

PEOPLE OF THE STATE OF MICHIGAN,  
PLAINTIFF,

VS

MICH SCI-NO #160034

ROBIN RICK MANNING  
DEFENDANT.

KUSHAWN MILES-EL #237011  
PRO SE LITIGANT FOR AMICUS CURIAE  
ALGER CORRECTIONAL FACILITY  
N 6141 INDUSTRIAL PARK DRIVE  
MUNISING, MI 49862

BRIEF OF AMICUS CURIAE KUSHAWN MILES-EL IN SUPPORT OF DEFENDANT

INTERESTS: INTEREST OF AMICUS CURIAE / DEFENDANT / INTERESTS OF KUSHAWN MILES-EL

THE PRO SE LITIGANT, KUSHAWN MILES-EL #237011 SUBMITS THIS BRIEF AS AMICUS CURIAE PURSUANT TO MCR 7.312(H)(1),(2), TO PROVIDE THE COURT HIS PERSPECTIVE OF THIS CASE. KUSHAWN MILES-EL IS A STATE PRISONER WHO WAS 18-YEARS, 3-MONTHS OLD WHEN HIS OFFENSE WAS COMMITTED AND UNDER MICHIGAN LAW WAS A WARD OF THE STATE SINCE 1991. IN MAY 1994 HE WAS SENTENCED TO LIFE ON FIRST-DEGREE MURDER AT AGE 18.

SUMMARY OF ARGUMENT:

AGE, RATHER THAN DEATH, HAS COME TO DEFINE THE SUPREME COURT'S EIGHTH AMENDMENT JURISPRUDENCE.<sup>1</sup> IN THREE DECISIONS OVER THE LAST 15-YEARS, THE US SUPREME COURT HAS SIGNIFICANTLY ALTERED THE CRIMINAL SENTENCING LANDSCAPE BY DOLLING OUT CONSTITUTIONAL, CATEGORICAL DISCOUNTS ON CAPITAL AND NONCAPITAL PUNISHMENT FOR THOSE WHO HAD NOT YET CELEBRATED THEIR 18TH BIRTHDAYS AT THE TIME OF THEIR CRIMES.<sup>2</sup>

THE COURT REJECTED CAPITAL PUNISHMENT FOR THOSE UNDER 18,<sup>3</sup> THEN LIFE WITHOUT PAROLE IN NONHOMICIDE CASES<sup>4</sup> AND MOST RECENTLY, THE COURT HELD THAT THE 8TH AMENDMENT PROHIBITS MANDATORY LIFE WITHOUT PAROLE SENTENCES.<sup>5</sup> EACH DECISION HAS TURNED ON ATTRIBUTES, OR FACTORS, INHERENT IN YOUTH THAT THE COURT HAS FOUND MAKE THOSE UNDER EIGHTEEN LESS CULPABLE FOR THEIR CRIMES UNDER THE 8TH AMENDMENT.<sup>6</sup> THEY INCLUDE OFFENDERS' (1) LACK OF MATURITY AND UNDERDEVELOPED SENSE OF RESPONSIBILITY, (2) VULNERABILITY TO NEGATIVE INFLUENCES AND LIMITED CONTROL OVER THEIR ENVIRONMENT, AND (3) LACK OF CHARACTERS THAT CAN BE REHABILITATED.<sup>7</sup>

THESE FACTORS HAVE NOT BEEN SURMISED SIMPLY FROM PRECEDENT OR COMMON SENSE. RATHER, THE COURT HAS RELIED ON SCIENTIFIC AND SOCIOLOGICAL STUDIES TO SUPPORT ITS FINDING THAT THESE THREE CHARACTERISTICS ARE INHERENT AMONG THOSE UNDER 18,<sup>8</sup> REDUCE THAT GROUP'S CULPABILITY, AND ACCORDINGLY REDUCE THE PUNISHMENTS THAT SOCIETY CAN JUSTLY IMPOSE.<sup>9</sup> BUT THE COURT'S RELIANCE ON SUCH EVIDENCE OVEREXTENDS ITS USEFULNESS. NEUROSCIENTIFIC AND PSYCHOLOGICAL DATA ON WHICH COURT HAS RELIED DOES NOT IDENTIFY A BRIGHT-LINE AGE AT WHICH THESE THREE FACTORS NO LONGER LESSEN CULPABILITY.<sup>10</sup> THEIR RESULTING IMPACT ON PENOLOGICAL JUSTIFICATIONS SUPPORTING LEGITIMATE PUNISHMENT, WHICH HAVE ALSO BEEN CENTRAL TO THE COURT'S HOLDINGS, SIMILARLY DOES NOT HINGE ON AN OFFENDER HAVING A PARTICULAR NUMBER OF CANDLES ON HIS BIRTHDAY CAKE.

THE SUPREME 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 MOST SUSCEPTIBLE TO INFLUENCE AND TO PSYCHOLOGICAL DAMAGE."<sup>11</sup> STILL, SINCE ROPER V SIMMONS, THE COURT HAS RESOLVED TO CATEGORICALLY AND INCREASINGLY MITIGATE PUNISHMENT BASED ON YOUTHFULNESS VIA THE 8TH AMENDMENT ONLY WHEN OFFENDERS ARE UNDER 18. WHILE THE COURT IN ROPER ACKNOWLEDGED AND DISCOUNTED THE LIMITATIONS OF ITS BRIGHT-LINE RULE,<sup>12</sup> THE MILLER V ALABAMA COURT DID NOT ADDRESS THE ISSUE.

AMICUS CURIAE KUSHAWN MILES-EL AIMS TO SEIZE ON THE MILLER COURT'S SILENCE AND DEMONSTRATE THE INEQUITY IN DRAWING A BRIGHT-LINE AT 19 FOR CONSIDERING YOUTHFULNESS IN MITIGATING PUNISHMENT UNDER THE COURT'S LOGIC. GIVEN BOTH THE SCIENTIFIC IMPOSSIBILITY OF IDENTIFYING A PRECISE AGE AT WHICH CHARACTERISTICS OF YOUTHFULNESS CEASE, AND THE

COURT'S REPEATED RECOGNITION THAT THESE VERY FACTORS IMPACT CULPABILITY AND PRECLUDE JUST PUNISHMENT,<sup>13</sup> THE CURRENT APPROACH CANNOT STAND. INSTEAD, THIS AMICUS CURIAE KUSHAWN MILES-EL ARGUES THAT IF THE WAY TO ADDRESS THE INCREASINGLY PUNITIVE ORIENTATION OF CRIMINAL JUSTICE REMAINS ONE OF PROTECTING YOUTHFUL DEFENDANTS THROUGH THE 8TH AMENDMENT, "THEN THE SAME CONSIDERATIONS OF YOUTHFULNESS THAT HAS BEEN DEEMED CONSTITUTIONALLY RELEVANT FOR THOSE UNDER 18 MUST ALSO BE AVAILABLE EQUALLY FOR YOUTHFUL<sup>14</sup> DEFENDANTS 'OVER 18' TO ASSERT WHEN THEY FACE EQUALLY HARSH AND IRREVOCABLE SENTENCES."

WHILE CONSIDERABLE LITERATURE DISCUSSES SENTENCING POLICY FOR YOUNG OFFENDERS, THIS AMICI FOCUSES ON THE US SUPREME COURT'S TAIO OF CATEGORICAL DECISIONS TO EXAMINE THE JUSTIFICATIONS FOR A BRIGHT-LINE RULE AND, ULTIMATELY, TO LEND SUPPORT DEFENDANTS' ABILITIES TO SEEK OUT THE MITIGATING FORCE OF YOUTHFULNESS UP TO AGE 25. BY CONTINUING TO CATEGORICALLY EXCLUDE THOSE 18 IN HOMAGE TO SOCIETY'S TRADITIONAL DEMARICATION POINT OF ADULTHOOD, THE COURT LOSES SIGHT OF THE EXCEPTIONALITY OF CRIMINAL PUNISHMENT COMPARED TO OTHER RIGHTS-ALLOCATING AREAS OF THE LAW, SUCH AS VOTING. FURTHERMORE, SETTING A BRIGHT LINE AT 18 UNJUSTLY DISREGARDS OFFENDERS OVER 18 WHO, IN MANY INSTANCES, WOULD LIKEWISE BE DEEMED LESS RESPONSIBLE UNDER THE SCHEDULED SCHEME OF JUSTIFICATIONS THE COURT HAS SET FORTH..

FOLLOWING THIS INTRODUCTION, PART I OF THIS AMICI'S ARGUMENT PROVIDES BACKGROUND REGARDING THE RELATIONSHIP BETWEEN YOUTHFULNESS AND CULPABILITY. FIRST, IT DESCRIBES THE BIOLOGICAL UNDERPINNINGS OF YOUTHFULNESS THAT HAVE BEEN DOCUMENTED THROUGH PSYCHOLOGICAL AND NEUROSCIENTIFIC STUDY. SECOND, IT SHOWS HOW THE US SUPREME COURT HAS GIVEN THIS EVIDENCE 8TH AMENDMENT SIGNIFICANCE..

PART II THEN RAISES THREE KEY ISSUES WITH THE COURT'S BRIGHT LINE AT 18. HIGHLIGHTING THE LACK OF SCIENTIFIC SUPPORT FOR A CATEGORICAL LINE, DESCRIBES THE COURT'S IMPROPER COMPARISON TO OTHER RIGHTS-ALLOCATING AREAS OF THE LAW, AND DEMONSTRATES HOW PENOLOGICAL JUSTIFICATIONS FOR PUNISHMENT CAN BE SIMILARLY UNDERMINED FOR YOUTHFUL DEFENDANTS "OVER 18."

FINALLY, PART III ARGUES THAT THE COURT SHOULD MAKE THE MITIGATING EFFECT OF YOUTHFULNESS AVAILABLE TO YOUTHFUL OFFENDERS BETWEEN THE AGES OF 18 TO 21 BY RECASTING ITS CATEGORICAL LINE AS A PRESUMPTION. UNDER SUCH A SCHEME, DEFENDANTS UP TO 18 YEARS OLD WOULD BE IRREBUTTABLY PRESUMED YOUTHFUL, WHILE DEFENDANTS 18 TO 21 COULD SEEK TO SHOW THAT THEY MEET THE COURT'S "YOUTHFUL" CRITERION AND LIKEWISE DESERVE PROTECTION FROM IRREVOCABLE SENTENCES.

## I. BACKGROUND:

### A. FINDING YOUTHFULNESS IN PSYCHOLOGY AND NEUROSCIENCE:

AS PUBLIC DEBATE SURROUNDING YOUTH PROSECUTIONS SWELLED, SOME RESEARCHERS LOOKED TOWARD YOUTH DEVELOPMENT WITH RENEWED INTEREST.<sup>15</sup> IN THE DECADES LAYING BARE THE PROMISE OF THE REHABILITATIVE JUVENILE JUSTICE MODEL, BOTH DEVELOPMENTAL PSYCHOLOGIST AND NEUROSCIENTISTS EXPLORING THE PRACTICE OF BRAIN IMAGING HONED IN ON CHANGES IN BRAIN COMPOSITION AND BEHAVIOR OCCURRING BETWEEN ADOLESCENCE AND ADULTHOOD.

PSYCHOLOGISTS IDENTIFIED A NUMBER OF IMPORTANT DISTINCTIVE QUALITIES ATTRIBUTABLE TO YOUTH. FOR EXAMPLE, PSYCHOLOGISTS FOUND EARLY ADOLESCENCE TO BE ACCOMPANIED BY INCREASED SUSCEPTIBILITY TO PEER PRESSURE.<sup>16</sup> ADOLESCENTS WERE ALSO FOUND TO ATTACH MORE WEIGHT TO SHORT-TERM CONSEQUENCES,<sup>17</sup> AND THEY DID NOT EXTEND PROJECTIONS FOR CONSEQUENCES AS FAR INTO THE FUTURE AS DID OLDER YOUTH.<sup>18</sup> PSYCHOLOGISTS ADDITIONALLY FOUND / DISCOVERED EVIDENCE SUGGESTING THAT ADOLESCENTS MAY BE DRIVEN MORE BY REWARDS AND LESS BY RISKS THAN "ADULTS" ARE.<sup>19</sup> MOREOVER, PSYCHOLOGISTS FOUND SUPPORT FOR AN ADOLESCENCE FIRST ARTICULATED BY ERIK ERIKSON,<sup>20</sup> WHICH SUGGESTED THAT MOVING INTO ADULTHOOD INVOLVED CHANGES IN THE WAY YOUNG PEOPLE FORMED THEIR IDENTITIES.<sup>21</sup>

IN THE FIELD OF NEROSCIENCE, RESEARCH BEGAN TO DEPICT ADOLESCENCE AS A PERIOD OF CONTINUED BRAIN GROWTH AND CHANGE. A PAIR OF NEUROIMAGING STUDIES IN 1999, FOR INSTANCE, SHOWED CONTINUED DEVELOPMENT THROUGH ADOLESCENCE OF THE BRAIN'S FRONTAL LOBE<sup>22</sup> - ESSENTIAL FOR SUCH FUNCTIONS AS ANTICIPATING CONSEQUENCES, PLANNING, AND CONTROLLING IMPULSES.<sup>23</sup> GRAY MATTER IN THE FRONTAL LOBE WAS SHOWN TO SPIKE JUST PRIOR TO ADOLESCENCE<sup>24</sup> AND THEN DECREASE BETWEEN ADOLESCENCE AND EARLY ADULTHOOD<sup>25</sup> IN A PROCESS KNOWN AS PRUNING. LIKE SCULPTING A TREE, PRUNING MIMORS "CUTTING BACK BRANCHES-TO-STIMULATE-HEALTH-AND-GROWTH."<sup>26</sup> THE GRAY MATTER REDUCTION IS ACCOMPANIED BY A WHITE MATTER INCREASE.<sup>27</sup> THROUGH THE CELLULAR MATURATION PROCESS KNOWN AS MYELINATION, WHITE MATTER DEVELOPMENT IS SAID TO IMPROVE COGNITIVE FUNCTIONING.<sup>28</sup>

BECAUSE THE SAMPLES FOR THESE STUDIES WERE LIMITED IN AGE, HOWEVER, THEY COULD NOT SUPPORT CONCLUSIONS ABOUT THE ENDPOINT OF BRAIN MATURATION.<sup>29</sup> WHEN A TEAM OF NEUROSCIENTISTS FINALLY MAPPED THE TRAJECTORY OF BRAIN MATURATION USING A SAMPLE OF INDIVIDUALS RANGING IN AGE FROM 7 TO 87, THEY OBSERVED GRAY MATTER DENSITY CHANGES CONTINUING BEYOND ADOLESCENCE INTO ADULTHOOD.<sup>30</sup>

PSYCHOLOGY PROFESSOR ~~AND~~ R.J. CASEY OF YALE UNIVERSITY ADOPTED THE THRUST OF THESE AND OTHER EMERGING NEUROSCIENTIFIC STUDIES SHOWING BRAIN MATURATION TO CONTINUE INTO EARLY ADULTHOOD AS PART OF HER INFLUENTIAL 2019 ARTICLE, "AGE-BASED JUSTICE SYSTEM APPROACH OVERLOOKS THAT ADOLESCENCE EXTENDS BEYOND AGE 18, SCIENTISTS SAY / INSIDE SCIENCE." COMBINED WITH PSYCHOLOGICAL RESEARCH, DISCOVERIES REGARDING BRAIN SYSTEMS IMPLICATED IN JUDGMENT AND IMPULSE CONTROL PROVIDED THE BASIS FOR PROFESSOR CASEY'S ARGUMENT THAT A PERSON'S BRAIN AND PSYCHOLOGICAL ABILITIES TYPICALLY DON'T "FULLY MATURE UNTIL AROUND AGE 20" WHEN SHE PRESENTED HER RESEARCH PROBING THE ADOLESCENT-ADULT TRANSITION AT THE "SOCIETY FOR NEUROSCIENCE CONFERENCE IN SAN DIEGO IN 2018-2019."

CONSIDERING THAT 18-TO 21-YEAR-OLDS ARE IN MANY WAYS STILL ADOLESCENTS WHO ARE BECOMING ADULTS, SHE AND OTHER SCIENTISTS ARGUE THAT THE LEGAL SYSTEM SHOULD ACCOUNT FOR THAT AND AVOID OVERLY HARSH PUNISHMENTS. BRAIN DEVELOPMENT "EXTENDS BEYOND WHAT WE TYPICALLY ASSOCIATE WITH ADOLESCENCE BASED ON LEGAL DEFINITIONS -- INTO THE YOUNG ADULT PERIOD," CASEY SAID. AT THE CONFERENCE, CASEY URGED SCIENTISTS, PARENTS AND POLICYMAKERS TO RECOGNIZE THAT BRAIN DEVELOPMENT EXTENDS BEYOND AGE 18 AND MAKE ACCOMMODATIONS ACCORDINGLY. PUBLISHED ON: 2/28/19, BY NETWORK ADMINISTRATION / MACARTHUR FOUNDATION RESEARCH NETWORK ON LAW AND NEUROSCIENCE / YANDERBILT UNIVERSITY.

## B. ATTAINING EIGHTH AMENDMENT SIGNIFICANCE:

### 1. ROPER V SIMMONS:

IN 2005, PSYCHOLOGICAL AND NEUROSCIENTIFIC EVIDENCE-BASED EXPLANATIONS FOR YOUNG PUNISHMENT FOUND THEIR WAY INTO SUPREME COURT JURISPRUDENCE. THE COURT FOR THE FIRST TIME ENDORSED SCIENTIFIC FINDINGS RELATING TO HUMAN DEVELOPMENT IN SUPPORT OF REDUCING YOUTH CULPABILITY IN ROPER V. SIMMONS, THE CASE OF A TEENAGER SENTENCED TO CAPITAL PUNISHMENT FOR MURDER.<sup>31</sup> CHRISTOPHER SIMMONS SOUGHT POSTCONVICTION RELIEF AFTER THE SUPREME COURT DECIDED ATKINS V VIRGINIA,<sup>32</sup> HOLDING EXECUTING A MENTALLY RETARDED PERSON TO BE UNCONSTITUTIONAL CRUEL AND UNUSUAL PUNISHMENT. DESPITE THE GRISLY DETAILS OF HIS CRIME,<sup>32</sup> SIMMONS ARGUED THAT THE SAME REASONING IN ATKINS PROHIBITED THE EXECUTION OF A JUVENILE WHO COMMITTED HIS CRIME WHEN HE WAS YOUNGER THAN 18.<sup>33</sup> THE SUPREME COURT RECONSIDERED PRECEDENT AND AGREED.<sup>35</sup> IN AN OPINION WRITTEN BY JUSTICE ANTHONY KENNEDY, THE COURT HELD THAT THE OBJECTIVE INDICIA OF CONSENSUS THEN PROVIDED SUFFICIENT EVIDENCE THAT SOCIETY VIEWS JUVENILES AS "CATEGORICALLY LESS CULPABLE THAN THE AVERAGE CRIMINAL."<sup>36</sup>

JUVENILES UP TO THE AGE OF 18, ACCORDING TO THE COURT, COMPRISE A CERTAIN CLASS OF OFFENDERS FOR WHICH THE DEATH PENALTY MAY NOT BE IMPOSED.<sup>37</sup> BECAUSE ROPER EXTENDED TO 16- AND 17-YEAR OLDS THE SAME PROTECTION THAT THOMPSON V OKLAHOMA PROVIDED FOR THOSE UNDER 16, THE GREATEST SIGNIFICANCE OF THE COURT'S OPINION MIGHT HAVE COME NOT FROM WHAT THE COURT SAID, BUT HOW IT SAID IT.

SPECIFICALLY, IN DESCRIBING THE CLASS OF OFFENDERS TO WHOM CAPITAL PUNISHMENT CAN NO LONGER BE IMPOSED, THE COURT RELIED ON THREE DIFFERENCES BETWEEN "JUVENILES UNDER 18" AND "ADULTS" - LACKING MATURITY, BEING VULNERABLE TO NEGATIVE INFLUENCES AND OUTSIDE PRESSURES, AND NOT HAVING AS WELL-FORMED CHARACTERS.<sup>38</sup> THESE FINDINGS, ACCORDING TO THE COURT, REFLECTED BOTH WHAT "ANY PARENT KNOWS" AND WHAT SCIENTIFIC AND SOCIOLOGICAL STUDIES TEND TO CONFIRM,<sup>39</sup> AS A RESULT OF THESE CHARACTERISTICS, YOUNG OFFENDERS WERE HELD TO BE LESS BLAME WORTHY THAN ADULTS TO COMMIT SIMILAR CRIMES, LESS LIKELY TO BE DETERRED BY THE PROSPECT OF DEATH SENTENCES, AND LESS LIKELY TO BE IRRETRIEVABLY DEPRAVED.<sup>40</sup>

WHILE THE ROPER COURT DIFFERENTIATED "JUVENILES UNDER 18" FROM "ADULTS," IT ACKNOWLEDGED THE LIMITATIONS OF SUCH A CATEGORIZATION. JUSTICE KENNEDY WROTE, "THE QUALITIES THAT DISTINGUISH JUVENILES FROM ADULTS DO NOT DISAPPEAR WHEN AN INDIVIDUAL TURNS 18."<sup>41</sup> STILL, THE COURT INSISTED UPON DRAWING A BRIGHT LINE FOR RULING OUT THE

DEATH PENALTY AS DISPROPORTIONATE PUNISHMENT, LOOKING BEYOND CRIMINAL PUNISHMENT TO SUGGEST A 'NATIONAL CONSENSUS FITTING WITHIN THE 8TH AMENDMENT RUBRIC. SINCE AS IS "WHERE SOCIETY DRAWS THE LINE FOR MANY PURPOSES BETWEEN CHILDHOOD AND ADULTHOOD," THE COURT CONCLUDED, SO TOO IT IS WHERE "THE LINE FOR DEATH ELIGIBILITY OUGHT TO REST." 42 THE COURT THUS REJECTED AN INDIVIDUALIZED STANDARD OF CULPABILITY BASED ON YOUTHFULNESS IN FAVOR OF A CATEGORICAL RULE TO PROTECT ALL OFFENDERS BELOW THE AGE OF 18.

## 2. GRAHAM v FLORIDA

THE COURT CEMENTED ITS BRIGHT LINE FOR MITIGATING UNDULY HARSH PUNISHMENT IN GRAHAM. THERE THE COURT CONSIDERED A CHALLENGE TO A MANDATORY LIFE SENTENCE FOR A 17-YEAR OLD WHO COMMITTED A PAIR OF NONHOMICIDE FELONIES. 43 IN ANOTHER OPINION WRITTEN BY JUSTICE KENNEDY, THE COURT FOUND THAT TERRANCE JAMAR GRAHAM'S LIFE-WITHOUT-PAROLE PUNISHMENT CONSTITUTED CRUEL AND UNUSUAL PUNISHMENT BASED ON THREE RELATED CONCERNS: (1) THE OFFENDER'S LIMITED CULPABILITY, (2) THE PARTICULAR SEVERITY OF LIFE IMPRISONMENT WITHOUT PAROLE, AND (3) THE FAILURE OF PENOLOGICAL THEORIES OF RETRIBUTION, DETERRENCE, INCAPACITATION, AND REHABILITATION TO JUSTIFY SUCH PUNISHMENT. 44

FOR THE FIRST CONSIDERATION, THE GRAHAM COURT RELIED ON ROPER'S HOLDING THAT JUVENILES ARE LESS CULPABLE AND THEREFORE LESS DESERVING OF THE MOST SEVERE PUNISHMENTS BECAUSE THEY LACK MATURITY ARE MORE VULNERABLE TO NEGATIVE OUTSIDE INFLUENCES AND OUTSIDE PRESSURES, AND THEIR CHARACTERS ARE NOT AS WELL-FORMED. 45 THE COURT ALSO NOTED THAT NO "RECENT DATA" PROVIDED A REASON FOR THE COURT TO RECONSIDER ROPER'S SOCIOLOGICAL AND SCIENTIFIC OBSERVATIONS. 46 INSTEAD, FURTHER DEVELOPMENTS IN PSYCHOLOGY AND BRAIN SCIENCE CONTINUED TO SHOW "FUNDAMENTAL DIFFERENCES BETWEEN JUVENILES AND ADULT MINDS" 47 INCLUDING THAT "PARTS OF THE BRAIN INVOLVED IN BEHAVIOR CONTROL CONTINUE TO MATURE THROUGH LATE ADOLESCENCE." 48

FOR THE SECOND CONSIDERATION REGARDING THE SEVERITY OF LIFE WITHOUT PAROLE, THE COURT ACKNOWLEDGED THE REALITY OF PASSING TIME. LIFE-WITHOUT-PAROLE SENTENCES ALREADY CONSTITUTES "THE SECOND MOST SEVERE PENALTY PERMITTED BY LAW." 49 FURTHERMORE, UNDER SENTENCES OF LIFE WITHOUT PAROLE, YOUNGER OFFENDERS GENERALLY SERVE MORE YEARS AND GREATER PERCENTAGES OF THEIR LIVES BEHIND BARS THAN ADULTS. 50 CONSEQUENTLY, THE COURT NOTED THAT IMPOSING SUCH PUNISHMENTS ON YOUNGER OFFENDERS WAS ESPECIALLY HARSH. 51

FINALLY, THE GRAHAM COURT CONSIDERED PENOLOGICAL JUSTIFICATIONS FOR JUVENILE SENTENCES OF LIFE WITHOUT PAROLE FOR NONHOMICIDE OFFENSES. WEAVING MANY OF ROPER'S DEVELOPMENTAL FINDINGS INTO ITS ANALYSIS, THE COURT FOUND THAT NONE OF THE GOALS OF PUNISHMENT PROVIDED ADEQUATE JUSTIFICATION FOR SENTENCING JUVENILE NONHOMICIDE OFFENDERS TO LIFE WITHOUT PAROLE. 52 THE COURT RULED OUT RETRIBUTION (BECAUSE OF OFFENDERS' REDUCED MORAL CULPABILITY), 53 DETERRENCE (BECAUSE OF THEIR IMPETUOUSNESS), 54 INCAPACITATION (BECAUSE OF OFFENDERS' CAPACITY FOR CHANGE), 55 AND REHABILITATION (BECAUSE LIFE WITHOUT PAROLE FORESWears ANY POTENTIAL REHABILITATION). 56 FINDING NO LEGITIMATE JUSTIFICATION FOR GRAHAM'S SENTENCE, THE COURT FOUND THAT IT WAS BY ITS NATURE DISPROPORTIONATE AND FAILED TO PASS 8TH AMENDMENT MUSTER. 57

## 3. MILLER v ALABAMA

THE COURT EXTENDED ~~ITS~~ ITS RELIANCE ON YOUTH DEVELOPMENTAL DIFFERENCES EVEN FURTHER IN MILLER, WHICH CONCERNED TWO CASES OF 14-YEAR-OLDS MANDATORILY SENTENCED TO LIFE IN PRISON WITHOUT PAROLE FOR THEIR INVOLVEMENT IN MURDERS. 58 THE COURT HELD THAT THE 8TH AMENDMENT FORBIDS MANDATORY SENTENCING SCHEMES THAT DO NOT ALLOW JUDGES OR JURIES TO CONSIDER THE MITIGATING CHARACTERISTICS OF YOUTH, AS PRECEDENT ESTABLISHED THAT "CHILDREN ARE CONSTITUTIONALLY DIFFERENT FROM ADULTS FOR PURPOSES OF SENTENCING." 59

HERE AGAIN, THE COURT RELIED UPON THE DISTINCT DEVELOPMENTAL QUALITIES OF YOUTH THAT RENDER YOUNG OFFENDERS LESS CULPABLE AND IMPAIR PENOLOGICAL JUSTIFICATIONS FOR THEIR PUNISHMENT. BUT THIS TIME, THE COURT DID NOT RELY ON NATIONAL CONSENSUS AGAINST THE PUNISHMENT OR FIND REASON TO LIMIT ITS HOLDING TO SPECIFIC TYPES OF CRIMES. 61 RATHER, THE COURT MELDED ROPER AND GRAHAM'S FOCUS ON PROHIBITING SEVERE PUNISHMENTS BASED CERTAIN OFFENDERS' REDUCED CULPABILITY WITH OTHER PRECEDENT THAT REQUIRES SENTENCING AUTHORITIES TO CONSIDER DEFENDANTS' CHARACTERISTICS IN DOING OUT THE MOST SEVERE PUNISHMENTS. 62 IN DOING SO, THE COURT NOTED THAT THE "DISTINCTIVE (AND TRANSITORY) MENTAL TRAITS AND ENVIRONMENTAL VULNERABILITIES" OF YOUTH WERE HARDLY CRIME-SPECIFIC. 63

IN ADDITION, IT NOTED THAT LIFE-WITHOUT-PAROLE SENTENCES SHOULD BE TREATED AS Akin TO CAPITAL PUNISHMENT WHEN THE OFFENDERS ARE YOUNG.<sup>61</sup> BECAUSE YOUTH MATTERS IN DETERMINING WHETHER AN IRREVOCABLE SENTENCE IS APPROPRIATE, THE COURT HELD THAT "A JUDGE OR JURY MUST HAVE THE OPPORTUNITY TO CONSIDER MITIGATING CIRCUMSTANCES BEFORE IMPOSING THE HARSHEST POSSIBLE PENALTY FOR JUVENILES."<sup>62</sup>

DESPITE ITS LOFTY PHRASING ABOUT PHRASING ABOUT THE IMPORTANCE OF YOUTH IN SENTENCING, MILLER FIRMLY CABINED ITS HOLDING TO THOSE UNDER THE AGE 18.<sup>66</sup> LOWER COURTS FOLLOWING MILLER UNSURPRISINGLY DO THE SAME. RATHER THAN EMBRACING MILLER'S APPEAL FOR INDIVIDUALIZED SENTENCING BEFORE THE HARSHEST POSSIBLE PENALTIES CAN BE ~~IMPOSED~~ IMPOSED, THEY CLING TO THE HARDLINE DICHOTOMY BETWEEN "JUVENILE" AND "ADULT" OFFENDERS. FOR EXAMPLE, A FLORIDA COURT OF APPEALS TERSELY REJECTED THE PETITION OF A DEFENDANT WHO WAS 19 WHEN HE COMMITTED HIS CRIME.<sup>67</sup> TO THE EXTENT THAT THE PETITIONER ASKED THE FLORIDA COURT TO EXPAND GRAHAM AND MILLER "TO OTHER 'YOUTHFUL OFFENDERS' UNDER THE AGE OF 21" THE COURT NOTED IT WAS "BOUND BY THE PRONOUNCEMENTS OF THE SUPREME COURT OF THE UNITED STATES."<sup>68</sup> SEVERAL OTHER COURTS FOLLOWING THE EARLIER DECISIONS IN ROPER AND GRAHAM SIMILARLY INVOKED THE SUPREME COURT'S BRIGHT LINE TO REJECT YOUNG ADULTS' 8TH AMENDMENT CLAIMS.<sup>69</sup> THE FOLLOWING PART ILLUSTRATES WHY THE REASONING UNDERPINNING ROPER, GRAHAM, AND MILLER REQUIRES COURTS TO ALLOW DEFENDANTS UP TO AGE 21 TO PRESENT EVIDENCE IN MITIGATION ABOUT THEIR YOUTH AT THE TIME OF THEIR CRIMES.

## II. DISCUSSION:

WHILE THE COURT FOR DECADES HAS CONSIDERED YOUTH TO BE LESS CULPABLE AND RECENTLY INVOKED SCIENCE TO SUPPORT A NEW ERA IN THAT TRADITION, IT REFUSES TO RECOGNIZE THAT YOUNG PEOPLE JUST OVER THE CHRONOLOGICAL AGE OF 18 MIGHT SIMILARLY BE LESS CULPABLE. YET, THE COURT RECOGNIZES THAT THAT AGE IS AN IMPERFECT PROXY DIMINISHED CULPABILITY. THE ROPER MAJORITY STATED THAT "THE QUALITIES THAT DISTINGUISHES JUVENILES FROM ADULTS DO NOT DISAPPEAR WHEN AN INDIVIDUAL TURNS 18."<sup>70</sup>

THIS PART PRESENTS THREE REASONS WHY CLINGING TO THE BRIGHT LINE AT 18 FOR MITIGATING PUNISHMENT IS "INADEQUATE." HOLDING THE MITIGATING FACTORS OF YOUTH TO BE RELEVANT ONLY UNTIL AGE 18 IS INCONSISTENT WITH, AND OVEREXTENDS, THE VERY SCIENTIFIC AND SOCIOLOGICAL DATA THE SUPREME COURT TOUTS. FURTHER, RELYING ON THE AGE 18 SIMPLY BECAUSE 18 "IS THE POINT WHERE SOCIETY DRAWS THE LINE FOR MANY PURPOSES BETWEEN CHILDHOOD AND ADULTHOOD,"<sup>71</sup> INAPPROPRIATELY EQUATES THE RIGHT NOT TO BE PUNISHED MORE SEVERELY THAN ONE DESERVES WITH AFFIRMATIVE RIGHTS TO ENGAGE IN CERTAIN ADULT CONDUCT.

FINALLY, DRAWING A BRIGHT LINE AT 18 AND DISREGARDING THE CHARACTERISTICS OF OLDER YOUTHFUL DEFENDANTS FAILS TO SERVE ANY OF THE PENOLOGICAL JUSTIFICATIONS THAT THE SUPREME COURT HAS RULED IMPERATIVE FOR HARSH AND IRREVOCABLE SENTENCES.

### A. OVEREXTENDING THE DATA:

THE COURT HAS EAGERLY ESPOUSED SCIENTIFIC AND SOCIOLOGICAL DATA TO BOLSTER ITS CONCLUSIONS REGARDING WHAT MAKES "JUVENILES" DEVELOPMENTALLY AND CONSTITUTIONALLY DIFFERENT FROM "ADULTS," BUT THE COURT HAS BEEN LESS THAN EAGER TO ADDRESS THE RESEARCH'S INABILITY TO IDENTIFY A PRECISE POINT WHEN DEVELOPMENTAL MATURITY CAN BE CONVINCINGLY PRESUMED FOR THE ENTIRE CLASS OF YOUTH EVEN IN THE VERY DATA IT CITES. AS ONE TEAM OF RESEARCHERS HAS LAMENTED: "UNFORTUNATELY, JUDGES, POLITICIANS, ADVOCATES, AND JOURNALISTS ARE BIASED TOWARD DRAWING A SINGLE LINE BETWEEN ADOLESCENCE AND ADULTHOOD FOR DIFFERENT PURPOSES UNDER THE LAW THAT IS AT ODDS WITH DEVELOPMENTAL COGNITIVE NEUROSCIENCE."<sup>72</sup>

EXAMPLES FROM MILLER AND ROPER DEMONSTRATE THIS POINT. MILLER AND ROPER BOTH POINT TO PROFESSORS LAURENCE STEINBERG AND ELIZABETH SCOTT'S "LESS GUILTY BY REASON OF ADOLESCENCE" AS AUTHORITY FOR THE DEVELOPMENTAL DIFFERENCES BETWEEN THOSE UNDER AND THOSE OVER 18.<sup>73</sup> YET, PROFESSORS STEINBERG AND SCOTT EXPLICITLY NOTE THAT RESEARCH FINDINGS ARE "UNLIKELY TO EVER BE SUFFICIENTLY PRECISE TO DRAW A CHRONOLOGICAL AGE BOUNDARY" FOR ACQUIRING ADULT DECISIONMAKING CAPACITIES.<sup>74</sup> FURTHER, SOME OF THE STUDIES ON WHICH THEY RELY ACTUALLY SHOW DEVELOPMENT CONTINUING BEYOND AGE 18.<sup>75</sup>

MILLER ALSO RELIES ON TWO BRIEFS TO SUGGEST THAT THE SCIENCE SUPPORTING ROPER'S AND GRAHAM'S CONCLUSIONS HAS "BECOME EVEN STRONGER,"<sup>76</sup> WHILE IT IS TRUE THAT THOSE BRIEFS POINT TO ADDITIONAL RESEARCH, THAT RESEARCH HARDLY SUPPORTS THE COURT'S BRIGHT LINE. QUITE THE OPPOSITE: THE BRIEF FROM A GROUP OF PSYCHOLOGY PROFESSORS NOTES HOW A YOUTH'S BRAIN "IS NOT FULLY MATURE UNTIL AN INDIVIDUAL REACHES HIS OR HER'S TWENTIES."<sup>77</sup> COMPELLINGLY, IT POINTS TO RESEARCH FROM NATIONAL INSTITUTE OF MENTAL NEUROSCIENTISTS JAY GIEDD, WHO CONCLUDED THAT THE PARTS OF THE BRAIN LINKED TO DECISIONMAKING AND IMPULSE INHIBITION DO NOT FULLY DEVELOP UNTIL THAT TIME.<sup>78</sup> THE AMERICAN PSYCHOLOGICAL ASSOCIATION'S BRIEF SIMILARLY NOTES HOW JUVENILES' DEVELOPMENT CONTINUES THROUGHOUT LATE ADOLESCENCE AND INTO YOUNG ADULTHOOD.<sup>79</sup> IN DESCRIBING SUCH FINDINGS, THE AMERICAN PSYCHOLOGICAL ASSOCIATION SWATS THE BINARY "JUVENILE" AND "ADULT" LABELS IT ORIGINALLY SET OUT TO APPLY.<sup>80</sup>

RECENT PSYCHOLOGICAL AND SOCIOLOGICAL RESEARCH FURTHER CALLS THE COURT'S STRICT CLASSIFICATIONS OF "JUVENILES" AND "ADULTS" INTO QUESTION. SIMILAR TO HOW PSYCHOLOGIST G. STANLEY HALL IDENTIFIED A NEW LIFE STAGE OF "ADOLESCENCE" AT THE TURN OF THE 19TH CENTURY,<sup>81</sup> RESEARCHERS TODAY ARE REDEFINING YOUNG ADULTHOOD.<sup>82</sup> ALLUDING TO MILESTONES THAT TRADITIONALLY DEFINED THE TRANSITION TO ADULTHOOD,<sup>83</sup> SOCIOLOGISTS ARE CHARTING THE COURSE OF A "CHANGING TIMETABLE" FOR DEVELOPMENT.<sup>84</sup> LEADING THAT CHARGE IS JEFFREY ARNETT, THE SAME PSYCHOLOGIST AND RESEARCH PROFESSOR CITED IN ROPER WHO HAS SINCE MARSHALLED SUPPORT FOR A NEW STAGE OF LIFE LASTING FROM THE LATE TEENS THROUGH THE MID-TO-LATE 20'S - "EMERGING ADULTHOOD."<sup>85</sup> AMONG THE TRENDS ON WHICH PROFESSOR ARNETT AND OTHERS RELY, YOUNG PEOPLE ARE PUTTING OFF MARRIAGE.<sup>86</sup> IN FACT, THE TIMING OF MARRIAGE HAS UNPRECEDENTEDLY SHIFTED INTO OLDER AGES IN RECENT YEARS.<sup>87</sup> YOUNG PEOPLE ARE ALSO LIVING WITH THEIR PARENTS LONGER AND WITH GREATER FREQUENCY.<sup>88</sup> WHEN THEY DO NOT LIVE WITH THEIR PARENTS, THEY ARE STILL UNLIKELY TO HAVE FAMILIES OF THEIR OWN.<sup>89</sup> AS A RESULT, BY CHOICE OR CIRCUMSTANCES,<sup>90</sup> YOUNG PEOPLE ARE FORESTALLING THE BEGINNING OF TRADITIONALLY "ADULT" LIFE. TO IMPOSE ROPER, GRAHAM, AND MILLER LANGUAGE, THEY APPEAR TO LACK THE DEGREE OF MATURITY THAT PREVIOUS GENERATIONS OF ADULTS COMMANDED, THEY STILL SEEM VULNERABLE TO OUTSIDE PRESSURES, AND THEIR CHARACTERS REMAIN NOT VERY "WELL-INFORMED."<sup>91</sup>

SOME OF THE STIMULI BEHIND THE DELAY IN ADULTHOOD ARE UNSURPRISING: AMERICANS' VIEWS TOWARD YOUNG PEOPLE'S SEXUAL RELATIONSHIPS<sup>92</sup> HAVE CHANGED.<sup>93</sup> MORE PEOPLE ARE PURSUING HIGHER EDUCATION.<sup>94</sup> AND A SLUGGISH JOB MARKET AND BURDENSOME STUDENT LOAN DEBT HAVE OTHERWISE STALLED BUYING HOMES AND STARTING FAMILIES.<sup>95</sup> THE LEGAL IMPLICATIONS OF SUCH A DELAY, HOWEVER, ARE THAN LESS THAN CLEAR. FOR THIS REASON, THE COURT'S CONTINUED RELIANCE ON A CATEGORICAL LINE AT AGE EIGHTEEN TO DIVIDE THE SUPPOSEDLY SCIENTIFICALLY AND SOCIOLOGICALLY MATURE FROM THE IMMATURE FOR MITIGATING PUNISHMENT IS TROUBLING. THE RESEARCH ON WHICH THE COURT RELIES DOES NOT SUPPORT SUCH A LINE, AND ADDITIONAL RESEARCH SUGGESTS THAT THE RELEVANT YOUTHFUL QUALITIES CONTINUE TO MATERIALIZE IN INDIVIDUALS INTO THEIR 20'S.

EVEN THOUGH THE COURT INVOKED SCIENCE AND SOCIOLOGICAL DATA TO SUPPORT ITS ROPER, GRAHAM, AND MILLER HOLDINGS, IT MAKES SENSE, THEN, THAT THE COURT TURNED TO A MORE CONVENTIONAL ANALYSIS IN ITS RARE ATTEMPT TO JUSTIFY THE LINE.<sup>96</sup> IN THIS WAY THE COURT SUGGESTS THAT ITS DEVELOPMENTAL ANALYSIS FOR PUNISHMENT APPLIES ONLY WITHIN THE BOUNDS OF PREVIOUSLY EXISTING LEGAL CONCEPTIONS OF CHILDHOOD AND ADULTHOOD.<sup>97</sup> THE FOLLOWING PART DEMONSTRATES THE ASYMMETRY IN SUCH AN APPROACH.

#### B. CRIMINAL PUNISHMENT NOT COMPARABLE TO AFFIRMATIVE RIGHTS TO ENGAGE IN "ADULT" CONDUCT:

A CATEGORICAL RULE MITIGATING PUNISHMENT BASED ON YOUTHFULNESS ONLY FOR THOSE UNDER 18 IS ADDITIONALLY INADEQUATE BECAUSE IT FAILS TO RECOGNIZE THE EXCEPTIONALITY OF CRIMINAL PUNISHMENT COMPARED TO OTHER CONTEXT OF THE LAW WHERE BRIGHT-LINE CLASSIFICATIONS PERVADE. STATES UNDOUBTEDLY DRAW BRIGHT LINES RULES TO REGULATE THE AGE AT WHICH YOUNG PEOPLE CAN VOTE,<sup>98</sup> SERVE ON JURIES,<sup>99</sup> MARRY,<sup>100</sup> DRIVE,<sup>101</sup> GAMBLE,<sup>102</sup> AND DRINK.<sup>103</sup> YOUNG PEOPLE SIMILARLY HAVE AGE-BASED RIGHTS TO ENTER INTO CONTRACTS,<sup>104</sup> AND CHOOSE HOW DOCTORS MAY TREAT THEM.<sup>105</sup> THESE CATEGORICAL RULES GRANTING INDIVIDUALS AFFIRMATIVE RIGHTS OVER THEIR CONDUCT AMOUNT TO "CRUDE DETERMINATIONS" THAT YOUNG PEOPLE OF CERTAIN AGES ARE MATURE ENOUGH TO ACT IN SOCIETY, IN SOME RESPECTS, AS ADULTS.<sup>106</sup> YOUNG PEOPLE CAN TEST OUT CERTAIN ADULT PRIVILEGES, IN SPITE OF THE SPECIAL RISKS OF THE LEARNING PERIODS INVOLVED.<sup>107</sup>

THE COURT SINCE ROPER, HOWEVER, HAS CONFLATED THIS AREA OF GRANTING AFFIRMATIVE RIGHTS TO YOUNG PEOPLE TO TRYOUT ADULT ACTIVITY WITH CRIMINAL PUNISHMENT. UNLIKE OTHER LAWS THAT REGULATE BEHAVIOR, CRIMINAL BEHAVIOR/ PUNISHMENT INVOLVES FINDING PEOPLE MORALLY BLAMEWORTHY. ANDREW VON HIRSCH HAS EXPLAINED THAT PUNISHMENT IS DIFFERENT FROM OTHER GOVERNMENT-GENERATED BENEFITS BECAUSE ITS DEFINING CHARACTERISTICS INCLUDES STATE CENSURE.<sup>108</sup> WHEN STATES FIND PEOPLE BLAMEWORTHY, "THE REQUIREMENT OF EQUAL TREATMENT BECOMES MUCH STRONGBER" BECAUSE UNEQUAL TREATMENT IMPLIES THAT THEY ARE UNEQUALLY BLAMEWORTHY.<sup>109</sup> DRAWING A BRIGHT LINE BETWEEN THOSE WHO ARE UNDER AND OVER 18 FOR MITIGATING PUNISHMENT THUS IMPLIES THEY ARE UNEQUALLY BLAMEWORTHY, EVEN THOUGH THEY MIGHT POSSESS THE SAME DEVELOPMENTAL TRAITS THAT RENDER THEM LESS CULPABLE. THE ROPER, GRAHAM, AND MILLER DECISIONS APPLIED TO THOSE OVER 18, THEREFORE OVERLOOK THE IMPORTANT AND UNIQUE GOALS FOR IMPOSING CRIMINAL PUNISHMENT OF TREATING EQUALLY CULPABLE OFFENDERS EQUALLY AND MAKING INDIVIDUALIZED INQUIRIES OF CULPABILITY FOR SOCIETY'S HARSHTEST PUNISHMENTS.<sup>110</sup>

IN THE CAPITAL PUNISHMENT CONTEXT, THE NEED FOR AN INDIVIDUALIZED INQUIRY TO MEASURE A PERSON'S BLAMEWORTHINESS IS HARDLY A NEW CONCEPT. LOCKETT V. OHIO RECOGNIZED THAT INDIVIDUALIZED DECISIONS ARE ESSENTIAL IN CAPITAL CASES, FEARING THAT THE DEATH PENALTY MIGHT BE IMPOSED "IN SPITE OF FACTORS WHICH MAY CALL FOR A LESS SEVERE PENALTY."<sup>111</sup> EDDINGS V. OKLAHOMA THEN HIGHLIGHTED THE OBLIGATION OF SENTENCING JUDGES AND JURIES TO CONSIDER YOUTHFUL DEFENDANTS' MENTAL AND EMOTIONAL DEVELOPMENT AS PART OF THEIR CALCULI.<sup>112</sup> AS THE EDDINGS COURT STATED, "YOUTH IS MORE THAN A CHRONOLOGICAL FACT. IT IS A TIME AND CONDITION OF LIFE WHEN A PERSON MAY BE MOST SUSCEPTABLE TO INFLUENCE AND TO PSYCHOLOGICAL DAMAGE."<sup>113</sup> AFTER ROPER, HOWEVER, THESE DECISIONS HAVE HAD

SENTENCE WHEN HE DECIDES TO OFFEND; HIS SENTENCE LOSES DETERRENT VALUE, WHILE SUCH SENTENCES MAY STILL HAVE SOME GENERAL DETERRENT VALUE FOR OTHER PROSPECTIVE OFFENDERS, IT REMAINS THEY MUST NOT BE GROSSLY DISPROPORTIONATE TO THE OFFENDER AGAINST WHOM THEY ARE IMPOSED. THUS, DEPENDING ON THEIR AGE TO THE OFFENDER AGAINST WHOM THEY ARE IMPOSED. THUS, DEPENDING ON THEIR CRIMES, SOME YOUNG PEOPLE AGED 18 TO 21 MIGHT HAVE SUCH DIMINISHED MORAL RESPONSIBILITY THAT ANY LIMITED DETERRENT EFFECT ON PROSPECTIVE OFFENDERS THAT WOULD BE GAINED FROM THE YOUNG PEOPLE'S IRREVOCABLE SENTENCES WOULD NOT JUSTIFY IMPOSING THOSE SENTENCES.

### 3. INCAPACITATION:

THE COURT IN GRAHAM ALSO ADDED AND REJECTED THE JUSTIFICATION OF INCAPACITATION. INCAPACITATION IS SAID TO PROTECT THE PUBLIC AND MAKE OFFENDERS INCAPABLE OF REOFFENDING.<sup>129</sup> THE GRAHAM COURT RECOGNIZED THAT INCAPACITATION CAN SATISFY CONCERNS REGARDING PUBLIC SAFETY, BUT IT DETERMINED THAT RELATING SUCH A JUSTIFICATION TO YOUNG OFFENDERS REQUIRED THE ASSUMPTION THAT THEY COULD BE ONGOING DANGERS.<sup>130</sup> BECAUSE THE NON-FIXED NATURE OF YOUNG PEOPLE'S CHARACTERS MAKES SUCH AN ASSUMPTION QUESTIONABLE, THE COURT RULED OUT THAT POSSIBILITY.<sup>131</sup> RELYING ON ROPER, IT NOTED THAT ~~THE~~ EVEN "EXPERT PSYCHOLOGISTS" HAVING TROUBLE DIFFERENTIATING BETWEEN YOUNG OFFENDERS WHO SUCCEED TO "UNFORTUNATE YET TRANSIENT IMMATURETY" AND THOSE "WHOSE CRIME REFLECTS IRREPARABLE CORRUPTION."<sup>132</sup>

THE SAME REASONING CAN MAKE THE INCAPACITATION JUSTIFICATION INAPPLICABLE TO YOUNG ADULTS. JUST AS INCORRIGIBILITY IS INCONSISTENT WITH YOUTH UNDER 18,<sup>133</sup> SO TOO MIGHT IT BE INCONSISTENT WITH SOME YOUNGS OVER 18.<sup>134</sup> PERSONALITY DISORDERS CAN GENERALLY BE DIAGNOSED IN YOUNG PEOPLE OVER 18,<sup>134</sup> BUT "USING A CHRONOLOGICAL AGE TO DEMARCATATE THE STAGE-IN WHICH SUCH DIAGNOSES ARE APPROPRIATE- CAN PRESENT DIFFICULTIES AS YOUNG PEOPLE OF THE SAME CHRONOLOGICAL AGE MAY DIFFER GREATLY IN THEIR LEVELS OF DEVELOPMENTAL MATURITY."<sup>135</sup> RESEARCH LIKEWISE SHOWS THAT YOUNG PEOPLE'S IDENTITIES CONTINUE TO FORM SUBSTANTIALY BEYOND 18.<sup>136</sup>

### 4. REHABILITATION:

FINALLY, THE COURT HAS CONCLUDED THAT A FOURTH GOAL, REHABILITATION, COULD NOT JUSTIFY IRREVOCABLE PUNISHMENTS FOR YOUNG OFFENDERS. ALTHOUGH "THE CONCEPT OF REHABILITATION IS IMPRECISE" AND REMAINS THE SUBJECT OF SUBSTANTIAL DIALOGUE,<sup>137</sup> THE REHABILITATIVE APPROACH GENERALLY CONCERNS ITSELF WITH THE PERCEIVED NEEDS OF THE OFFENDER RATHER THAN WITH THE GRAVITY OF THE CRIME.<sup>138</sup> AS A RESULT, THE AIM IS TO TREAT THE OFFENDER AND PROVIDE THE EDUCATION OR SKILLS NECESSARY TO REDUCE HIS RISK OF REOFFENDING.<sup>139</sup> IN GRAHAM, THE COURT HELD THAT LIFE IMPRISONMENT WITHOUT PAROLE COULD NOT BE JUSTIFIED BY REHABILITATION BECAUSE "THE PENALTY FORSWEAR ALTOGETHER THE REHABILITATIVE IDEAL."<sup>140</sup> DENYING YOUNG OFFENDERS REENTRY TO THE COMMUNITY, ACCORDING TO THE COURT, REQUIRES MAKING PERMANENT JUDGMENTS ABOUT THEIR VALUE AND PLACE IN SOCIETY - INAPPROPRIATE IN LIGHT OF YOUNG OFFENDERS' "CAPACITY FOR CHANGE AND LIMITED MORAL CULPABILITY."<sup>141</sup>

THIS JUSTIFICATION CAN ALSO BE REJECTED ON A SIMILAR BASIS FOR YOUNG ADULTS. THOSE YOUNG PEOPLE WHO HAVE THE SAME CAPACITY FOR CHANGE AND THE SAME LIMITED MORAL CULPABILITY AS 17-YEAR-OLDS SHOULD NOT BE FORSWORN FROM POTENTIAL REHABILITATION SIMPLY BECAUSE THEY ARE OLDER THAN 18.

BECAUSE ROPER, GRAHAM AND MILLER RECOGNIZED THAT PENOLOGICAL GOALS CANNOT JUSTIFY IRREVOCABLE SENTENCES WHEN OFFENDERS POSSESS CERTAIN CHARACTERISTICS OF YOUTHFULNESS, IT FOLLOWS THAT THE PENOLOGICAL GOALS ALSO CANNOT BE MET WHEN OTHER YOUNG PEOPLE EXHIBIT THE SAME CHARACTERISTICS. SENTENCES ~~OF~~ PRESCRIBING DEATH, LIFE IN PRISON WITHOUT PAROLE FOR NONHOMICIDE OFFENSES, OR MANDATORY ~~OF~~ LIFE IN PRISON WITHOUT PAROLE ~~OF~~ ALSO WOULD BE DISPROPORTIONATE FOR YOUTHFUL OFFENDERS WHO ARE MERELY OF A "SLIGHTLY HIGHER AGE." PUNISHMENT FOR BOTH GROUPS OF OFFENDERS SHOULD BE PROHIBITED BY THE 8TH AMENDMENT.

### III. ~~THE~~ PROPOSED SOLUTION:

TO THIS POINT, THIS AMICI HAS FOCUSED ON ILLUSTRATING THE INADEQUACY OF DRAWING A BRIGHT LINE AT 18 FOR MITIGATING SOCIETY'S HARSHEST PUNISHMENTS. THIS PART OFFERS A POTENTIAL REMEDY: EXTENDING SENTENCING MITIGATION TO THOSE YOUNG ADULTS UNDER 20 WHO WOULD OTHERWISE SIMILARLY BE DEEMED LESS RESPONSIBLE UNDER THE SCHEME OF JUSTIFICATIONS THE COURT HAS SET FORTH, ABSENT THE COURT'S FIRM GRIP ON CHRONOLOGICAL AGE.

#### A. PRESUMPTION OF YOUTHFULNESS:

A PRESUMPTION SCHEME WOULD BETTER SERVE CRIMINAL SENTENCING PURPOSES, APPRECIATING AGE YET REFUSING TO BE WHOLLY BOUND BY YEARS AND DAYS. ROPER, GRAHAM, MILLER'S BRIGHT LINE SHOULD BE TRANSFORMED INTO A SCHEME IN WHICH DEFENDANTS UNDER THE AGE OF 18 ARE IRREBUTTABLY PRESUMED TO POSSESS THE YOUTHFUL CHARACTERISTICS THAT MANDATE REDUCED PUNISHMENT UNDER THE 8TH AMENDMENT, WHILE DEFENDANTS UP TO AGE 21 CAN SEEK, BUT ARE NOT GUARANTEED, THE SAME PROTECTION. GRADATING BASED ON AGE IN THIS WAY IMPORTS INTO THE MODERN ERA THE EARLY COMMON LAW FOCUS ON PUNISHING OFFENDERS BASED ON THE STRENGTH OF THEIR UNDERSTANDING AND JUDGMENT.<sup>142</sup>

WITH THE CONTOURS OF THIS REMEDY ESTABLISHED, A NUMBER OF QUESTIONS EMERGE. FOR EXAMPLE, WHY SHOULD THE PRESUMPTION BE LIMITED TO THOSE UNDER THE AGE OF 21? WOULD IMPOSING THE PRESUMPTION BE UNNECESSARILY BURDEN COURTS? ADDITIONALLY, WOULD ALLOWING THIS LEVEL OF JUDICIAL DISCRETION INVITE UNCERTAINTY AND UNWARRANTED INCONSISTENCY? THE FOLLOWING SECTIONS ADDRESS THESE ISSUES.

### 1. SIMPLY A DELAYED BRIGHT LINE?

THE FIRST AND MOST OBVIOUS CRITIQUE OF THIS REMEDY IS THE WAY IT ADVOCATES A SOLUTION IT SEEMINGLY OPPOSES: DRAWING A SOMEWHAT ARBITRARY, ALBEIT DELAYED, BRIGHT LINE. DRAWING A LINE AT 21, HOWEVER, IS MORE APPROPRIATE THAN 18 FOR SEVERAL REASONS. TO BE SURE, A LINE AT 21 COMES CLOSER TO THE SCIENCE THE COURT TOUTS. RECALL THAT NEUROSCIENTIFIC EVIDENCE PREVIOUSLY BEFORE THE COURT PROVED THAT A YOUTH'S BRAIN IS NOT FULLY MATURE UNTIL AN INDIVIDUAL'S TWENTIES.<sup>154</sup> MORE RECENT SOCIOLOGICAL AND PSYCHOLOGICAL EVIDENCE CONTINUES TO SUPPORT SUCH FINDINGS.<sup>155</sup> FOR EXAMPLE, AS A RESULT OF MOUNTING EVIDENCE, CHILD PSYCHOLOGISTS IN BRITAIN ISSUED NEW GUIDELINES IN SEPTEMBER 2013 "DIRECTING CLINICIANS TO RECONSIDER HOW THEY VIEW PATIENTS IN YOUNGER ADULTHOOD" AND TREAT THOSE UP TO AGE 25.<sup>156</sup> A LINE AT 21 WOULD ALSO BETTER HEED THE COURT'S CONCERNS REGARDING THE IMPACT OF YOUTHFULNESS ON RETRIBUTION, DETERRENCE, INCAPACITATION, AND REHABILITATION.<sup>157</sup> AS PREVIOUSLY DEMONSTRATED, COURTS RISK IMPOSING UNJUST, UNEQUAL PUNISHMENT WHEN MARGINALLY OLDER DEFENDANTS CAN BE CENSURED MORE HARSHLY THAN THEIR YOUNGER COUNTERPARTS, EVEN THOUGH BOTH GROUPS POSSESS THE SAME CULPABILITY REDUCING TRAITS.

DRAWING A LINE AT 21, AND NOT SOME LATER AGE, ADDITIONALLY RETAINS THE COURT'S FOCUS ON THE PARTICULAR DISPROPORTIONALITY OF LIFE IMPRISONMENT WITHOUT PAROLE FOR YOUNGER DEFENDANTS. AS THE GRAHAM COURT RECOGNIZED, "LIFE WITHOUT PAROLE IS AN ESPECIALLY HARSH PUNISHMENT FOR A JUVENILE, UNDER THIS SENTENCE A JUVENILE OFFENDER WILL ON AVERAGE SERVE MORE YEARS AND A GREATER PERCENTAGE OF HIS LIFE IN PRISON THAN AN ADULT."<sup>158</sup> THIS SENTIMENT RINGS TRUE FOR THOSE DEFENDANTS MARGINALLY OLDER THAN 18. IF A DEFENDANT IS OLDER THAN 25, HOWEVER, THE VALIDITY OF YOUTH-BASED REBUTTALS TO LIFE IMPRISONMENT DIMINISH. INDEED, IF DEFENDANTS ARE NOT FULLY DEVELOPED BY AGE 25, THEIR AVAILABLE RECOURSE SHOULD PERHAPS NOT BE A YOUTHFULNESS PRESUMPTION. IT COULD BE A DEVELOPMENTAL DISABILITY DEFENSE.<sup>159</sup>

### 2. SACRIFICING JUDICIAL EFFICIENCY?

A SECOND CRITIQUE OF THE PRESUMPTION IS THE BURDEN IT WOULD IMPOSE ON COURTS, REQUIRING THEM TO EVALUATE A NEW CLASS OF DEFENDANTS' YOUTHFULNESS, CASE-BY-CASE. EVALUATING A DEFENDANT'S YOUTHFULNESS, HOWEVER, IS ALREADY MANDATED FOR SOCIETY'S HARSHEST PENALTIES UNDER THE 8TH AMENDMENT. EDDINGS REQUIRED COURTS TO CONSIDER YOUTHFULNESS BEFORE THEY COULD IMPOSE CAPITAL PUNISHMENT.<sup>160</sup> MILLER REQUIRED COURTS TO SIMILARLY CONSIDER YOUTHFULNESS WHEN DEFENDANTS UNDER 18 FACE LIFE IMPRISONMENT WITHOUT PAROLE.<sup>161</sup> WHERE EDDINGS ADDITIONALLY STATED THAT "YOUTH IS MORE THAN A CHRONICAL FACT,"<sup>162</sup> THIS AMICI'S PRESUMPTION SCHEME WOULD ENSURE THAT YOUTH AMOUNTS TO MORE THAN A CHRONICAL FACT IN THOSE SITUATIONS WHERE LIFE IMPRISONMENT AMOUNTS TO CAPITAL PUNISHMENT.<sup>163</sup> IN THIS WAY, THE PRESUMPTION SCHEME CLOSES THE 8TH AMENDMENT LOOP FASHIONED FROM CONJUNCTIVE READINGS OF EDDINGS, ROPER, GRAHAM AND MILLER.

EVEN IF 8TH AMENDMENT CASE LAW DOES NOT REQUIRE THIS YOUTHFULNESS INQUIRY, THE INTEREST IN FAIR, PROPORTIONAL SENTENCES DEMANDS IT AND OFFSETS ANY ADDED JUDICIAL BURDEN. OUTSIDE THE SENTENCING CONTEXT, SUCH INDIVIDUALIZED DETERMINATIONS OFTEN WOULD BE IRRATIONAL. FOR EXAMPLE, REQUIRING COURTS TO DECIDE WHETHER EVERY 17-YEAR-OLD IS MATURE ENOUGH TO VOTE WOULD "GREATLY 164 OUTWEIGH WHATEVER INJUSTICE MIGHT BE PRODUCED BY THE USE OF A BRIGHT LINE MINIMUM VOTING AGE." WHEN UNJUSTIFIED PUNISHMENT IS THE CONTRAVAILING INJUSTICE, HOWEVER, THE INTEREST IN JUDICIAL EFFICIENCY HARDLY COMPARES.<sup>165</sup> INDEED, THE INJUSTICE THAT STEMS FROM SENTENCING EQUALLY YOUTHFUL DEFENDANTS TO SIGNIFICANTLY HARSHER PUNISHMENTS MUST REQUIRE INDIVIDUALIZED YOUTHFULNESS DETERMINATIONS IN SPITE OF EFFICIENCY INTERESTS.<sup>166</sup> THE SUPREME COURT HAS HELD THAT YOUTHFULNESS DIMINISHES CULPABILITY. IMPOSING FAIR, PROPORTIONAL PUNISHMENT REQUIRES THE SAME YOUTHFULNESS CONSIDERATION FOR DEFENDANTS WHO ARE MERELY "DAYS OR YEARS OLDER."

### 3. INVITING UNCERTAINTY AND UNWARRANTED SENTENCING INCONSISTENCY?

FINALLY, THIS REMEDY CRITICIZED FOR INVITING UNCERTAINTY AND UNWARRANTED SENTENCING INCONSISTENCIES FOR DEFENDANTS AGED 18 TO 21. THANKFULLY, HOWEVER, THE COURT HAS PROVIDED LOWER COURTS WITH A SUFFICIENT FRAMEWORK THAT CAN PERMIT INDIVIDUALIZED SENTENCING AND AVOID UNFAIR DISPARITIES.<sup>167</sup> IN ROPER, GRAHAM, AND MILLER, THE COURT OFFERED AND STRENGTHENED THREE FACTORS THAT MAKE YOUTH LESS CULPABLE UNDER THE 8TH AMENDMENT.<sup>168</sup> IN SO DOING, THE COURT PROVIDED A GUIDE FOR LOWER COURTS EVALUATING WHETHER DEFENDANTS BETWEEN THE AGES OF 18 AND 21 WARRANTS YOUTHFULNESS PRESUMPTIONS. THE YOUTHFULNESS CASES ENCOURAGE LOWER COURTS TO CONSIDER EVIDENCE OF AN OFFENDER'S (1) LACK OF MATURITY AND UNDERDEVELOPED SENSE OF

OF RESPONSIBILITY, (2) VULNERABILITY TO NEGATIVE INFLUENCES AND LIMITED CONTROL OVER THEIR ENVIRONMENT, AND (3) LACK OF CHARACTERS THAT CAN BE REHABILITATED.

SENTENCING JUDGES OR IN BOTH STATE AND FEDERAL COURTS COULD RELY ON THESE FACTORS SIMILARLY TO HOW FEDERAL DISTRICT COURTS USE FEDERAL SENTENCING GUIDELINES. THE ADVISORY GUIDELINES CREATE A BASELINE FOR SENTENCING WITHOUT SACRIFICING JUDICIAL FACT-FINDING.<sup>159</sup> THE YOUTHFULNESS FACTORS COULD LIKEWISE PROVIDE A CONSISTENT BASELINE FOR ADDRESSING 18-YEAR-OLDS' YOUTHFULNESS CLAIMS. WHEN COURTS ADDRESS OFFENDER CHARACTERISTICS "IN A REASONABLY CONSISTENT MANNER," ACCORDING TO THE GUIDELINES, THEY "HELP SECURE NATIONWIDE CONSISTENCY, AVOID UNWARRANTED SENTENCING DISPARITIES, PROVIDE CERTAINTY AND FAIRNESS, AND PROMOTE RESPECT FOR THE LAW."<sup>170</sup>

MOREOVER, THE CASE LAW UNDERSTANDING OF YOUTHFULNESS ACTUALLY CONSTRAINS FEDERAL JUDICIAL DISCRETION TO A GREATER DEGREE THAN THE SENTENCING COMMISSION ENVISIONED. THE GUIDELINES' SECTION ON AGE PROVIDES THAT "AGE (INCLUDING YOUTH) MAY BE RELEVANT IN DETERMINING WHETHER A DEPARTURE IS WARRANTED, IF CONSIDERATIONS BASED ON AGE, INDIVIDUALLY OR IN COMBINATION WITH OTHER OFFENDER CHARACTERISTICS, ARE PRESENT TO AN UNUSUAL DEGREE AND DISTINGUISH THE CASE FROM THE TYPICAL CASES COVERED BY THE GUIDELINES."<sup>171</sup> IF JUDGES TRACK 8TH AMENDMENT CASE LAW TO DEFINE "YOUTH," THEY WOULD HAVE EVEN MORE CHARACTERISTICS TO STUDY.

ACROSS COURTS, THIS EXPANDED INQUIRY ~~REGARDING~~ REGARDING YOUTHFULNESS COULD CURTAIL DISCRETION AND INCONSISTENCY, ~~AND~~ AND THE GUIDELINES' NONDESCRIPT "YOUTH" COULD BE GIVEN NEW MEANING FOR DEFENDANTS UNDER 21 FACING CAPITAL PUNISHMENT OR LIFE IMPRISONMENT FOR NON HOMICIDE CRIMES. ALTHOUGH THIS AMICI DOES NOT DEFINE THE FACTORS' EXACT APPLICATION, THE COURT WAS NOT OTHERWISE REQUIRED DETAILED REMEDIES. FOR EXAMPLE, THE COURT WAS LEFT FOR STATES TO DETERMINE THE APPROPRIATE WAYS TO ENFORCE CONSTITUTIONAL RESTRICTIONS AGAINST EXECUTING BOTH MENTALLY RETARDED AND INSANE INDIVIDUALS.<sup>172</sup> THIS PRESUMPTION REMEDY SIMPLY GIVES COURTS NEW LENSES THROUGH WHICH TO VIEW EVIDENCE THAT MANY ALREADY ARE REQUIRED TO GATHER.

CONCLUSION:

THIS AMICI HAS DEMONSTRATED THREE REASONS WHY THE CURRENT APPROACH OF RECOGNIZING THE MITIGATING EFFECT OF YOUTHFULNESS ONLY WHEN DEFENDANTS ARE UNDER 18-YEARS-OLD CANNOT STAND. IF THE SOLUTION TO ADDRESS THE INCREASINGLY PUNITIVE ORIENTATION OF CRIMINAL JUSTICE REMAINS ONE OF PROTECTING YOUTHFUL DEFENDANTS THROUGH THE 8TH AMENDMENT, THEN COURTS MUST ALSO CONSIDER DEFENDANTS YOUTHFULNESS WHEN 18-TO-21-YEAR-OLDS FACE IRREVOCABLE SENTENCES. BECAUSE THE COURT CONTINUES TO INSIST THAT DEVELOPMENTAL DIFFERENCES LESSEN CULPABILITY AND NEGATE ALL PENOLOGICAL JUSTIFICATIONS FOR IMPOSING SOCIETY'S HARSHEST SANCTIONS, MARGINALLY OLDER AND EQUALLY BLAMELESS OFFENDERS MUST BE ABLE TO SEEK THE SAME PROTECTION. A PERMISSIVE, REBUTTABLE PRESUMPTION OF YOUTHFULNESS WOULD ACCOMPLISH THIS GOAL. INDEED, AS THE COURT HAS SUGGESTED, "MAKING YOUTH (AND ALL THAT ACCOMPANIES IT) IRRELEVANT" TO THE IMPOSITION OF THE HARSHEST AND IRREVOCABLE SENTENCES "POSES TOO GREAT A RISK OF DISPROPORTIONATE PUNISHMENT."<sup>173</sup>

RESPECTFULLY SUBMITTED BY:

DATED: JUNE 2, 2020

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FOOTNOTES:

1. SEE MILLER V ALABAMA, 132 S. CT. 2455, 2470 (2012) ("SO IF... DEATH IS DIFFERENT, CHILDREN ARE DIFFERENT TOO... IT IS NO SURPRISE THAT THE LAW RELATING TO SOCIETY'S HARSHEST PUNISHMENTS RECOGNIZES SUCH A DISTINCTION." SEE ALSO MARY ~~BERKMEISHER~~ BERKMEISHER, DEATH IS NOT SO DIFFERENT AFTER ALL: GRAHAM V. FLORIDA AND THE COURT'S "KIDS ARE DIFFERENT" 8TH AMENDMENT JURISPRUDENCE, 36 VT. L. REV. 1, 1 (2011) (DESCRIBING HOW THE COURT'S APPROACH IN GRAHAM V FLORIDA "UNCEREMONIOUSLY DEMOLISHED THE HADRIAN'S WALL THAT HAS SEPARATED ITS 'DEATH IS DIFFERENT' JURISPRUDENCE FROM

NON-CAPITAL SENTENCING REVIEW SINCE 1970" AND, IN ITS PLACE, "FORTIFIED AN EXPANSIVE "KIDS ARE DIFFERENT" JURISPRUDENCE").

9. SEE MILLER, 132 S.C.T. AT 2455; GRAHAM V ROPER, 130 S.C.T. 2011 (2010); ROPER V SIMMONS, 543 U.S. 581. EACH OF THESE CASES DECISIONS FOLLOWED ATKINS V VIRGINIA, WHICH HELD EXECUTING MENTALLY RETARDED CRIMINALS TO BE CRUEL AND UNUSUAL PUNISHMENT DUE TO THE OFFENDERS' REDUCED CAPACITY AND THE EXECUTIONS' FAILURE TO SERVE SOCIAL JUSTIFICATIONS RECOGNIZED FOR THE DEATH PENALTY. SEE 536 U.S. 904, 318-21 (2002).
3. SEE ROPER, 543 U.S. AT 578.
4. SEE GRAHAM, 130 S.C.T. AT 2034.
5. SEE MILLER, 132 S.C.T. AT 2469. THE COURT CONSIDERED MILLER ALONG WITH JACKSON V. HOBBS, 132 S.C.T. 2455 (2010) WHICH ALSO PRESENTED THE QUESTION OF WHETHER A JUVENILE'S SENTENCE OF LIFE WITHOUT PAROLE VIOLATED THE 8TH AMENDMENT PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT. SEE MILLER, 132 S.C.T. AT 2460-62.
6. SEE MILLER, 132 S.C.T. AT 2464 (CITING GRAHAM, 130 S.C.T. AT 2026; ROPER, 543 U.S. AT 569-70).
7. Id. THE COURT BELLOTTI V. BAIRD HAD POSITED A SIMILAR BUT DISTINGUISHABLE LIST OF REASONS FOR TREATING CHILDREN DIFFERENTLY FROM ADULTS, INCLUDING: (1) "THE PECULIAR VULNERABILITY OF CHILDREN," (2) "THEIR INABILITY TO MAKE CRITICAL DECISIONS IN AN INFORMED, MATURE MANNER," AND (3) "THE IMPORTANCE OF THE PARENTAL ROLE IN CHILD REARING." SEE 443 U.S. 622, 634 (1979) (CONCERNING A LAW RESTRICTING THE RIGHT OF A MINOR TO OBTAIN AN ABORTION).
8. SEE ROPER, 543 U.S. AT 569.
9. SEE MILLER, 132 S.C.T. AT 2464-65; GRAHAM, 130 S.C.T. AT 2026, 2034; ROPER, 543 U.S. AT 569, 570, 578.
10. A BRIEF OFFERING UP SCIENTIFIC EVIDENCE FOR THE COURT, FOR EXAMPLE, RECOGNIZED ITS OWN LIMITATIONS. SEE BRIEF FOR AMERICAN PSYCHOLOGICAL ASS'N ET AL. AS AMICI CURIAE SUPPORTING PETITIONERS AT 6 n.3, GRAHAM V FLORIDA, 130 S.C.T. 2011 (2010) (Nos. 08-7412, 08-7621) ("SCIENCE CANNOT, OF COURSE DRAW BRIGHT LINES PRECISELY BEMARKATING THE BOUNDARIES BETWEEN CHILDHOOD, ADOLESCENCE AND ADULTHOOD."); SEE ALSO 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, 218 (2009) ("NEUROIMAGING STUDIES DO NOT ALLOW A CHRONOLOGICAL CUT-POINT FOR BEHAVIORAL OR COGNITIVE MATURITY AT EITHER THE INDIVIDUAL OR POPULATION LEVEL.")
11. SEE EDDINGS V OKLAHOMA, 455 U.S. 104, 115 (1982). FOR THIS REASON, THE COURT REQUIRED LOWER COURTS TO ALSO CONSIDER "THE BACKGROUND AND MENTAL AND EMOTIONAL DEVELOPMENT OF A YOUTHFUL DEFENDANT." Id. AT 116.
12. IN ROPER, THE COURT REASONED THAT "THE QUALITIES THAT ~~ARE~~ DISTINGUISH JUVENILES FROM ADULTS DO NOT DISAPPEAR WHEN AN INDIVIDUAL TURNS 18 IS THE POINT WHERE SOCIETY DRAWS THE LINE FOR MANY PURPOSES BETWEEN CHILDHOOD AND ADULTHOOD." 543 U.S. AT 574.
13. IN MILLER, THE COURT ARTICULATED ITS MOST RECENT AFFIRMATION THAT THE FACTORS ARE OF CENTRAL IMPORT FOR SENTENCING JUDGES AND JURIES TO CONSIDER IN ARRIVING AT APPROPRIATE, PROPORTIONAL PUNISHMENT. SEE 132 S.C.T. AT 2468.
14. THIS AMICI USES THE TERM "YOUTHFUL" TO DESCRIBE THOSE WHO POSSESS THE CHARACTERISTICS THAT THE COURT HAS RELIED ON IN ROPER, GRAHAM, AND MILLER TO MITIGATE PUNISHMENT. IN ADDITION, WHEREAS OTHER WRITERS HAVE OPTED TO DISTINGUISHED BETWEEN "CHILDREN" AND "ADULTS," USING THE AGE OF 18 AS A BOUNDARY, THIS AMICI ADOPTS THE TERMS "YOUTH" AND "YOUNG PEOPLE"

TO DESCRIBE THOSE INDIVIDUALS WHO ARE NO LONGER CHILDREN AND NOT YET FULLY FUNCTIONING ADULTS. KENNETH KENISTON REFERRED TO THE PERIOD BETWEEN ADOLESCENCE AND ADULTHOOD AS "YOUTH" IN 1970. KENNETH KENISTON, YOUTH: A "NEW" STAGE OF LIFE, 34 AM SCHOLAR 631, 635 (1970). SCHOLARS TODAY CONTINUE TO REDEFINE THIS TRANSITIONAL PERIOD.

15. SEE EMILY BUSS, WHAT THE LAW SHOULD (AND SHOULD NOT) LEARN FROM CHILDREN DEVELOPMENT RESEARCH, 38 HOFSTRA L. REV. 13, 33 (2009). THE MACARTHUR FOUNDATION, FOR EXAMPLE, CONVENED A GROUP TO STUDY ADOLESCENT DEVELOPMENT AND FUNDED EXTENSIVE RESEARCH ABOUT EFFECTIVE JUVENILE CRIME POLICY. SEE *Id.*
16. SEE THOMAS J. BERNDT, DEVELOPMENTAL CHANGES IN CONFORMITY TO PEERS AND PARENTS, 15 DEV. PSYCHOL. 608, 615 (1979) (STUDYING YOUTH IN THE 3RD, 6TH, 9TH, 11TH AND 13TH GRADES AND FINDING CONFORMITY TO PEERS TO INCREASE BETWEEN 3RD AND 9TH GRADE, AND THEN DECLINE); LAURENCE STEINBERG & SUSAN B. SILVERBERG, THE VICISSITUDES OF AUTONOMY IN EARLY ADOLESCENCE, 57 CHILD DEV. 841, 843, 848 (1986)
17. SEE WILLIAM GARDNER, A LIFE-SPAN RATIONAL-CHOICE THEORY OF RISK TAKING, IN ADOLESCENT RISK TAKING 66, 66 IN ANCY J. BELL & ROBERT W. BELL EDS., 1993; SEE ALSO JEFFREY ARNETT, RECKLESS BEHAVIOR IN ADOLESCENCE: A DEVELOPMENTAL PERSPECTIVE, 12 DEV. REV. 339, 366-367 (1992) (CONCLUDING THAT HIGH LEVELS OF RECKLESS BEHAVIOR DURING ADOLESCENCE IMPLICATE DEVELOPMENTAL ROOTS IN SENSATION SEEKING AND SEEKING ADOLESCENT EGOCENTRISM, DECLINING AFTER ADOLESCENCE - PERHAPS DUE TO BIOLOGY, INCREASED MATURITY, AND YOUNG PEOPLE ASSUMING GREATER RESPONSIBILITIES)
18. SEE A.L. GREENE, FUTURE-TIME PERSPECTIVE IN ADOLESCENCE: THE PRESENT OF THINGS FUTURE REVISITED, 15 J. YOUTH & ADOLESCENCE 99, 103, 108-09 (1986) (STUDYING 9TH GRADERS, 12TH GRADERS, AND COLLEGE SOPHOMORES).
19. SEE LEON MANN ET AL., ADOLESCENT DECISION-MAKING: THE DEVELOPMENT OF COMPETENCE, 12 J. ADOLESCENCE 265, 275 (1989) ("OUR ANALYSIS OF THE MODEST EVIDENCE LEADS US TO CONCLUDE THAT BY AGE 15 YEARS MANY ADOLESCENTS HAVE ACHIEVED A REASONABLE LEVEL OF COMPETENCE . . . HOWEVER, LIKE ALL HUMANS, ADOLESCENTS DO NOT CONSISTENTLY BEHAVE AS COMPETENT DECISION MAKERS . . ."), BUT SEE LITA FURBY & RUTH BETH-MAROM, RISK TAKING IN ADOLESCENCE: A DECISION-MAKING PERSPECTIVE, 12 DEV. REV. 1, 38 (1992)
20. SEE ALAN S. WATERMAN, IDENTITY DEVELOPMENT FROM ADOLESCENCE TO ADULTHOOD: AN EXTENSION OF THEORY AND A REVIEW OF RESEARCH, 18 DEV. PSYCHOL. 341, 346, 355 (1982) ("IT IS DURING THE COLLEGE YEARS THAT THE GREATEST GAINS IN IDENTITY FORMATION APPEAR TO OCCUR.")
21. FOR AN ARTICULATION OF PROFESSOR ERIKSON'S THEORY, SEE GENERALLY ERIK H. ERIKSON, IDENTITY AND THE LIFE CYCLE (W.W. NORTON & CO. 1980) (1959); ERIK H. ERIKSON, IDENTITY: YOUTH AND CRISIS (1968). PROFESSOR ERIKSON ARTFULLY DESCRIBED ADOLESCENCE AS "A VITAL REGENERATOR IN THE PROCESS OF SOCIAL EVOLUTION." ERIKSON, IDENTITY: YOUTH AND CRISIS, *SUPRA*, AT 124.
22. JAY N. GIEDD ET AL., BRAIN DEVELOPMENT DURING CHILDHOOD AND ADOLESCENCE: A LONGITUDINAL MRI STUDY, 2 NATURE NEUROSCIENCE 861, 861 (1999); ELIZABETH R. SOWELL ET AL., IN VIVO EVIDENCE FOR POST-ADOLESCENT BRAIN MATURATION IN FRONTAL AND STRIATAL REGIONS, 2 NATURE NEUROSCIENCE 859, 860 (1999). THESE STUDIES USED 3D IMAGE MAPPING TECHNIQUES, WHEREAS EARLY QUANTITATIVE STRUCTURAL BRAIN-IMAGING STUDIES IN THE LATE 1980'S AND EARLY 1990'S COULD NOT ASSESS DENSITY. SEE ARTHUR W. TOGA ET AL., MAPPING BRAIN MATURATION, 29 TRENDS NEUROSCIENCES 148, 149 (2006).
23. SEE ADAM ORTIZ, ADOLESCENCE, BRAIN DEVELOPMENT AND LEGAL CULPABILITY, A.B.A. JUV. JUST. CTR., JAN. 2004, AT 1, AVAILABLE AT [HTTP://WWW.ABAJOURNAL.COM/COURTS/ARTICLE/ADOLESCENCE-BRAIN-DEVELOPMENT-AND-LEGAL-CULPABILITY](http://www.abajournal.com/courts/article/adolescence-brain-development-and-legal-culpability); SEE ALSO INSIDE THE TEENAGE BRAIN: INTERVIEW: JAY GIEDD, PBS FRONTLINE (2002), [HTTP://WWW.PBS.ORG/FRONTLINE/TEENS/](http://www.pbs.org/frontline/teens/) ("THE FRONTAL LOBE IS OFTEN CALLED THE CEO, OR THE EXECUTIVE OF THE BRAIN . . . IT'S A PART OF THE BRAIN THAT MOST SEPARATES MAN FROM BEAST, IF YOU WILL.")
24. SEE GIEDD ET AL., *SUPRA* NOTE 23, AT 861 (FINDING GRAY MATTER TO INCREASE TO MAXIMIZE SIZES AROUND THE AGES OF 12 AND 11 FOR MALES AND FEMALES RESPECTIVELY).
25. SEE *Id.* AT 861-62; SOWELL ET AL., *SUPRA* NOTE, AT 860.

26. ORTIZ, SUPRA NOTE 54 AT 2
27. SEE ID.
28. SEE SOWELL ET AL., SUPRA NOTE 53, AT 860. FOR ADDITIONAL GENERAL DESCRIPTIONS OF BRAIN DEVELOPMENT, SEE, FOR EXAMPLE, PATRICIA SOUNG, SOCIAL AND BIOLOGICAL CONSTRUCTIONS OF YOUTH: IMPLICATIONS FOR JUVENILE JUSTICE AND RACIAL EQUITY, 6 NW. J.L. & SOC. POL'Y 498, 433 (2011); CLAUDIA WALLIS, WHAT MAKES TEENS TICK, TIME, MAY 10, 2004, AT 56.
29. SEE TOGA ET AL., SUPRA NOTE 54, AT 150-51; SEE GIBDD ET AL. SUPRA NOTE 53, AT 861 (FINDING GRAY MATTER TO DECREASE FOLLOWING ADOLESCENCE THROUGH AGE 22, THE OLDEST AGE OF THOSE STUDIED); SOWELL ET AL., SUPRA NOTE 53, AT 860 (FINDING LOSS OF GRAY MATTER TO CONTINUE UP TO AGE 30, THE OLDEST AGE OF THOSE STUDIED).
30. SEE LAURENCE STEINBERG & ELIZABETH S. SCOTT'S, "LESS GUILTY BY REASON OF ADOLESCENCE: DEVELOPMENTAL IMMATUREITY, DIMINISHED RESPONSIBILITY, AND THE JUVENILE DEATH PENALTY, 58 AM. PSYCHOL. 1009 (2003)/1011-12) SEE ALSO ELIZABETH R. SOWELL ET AL., MAPPING CORTICAL CHANGE ACROSS THE HUMAN SPAN, 6 NATURE NEUROSCIENCE 309-310 (2003). OTHER RESEARCHERS HAVE REACHED SIMILAR CONCLUSIONS. SEE CATHERINE LEBEL & CHRISTIAN BEAULIEU, LONGITUDINAL DEVELOPMENT OF HUMAN BRAIN WIRING CONTINUES FROM CHILDHOOD INTO ADULTHOOD, 31 J. NEUROSCIENCE 10937, 10938, 10943 ("WE SHOW WITHIN-SUBJECT BRAIN DEVELOPMENT DURING YOUNG ADULTHOOD IN ASSOCIATION TRACTS, PARTICULARLY FRONTAL CONNECTIONS NEEDED FOR COMPLEX COGNITIVE TASKS SUCH AS INHIBITION, EXECUTIVE FUNCTIONING, AND ATTENTION.") (STUDYING SUBJECTS AGE 5.6 TO 29.3 YEARS OLD); SEE ALSO MELINDA BECK, DELAYED DEVELOPMENT: 20 - SOMETHINGS BLAME THE BRAIN, WALL ST. J., AUG 21, 2012, AT D1; TONY COX, BRAIN MATURITY EXTENDS WELL BEYOND TEEN YEARS (NPR RADIO BROADCAST OCT. 10, 2011), AVAILABLE AT HTTP://WWW.77K.
31. 543 US 551 (2005). THE IMPORTANCE OF THE SUPREME COURT INJECTING ("SCIENCE INTO ITS REASONING") WAS NOT LOST ON THIS AMICI AND SHOULD NOT BE LOST BY THIS COURT. SEE BISHOP & FARBER, SUPRA NOTE 33, AT 195 ("ALTHOUGH ROPER WILL ALWAYS BE BEST KNOWN AS THE CASE THAT ABOLISHED THE JUVENILE DEATH PENALTY IN AMERICA, THE DECISION IS AT LEAST EQUALLY NOTEWORTHY FOR ITS ENDORSEMENT AND APPLICATION OF SCIENTIFIC FINDINGS RELATING TO ADOLESCENT DEVELOPMENTAL IMMATUREITY."); JEFFREY ROSEN, THE BRAIN ON THE STAND: HOW NEUROSCIENCE IS TRANSFORMING THE LEGAL SYSTEM, N.Y. TIMES MAG. 48, 51 (MAR 11, 2007) ("JUSTICE KENNEDY INDIRECT REFERENCE TO THE SCIENTIFIC STUDIES IN THE BRIEFS LED SOME SUPPORTERS AND CRITICS TO VIEW THE DECISION AS THE BROWN V BOARD OF EDUCATION OF NEUROLAW.")
32. ATKINS V VIRGINIA, 536 U.S. 304 (2002)
33. SEE ID ROPER, SUPRA AT 556-557
34. ID AT 559.
35. SEE ID. AT 559-60. IN STANFORD V KENTUCKY, THE COURT REJECTED AN OPPORTUNITY TO RULE OUT CAPITAL PUNISHMENT FOR DEFENDANTS OVER FIFTEEN BUT UNDER THE AGE 18. 492 U.S. 361, 377-78 (1989).
36. ROOPER, 543 US 567-68 (QUOTING ATKINS, 536 US AT 316)
37. SEE ID AT 568. ROOPER EXTENDED THE PROTECTION TO 16- AND 17- YEAR- OLDS THAT THOMPSON V. OKLAHOMA PROVIDED FOR THOSE UNDER 16. SEE 487 U.S. 815, 838 (1988).
38. SEE ROOPER, 543 U.S. AT 569-70.
39. ID. AT 569. THE COURT CITED ARNETT, SUPRA NOTE 48, AT 339, FOR THE FIRST FINDING; STEINBERG AND SCOTT, SUPRA NOTE 62, AT 1084, FOR THE SECOND FINDING; AND ERIKSON, IDENTITY: YOUTH AND CRISIS, SUPRA NOTE 52, FOR THE THIRD FINDING.
40. SEE ROOPER, 543 U.S. AT 570-571. THESE ARGUMENTS REGARDING RETAIBUTION AND BLAMEWORTHINESS MIRROR THOSE THE COURT REJECTED IN STANFORD V KENTUCKY. SEE 492 U.S. 361, 377-378 (1989)

41. *ROPER*, 543 U.S. AT 574.
42. *Id.*
43. *SEE GRAHAM V FLORIDA*, 130 S.Ct 2011, 2020 (2010).
44. *SEE Id.* AT 2026-30.
45. *Id.* AT 2026 (CITING *ROPER* 543 U.S. AT 569-70). THE *GRAHAM* COURT CONTINUED:  
 "THESE SALIENT CHARACTERISTICS MEAN THAT IT IS DIFFICULT EVEN FOR EXPERT PSYCHOLOGIST TO DIFFERENTIATE BETWEEN THE JUVENILE OFFENDER WHOSE CRIME REFLECTS UNFORTUNATE YET TRANSIENT IMPATURITY, AND THE RARE JUVENILE OFFENDER WHOSE CRIME REFLECTS IRREPARABLE CORRUPTION. ACCORDINGLY, JUVENILE OFFENDERS CANNOT WITH RELIABILITY BE CLASSIFIED AMONG THE WORST OFFENDERS. A JUVENILE IS NOT ABSOLVED OF RESPONSIBILITY FOR HIS ACTIONS, BUT HIS TRANSGRESSION IS NOT AS MORALLY REPREHENSIBLE AS THAT OF AN ADULT.
46. *SEE Id.*
47. *Id.*
48. *Id.*
49. *Id.* AT 2027 (QUOTING *HAMERLIN V MICHIGAN*, 501 U.S. 957, 1001 (1991)).
50. *Id.* AT 2028.
51. *SEE Id.*
52. *SEE Id.* AT 2028-31.
53. *Id.* AT 2028.
54. *Id.* AT 2028-29.
55. *Id.* AT 2029.
56. *Id.* AT 2029-30.
57. *SEE Id.* AT 2030.
58. *MILLER V ALABAMA*, 132 S.Ct. 2455, 2460 (2012).
59. *Id.* AT 2464. THE COURT'S HOLDING TURNED ON FINDING THAT MANDATORY SENTENCING SCHEME POSE "TOO GREAT A RISK OF DISPROPORTIONATE PUNISHMENT" BECAUSE THEY MAKE "YOUTH (AND ALL THAT ACCOMPANIES IT) IRRELEVANT" TO THE IMPOSITION OF THE HARSHEST PRISON SENTENCE AND CAN WEAKEN RATIONALES FOR PUNISHMENT. *Id.* AT 2469.
60. *SEE Id.* AT 2464-65.
61. *SEE Id.* AT 2465, 2470-71. ALTHOUGH THE MAJORITY OPINION PROVIDES SOME ARGUMENT REGARDING "OBJECTIVE INDICIA," *Id.* AT 2471-73. THE CRUX OF ITS HOLDING RELIED ON INDIVIDUALIZED SENTENCING PRECEDENT, *Id.* AT 2471, 2472 n.11.
62. *SEE Id.* AT 2463.
63. *SEE Id.* AT 2465.
64. *Id.* AT 2466.
65. *Id.* AT 2475.
66. *Id.* AT 2460.
67. *JAVIER V STATE*, NO HD13-1695, SLIP OP. AT 1-2 (FLA DIST. CT. APP OCT 2, 2013);
68. *JAVIER*, SLIP OP. AT 1-2.
69. *SEE E.G.*, *TERCERO V STEPHENS*, NO. 13-70010, SLIP OP. AT 10 (5TH CIR. DEC 18, 2013) (18-YEAR-OLD); *IN RE GARNER*, 612 F.3d 533, 534 (6TH CIR. 2010) (19-YEAR-OLD); *STATE V MILLER*, 2018 CONN APP LEXIS 470 (19-YEAR-OLD); *PEOPLE V HOUSE*, 2015 ILL APP LEXIS (1ST) 110580, VACATED BY *PEOPLE V HOUSE*, 2018 ILL LEXIS 1110

70. *ROPER V SIMMONS*, 543 U.S. 551, 574 (2005). IN HER *ROPER* DISSENT, JUSTICE O'CONNOR TOOK ISSUE WITH THE RULE'S OVERINCLUSIVENESS AND UNDERINCLUSIVENESS. SEE *Id.* AT 601-02 (O'CONNOR, J., DISSENTING). SEE ALSO JOSEPH L. HOFFMAN, ON THE PERILS OF LINE-DRAWING: JUVENILES AND THE DEATH PENALTY, 40 HASTINGS L.J. 229, 259 (1989).
71. *ROPER*, 543 U.S. AT 574.
72. B.J. CASEY ET AL. THE ADOLESCENT BRAIN, 1124 ANNALS N.Y. ACAD. SCI. 111, 122 (2008). IT WAS THEIR HOPE TO PRESENT RESEARCH "TO MAKE STRIDES IN MOVING THIS SINGLE LINE TO MULTIPLE LINES THAT CONSIDER DEVELOPMENTAL CHANGES ACROSS BOTH CONTEXT (EMOTIONALLY CHARGED OR NOT) AND TIME (IN THE MOMENT OR IN THE FUTURE)." *Id.*
73. SEE *MILLER V ALABAMA*, 132 S.Ct. 2455 (2018) (CITING STEINBERG & SCOTT, SUPRA NOTE 62); *ROPER*, 543 U.S. AT 569, 570, 573 (SAME). IN TOTAL, THE MAJORITY IN *ROPER* CITES PROFESSORS STEINBERG AND SCOTT FOUR TIMES.
74. STEINBERG & SCOTT, SUPRA NOTE 62, AT 1016. EVEN THOUGH THEY ACKNOWLEDGED THE SCIENTIFIC IMPRECISION FOR DRAWING A BOUNDARY, THE PSYCHOLOGISTS ADVANCED POLICY ARGUMENTS IN SUPPORT OF ONE. FOR INSTANCE, THEY REJECTED A CASE-BY-CASE APPROACH FOR MITIGATION AS AN UNACCEPTABLE, "ERROR-PRONE UNDERTAKING" WHEN THE STAKES ARE LIFE AND DEATH. SEE *Id.* THEY ALSO ADVOCATED A BOUNDARY, EVEN WHEN IT EXCLUDED POTENTIALLY DESERVED YOUTH, TO AVOID PRACTICAL INEFFICIENCIES AND CASES IN WHICH IMMATURETY MIGHT BE IGNORED DUE TO PARTICULAR DESIRES TO IMPOSE PUNITIVE PUNISHMENTS.
75. SEE STEINBERG & SCOTT, SUPRA NOTE 62, AT 1012 (CITING ELIZABETH CAUFFMAN & LAURENCE STEINBERG, "IMMATURETY OF JUDGMENT IN ADOLESCENCE: WHY ADOLESCENTS MAY BE LESS CULPABLE THAN ADULTS, 18 BEHAV. SCI. & L. 741 (2000)). CAUFFMAN AND STEINBERG EXAMINED THE RELATIONSHIP BETWEEN AGE, PSYCHOSOCIAL MATURITY, AND ANTI-SOCIAL DECISIONMAKING, FINDING THAT "THE PERIODS BETWEEN 16 AND 19 MARKS AN IMPORTANT TRANSITION POINT IN PSYCHOSOCIAL DEVELOPMENT THAT IS POTENTIALLY RELEVANT TO DEBATES ABOUT THE DRAWING OF LEGAL BOUNDARIES BETWEEN ADOLESCENCE AND ADULTHOOD." CAUFFMAN & STEINBERG, SUPRA AT 756. FOR A THOROUGH CRITIQUE OF THE SUPREME COURT'S SCIENTIFIC PITFALLS IN *ROPER*, SEE GENERALLY DEBORAH W. DENNO, THE SCIENTIFIC SHORTCOMINGS OF *ROPER V SIMMONS*, 3 OHIO ST. 3. CRIM. L. 379 (2006).
76. *MILLER*, 132 S.Ct. AT 2464 N.5
77. BRIEF OF AMICI CURIAE J. LAWRENCE ABNER ET AL. IN SUPPORT OF PETITIONERS AT 15-16, *MILLER*, 132 S.Ct. 2455 (Nos. 10-9646, 10-9647)
78. *Id.* AT 16 N. 19 (CITING JAY N. GIEDD, STRUCTURAL MAGNETIC RESONANCE OF THE ADOLESCENT BRAIN, 1021 ANNALS N.Y. ACAD. SCI. 77, 83 (2004); SEE ALSO SUPRA NOTE 61.
79. SEE BRIEF FOR AMERICAN PSYCHOLOGICAL ASS'N ET AL. AS AMICI CURIAE IN SUPPORT OF PETITIONERS AT 5, 9, *MILLER*, (Nos 10-9646, 10-9647).
80. SEE *Id.* AT 6 N.9. THE ERROR IS UNDERSTANDABLE; "ADULTHOOD," "ADOLESCENCE" AND "EARLY ADULTHOOD" HAVE NO CLEAR DEFINITIONAL PARAMETERS, AND RESEARCHERS OFTEN PRESCRIBE DIFFERENT LABELS. SEE NITIN COCTAY ET AL., DYNAMIC MAPPING OF HUMAN CORTICAL DEVELOPMENT DURING CHILDHOOD THROUGH EARLY ADULTHOOD, 101 PROC. NAT'L ACAD. SCI. 8174 (DESCRIBING "ADOLESCENCE AND EARLY ADULTHOOD" AS ENCOMPASSING AGES 17 TO 19 BUT ALSO DESCRIBING AS "CHILDREN AND ADOLESCENTS" A SAMPLE OF PEOPLE AGES FOUR TO TWENTY-ONE). COMPARE CASEY ET AL., SUPRA NOTE 109, AT 117 FIG. 4 (SHOWING MEASURES IN A BAR GRAPH FOR "ADOLESCENTS" (AGES 13 TO 17) AND "ADULTS" (AGES 23 TO 29), WITH *Id.* AT 118 FIG. 5 (SHOWING A MEASURE IN A SCATTERPLOT FOR "ADULTS" (AGE 18 TO THIRTY)).

81. IN 1904, G. STANLEY HALL PUBLISHED HIS TWO-VOLUME OPUS ON WHAT WAS THEN CONSIDERED A NEW LIFE STAGE, ADOLESCENCE. G. STANLEY HALL, ADOLESCENCE: ITS PSYCHOLOGY AND ITS RELATIONS TO PHYSIOLOGY, ANTHROPOLOGY, SOCIOLOGY, SEX, CRIME, RELIGION AND EDUCATION (1904).
82. THIS PERIOD OF YOUNG ADULTHOOD- SUBJECTED TO MANY LABELS, SUCH AS "ADULTESCENCE," "EXTENDED ADOLESCENCE," AND "YOUTHHOOD" - HAS BECOME THE SUBJECT OF MUCH INTEREST. SEE KAY S. HYMANOWITZ, WHERE HAVE THE GOOD MEN GONE?, WALL ST. J., FEB. 19, 2011, AT C1; HOPE REESE, YES, 20-SOMETHINGS ARE TAKING LONGER TO GROW UP - BUT WHY? ATLANTIC (NOV. 30, 2012, 12:52 PM)
83. SEE JEFFREY ARNETT, EMERGING ADULTHOOD: THE WINDING ROAD FROM THE LATE TEENS THROUGH THE 20'S, AT v (2004) (NOTING HOW SOCIOLOGISTS DEFINE THE TRANSITION TO ADULTHOOD IN TERMS OF YOUNG PEOPLE FINISHING SCHOOL, ENTERING FULL-TIME WORK, GETTING MARRIED AND BECOMING PARENTS)
84. SEE FRANK F. FURSTENBERG, JR. ET AL., ON THE FRONTIER OF ADULTHOOD: EMERGING THEME AND NEW DIRECTIONS, IN ON THE FRONTIER OF ADULTHOOD: THEORY, RESEARCH, AND PUBLIC POLICY 3, 5 (RICHARD A. SETTERSTEN, JR. ET AL. EDS. 2005). SEE ALSO ROBIN MARANTZ HENIG, WHAT IS IT ABOUT 20-SOMETHINGS? N.Y. TIMES MAG., AUG. 23, 2010, AT 28.
85. SEE JEFFREY JENSEN ARNETT & SUSAN TABER, ADOLESCENCE TERMINABLE AND INTERMINABLE: WHEN DOES ADOLESCENCE END? 23 J. YOUTH & ADOLESCENCE 517, 534 (1994). JEFFREY JENSEN ARNETT, EMERGING ADULTHOOD: A THEORY OF DEVELOPMENT FROM THE LATE TEENS THROUGH THE 20'S, 55 AM PSYCHOL 469 (2000). PROFESSOR ARNETT'S TERM "EMERGING ADULTHOOD" SEEMS TO HAVE TAKEN OFF, WHILE PREVIOUS CHARACTERIZATIONS, SUCH AS "THE POSTPONED GENERATION" OR "INCOMPLETELY-LAUNCHED YOUNG ADULTS," HAVE NOT. IN FACT, A MULTIDISCIPLINARY, INTERNATIONAL RESEARCH ORGANIZATION DEDICATED TO THE STUDY OF "EMERGING ADULTHOOD" HAS FORMED.
86. SEE ARNETT, SUPRA NOTE 119, AT 4-5; SILVA, SUPRA NOTE 119, AT 6.
87. SEE ERIN MIEDOL, DELAYING MARRIAGE HAS SERIOUS CONSEQUENCES FOR SOME, NEW RESEARCH REVEALS, HUFFINGTON POST (MAR. 16, 2013, 11:14 AM), HTTP://GOO.GL/PX6SCD (DESCRIBING HOW THE AVERAGE AGES FOR MARRIAGE HAVE NEVER BEEN HIGHER THAN THEY ARE NOW FOR WOMEN (26.5) AND MEN (28.7)).
88. SEE RICHARD FRY, FEW RES. CTR., A RISING SHARE OF YOUNG ADULTS LIVE IN THEIR PARENTS' HOME 11 (2012), AVAILABLE AT HTTP://GOO.GL/B3UY63; SEE ALSO ROBERT F. SCHENI & KAREN E. ROSS, MATERIAL ASSISTANCE FROM FAMILIES DURING THE TRANSITION TO ADULTHOOD, IN ON THE FRONTIER, SUPRA NOTE 120, AT 396, 413
89. SEE ELIZABETH FUSSELL & FRANK F. FURSTENBERG, JR., THE TRANSITION TO ADULTHOOD DURING THE 20TH CENTURY: RACE, NATIVITY, AND GENDER, IN ON THE FRONTIER, SUPRA NOTE 120, AT 29, 31, 33 FIG. 2.3, 58.
90. FOR CRITQUES OF THE MILLENNIAL GENERATION AS SELF-ABSORBED AND NEEDLESSLY COOLED, SEE, FOR EXAMPLE, JEFFREY ZASLOW, THE COODLING CRISIS: WHY AMERICANS THINK ADULTHOOD BEGINS AT 26, WALL ST. J., JAN 6, 2005, AT D1; 60 MINUTES: THE MILLENNIALS ARE COMING (CBS TELEVISION BROADCAST MAY 25, 2008), AVAILABLE AT HTTP://GOO.GL/HF1HLO; SEE ARNETT, SUPRA NOTE 119, AT 6, 8-9.
91. SEE *id* AT 5.
92. SEE *id*. AT 5-6; SEE ALSO FURSTENBERG, JR. ET AL., SUPRA NOTE 120, AT 3, 6.
93. SEE SHELLENBARGER, SUPRA NOTE 119; SEE ALSO DEREK THOMPSON, ADULTHOOD, DELAYED: WHAT HAS THE RECESSION DONE TO MILLENNIALS? ATLANTIC (FEBRUARY 14, 2012, 9:00 AM), HTTP://GOO.GL/008 GSB.

94. RECALL THE COURT REASONED THAT ALTHOUGH "THE QUALITIES THAT QUALITIES THAT DISTINGUISH JUVENILES FROM ADULTS DO NOT DISAPPEAR WHEN AN INDIVIDUAL TURNS 18... THE AGE OF 18 IS THE POINT WHERE SOCIETY DRAWS THE LINE FOR MANY PURPOSES BETWEEN CHILDHOOD AND ADULTHOOD." *ROPER V SIMMONS*, 543 U.S. 551, 574 (2005); SEE ALSO RONALD ROESCH ET. AL., *SOCIAL SCIENCE AND THE COURTS: THE ROLE OF AMICUS CURIAE BRIEFS*, 15 *LAW & HUMAN BEHAV.* 14 (1991) ("BECAUSE JUDGES ARE TRAINED IN THE LAW AND ARE GENERALLY UNFAMILIAR WITH PSYCHOLOGY'S RESEARCH METHODOLOGY AND STATISTICS, THEY ARE NATURALLY MORE INCLINED TO RELY ON LEGAL SCHOLARSHIP AND PRECEDENT WHEN THEY MAKE THEIR DECISIONS. THE DIFFERENCES IN TRAINING AND APPROACHES TO SCHOLARSHIP MAKE COMMUNICATION BETWEEN THE TWO DISCIPLINES DIFFICULT.")
95. SEE TERRY A. MARONEY, *THE FALSE PROMISE OF ADOLESCENT BRAIN SCIENCE IN JUVENILE JUSTICE*, 85 *NOTRE DAME L. REV.* 89, 144-45 (2009) ("THE IMPACT OF ADOLESCENT BRAIN SCIENCE ON JUVENILE JUSTICE HAS BEEN STRONGLY CABINED BY THE EXTRINSIC REALITY OF LEGAL DOCTRINE... DOCTRINAL FORCES ARE SO ENTRENCHED AND OF SUCH BROAD APPLICABILITY WITHIN CRIMINAL LAW, ADOLESCENT BRAIN SCIENCE IS INADEQUATE TO PROVOKE DEEP CHANGE, AT LEAST WITHIN THE COURTS.")
96. THE 26TH AMENDMENT GUARANTEES 18-YEAR-OLDS THE RIGHT TO VOTE, U.S. CONST. AMEND. XXVI, AND ALMOST EVERY STATE RECOGNIZES A VOTING AGE OF 18, SEE *ROPER*, 543 U.S. AT 581 APPX B.
97. SEE *ROPER*, 543 U.S. AT 583 APPX C.
98. SEE *id.* AT 585 APP D.
99. SEE *THOMPSON V. OKLAHOMA*, 487 U.S. 815, 842 APP. C (1988) ("MOST STATES HAVE VARIOUS PROVISIONS REGULATING DRIVING AGE, FROM LEARNER'S PERMIT THROUGH DRIVER'S LICENSES. IN ALL STATES BUT ONE, 15-YEAR-OLDS EITHER MAY NOT DRIVE, OR MAY DRIVE ONLY WITH PARENTAL CONSENT OR ACCOMPANIMENT.")
100. SEE *id.* AT 847 APP. F.
101. SEE, E.G., CAL. CONST. ART. 20, § 20(d); 235 ILL. COMP. STAT. ANN 5/6-16 (WEST 2013); N.Y. ALCO BEV. CONT. LAW § 65(1) (MCKINNEY 2011),
102. SEE, E.G., ALA. CODE § 27-14-5(b) (LEXISNEXIS 2007); CAL. FAM. CODE § 6700 (WEST 2013); 215 ILL. COMP. STAT. ANN. 5/242 (WEST 2000); N.Y. GEN. OBLIGATION. LAW § 3-101(1) (MCKINNEY 2010)
103. SEE E.G. ALA. CODE § 29-8-4 (LEXISNEXIS 2006); CAL. FAM. CODE § 6922 (WEST 2013); SEE ALSO ELIZABETH S. SCOTT, *THE LEGAL CONSTRUCTION OF CHILDHOOD, IN A CENTURY OF JUVENILE JUSTICE*, SUPRA NOTE 28, AT 113, 120.
104. SEE SCOTT, SUPRA NOTE 141 AT 120.
105. SEE ZIMRING, SUPRA NOTE 38, AT 72 (NOTHING SUCH ACTIVITIES AS DRIVING).
106. SEE ANDREW VON MIRSCH, *SELECTIVE INCAPACITATION REEXAMINED: THE NATIONAL ACADEMY OF SCIENCES' REPORT ON CRIMINAL CAREERS AND "CAREER CRIMINALS,"* 7 *CRIM. JUST. ETHICS* 19, 27 (1988).
107. SEE *id.*

108. SOME CHILDREN'S RIGHTS ADVOCATES FEAR THAT CRIMINAL LEGAL DEVELOPMENTS THAT DO NOT RECOGNIZE THE DIFFERENCES BETWEEN CRIMINAL LAW AND OTHER DECISIONMAKING CONTEXTS MIGHT UNDERMINE YOUTH AUTONOMY. SEE BUSS, SUPRA NOTE 46, AT 43-44. SUCH FEARS ARE REASONABLE, GIVEN THAT DEVELOPMENTAL DISCOVERIES ABOUT YOUTH IMMATURITY HAVE HAD IMPLICATIONS BEYOND THE REALM OF CRIMINAL SENTENCING. FOR EXAMPLE, PROPONENTS AND OPPONENTS OF A WOMAN'S ABILITY TO HAVE AN ABORTION USED THE SCIENCE. SEE SCOTT, SUPRA NOTE 140, AT 569-76; SEE ALSO *ROPER V. SIMMONS*, 543 U.S. 551, 617-18.
109. *LOCKETT V. OHIO*, 438 U.S. 586, 605 (1978); SEE ALSO *Id.* ("THE NONAVAILABILITY OF CORRECTIVE OR MODIFYING MECHANISMS ... UNDERSCORE - THE NEED FOR INDIVIDUALIZED CONSIDERATION AS A CONSTITUTIONAL REQUIREMENT IN IMPOSING THE DEATH SENTENCE.")
110. SEE *EDDINGS V. OKLAHOMA*, 455 U.S. 104, 115-16 (1982).
111. *Id.* AT. 115.
112. SEE SUPRA NOTES 103 AND 105, AND ACCOMPANYING TEXT.
113. SEE *MILLER V. ALABAMA*, 132 S.Ct. 2455, 2475 (2012)
114. *GRAHAM*, SUPRA, 130 S.Ct. AT 2027 (2010)
115. *MILLER*, SUPRA, 132 S.Ct. 2465.
116. *Id.* AT 2465-66; *GRAHAM*, 130 S.Ct. AT 2028-30; *ROPER*, SUPRA, 543 U.S. AT 571-72.
117. *GRAHAM*, SUPRA, 130 S.Ct. AT 2028; THE *GRAHAM* COURT NOTED THAT "THE CONCEPT OF PROPORTIONALITY IS CENTRAL TO THE 8TH AMENDMENT." *Id.* AT 2021.
118. *ATKINS V. VIRGINIA*, 536 U.S. 304, 319 (2002).
119. *GRAHAM*, SUPRA, 130 S.Ct. AT 2028 ("THE HEART OF THE RETRIBUTION RATIONALE IS THAT A CRIMINAL SENTENCE MUST BE DIRECTLY RELATED TO THE PERSONAL CULPABILITY OF THE CRIMINAL OFFENDER.")
120. *ROPER*, SUPRA, 543 U.S. AT 571.
121. *Id.*
122. *GRAHAM*, 130 S.Ct. AT 2028-29.
123. *Id.*
124. *ATKINS*, SUPRA 536 U.S. 304, 319 (2002).
125. ANDREW ASHWORTH, *SENTENCING AND CRIMINAL JUSTICE* 79 (5TH ED. 2010)
126. *Id.*
127. *ROPER*, 543 U.S. AT 570-72.
128. *GRAHAM*, 130 S.Ct. AT 2028-29.
129. SEE *Id.*
130. SEE ASWORTH, SUPRA NOTE 162, AT 84.
131. *GRAHAM*, SUPRA, 130 S.Ct. AT 2029.
132. *Id.*
133. *Id.* AT 2026
134. *MILLER*, SUPRA, 132 S.Ct. AT 2465.

135. BRUCE J. COHEN, *THEORY AND PRACTICE OF PSYCHIATRY* 504 (2003) ("SINCE CHILDREN'S PERSONALITIES ARE STILL SUBJECT TO CHANGE AT LEAST INTO THEIR YOUNG ADULTHOODS, MOST CLINICIANS ARE CIRCUMSPECT ABOUT DIAGNOSING PERSONALITY DISORDER IN INDIVIDUALS UNDER THE AGE 18.")
136. SEE NAT'L COLLABORATING CTR. FOR MENTAL HEALTH, *BORDERLINE PERSONALITY DISORDER: TREATMENT AND MANAGEMENT* 348 (2009).
137. SEE WATERMAN, *SUPRA* NOTE 91, AT 355; SEE ALSO JENNIFER LYNN TANNER & JEFFREY JENSEN ARNETT, *THE EMERGENCE OF "EMERGING ADULTHOOD": THE NEW LIFE STAGE BETWEEN ADOLESCENCE AND YOUNG ADULTHOOD; NEW PERSPECTIVES AND AGENDAS* 39, 42 (ANAY FURLONG) 2009)
138. GRAHAM, 130 S. CT. AT 2029.
139. SEE ASHWORTH, *SUPRA* NOTE 160, AT 86.
140. SEE GRAHAM, 130 S. CT AT 2030.
141. *Id.*
142. *Id.*
143. SEE *SUPRA* NOTES 16-27 AND ACCOMPANYING TEXT. WHEREAS EARLY DETERMINATIONS FOCUSED ON CULPABILITY AS IT RELATED TO CAPACITY, THIS SCHEME PRIORITIZES RESPONSIBILITY.
144. SEE *ROPER*, *SUPRA* 543 US AT 573
145. SEE ELIZABETH F. EMENS, *AGGRAVATING YOUTH: ROPER, SUPRA AND AGE DISCRIMINATION*, 2005 SUP. CT. REV. 51, 76.
146. SEE BARRY C. FEID, *ADOLESCENT CRIMINAL RESPONSIBILITY, PROPORTIONALITY, AND SENTENCING POLICY: ROPER, GRAHAM, MILLER / JACKSON, AND THE YOUTH DISCOUNT*, 31 LAW & INEQ. 263, 301 & N. 313 (2013)
147. *ROPER*, *SUPRA*, 543 U.S. AT 619; SEE ALSO GRAHAM *SUPRA*, 130 S CT 2051-52.
148. SEE *SUPRA* PART I. B.
149. SEE *ROPER*, 543 US AT 572-73.
150. SEE NOTES 24-26 AND ACCOMPANYING TEXT.
151. FOR A DISCUSSION ABOUT THE ENDPOINT OF 21 TO 25, SEE *INFRA* PART III. B.1
152. DUE TO ITS POTENTIAL IMPACT ON PLEA BARGAINING, ANY DETERMINATION REGARDING A DEFENDANT'S ELIGIBILITY FOR IRREVOCABLE PUNISHMENTS SHOULD PRECEDE THE GUILT PHASE OF A TRIAL
153. BEFORE *ROPER*, *GRAHAM*, AND *MILLER*, PROFESSOR STEPHEN MORSE DISCUSSED A SIMILAR REBUTTABLE PRESUMPTION SCHEME BUT SUGGESTED THAT "FAIRNESS AND EFFICIENCY SHOULD REQUIRE THE PROSECUTION TO PROVE BEYOND A REASONABLE DOUBT THAT A PARTICULAR ADOLESCENT WAS FULLY RESPONSIBLE." STEPHEN J. MORSE, *IMMATURITY AND IRRESPONSIBILITY*, 88 J. CRIM. L. & CRIMINOLOGY, 15, 63 (1997)
154. SEE *SUPRA* NOTES 113-15 AND ACCOMPANYING TEXT.
155. SEE *SUPRA* NOTES 118-25 AND ACCOMPANYING TEXT.
156. SEE *HOFFMAN*, *SUPRA* NOTE 106, AT 281-82. SEE GENERALLY *SUPRA* PART. II. B.

157. WHILE POLICE PROCEDURE AND CRIMINAL SENTENCING ARE IMPERFECT ANALOGS, THE COURT IN *J.D.B. V. NORTH CAROLINA* RECOGNIZED THE NEED TO CARVE OUT AGE AS AN EXCEPTION TO AN OTHERWISE OBJECTIVE MIRANDA RULE. 131 S.C.T. 2394, 2407 (2011). IN RESPONSE TO THE STATE'S ARGUMENT THAT A CHILD'S AGE MUST BE EXCLUDED FROM THE CUSTODY ANALYSIS "TO PRESERVE CLARITY," JUSTICE SONIA SOTOMAYOR WROTE THAT THE COURT HAS REJECTED A "MORE EASILY ADMINISTERED LINE, RECOGNIZING THAT IT WOULD SIMPLY ENABLE THE POLICE TO CIRCUMVENT THE CONSTRAINTS ON CUSTODIAL INTERROGATIONS ESTABLISHED BY MIRANDA." *Id.* IN THE SENTENCING CONTEXT, HOWEVER, THE COURT'S BRIGHT LINE AT AGE 18 ARGUABLY ENABLES SOME JUDGES AND JURIES TO CIRCUMVENT BOTH AMENDMENT CONSTRAINTS ON PUNISHMENT.
158. PROFESSOR FELD HAS ~~PREVIOUSLY~~ PREVIOUSLY RECOGNIZED THE BURDEN THAT MITIGATING SENTENCES BASED ON YOUTH MIGHT IMPOSE ON COURTS. SEE, E.G. FELD, SUPRA NOTE 23, AT 120 ("FOR EASE OF ADMINISTRATION, AGE ALONE PROVIDES THE MOST USEFUL CRITERION UPON WHICH TO ALLOCATE MITIGATION"). IN PART FOR THIS REASON, PROFESSOR FELD HAS PROPOSED A "YOUTH DISCOUNT" PRINCIPLE). PROFESSOR FELD HAS ARGUED THAT HIS APPROACH "AVOIDS THE CONCEPTUAL AND ADMINISTRATIVE DIFFICULTIES OF A MORE ENCOMPASSING SUBJECTIVE INQUIRY." FELD, SUPRA NOTE 23, AT 122. THIS ~~AMICI~~ AMICI REJECTS PROFESSOR FELD'S AGE-BASED APPROACH, SIDING INSTEAD WITH REASONING OFFERED BY PROFESSOR MORSE, WHO ASKED, "SHOULD NOT EFFICIENCY YIELD TO THE NEED TO INDIVIDUALIZE FOR THE SMALL CLASS OF ADULTS WITH THE SAME CHARACTERISTICS AS JUVENILES WHO THEREFORE MIGHT NOT BE RESPONSIBLE?" MORSE, SUPRA NOTE 191, AT 64; SEE ALSO *Id.* AT 59 ("WE MUST VERY CAREFULLY IDENTIFY WHY ADOLESCENTS MIGHT BE TREATED DIFFERENTLY, AND IF FAIRNESS REQUIRES DIFFERENTIAL TREATMENT FOR THE CLASS, IT ALSO REQUIRES THAT ADULTS WITH THE SAME RESPONSIBILITY DIMINISHING CHARACTERISTICS SHOULD BE TREATED EQUALLY.")
159. THIS AMICI ASSERTS THAT THE COURT HAS IDENTIFIED RELEVANT FACTORS FOR SUBSEQUENT COURTS TO CONSIDER WHEN EVALUATING THE BLAMEWORTHINESS OF YOUNG ADULTS. SEE FELD, SUPRA NOTE 184, AT 321-22.
160. MILLER, SUPRA, 132 S.C.T. 2464; GRAHAM, SUPRA 130 S.C.T. AT 2026; ROPER, SUPRA, 543 U.S. AT 569-70
161. BOOKER V. U.S. 543 U.S. 220, 233 (2005).
162. U.S. SENTENCING GUIDELINES MANUAL CHAP. 5, PT. H, INTRODUCTORY CMT. (2012), [HTTP://WWW.USSC.GOV/GUIDELINESMANUAL](http://www.ussc.gov/GuidelinesManual).
163. *Id.* § 5H1.1
164. ATKINS, SUPRA, 536 U.S. AT 317 (CITING *FORD V. WAINWRIGHT*, 477 U.S. 399, 405, 416-17 (1986)). SEE ALLISON FREEDMAN, NOTE, MENTAL RETARDATION AND THE DEATH PENALTY: THE NEED FOR AN INTERNATIONAL STANDARD DEFINING MENTAL RETARDATION, 12 NW. J. INT'L HUM. RTS. 1, 8 (2014)
165. MILLER, 132 S.C.T. AT 2469.

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RESPECTFULLY SUBMITTED,

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