neuroimaging studies establish that brain maturation continues into one’s twenties.⁴⁹ For example, the frontal lobes, which are responsible for planning, working memory, and impulse control (i.e. activities usually termed “executive functions”), are not fully developed until age twenty-five.⁵⁰ But, this is not a precise science. As Dr. Jeffrey Arnett⁵¹ explains, “[t]here are nineteen-year-olds who have reached adulthood—demographically, subjectively, and in terms of identity formation—and twenty-nine-year-olds who have not. Nevertheless, for most people, the transition from emerging adulthood to young adulthood intensifies in the late twenties and is reached by age thirty. . . .”⁵² Generally, those in emerging adulthood are distinguishable from the rest of the population by their “identity exploration, instability, self-focus, feeling in-between and a rather poetic characteristic he [Dr. Arnett] calls ‘a sense of possibilities.’”⁵³

The period of brain growth and maturation occurring between ages ten and twenty-four is the second most dynamic period of development, behind only infancy.⁵⁴ The differences before and after this stage are stark and “the years between 18 and 26 are when young people develop

46. Whether or not we consider the +/- one year (i.e. those of age twenty-four and/or twenty-six) as part of the “emerging adult” class is negligible in terms of this author’s argument.

47. Caulum, *supra* note 27, at 739.

48. *Id.*

49. Johnson et al., *supra* note 22, at 216.

50. *Id.*

51. Dr. Arnett primarily focuses his research on “emerging adulthood,” which he defines as the age between late teens and mid-twenties, mainly ages 18 to 25. See *About Jeffrey Jensen Arnett*, JEFFREYARNETT.COM, <http://www.jeffreyarnett.com/about.htm> (last visited Jan. 13, 2017).

52. Caulum, *supra* note 27, at 740 (quoting Jeffrey Jensen Arnett, *Emerging Adulthood: A Theory of Development from the Late Teens Through the Twenties*, 55 AM. PSYCHOLOGIST 469, 477 (2000)).

53. Pimentel, *supra* note 30, at 83 (citing Robin Marantz Henig, *What Is It About 20-Somethings?*, N.Y. TIMES (Aug. 18, 2010), <https://www.nytimes.com/2010/08/22/magazine/22Adulthood-t.html>).

54. Arain et al., *supra* note 45, at 451 (labeling this dynamic period as “adolescence,” encompassing ages ten to twenty-four).

psychologically in ways that bridge these differences.”⁵⁵ During this time, “[c]ognitive capacities, strategies, and organization shift”⁵⁶ and the “attainment of wisdom-related knowledge and judgment occurs primarily.”⁵⁷ Emerging adulthood also sees maximum levels of aptitude, “numerical ability, verbal aptitude, clerical perception, finger dexterity, and general intelligence.”⁵⁸

During this transition from childhood to adulthood,⁵⁹ the brain “rewires” itself—a process that is not complete until approximately age twenty-four.⁶⁰ The prefrontal cortex is responsible for higher-order cognitive processes and executive functioning, which are necessary for “goal-directed behavior, including planning, response inhibition, working memory, and attention.”⁶¹

These [advanced functions] allow an individual to pause long enough to take stock of a situation, assess his or her options, plan a course of action, and execute it. Poor executive functioning leads to difficulty with planning, attention, using feedback, and mental inflexibility, all of which could undermine judgment and decision making.⁶²

The prefrontal cortex is one of the last regions to mature,⁶³ reaching adult-level capacity in one’s early twenties or later.⁶⁴ This is problematic in that, for example, limbic system development outpaces the prefrontal cortex during puberty.⁶⁵ Thus the system responsible for emotions develops faster than the system charged with managing them and “it is logical to suppose . . . that when the limbic system is fully active but the

55. INVESTING IN THE HEALTH AND WELL-BEING OF YOUNG ADULTS, *supra* note 43, at 37.

56. Tanner & Arnett, *supra* note 42, at 41 (internal citations removed) (defining “emerging adulthood” as ages eighteen to twenty-five).

57. *Id.* (specifically from ages fifteen to twenty-five).

58. Tanner & Arnett, *supra* note 42, at 41 (internal citations removed).

59. Arain et al., *supra* note 45, at 451.

60. *Id.* at 452.

61. Johnson et al., *supra* note 22, at 217; *see also* INVESTING IN THE HEALTH AND WELL-BEING OF YOUNG ADULTS, *supra* note 43, at 38 (“The prefrontal cortex is the region that supports abstract reasoning and planning. Through its extensive connectivity throughout the brain, it also supports executive function, providing control and modulation of behavior. It plays a major role in decision making, and its maturation is believed to support cognitive development.” (internal citations removed)).

62. Johnson et al., *supra* note 22, at 217.

63. Arain et al., *supra* note 45, at 453.

64. Johnson et al., *supra* note 22, at 217.

65. *See* Arain et al., *supra* note 45, at 453. The limbic system is comprised of the amygdala, hippocampus, and hypothalamus; together they regulate survival-related emotions and motivations (fear, anger, and the fight-or-flight response) as well as species-survival drives (hunger and sex). *Id.*

cortex is still being built, emotions might outweigh rationality.”⁶⁶

Impulse control also develops as the brain matures by processes of synaptic pruning, myelination, and neurochemical changes.⁶⁷ These mechanisms refine and improve the brain’s communication network so information can be transferred more efficiently.⁶⁸ One result of this “system upgrade” is better impulse control.⁶⁹ Young children have some impulse control skills, but “with age and neuromaturation (e.g., pruning and myelination), comes the ability to consistently use these skills.”⁷⁰ Thus, science suggests that higher-order cognitive faculties and executive functioning are necessary for behavioral control; that the prefrontal cortex controls these functions; and that the prefrontal cortex continues to mature up until age twenty-four.⁷¹

III. EMERGING ADULTS AND THE JUSTICE SYSTEM

Science evinces that emerging adults’ brains—especially the executive functions region, including the prefrontal cortex—are not yet developmentally complete. Given this, it seems unfair to hold these individuals to the same level of criminal culpability and punishment as fully mature adults. Yet lumping these eighteen- to twenty-five-year-olds in with juveniles infantilizes a whole group that other areas of the law have dubbed competent to drive,⁷² enlist,⁷³ vote,⁷⁴ marry,⁷⁵ smoke,⁷⁶ and drink,⁷⁷ just to name a few. The remainder of this Note addresses emerging adults within the criminal justice context: first, reasoning that emerging adults should not be eligible to receive the death penalty and, second, that they should be treated more like juveniles in terms of the

66. Pimentel, *supra* note 30, at 83–84 (quoting Henig, *supra* note 53) (discussing a study conducted by Dr. Jay Giedd at the National Institutes of Mental Health).

67. INVESTING IN THE HEALTH AND WELL-BEING OF YOUNG ADULTS, *supra* note 43, at 37–38.

68. Johnson et al., *supra* note 22, at 217.

69. *Id.*

70. *Id.*; see also Adriana Galvan et al., *Risk Taking and the Adolescent Brain*, 10 DEVELOPMENTAL SCI. F8, F13 (2007) (finding, in a study of individuals aged seven to twenty-nine, that impulse control continues to develop throughout adolescence and early adulthood).

71. Arain et al., *supra* note 45, at 456.

72. California Driver Handbook, *supra* note 29.

73. *Join the Military*, USA.GOV, <https://www.usa.gov/join-military> (last visited Mar. 27, 2018).

74. U.S. CONST. amend. XXVI.

75. Baldwin, *supra* note 31.

76. *State By State, List of All Tobacco 21 Cities*, TOBACCO, <https://tobacco21.org/state-by-state/> (last visited Mar. 27, 2018).

77. *Alcohol to 21, Lessons from the Drinking Age Experiment*, TOBACCO, <https://tobacco21.org/alcohol-to-21/> (last visited Mar. 27, 2018).

programs and services provided during incarceration.

A. Logic Dictates That Emerging Adults Should Not Be Eligible for the Death Penalty

The United States Supreme Court prohibits the execution of juveniles⁷⁸ and the mentally retarded.⁷⁹ Because “death is different,”⁸⁰ the Court’s opinions regarding the death penalty and its consideration of research therein are quite detailed.⁸¹ As such, the Court’s logic can be applied to emerging adults to conclude that said group should not be eligible for the death penalty.

1. Juveniles and the Mentally Retarded are Less Culpable

The Supreme Court concluded that juveniles are criminally less culpable than adults because the former are less mature.⁸² In *Thompson v. Oklahoma*,⁸³ the Court held that juveniles were less culpable because:

Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult.⁸⁴

The Court found that “the reasons why juveniles are not trusted with privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult.”⁸⁵

In *Roper v. Simmons*,⁸⁶ the Court identified three general differences between juveniles and adults.⁸⁷ First, that “[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the

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

79. *Atkins v. Virginia*, 536 U.S. 304 (2002). In *Atkins*, the Court uses the specific term “mental retardation” and defines it as requiring “not only subaverage intellectual functioning, but also significant limitations in adaptive skills.” *Id.* at 305. As such this author will use the language of the Court.

80. *Woodson v. North Carolina*, 428 U.S. 280, 322 (1976).

81. *See* Caulum, *supra* note 27, at 733–34 (in recent years, the Court has used psychological, behavioral, and cognitive-brain development research similar to that discussed *supra*).

82. *See, e.g.*, *Thompson v. Oklahoma*, 487 U.S. 815 (1988).

83. *Thompson*, 487 U.S. at 815 (finding that the execution of offenders who were younger than sixteen at the time of their offense was cruel and unusual punishment).

84. *Id.* at 835. In *Thompson*, the defendant was 15 years old at the time of his crime. *Id.* at 819.

85. *Id.* at 819.

86. *Simmons*, 543 U.S. at 551.

87. *Id.* at 553.

young. These qualities often result in impetuous and ill-considered actions and decisions.’”⁸⁸ Second, that “juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure.”⁸⁹ And third, that “the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed.”⁹⁰ Although the Court acknowledged that these distinguishing qualities remain present even after the juvenile turns eighteen, it still held that age eighteen was the line for death eligibility.⁹¹ Once the Court concluded that juveniles have diminished culpability, the dual purposes of the death penalty (i.e. retribution and deterrence)⁹² can no longer justify its imposition.⁹³

With similar logic, the Court ruled in *Atkins v. Virginia*⁹⁴ that the mentally retarded are less morally culpable than neurotypical offenders.⁹⁵ Thus, executing the former is not an effective deterrent.⁹⁶ Specifically, the Court looked to cognitive and behavioral research⁹⁷ to conclude that:

[t]he theory of deterrence in capital sentencing is predicated upon the notion that the increased severity of the punishment [i.e. death] will inhibit criminal actors from carrying out murderous conduct. Yet, it is the same cognitive and behavioral impairments that make these defendants [i.e. the mentally retarded] less morally culpable . . .⁹⁸

In reaching its decision in *Roper*, the Court relied on psychological research from 1968 and 1992, which is now largely outdated.⁹⁹ The cited study was conducted by Professor Jeffrey Jensen Arnett in 1992 and supported the Court’s “determination that those under the age of eighteen lack maturity and demonstrate an underdeveloped sense of responsibility.”¹⁰⁰ Dr. Arnett has since published research indicating that

88. *Id.* at 569 (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)).

89. *Id.* (citing *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982)).

90. *Id.* at 570.

91. Caulum, *supra* note 27, at 737 (citing *Roper v. Simmons*, 543 U.S. 551, 574 (2005)).

92. Proponents of the death penalty argue that capital punishment is retributory in that the defendant must be proportionately punished for his crime and that capital punishment also serves a deterrent purpose in that it deters potential murderers. ELLEN S. KREITZBERG ET AL., UNDERSTANDING CAPITAL PUNISHMENT LAW, 8, 13 (3d ed. 2012).

93. *Simmons*, 543 U.S. at 553 (internal citations removed).

94. *Atkins v. Virginia*, 536 U.S. 304 (2002).

95. *See id.*

96. *Id.* at 320.

97. Caulum, *supra* note 27, at 736.

98. *Atkins*, 536 U.S. at 320.

99. *See* Caulum, *supra* note 27, at 737 (internal citations removed).

100. *Id.* at 737.

significant behavioral and cognitive development continues past age eighteen.¹⁰¹ “He found that “emerging adults [i.e. individuals eighteen to twenty-five years old] lack the maturity expected of adults and demonstrate an underdeveloped sense of responsibility, much like their juvenile counterparts.”¹⁰² In other words, the *Roper* Court embraced the type of research that now supports the conclusion that behavioral and cognitive development continues into one’s twenties.¹⁰³ As such, “the Court’s reasoning leaves the question of whether emerging adults are categorically less culpable for their actions open.”¹⁰⁴

2. *Extending the Court’s Logic to Exclude Emerging Adults from the Death Penalty*

Using the logic employed by the Supreme Court in *Atkins v. Virginia*¹⁰⁵ and *Roper v. Simmons*,¹⁰⁶ the following logic proof (albeit a simplistic generalization) is generated:

Premise 1—Juveniles (or the mentally retarded) are less mature than full adults.

Premise 2—Therefore, juveniles (or the mentally retarded) are less culpable than full adults.

Premise 3—Therefore, the retributive and deterrent purposes of the death penalty are lost.

Conclusion—Thus, the death penalty is unjustifiable as to juveniles (or the mentally retarded).

The brains of emerging adults are physiologically less mature than an adult’s. Looking at behavioral manifestations can further substantiate Premise 1 of the above proof. For example, modern college students are in constant contact with their parents, communicating an average of 13.4 times per week¹⁰⁷ with forty-one percent contacting their parents every day and twenty percent contacting their parents three or more times per day.¹⁰⁸ As captured by one Twitter user:

Today my 11 year old brother wanted us to go outside and play with

101. *Id.*

102. *Id.* at 730, 737 (internal citations removed).

103. *Id.* at 738 (internal citations removed).

104. *Id.*

105. *Atkins v. Virginia*, 536 U.S. 304 (2002) (the mentally retarded).

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

107. Pimentel, *supra* note 30, at 76 (quoting Reema Khrais, *Phone Home: Tech Draws Parents, College Kids Closer*, NPR (Sept. 25, 2012, 3:25 AM), <http://www.npr.org/2012/09/25/161716306/phone-home-tech-draws-parents-college-kids-closer>).

108. Pimentel, *supra* note 30, at 76 (quoting Tamar Lewin, *Digital Natives and Their Customs*, N.Y. TIMES (Nov. 2, 2012), http://www.nytimes.com/2012/11/04/education/edlife/arthur-levine-discusses-the-new-generation-of-college-students.html?_r=0).

his BB but my Dad wasn't around, so I was like "idk, maybe we shouldn't use it without adult supervision"

and he just stared at me and I realized

I am 20

I am an adult

I am the adult supervision

??!?!?!¹⁰⁹

In terms of impulsivity when emotionally aroused, eighteen- to twenty-one-year-olds act more like younger adolescents than older adults.¹¹⁰ These emerging adults engage in risky behavior to a higher degree than older adults.¹¹¹ As such, criminal activities peak at age eighteen and binge drinking peaks at age twenty.¹¹² Similarly, when compared to adolescents and older adults (i.e. individuals ages twenty-six to thirty-four), emerging adults are more likely to be hurt or killed in a car accident.¹¹³

Eighteen- to twenty-four-year-olds make up approximately ten percent of the total population, but account for over twenty-nine percent of arrests.¹¹⁴ In 2011, 1.7 million eighteen- to twenty-one-year-olds and another one million twenty-two- to twenty-four-year-olds were arrested.¹¹⁵ In terms of incarceration, 200,000 eighteen- to twenty-four-year-olds are serving a year or more in prison with at least another 100,000 serving in local jails.¹¹⁶ Figure 1, which compiles data from a Bureau of Justice Study, depicts this age group as receiving prison

109. Jo Barrow, *21 Times All Your Fears About Growing Up Were Summed Up Perfectly* By Tumblr, BUZZFEED (Dec. 2, 2014), https://www.buzzfeed.com/jobarrow/21-times-all-your-fears-about-growing-up-were-summed-up-perf?utm_term=.tdBBD9Rvbw#.yjpOe4VEXR (formatting in the original).

110. Elizabeth S. Scott et al., *Young Adulthood as a Transitional Legal Category: Science, Social Change, and Justice Policy*, 85 *FORDHAM L. REV.* 641, 642 (2016) (citing Alexandra O. Cohen et al., *When Is an Adolescent an Adult?: Assessing Cognitive Control in Emotional and Nonemotional Contexts*, 27 *PSYCHOL. SCI.* 549, 559–60 (2016)).

111. *Id.*

112. *Id.* at 642 n.9.

113. INVESTING IN THE HEALTH AND WELL-BEING OF YOUNG ADULTS, *supra* note 41, at 5.

114. Tracy Valázquez, *Young Adult Justice: A New Frontier Worth Exploring* 1, <https://chronicleofsocialchange.org/wp-content/uploads/2013/05/Young-Adult-Justice-FINAL1.pdf> (last visited June 18, 2017) (citing *Crime in the United States 2011*, FBI: UCR, <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/tables/table-38> (last visited Mar. 27, 2018)).

115. *Id.*

116. *Id.* (“According to the Bureau of Justice Statistics, 735,601 people were jailed at midyear 2011, which is close to half the number in state and federal prison (1,537,415); no national data on age of people in jail is available.”).

sentences for violent and property crimes more than any other group.¹¹⁷

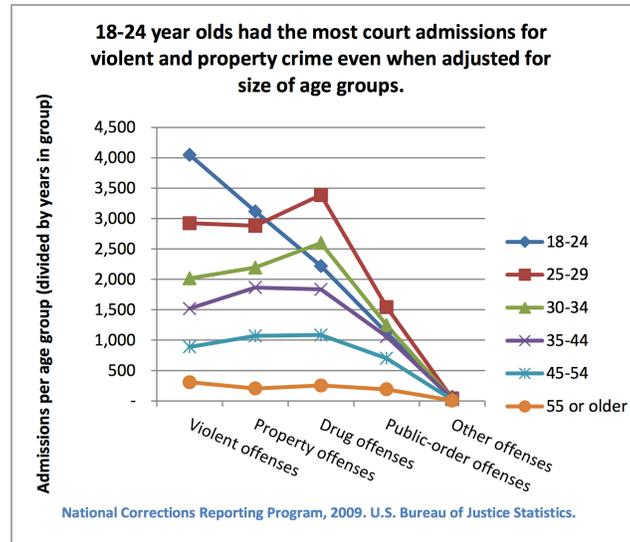


Figure 1: Incarceration of Eighteen- to Twenty-Four-Year-Olds Compared to Other Age Groups¹¹⁸

Additionally, a 2002 Bureau of Justice study “showed that of all adults who had been in state prison, those in the 18-24 year old age bracket had the highest rates of re-arrest (75.4%), reconviction (52%) and return to prison with a new sentence (30.2%) within three years of release.”¹¹⁹

Moreover, emerging adults differ from older ones in processing socioemotional information in that “[e]merging adults’ responses to emotional stimuli are more sensitive compared to older adults; specifically, selectively of and reactivity to negative-stimuli are heightened.”¹²⁰ Thus emerging adults are physiologically, behaviorally, and emotionally less developed than adults.

Once the above evidence establishes Premise 1 of the proof, the logic employed in *Atkins* and *Roper* carries emerging adults to the end conclusion that it should be unconstitutional to execute them. Similarly, looking to the juvenile system and applying the logic therein suggests how to treat these emerging adults once they enter the justice system.

117. *Id.*

118. *Id.* (citing PATRICK A. LANGAN & DAVID J. LEVIN, U.S. DEP’T OF JUST., NCJ 193427, RECIDIVISM OF PRISONERS RELEASED IN 1994 (2002), <http://bjs.gov/content/pub/pdf/rpr94.pdf>).

119. *Id.*

120. Tanner & Arnett, *supra* note 42, at 42.

B. Treating Emerging Adults More Like Juveniles in Terms of Rehabilitation and Not Retribution

Society need not create a completely separate court system for emerging adults. Parallel arguments can be drawn from those made regarding the juvenile system. “Trying children as adults is ‘not the primary evil; it [is] that children [are] sent to adult prisons’ or otherwise punished as adults.”¹²¹ That is, the problem is not “that adult court judges are incapable of appropriately adjudicating cases involving children, if [and as long as] they treat[] children as children rather than adults.”¹²² The problem is when a juvenile is waived out of the juvenile system and thus receives adult punishment, which focuses on retribution and not rehabilitation.¹²³ Likewise, emerging adult cases should be adjudged with rehabilitation goals in mind.

1. Emerging Adults Should Be Incarcerated in Juvenile Detention Centers

During incarceration, an emerging adult’s brain will respond and change to environmental and behavioral demands.¹²⁴ Thus if “a highly impressionable emerging adult is placed in a social environment composed of adult offenders, this environment may affect the individual’s future behavior and structural brain development.”¹²⁵ Given this elasticity and permeability of an emerging adult’s brain, a setting more akin to a juvenile detention center is preferable to that of an adult prison because juvenile facilities often provide rehabilitation and education.¹²⁶ The juvenile system is based on the idea that “juveniles are still developing, and therefore are amenable to rehabilitation.”¹²⁷ As such, judges in the juvenile system have more flexibility in sentencing and can make such decisions based on the defendant’s developmental

121. Jarod K. Hofacket, *Justice or Vengeance: How Young Is Too Young for A Child to Be Tried and Punished As an Adult?*, 34 TEX. TECH L. REV. 159, 163 (2002) (alterations in the original) (quoting Paolo G. Annino, *Children in Florida Adult Prisons: A Call for a Moratorium*, 28 FLA. ST. U.L. REV. 471, 474 (2001), which notes “that adult prisons expose impressionable children to hardened criminals and offer little chance for rehabilitation.”).

122. Hofacket, *supra* note 121, at 163–64 (citing Douglas A. Hager, *Does the Texas Juvenile Waiver Statute Comport With the Requirements of Due Process?*, 26 TEX. TECH L. REV. 813, 819–23 (1995), which discusses some of the benefits of a separate juvenile justice system, including “freeing up the already overburdened docket of adult courts and allowing a judge with more familiarity in dealing with juveniles and a greater understanding of the abilities of the juvenile justice system to dispense with the case.”).

123. Hofacket, *supra* note 121, at 164 (citing Annino, *supra* note 121).

124. Caulum, *supra* note 27, at 746.

125. *Id.* at 731–32.

126. *Id.* at 732.

127. *Id.* at 757 (internal citations removed).

needs.¹²⁸ Juvenile sentences can include education and counseling to make sure the youthful defendant becomes a responsible member of society.¹²⁹ Similarly, in sentencing emerging adults, judges should rely more on “individual, developmental, and maturation information rather than only on traditional adult punishment and incarceration.”¹³⁰

Of state inmates ages twenty-four and younger, more than half “had not completed high school or obtain[ed] a GED, but [nevertheless] young inmates were more likely to participate in prison educational programs.”¹³¹ Research also shows that “structured programs yield positive results among emerging adults in particular, and that learning- and training-induced structural changes within the brain continue through the mid-twenties.”¹³² This data suggests that emerging-adult inmates may respond well to educational programs.¹³³

That is not to say all adult prisons lack options for emerging adults. For example, Washington State allows emerging adults sentenced to less than five years to serve time at a grant-funded vocational transition program.¹³⁴ Kern County in California will use a three-year grant from the Department of Health and Human Services to provide drug-abuse treatment for emerging adults in rural communities.¹³⁵ Thus the problem with treating emerging adults as full adults is that although some prisons offer up to five hours of educational programs per day, attendance is not always required.¹³⁶ In juvenile detention centers, however, education and rehabilitation programs are mandatory.¹³⁷

Not all jurisdictions receive grants and a potential downside of providing juvenile-like programs and services to emerging adults is the cost. On their face, juvenile programs can cost up to three times as much

128. *Id.*

129. *Id.*

130. Caulum, *supra* note 27, at 733.

131. *Id.* at 753–54 (citing CAROLINE WOLF HARLOW, U.S. DEP’T OF JUST., NCJ 195670, EDUCATION AND CORRECTIONAL POPULATIONS 7 (2003), <https://www.bjs.gov/content/pub/pdf/ecp.pdf>).

132. Caulum, *supra* note 27, at 755 (internal citations removed).

133. *Id.* at 754.

134. *Id.* (referencing *Clallam Bay Corrections Center*, WASH. ST. DEP’T OF CORRECTIONS, <http://www.doc.wa.gov/corrections/incarceration/prisons/cbcc.htm> (last visited Mar. 27, 2018)).

135. Caulum, *supra* note 27, at 754 (referencing Press Release, *HHS Awards \$16.2 Million for Methamphetamine Abuse Treatment*, DEP’T OF HEALTH & HUMAN SERVS. (Aug. 18, 2005), <https://wayback.archive-it.org/3926/20131029135025/http://archive.hhs.gov/news/press/2005pres/20050818.html> (last visited Jan. 13, 2017)).

136. *See* Caulum, *supra* note 27, at 755 (internal citations removed).

137. *Id.* at 732 (internal citation removed).

as adult programs.¹³⁸ However, they are cost effective in the long term.¹³⁹ One study found that “for every dollar spent on intensive treatment for seriously delinquent youth, [the state] saved \$7.18 in lowered recidivism and associated victim costs.”¹⁴⁰ In other words, juvenile programs cost more because they focus on rehabilitating the offender.¹⁴¹ Since emerging adults are still developing, they too would benefit from a correctional program focused on rehabilitation.

2. Existing and Planned Programs Assisting Emerging Adults

Even with a bright line age of majority set at eighteen, *Roper v. Simmons* acknowledged that “[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.”¹⁴² And the same is true for emerging adults. The new neurological research does not mean all emerging adults should be held less responsible for their actions.¹⁴³ Just as under the current juvenile scheme wherein a defendant, age ten, can be tried as an adult for certain crimes,¹⁴⁴ a defendant, age twenty-three, can be called to answer as an adult given proportionate circumstances. Some jurisdictions are already on their way. As of 2006, two states extended juvenile authority to persons age nineteen;¹⁴⁵ thirty-four states and the District of Columbia extended it to age twenty;¹⁴⁶ one state to age twenty-one;¹⁴⁷ one state to age twenty-two;¹⁴⁸ and four states, including California, to age twenty-four.¹⁴⁹ In Ohio, the Ohio Criminal Sentencing Commission¹⁵⁰ recommended that to “maximize

138. *Id.* at 757 (internal citation removed).

139. *Id.*

140. *Id.*

141. *Id.*

142. *Roper v. Simmons*, 543 U.S. 551, 573 (2005).

143. Caulum, *supra* note 27, at 732.

144. In twenty-seven states, a ten-year-old defendant charged with murder can be tried as an adult. Scott, *The Legal Construction of Adolescent*, *supra* note 22, at 548 n.1 (citing OFF. OF JUV. JUST. & DELINQ. PREVENTION, JUV.’L REP. 86–87 (1995)).

145. Caulum, *supra* note 27, at 749 n.157 (citing HOWARD K. SNYDER & MELISSA SICKMUND, NAT’L CTR. FOR JUV. JUST., JUV. OFFENDERS AND VICTIMS: 2006 NAT’L REP. 103 (2006), <http://ojjdp.ncjrs.org/ojstatbb/nr2006/downloads/NR2006.pdf>) (Mississippi and North Dakota).

146. *Id.* at 74.

147. *Id.* (Florida).

148. *Id.* (Kansas).

149. *Id.* (California, Montana, Oregon, and Wisconsin).

150. *Id.* (citing THOMAS J. MOYER, OHIO CRIM. SENTENCING COMM’N, A PLAN FOR JUVENILE SENTENCING IN OHIO 36 (David J. Diroll ed., 1999), <https://www.supremecourt.ohio.gov/Boards/Sentencing/resources/>

rehabilitation opportunities, while protecting the public, the Commission proposes extending the juvenile court's jurisdiction for some offenses until the offender reaches age 25.”¹⁵¹

Twelve states have “youthful offender acts,” which allow a judge to suspend an emerging adult’s sentence in exchange for community supervision or a rehabilitation program, eventually having the sentence reduced, dismissed, or expunged.¹⁵² And counties in eleven states have young adult courts that operate similar to drug or mental health courts.¹⁵³

Looking to Europe, Switzerland permits young adults to be treated like juveniles until age twenty-five.¹⁵⁴ Sweden considers youth a distinct factor in deciding punishment for young adults under the age of twenty-one.¹⁵⁵ Germany gives jurisdiction of eighteen- to twenty-one-year-olds to the juvenile courts, which can elect to sentence according to juvenile law or adult law.¹⁵⁶

sentencingRecs/juvenile_sentencing.pdf).

151. Caulum, *supra* note 27, at 749 (quoting MOYER, *supra* note 150).

152. Alex A. Stamm, *Young Adults Are Different, Too: Why and How We Can Create A Better Justice System for Young People Age 18 to 25*, 95 TEX. L. REV. 72, 80 (2017).

153. *Id.* at 88.

154. TRANSITION TO ADULTHOOD, YOUNG ADULTS AND CRIM. JUST.: INT’L NORMS AND PRAC. 3 (2010), <https://www.t2a.org.uk/wp-content/uploads/2016/02/T2A-International-Norms-and-Practices.pdf>.

155. *Id.*

156. *Id.* For example:

Section 105 (1) No. 1 of the [German] Juvenile Law provides for the application of juvenile law if ‘a global examination of the offender’s personality and of his social environment indicates that at the time of committing the crime the young adult in his moral and psychological development was like a juvenile.’ Juvenile law has to be applied if it appears that the motives behind and the circumstances surrounding the offence are those of a typical juvenile crime.

The [German] Supreme Federal Court has developed the law further by ruling that a young adult has the maturity of a juvenile if his or her personality is still developing, a logic which has been used to argue that juvenile justice options should be available for young adults up to the age of 24. Whilst about two thirds of young adults are sentenced as juveniles there is considerable variation between states . . .

On the whole it is more serious cases that are dealt within the juvenile jurisdiction and minor, particularly traffic offences that are dealt with, in the adult system.

Id. (internal citations removed). *But see* Frieder Dünkel, *Juvenile Justice in Germany: Between Welfare and Justice*, in INT’L HANDBOOK OF JUV. JUST. 225–62 (Josine Junger-Tas & Scott H. Decker eds., 2006).

CONCLUSION

“I’m 23 and I still think of the future as ‘when I grow up’
#twentysomethingprobs”¹⁵⁷

Based on the Supreme Court’s logic from juvenile and mentally retarded death penalty cases, there is a strong argument against executing emerging adults:

Premise 1—Science suggests that the prefrontal cortex, which is responsible for the higher-order cognitive and executive functions that control behavior, is not fully developed until age twenty-four. Behavioral and observational studies support the same.

Premise 2—Therefore, emerging adults are less mature than full adults.

Premise 3—Therefore, emerging adults are less culpable than full adults.

Premise 4—Therefore, the retributive and deterrent purposes of the death penalty are lost.

Conclusion—Thus, the death penalty is unjustifiable as to emerging adults.

As such, at least for the most severe punishment, emerging adults should be treated as a distinct class separate from mature and culpable adults. Similarly, the incarceration of emerging adults should focus on rehabilitation rather than retribution, comparable to the juvenile system. Given this, it is imperative to acknowledge, in light of the current neurological research, that emerging adults are a discrete developmental group and can be better served once recognized and treated as such.

157. RJ Mecaydor (@pejoy26), TWITTER (Jun. 20, 2017, 10:33 AM), <https://twitter.com/pejoy26/status/877217875840335872>.