THE INBETWEENERS: STANDARDIZING JUVENILENESS AND RECOGNIZING EMERGING ADULTHOOD FOR SENTENCING PURPOSES AFTER *MILLER*

I. INTRODUCTION

The status of constitutional and criminal law regarding juvenile offenders has been in flux over the last decade and remains so. In recent years, children have gradually gained legal rights and protections, but many pressing and difficult issues still face juvenile offenders today. Throughout the history of juvenile jurisprudence, the protection of the child has fluctuated and has been largely state-dependent. Perhaps the most concerning situation is when a juvenile may be tried as an adult, or in some cases, *must* be tried as an adult. In such cases, a juvenile defendant is left to face the harsh adult criminal justice system. Previously, juveniles could even be sentenced to death or life without parole. If a juvenile defendant was tried and convicted as an adult, and the homicide statute dictated life without parole as the mandatory sentence, he would be sent to stay behind bars for the rest of his life—a more extreme sentence when imposed on a juvenile than on an adult.

Fortunately, in June 2012, the United States Supreme Court decided *Miller v. Alabama*,[1] which represented progress in the Court's Eighth Amendment jurisprudence regarding juvenile offenders.[2] In *Miller*, the Court held mandatory life without parole for juvenile offenders to be unconstitutional.[3] Following its reasoning set forth in previous cases,[4] the

1. 132 S. Ct. 2455 (2012).

2. *Miller* is the most recent in a line of three Eighth Amendment cases in which the Supreme Court found that the Eighth Amendment affords juveniles greater protection than adult offenders. The first case held that juveniles may not be sentenced to death. Roper v. Simmons, 543 U.S. 551, 578 (2005). The second case held that juveniles may not be sentenced to life without parole for nonhomicide crimes. Graham v. Florida, 560 U.S. 48, 82 (2010).

In fact, *Miller* may not be the last case in this line of jurisprudence; however, that issue is outside the scope of this Note. For discussion on whether *Miller* went far enough (or too far) and whether there will be further decisions in this line of cases, see, for example, Mary Berkheiser, *Developmental Detour: How the Minimalism of* Miller v. Alabama *Led the Court's "Kids Are Different" Eighth Amendment Jurisprudence Down a Blind Alley*, 46 AKRON L. REV. 489 (2013); Craig S. Lerner, *Sentenced to Confusion:* Miller v. Alabama *and the Coming Wave of Eighth Amendment Cases*, 20 GEO. MASON L. REV. 25 (2012); Sean Craig, Note, *Juvenile Life Without Parole Post-*Miller*: The Long, Treacherous Road Towards a Categorical Rule*, 91 WASH. U. L. REV. 379 (2013).

3. *Miller*, 132 S. Ct. at 2475 ("*Graham*, *Roper*, and our individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles."). The Court thus found that subjecting juveniles to mandatory sentencing schemes, rather than deciding on a case-by-case basis, violates the Eighth

Court found that "children are different" in a fundamental way: offenders under the age of eighteen are incapable of being criminally liable to the same extent as their adult counterparts; for example, due to undeveloped cognitive abilities, they cannot form the requisite criminal intent in the same way as an adult.[5]

Miller was based on two strands of case precedent.[6] The first strand of cases "has adopted categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty,"[7] and in regards to the juvenile, is derived chiefly from *Graham v. Florida* and *Roper v. Simmons*.[8] Thus, this strand implicates the Eighth Amendment when punishment is disproportionate to the level of culpability of the class.[9] From the second strand of precedent, which includes *Woodson v. North Carolina*[10] and *Lockett v. Ohio*,[11] the Court

---

Amendment: "By requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, the mandatory sentencing schemes before us violate this principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment." *Id.*

The Court also reasoned that the discretion involved in deciding whether to transfer a juvenile defendant from juvenile court to the adult system is not enough to satisfy the Eighth Amendment; instead, there must be an exercise of discretion at sentencing:

> It is easy to imagine a judge deciding that a minor deserves a (much) harsher sentence than he would receive in juvenile court, while still not thinking life-without-parole appropriate. For that reason, the discretion available to a judge at the transfer stage cannot substitute for discretion at post-trial sentencing in adult court—and so cannot satisfy the Eighth Amendment.

Id.

4. *See Graham*, 560 U.S. at 82; *Roper*, 543 U.S. at 578.

5. *Miller*, 132 S. Ct. at 2464 (quoting *Graham*, 560 U.S. at 68) ("[C]hildren are constitutionally different from adults for purposes of sentencing. . . . '[T]hey are less deserving of the most severe punishments.'").

6. *Id.* at 2463 ("The cases before us implicate two strands of precedent reflecting our concern with proportionate punishment.").

7. *Id.*

8. *Id.* (citing *Graham*, 560 U.S. at 60–62).

9. *See id.* This Note concerns the context of juveniles as the relevant class of offenders, and will therefore focus mainly on *Miller*, *Graham*, and *Roper*, but the cases from which this jurisprudence is derived include *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (holding the death penalty for nonhomicide crimes violates the Eighth Amendment), and *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding that the death penalty for mentally retarded defendants violates the Eighth Amendment).

For a discussion of *Kennedy* in the context of mentally ill defendants' sentencing and the death penalty, see, for example, John D. Bessler, *Tinkering Around the Edges: The Supreme Court's Death Penalty Jurisprudence*, 49 AM. CRIM. L. REV. 1913 (2012); Lyn Entzeroth, *The Challenge and Dilemma of Charting a Course to Constitutionally Protect the Severely Mentally Ill Capital Defendant from the Death Penalty*, 44 AKRON L. REV. 529 (2011).

For a discussion of *Atkins* and the role of the jury in capital sentencing, see, for example, Bryan A. Stevenson, *The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing*, 54 ALA. L. REV. 1091 (2003).

10. Woodson v. North Carolina, 428 U.S. 280 (1976).

11. Lockett v. Ohio, 438 U.S. 586 (1978).

"prohibited mandatory imposition of capital punishment, requiring that sentencing authorities consider the characteristics of a defendant and the details of his offense before sentencing him to death."[12] The rationale in these two lines of cases merges in *Miller* and leads to "the conclusion that mandatory life-without-parole sentences for juveniles violate the Eighth Amendment."[13]

This was an enormous win for the juvenile justice system, because it meant that the Court had recognized that even homicide does not warrant a mandatory life sentence without the possibility of parole if the offender is less than eighteen years old at the time of the crime.[14] The Court thus recognized that "children are constitutionally different," in all cases, and fundamentally so.[15] It concluded that, as a constitutional rule, juveniles' cognitive development has not progressed enough to warrant adult sentencing (save for extreme circumstances, which the Court did not outline).[16] That conclusion has major implications for juvenile sentencing and, more generally, juvenile justice.[17]

The changing landscape for juveniles has not fully settled following *Miller*. There is still a question of whether juveniles can be sentenced to life without parole at all, and, if so, when and under what circumstances.[18] Moreover, it is not completely clear whether *Miller* applies retroactively, to defendants who were juveniles at the time of their crimes and who were convicted and sentenced to mandatory life without parole prior to the ruling.[19]

---

12. *Miller*, 132 S. Ct. at 2463–64. This second strand of precedent is indeed crucial to the holding in *Miller*, because the ultimate holding indicates that a judge must consider the youthful characteristics of a juvenile before sentencing him to life without parole. While this strand of precedent is important, it will only be relevant to the second portion of this Note. *See* discussion *infra* Part II.

13. *Miller*, 132 S. Ct. at 2464.

14. Consequently, crimes that are less severe should certainly warrant consideration of a juvenile's youthful characteristics in deciding whether to transfer the juvenile to adult court or sentence the juvenile to adult punishments. Thus, it is more prudent and more concurrent with the Eighth Amendment to create a national age cutoff of juvenileness. *See* discussion *infra* Part I.

15. *Miller*, 132 S. Ct. at 2464.

16. *Id.*

17. This includes the possibility, and arguably the recognition after these cases, of a constitutional category of juvenile set at age eighteen. *See* discussion *infra* Part I.

18. *See Miller*, 132 S. Ct. at 2469 ("[G]iven all we have said in *Roper*, *Graham*, and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon."); *see also* Berkheiser, *supra* note 2; Lerner, *supra* note 2.

19. States are currently deciding individually whether the ruling will apply retroactively. They have come down on opposite sides of the issue without a clear pattern. Moreover, if *Miller* is indeed retroactive, it is unclear how such retroactivity will apply to defendants. On the one hand, a hearing by a judge considering the defendant's youthful characteristics at the time of the crime (often many years

After *Miller*, there are two related, unsettled issues that contribute to the daunting uncertainty facing juvenile offenders. First, there is no uniform definition or cutoff of the "juvenile" class of defendants in the United States, which means due process may differ from state to state, depriving some children of the full constitutional protection intended by the Court. The Court's decision in *Miller* may necessitate a constitutional definition of "juvenile" as a person under eighteen years old.

Second, if the neurological research and social science on which *Miller* was based conclude that cognitive abilities are not fully developed until around age twenty-five, it may be arbitrary and inconsistent to choose age eighteen as the age after which a defendant may be subject to mandatory life without parole, or even the death penalty.[20] That is, if traditional norms of adulthood have been disproven by cognitive science, and the brain continues to develop past the age of eighteen, the Court should have placed the cutoff beyond age eighteen. The distinction of adulthood beginning at age eighteen is arguably based on no more than traditional and outdated norms. Should judges be given discretion to consider whether a young-adult defendant has not developed to his full cognitive capacity, such that he should not be charged as an adult and sentenced to death, as in *Roper*,[21] life without parole for nonhomicide crimes, as in *Graham*,[22] or mandatory life without parole, as in *Miller*?[23] The Court's Eighth Amendment jurisprudence and cognitive science articulated in *Miller* and its forebears may necessitate legal recognition of a stage of life between adolescence and adulthood often called "emerging adulthood,"[24] during which defendants should be entitled to further special consideration under the Eighth Amendment.[25]

---

earlier) would be extremely difficult and subjective. On the other hand, a judge considering the defendant as he is at the time of the hearing would be akin to a quasi-parole hearing, and would be similarly difficult.

The issue of retroactivity lies beyond the scope of this Note. For more on this issue, see, for example, Tamar Birckhead, *Should* Miller v. Alabama *Be Applied Retroactively?*, JUVENILE JUSTICE BLOG (Aug. 15, 2012), http://juvenilejusticeblog.web.unc.edu/2012/08/15/should-miller-v-alabama-be-applied-retroactively/, *archived at* http://perma.cc/FP75-NHSK; Lerner, *supra* note 2.

20. Emily Buss, *What the Law Should (and Should Not) Learn from Child Development Research*, 38 HOFSTRA L. REV. 13, 38–39 (2009) (arguing that the Court's decision to place the cutoff at eighteen in *Roper* was inconsistent and arbitrary); *see also* discussion *infra* Parts I, II.

21. 543 U.S. 551 (2005).

22. 560 U.S. 48 (2010).

23. 132 S. Ct. at 2464.

24. Jeffrey Jensen Arnett, *Emerging Adulthood: A Theory of Development from the Late Teens Through the Twenties*, 55 AM. PSYCHOLOGIST 469 (2000); *see also* JEFFREY JENSEN ARNETT, EMERGING ADULTHOOD: THE WINDING ROAD FROM THE LATE TEENS THROUGH THE TWENTIES (2004).

25. If the Eighth Amendment jurisprudence is really based on the idea that juveniles' cognitive

In Part II, this Note will discuss the background of the trio of juvenile Eighth Amendment cases, *Roper*, *Graham*, and *Miller*, and the social science, psychology, and neuroscience research underpinning the Supreme Court's decisions in these cases. Then, in Part III, this Note will discuss and analyze the issue of establishing a uniform constitutional definition of juvenileness that ends at eighteen years of age. Next, in Part IV, this Note will discuss the issue of defining "emerging adults" as a separate class from juveniles and adults. Overall, this Note will offer two proposals. First, that there should be a uniform definition of "juvenile" that ends at eighteen years of age, and this should be the cutoff age for juvenile court jurisdiction nationwide. Second, that courts should recognize an age group between the ages of eighteen and twenty-five, called "emerging adulthood," during which judges would potentially consider a defendant's youthful characteristics, capacity for change, and culpability in deciding whether to give the defendant a sentence as harsh as his or her fully formed adult counterparts.

II. BACKGROUND & HISTORY

A. The Miller Line of Cases

In *Roper*, Christopher Simmons was convicted of a first-degree murder he committed the crime at age seventeen.[26] After he told friends he would commit a murder, he kidnapped a woman, bound her, and threw her into a river to drown.[27] As he turned eighteen before trial, he was convicted and sentenced to death.[28] The Supreme Court overturned the sentence and found that the Eighth and Fourteenth Amendments prohibit the death penalty for offenders who were under eighteen years old at the time of their crimes.[29]

In *Graham*,[30] Terrance Jamar Graham pled guilty to and was convicted of armed robbery and armed burglary, which he committed when he was sixteen and seventeen years old, respectively.[31] Graham was thereafter

---

function is not fully developed until well past the age of eighteen, then *Miller*'s reasoning should apply to those in the "emerging adulthood" phase that spans from eighteen years old until the person's brain is fully formed—around age twenty-five.

26. 543 U.S. 551.
27. *Id.* at 556–57.
28. *Id.*
29. *Id.* at 578.
30. 560 U.S. 48 (2010).
31. *Id.* at 52–55.

sentenced to life in prison without the possibility of parole.[32] The Supreme Court found that in the case of a nonhomicide crime, the Eighth Amendment forbids a life sentence without the possibility of parole imposed on an offender who was a juvenile at the time of his or her crime.[33]

In June 2012, the Court decided *Miller v. Alabama* along with the companion case *Jackson v. Hobbs*.[34] The Court held that a defendant under age eighteen could not be sentenced to mandatory life without parole.[35] In this consolidated case, both defendants were fourteen years old at the time of their crimes.[36] The two defendants' "stories are representative of the background, nature of offense, and level of culpability of other children sentenced to life behind bars."[37]

In *Miller*, fourteen-year-old Evan Miller was charged with murdering his neighbor.[38] One night in 2003, he and a friend were in Miller's home when Miller's neighbor, "Cole Cannon, came to make a drug deal with Miller's mother."[39] Miller and his friend then went to Cannon's home with him to smoke marijuana and play drinking games.[40] When Cannon passed out, Miller took $300 from his wallet and split it with his friend.[41] When Miller went to return the wallet to Cannon's pocket, Cannon woke up and grabbed Miller's throat.[42] Miller's friend struck Cannon with a baseball bat, and Cannon released Miller.[43] Miller then grabbed the bat and repeatedly hit Cannon with it before putting a sheet over his head and delivering another blow.[44] The boys fled, and later returned to the trailer to cover their crime by starting two fires.[45] Later, Cannon died of his injuries and smoke inhalation.[46]

---

32. *Id.* at 57–68. There was no possibility of parole because Florida had abolished its parole system. *Id.* at 57; *see* FLA. STAT. § 921.001(1)(e) (2003). Therefore, a mandatory life sentence comes with no possibility of parole unless the defendant is granted executive clemency. *See Graham*, 560 U.S. at 56–58.

33. *Id.* at 82.

34. 132 S. Ct. 2455, 2461 (2012).

35. *Id.* at 2464.

36. *Id.* at 2461–62.

37. Ioana Tchoukleva, Note, *Children* Are *Different: Bridging the Gap Between Rhetoric and Reality Post* Miller v. Alabama, 4 CALIF. L. REV. CIRCUIT 92, 95 (2013).

38. 132 S. Ct. at 2462–63.

39. *Id.* at 2462.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

Alabama law required Miller to be initially charged as a juvenile, "but allowed the District Attorney to seek removal" to try him in adult court, which the District Attorney did.[47] Following a hearing, "the juvenile court agreed to the transfer."[48] Due to the severity of the crime, as well as Miller's "mental maturity" and prior juvenile offenses, the Alabama Court of Criminal Appeals affirmed the transfer.[49] The State then charged Miller with "murder in the course of arson", invoking the mandatory minimum punishment, which was life without parole.[50] Miller was found guilty, and was accordingly sentenced to this minimum.[51] The sentence was affirmed by the Alabama Court of Criminal Appeals, which found that life without parole was proportional to the crime and that the fact that the sentence was mandatory did not violate the Eighth Amendment's ban on cruel and unusual punishment.[52] The Alabama Supreme Court denied review, and the United States Supreme Court granted certiorari.[53]

In the companion case, fourteen-year-old Kuntrell Jackson and two other teenage boys robbed a video store.[54] On the way there, Jackson discovered one of the other boys was carrying a gun.[55] As the other boys walked in the store, Jackson decided to stay outside.[56] One of the other boys pointed the gun at the store clerk and demanded she "give up the money;"[57] when Jackson entered the store, he saw the boy "continuing to demand money" while pointing the gun at the clerk.[58] Jackson either said, "[w]e ain't playin'" to the clerk or "I thought you all was playin'" to the other boys.[59] When the clerk still refused, threatening to call the police, the other boy shot and killed her. The three boys then fled with nothing.[60]

Arkansas law gave prosecutors discretion to charge fourteen year olds as adults when they have allegedly committed certain serious offenses.[61] The prosecutor used this discretion and charged Jackson "with capital

47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.* at 2462–63. *See* Ala. Code §§ 13A-5-40(9), 13A-6-2(c) (1982).
51. *Miller*, 132 S. Ct. at 2463.
52. *Id.*
53. *Id.*
54. *Id.* at 2461.
55. *Id.*
56. *Id.*
57. *Id.* (quoting Jackson v. State, 194 S.W.3d 757, 759 (Ark. 2004)).
58. *Miller*, 132 S. Ct. at 2461.
59. *Id.* What he said was disputed at trial. *Id.*; *Jackson*, 194 S.W.3d at 760.
60. *Miller*, 132 S. Ct. at 2461; *Jackson*, 194 S.W.3d at 758–60.
61. *Miller*, 132 S. Ct. at 2461; *see* Ark. Code § 9-27-318(c)(2) (1998).

felony murder and aggravated robbery."[62] Jackson moved to transfer his case to juvenile court, but the trial court denied that motion after considering the circumstances of the crime, a psychiatric examination, and Jackson's juvenile criminal history and prior arrests.[63] The state appellate court affirmed the denial.[64] Subsequently, a jury convicted Jackson of the crimes.[65] The judge sentenced him to life without parole—the "'only . . . possible punishment.'"[66] Jackson did not appeal the sentence, and the Arkansas Supreme Court affirmed his convictions.[67]

After *Roper v. Simmons*,[68] in which the Supreme Court "invalidated the death penalty for all juvenile offenders under" age eighteen,[69] Jackson filed a habeas corpus petition.[70] He argued that mandatory life without parole for a fourteen year old violated the Eighth Amendment, using *Roper* as a basis for support.[71] The circuit court rejected the argument and granted the government's motion to dismiss.[72] While that ruling was undergoing appeal, the Supreme Court decided *Graham v. Florida*,[73] holding that life without parole sentences for juvenile nonhomicide offenders violate the Eighth Amendment.[74] The parties filed briefs on the issue, and the Arkansas Supreme Court affirmed the dismissal of Jackson's petition.[75] The court found that "*Roper* and *Graham* were 'narrowly tailored'" and therefore did not apply in Jackson's case.[76] The two dissenting justices "noted that Jackson was not the shooter and that" there was little evidence he intended to kill anyone.[77] The dissenters also argued that the mandatory sentence ran contrary to the holding in *Graham* that "'age is relevant to the Eighth Amendment, and criminal procedure laws that fail to take defendants' youthfulness into account at all would be

62. *Miller*, 132 S. Ct. at 2461.
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.* (quoting Appeal at 55, Jackson v. Hobbs, 2012 WL 94588 (U.S. 2012) (No. 10-9647).
67. *Id.*; *see Jackson*, 194 S.W.3d at 757.
68. 543 U.S. 551 (2005).
69. *Id.* at 578.
70. *Miller*, 132 S. Ct. at 2461.
71. *Id.*
72. *Id.*
73. 560 U.S. 48 (2010).
74. *Id.* at 82.
75. *See* Jackson v. Norris, 378 S.W.3d 103 (2011), *rev'd sub nom.* Miller v. Alabama, 132 S. Ct. 2455 (2012).
76. *Miller*, 132 S. Ct. at 2461 (quoting *Jackson*, 378 S.W.3d at 106, *rev'd sub nom.* Miller v. Alabama, 132 S. Ct. 2455 (2012)).
77. *Id.* at 2461–62; *see Jackson*, 378 S.W.3d at 107–09 (Danielson, J., dissenting).

flawed.'"[78] Along with Miller's case, the United States Supreme Court granted certiorari, electing to decide the cases together.[79] The Court reversed each case, holding that mandatory life without parole is improper for defendants under age eighteen and that judges must consider the defendant's circumstances and capacity for culpability.[80]

More specifically, the Court held that mandatory life sentences without parole for juvenile offenders constitute cruel and unusual punishment, and therefore violate the Eighth Amendment.[81] The Court based this holding on two strands of precedent.[82] The first strand was based on *Roper* and *Graham*, which barred capital punishment for juveniles and life without parole for juveniles convicted of nonhomicide crimes, respectively.[83] In these cases, the Court found the sentencing procedures in question applied disproportionately severe punishments to a class of offenders that could not be considered as culpable as their adult counterparts. In other words, the severity of the adult punishments outweighed the culpability of juvenile offenders in all cases.[84] The second strand was based on *Woodson v. North Carolina*[85] and *Lockett v. Ohio*,[86] in which the Court found that a sentencing authority must take the characteristics of a defendant and the details of the offense into account before imposing a death sentence.[87] Considering both of these strands of precedent, the Court in *Miller* concluded that juveniles deserve individualized consideration before being sentenced to life without parole.[88] In doing so, the Court made clear that for the purposes of the holding—as in *Roper*[89] and *Graham*[90]—the cutoff to qualify as a juvenile rests at eighteen years of age.[91]

78. *Miller*, 132 S. Ct. at 2462 (quoting *Jackson*, 378 S.W.3d at 109 (Danielson, J., dissenting)).
79. *Miller*, 132 S. Ct. at 2463.
80. *Id.* at 2464.
81. *Id.* at 2475.
82. *Id.* at 2463.
83. *Id.*; Graham v. Florida, 560 U.S. 48, 82 (2010); Roper v. Simmons, 543 U.S. 551, 578 (2005).
84. *Miller*, 132 S. Ct. at 2463–64 (citations omitted).
85. 428 U.S. 280 (1976) (plurality opinion).
86. 438 U.S. 586 (1978).
87. *Miller*, 132 S. Ct. at 2463–64.
88. *Id.* at 2464.
89. Roper v. Simmons, 543 U.S. 551, 578 (2005).
90. Graham v. Florida, 560 U.S. 48, 82 (2010).
91. *See Miller*, 132 S. Ct. at 2475.

B. Social Science and Neurological Background

The first strand of precedent in these three cases—i.e., the Court's view that juveniles as a class are less culpable than their adult counterparts—comes from the fundamental difference in development between children and adults.[92] To support its finding that "children are different,"[93] the Court relied on neurological and social science research, which together has firmly concluded that children under the age of eighteen are less cognitively developed than adults, and therefore less capable of criminal culpability and less deserving of the severest of punishments.[94]

The Court in *Miller* indicated that the science and social science had become stronger since *Graham* and *Roper*, thus further supporting the conclusions in those cases.[95] The trend of changes in social science, psychology, cognitive science, and neuroscience, which now points to differences between juvenileness, adulthood, and a stage in between the two, supports the holdings of these three important cases and indicates the potential for further change.[96]

C. Emerging Adulthood

The research on which the decisions were based largely shares the conclusion that cognitive development continues into a person's mid-twenties, on average.[97] Though the Court decided to place a bright-line rule at eighteen years of age, which runs somewhat contrary to its

---

92. *Id.* at 2464–65 (finding that youth are not as blameworthy as adults; exhibit "transient rashness, proclivity for risk, and inability to assess consequences;" have a lessened '"moral culpability,'" and have a greater chance for rehabilitation and reformation over the years as neurological development occurs); *see also* Berkheiser, *supra* note 2.

93. *See Miller*, 132 S. Ct. at 2469, 2470; *see also* ARNETT, *supra* note 24; Arnett, *supra* note 24.

94. *See Miller*, 132 S. Ct. 2455 *passim*; *see also* Arnett, *supra* note 24.

95. *Miller*, 132 S. Ct. at 2464 n.5 ("The evidence presented to us in these cases indicates that the science and social science supporting *Roper*'s and *Graham*'s conclusions have become even stronger.").

96. *See, e.g.*, ARNETT, *supra* note 24; Arnett, *supra* note 24.

97. *See, e.g.*, ARNETT, *supra* note 24; Arnett, *supra* note 24. *See also* Melissa S. Caulum, Comment, *Postadolescent Brain Development: A Disconnect Between Neuroscience, Emerging Adults, and the Corrections System*, 2007 WIS. L. REV. 729, 731; Grace E. Shear, Note, *The Disregarding of the Rehabilitative Spirit of Juvenile Codes: Addressing Resentencing Hearings in Blended Sentencing Schemes*, 99 KY. L.J. 211, 225 (2010) (footnote omitted) ("Studies indicate that '[t]he human brain continues to mature until at least the age of twenty-five, particularly in the areas of judgment, reasoning, and impulse control.' . . . Recent studies conclude 'that emerging adulthood is a period between adolescence and adulthood which is theoretically and empirically distinct.'") (citing Caulum, *supra*, at 731, 739).

reasoning in the opinions upon closer examination,[98] the decisions and reasoning present several encouraging developments.

That the Court defined the age of majority at eighteen is promising. The Court provided an explicit cutoff for the purposes of the Eighth Amendment, which means that there may be an argument to define the juvenile–majority distinction at eighteen across the board. Moreover, the reasoning behind the decision is promising because it may leave open the possibility for a separate category of rules for defendants between the stages of juvenile and adult. The remainder of this Note will cover these two possibilities in more depth.

D. Changes in Juvenile Justice

The juvenile justice system has changed considerably over time.[99] Relatively recently, the system consisted of various sorts of judicial waiver, automatic transfer, and prosecutorial transfer of juveniles under eighteen.[100] Essentially, the system has allowed for juveniles under the age of eighteen to be transferred to adult court and be tried as adults under various conditions and varying procedures depending on the state.[101] The age of eighteen has been the cutoff for the age of majority in several other circumstances, like *Miranda* rights[102] and homeless assistance.[103] Then, the Court in *Miller* held the cutoff at eighteen years of age,[104] based on findings in psychological and neurological research.[105]

---

98. Buss, *supra* note 20, at 37–41; *see* discussion *infra* Part II.

99. *See, e.g.*, Hillary J. Massey, Note, *Disposing of Children: The Eighth Amendment and Juvenile Life Without Parole After* Roper, 47 B.C. L. REV. 1083 (2006); *see also* Tchoukleva, *supra* note 37, at 98–100 (detailing history of juvenile justice system).

100. *See, e.g.*, Rachel Jacobs, Note, *Waiving Goodbye to Due Process: The Juvenile Waiver System*, 19 CARDOZO J.L. & GENDER 989 (2013); Massey, *supra* note 99; Tchoukleva, *supra* note 37; *see also* Miller v. Alabama, 132 S. Ct. 2455, 2474 (2012).

101. *See* Jacobs, *supra* note 100; *see also, e.g.*, ILL. JUVENILE JUSTICE COMM'N, RAISING THE AGE OF JUVENILE COURT JURISDICTION: THE FUTURE OF 17-YEAR-OLDS IN ILLINOIS' JUSTICE SYSTEM (2013).

102. *See* J.D.B. v. North Carolina, 131 S. Ct. 2394 (2011) (recognizing differences between adults and juveniles as relevant to *Miranda* custody analysis).

103. *See, e.g.*, McKinney–Vento Homeless Assistance Act of 1987, 42 U.S.C. § 11301 *et seq.* (2012); *see also Raise the Age*, JUVENILE JUSTICE INITIATIVE (last updated May 14, 2013), http://jjustice.org/juvenile-justice-issues/raise-the-age/, *archived at* http://perma.cc/2TBL-TUTN.

104. Miller v. Alabama, 132 S. Ct. 2455, 2475 (2012).

105. *See id.* at 2464–66; *see also* Graham v. Florida, 560 U.S. 48 (2010); Roper v. Simmons, 543 U.S. 551 (2005); Mariko K. Shitama, Note, *Bringing Our Children Back from the Land of Nod: Why the Eighth Amendment Forbids Condemning Juveniles to Die in Prison for Accessorial Felony Murder*, 65 FLA. L. REV. 813 (2013); Massey, *supra* note 99; Tchoukleva, *supra* note 37; Jacobs, *supra* note 100.

III. THE COURT DEFINED THE JUVENILE-MAJORITY DISTINCTION AT EIGHTEEN

A. "Children are Different"—But Are Not Treated Differently in Practice

Children are constitutionally different, according to current Eighth Amendment jurisprudence, but this is not reflected in their treatment by the criminal justice system.[106] For as far as the *Miller* line of cases took juveniles, the amount of ground covered is still painfully inadequate.

For the purposes of the Eighth Amendment, defendants under age eighteen at the time of their crimes are fundamentally different from adults according to the Court's reasoning in *Miller* and its predecessors.[107] So at least for serious offenses with severe punishments, like the crimes in *Roper*,[108] *Graham*,[109] and *Miller*,[110] the line between majority and juvenile is eighteen, as set forth by the Supreme Court.

However, for the most part, states are free to implement a juvenile justice system—including courts, correctional facilities, and rehabilitation programs—as they see fit. Beyond the Eighth Amendment challenges decided by the Court—since the Eighth Amendment has been incorporated by the Fourteenth Amendment to apply against the states—the states have exclusive authority to decide the reach of their juvenile courts. This presents a problem—some states have cutoffs before age eighteen that force defendants to be tried as adults for certain crimes.[111] Thus, in some states, defendants that the Supreme Court considers juveniles can be treated, charged, and sentenced as if they were adults for certain types of offenses.[112]

For example, in Missouri, the cutoff for status offenses is eighteen, meaning a seventeen year old may be considered a juvenile for offenses based upon status, like violation of curfew. However, in Missouri, the cutoff for delinquency offenses is seventeen, meaning a seventeen year old will automatically be tried as an adult for an offense like stealing, assault, or homicide. Therefore, in first-degree homicide cases in Missouri, after *Miller*, there is the possibility that a seventeen year old defendant will be

106. Aaron Sussman, *The Paradox of* Graham v. Florida *and the Juvenile Justice System*, 37 VT. L. REV. 381 (2012); Tchoukleva, *supra* note 37, at 102.

107. *See Miller*, 132 S. Ct. at 2475; *Graham*, 560 U.S. at 82; *Roper*, 543 U.S. at 578.

108. 543 U.S. 551 (homicide crime resulting in a death penalty sentence).

109. 560 U.S. 48 (nonhomicide crime resulting in a life without parole sentence).

110. 132 S. Ct. 2455 (homicide crime resulting in a mandatory life without parole sentence).

111. *See, e.g.*, ILL. JUVENILE JUSTICE COMM'N, *supra* note 101.

112. *Id.*

tried as an adult but may not be sentenced under the state's homicide statute because it mandates either a sentence to death or life without parole. For that one year, the statute is unconstitutional as applied to that defendant.

The difference in cutoffs for juvenileness across the states presents problems. Cutoffs below eighteen are a problem because they conflict with the reasoning that "children are different," as the Supreme Court has now espoused on multiple occasions.[113] If children under eighteen really are different, and cannot as a matter of law,[114] or as a matter of course,[115] be held as culpable as adults because they are not capable of forming the same criminal intent as their adult counterparts,[116] this should apply to any crime, not only serious crimes with extreme punishments.

If a child under eighteen is incapable of forming the requisite intent of an adult counterpart to be sentenced to life without parole in a nonhomicide case,[117] for example, then it stands to reason that the child cannot form the criminal intent of an adult mind to commit a less serious crime and be culpable for the full adult punishment. The reasoning is no different for a lesser crime—the constitutional issues associated with sentencing children to the harshest of penalties should exist for any crime committed by a juvenile, even if mild in manner, and the Court's hesitation to jail a child for life should extend to any adult punishment imposed on a child.

In reality, sentences for defendants under eighteen years of age are *per se* more severe than identical or comparable sentences for adults.[118] Being incarcerated for any amount of time is harsher (likely traumatic) for kids,

---

113. Miller v. Alabama, 132 S. Ct. 2455, 2469, 2470; Graham v. Florida, 560 U.S. 48 *passim* (2010); Roper v. Simmons, 543 U.S. 551 *passim* (2005); Tchoukleva, *supra* note 37.

114. *Graham* 560 U.S. at 82; *Roper*, 543 U.S. at 578.

115. *Miller*, 132 S. Ct. at 2469 ("'But given all we have said in *Roper*, *Graham*, and this decision about children's diminished culpability and heightened capacity for change, *we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon*. That is especially so because of the great difficulty we noted in *Roper* and *Graham* of distinguishing at this early age between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.' Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." (emphasis added) (quoting *Roper*, 543 U.S. at 573)).

116. *Id.* at 2475; *Graham*, 560 U.S. at 82; *Roper*, 543 U.S. at 578.

117. *Graham*, 560 U.S. at 82.

118. *See* Tchoukleva, *supra* note 37, at 104. *See also* Andrea Wood, Comment, *Cruel and Unusual Punishment: Confining Juveniles with Adults After* Graham *and* Miller, 61 EMORY L.J. 1445 (2012); Jacobs, *supra* note 100, at 1002–05.

and can sometimes be a great detriment to a child's life if it is extended.[119] Though juvenile detention often includes educational services, holding a child out of school and away from his or her normal environment can be damaging to development, especially when the child is away from his family.[120] Consequently, the systems that see the best results are those that focus on rehabilitation and smooth reentry, rather than long, deterrence-focused sentences.[121] Older teens have needs that cannot be overstated.[122] A seventeen year old offender needs appopriate developmental and school environments in order to develop properly into an emerging adult and eventually a fully formed adult.[123]

Thus, because any sentence is harsh for a child under eighteen years of age, the Court's analysis in *Miller* should extend beyond just those sentences that would be considered harsh for adult offenders. The harshest sentences in their respective order are death, life without parole, and life in prison with the possibility of parole. But other sentences should not be foreclosed simply because they are *less* harsh; that they are harsh when considered on their own should place them under the Court's protection of juvenile defendants laid out in *Miller* and its predecessors.

In the last year, the state of Illinois made a change to its long-standing law defining the jurisdictional reach of its juvenile courts, changing its definition of majority to eighteen years and above.[124] In fact, in doing so, Illinois joined thirty-eight other states that set the minimum age for prosecution in adult court at eighteen.[125] Before the change, the juvenile cutoff was below eighteen in thirteen states.[126] The remaining states stand opposed to the Court's understanding of the majority-age cutoff. Thus, unless these states raise their cutoffs to at least age eighteen, these states stand opposed to the Eighth Amendment.

---

119. *See, e.g.*, Jacobs, *supra* note 100, at 1002–05; Tchoukleva, *supra* note 37, at 104; Wood, *supra* note 118.

120. Jacobs, *supra* note 100, at 1002–05.

121. *See* MARY ANN SCALI ET AL., NATIONAL JUVENILE DEFENDER CTR. & CENTRAL JUVENILE DEFENDER CTR., MISSOURI: JUSTICE RATIONED, AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF JUVENILE DEFENSE REPRESENTATION IN DELINQUENCY PROCEEDINGS (2013).

122. *See id.*

123. *See id.*

124. *Raise the Age*, *supra* note 103.

125. *Id.*

126. *See id.* That the age is below eighteen in a minority of states does not make the issue insignificant. Juvenile defendants and other youth in the states with lower ages face very real risks that should be addressed by a national adoption of eighteen as the cutoff age for juvenile jurisdiction.

IV. THE JUVENILE-MAJORITY DISTINCTION SHOULD BE EIGHTEEN NATIONWIDE

Because the Court explicitly held that eighteen should be the cutoff between childhood and adulthood, practically assumed this to be true without pause,[127] and then bolstered that definition with social science and neurological research,[128] it stands to reason that eighteen is the cutoff for the definition of juvenile under the Constitution. This is true for the harsh penalties in the trio of Eighth Amendment cases, but it should be extended to other cases.

Thus, the juvenile–majority cutoff should be eighteen in every state. First, the Court may already have dictated this in its trio of decisions.[129] In *Miller*, *Graham*, and *Roper*, when the Court held that juveniles deserve additional protection under the Eighth Amendment, it used eighteen as the age of juvenileness.[130] In doing so, the Court implicitly and explicitly held that juvenileness, as a constitutional matter, ends on a person's eighteenth birthday.

Moreover, because the defendants in *Graham* and *Miller* were not even seventeen at the time of their crimes,[131] the Court's holdings in these two cases further support the argument that the Court held eighteen to be the cutoff for the definition of juvenileness. That is, the Court could have held that fourteen was too young to be sentenced as an adult in *Miller*,[132] or that sixteen was too young in *Graham*,[133] but instead held in both that a cutoff below eighteen was too low.[134] Whether the Court did so consciously or not,[135] these holdings must represent the Court's belief that eighteen is when childhood ends.[136] Compellingly, the Court in *Roper* spoke in

127. Miller v. Alabama, 132 S. Ct. 2455 (2012).

128. *Id.*

129. *See Miller*, 132 S. Ct. 2455; Graham v. Florida, 560 U.S. 48 (2010); Roper v. Simmons, 543 U.S. 551 (2005).

130. *Miller*, 132 S. Ct. at 2460; *Graham*, 560 U.S. at 82; *Roper*, 543 U.S. at 578.

131. *Miller*, 132 S. Ct. at 2461–62; *Graham*, 560 U.S. at 53–54. The defendant in *Roper* was seventeen at the time of his crime, however. *Roper*, 543 U.S. at 556.

132. Both defendants in *Miller* were fourteen years old at the time of their crimes. *Miller*, 132 S. Ct. at 2461–62.

133. The defendant in *Graham* was sixteen at the time of his crime. *Graham*, 560 U.S. at 53–54.

134. *Miller*, 132 S. Ct. at 2460; *Graham*, 560 U.S. at 82.

135. Generally, we assume the Court makes decisions intentionally. Here, even if the Court decided arbitrarily, its holding represents a belief, conscious or unconscious, that eighteen is the end of juvenileness. If the decision was arbitrary, it is because the Court arguably should have gone further (and chosen a higher cutoff), according to the psychology forming the basis of the three decisions. Buss, *supra* note 20, at 36 (discussing the research in relation to *Roper*); *see* discussion *infra* Part II.

136. *See Miller*, 132 S. Ct. at 2460; *Graham*, 560 U.S. at 82.

explicit terms about placing the cutoff at age eighteen, acknowledging that "[eighteen] is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line . . . ought to rest."[137]

Also, the Court in *Miller*, *Graham*, and *Roper* spoke of the various defendants in terms of youth and juvenileness,[138] despite the fact that the defendants were classified as adults and tried as such in their respective states.[139] In doing so, the Court explicitly classified the defendants as juveniles because they were under eighteen.[140] This is especially obvious in *Roper* because the defendant was seventeen at the time of his crime,[141] and the Court still referred to him as a "juvenile" throughout.[142] Moreover, while the psychological research indicates that cognitive development lasts until past age eighteen,[143] the Court decided consciously to choose a cutoff of eighteen.[144]

If the Court has not spoken explicitly enough, then implementation of a uniform definition of juvenile at eighteen would take an explicit Supreme Court case,[145] a mandate by Congress,[146] or a sea change of state laws in the remaining states with cutoffs below eighteen.[147] In either case, the Court—having spoken in *Miller*, *Graham*, and *Roper*—should prompt one

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

138. *Miller*, 132 S. Ct. 2455 *passim*; *Graham*, 560 U.S. 48 *passim*; *Roper*, 543 U.S. 551 *passim*.

139. *Miller*, 132 S. Ct. at 2461–62; *Graham*, 560 U.S. at 53; *Roper*, 543 U.S. 557.

140. *Miller*, 132 S. Ct. at 2461–63; *Graham*, 560 U.S. at 82; *Roper*, 543 U.S. at 578.

141. *Roper*, 543 U.S. at 556.

142. *Roper*, 543 U.S. 551 *passim*.

143. *See*, *e.g.*, Arnett, *supra* note 24; ARNETT, *supra* note 24; *see also* discussion *infra* Part II.

144. *Miller*, 132 S. Ct. at 2460; *Graham*, 560 U.S. at 82; *Roper*, 543 U.S. at 574 ("Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules . . . however, a line must be drawn. . . . [Eighteen] is the point where society draws the line . . . . It is, we conclude, the age at which the line . . . ought to rest.").

145. *See, e.g.*, Berkheiser, *supra* note 2, at 514–17; Craig, *supra* note 2, at 409–10; Lerner, *supra* note 2 at 39.

146. An explicit piece of legislation might be unconstitutional if it would infringe upon the states' police powers or rights to create juvenile court systems independently.

147. Even if the law itself would be outside the purview of Congress, the legislature could attempt to use a different means of coercion to get the states to pass identical laws. A classic example of this was the National Minimum Drinking Age Act, which coerced the states to pass laws to make the legal drinking age twenty-one by threatening to withhold ten percent of their federal highway funding—a significant portion—if they did not comply. National Minimum Drinking Age Act of 1984, 23 U.S.C. § 158 (2012). The Supreme Court found the Act to be a valid and constitutional use of Congress's spending powers. South Dakota v. Dole, 483 U.S. 203 (1987).

Otherwise, there are groups such as the National Juvenile Defender Center or the Department of Justice that could participate in encouraging the spread of reform in the states' juvenile justice systems.

of these to occur; the societal and constitutional cutoffs of juvenileness at the very least implicitly, if not explicitly, rest at eighteen.[148]

Though *Miller*, *Graham*, and *Roper* concerned serious crimes and sentences,[149] the Court did not qualify its language in holding eighteen as the cutoff for the definition of juvenileness under the Eighth Amendment.[150] Therefore, a broader definition of juvenileness is preferrable to the narrow holdings in these cases. Sentences imposed on juveniles carry heavy weight, even if they are not as extreme as in these three cases.

Placing the juvenile-majority distinction at eighteen should have positive effects, such as eliminating automatic waiver for certain defendants under eighteen,[151] which will solve many of the problems still facing juvenile defendants today.[152] Juvenile justice systems in some states and areas are horrendous.[153] The problems in the system amount to direct violations of due process for the vast majority of defendants.[154] The problems stem in part from a lack of uniformity and a lack of guidance.[155] A nationally consistent definition of juvenileness could begin to provide that uniformity and guidance, initating the movement for creating a better system. Moreover, a consistent definition of juvenileness would avoid the difficult questions faced when a child below age eighteen commits a crime proscribed by an adult statute carrying strictly adult punishments, e.g. mandatory life without parole, as well as the difficulty in sentencing defendants under eighteen who are automatically tried as adults while still protected by the *Miller* line of cases.[156] A nationally consistent definition

148. *Miller*, 132 S. Ct. at 2475; *Graham*, 560 U.S. at 82; *Roper*, 543 U.S. at 578. The Court's findings will at least have an impact on precedent, but should arguably spur Congress to adopt a definition of juvenileness at eighteen, consciously or otherwise, or the states to adopt the societal definition in their various juvenile court systems.

149. *Miller*, 132 S. Ct. 2455 (mandatory life without parole for homicide offense); *Graham*, 560 U.S. 48, (life without parole for nonhomicide offense); *Roper*, 543 U.S. 551 (death penalty).

150. *Miller*, 132 S. Ct. 2455; *Graham*, 560 U.S. 48; *Roper*, 543 U.S. 551.

151. *See* Jacobs, *supra* note 100 at 1010 n.201.

152. *See, e.g.*, Jacobs, *supra* note 100; Tchoukleva, *supra* note 37.

153. SCALI ET AL., *supra* note 121 (discussing the issue mostly in the context of Missouri).

154. *Id.*

155. *Id.*

156. Juvenile defendants and their attorneys still face real challenges, even after *Miller*, *Graham*, and *Roper*. In advocating for Eighth Amendment protection, juvenile defendants' counsel must wade through the possible avenues that the court may take, when it is entirely unclear what is proper. For example, counsel might be forced to argue against a statute in light of *Miller* or hope that the judge feels the defendant is actually not mature enough to have understood his or her actions. It's unclear exactly how a judge is supposed to decide whether a defendant is fully culpable as an adult or what evidence a defendant's counsel must present.

of juvenile could begin to fix many of the problems facing young defendants.

A uniform definition of juvenile would address a multitude of issues arising from the disarray in juvenile systems across the country. For one, it would facilitate oversight of due process and fairness across states. Uniformity in certification for all types of offenses would achieve these goals as well. If the cutoff of eighteen applied to status and delinquency offenses, the system would exhibit consistency and fairness while reducing confusion.[157]

V. PROPOSING EMERGING ADULTHOOD: A STAGE BETWEEN JUVENILENESS AND ADULTHOOD

A. Going Beyond Eighteen

Eighteen may be considered too soon for full adulthood. For serious crimes with serious punishments,[158] consideration of the mitigating characteristics of youth should not stop at such an arbitrary time as an individual's eighteenth birthday.[159] Indeed, if a child under eighteen years old is given special consideration due to the child's youthful

157. *See, e.g.*, ILL. JUVENILE JUSTICE COMM'N, *supra* note 101. In this seventy-two-page report, the Illinois Juvenile Justice Commission studied the issue and decided that Illinois should raise its age cutoff of juvenile court jurisdiction to eighteen. *Id.*

158. This Note, mainly because it utilizes the cases to analyze the Court's Eighth Amendment jurisprudence regarding juveniles and young adults, focuses primarily on the crimes and sentences encountered in *Roper* (homicide crime and death sentence), *Graham* (nonhomicide crime and life without parole sentence), and *Miller* (homicide crime and mandatory life without parole sentence). However, these are not the only potential crimes or sentences this Note is intended to contemplate; the three cases are simply the foundations of this Note and the sources of current Eighth Amendment jurisprudence, and therefore the best illustrations.

Other sorts of issues to which this Note may apply include three strike laws as applied to defendants between the ages of eighteen and twenty-five. The extreme harshness of three strike laws may place them on a similar level of severity to the sentences mentioned above.

One federal example of a three strikes law is 18 U.S.C. § 3559 (2012). For more on three strikes laws, and a discussion of their favorability and their overall utility, see, for example, Linda S. Beres & Thomas D. Griffith, *Do Three Strikes Laws Make Sense? Habitual Offender Statutes and Criminal Incapacitation*, 87 GEO. L.J. 103 (1998).

159. Buss, *supra* note 20, at 39 ("The Court's suggestion that a categorical line of eighteen accurately divides the mature from the immature, along the relevant dimensions, is particularly troubling, because age eighteen may not even be the right place to draw the line for the most typical child.").

Professor Buss discusses another complication not reached by the Court in *Roper*: "Further complicating the picture, the pace of maturity appears to diverge predictably and consistently between girls and boys . . . ." *Id.* at 39–40. The issue of gender differences in development is beyond the scope of this Note. For more discussion on the impact of *Roper* on gender differences, which may be analogized to current jurisprudence after *Miller* and *Graham*, see *id.*

circumstances,[160] such circumstances that remain after age eighteen should warrant special consideration.[161] Those circumstances that warrant leniency, and did warrant leniency in Eighth Amendment analyses, do not magically disappear on the individual's eighteenth birthday.

B. "Children Are Different," and Emerging Adults Are, Too

The psychological research cited by the Court, and the cases themselves, indicate that eighteen is not the end of psychological and neurological development.[162] Rather, the research reveals that the brain develops well into a person's twenties.[163] Thus, the analysis for children—that they are "different" from adults, unable to fully form the same level of culpability, and prone to bouts of poor decision making—should apply to those under twenty-five, as well. Because some brains develop past twenty-five, and some finish developing before that time, a bright-line rule of leniency prior to that age could present problems. Some potential pitfalls that could come from a bright-line rule giving an automatically reduced sentence for those under twenty-five include the possibility that some defendants with full cognitive capabilities could be sentenced with more leniency than is warranted by their circumstances. In order to avoid these pitfalls, sentencing emerging-adult offenders would likely need to follow a *Miller* framework, such as consideration of youthful characteristics, cognitive development, and capacity for culpability and rehabilitation.[164]

C. Emerging Adulthood as a Life Phase for Sentencing

Eighteen indeed is an arbitrary cutoff in the context of these cases.[165] If "children are different" because the human brain does not fully develop until around age twenty-three to twenty-five,[166] then basing the cutoff for

160. Miller v. Alabama, 132 S. Ct. 2455 *passim* (2012); Graham v. Florida, 560 U.S. 48 *passim* (2010); Roper v. Simmons, 543 U.S. 551 *passim* (2005).

161. *See* Arnett, *supra* note 24.

162. *See, e.g.*, Arnett, *supra* note 24; *Miller*, 132 S. Ct. 2455 *passim* (2012); *Graham*, 560 U.S. 48 *passim* (2010); *Roper*, 543 U.S. 551 *passim* (2005).

163. *See* ARNETT, *supra* note 24; Arnett, *supra* note 24.

164. *See* discussion *infra* Part V.F.

165. *See* Buss, *supra* note 20, at 40–41.

166. *See* Laurence Steinberg et al., *Are Adolescents Less Mature than Adults?: Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop"*, 64 AM. PSYCHOLOGIST 583 (2009); Arnett, *supra* note 24; *see also, e.g.*, Buss, *supra* note 20, at 39 ("Much of the developmental research suggests that the qualities highlighted by the Court, described together as psycho-social immaturity, continue to apply to individuals into their twenties, even mid-twenties or beyond.").

the purposes of the Eighth Amendment at eighteen makes little sense.[167] It seems this way of thinking is based on antiquated views, when eighteen was traditionally the time when a person became an adult, but this thinking is precisely what the findings on which *Miller* and its predecessors relied found erroneous.[168]

The Eighth Amendment jurisprudence likely stems from the need to hedge—keeping the cutoff at the conservative age of eighteen rather than twenty-three or twenty-five ensures that fully developed and culpable defendants do not receive softer penalties than they deserve.[169] However, the social and cognitive science findings show that the human brain is not developed until the mid-twenties; thus, the cutoff is not eighteen.[170] Therefore, the Eighth Amendment cutoff seemingly does not follow its bases in research.[171] As Professor Buss explains, there are many other reasons that eighteen is the strict definition of juvenileness.[172]

---

167. *See* Buss, *supra* note 20.

168. *See, e.g.*, *id.*; Arnett, *supra* note 24; Steinberg et al., *supra* note 166.

169. Also, if the "safe," conservative estimate of eighteen ensures that no guilty party falls through the cracks, that rationale is faulty—an innocent or less culpable person falling through the cracks is a worse outcome for society than failing to sentence a culpable one strongly enough. 4 WILLIAM BLACKSTONE, COMMENTARIES *352 ("[T]he law holds that it is better that ten guilty persons escape, than that one innocent suffer.").

170. *See, e.g.*, Buss, *supra* note 20; Arnett, *supra* note 24; Steinberg et al., *supra* note 166, at 592.

171. Buss, *supra* note 20.

172.

> "For the reasons we have discussed, however, a line must be drawn. . . . The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest."
>
> The Court's retreat to more conventional, law-controlled analysis when justifying its refusal to draw the line between childhood and adulthood any later than eighteen reads, at first, like a rejection of all the developmental analysis that came before it in the opinion. Less schizophrenically, the Court might be suggesting that age eighteen is the (current) legally defined boundary between childhood and adulthood, and that its developmental analysis appropriately applies only to legal distinctions within the legally defined category of childhood. Put another way, the law might be understood to define the space within which developmental analysis is permitted. Similarly, the law might further limit the distinctions the developmental analysis legitimately can explore, even within that space (so the correlation between life experience and development might be legitimately explored, but not the correlation between gender, or race, and development).
>
> . . . [T]here is no evidence that *Roper* is actually taking [a law-centered] approach. The thrust of the analysis clearly focuses on the developmental findings, not on legal or cultural conventions. More plausibly, the Court invoked this brief generic language about legal conventions and the need for bright line rules to avoid confronting the difficult and complex implications of its developmentally driven approach.

Id. at 40–41 (first ellipsis in original) (quoting Roper v. Simmons, 543 U.S. 551, 574 (2005)). For more on these implications of the Court's approach in *Roper*, as well as further discussion of the above issues, see Buss, *supra* note 17.

D. Jeffrey Jensen Arnett's Theory of "Emerging Adulthood"

In May 2000, Jeffrey Jensen Arnett, a psychology professor and expert devoted to the study of juveniles and young adults, published an article in *American Psychologist*[173] detailing his proposal to recognize a stage of the human life span between adolescence and adulthood, called "emerging adulthood."[174] Arnett has since written several additional books and articles and edited volumes on emerging adulthood;[175] as such, the topic has remained his main area of study.[176] Emerging adulthood has grown as a psychological and cognitive theory since its inception and continues to gain recognition.[177]

The stage of emerging adulthood is the period experienced by young adults from age eighteen to twenty-five.[178] This period of life is very different from both adolescence and full adulthood.[179] Arnett's proposition emerges from the implications of these notable distinctions.[180] This distinction of emerging adulthood seems to follow common sense. So-called "twenty-somethings" identify with very different sets of characteristics than teenagers and "thirty-somethings."[181] "Young

---

173. *American Psychologist* is the official peer-reviewed academic journal of the American Psychological Association. *Publications*, AM. PSYCHOLOGICAL ASS'N, http://www.apa.org/pubs/journals/ amp/ (last visited Mar. 8, 2015), *archived at* http://perma.cc/M2ZQ-YA39.

174. Arnett, *supra* note 24, at 469–80.

175. *See, e.g.*, JEFFREY JENSEN ARNETT, ADOLESCENCE AND EMERGING ADULTHOOD: A CULTURAL APPROACH (4th ed. 2010); JEFFREY JENSEN ARNETT ET AL., DEBATING EMERGING ADULTHOOD: STAGE OR PROCESS (Jeffrey Jensen Arnett ed., 2011); ARNETT, *supra* note 24; ADOLESCENT PSYCHOLOGY AROUND THE WORLD (Jeffrey Jensen Arnett ed., 2012); EMERGING ADULTS IN AMERICA: COMING OF AGE IN THE 21ST CENTURY (Jeffrey Jensen Arnett & Jennifer Lynn Tanner eds., 2006); INTERNATIONAL ENCYCLOPEDIA OF ADOLESCENCE (Jeffrey Jensen Arnett ed., 2007).

The bulk of Arnett's work is involved in developing and studying the concept of emerging adulthood, which has gained traction since its inception. Currently, the concept is gaining recognition and may become a widely accepted phase of life in forthcoming literature. The American Psychological Association, for example, seems to endorse it, since Arnett has published in *American Psychologist* on multiple occassions.

176. *About Jeffrey Jensen Arnett*, http://www.jeffreyarnett.com/about.htm (last visited Mar. 8, 2015), *archived at* http://perma.cc/HTQ7-AMLR.

177. *Id.*

178. Arnett, *supra* note 24, at 469.

179. *Id.*

180. *Id.*

181. *Id.* People from age eighteen to twenty-five experience a period of life where they become more independent and begin to figure out their lives and goals. For the most part, they do not have children, do not live in their own home, and do not have sufficient income to become fully independent. They are still in school and do not have families of their own yet. *Id.*

The vast majority of those under eighteen, on the other hand, embody the traditional view of adolescence—they live with their parents and do not have the freedom associated with being over age eighteen. Those over age twenty-five (roughly) are the opposite: they embody the traditional view of

adulthood" as a term fits more accurately with the latter group,[182] though it is generally used to describe any of the three or a combination.[183]

These distinctions are based on more than just common sense, however. Indeed, social and psychological research has abounded in the time since Arnett coined the term "emerging adulthood." Those between age eighteen and twenty-five are neurologically and cognitively different from those both younger and older than these parameters. Based on the rationale for leniency for juveniles, the law should borrow Arnett's characterization of this life phase and implement emerging adulthood for sentencing purposes.

E. Implications for the Law

This distinct life stage has implications beyond the need for more precise terminology. During emerging adulthood, the brain is still developing.[184] This stage is part of the period of development on which the scientific bases of *Miller* and its predecessors focused.[185] Since the Court found that "children are different" for the purposes of the Eighth Amendment, because their brains have not fully developed to the point of adulthood and they are therefore incapable of being as culpable as adults,[186] emerging adults should also be treated differently than fully developed adults.[187] If juveniles exhibit characteristics that are meant to be protected by the law, including undeveloped cognitive function,[188] then emerging adults who retain these characteristics should retain the same protections.[189] To shed protections when the emerging adult still needs

---

adulthood—getting married, having families, and settling into established careers. The time between these two stages is vastly different from each respective statge. *Id.*

For more discussion and support on this topic, see ARNETT, *supra* note 24.

182. Arnett, *supra* note 24.

183. *Id.*

184. EMERGING ADULTS IN AMERICA, *supra* note 175.

185. *See* Arnett, *supra* note 24.

186. *Miller*, 132 S. Ct. 2455, 2469, 2470 (2012); *Graham*, 560 U.S. 48 *passim* (2010); *Roper*, 543 U.S. 551 *passim* (2005).

187. *See* Arnett, *supra* note 24; Shear, *supra* note 97, at 225 ("Thus, juveniles reaching the age of majority may be more aptly considered 'emerging adults' rather than adults . . . .").

188. *See* Arnett, *supra* note 24; *see also* Shear, *supra* note 97, at 225 (quoting Caulum, *supra* note 97, at 731, 739) ("Studies indicate that '[t]he human brain continues to mature until at least the age of twenty-five, particularly in the areas of judgment, reasoning, and impulse control.' . . . Recent studies conclude 'that emerging adulthood is a period between adolescence and adulthood which is theoretically and empirically distinct.'").

189. *See* Shear, *supra* note 97, at 225 ("Juvenile codes promote rehabilitative sanctions, and as juvenile offenders retain the very characteristics the codes seek to protect, state courts must adhere to the ideological principles of those juvenile codes.").

them, simply because he or she has reached age eighteen, is arbitrary and inconsistent with the purpose of the protections themselves.

F. The Law Should Implement Emerging Adulthood for Sentencing Purposes

The landscape of Eighth Amendment jurisprudence and the emergence—not only in the fields of psychology and science, but in the law[190]—of emerging adulthood as a distinct stage of the human life ignite a call for a change in sentencing procedures for criminal defendants under the age of twenty-five.

G. Implementation

When a defendant is under eighteen, the protections of *Roper* and *Graham* are automatic.[191] But for emerging adults, the analysis for sentencing should follow *Miller*,[192] albeit with a higher chance that defendants are eligible for full sentencing (because the bar is set so high in *Miller*).[193] That is, the sentences in question should no longer be mandatory for emerging adult defendants, and the court should give consideration of their youthful characteristics retained from their childhood.[194]

Judges should be *required* to consider a defendant's characteristics, the circumstances of the defendant's involvement, and the nature of the crime itself when the defendant is in the emerging adulthood stage between the ages of eighteen and twenty-five.[195] These protections would be less stringent and protective than *Miller*, yet more protective than adult sentencing procedures. Therefore, emerging adult defendants would undergo sentencing similar to juvenile sentencing under *Miller*.[196]

The implementation of emerging adulthood as a stage of the human life cycle in sentencing procedures could be rather simple—potentially simpler

190. 132 S. Ct. at 2475.

191. Graham v. Florida, 560 U.S. 48, 82 (2010); Roper v. Simmons, 543 U.S. 551, 578 (2005).

192. *See Miller*, 132 S. Ct. at 2475. Essentially, an emerging adult would be examined in terms of the cognitive capacity for rehabilitation and culpability, just like *Miller* ascribed for juveniles. *See id.*

193. *See id.* at 2469.

194. *See* Caulum, *supra* note 97.

195. This category includes age twenty-four, twenty-three, twenty-two, or anywhere around those ages, since those are the main ages where cognitive development culminates. *See* Arnett, *supra* note 24.

196. *See Miller*, 132 S. Ct. at 2475.

than that of defining juvenileness at eighteen.[197] It only takes one Supreme Court case in which the Court follows its reasoning and the social science, cognitive science, neuroscience, and psychology that laid the foundation for those decisions. In doing so, the Court should rule that research and precedent dictate that there should be a stage of life between childhood and adulthood during which a judge must consider an emerging adult offender's circumstances and youthful characteristics.

A major issue with this approach, and the likely reason the Court chose eighteen as its cutoff,[198] is that it is difficult to find objective criteria on which to base decisions. That is, sentencing judges must be afforded a great deal of discretion to implement this system.[199] This is especially true when the range of years and development can vary considerably, as is true in the emerging adulthood phase.[200] This makes it difficult to decide objectively whether an emerging adult defendant is capable of culpability like that of an adult counterpart. However, the difficulties with implementing these criteria are on par with *Miller*'s framework, and when judges are given wider discretion and fewer restrictions than *Miller* (which essentially instructed judges to find a juvenile defendant fully culpable only in the rarest occasions), the task becomes easier rather than more difficult.

In the end, the decisions and considerations may end up being subjective because there is either an objective line to be drawn at a certain age or a subjective consideration of characteristics by a judge. A middle ground may be difficult or impossible to find, since the range of different people, especially at the emerging adulthood phase, makes it nearly impossible to formulate an objective test other than age. Moreover, judges are not psychologists and are very much products of their past experiences and environments. Therefore, judges should be educated about emerging adulthood and how to follow proper sentencing procedures for defendants within this group.[201]

---

197. *See* discussion *supra* Part I.

198. *See* Buss, *supra* note 20, at 37–41; *see also* discussion *supra* Part I.

199. However, the holding in *Miller* exhibited no hesitation to toe this line for offenders under the age of eighteen. *Miller*, 132 S. Ct. 2455. There is little reason emerging adults should be more difficult.

200. *See* Arnett, *supra* note 24.

201. For example, a judge would not automatically know which defendants have developed quickly and which have not. This difficult question is much more easily answered by having a set cut-off age, such as eighteen. *See* Buss, *supra* note 20, at 37–41. Moreover, if the cutoff was higher, there might be danger of excessive leniency. *See* discussion *supra* Part II.

To combat these potential issues, the new framework adapted from *Miller* for emerging adults should establish a much lower bar. That is, whereas it is very uncommon for juveniles to be sentenced as adults after *Miller*, it might be much more common for emerging adults to fulfill adulthood criteria and therefore be sentenced as adults. Transferring the *Miller* framework to emerging adults makes the framework much simpler to implement.[202]

VI. CONCLUSION

In summary, historically, there has not been a uniform, legal definition of juvenile. *Miller*,[203] *Graham*,[204] and *Roper*[205] all support the adoption of a national, uniform definition: a juvenile is anyone under the age of eighteen. If "children are different," as the Court says,[206] then they should be treated differently.[207] Moreover, the definition of "children" should be established uniformly. One definition would solve some of the major issues facing juvenile defendants in the various juvenile justice systems across the country.[208] Implementing that definition would not be a panacea, but it should go a long way toward promoting uniformity, fairness in treatment, and due process in these systems, which would establish a path to reform. It would also make *Miller* easier to implement because, combined with emerging adulthood as a sentencing phase, the *Miller* framework would apply to emerging adults, would not have as high of a bar, and should ultimately fix the consequences and issues stemming from *Miller* as it currently stands.[209]

Additionally, courts should recognize emerging adulthood as a stage between juvenileness and adulthood. If recognized by courts, this would help achieve the goals discussed by the Court in its reasoning in *Roper*, *Graham*, and *Miller*. Juveniles may be different according to established

202. It is no surprise that *Miller* on its own would and will be very difficult to implement, and especially to implement fairly and consistently. *See* Lerner, *supra* note 2, at 30–31. This is partly because the framework is based on subjective criteria, whereby judges must somehow decide based on very limited evidence whether juvenile offenders have adult capacities to be fully culpable for crimes, or on the other hand, juvenile capacities for rehabilitation and change.

203. 132 S. Ct. at 2475.

204. 560 U.S. 48, 82 (2010).

205. 543 U.S. 551, 578 (2005).

206. *Miller*, 132 S. Ct. at 2469, 2470; *Graham*, 560 U.S. 48 *passim; Roper*, 543 U.S. 551 *passim*.

207. *See, e.g.*, Berkheiser *supra* note 2; Tchoukleva, *supra* note 37.

208. See SCALI ET AL., *supra* note 121, for a discussion on the juvenile systems in the United States, particularly in the state of Missouri, and the problems that face juvenile offenders within the system.

209. *See* Lerner, *supra* note 2.

norms, but, according to scientific research in several fields, emerging adults are different as well. It is also logical in terms of common sense: we know that the very late teen years and early twenties are different than any other time in life, and people undergo almost as much change as they do throughout early childhood to adolescence (though not as much physically). The brain is still developing until the age of twenty-five. If juveniles deserve special consideration because they lack the cognitive development to be held as culpable as adults who commit the same crimes, then emerging adults should also receive some degree of special consideration. Arguably, this consideration may not need to be as drastic, since emerging adults are at least further along in their cognitive development than juveniles.

On the other hand, if this emerging adulthood age group is given a greater degree of leniency than fully formed adults, it may have the potential to allow for some young offenders who deserve punishment to avoid responsibility for their actions.[210] Thus, such a change should not be taken lightly and should not be drastic or sudden. Emerging adults should be sentenced according to a similar framework as that used in *Miller* to remedy this potential consequence.[211]

Another consequence of recognizing emerging adulthood might be that those in this age group might feel or experience setbacks from being placed in what may be seen as a new category of youth rather than that of adulthood. In other words, if such a stage of life were more nationally recognized, emerging adults might not be considered "adults" for some purposes and therefore might not fully enjoy the advantages of adulthood. After the legal age to drink alcohol was raised to age twenty-one from age eighteen in every state,[212] the age of twenty-one arguably became the benchmark for true adulthood. This is mainly because those between eighteen and twenty-one years of age were considered too irresponsible to drink alcohol,[213] and not trustworthy enough to refrain from driving across state borders to drink legally.[214] Emerging adults could experience a similar consequence, whereby the true stage of adulthood would be

210. *See* Miller v. Alabama, 132 S. Ct. 2455, 2475 (2012).

211. *Id.*

212. *See* South Dakota v. Dole, 483 U.S. 203 (1987).

213. *Id.* at 208–09 (finding that forcing states to raise the drinking age was within Congress's spending powers).

214. *Id.* at 209 (citing PRESIDENTIAL COMM'N ON DRUNK DRIVING, FINAL REPORT 10–11 (1983)) (reasoning that variations in the drinking age between states gave an incentive to drink and drive across state borders, because border states had lower drinking ages and would encourage traveling across state lines for more favorable (lower) alcohol age limit laws).

considered by society to begin at age twenty-five. Having a legal and societal definition of another benchmark, this could essentially create another stage of childhood and make life more challenging for young adults who are fully formed and wish to be taken seriously. However, this problem is not very pressing; the drinking age is a rigid limit, while the limit of emerging adulthood is flexible. Also, the difference in the stages is not an arbitrary distinction, as it is based on psychological and social science research. If the differences really do exist, they are minimal in comparison to the benefits achieved by recognizing the phase of development.

Kevin J. Holt[*]

---

* J.D. (2015), Washington University School of Law; B.A. (2012), University of Michigan. Thank you to Professor Mae C. Quinn for your invaluable mentorship, inspiration, and advice, for this Note and beyond; and to my colleagues on the *Washington University Law Review*, especially Rebecca Morton, Ellen Eichner, David Allen, Jonathan Clow, Jonathan Adair, Nicole Berkowitz, and Patrick Paterson, for all your incredible help and advice on this Note and for putting up with me as an author. Lastly, thank you so much to my loving and supportive family, friends, and my fiancée Meredith Schlacter—I could not be where I am without all of you behind me.