

***Execution of Youth under Age 21 on the Date of Offense:
Ending with a Bang or a Whimper?****

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Consistent with the scientific evidence that proves that adolescent brain development continues well into the third decade of life, the Supreme Court may be foreshadowing the day when an actual or de facto categorical ban will bar the death penalty for offenders who were under the age of 21 years old on the date of the offense. For almost two decades, death sentences and executions of such persons have been in steep decline – in absolute numbers and in geographical concentration. Over the same period, the minority percentage of those impacted has increased. The author joins the American Bar Association and other voices that have called for a categorical ban on execution of persons who were under the age of 21 years old at the date of offense.

Execution is already prohibited for persons under 18 at the time of the offense, people with intellectual disability, some people with mental illness, and people who did not commit a murder.¹ Perhaps, with a “bang,” the next categorical exclusion to be announced by the Supreme Court will be abolition of the practice of executing people for crimes they committed when they were under the age of 21 years old. Alternatively, perhaps the dramatic decline in the number of such executions and the increasing geographical concentration of the practice will, in a “whimper,” culminate in a natural death of the practice.

In 2005, in *Roper v. Simmons*, the U.S. Supreme Court issued its landmark opinion barring execution of youth who were under the age of 18 at the time of their crimes, even for murder.² The Court relied upon an overwhelming body of scientific literature demonstrated that adolescents are significantly less culpable than their adult counterparts. The *Roper* Court noted that the cut-off point of age

18 years old was somewhat arbitrary, because “[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18.”³ Because Christopher Simmons was only 17 years old, the Court did not need to decide where society should draw the line. Justice Kennedy observed that because the age of 18 is “the point where society draws the line for many purposes between childhood and adulthood,” that was “the age at which the line for death eligibility ought to rest.”⁴

In 2010 and again in 2012, the Supreme Court built on the *Roper v. Simmons* rule by barring automatic, severe imprisonment penalties for adolescents who were under the age of 18 years old on the date of the offense. In 2010, in *Graham v. Florida*, the Supreme Court struck down life imprisonment sentences for non-homicide crimes when committed by individuals under the age of 18 years old.⁵ In 2012, in *Miller v. Alabama*, the U.S. Supreme Court recognized that “developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds”—for example, in “parts of the brain involved in behavior control.”⁶ Declaring that “the science and social science supporting *Roper*’s and *Graham*’s conclusions have become even stronger,” the Supreme Court struck down automatic, mandatory life imprisonment sentences for juveniles, even when they had committed a murder.⁷ Neither *Graham* nor *Miller* involved a youth between the ages of 18 and 21 at the time of the offense. But both cases have made it more likely that eventually, the high Court will revisit its *dicta* in *Roper* that drew the line at age 18 years old.

As that day draws nearer, everyone wants the same thing: facts. Facts about how many people have been executed for murders committed as a youth over the age of 18; facts about which states are executing these people; facts about their race; facts about whether their crimes reflect the transient qualities of youth or share common characteristics; facts about sentencing.

Even as these words are being written, those facts are being developed. All over the country, researchers are meticulously compiling and analyzing data on

the sentencing and execution of youth who were under the age of 21 years old at the time of the offense. As we await completion of such research and issuance of court rulings where the practice is facing constitutional challenge, this is a good time to take stock of the scientific developments, the legal landscape, and the prevalence of death penalty practices affecting youth who were under the age of 21 years old at the date of offense.

1. Scientific developments since Roper v. Simmons.

Research in developmental psychology and neuroscience in the years since the United States Supreme Court's 2005 ruling in *Roper v. Simmons* has confirmed that older adolescents (over the age of 18 years old) differ from adults in ways that both diminish their culpability and impair the reliability of the sentencing process.⁸ Adolescents of that age are less able to envision or comprehend the full range of potential future consequences of their immediate actions, and less able to control their impulses, especially in peer settings.⁹ The parts of the brain that enable impulse control and reasoned judgment are not yet fully developed in this age group. The defining feature of late adolescence is that the self is still unformed. In a very real sense, 18, 19, and 20-year-olds are not yet the people they will ultimately become. Their vulnerability and still-developing nature preclude a reliable determination that death is a fit response to their personal culpability and character.

By 2018, scientists have found that many of the same traits reflected in juveniles under the age of 18 years old—traits that make them ineligible for the death penalty—also apply to older adolescents in their late teens and well into their early 20s. Neuroimaging studies since 2008 show that “psychological and neural reflections of better cognitive control increase gradually and linearly throughout adolescence and into the early 20s.”¹⁰ Leading scientists have concluded that “developmental science does not support the bright-line boundary that is observed in criminal law under which eighteen-year-olds are categorically

deemed to be adults. ... [W]e now know that the prefrontal cortex continues to change prominently until well into a person's 20s."¹¹ The full development of executive functioning—the aspect of a person's brain that regulates moral decision making—does not occur until well into a person's third decade of life. The development of gray matter “peaks latest in the prefrontal cortex, crucial to executive functioning, a term that encompasses a broad array of abilities, including organization, decision making and planning, along with the regulation of emotion.”¹² “[Y]oung adulthood is a developmental period when cognitive capacity is still vulnerable to the emotional influences that affect adolescent behavior, in part due to continued development of prefrontal circuitry involved in self-control.”¹³ Developments in brain science now support extension of the *Roper v. Simmons* rule to adolescents that are older than 18 years old.

2. Legal and societal response to the new scientific evidence.

In the wake of *Graham v. Florida* and *Miller v. Alabama*, states are rapidly developing specialized criminal justice approaches for individuals who commit their crimes before they have reached their early or mid-twenties. Society is no longer universally willing to draw the line in criminal justice for all purposes at the age of 18 years old. Brooklyn has set up a Young Adult Crime Bureau designed for youths accused of misdemeanors committed between the ages of 16 and 24 years old.¹⁴ In September 2016, the Harvard Kennedy School recommended that the age for entering the juvenile justice system be raised to 21 and that youths under age 25 receive developmentally appropriate treatment.¹⁵ Examples include Vermont, which has raised the age threshold for juvenile court jurisdiction to offenses committed up to the offender's 22nd birthday,¹⁶ and California, which now provides early parole hearings for inmates who committed a qualifying offense prior to the offender's 25th birthday.¹⁷ Other courts have extended the rules from *Miller v. Alabama* to youth 18 to 21 years old.¹⁸ Such

reforms are evidence of the growing recognition of the neuroscience and developmental psychology that is driving criminal justice reform.

The fact that some reforms have not yet reached all youth convicted of murder, but instead are reserved for lesser offenses, does not diminish the import of the findings from neuroscience that are driving the national wave of change. The legislative process is one of compromise and bargaining. Legislative changes are often incremental.¹⁹ In *Miller v. Alabama*, the Court explained that the brain science about the young offender applies regardless of the crime the he or she has committed: “But none of what it said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific. Those features are evident in the same way, and to the same degree, when (as in both cases [in *Miller*]) a botched robbery turns into a killing.”²⁰

On February 5, 2018, the American Bar Association House of Delegates adopted a formal resolution calling on all death-penalty jurisdictions to prohibit capital punishment for any individual 21 years old or younger at the time of the offense.²¹ The resolution states: “RESOLVED, That the American Bar Association, without taking a position supporting or opposing the death penalty, urges each jurisdiction that imposes capital punishment to prohibit the imposition of a death sentence on or execution of any individual who was 21 years old or younger at the time of the offense.”²² The ABA cited the “evolution of both the scientific and legal understanding surrounding young criminal defendants and broader changes to the death penalty landscape” and concluded that “offenders up to and including age 21” should be categorically exempt from receiving the death penalty.²³

Two Kentucky trial courts have barred death penalty prosecutions – declaring the penalty unconstitutional when applied to defendants 18 years old at the time of the alleged murders; those cases are pending before the Kentucky Supreme Court.²⁴ Across the country, courts are holding evidentiary hearings and reviewing briefs on this issue.

And for good reason.

Youths under the age of 21 years old remain a protected class for a wide range of purposes, under laws that recognize the diminished capacity of this age group. Most people are familiar with restrictions and protections on youths ages 18-21 under the liquor laws. However, there are literally hundreds of other restrictions and protections in the state and federal statutes for youths ages 18-21.²⁵ Youth under the age of 21 years are usually ineligible for commercial drivers' licenses. They are prohibited from entering sexually oriented businesses. The inheritance laws for adopted beneficiaries use age 21 as the cutoff for preferential treatment under the tax code. Many states include children up to the age of 21 years old in their provisions for public education. State statutes and constitutions often define "child" and "adult" to include persons under 21 years old as "children" or "minors" for many purposes. A wide range of professions are closed to children under the age of 21 years old.²⁶ Many provisions of state statutes refer to persons under the age of 21 as "children" and "minors." Persons under age 21 are usually minors for claims before the Industrial Claims Commissions. The Workers' Compensation statutes (that govern compensation of children of deceased workers) presume children between the ages of 18 and 21 to be wholly dependent. Even before passage of the 2010 federal Patient Protection and Affordable Care Act, which extended health care coverage for young adult children under their parent's health plan up to the age of 26, many states' health care coverage acts already defined a "dependent child" as one up to 21 years of age or older.²⁷ The Uniform Transfers to Minors Act refers to children under 21 years old as *minors*. A person licensed as a physician's assistant by virtue of their status as a child health associate may work on patients only if the patient is under the age of 21 years old. Some states (including Colorado) allow certain offenders who have reached their 18th birthday at the time of sentencing to be provided services through youthful offender programs.²⁸

In 2017, the U.S. Sentencing Commission issued a report defining “youthful offenders” as “persons age 25 or younger at the time they are sentenced in the federal system.”²⁹ Finding that “[t]he contribution that neuroscience has made to the study of youthful offending is significant and continues to evolve,” the Commission’s report summarized the current scientific consensus regarding brain maturation: “the prefrontal cortex is not complete by the age of 18;” that brain “development continues into the 20s;” and, though “there will be significant variation from person to person,” “the average age at which full development has taken place” is 25 years old.³⁰

Given the universal recognition of youths as having diminished capacity or a special need for protection, it is antithetical to permit their classification as the “worst of the worst” and permit their execution. *Roper*’s dicta regarding the “cutoff” at age 18 years old no longer has any basis in science or sound principles of criminology.

Some might argue that jurors should have the freedom to discern which youthful defendants are deserving of the death penalty and which are not. This same argument could be raised to any categorical ban, yet those bans already exist. Categorical bans are necessary for classes of defendants (like youth) for whom the death penalty would never, or almost never, be an appropriate sentence.

A single jury reviewing an individual case is ill-suited to account for the “diminished culpability and greater prospects for reform”³¹ of young offenders. Jurors see only the case before them, and therefore have no basis for comparison of the relative culpability or “death worthiness” of defendants. This limited frame of reference invites deference to the prosecutor’s decision to seek the death penalty. As with any categorical exclusion, the issue is the relative risk that society is willing to tolerate: is the societal benefit of jurors properly identifying the rare youthful offender who “deserves” the death penalty worth the risk of jurors improperly failing to recognize the transient qualities of youth that mitigate

against imposition of the death penalty for the majority of youths who commit their offenses before they turn 21 years old? In *Roper*, the Supreme Court was not willing to tolerate that risk for defendants like 17-year-old Christopher Simmons. The Supreme Court found it necessary to announce a categorical rule, rather than continue with a failed system that left it up to the jury to decide if youth was a mitigating factor in the particular case.

In *Roper*, the trial judge had instructed the jurors they could consider as a mitigating factor. However, the prosecutor argued that it was an aggravating factor: "Age, he says. Think about age. Seventeen years old. Isn't that scary? Doesn't that scare you? Mitigating? Quite the contrary I submit. Quite the contrary."³² Without a categorical ban, jurors may apply their preconceived notions and biases and conclude that the fact of the defendant's youth shows merely that he or she is a "bad seed" who cannot be reformed or redeemed.

3. *Penological goals are not served by executing persons who were youth at the time of the offense.*

The death penalty does not serve as a deterrent, even for adults.³³ Given what we know about the science, it certainly cannot be justified on the grounds that it deters *teenagers*. Minors under age 21 are inherently less capable of being deterred by the prospect of an uncertain future punishment, because they are less able to project into the future, to envision the consequences of their actions, and to apprehend the relevance of an uncertain future cost.³⁴ Especially given the rarity of executions, there is no basis to believe that any young person would be deterred by existence of a hypothetical, uncertain death penalty.

In 2012, in *Miller v. Alabama*, the Supreme Court struck down mandatory sentences of life imprisonment without parole for defendants who committed a murder prior to the defendant's 18th birthday. The Supreme Court found that juveniles have "lesser culpability" as a class and that "the distinctive attributes of youth diminish the penological justifications" for imposing the harsh sentence of

life without parole.³⁵ Because retribution “relates to an offender's blameworthiness, the case for retribution is not as strong with a minor as with an adult.”³⁶

In 2016, the Supreme Court ruled that the ban on mandatory LWOP sentences announced in *Miller v. Alabama* must be applied retroactively. The Court acknowledged that the deterrence rationale “likewise does not suffice” to justify society’s harshest penalties, because “the same characteristics that render juveniles less culpable than adults—their immaturity, recklessness, and impetuosity—make them less likely to consider potential punishment.”³⁷ The Supreme Court rejected other penological justifications offered in support of life imprisonment sentences: “The need for incapacitation is lessened, too, because ordinary adolescent development diminishes the likelihood that a juvenile offender ““forever will be a danger to society.””³⁸ The Supreme Court observed that rehabilitation is an unsatisfactory rationale: “Rehabilitation cannot justify the sentence, as life without parole ‘forfeits altogether the rehabilitative ideal.’”³⁹ Applying *Miller’s* categorical ban retroactively, the Supreme Court confirmed *Miller’s* holding that mandatory life-without-parole sentences for children “pose too great a risk of disproportionate punishment.”⁴⁰

The problem of sentencing and execution of the innocent that plagues the modern death penalty undermines penological objectives. Experts have raised special concerns about the risk of wrongful convictions when the defendant is a young person.⁴¹ The Bluhm Legal Clinic’s Center on the Wrongful Conviction of Youth at the Northwestern University’s Spritzker School of Law observes: “There can be no doubt about it: Young people are simply more likely to be wrongfully convicted than adults. There are many reasons for this, many of which are rooted in the special developmental vulnerabilities of children. Children and teenagers are categorically more suggestible, compliant, and vulnerable to outside pressures than adults. They are less able to weigh risks and consequences; less likely to

understand their legal rights; and less likely to understand what attorneys do or how attorneys can help them.”⁴²

Also undermining penological objectives is the reality of the many decades of delay in execution of an individual sentenced to death. Individual justices of the United States Supreme Court have expressed dismay that the long delay between conviction and execution, even for offenders who were adults at the time of their offenses, “subjects death row inmates to decades of especially severe, dehumanizing conditions of confinement.”⁴³ The concern about the profound psychological impact of decades-long confinement on death row is magnified many times over when a young person is involved. The detriment to their maturation and psychological and spiritual growth is especially severe, with the severe lock-down conditions on death row and the enormous anxiety and depression produced by living most of their lives under the shadow of death. “The death row confinement regime, whatever its details, offers no life to speak of, only an isolated world devoid of purpose or meaning other than waiting for the executioner,” and when an adolescent is placed into that environment and left there for many decades, the confinement itself becomes an additional punishment above and beyond the penalty of death.⁴⁴ Even more than for adult death row inmates, the extended, extreme conditions of death row confinement may be especially cruel for teenagers and other adolescents who, literally, *grow up on death row*.⁴⁵

The emotional, mental, physical, and spiritual/religious changes experienced by the young offender in the decades that pass before the execution are so profound as to challenge the moral legitimacy of the practice. Psychological, behavioral, and spiritual development of persons in the decades between the teens and the forties creates a reality in which the middle-aged man who is eventually executed does not even remotely resemble the teenager who committed the crime.

The societal expenditure of an overwhelming amount of resources in an attempt to execute is counterproductive to the goal of ending violence among youth. There is no longer any serious doubt that the maintenance of the death penalty costs millions more than would incarceration for life in prison. Such resources would be better spent upon interventions that might prevent the senseless violence that ends the life of the victim and banishes a young man or woman to death row.

4. *Evolving community standards: the practice is rare and declining.*

To implement the Eighth Amendment's prohibition against "cruel and unusual punishments, the Supreme Court measures "the evolving standards of decency that mark the progress of a maturing society" to determine which punishments are so disproportionate as to be "cruel and unusual."⁴⁶ For that reason, when deciding whether to impose a categorical ban exempting specific groups from the reach of the death penalty, the Supreme Court examines the prevalence and recent history of the practice at issue. In *Roper* and *Atkins*, the Court found relevant the prevalence and direction of change in the practice going back about ten to fifteen years preceding the court's consideration of the case before it.⁴⁷

To assess the prevalence of the practice of execution of youth, and the direction of change away from the practice, there are at least two distinct sources of data: information about those who have been executed and information about who have been sentenced to death.⁴⁸ Available data in each of these areas is discussed below.

a. Executions⁴⁹

Between January 1, 2000 through 2018, 883 persons who were at least 18 years old at the time of the offense were executed: 159 of the persons executed had not reached their 21st birthday on the date of the offense.⁵⁰ In the last five years (1/1/2014 through 2018), there were 23 people executed who were under age 21 on the date of the offense. Table 1 shows the decline over time:

Table 1. Executions 2000-2018, by age category on the date of offense (“DOO”)

Year	Total Executed	Under 21 years old DOO⁵¹	At least 21 years old DOO
2018	25	2	23
2017	23	8	15
2016	20	5	15
2015	28	5	23
2014	35	3	32
2013	39	5	34
2012	43	7	36
2011	43	11	32
2010	46	10	36
2009	52	11	41
2008	37	9	28
2007	42	13	29
2006	53	11	42
2005	60	6	54
2004	59	12	47
2003	64	9	55
2002	68	10	58
2001	65	9	56
2000	81	13	68
TOTAL	883	159	724

The decline can be illustrated by examining the most recent two six-year periods: the 6-year period January 1, 2007 through 2012, compared with the 6-year period January 1, 2013 through 2018. As seen in Table 1, the number of executions of persons under the age of 21 years old on the date of offense declined, from 60 executions occurring between January 1, 2007 through 2012, to 27 executions occurring between January 1, 2013 through 2018. This represents a 55% decrease.

The 55% decrease in executions of 18-21 years old DOO compares to a 29.55% drop in executions of adults who were at least 21 years old at the time of the offense, and a 35.36% drop over all age ranges. As shown in Table 2, executions are decreasing most dramatically among those who were under the age of 21 at the time of the offense:

Table 2. Percentage decrease in executions between two 6-year periods (1/1/2007-12/31/2012, and 1/1/2013-12/31/2018)

Defendant under the age of 21 on DOO	55%
Defendant at least 21 years old on DOO	29.55%
All ages	35.36%

Geographical concentration

Another way the Supreme Court views prevalence is by examining the number of states that participate in the challenged execution practice each year.⁵² In that regard, the evidence establishes that the death penalty is shrinking in scope. There is a substantial geographical concentration in the incidence of execution of persons who were under 21 years old on the date of offense (“DOO”). From 2000 through 2018, 16 states executed people who were youths 18-21 at DOO. That number is on the decline. In the last 5 years, from 2014 through 2018, only 6 states did so.

In the past 19 years, only 3 states have executed in a single year more than two persons who committed the offense prior to their 21st birthday.⁵³ As seen in Table 3, from 2000 through 2018, other than Texas, no single state executed more than two such persons in any single year since 2003, when Oklahoma executed three:

Table 3. States executing, in any single year, more than two persons who were under 21 years old at DOO

Year	Total persons under 21 years old DOO executed	States executing more than 2 such persons in a single year
2018	2	0
2017	8	0
2016	5	0
2015	5	Texas
2014	3	Texas
2013	4	0
2012	6	Texas
2011	11	Texas
2010	10	Texas
2009	11	Texas
2008	9	Texas
2007	13	Texas
2006	11	Texas
2005	6	Texas
2004	12	Texas
2003	9	Texas, Oklahoma
2002	10	Texas
2001	9	Oklahoma
2000	13	Texas, Virginia
TOTAL	157 persons	3 States: Texas, Oklahoma, Virginia

Texas accounts for over half of the executions of youths. From January 1, 2000 through 2018, 157 persons were executed who were less than 21 years old (but at least 18 years old, see endnote 50). Texas executed 85 of those 157 persons –

over 54% of the total. In the past ten years (January 1, 2009 through 2018), of the 65 persons executed who were less than 21 years old DOO, Texas executed 33 of them.

Because the large number of persons executed in Texas masks the very low incidence and geographical concentration of the practice, Table 4 breaks out Texas executions as compared with the number in all other states:

Table 4. Executions 2000-2018 of persons under 21 years old at DOO, showing Texas and all other states

Year	Total under 21 years old DOO	Executed in Texas	Executed in all other states	Number of states Executing youth under 21 years old DOO
2018	2	1	1	2
2017	8	2	6	6
2016	5	2	3	3
2015	5	5	0	1
2014	3	3	0	1
2013	4	2	2	3
2012	6	4	2	3
2011	11	4	7	6
2010	10	4	6	6
2009	11	6	5	4
2008	9	4	5	5
2007	13	9	4	4
2006	11	9	2	3
2005	6	4	2	3
2004	12	7	5	4
2003	9	4	5	6
2002	10	6	4	5
2001	9	2	7	5
2000	13	7	6	5
TOTAL	157	85	72	16 states

Racial concentration

Among those executed for offenses occurring before the defendant's 21st birthday, the vast majority are members of minority groups. As the total number of executions in all age groups has *decreased*, the minority percentage in the age group under 21 years old at DOO has *increased*, from 59.3% in the 5 years preceding *Roper* (2000-2004), to 65.2% in the most recent five-year period (2014-2018). In 2014, 2015, and 2018, 100% of those executed who were under 21 years old at DOO were minorities.⁵⁴

Placing these figures in statistical context would require an analysis of the minority percentage of the aggravated, i.e. death-eligible, offenses in the particular states for the particular years in which the offenses of conviction took place. Because of the many variables that go into the selection and implementation of an actual execution date, execution data alone provides only part of the picture.⁵⁵ As will be seen in the next section, available sentencing data also demonstrates a move away from execution of persons who were under 21 years old on the date of offense, as well as geographical concentration and racial disparity in death sentencing in this age group.

b. Sentencing data⁵⁶

Researchers at Cornell Law School and Justice 360 have collected extensive data on death sentences imposed upon youth ages 18-21 from January 1, 2005 through 2017 for offenses occurring prior to the offender's 21st birthday.⁵⁷ The data reveals a dramatic decrease in sentencing practices for this age group. "The peak for young offender death sentences post-*Roper* was in 2007, when twenty-two youthful offenders nationwide were sentenced to die. Since 2013, at most, eight youthful offenders have been sentenced to die in one year."⁵⁸ The researchers note that, while death sentencing in all age groups has declined, "the proportion of death sentences given to young offenders has remained very low."⁵⁹

It appears that the downward trend in death sentencing for youthful conduct occurring before the offender's 21st birthday appears is at least as great, and may be outpacing the decrease in death sentencing for conduct occurring on or after the offender's 21st birthday.⁶⁰

Geographical concentration

As with the execution data, the sentencing data reflects a death penalty that is shrinking in scope.

States: There has been a decline in the number of states involved in the practice of imposing death sentences upon youth who were under the age of 21 years old on the DOO, from 20 jurisdictions (19 states plus the U.S. Government) in the period January 1, 2006 through 2011 to only 10 jurisdictions (9 states plus the U.S. Government) in the period January 1, 2012 through 2017. This is a 50% decrease.

The researchers at Cornell Law School and Justice 360 report that, in the past five years for which data is available (2012-2017), "at most five jurisdictions have sentenced a youthful offender to death."⁶¹ Half of the death sentences were imposed in only two states – California and Florida.

Counties: The decrease on the county level is also striking: in the most recent six-year period (2012-2017), death sentences were imposed upon youthful offenders (18-21 years old) in only 24 counties, down from 57 counties in the previous six-year period (2006-2011). This represents a decrease of almost 58% (57.89%), compared to a 25.53% decrease in the number of counties imposing sentences on persons at least 21 years old at DOO (from 235 counties to 175 counties).

Racial concentration

Since January 1, 2005, of death sentences imposed on youthful offenders under the age of 21 years old at DOO, approximately 74% were imposed on

minority defendants, compared with 54% for offenders sentenced to death who were at least 21 years old at DOO.⁶² Colorado provides a disturbing example, where the only death sentences handed down in this century condemned to death two young Black men under the age of 21 at the date of the offense; clearly, in Colorado, 100% of death-eligible murders in this century were not committed by young Black men, yet, 100% of Colorado's death row is made up of Black men who committed their offenses before they reached their 21st birthdays.⁶³

CONCLUSION

The dramatic decline in the practice of executing people who were but youths under the age of 21 years old at the time of their crimes might appear to obviate the need for a judicial declaration of a categorical exemption from the death penalty, but appearances are deceptive. The very fact that the practice has slowed to a “whimper” is what demands a judicial “bang” to finish it off. When a practice is so infrequently imposed, “there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not,”⁶⁴ which magnifies the risk of arbitrary, random, or discriminatory implementation of the practice. The tipping point was passed some years ago, making the time ripe for the Supreme Court to declare a categorical exemption.

To be sure, the typical alternative – a life imprisonment sentence – is also a very harsh penalty to impose upon such a young person. Still, “carving out” from the death penalty persons in this category would be consistent with judicial efforts to ensure that the death penalty is restricted to the “worst of the worst,” and consistent with the judicial obligation to declare a penalty unconstitutional under the Eighth Amendment when it has become inconsistent with “the evolving standards of decency that mark the progress of a maturing society.”⁶⁵ A categorical exemption would prohibit the killing of these individuals and mitigate the extreme psychological suffering of these young people who spend many decades living as “dead men walking” on death row.⁶⁶

ENDNOTES

* T.S. Eliot, The Hollow Men (1925) (“This is the way the world ends. Not with a bang but a whimper.”)

+ Samler and Whitson, P.C. (Denver, Colorado). J.D. Yale Law School (1984), B.A. University of Redlands (1979).

⁺⁺Samler and Whitson, P.C. (Denver, Colorado). J.D. Washington College of Law at American University (1986), B.A. Grinnell College (1979).

1. See e.g. *Atkins v. Virginia*, 536 U.S. 304 (2002)(declaring unconstitutional the execution of persons with “mental retardation”), *accord Hall v. Florida*, 134 S.Ct. 1986 (2016) (same, persons with “intellectual disability”); *Ford v. Wainwright*, 477 U.S. 399 (1986) (recognizing the unconstitutionality of execution of certain individuals who have mental illness); *Panetti v. Quarterman*, 551 U.S. 930 (2007)(same); *Enmund v. Florida*, 458 U.S. 782 (1982) (declaring the death penalty unconstitutional for those insufficiently involved in the killing of the victim), *Coker v. Georgia*, 433 U.S. 584 (1977)(declaring the death penalty unconstitutional for rape of an adult), and *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (declaring unconstitutional the practice of executing someone who did not kill the victim).

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

3. *Ibid.*

4. *Ibid.*

5. *Graham v. Florida*, 560 U.S. 48, 68 (2010).

6. *Miller v. Alabama*, 567 U.S. 460, 472 n. 5 (2012).

7. *Ibid.*

8. Much of this new understanding began with a longitudinal study of brain development sponsored by the National Institute of Mental Health, which started following nearly 5,000 children. Dr. Jay Giedd, chief of brain imaging in the child psychiatry branch at the National Institute of Mental Health, has spent decades doing brain imaging studies to determine how, and when, the brain develops. The scientists found the children’s brains were not fully mature until at least 25. “In retrospect I wouldn’t call it shocking, but it was at the time,” Dr.

Giedd said, “The only people who got this right were the car-rental companies.” (quoted in R. Henig, “Why are so many people in their 20s taking so long to grow up?” *New York Times* (August 18, 2010)). ““We figured that by 16 their bodies were pretty big physically,” he said. But every time the children returned, their brains were found still to be changing. The scientists extended the end date of the study to age 18, then 20, then 22. The subjects’ brains were still changing even then. Tellingly, the most significant changes took place in the prefrontal cortex and cerebellum, the regions involved in emotional control and higher-order cognitive function.” *Ibid.* This research has resulted in a now-indisputable body of scientific literature. While it is not possible to include a full bibliography of all recent scientific studies, some important ones are listed here (by year of publication):

Laurence Steinberg, Richard J. Bonnie, & Elizabeth S. Scott, *Young Adulthood as a Transitional Legal Authority: Science, Social Change, and Justice Policy*, 85 *Fordham L. Rev.* 641, 645 (2016); Elizabeth P. Shulman et al., *The Dual Systems Model: Review, Reappraisal, and Reaffirmation*, 17 *Developmental Cognitive Neuroscience* 103, 114 (2016); Alexandra Cohen et al., *When Does a Juvenile Become an Adult? Implications for Law and Policy*, 88 *Temp. L. Rev.* 769, 771 (2016); Jay N. Giedd, *The Amazing Teen Brain*, 312 *Sci. Am.* 32, 34 (2015); D. Albert, J. Chein, & L. Steinberg, “Peer influences on adolescent decision-making.” 2013 *CURRENT DIRECTIONS IN PSYCHOLOGICAL SCIENCE*, 22, 80-86; M. Banich, et al., “Developmental Trends and Individual Differences In Brain Systems Involved In Intertemporal Choice During Adolescence,” 2013 *PSYCHOLOGY OF ADDICTIVE BEHAVIORS* 416-430 (v. 27(2)); J. Chein, D. Albert, L. O’Brien, K. Uckert, & L. Steinberg, “Peers increase adolescent risk taking by enhancing activity in the brain’s reward circuitry. *Developmental Science*,” 2011 *DEVELOPMENTAL SCIENCE*, 14, F1–F10; Giedd, J.N., & Rapoport, J.L., “Structural MRI of pediatric brain development: what have we learned and where are we going?” 2010 *NEURON*, 67(5):728-734; L. Steinberg, E. Cauffman, J. Woolard, S. Graham, M. Banich, “Are Adolescents Less Mature than Adults? Minors’ Access to Abortion, the Juvenile Death Penalty, and the Alleged APA ‘Flip-Flop’”, 2009 *AMERICAN PSYCHOLOGIST* (v. 64); M. Banich, “Executive Function: the Search for an Integrated Account,” 2009 *CURRENT DIRECTIONS IN PSYCHOLOGICAL SCIENCE* 89 (v. 18, no. 2); L. Steinberg, L. O’Brien, E. Cauffman, S. Graham, J. Woolard, M. Banich, “Age Differences in Future Orientation and Delay Discounting,” 2009 *CHILD DEVELOPMENT* 28-44 (v. 80, no. 1); P. Shaw, N. Kabani, J. Lerch, K. Eckstrand, R. Lenroot, N. Gogtay, D. Greenstein, L. Clasen, A. Evans, J. Rapoport, J. Giedd, S. Wise, “Neurodevelopmental Trajectories of the Human Cerebral Cortex,” 2008 *THE JOURNAL OF NEUROSCIENCE* 3586-3594; B. Casey, R. Jones, T. Hare, “The Adolescent Brain,” 2008 *ANN. NY. ACAD. SCI.* 1124: 111-126 (v. 1124); J. Giedd, “The Teen Brain: Insights from Neuroimaging,” 2008 *JOURNAL OF ADOLESCENT HEALTH* 42: 335-343; E.

Olson, et. al, "White Matter Integrity Predicts Delay Discounting Behavior in 9- to 23-Year Olds: A Diffusion Tensor Imaging Study," 2008 JOURNAL OF COGNITIVE NEUROSCIENCE 21:7, pp. 1406-1421; L. Steinberg and D. Albert, M. Banich, E. Cauffman, S. Graham, "Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual-Systems Model," 2008 DEVELOPMENTAL PSYCHOLOGY 1764-1778 (v. 44, no. 6); A. Mohanty, A. Engels, J. Herrington, W. Heller, M. Ringo Ho, M. Banich, A. Webb, S. Warren, G. Miller, "Differential engagement of anterior cingulate cortex subdivisions for cognitive and emotional function," 2007 PSYCHOPHYSIOLOGY 343-351 (v. 44); B. Depue, T. Curran, M. Banich, "Prefrontal Regions Orchestrate Suppression of Emotional Memories via a Two-Phase Process," 2007 SCIENCE 215-219 (v. 317); J. Tanabe, et al., "Prefrontal Cortex Activity is Reduced in Gambling and Nongambling Substance Users During Decision-Making," 2007 HUMAN BRAIN MAPPING 28:1276-1286; L. Steinberg, "Risk Taking in Adolescence: New Perspectives from Brain and Behavioral Science," 2007 CURRENT DIRECTIONS IN PSYCHOLOGICAL SCIENCE 55 (v. 16, no. 2); R. Lenroot, J. Giedd, "Brain development in children and adolescents: Insights from anatomical magnetic resonance imaging," 2006 NEUROSCIENCE AND BIOBEHAVIORAL REVIEWS 30: 718-729; V. Reyna, F. Farley, "Risk and Rationality in Adolescent Decision Making: Implications for Theory, Practice, and Public Policy," 2006 PSYCHOLOGICAL SCIENCE IN THE PUBLIC INTEREST 1-44 (v. 7, no. 1); A. Galvan, et al., "Earlier Development of the Acumbens Relative to Orbitofrontal Cortex Might Underlie Risk-taking Behavior in Adolescents," 2006 THE JOURNAL OF NEUROSCIENCE 6885-6892; L. Steinberg, "Cognitive and affective development in adolescence," 2005 TRENDS IN COGNITIVE SCIENCES (v. 29, no. 2); J. Herrington, et al., M. Banich, A. Webb, et al., "Emotion-Modulated Performance and Activity in Left Dorsolateral Prefrontal Cortex," 2005 EMOTION 200-207 (v. 5, no. 2).

9. Albert, Chein, and Steinberg (2013), *supra*, at 80-86; Chein, et al (2011), *supra*, at F1-F10; Reyna and Farley (2006), *supra*; Galvan, et al. (2006), at 6885-6892; Steinberg, et al (2009), *supra*, at 28-44; Banich, et al., (2013), *supra*, at 416-430; Tanabe, et al. (2007), *supra*, at 1276-1286; L. Steinberg "Risk Taking in Adolescence: What Changes, and Why?" 2004 ANN. N.Y. ACAD. SCI. 1021: 51-58; Steinberg (2007), *supra*, at 55; Olson, et al (2008), *supra*, at 1406-1421; Steinberg, et. al (2008), *supra*, at 1764-1778.

10. Shulman et al. (2016), *supra*, at 114.

11. Steinberg, Bonnie, and Scott, (2016), *supra*, at 645. *See also* Giedd (2015), *supra*, at 34; Shulman et al. (2016), at 114; Cohen et al. (2016), *supra*, at 771.

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12. Giedd (2015), *supra*, at 35.
 13. Cohen et al., *supra*, at 771.
 14. <http://www.brooklynda.org/young-adult-bureau>. As stated on the Brooklyn District Attorney’s website: “Established in the spring of 2016, the Young Adult Bureau handles all misdemeanors involving defendants ages 16 to 24, with a few exceptions. Funded by a Smart Prosecution grant from the U.S. Department of Justice, the bureau operates in the Brooklyn Young Adult Court (BYAC) – the first dedicated court part for young adult offenders in New York State and the second in the nation. The bureau provides needs-risk assessments, counseling and services tailored to the specific requirements of that age group, including substance abuse, mental health, GED, vocational and internship programs. Working together with the Center for Court Innovation and other partners, the bureau offers a variety of alternatives to incarceration with the goal of setting young offenders on the right path, reducing recidivism and enhancing public safety.” *Ibid*.
 15. “To explore the potential effects of this proposal both for public safety and outcomes for emerging adults, the Program in Criminal Justice Policy and Management at the Harvard Kennedy School, in collaboration with the Tow Youth Justice Institute (TYJI) of the University of New Haven, embarked on an action research project.” Lael Chester and Vincent Schiraldi, Harvard Kennedy School Report Submitted to the Tow Youth Justice Institute of the University of New Haven: “Public Safety and Emerging Adults in Connecticut: Providing Effective and Developmentally Appropriate Responses for Youth Under Age 21” (Finalized December 28, 2016). Changes are being explored and/or introduced in a variety of forms in a variety of states.
 16. Vt. St. Tit. 33, §§5102(2)(C), 5280(b)(extending juvenile court jurisdiction to juveniles whose offense was committed prior to their 22nd birthday).
 17. Cal. Penal Code §3051 (b)(2018). For those convicted of a qualifying offense, the inmate is provided an early parole hearing held during the inmate’s 15th, 20th, or 25th year of incarceration (depending upon the offense of conviction). While not all of those convicted of murder have access to this program – for example, those who receive a sentence of life imprisonment without parole are exempted – many murder defendants with sentences less than LWOP are eligible (if not excluded through other criteria unrelated to age).
 18. *Cruz v. United States*, Civil Action No. 11-Cv-787 (JCH), 2018 WL 1541898, at *21 (D. Conn. March 29, 2018) (prohibiting a mandatory life-without-parole sentences for a defendant who was 18 years old at time of his

crime); *State v. Norris*, No. A-3008-15T4, 2017 WL 2062145, at *5 (N.J. Super. Ct. App. Div. May 15, 2017) (relying on *Miller* to vacate 75-year sentence for murder committed by 21-year-old).

19. The Connecticut Supreme Court commented on this phenomenon in *State v. Santiago*, 318 Conn. 1, 68, 122 A.3d 1, 44 (2015), when it ruled that it was unconstitutional under the State Constitution for the State to maintain the death penalty for existing prisoners even after the legislature passed a prospective-only repeal. The Court observed that the vast majority of the legislators who voted for the prospective-only repeal would have supported a full repeal “but were forced at that time to accept half a loaf because there were not enough votes to pass a full repeal.” *Ibid.* The fact that some new statutes do not yet reach those who have committed certain murders cannot be regarded on the last legislative or judicial word on the subject.

20. *Miller v. Alabama*, 567 U.S. 460, 473 (2012), referring to *Graham v. Florida*, 560 U.S. 48, 68 (2010).

21. Am. Bar Ass’n, Resolution 111 (2018), available at <https://www.americanbar.org/content/dam/aba/images/abanews/mym2018res/111.pdf>

22. 176 Am. Bar Ass’n, Death Penalty Due Process Review Project: Report to the House of Delegates 1 (2018) available at <https://www.americanbar.org/content/dam/aba/images/abanews/mym2018res/111.pdf>.

23. *Id.*, at 14.

24. *Commonwealth v. Bredhold*, No. 14-CR-161 (Fayette Cir. Ct. Div. 7, Aug. 1, 2017); *Commonwealth v. Diaz*, No. 15-CR-584-001 (Fayette Cir. Ct. Div. 7, Sept. 6, 2017). See “Kentucky Trial Judge Rules Death Penalty Unconstitutional for Offenders Younger than Age 21,” DPIC Website, <https://deathpenaltyinfo.org/news/kentucky-trial-judge-rules-death-penalty-unconstitutional-for-offenders-younger-than-age-21>.

25. For example, under Colorado law, children under the age of 21 are characterized and treated as “minors” for many purposes. See e.g. C.R.S. §2-4-401(6) (Unless superseded by a specific statute, “Minor” means any person who has not attained the age of twenty-one years.”).

26. There are so many such laws, and more being passed each year, that cataloging them all would not be possible. However, some examples of the types of professions that are closed to persons under 21 years old include, in many states: a representative for wholesale manufacturers or sellers of pharmaceutical drugs, a podiatrist, a chiropractor, a dentist, a physician's assistant, a nursing home administrator, an optometrist, a psychologist, a licensed clinical social worker or a licensed social worker, a marriage and family therapist, a physician, a licensed professional counselor, and dozens upon dozens of other professions. *See also* 21 U.S.C. §859(a) ("Any person at least 18 years of age who distributes a controlled substance to a person under 21 years of age is subject to twice the maximum punishment, and at least twice any term of supervised release, for a first offense involving the same controlled substance and schedule."); 21 U.S.C. §859(b) ("Any person at least 18 years of age who distributes a controlled substance to a person under 21 years of age after a prior conviction is subject to three times the maximum punishment, and at least three times any term of supervised release, for a second or subsequent offense involving the same controlled substance and schedule."); 42 U.S.C. § 290bb-35(e)(2) (Youth offender. "The term 'youth offender' means an individual *who is 21 years of age or younger* who has been discharged from a State or local juvenile or criminal justice system, except that if the individual is *between the ages of 18 and 21 years*, such individual has had contact with the State or local juvenile or criminal justice system prior to attaining 18 years of age and is under the jurisdiction of such a system at the time services are sought."); 18 U.S.C. §5031 ("'Juvenile' is defined as a person who is under 18 years of age, or for purposes of proceedings and disposition because of an act of juvenile delinquency, *a person who is under 21 years of age*."); 18 U.S.C. §4101(c)(1)-(2)(same); 18 U.S.C. §923(d)(1)(A) (restriction on federal firearms license to persons at least 21 years old); 18 U.S.C. §922(b)(1)(same, other firearms restrictions); 18 U.S.C. §842(d)(1) ("It shall be unlawful for any person knowingly to distribute explosive materials to any individual who is *under 21 years of age*."); 14 U.S.C. §371(c)(2), 10 U.S.C. §8257(d)(2), and 10 U.S.C.A. §6911(c)(2) (In Navy, Air Force, and Coast Guard, "[n]o person may be enlisted or designated as an aviation cadet unless he has the consent of his parent or guardian to his agreement, if he is under 21 years of age."); 10 U.S.C. § 1072 (2), 10 U.S.C. §1074 i (a), 10 U.S.C. §1079(g) (1), 10 U.S.C. §1079(g) (2)(B) (provisions for benefits for children under the age of 21 years for children whose parent is a member of the uniformed services); 8 U.S.C. §1157(a)(5)(c)(2)(B), 8 U.S.C. §1158(b)(3)(B), 8 U.S.C. § 1184(o) (statutes providing for status for children of refugees and applicants for immigration *when children are under 21 years old*); 8 U.S.C. §1151(2)(A)(I), 8 U.S.C. §1153(a)(4), 8 U.S.C. §1153(h)(3), 8 U.S.C. §1154(a) (various provisions defining who is eligible for permanent residency); 6 U.S.C. §774 (the Emergency Child Locator Center, within the National Center for Missing and Exploited Children, defining "*adults*" as *21 and older*, and "*child*" as *under 21 years of age*); 5 U.S.C.

§8122(d)(1) (the statute of limitations for filing a suit for death or disability of a federal worker does not run against *a minor until he reaches 21 years of age*); 5 U.S.C. §5561(3)(B) (“‘Dependent’ means *an unmarried child* (including an unmarried dependent stepchild or adopted child) *under 21 years of age.*”). Additional relevant statutes have been catalogued in A. Michaels, “Decent Proposal: Exempting Eighteen- to Twenty-Year-Olds From The Death Penalty,” 40 New York University Review of Law and Social Change 139 (2016). See also B. Eschels, “Data & The Death Penalty: Exploring The Question Of National Consensus Against Executing Emerging Adults In Conversation With Andrew Michaels’s A Decent Proposal: Exempting Eighteen- To Twenty-Year-Olds From The Death Penalty,” The Harbinger 40:147 (June 15, 2016).

27. The National Conference of State Legislatures (NCSL)’s website reports that at least 37 states require insurers to permit young adults in their 20’s to remain on their parents’ health insurance plan: Colo. Rev. Stat. § 10-16-104.3 (up to age 25); Conn. G.S.A. § 38a-497 (up to age 26); Del. Code Ann. Tit. 18, § 3354 (until age 24); Florida 627.6562 (up to age 25 and in some cases, age 30); Ga. Code § 33-30-4 (up to age 25); Ga. Code § 33-24-28 (general exemption from dependent age limits in cases of children incapable of self-sustaining employment due to disability); Idaho Stat. § 41-2103 (until age 21, or if a student, age 25, or if disabled, no limit); 215 ILCS 5/356z.12 (up to age 26 and veteran dependents up to age 30); IC 27-8-5-2,28 and IC 27-13-7-3 (until age of 24, or, if disabled, no limit); Iowa Code § 509.3 and Iowa Code § 514E.7 (under the age of 25); Ky. Rev. Stat. § 304.17A-256 (until the age of 25); La. Rev. Stat. Ann. § 22:1003 (up to age 25 if student); 24-A MRSA § 2742-B (up to 25 years of age); MD Code, Insurance § 15-418 (under the age of 25); Mass. Gen. Laws Ann. Ch. 175 § 108 (until age 26 or 2 years past the age of dependency; Young adults ages 19-26 are eligible for lower-cost insurance coverage offered through the Commonwealth Health Insurance Connector); Minnesota Chapter 62E.02 (defines “dependent” as a spouse or unmarried child under age 25); W. Va. Code § 33-16-1a (same); O.R.S. § 735.720 (same, up to 23); Mo. Rev. Stat. § 354-536 (same, up to age 26); N.H. Rev. Stat § 420-B:8-aa (same; 2009 SB 115 allows those up to age 26 to buy-in to coverage through the state’s CHIP program, Healthy Kids); Mont. C.A. 33-22-140 (up to age 25); Nev. Rev. Stat. 689C.055 (up to age 24); N.J.S.A. 17B:27-30.5 (up to age of 31); NM Stat. Ann. § 13-7-8 (up to age 25); N.Y. 2009 AB 9038 (up to age 30); N.D. Cent. Code § 26.1-36-22 (up to age 22 or, if student, up to age 26); Ohio Rev. Code § 1751.14, as amended by 2009 OH H 1 (up to age 28); 2009 SB 189 (up to age 30, or longer if deployed in the reserves or National Guard (51 Pa.C.S.A. § 7309)); R.I. Gen. Laws § 27-20-45 and Gen. Laws § 27-41-61 (until age 19 or, if a student, until age 25); S.C. Code Ann. § 38-71-1330 (up to age 22); S.C. Code Ann. § 38-71-350 (no limit if disabled); SD Codified Laws Ann. § 3-12A-1, 58-17-2.3 (up to age 19 or, if student, age 24 or age 29); and thereafter, if child remains a student, the insurance company shall);

Tennessee Code Ann. § 56-7-2302 (up to age 24); Vernon's Texas Code Ann. Insurance Code § 846.260 and § 1201.059 (up to age 25); Utah Code Ann. tit. 31A § 22-610.5 (up to age 26); Va. Code Ann. § 38.2-3525 (up to age 19 or, in some cases, up to age 25); West's Rev. Code Washington Ann. 48.44.215 (up to age 25); Wis. Stat. § 632.885 (up to age 27 or, for certain students called to active duty in the armed forces, beyond age 26); Wyo. Stat. § 26-19-302 (up to age 23). Source: NCLS website, Table, State Laws Relating to Dependent Coverage, http://www.ncsl.org/default.aspx?tabid=14497#State_Actions.

28. See Section 18-1.3-407.5 (3), C.R.S. (2013)(defining a “young adult offender” as “a person who is at least eighteen years of age but under twenty years of age at the time the crime is committed and under twenty-one years of age at the time of sentencing pursuant to this section.”); Accord, § 18-1.3-407 (2)(a)(III)(B)(same); *id.*, (2)(a)(III)(C)(“youthful offender” includes “young adult offender”). .*See id.*, (1)(a)(“A young adult offender may be sentenced to the youthful offender system in the department of corrections....”). § 18-1.3-407(1)(c)(II)(“For the purposes of public safety, academic achievement, rehabilitation, the development of pro-social behavior, or reentry planning for youthful offenders, the executive director or his or her designee may transfer any offender age twenty-four years or younger and sentenced to the department of corrections into and out of the youthful offender system at his or her discretion.”) A young adult offender is not statutorily eligible for placement in the youthful offender system if the offense is a class 1 or class 2 felony, *id.*, §18-1.3-407.5 (2)(b)(i), yet, the fact that the classification exists at all is a testament to the fact that offenders this age are distinguished from older offenders.

29. U.S. Sentencing Commission, *Youthful Offenders in the Federal System* (May 26, 2017), available at: <https://www.ussc.gov/research/research-reports/youthful-offenders-federal-system>

30. *Id.*, at 6-7.

31. *Miller v. Alabama, supra*, 567 U.S. at 471.

32. Quoted in *Roper v. Simmons, supra*, 543 U.S. at 548.

33. Committee on Deterrence and the Death Penalty, D. Nagin and J. Peppers, editors, Committee on Law and Justice, Division on Behavioral and Social Sciences and Education of the National Research Council, DETERRENCE AND THE DEATH PENALTY (National Academies Press, 2012) (no studies support the theory that capital punishment deters murder). See also M. Radelet, T. Lacoock, “Do Executions Lower Homicide Rates?: The Views of Leading Criminologists,” 2009 JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY

489-508 (v. 99, no. 2); Fagan, J., “Death and Deterrence Redux: Science, Law and Causal Reasoning on Capital Punishment,” 4 *Ohio State Journal of Criminal Law* 255 (2006); Jeffrey Fagan et al., *Capital Punishment and Capital Murder: Market Share and the Deterrent Effects of the Death Penalty*, 84 TEX. L. REV. 1803 (2006); Fagan, J., Geller, A., and Zimring, F.E. “The Texas Deterrence Muddle,” 11 *Criminology and Public Policy* 102 579–591 (2012); J. Fagan, “Accuracy and Efficiency in the Administration of the Death Penalty,” Testimony to the Maryland Governor’s Commission on Capital Punishment (Sept. 5, 2008); DPIC, “Does Capital Punishment Deter Murder? Exploring murder rates, killings of police officers, and the death penalty,” posted September 12, 2017, <https://deathpenaltyinfo.org/resources/podcasts/discussions-with-dpic/discussions-with-dpic-does-capital-punishment-deter-murder-exploring-murder-rates-killings-of-police-officers-and-the-death-penalty>). “The data show that the death-penalty states had an overall UCR murder rate that was 1.39 times higher than the non-death penalty states and accounted for 12 of the 16 states with the highest murder rates. Police officers were murdered in death-penalty states at a rate that was 1.37 times higher than in non-death-penalty states....” *Ibid.*

34. *See* sources listed in note 8, *supra.*

35. *Miller v. Alabama, supra*, 567 U.S. at 472.

36. *Ibid.* (quoting *Graham, supra*, at 71; internal quotation marks omitted).

37. *Montgomery v. Louisiana*, 136 S.Ct. 718, 726 (2016), *quoting Miller*, 567 U.S. at 472 (internal quotation marks omitted).

38. *Montgomery*, at 733, *quoting Miller*, at 472 (*quoting Graham*, at 72).

39. *Montgomery v. Louisiana*, at 733 (*quoting Miller*, at 473 (*quoting Graham, supra*, at 74)).

40. *Montgomery v. Louisiana*, at 733, *quoting Miller*, at 479.

41. As of June 26, 2019, 166 former death row inmates have been exonerated. <https://deathpenaltyinfo.org/news/charles-ray-finch-becomes-166th-death-row-exoneree-as-north-carolina-prosecutor-formally-drops-all-charges>. The term “exoneration” is used by the Death Penalty Information Center (DPIC), the Innocence Project, and others to refer to persons who, even though they were on death row or have been executed, have been acquitted of all charges related to the crime that placed them on death row, or have had all charges related to that crime dismissed by the prosecution, or have been granted a complete pardon based on evidence of innocence. Dieter, R., “Innocence and the Crisis in the American

Death Penalty,” a DPIC Report (September 2004), available at <https://deathpenaltyinfo.org/facts-and-research/dpic-reports/in-depth/innocence-and-the-crisis-in-the-american-death-penalty>. In 2014, Ricky Jackson, Wiley Bridgeman, and Kwame Ajamu were released from prison in Ohio and prosecutors filed a motion to drop the charges. The three men – all under the age of 21 at the time -- had been convicted of a 1975 murder solely on the testimony of a 12-year-old boy, who recanted, saying he had not witnessed the murder at all. E. Izadi, “Ohio man exonerated after spending 27 years in prison for a murder he didn’t commit,” Washington Post (Dec. 9, 2014). (https://www.washingtonpost.com/news/post-nation/wp/2014/12/09/ohio-man-exonerated-after-spending-27-years-in-prison-for-a-murder-he-didnt-commit/?utm_term=.e140552ccac6)

42. <http://www.law.northwestern.edu/legalclinic/wrongfulconvictionsyouth/unders tandproblem/> See also e.g. Tepfer, J., Nirider, L., Tricarico, L., “Arresting Development: Convictions of Innocent Youth,” 62 Rutgers Law Review 887 (Summer 2010).

43. *Johnson v. Bredesen*, 558 U.S. 541, 543 (2009)(Stevens, J., statement with respect to Court’s denial of a writ of *certiorari*). See also *Valle v. Florida*, 564 U.S. 1067 (2011)(Breyer, dissenting from Court’s denial of stay); *Thompson v. McNeil*, 556 U.S. 1114, 129 S.Ct. 1299, 1299-1300 (2009)(Stevens, J., statement with respect to Court’s denial of a writ of *certiorari*). Justice Stevens observed that “delays in state-sponsored killings are inescapable” and concluded that “executing defendants after such delays is unacceptably cruel.” *Id.*, 129 S.Ct. at 1300. Justice Stevens found it “appropriate to conclude that a punishment of death after significant delay is ‘so totally without penological justification that it results in the gratuitous infliction of suffering.’” *Id.*, 129 S.Ct. at 1300 (*quoting Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.)). As early as 1972, Justice Brennan had opined that “the prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death.” *Furman v. Georgia*, 408 U.S. 238, 288 (1972) (Brennan, J., concurring). Compare *In re Medley*, 134 U.S. 160, 171 (1889)(describing the solitary confinement of the condemned in the four weeks preceding the execution “an additional punishment of the most important and painful character”).

44. R. Johnson, *Solitary Confinement Until Death by State-Sponsored Homicide: An Eighth Amendment Assessment of the Modern Execution Process*, 73 WASH. & LEE L. REV. 1213, 1217 (2016).

45. See Johnson, *supra* note 44. See also *People v. Anderson*, 6 Cal.3d 628, 649, 100 Cal.Rptr. 152, 493 P.2d 880, 894 (1972) (“[T]he process of carrying out a

verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture”). Justice Stevens’ description of the condemned, living for decades while “spending up to 23 hours per day in isolation in a 6-by 9-foot cell,” *Thompson v. McNeil*, *supra*, is especially disturbing when applied to prisoners who enter those isolation chambers as teenagers or very young adults. (Parenthetically, as of January 19, 2019, Florida still has not executed William Thompson, who is almost 67 years old and has been on death row since 1978 for an offense that he committed when he was 24 years old.)

<http://www.dc.state.fl.us/OffenderSearch/deathrowroster.aspx> (last visited 1/19/2019).

46. *Trop v. Dulles*, 356 U.S. 86, 100–101 (1958). See e.g. *Atkins v. Virginia*, 536 U.S. 304, 311-12 (2002)(declaring unconstitutional the execution of persons with intellectual disability); *Roper v. Simmons*, 543 U.S. at 561 (declaring unconstitutional the execution of persons under the age of 18 on the date of the offense).

47. See e.g. *Atkins v. Virginia*, *supra*, 536 U.S. at 316 (noting that since 1989, only five states had executed inmates who had an IQ under 70); *Roper v. Simmons*, 543 U.S. at 564–65 (noting that since 1989, only six States had executed prisoners for crimes committed as juveniles, but in the previous ten years, only three had done so).

48. Another potential measure of the death penalty’s application to persons under the age of 21 years old on the date of the offense is the death row census. The best estimate from available data is that, of the approximately 2738 inmates on death row, 426 committed their offenses before they reached their 21st birthday; of those 426 inmates, almost 70% are minorities. Sources for this data include the NAACP-LDF’s Summer 2018 “Death Row USA” quarterly publication, an extensive national death row survey conducted by law students at the University of Denver School of Law in 2011-2012, and independent research on websites of state departments of corrections and criminal justice. Because a snapshot view of the national death row census does not reveal the decrease in numbers or the minority percentage over time, it is not reported separately in the body of this report.

49. Execution data is relatively easy to come by, at least for executions of persons since January 1, 2000. The Clark County (Indiana) Prosecutor’s website contains a comprehensive database of all executions since 1976 through November 14, 2014. For executions after January 1, 2000, the records contain information about date of birth, date of offense, race, age at time of offense, and a substantial amount of additional data for each person executed. For executions after November 14, 2014, the most reliable list is published online by the Death

Penalty Information Center (“DPIC”). DPIC posts information about the race of the inmate and the inmate’s age at the time of execution. Unlike the Clark County data, DPIC does not post information about the inmate’s age at the date of the offense (“DOO”). Thus, for executions after November 14, 2014, independent research is required. Such information is often available on the website of the department of corrections in the executing state or can be found in official judicial opinions issued in the case. In the instances where no state government agency or court opinion provides the information necessary to calculate age on DOO, sufficient reliable data to calculate the age on DOO can usually be found by searching news reports and other sources for the date or year of the offense, and then the inmate’s age at DOO can be calculated. For example, even if DOB information is not available on the corrections’ website, if the date of the offense is documented in news reports or other sources, the inmate’s age on DOO can be calculated using the date of offense and age on the date of execution, which is available from the DPIC and/or corrections department reports or other reliable sources. This research has a high degree of reliability and is not hard to obtain for executed persons.

50. In the years leading up to *Roper* (2000-2004), there were 9 executions of youth who were under the age of 18 years old at the time of the offense. (6 were executed by Texas, 2 by Virginia, and 1 by Oklahoma, all in the years 2000 through 2003 (inclusive)). Those 9 individuals are not included in any of the numbers reported herein.

51. See previous note.

52. *Roper v. Simmons*, *supra*, 543 U.S. at 565-566; *Atkins v. Virginia*, *supra*, 536 U.S. at 316.

53. See note 50, above. To ease comparison between years, the pre-*Roper* execution of individuals under age 18 at the date of the offense are not included in these results.

54. There were 398 total executions between January 1, 2000 and December 31, 2004 (for persons at least 18 years old at DOO). 54 of those persons were under the age of 21 at DOO – 32 minorities and 22 whites. 284 of the executed were at least 21 years old at DOO – 181 minorities and 183 whites. Thus, 59.3% (32/54) of those executed who were under the age of 21 years old at DOO were minorities, compared to 35.6% (181/284) of those who were at least 21 years old at DOO. There were 131 total executions between January 1, 2014 through December 31, 2018: 23 of those persons were under the age of 21 at DOO – 15 minorities and 8 whites. 107 of the executed were at least 21 years old at DOO – 48 minorities and 59 whites. Thus, 65.2% (15/23) of those executed who were under the age of 21 years old at DOO were minorities, compared to 44.9% (48/107) of

those who were at least 21 years old at DOO. Comparing these two sets shows that the minority percentage of those under the age of 21 years old increased dramatically from the pre-*Roper* years -- from 59.3% in the five-year period January 1, 2000 through 2004, to 65.2% in the five-year period January 1, 2014 through 2018.

55. Setting an execution date and actually killing the inmate is the culmination of an opaque process that is impacted by stay litigation, the status of the cases of other inmates on that state's death row, availability of lethal drugs, result of clemency or reprieve procedures, appeals and postconviction proceedings, and many other variables. In 2014, U.S. District Judge Cormac J. Carney dubbed the implementation of California's death penalty so arbitrary and random that it amounts to a sentence of "*life in prison, with the remote possibility of death.*" *Jones v. Chappell*, 31 F.Supp.3d 1050, 1053 (C.D. Calif. 2014)(italics in original). (The Ninth Circuit reversed Judge Carney's ruling, but not on the merits; instead, the Ninth Circuit ruled that the District Court's ruling ran afoul of *Teague v. Lane*, 489 U.S. 288 (1989), which held that federal courts may not consider novel constitutional theories on habeas review. *Jones v. Davis*, 806 F.3d 538 (9th Cir. 2015)). Because arguably, the disproportionate minority representation among the executed could be the result of differential treatment of minorities in the myriad of procedures that go into setting and implementation of an execution date, a more full understanding of the phenomenon of execution of youthful offenders is attainable through examination of not only execution data, but sentencing data as well.

56. J. Blume, H. Freedman, L. Vann, & A. Hritz, *Death by Numbers: Why Evolving Standards Compel Extending Roper's Categorical Ban against Executing Juveniles from 18 to 21*, Texas Law Review (forthcoming 2019)(hereinafter, "*Death by Numbers*") (last revised 6/2/2019)(available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3341438). The data reported in *Death by Numbers* is consistent with the Death Row Census Rosters published by the NAACP-Legal Defense Fund ("*Death Row USA*," published on a quarterly basis), death row census information issued by Departments of Corrections in states that compile and report such data, a death row census conducted by law students at the University of Denver Sturm College of Law in 2011-2012, and our own ongoing monitoring of death sentencing practices impacting young adults. We find these sources to be sufficiently reliable to document trends in the time period 2005-2017.

Because a very high percentage of death sentences are reversed or vacated, a death sentence does not always result in death row confinement or an execution. Although over 8,000 death sentences have been handed down since the death penalty was reinstated in 1976, many of these have been overturned and will never result in executions because of errors at trial or the discovery of new

evidence. According to a study published in 2000 by Prof. James Liebman of Columbia University Law School, courts found serious reversible error in about 68% of the capital cases that were fully reviewed. Of cases overturned in state post-conviction, 82% resulted in a non-death sentence or exoneration. (James S. Liebman, Jeffrey Fagan, and Valerie West, “A Broken System: Error Rates in Capital Cases, 1973-1995,” Columbia Law School Public Law & Legal Theory Working Paper Group Paper No. 15 (June 12, 2000)), available at https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=2220&context=faculty_scholarship. As a result, sentencing data is always a “snapshot” and inherently an estimate, because sentences are added and vacated on an ongoing basis even during any research effort. See discussion regarding *Jones v. Chappell*, supra note 55.

57. *Death by Numbers*, supra note 56. *Death by Numbers* represents a substantial contribution to the study of the application of the death penalty to youths.

58. *Death by Numbers*, supra note 56, electronic copy page 20.

59. *Ibid.* It appears that the proportion of death sentences given to persons under the age of 21 at the date of the offense has decreased, from approximately 13% of the total death sentences in the six-year period January 1, 2006 through 2011, to approximately 11% in the six-year period January 1, 2012 through 2017. *Ibid.*

60. *Death by Numbers*, supra note 56, electronic copy pages 20-21.

61. *Death by Numbers*, supra note 56, electronic copy page 22.

62. *Death by Numbers*, supra note 56, electronic copy pages 27-28 and Figure 4. For offenders at least 21 years old at DOO, *Death by Numbers* reports that the figure is 54% minority. *Ibid.* The difference in racial composition cannot be explained by differences in homicide arrest. *Death by Numbers*, supra note 56, electronic copy pages 29-30. For an excellent discussion of the phenomenon of racial disparities within the criminal justice system generally, see Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (The New Press, 2011).

63. The only three men on Colorado’s death row are Nathan Dunlap, who was convicted for a 1993 offense occurring when he was 19 years old, and co-defendants Sir Mario Owens and Robert Ray, who were convicted of 2005 offenses occurring when Owens was 20 years old and Ray was 19 years old. Demonstrating geographical concentration on the county level that is

characteristic of the modern death penalty, all three of these death sentences were returned in a single county in Colorado (Arapahoe County).

64. *Furman v. Georgia*, 408 U.S. 238, 313 (1972)(White, J. concurring).

65. *Trop v. Dulles*, *supra*, 356 U.S. at 100–101; *Atkins v. Virginia*, *supra*, 536 U.S. at 311-12; *Roper v. Simmons*, *supra*, 543 U.S. at 561.

66. The term “Dead Man Walking,” used to describe death row, was coined by Sister Helen Prejean, a Roman Catholic nun and one of the Sisters of Saint Joseph of Medaille based in New Orleans in her 1993 non-fiction book, Dead Man Walking (1993), which was based upon Sister Helen’s work as a spiritual adviser to two death row inmates. The book was adapted for the screen in a 1995 movie which resulted in four Academy Awards nominations and an Academy Award for Best Actress (won by Susan Sarandon).