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The Roper Extension: A California Perspective

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Notes

The *Roper* Extension: A California Perspective

ZOE JORDAN[†]

Although adulthood legally begins at age eighteen, young adults between the ages of eighteen and twenty-one are distinct from the rest of the adult population. Many studies conducted over the last two decades have revealed that the prefrontal cortex, the part of the brain responsible for social and emotional maturity as well as impulse control, is not fully developed until near the age of twenty-five. Thus, young adults have a neurobiologically-compromised ability to exercise self-control, adequately consider the consequences of their actions, and resist coercive pressures from others. Notably, the California Legislature has acknowledged the need to treat young adults differently than the rest of the adult population by enacting laws and programs that take their developmental deficiencies into account. Through these various enactments, the legislature has demonstrated a desire to insulate and aid this age group even though they are considered adults under the law. Despite giving these added protections and assistance, the California Legislature has inexplicably failed to exempt young adults from the most severe sentence our criminal justice system has to offer: capital punishment—a sentence traditionally reserved for the most culpable individuals who commit the most egregious crimes. Based on the diminished culpability of young adults and the legislature’s own measures to offer additional assistance to these young adults, this Note proposes that the minimum age at which a California citizen should be eligible for capital punishment should be raised from eighteen to twenty-one.

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INTRODUCTION

“Capital punishment must be limited to those offenders who commit ‘a narrow category of the most serious crimes’ and whose extreme culpability makes them ‘the most deserving of execution.’”¹ In *Roper v. Simmons*, decided in 2005, the U.S. Supreme Court held that, under the United States Constitution’s “cruel and unusual” punishment standard,² the death penalty could not be imposed on a juvenile, a person under the age of eighteen.³ In making its determination, the Court found two factors persuasive: the first was a growing national consensus against sentencing juveniles to death, and the second was a comprehensive body of research establishing that the brains of juveniles continue to develop, such that they are unable to fully understand and control their actions.⁴ As a result, the Court found that juveniles are less culpable for their crimes than older adults.⁵

Over the past decade and a half since the *Roper* decision, a new national consensus has developed concerning the minimum age eligibility for the death penalty.⁶ This consensus is based on numerous psychological and neurobiological studies that have led many scholars, researchers, scientists, and attorneys to agree that young adults, persons under the age of twenty-one,⁷ should not be sentenced to death because they are psychologically similar to juveniles and, therefore, less culpable than older adults.⁸ In light of these new

1. *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (quoting *Atkins v. Virginia*, 536 U.S. 304, 319 (2002)). *Roper* was authored by Justice Anthony M. Kennedy, who was the primary architect of the Court’s proportionality doctrine. This doctrine gave way to categorial exemptions from the death penalty for juvenile offenders, intellectually disabled offenders, and nonhomicide offenders. See *Atkins*, 536 U.S. 304; *Roper*, 543 U.S. 551; and *Kennedy v. Louisiana*, 554 U.S. 407 (2008). Justice Kennedy also categorically exempted juvenile offenders from life without parole sentences. See *Graham v. Florida*, 560 U.S. 48 (2010). As such, his decisions lay the groundwork for this Note and offers a rationale under which *Roper* should be extended to young adults.

2. U.S. CONST. amend. VIII. The Eighth Amendment’s protection against “cruel and unusual” punishment flows from the basic “precept of justice that punishment for crime should be graduated and proportioned to [the] offense.” *Atkins*, 536 U.S. at 311 (alteration in original) (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)).

3. *Roper*, 543 U.S. at 575; U.S. CONST. amend. VIII.

4. *Roper*, 543 U.S. at 569–70 (including the parts of the brain responsible for responding to peer pressure and making mature and responsible decisions).

5. *Id.*

6. See, e.g., Lee Rawles, *Ban Death Penalty for Those 21 or Younger*, *ABA House Says*, ABA JOURNAL, (Feb. 5, 2018, 9:56 PM), http://www.abajournal.com/news/article/Ban_death_penalty_for_those_21_or_younger_aba_house_says (“The ABA House of Delegates . . . asked all death penalty jurisdictions to ban capital punishment for any offender who committed their crime at the age of 21 or younger.”).

7. I refer to persons between the ages of eighteen and twenty as “young adults” throughout this Note. I also periodically refer to “emerging adults;” this term refers to a broader category of still-maturing adults, encompassing those between the ages of eighteen and twenty-five.

8. See, e.g., Melissa S. Caulum, Note, *Postadolescent Brain Development: A Disconnect Between Neuroscience, Emerging Adults, and the Corrections System*, 2007 WIS. L. REV. 729, 731.

developments, the application of the death penalty to young adults is being challenged in various states.⁹ Although it has already been argued that the death penalty as applied to young adults violates the Eighth Amendment, this Note extends that argument to a California-specific perspective.¹⁰

Because of the California Legislature's intentional actions assisting and safeguarding these young adults, California, whether through legislation, judicial review, or referendum, should raise the age eligibility of the death penalty to reflect the limitations of young adults and their culpability. The State Legislature's apparent awareness of young adults' compromised maturity, which is reflected in various pieces of legislation intended to protect young adults from their own immaturity and lack of life experience, is emphasized within this Note. Such protections infiltrate the California Code, impacting the State's criminal justice system, family code, consumer protection laws, and other areas as well.

This Note proceeds as follows. Part I provides relevant background information. Subpart I.A. discusses the history and status of the death penalty in California and sheds light on the need to discuss applying the *Roper* extension in California, a state that has not executed a single person since 2006

9. See, e.g., *Otte v. State*, 96 N.E. 3d 1288, 1290 (Oh. Ct. App. 2017) (“Otte alleged that ‘[b]ased on the Eighth and Fourteenth Amendments’ evolving standards of decency, the death penalty is now a disproportionate punishment for any offender who committed his capital crime before turning age twenty-one.”) (alteration in original); see also *In re Phillips*, No. 17-3729, 2017 WL 4541664 (6th Cir. July 20, 2017); *Commonwealth v. Bredhold*, No. 14-CR-161, 2017 WL 8792559, at *1 (Ky. Cir. Ct. Aug. 1, 2017); *Kentucky v. Efrain Diaz*, No. 15-CR-584-001 (Ky. Cir. Ct. Sept. 6, 2017), <https://deathpenaltyinfo.org/files/pdf/KentuckyAge21DecisionEfrainDiaz.pdf>.

10. See Andrew Michaels, *A Decent Proposal: Exempting Eighteen-to Twenty-Year-Olds from the Death Penalty*, 40 N.Y.U. REV. L. & SOC. CHANGE 139, 142 (2016). Andrew Michaels pioneered the academic discussion of the *Roper* extension by laying the framework for its application to young adults. *Id.* His scholarship inspired my own, as I also argue that the application of the death-penalty to young adults in California violates the U.S. and California Constitutions. See *id.* Michaels, along with many others, make the more conservative argument that offenders under the age of twenty-one should be categorically exempted from the death penalty; however, studies support arguments for a broader categorical exemption that would encompass adults as old as twenty-four. See, e.g., RAE SIMPSON, MASS. INST. OF TECH YOUNG ADULT DEVELOPMENT PROJECT 11 <http://hr.mit.edu/static/worklife/youngadult/youngadult.pdf> (“The brain isn’t fully mature at 16, when we are allowed to drive, or at 18, when we are allowed to vote, or at 21, when we are allowed to drink, but closer to 25, when we are allowed to rent a car.”). I, in line with Michaels, make the more conservative argument with respect to the application of the death penalty in California because the state legislature has promulgated ample evidence that it views eighteen to twenty-year-olds as lacking the life experience and faculties necessary to make mature, responsible decisions and are, therefore, less culpable than other adult offenders. It should be noted that others have written about the need to treat emerging adults similarly to juveniles and that young adults should be ineligible to receive life without parole; however, those articles take a more general approach in addressing their respective topics, whereas I focus the argument around California. See Christine E. Fitch, *Emerging Adulthood and the Criminal Justice System: #Brainnotfullycooked #cantadulyet #yolo*, 58 SANTA CLARA L. REV. 325 (2018) (making a more general argument that emerging adults in the criminal justice system should be treated similarly to juveniles); Emily Powell, *Underdeveloped and Over-Sentenced: Why Eighteen to Twenty-Year-Olds Should Be Exempt From Life Without Parole*, 52 U. RICH. L. REV. ONLINE 83 (2018) (arguing that young adults should be ineligible to receive life without parole).

and has recently imposed a moratorium on the death penalty. Subpart I.B. discusses the new national, post-*Roper* consensus against executing inmates, particularly young and emerging adults, and Subpart I.C. explores the scientific research supporting the argument that the minimum age at which one should be eligible for capital punishment should be raised to twenty-one. Part II discusses specific California statutes that evidence the legislature's desire to insulate young adults from some of the harsh realities associated with entering adulthood. Finally, Part III lays out three arguments through which California could and should raise the minimum age at which one is eligible for the death penalty to twenty-one. First, the California Legislature should do so by amending its death penalty statutes. Given its numerous demonstrations evincing a collective belief that young adults need special protections, it is surprising that the legislature has not already imposed such a limitation. Second, in the absence of legislative action, the courts should raise the minimum age at which a person is eligible for capital punishment to twenty-one. Courts should exempt these young adults, finding that the current practice violates the California Constitution, which historically has offered more expansive protections to its citizens. Lastly, if the Legislature and courts are unwilling to raise the minimum age eligibility, the people can propose a referendum supporting this argument, which, if passed, would raise the minimum age for the death penalty to twenty-one. Although recent propositions have shown majority support for the death penalty, raising the age eligibility is a modest adjustment in death penalty practice.

I. BACKGROUND

A. THE DEATH PENALTY IN CALIFORNIA

Several sections of the California Penal Code create the parameters for who is death penalty eligible, and many have been convicted under these statutes.¹¹ Indeed, of all the fifty states, California has the largest number of death row inmates by far.¹² However, within the last fifty years, California courts and the general populace have disagreed on whether the death penalty, in general, is an appropriate and lawful punishment. In 1972, the California Supreme Court found that the death penalty violated the state constitution; however, despite the court's decision, six years later, in 1978, California voters

11. See CAL. PENAL CODE §§ 37(a), 190(a), 3700 (West 2019).

12. See *Facts About the Death Penalty*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/documents/FactSheet.pdf> (last updated May 31, 2019). It should be noted that California has the largest general population of the fifty states—making up roughly twelve percent of the U.S. population—which explains why California would have the highest total number of death row inmates. See *US States—Ranked by Population 2019*, WORLD POPULATION REVIEW, <http://worldpopulationreview.com/states> (last visited Nov. 6, 2019).

superseded the courts and restored the death penalty via Proposition 17.¹³ Even though the death penalty became constitutional again through Proposition 17, executions were slow to resume. No executions took place until 1992,¹⁴ and only thirteen executions took place between 1992 and 2006.¹⁵

Since 2006, executions in California have been stalled after U.S. District Court Judge Jeremy Fogel blocked the execution of Michael Morales due to concerns that lethal injection was being administered in a way that risked exposing the recipient to intense pain, constituting cruel and unusual punishment in violation of the Eighth Amendment.¹⁶ This decision created a *de facto* moratorium on the death penalty in California pending restoration of California's procedures. In 2014, a different U.S. District Court Judge, Judge Cormac J. Carney, found that California's death penalty violated the Eighth Amendment in another way. Judge Carney found that the death penalty was arbitrarily imposed and plagued with lengthy delays throughout the appellate process such that it was cruel and unusual punishment.¹⁷ This case was later overturned on procedural grounds, but the *de facto* moratorium from 2006 remained.

Outside of the courts, California voters reasserted their support for the death penalty yet again in 2016 when a majority of less than five percent passed Proposition 66, a measure intended to remove the procedural barriers responsible for the lengthy delays.¹⁸ As actions were being taken to speed up

13. See *People v. Anderson*, 493 P.2d 880 (Cal. 1972), *superseded by constitutional amendment*, CAL. CONST. art. I, § 27. The California Constitution now provides that, “[t]he death penalty . . . shall not be deemed to be, or to constitute, the infliction of cruel or unusual punishments within the meaning of Article 1, Section 6 nor shall such punishment for such offenses be deemed to contravene any other provision of this constitution.” CAL. CONST. art. I, § 27.

14. In 1992, “Robert Harris . . . [was] the first individual executed in the state in two decades.” *A Timeline of the Death Penalty in California*, STANFORD PROGRESSIVE (Oct. 2011).

15. *Executions by State and Region Since 1976*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/number-executions-state-and-region-1976> (last visited Nov. 6, 2019); *Ten Years After Last Execution, California Still Far from Resuming Executions*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/node/6360> (Jan. 21, 2016); see also Paige St. John & Maloy Moore, *These Are the 737 Inmates on California's Death Row*, L.A. TIMES (Mar. 13, 2019), <https://www.latimes.com/projects/la-me-death-row> (showing that a slow execution rate leaves many inmates—currently 737, to be exact—on death row).

16. *Morales v. Tilton*, 465 F. Supp. 2d 972 (N.D. Cal. 2006).

17. *Jones v. Chappell*, 31 F. Supp. 3d 1050 (C.D. Cal. 2014), *rev'd*, 806 F.3d 538 (9th Cir. 2015); Marc Berman, *Federal Judge Says California's Death Penalty System Is "Unconstitutional,"* WASH. POST (July 16, 2014, 1:04 PM), <https://www.washingtonpost.com/news/post-nation/wp/2014/07/16/federal-judge-says-californias-death-penalty-system-is-unconstitutional/>.

18. California's voters actually had two competing propositions to choose from during the 2016 election: in addition to Proposition 66, Proposition 62, which would have repealed the death penalty in California altogether, was also on the ballot. By a narrow margin, voters passed Proposition 66, with 51.13% voting yes, and 48.87% voting no. Proposition 62 was defeated 53.15% to 46.85%. See *California Proposition 66, Death Penalty Procedures (2016)*, BALLOTEDIA [hereinafter *Proposition 66*], [https://ballotpedia.org/California_Proposition_66_Death_Penalty_Procedures_\(2016\)](https://ballotpedia.org/California_Proposition_66_Death_Penalty_Procedures_(2016)) (last visited Nov. 6, 2019); *California Proposition 62, Repeal of the Death Penalty (2016)*, BALLOTEDIA [hereinafter *Proposition 62*], [https://ballotpedia.org/California_Proposition_62_Repeal_of_the_Death_Penalty_\(2016\)](https://ballotpedia.org/California_Proposition_62_Repeal_of_the_Death_Penalty_(2016)) (last visited

the appellate process, Governor Gavin Newsom issued an executive order imposing a moratorium on the death penalty on March 13, 2019.¹⁹ His executive order eliminated any current risk of execution for the 737 individuals on death row; however, their sentences were not changed.²⁰ Each person still faces the possibility of execution if the moratorium were to be lifted in the future. This lingering threat of execution is why advocacy against the death penalty remains active and crucial. Cases continue to be appealed and litigated,²¹ and county prosecutor offices still retain the discretion to pursue death penalty sentences. For example, a month after the moratorium was imposed, District Attorneys in four counties agreed to seek the death penalty against the Golden State Killer.²² Because such prosecution continues, advocacy must continue until the death penalty is repealed or abolished.

It is time for California's death penalty statutes to reflect the research and laws that impact and treat these young adults differently than the rest of the adult population, by ensuring that the death penalty is reserved for those who are the most culpable for their actions.

B. NATIONAL TRENDS IN APPLYING THE DEATH PENALTY, ESPECIALLY TO YOUNG ADULTS

Executions and death sentences are becoming increasingly rare across the nation. In 2018, twenty-nine of the nation's fifty states still allowed the death penalty, and yet only forty-two death penalty sentences were imposed, and only twenty-five executions were carried out across the nation.²³ Texas, alone, was responsible for thirteen of these executions.²⁴ Although the numbers have slightly increased from 2017, according to the Death Penalty Information Center:

Nov. 6, 2019). Proposition 66 was upheld by the Supreme Court of California in 2017. See *Briggs v. Brown*, 400 P.3d 29 (Cal. 2017), as modified on denial of reh'g (Oct. 25, 2017).

19. Tim Arango, *California Death Penalty Suspended; 737 Inmates Get Stay of Execution*, N.Y. TIMES (Mar. 12, 2019) <https://www.nytimes.com/2019/03/12/us/california-death-penalty.html>.

20. *Id.*

21. Steve Gorman, *Two California Supreme Court Justices Decry Death Penalty as "Dysfunctional,"* REUTERS (Mar. 28, 2019, 6:37 PM) <https://www.reuters.com/article/us-usa-california-death-penalty/two-california-supreme-court-justices-decry-death-penalty-as-dysfunctional-idUSKCN1RA05Z>.

22. Matthias Gafni, *Prosecutors to Seek Death Penalty Against Golden State Killer Defendant*, S.F. CHRON. (Apr. 10, 2019, 7:34 PM) <https://www.sfchronicle.com/bayarea/article/Prosecutors-to-seek-death-penalty-against-Golden-13757964.php>.

23. *The Death Penalty in 2018: Year End Report*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/documents/2018YrEnd.pdf> (last visited Nov. 6, 2019). In May 2019, New Hampshire became the most recent state to abolish the death penalty. *State and Federal Info: New Hampshire*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/new-hampshire> (last visited Nov. 6, 2019). In 2019, the federal government ordered to reinstate the death penalty and has scheduled executions. Tammy Kupperman et al., *Barr Directs Federal Government to Reinstate Death Penalty, Schedule the Execution of 5 Death Row Inmates*, CNN POLITICS (July 15, 2019), <https://edition.cnn.com/2019/07/25/politics/justice-department-capital-punishment-barr/index.html>.

24. *The Death Penalty in 2018: Year End Report*, supra note 23.

2018 was a record-low year for death penalty usage in the United States, as eighteen death-penalty states set or matched records for the fewest new death sentences imposed in the modern history of U.S. capital punishment. . . . Thirty-five U.S. States—including sixteen that authorized capital punishment in 2018—did not impose any death sentences in 2018, while California and Pennsylvania, which collectively account for nearly one-third of the nation’s death-row population, imposed record lows. Every western state except Arizona and Nevada set or tied a record low, and Arizona, which imposed two new death sentences, and Nevada, which imposed one, were just one above their record lows.²⁵

Setting Texas aside, a national consensus has developed and strengthened against the imposition of the death penalty, without any reference to the convict’s age.²⁶ However, even with reference to age, a consensus exists.

A national consensus, specifically against imposing the death penalty on society’s youngest adults, has developed as young adults are facing execution with less frequency. Of the states that still allow executions, “seven (7) have *de facto* prohibitions on the execution of offenders under twenty-one (21) years of age”²⁷ Moreover, between 2011 and 2016, only nine states executed people who were considered young adults at the time of the offense.²⁸ Thirty-three young adults were executed in total, and Texas, having executed nineteen young adults, performed the majority of those executions.²⁹ In 2015 alone, Texas was responsible for *the only* five executions of young adults nationwide.³⁰ Excluding Texas, eight other states executed fourteen young adults in total between 2011 and 2016, compared to twenty-nine executions of young adults between 2006 and 2011, and twenty-seven executions between 2001 and 2006.³¹ Although many factors may influence these numbers, the data indicates a developing national consensus against executing young adults.

Even though many states have not expressly exempted young adults from receiving the death penalty, the actual practice of executing young adults is becoming increasingly rare. When analyzing the numbers of executed people who were between the ages of eighteen and twenty-one at the time of their offenses, there is a significant downward trend in these executions.³² Between

25. *Record Lows Set Across the U.S. for Death Sentences Imposed in 2018*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/node/7285> (last visited Nov. 6, 2019).

26. *Facts About the Death Penalty*, *supra* note 12. In 1999, 279 offenders were sentenced to death, whereas only forty-two people were sentenced to the death penalty in 2018. *Id.*

27. *Commonwealth v. Bredhold*, No. 14-CR-161, 2017 WL 8792559, at *4 (Ky. Cir. Ct. Aug. 1, 2017) (alteration in original) (footnotes omitted).

28. *Id.*

29. *Id.* at 5.

30. Brian 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*, 40 N.Y.U. REV. L. & SOC. CHANGE 147, 152 (2016).

31. *Bredhold*, 2017 WL 8792559, at *5.

32. Memorandum of Points and Authorities in Support of [Under 21 Years] in Support of Motion to Preclude Death Penalty as Unconstitutional at exhibit C, *Doe v. People* (2015) (motion and exhibit on file with

2006 and 2011, roughly eleven young adults were executed per year, but that number has decreased.³³ In 2012, six young adults were executed, and in 2013, five young adults were executed; however, in 2014 and 2015, only three young adults were executed each year.³⁴ Similarly, the practice of sentencing those who were between the ages of eighteen and twenty-one at the time of their offense is low, in spite of the high criminality rates.³⁵ Although 2017 had roughly ten youthful offenders sentenced to death, in 2018, only four out of the forty-three people sentenced to death nationwide were youthful offenders.³⁶

Thus, in practice, a national consensus is strengthening against imposing the death penalty on young adults. This consensus is supported by the Supreme Court's jurisprudence on the death penalty. In *Graham v. Florida*, for example, the Court found a national consensus against sentencing juveniles with non-homicide charges to life without parole despite thirty-seven states and the District of Columbia allowing the death penalty.³⁷ In finding the existence of such a consensus, the Court evaluated the "actual sentencing practices" of the jurisdictions rather than simply accepting that these jurisdictions had no express prohibition against giving juveniles with non-homicide charges life without parole.³⁸ As the *Roper* Court recognized with juveniles, this rare practice of sentencing young adults to the death penalty does not "deny or overlook the brutal crimes too many . . . offenders have committed," it only acknowledges the diminished culpability of young adults that contributes to their exemption from the ultimate punishment.³⁹

In 2017, a circuit court in Fayette, Kentucky took this emerging national consensus into consideration when it found Kentucky's death penalty statute

the author) (offering a chart reflecting the number of people between the ages of eighteen and twenty who were executed from 2000 through July 15, 2015, broken down by state). This number does not account for those who were twenty-one at the time of their offense.

33. *Id.*

34. *Id.*

35. Michaels, *supra* note 10, at 169. Regarding the high criminality of young adults, the Bureau of Justice Programs (BJP) reported that, in 2010, the highest number of murder and non-negligent manslaughter arrests were of nineteen-year-olds (744 arrests), with eighteen-year-olds coming in at a close second (709 arrests). HOWARD N. SNYDER, U.S. DEP'T OF JUSTICE PATTERNS & TRENDS: ARREST IN THE UNITED STATES, 1990–2010, at 17 tbl.3 (2012), <https://www.bjs.gov/content/pub/pdf/aus9010.pdf>. In contrast, only 449 twenty-four-year-olds were arrested for murder and non-negligent manslaughter that same year. *Id.* When analyzing older age groups, the number of arrests for murder and non-negligent manslaughter continued to decline. For example, only 1849 people arrested murder and non-negligent manslaughter were between the ages of twenty-five and twenty-nine. *Id.* Although there may be many factors influencing such sentencing decisions, one interpretation is a decline in support of sentencing these young adults to the death penalty.

36. *Recent Death Sentences by Name, Race, County, and Year*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/2018-sentencing> (last visited Nov. 6, 2019).

37. 560 U.S. 48, 62 (2010); Michaels, *supra* note 10, at 170 ("The *Graham* court noted that only 123 incarcerated juveniles were serving life without parole for non-homicide crimes committed as juveniles, and contrasted those figures with statistics showing that nearly 400,000 juveniles were arrested for serious non-homicide offenses in a single year.").

38. Michaels, *supra* note 10, at 149–150.

39. *Roper v. Simmons*, 543 U.S. 551, 572 (2005).

unconstitutional as applied to young adults in two cases. Judge Ernesto Scorsone issued two opinions, one for Travis Bredhold and one for Efrain Diaz, both eighteen-years-old at the time of their offenses.⁴⁰ Judge Scorsone stated that, “it appears there is a very clear national consensus trending toward restricting the death penalty, especially in the case where defendants are eighteen (18) to twenty-one (21) years of age.”⁴¹

C. POST-*ROPER* STUDIES SHOW THAT YOUNG ADULTS LACK THE MENTAL CAPACITY TO UNDERSTAND AND APPRECIATE THEIR ACTIONS

Young and emerging adults are uniquely situated within the adult population. As they turn eighteen and transition into adulthood, this demographic of adults experiences greater independence than children, but often does not yet take on the “enduring responsibilities that are normative in adulthood.”⁴² These young adults, between the ages of eighteen and twenty-one, begin to make significant choices in key areas of life such as occupation, relationships, and education and begin to develop their own worldviews and opinions,⁴³ even before they develop the maturity to make thought-out and well-reasoned decisions. Over the years, research pertaining to these *adults* has developed to show that young adults are distinct from the rest of the older adult population, not only situationally but developmentally.

In studies comparing the temperance and delinquency of adolescents,⁴⁴ college-aged adults, and older adults, adolescents and college-aged adults displayed greater similarities in temperance than college-aged and older adults.⁴⁵ In fact, “eighteen-to twenty-one-year-olds . . . [are] more similar to ten- to seventeen-year-olds on indices of psychosocial maturity than they were to adults twenty-six years of age and older.”⁴⁶ As such, these young adults can neither control their impulses as well as older adults nor understand and

40. Commonwealth v. Bredhold, No. 14-CR-161, 2017 WL 8792559 (Ky. Cir. Ct. Aug. 1, 2017); Kentucky v. Efrain Diaz, No. 15-CR-584-001 (Ky. Cir. Ct. Sept. 6, 2017), <https://deathpenaltyinfo.org/files/pdf/KentuckyAge21DecisionEfrainDiaz.pdf>.

41. *Bredhold*, 2017 WL 8792559, at *5.

42. Jeffrey Jensen Arnett, *Emerging Adulthood: A Theory of Development from the Late Teens Through the Twenties*, 55 AM. PSYCHOLOGIST 469, 469 (2000); see also Craig M. Bennett & Abigail A. Baird, *Anatomical Changes in the Emerging Adult Brain: A Voxel-Based Morphometry Study*, 27 HUM. BRAIN MAPPING 766 (2006) (explaining that changes in the brain signal that maturation is not complete until around age twenty-five). In total recognition of their propensity to be irresponsible, emerging adults refer to “carrying out one or more of the duties and responsibilities expected of fully developed individuals” as “adulthood.” See *Adulthood*, URBAN DICTIONARY, <https://www.urbandictionary.com/define.php?term=Adulthood> (last visited Nov. 6, 2019).

43. URBAN DICTIONARY, *supra* note 42.

44. Michaels, *supra* note 10, at 162 (defining temperance as “the ability to evaluate a situation before acting,” and delinquency as the “involvement in stealing, property, and assault offenses”); Kathryn Lynn Modecki, *Addressing Gaps in the Maturity of Judgment Literature: Age Differences and Delinquency*, 32 LAW & HUM. BEHAV. 78, 79 (2008).

45. Michaels, *supra* note 10, at 162–63.

46. *Id.* at 163.

evaluate future consequences “because gains in impulse control continue to occur during the early twenties (20s).”⁴⁷

Although significant changes in the brain begin at puberty, these changes are not complete by the age of eighteen. Neurological research has shown that when an adolescent turns eighteen, their prefrontal cortex, the part of the brain “that helps . . . to inhibit impulses and to plan and organize . . . behavior to reach a goal,” has not yet fully developed.⁴⁸ Gray matter, brain cells credited with carrying out higher brain functions such as regulating behavioral control, does not reach full maturity until after the age of twenty.⁴⁹ White matter, attributed with facilitating communication within the brain through myelin and myelination, similarly develops into the twenties.⁵⁰ “Incomplete myelination is believed to make eighteen- to twenty-year-olds more vulnerable to peer pressure,”⁵¹ which influences young adults to respond in a manner that they normally would not, absent the pressure.⁵²

As neurological developments continue, young adults are also in the process of maturing behaviorally.⁵³ Research has shown that individuals between the ages of eighteen and twenty cannot fully anticipate future consequences, and they lack the ability to adequately understand rewards and consequences.⁵⁴ A psychological study found that young adults scored significantly lower than older adults on tests that measured their ability to evaluate situations before acting.⁵⁵ Even until the age of twenty-five, the

47. *Kentucky v. Efrain Diaz*, No. 15-CR-584-001, at *6–*7 (Ky. Cir. Ct. Sept. 6, 2017), <https://deathpenaltyinfo.org/files/pdf/KentuckyAge21DecisionEfrainDiaz.pdf>.

48. *Brain Maturity Extends Well Beyond Teen Years*, NPR (Oct. 10, 2011, 12:00 PM), <https://www.npr.org/templates/story/story.php?storyId=141164708>.

49. See Brief for the American Medical Ass’n & the American Academy of Child and Adolescent Psychiatry as Amici Curiae in Support of Neither Party at 18–21, *Graham v. Florida*, 560 U.S. 48 (2010) (Nos. 08-7412, 08-7621) [hereinafter Brief for the AMA]; Michaels, *supra* note 10, at 166.

50. Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 DEV. REV. 78 (2008) (offering scientific background on brain maturation); see also Brief for the AMA, *supra* note 49, at 22; Michaels, *supra* note 10, at 166.

51. Michaels, *supra* note 10, at 166.

52. NPR, *supra* note 48.

53. Bennett & Baird, *supra* note 42, at 766.

54. Laurence Steinberg et al., *Age Differences in Future Orientation and Delay Discounting*, 80 CHILD DEV. 28, 35 (2009); see also Elizabeth Cauffman et al., *Age Differences in Affective Decision Making as Indexed by Performance on the Iowa Gambling Task*, 46 DEV. PSYCHOL. 193 (2010) (proposing that a significant difference between adults and adolescents rests in their evaluation of rewards and consequences when making decisions); Michaels, *supra* note 10, at 165; Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1014 (2003) (“Although the identity crisis may occur in middle adolescence, the resolution of this crisis, with the coherent integration of the various retained elements of identity into a developed *self*, does not occur until late adolescence or early adulthood. Often this experimentation involves risky, illegal, or dangerous activities like alcohol use, drug use, unsafe sex, and antisocial behavior.” (alteration in original) (citing Alan S. Waterman, *Identity Development from Adolescence to Adulthood: An Extension of Theory and a Review of Research*, 18 DEV. PSYCHOL. 341, 341 (1982))).

55. Michaels, *supra* note 10, at 162.

human brain continues to mature and develop in areas such as judgment, reasoning, and impulse control.⁵⁶ This continuing development prevents young adults from fully controlling their behavior or understanding that violating the law is “morally wrong.”⁵⁷ Consequently, young adults underestimate “the number, seriousness, and likelihood of risks involved in a given situation”⁵⁸ and “are more likely to engage in ‘sensation-seeking,’ the pursuit of arousing, rewarding, exciting, or novel experiences.”⁵⁹

Other studies have also shown that emotional abilities, such as the ability to exercise self-control, to adequately “consider the risks and rewards of alternative courses of action, and to resist coercive pressure from others,” form after memory and logical reasoning have already developed in the brain.⁶⁰ “Thus, one may be intellectually mature but also socially and emotionally immature.”⁶¹ This juxtaposition of intellectual and emotional development becomes more pronounced when young adults make decisions in “situations that are emotionally arousing.”⁶² As a result, risky decision-making occurs more frequently, and peer pressure has a greater effect on young adults as compared to the rest of the adult population.⁶³ In light of these significant developments occurring both internally and within a social context, “[t]o cast eighteen- to twenty-year-old offenders in the group most deserving of capital punishment is to turn a blind eye to the realities of their behavioral, psychological, and neurological predispositions.”⁶⁴

Because young adults are limited by their own neurological developments that are outside of their control, they should not be considered culpable enough to deserve the death penalty. In fact, the brain continues to develop even after an adult reaches the age of twenty-one. These developments continue after the age of twenty-one significantly impacting how adults within this age range interact with others and respond to different environments. The prefrontal cortex, the part of the brain responsible for impulse control, is not fully

56. Caulum, *supra* note 8, at 731.

57. *Id.* at 732.

58. Kentucky v. Efrain Diaz, No. 15-CR-584-001, at *6 (Ky. Cir. Ct. Sept. 6, 2017), <https://deathpenaltyinfo.org/files/pdf/KentuckyAge21DecisionEfrainDiaz.pdf>.

59. *Id.* (citing Cauffman et al., *supra* note 54; Laurence Steinberg et al., *Around the World, Adolescence Is a Time of Heightened Sensation Seeking and Immature Self-Regulation*, 21 DEVELOPMENTAL SCI. e12532 (2018)).

60. Diaz, No. 15-CR-584-001, at *7.

61. *Id.* (citing 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)).

62. *Id.* (citing Alexandra O. Cohen et al., *When Is an Adolescent an Adult? Assessing Cognitive Control in Emotional and Nonemotional Contexts*, 4 PSYCHOL. SCI. 549 (2016)); Steinberg et al., *supra* note 54;

63. *Id.* (citing Dustin Albert et al., *The Teenage Brain: Peer Influences on Adolescent Decision Making*, 22 CURRENT DIRECTIONS IN PSYCHOL. SCI. 114 (2013)); Barbara R. Braams et al., *Longitudinal Changes in Adolescent Risk-Taking: A Comprehensive Study of Neural Responses to Rewards, Pubertal Development, and Risk-Taking Behavior*, 35 J. NEUROSCI. 7226 (2015); Elizabeth P. Shulman & Elizabeth Cauffman, *Deciding in the Dark: Age Differences in Intuitive Risk Judgment*, 50 DEVELOPMENTAL PSYCHOL. 167 (2014)).

64. Michaels, *supra* note 10, at 167.

developed until age twenty-five, meaning that older adults, those twenty-five and over, are better able to control impulses, plan, and organize behaviors.⁶⁵ During adolescence, a period that some researchers define as ranging from ten- to twenty-four years old, “neurocircuitry strengthens and allows for multitasking, enhanced ability to solve problems, and the capability to process complex information.”⁶⁶ Studies have shown that gray matter “seems to have completed its most dramatic structural change’ by age 25,” and white matter continues to form after the age of twenty-five but at a slower rate.⁶⁷ The late development of the limbic system and prefrontal cortex can also explain why adolescents, or young adults, rely more on emotions and feelings when making decisions and why they act more impulsively than adults with fully developed brains.⁶⁸ Because brain development continues until around the age of twenty-five (and possibly after),⁶⁹ credible arguments can be made that the death penalty should not be applied to adults under the age of twenty-five.

However, even though brain development continues into the mid-twenties, the changes occurring in the brains of these adults “appear[] to be one of fine-tuning.”⁷⁰ The developments, although significant, are “facilitated by the more extensive connectivity within and across brain areas.”⁷¹ In a study about risk-taking, Laurence Steinberg found that higher risk-taking rates existed among eighteen to twenty-one-year-olds even though as a whole, adolescents and young adults engage in risky behavior more often than adults over the age of twenty-five.⁷²

Another study addressing crime and age revealed that by the early twenties, half of active criminal offenders cease to engage in criminal activity, whereas “by age 28, almost 85% of former delinquents desist from offending.”⁷³ The study revealed that the most significant decrease in criminal activity occurred in the early twenties.⁷⁴ Researchers, such as Sandra Aamodt, have agreed that young adults can exhibit maturity at different ages, so setting the legal age at twenty-five may not always be appropriate.⁷⁵ Aamodt suggested flexibility in the legal system to address the unique positions that

65. NPR, *supra* note 48.

66. Mariam Arain et al., *Maturation of the Adolescent Brain*, 9 NEUROPSYCHIATRIC DISEASE & TREATMENT 449, 452 (2013).

67. Robin Marantz Henig, *What Is it About 20-Somethings?*, N.Y. TIMES MAG. (Aug. 18, 2010), <https://www.nytimes.com/2010/08/22/magazine/22Adulthood-t.html?pagewanted=all>.

68. Arain et al., *supra* note 66, at 453.

69. *Id.* at 451.

70. Steinberg, *supra* note 50, at 95.

71. *Id.*

72. *Id.* at 79.

73. Terrie E. Moffitt, *Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 PSYCHOL. REV. 674, 675 (1993).

74. *Id.*

75. NPR, *supra* note 48.

young adults face as a result of their developing brains.⁷⁶ Even though brain maturation is occurring in a young adult who is twenty-five, that twenty-five-year-old has more culpability for his or her actions than a younger adult who is under the age of twenty-one. Because the brain is still changing until the age of twenty-five, legislatures, courts, or voters should, at a minimum, raise the age eligibility of the death penalty to twenty-one which would more accurately reflect culpability. Such a change is supported by California legislation.

II. CALIFORNIA'S LAWS REFLECT LEGISLATIVE INTENT TO PROTECT YOUNG ADULTS

The California Legislature has chosen to treat young adults with special care and attention through various laws, regulations, and programs that are not just limited to one context but rather span many different sectors of the legal field including the criminal justice system, the family law sector, and consumer protection laws. Taken together, these legislative acts demonstrate an intent to protect young adults from the world they are forced to enter when they turn eighteen. By affording young adults special protections, the legislature's actions imply that young adults should not be considered among the most culpable and as a result, should not be eligible for the death penalty. As shown below, each legislative act uniquely seeks to insulate and assist young adults as they transition into adulthood.

A. CONSUMER PROTECTION LAWS

Recently, the legislature enacted two historic regulations concerning people under the age of twenty-one. In 2016, California became the second state to raise the minimum age at which an adult could legally purchase cigarettes from eighteen to twenty-one,⁷⁷ and in 2017, the legislature created the Medicinal and Adult-Use Cannabis Regulation and Safety Act (MAUCRSA) after California citizens passed Proposition 64, the Adult Use of Marijuana Act in 2016.⁷⁸ Both Proposition 64 and MAUCRSA limit the recreational use of cannabis to those over the age of twenty-one.⁷⁹ In both instances, the legislature was concerned with the harmful health consequences

76. *Id.*

77. Lisa Aliferis, *California Raises Age of Tobacco Purchase to 21 and Tightens Vaping Rules*, NPR (May 5, 2016, 10:58 AM), <https://www.npr.org/sections/health-shots/2016/05/05/476872674/california-raises-age-of-tobacco-purchase-to-21-and-tightens-vaping-rules>. Hawaii was the first state to raise the legal age requirement to twenty-one and, as of Nov. 6, 2019, thirteen other states have followed suit. *States and Localities that Have Raised the Minimum Legal Sale Age for Tobacco Products to 21*, CAMPAIGN FOR TOBACCO-FREE KIDS, https://www.tobaccofreekids.org/assets/content/what_we_do/state_local_issues/sales_21/states_localities_ML_SA_21.pdf (last visited Nov. 6, 2019).

78. *Cannabis Legislation*, CAL. CANNABIS PORTAL, <https://cannabis.ca.gov/cannabis-legislation> (last visited Nov. 6, 2019).

79. *Id.*

of cigarette and marijuana use, as well as young adults' susceptibility to addiction and peer pressure with respect to the use of these products.⁸⁰

1. Tobacco Laws

On May 4, 2016, Governor Edmund G. Brown, Jr. approved California Senate Bill 7, which amended the Stop Tobacco Access to Kids Enforcement (STAKE) Act, effectively raising the legal smoking age from eighteen to twenty-one.⁸¹ In creating and pursuing this bill, the legislature was motivated by health concerns and successfully amended the Business and Professions Code section 22951 to reflect this motivation.⁸² Section 22951 now reads: "The Legislature finds and declares that reducing and eventually eliminating the illegal purchase and consumption of tobacco products by any person under 21 years of age is critical to ensure the long-term health of our state's citizens."⁸³ After Governor Brown signed the bill, Senator Ed Hernandez, the lead author of the bill, stated, "What this means for California is now we can know that our youth are less likely to be addicted to this horrible drug of tobacco . . . [and] we're going to reduce health care costs and save lives."⁸⁴ The legislature's decision to raise the minimum age was noteworthy because it indicated a concern for the addictive qualities of cigarettes and the impacts that this specific activity can have on a young adult's health. This decision was significant because it was made in the face of forty-eight other states that allowed young adults, upon turning eighteen and reaching legal adulthood, to make such decisions impacting their health and future.⁸⁵

To that point, the American Lung Association supported the bill, saying that "delaying the age when youth first use tobacco can reduce their likelihood of transitioning to regular tobacco users."⁸⁶ The author of the bill estimated that ninety percent of people who use tobacco begin using it before the age of

80. *Tobacco Products: Minimum Legal Age: Hearings Before Sen. Comm. on Pub. Health and Developmental Servs.*, 2015–2016 Leg., 2 (Cal. 2016) [hereinafter *Tobacco Products: Minimum Legal Age Hearings*] (statement of Sen. Ed Hernandez, Chairman, Sen. Comm. on Pub. Health and Developmental Servs.) ("Research shows that nicotine exposure has a dynamic impact on developing brains in smaller doses and leads to increased vulnerability to addiction, impulsivity, and mood disorders."); see also ASSEMB. FLOOR ANALYSIS, S.B. 7, 2015–2016 Leg., 2 (Cal. 2016) ("[A]dolescent brains are more vulnerable to nicotine addiction . . . [T]he evidence and need are clear on the legal age for tobacco and now is time for us to make this change.").

81. See S.B. 7, 2015–2016 Leg. (Cal. 2016); Assemb. B. 64, 2017–2018 Gen. Assemb. (Cal. 2017). Proposition 64, which the legislature expanded on, was based on a desire to prevent adolescents from purchasing marijuana and, in doing so, included young adults with adolescents in this prohibition. See *id.* § 3.

82. CAL. BUS. & PROF. CODE § 22951 (West 2019).

83. *Id.*; see also CAL. BUS. & PROF. CODE §§ 17537.3, 22952, 22956, 22958, 22963 (West 2019); CAL. PENAL CODE § 308 (West 2019) (referring to twenty-one as an age requirement); Cal. Assemb. B. 64.

84. Aliferis, *supra*, note 77 (alteration in original).

85. See *States and Localities that Have Raised the Minimum Legal Sale Age*, *supra* note 77 (following California and Hawaii's lead, sixteen other states have since raised the minimum age to twenty-one).

86. ASSEMB. FLOOR ANALYSIS 5, S.B. 7, 2015–2016 Leg., 2 (Cal. 2016).

twenty-one, and “80% of lifetime users start before the age of 18.”⁸⁷ Because nicotine is an addictive and psychoactive substance, it directly influences emotional and cognitive processes in the brain and can cause cell damage and cell loss.⁸⁸ Nicotine also affects “reward pathways and circuits involved in learning, memory, and mood,” which is “likely to contribute to increased addiction and long-term behavioral problems in adolescents.”⁸⁹ With this research in mind, the legislature’s decision to raise the age at which a young adult can purchase and smoke cigarettes indicates that scientific research has a significant impact on how the legislature makes decisions in regard to young adults and their susceptibility to outside influences.

Because young adults are more susceptible to peer pressure and their brains continue to develop beyond the age of twenty-one, the legislature’s decision to prohibit these adults from smoking and purchasing cigarettes shows that the legislature does not fully trust a young adult’s decision-making capabilities. Senator Ed Hernandez stated, “We can no longer afford to sit on the sidelines while big tobacco markets to our kids and gets another generation of young people hooked on a product that will ultimately kill them.”⁹⁰ Senator Hernandez’s rationale in raising the minimum age reflects studies revealing the susceptibility of young adults to peer pressure.⁹¹ Studies have revealed that young adults are influenced by the smoking behaviors of those around them.⁹² These findings support the notion that the brain of a young adult is still in a season of transition, and thus, age must be considered when determining whether a young adult should be held responsible for their choices and decisions that can have significant impacts on their futures. The legislature’s progressive decision to take away a young adult’s ability to purchase cigarettes shows a significant shift in how people under the age of twenty-one are protected and distinguished from the rest of the adult population.

2. Marijuana Laws

Similarly, in 2017, the legislature passed California Senate Bill 94 (SB 94), creating MAUCRSA, which legalized the recreational use of cannabis for

87. *Tobacco Products: Minimum Legal Age Hearing*, at 2 (statement of Sen. Ed Hernandez, Chairman, Sen. Comm. on Pub. Health and Developmental Servs.)

88. *Nicotine and the Developing Brain*, UTAH DEP’T OF HEALTH (May 2018), <https://tobaccofreeutah.org/wp-content/uploads/youth-nicotine-and-brain-2017.pdf>.

89. *Id.*

90. Alexei Koseff, *Bill Would Raise California Smoking Age to 21*, SACRAMENTO BEE (Jan. 30, 2015, 11:57 PM), <https://www.sacbee.com/news/politics-government/capitol-alert/article8587841.html>.

91. *Tobacco Products: Minimum Legal Age Hearing*, at 2 (statement of Sen. Ed Hernandez, Chairman, Sen. Comm. on Pub. Health and Developmental Servs.).

92. U.S. DEP’T OF HEALTH AND HUMAN SERVS., PREVENTING TOBACCO USE AMONG YOUTH AND YOUNG ADULTS: A REPORT OF THE SURGEON GENERAL 10 (2012) (defining young adults as between the ages of eighteen to twenty-five).

those twenty-one and over.⁹³ Following the enactment of SB 94, the California Department of Public Health (CDPH) launched an education and health information campaign titled “Let’s Talk Cannabis,” providing information about how cannabis can affect youth and young adults.⁹⁴ The CDPH’s campaign explained that smoking cannabis can harm the lungs and that young adults face higher risks of poisoning if they ingest edibles too quickly.⁹⁵ The CDPH also emphasized that cannabis can affect one’s brain, which in turn can impact one’s educational and professional goals.⁹⁶ All these reasons supported the legislature’s decision to prohibit young adults, between the ages of eighteen and twenty, from using cannabis recreationally. It appears that a primary concern of the CDPH was to ensure the health and safety of California’s youth as they gain more responsibility as adults. Again, although these young adults have reached the age of majority, the legislature still exercises special and significant control over this subsection of the adult population to ensure their maximum development and health.

B. FAMILY LAWS

In 2012, the California Fostering Connections to Success Act was enacted.⁹⁷ This bill allowed certain “non-minor dependents” youth between the ages of eighteen and twenty-one, to continue to receive various forms of support and aid by “extending payment benefits and transitional support services for the Adoption Assistance Program (AAP) and the Kinship Guardianship Assistance Payment (Kin-GAP) Program.”⁹⁸ In implementing

93. *Cannabis Legislation*, *supra* note 78; *see also* CAL. BUS. & PROF. CODE §§ 26000–26001, 26030, 26120, 26140, 26151–26152, 26155 (West 2019) (referencing the age requirement of twenty-one); CAL. CIV. CODE § 1550.5 (West 2019) (referencing the age requirement of twenty-one); CAL. REV. & TAX. CODE § 34017 (West 2019) (referencing the age requirement of twenty-one); CAL. HEALTH & SAFETY CODE §§ 11357–11359, 11362.1, 11362.3, 11362.45 (West 2019) (referencing the age requirement of twenty-one); CAL. VEH. CODE § 2429.7 (West 2019) (requiring a task force to determine policy recommendations about regulating impaired driving due to cannabis).

94. *Youth and Cannabis: What You Should Know*, CAL. DEP’T PUB. HEALTH, <https://www.cdph.ca.gov/Programs/DO/letstalkcannabis/Pages/youth.aspx> (last updated Nov. 17, 2017).

95. *Id.*; *see also Cannabis Information for Health Care Providers*, CAL. DEP’T PUB. HEALTH, <https://www.cdph.ca.gov/Programs/DO/letstalkcannabis/CDPH%20Document%20Library/October%202017%20Update/CDPH-Providers.pdf> (last updated Oct. 17, 2017) (explaining the effects of cannabis on health and goals).

96. *Cannabis Information for Health Care Providers*, *supra* note 95.

97. Assemb. B. 12, 2009–2010 Gen. Assemb. (Cal. 2010).

98. *After 18 Program*, CAL. DEP’T SOC. SERVS., <http://www.childsworld.ca.gov/res/pdf/AB12FactSheet.pdf> (last updated Nov. 14, 2016); *see also California Fostering Connections to Success Act: Assembly Bill 12 Primer* 10, ALL. FOR CHILDREN’S RIGHTS ET AL. <https://kids-alliance.org/wp-content/uploads/2013/01/AB12-Primer-Jan-2014.pdf> (last updated Jan. 1, 2014); Letter from Gregory E. Rose, Deputy Dir., Child. And Fam. Servs. Division, Cal. Dep’t Soc. Servs. (Mar. 1, 2012), <http://www.cdss.ca.gov/lettersnotices/entres/getinfo/acl/2011/11-86.pdf>. Transitional Independent Living Case Plans “(1) to develop permanent connections with caring and committed adults (2) to develop independent living skills and have opportunities for incremental responsibility and (3) to live in the least restrictive placement,” and other programs and benefits are offered to these young adults. *Id.*

the program, one goal was to allow these young adults to maintain a safety net of support in a supervised living environment as they began to gain independence.⁹⁹ The legislature wanted to ensure that non-minor dependents were given the opportunity to “make decisions regarding his or her housing, education, employment, and leisure activities, while ensuring the availability of ongoing support and assistance when difficulties are encountered.”¹⁰⁰ By extending benefits to these young adults, the legislature acknowledged that non-minor dependents, specifically those in the foster care system, require additional support as they transition into adulthood.

Although these services are only available to foster youth who meet certain ongoing requirements, the rationale behind the extension of benefits and assistance is significant. In Wellness and Institutions Code section 11403.1, the legislature wrote:

[F]ormer foster youth are a vulnerable population at risk of homelessness, unemployment, welfare dependency, incarceration, and other adverse outcomes if they exit the foster care system unprepared to become self-sufficient. Unlike many young individuals 18 years of age who can depend on family for ongoing support while they complete postsecondary education or develop career opportunities, emancipating foster youth have their primary source of support, AFDC-Foster Care payments, terminated at 18 years of age and are then dependent on their own resources for self-support. Some foster youth are not able to complete high school or other education or training programs due to ongoing trauma from the parental abuse or neglect and gaps in their educational attainment stemming from the original removal and subsequent changes in placement.¹⁰¹

Thus, the legislature’s rationale acknowledges that young adults generally receive and should receive support from others as they transition into adulthood. Whether or not a youth is in the foster care system, young adults depend on older, wiser, more settled adults to help them navigate the added responsibilities that come with adulthood. However, specifically regarding foster youth, the legislature explained that participating in and completing an educational or training program is a necessary, minimal skill for a foster youth to “be competitive in today’s economy.”¹⁰² Here, the legislature ensured more support and resources for this marginalized group of adults even after reaching the age of majority. Entering into adulthood comes with added difficulties, and young adults, regardless of upbringing—however, more acutely felt by those with traumatic childhoods—need additional help to thrive in society and succeed. On a basic level, young adults simply lack the maturity of older adults

99. *California Fostering Connections to Success Act*, *supra* note 98.

100. *A.B. 12 / 212: California Fostering Connections to Success Act*, CAL. COURTS: THE JUD. BRANCH OF CAL., <http://www.courts.ca.gov/7988.htm> (last visited Nov. 6, 2019); *Extended Foster Care Rules and Forms*, CAL. COURTS: THE JUD. BRANCH OF CAL., http://www.courts.ca.gov/documents/Extended_Foster_Care_Rules_and_Forms.pdf (last visited Nov. 6, 2019).

101. CAL. WELF. & INST. CODE § 11403.1(a)(1) (West 2019).

102. *Id.* § 11403.1(a)(2).

who have already successfully entered into society.¹⁰³ With the legislature acknowledging the difficulty of transitioning into adulthood, they should also recognize that young adults should not be treated the same as older adults in the criminal justice system.

C. SPECIAL ACCOMMODATIONS IN THE CRIMINAL JUSTICE SYSTEM

In 2016, the legislature acknowledged yet again how young adults are in a different season developmentally and transitionally than older adults.¹⁰⁴ This time the legislature sought to provide additional support within the criminal justice system for young adults who committed certain crimes. California Senate Bill 1004 (SB 1004) created a five-county pilot program that would run until 2020 and allow “transitional adult youth” (youth between ages eighteen to twenty) to serve time in a juvenile detention facility, rather than adult county jail, if they entered a plea.¹⁰⁵ Originally, this program was approved for five counties: Alameda, Butte, Napa, Nevada, and Santa Clara counties, but in 2018, Governor Brown signed SB 1106, which extended the duration of the program until 2022 and expanded it to include Ventura County.¹⁰⁶ SB 1004 and 1106 allow young adults, who are in transitional and pivotal life stages, not only legally but developmentally, to receive services in a juvenile detention facility that they would be otherwise unable to access in adult prison. Although these provisions only apply to non-violent, non-serious offenses, it is a significant step in acknowledging the unique impact that the criminal justice system has on young adults. The author of the SB 1004 explained:

While legally they are adults, young offenders age 18–21 are still undergoing significant brain development and it’s becoming clear that this age group may be better served by the juvenile justice system with corresponding age appropriate intensive services. Research shows that people do not develop adult-quality decision-making skills until their early 20s. This can be referred to as the “maturity gap.” Because of this, young adults are more likely to engage in risk seeking behavior.¹⁰⁷

103. *See Roper v. Simmons*, 543 U.S. 551, 570 (2005) (“Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment.”).

104. S.B. 1004, 2015–2016 Leg. (Cal. 2016); *see also* CAL. PENAL CODE § 1000.7 (West 2019). CAL. PENAL CODE § 1000.7 is repealed as of Jan. 1, 2020 by its own provisions. CAL. PENAL CODE § 1000.7.

105. CAL. PENAL CODE § 1000.7.

106. S.B. 1106, 2017–2018 Leg. (Cal. 2018). The bill analysis of SB 1106 stated that Ventura County was added to “provide valuable information,” and the sunset date was extended to ensure that the program would “operate for a length of time that delivers the most comprehensive and evidence based evaluation.” ASSEMB. FLOOR ANALYSIS, S.B. 1106, 2017–2018 Leg., 4 (Cal. 2018).

107. ASSEMB. FLOOR ANALYSIS, S.B. 1104, 2015–2016 Leg., 4 (Cal. 2016).

Specifically, in passing SB 1004, the legislature considered the recent scientific research pertaining to the development of adolescents' brains.¹⁰⁸ In the bill analysis, the legislature acknowledged that young adults are not similarly situated with the rest of the adult population, especially when placed into the criminal justice system and that eighteen to twenty-year-olds "may be better served in the juvenile justice system with age appropriate intensive services."¹⁰⁹ According to the Chief Probation Officers of California:

In order to address the criminogenic and behavioral needs of adolescents, it is important that developmental age appropriate services are provided. Juvenile detention facilities have such services available for adolescents including, but not limited to, cognitive behavioral therapy, mental health treatment, vocational training, and education among other programming intended to specifically address the needs of the emerging adolescent brain.¹¹⁰

This rationale mirrors that of the *Roper* Court, which found that juveniles were more susceptible to making "immature and irresponsible" decisions and such susceptibility means they have a "greater claim . . . to be forgiven."¹¹¹

Although the Transitional Age Youth Pilot Program is still being piloted, its implementation signifies an important step ensuring that young adults are given adequate assistance within the criminal justice system. Young adults are still in a pivotal time of development despite having reached the age of majority. The program not only validates the developmental shortcomings of these adults but gives them additional support and programming that older adults in the criminal justice system do not always receive.

D. PROPOSED PROVISIONAL LICENSING FOR SAFER DRIVING

In September of 2017, California Assembly Bill 63 (AB 63), a bill aimed at protecting young drivers, was vetoed by Governor Brown after being approved by both the Assembly and Senate.¹¹² Had it been signed, the law would have taken effect January 1, 2020, extending the provisional license program from the age of eighteen to twenty-one. The bill proposed that, if someone received their license between the ages of sixteen and twenty-one, that new driver would have a twelve-month provisional license with which

108. S.B. 1004 § 2 (quoting the Chief Probation Officers of California who stated that "[r]ecent research on the adolescent brain development has found that brain development continues well after an individual reaches 18 years of age.").

109. ASSEMB. FLOOR ANALYSIS, S.B. 1104, 2015–2016 Leg., 4 (Cal. 2016).

110. *Governor Brown Signs Transitional Age Youth Pilot Program Legislation Relying on Mounting Brain Research of Treatment Options for Youthful Offenders Age 18–21*, CHIEF PROB. OFFICERS OF CAL., <https://www.cpoc.org/post/governor-brown-signs-transitional-age-youth-pilot-program-legislation-relying-mounting-brain> (last visited Nov. 6, 2019).

111. *Roper v. Simmons*, 543 U.S. 551, 570 (2005).

112. Assemb. B. 63, 2017–2019 Gen. Assemb. (Cal. 2017); Alexei Koseff, *Jerry Brown Vetoes New Restrictions for Rookie Drivers Under 21*, SACRAMENTO BEE (last updated Oct. 7, 2017, 4:54 PM), <https://www.sacbee.com/news/politics-government/capitol-alert/article177653871.html>.

they could not drive between 11:00 p.m. and 5:00 a.m. and would be required to “keep in his or her possession a copy of his or her class schedule or work schedule as documentation to satisfy the exceptions for a school or school-authorized activity and employment necessity.”¹¹³

In passing the bill, the legislature was influenced by the State Department of Public Health’s EpiCenter, as well as by data from the National Center for Injury Prevention and Control of the federal Centers for Disease Control and Prevention.¹¹⁴ According to these organizations, “unintentional injuries are the leading cause of death and hospitalizations for California’s children and youth between 1 and 19 years of age.”¹¹⁵ The reports indicated that vehicle crashes involving youth, ages nineteen and under, cost \$110 million in medical expenses and \$387 million in medical and wage loss costs combined.¹¹⁶ According to the California Department of Motor Vehicles, at least thirty-five percent of teenagers in California get their driver’s license when they are eighteen or nineteen years old.¹¹⁷ Furthermore, legislative history quoted California’s 2015–19 Strategic Highway Safety Plan (SHSP) Implementation Plan, which stated, ““Young drivers have less driving experience, may be less likely to identify hazardous conditions and react to them, and are disproportionately involved in risky driving behaviors that directly result in more crashes than experienced drivers.”¹¹⁸ These sources reaffirm that young adults are a distinct subsection of the adult population and necessitate added protection and oversight for their own safety and the safety of others.

Despite the Legislature’s passage of the bill, Governor Brown vetoed AB 63. He explained:

While I understand the author’s intent of needing to address factors that contribute to the unnecessary collisions and deaths of young Californians on our highways, the provisions of this bill create a burden on a segment of adult Californians that are no longer seen as a minor in the eyes of the law.¹¹⁹

Governor Brown’s rationale in vetoing the bill reemphasizes what the law already acknowledges: eighteen to twenty-year-olds are autonomous adults. His opposition to the proposed legislation stemmed, in part, from a concern that it would “burden” young adults by limiting freedoms currently afforded to their age group. In the context of the death penalty, raising age eligibility for the death penalty would not burden young adults but would protect them from

113. Cal. Assemb. B. 63.

114. *See id.* § 1.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Driver’s Licenses: Instructional Permits and Provisional Licenses: Hearings Before Assemb. Comm. on Transp.*, 2017–2018 Gen. Assemb. 3 (Cal. 2017) (statement of Jim Fraazier, Chair, Comm. on Transp.) (internal quotation marks omitted).

119. Koseff, *supra* note 112.

a punishment that may be too harsh given their limitations and diminished culpability. Such a sentence should be reserved for the most culpable offenders, not simply those who are “no longer seen as a minor in the eyes of the law.”¹²⁰ In vetoing AB 63, Governor Brown indicated that focusing on better driver education and training would help address safety concerns; however, his rationale fails to address scientific research demonstrating that young adults lack adequate impulse control and have increased risk-taking habits.¹²¹ Although further education and programming for young adults to help ensure they are productive and positive members of society is important, young adults are limited by the developments occurring within them as they age. In the context of the death penalty, young adults sentenced to death are given no opportunity to move beyond their convictions or to see if their decision-making processes evolve as their brains mature. Rather, the death sentence seals their fate and inhibits these young offenders from receiving any form of rehabilitation as their brains mature.

Although AB 63 will not go into effect, the legislature’s rationale behind the bill continues to show a trend of acknowledging that young adults do not possess the maturity and restraint that the rest of the adult population possesses and thus, are not among the most culpable offenders worthy of the most severe form of punishment.¹²²

E. LEGISLATIVE EFFORTS TO FOSTER CIVIC ENGAGEMENT BEFORE ADULTHOOD

Although eighteen is the recognized age of adulthood, the legislature has sought to engage and encourage adolescents to be civically engaged before they are legally able to vote. In September of 2014, Governor Brown approved California Senate Bill 113 (SB 113), which lowered the age at which one could pre-register to vote from seventeen years old to sixteen years old.¹²³ In support of the bill, Senator Hannah-Beth Jackson, the author, argued that “the earlier people are introduced to voting, the more likely they are to become life-long participants in democracy.”¹²⁴ This bill came after the 2012 presidential election, in which only sixty-two percent of Californians between the ages of eighteen and twenty-four were registered to vote.¹²⁵ Senator Jackson noted that these young adults were registering at a lower rate than other age groups and were not voting at rates reflective of the size of their age group.¹²⁶ Although

120. *Id.*; accord *Roper v. Simmons*, 543 U.S. 551 (2005) (describing culpability as one of the main determinants of death eligibility).

121. NPR, *supra* note 48.

122. See generally *Roper*, 543 U.S. 551 (holding that the death penalty should be reserved for the most culpable offenders).

123. S.B. 113, 2013–2014 Leg. (Cal. 2014).

124. S. FLOOR ANALYSIS, S.B. 113, 5.

125. *Id.*

126. *Id.*

this bill allows youth to pre-register to vote in hopes of larger voter turnouts at future elections, the voting age remains set at eighteen despite attempts to lower it.

In September of 2017, the legislature rejected an effort to lower the voting age in California. Earlier that year, Assemblyman Evan Low and Assemblywoman Lorena Gonzalez Fletcher introduced Assembly Constitutional Amendment 10 (ACA 10), which sought to amend the California Constitution and lower the legal voting age to seventeen years old.¹²⁷ The comments behind the Amendment indicated that lowering the voting age would help young people build a habit of voting and that “many 18-year-olds are in a time of intense transition, but at 17, young people can cast their crucial first votes at a time when they are still connected to their school, home, and community.”¹²⁸ When taken to the Assembly, the Amendment failed, but together, ACA 10 and SB 113 signal an effort to entrust youth with greater responsibility and a desire to foster productive habits while youth are under the supervision of adults. The legislature seems inclined to help youth be more engaged by the time they reach the age of majority, but ultimately is resistant to letting juveniles actually cast a vote.

Voting is a crucial aspect of our democracy. Young adults are entrusted with this significant responsibility, that at face value, counters arguments in support of raising death penalty eligibility. Having the right to vote implies that young adults are capable to make significant decisions that will impact their future; however, such assumptions do not necessarily contradict research supporting raising the age eligibility for the death penalty. The judgment necessary to make *unhurried* decisions, in which one can consult with others, has developed by the time one turns sixteen.¹²⁹ This type of judgment is called “cold cognition.”¹³⁰ Contrary to the type of judgment used in situations “characteri[z]ed by heightened emotions, time pressure, or the potential for social coercion” (hot cognition), cold cognition is not likely mature until adults reach the age of twenty-one.¹³¹ Even though the legislature has bestowed the right to vote upon young adults, such a responsibility does not contradict how a young adult remains less culpable than an older adult when facing a sentence in the criminal justice system. The legislature’s own efforts to shelter young adults in the criminal justice system, the family law sector, and through consumer protection laws indicate their acknowledgment that young adults

127. ASSEMB. CONST. AMEND. 10, 2017–2018 Leg. (Cal. 2017).

128. *Elections: Voter Qualifications: Hearings Before Assemb. Comm. on Elections & Redistricting*, 2017–2018 Leg. 2 (Cal. 2017) (statement of Nichole Becker, Principal Consultant) (quoting Generation Citizen—VOTE16USA, an organization in support of the amendment).

129. Laurence Steinberg, *Let Science Decide the Voting Age*, NEW SCIENTIST (Oct. 8, 2014), <https://www.newscientist.com/article/mg22429900-200-let-science-decide-the-voting-age>.

130. *Id.*

131. *Id.*

should not be treated the same as older adults when it comes to criminal culpability.

III. ARGUMENTS

A. THE CALIFORNIA LEGISLATURE SHOULD IMPOSE A MINIMUM-AGE CRITERIA THAT PROTECTS YOUNG ADULTS FROM THE HARSHTEST FORM OF PUNISHMENT

“The Legislature is . . . accorded the broadest discretion possible in enacting penal statutes and in specifying punishment for crime[s].”¹³² Thus, the California Legislature could and should amend its death penalty statutes to exempt young adults from capital punishment. Such an amendment would be supported by the legislature’s numerous demonstrations of a collective belief that young adults need special protections from themselves and society. Indeed, it is perplexing that a legislature that finds young adults in need of special protections spanning many fields of California law does not also safeguard young adults from the death penalty, the most severe form of punishment. After all, “[t]he reasons why juveniles,” or young adults in California, “are not trusted with the privileges and responsibilities of” other adults “explain[s] why their irresponsible conduct is not as morally reprehensible as that of” older adults.¹³³ If the distinctions between young adults and older adults were not persuasive, the legislature would not pass bills that limit young adults’ freedoms in order to protect them from their inability to make mature, rational choices.

Moreover, the choice to raise the minimum-age criteria for the death penalty would acknowledge the statewide consensus that has developed regarding the imposition of death sentences on young adults. Sentencing data shows that between 2000 and 2015 only twelve of California’s fifty-eight counties imposed death sentences on a young adult.¹³⁴ Conversely, roughly eighty percent of California’s counties have not sentenced a young adult offender to the death penalty in over almost two decades.¹³⁵ This statistic could

132. *People v. Anderson*, 493 P.2d 880, 888 (Cal. 1972), *superseded by Constitutional amendment*, CAL. CONST. art. 1 § 27; *accord Furman v. Georgia*, 408 U.S. 238, 269 (1972) (Brennan, J., concurring); *Trop v. Dulles*, 356 U.S. 86, 103–104 (1958) (Warren, C.J., plurality opinion); *Weems v. United States*, 217 U.S. 349, 378–379 (1910).

133. *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988).

134. Angela Marie Krueger, *Number to DR.CA Counties.2000-2015* (data updated through 2015 and on file with the author); *Legal Process*, DEATH PENALTY INFO. CTR. (July 11, 2018), <https://deathpenaltyinfo.org/podcast/resources/Episode14LegalProcess.pdf> (explaining that thirty-one counties have recommended the death penalty on a defendant); 19 additional counties imposed the death penalty only on people twenty-one and over between 2000 and 2015. Angela Marie Krueger, *Number to DR.CA Counties.2000-2015* (unpublished manuscript) (on file with author).

135. *See The Death Penalty in 2018: Year End Report*, *supra* note 23 (reporting that Riverside, the California county that sentenced the most people to death between 2015 and 2017, did not sentence a single defendant to death in 2018; that Kern County and San Bernardino County also abstained from imposing the

imply that a *de facto* death penalty exemption for young adults exists, despite public opinion favoring the death penalty.

If the legislature were to grant statutory protection from capital punishment, such a decision would not impede efforts to protect society from those who have most appropriately received the death penalty. Even with an age limitation, these young adults would still face sufficient punishment for their actions.¹³⁶ As Andrew Michaels contends, “exemption is not exoneration.”¹³⁷ Rather, the prohibition would reaffirm the notion that capital punishment should be reserved for those who are most deserving of it. In other words, it would reserve the ultimate punishment for those who were mature enough to fully recognize the harm they were doing when they committed their death-penalty-eligible crime and who had the self-control to behave accordingly. Young adults should not be considered among the most culpable.

B. THE COURTS SHOULD RULE THE DEATH PENALTY UNCONSTITUTIONAL AS APPLIED TO YOUNG ADULTS

Even if the legislature fails to amend the death penalty statutes in accordance with its demonstrable efforts to shield young adults from the consequences of making bad decisions, the courts can step in and rule the death penalty unconstitutional as applied to young adults.¹³⁸ In the past, the Supreme Court of California did not shy away from declaring the death penalty a violation of the Eighth Amendment,¹³⁹ and today, it certainly should not experience any trepidation in declaring the death penalty, as applied to eighteen- to twenty-year-olds, either a violation of the Eighth Amendment’s cruel and unusual standard or the state constitution’s “cruel or unusual” standard. Although voters of the 1970s reacted against the Supreme Court’s

death penalty on defendants in 2018 despite having employed it in prior years; that Los Angeles County only sentenced two people to death in 2018; and that Orange County only sentenced one person to death in 2018); see also Maura Dolan, *Death Sentences Plummet Across California. Riverside County, Which Led the U.S. in 2017, Has Had Zero This Year*, L.A. TIMES (Dec. 13, 2018, 9:05 PM), <https://www.latimes.com/local/lanow/la-me-death-penalty-cases-california-20181213-story.html> (“Five California counties, among the 10 with the most death sentences nationwide in the last five years, either had no sentences or no more than two, according to the report by the Death Penalty Information Center.”).

136. Courts could still sentence young adults to life without the possibility of parole, a sentence that many argue is worse than the death penalty because it deprives an individual of any hope that they might re-enter society one day.

137. Michaels, *supra* note 10, at 176.

138. *People v. Anderson*, 493 P.2d 880, 888 (Cal. 1972), *superseded by Constitutional amendment*, CAL. CONST. art. I § 27 (“The Legislature is . . . accorded the broadest discretion possible in enacting penal statutes and in specifying punishment for crime, *but the final judgment as to whether the punishment it decrees exceeds constitutional limits is a judicial function.*” (emphasis added)); see also *Furman v. Georgia*, 408 U.S. 238, 269 (1972) (Brennan, J., concurring); *Trop v. Dulles*, 356 U.S. 86, 103–104 (1958) (Warren, C.J., plurality opinion); *Weems v. United States*, 217 U.S. 349, 378–379 (1910).

139. See *Anderson*, 493 P.2d at 895, *superseded by constitutional amendment*, CAL. CONST. art. I, § 27.

progressivity then, the State's current populous might not take issue with a more moderate constraint on death penalty sentencing.¹⁴⁰

1. Imposing Death Sentences on Young Adults Violates the Eighth Amendment

What qualifies as cruel and unusual punishment in the United States Constitution has been debated since the Eighth Amendment was ratified in 1791.¹⁴¹ Apart from “barbaric” forms of punishment that are uncontested Eighth Amendment violations, other forms of punishment cause the Court to question what this standard really means.¹⁴² Based on this jurisprudence, the Eighth Amendment is not a static standard that refuses to change over time. Rather, cruel and unusual punishment is evaluated by “the evolving standards of decency that mark the progress of a maturing society.”¹⁴³ These evolving standards are measured by objective factors, namely, “(1) state legislation, (2) sentencing decisions of juries, and (3) the views of entities with relevant expertise”—these standards are, in fact, very high.¹⁴⁴

Over the years, the Supreme Court has been hesitant to find controversial forms of punishment cruel and unusual.¹⁴⁵ However, the Court does allow for evolution of this standard when it is clearly warranted. As Justice Kennedy noted, “The Eighth Amendment ‘is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.’”¹⁴⁶ Thus, this vague standard is malleable and evolving. It demands review when change is due, as is the case here with respect to exempting young adults from receiving the death penalty.

Indeed, the Court's proportionality doctrine has given way to several categorical exemptions from the death penalty over the last two decades. In 2002, the Court determined that it was cruel and unusual to allow the “mentally retarded” to face the death penalty, and in doing so, overturned a prior decision made roughly a decade before that upheld the constitutionality of sentencing these individuals to the death penalty.¹⁴⁷ In 2005, the Court again overturned a previous opinion when it found that sentencing juveniles to the

140. See *supra* note 13 and accompanying text.

141. See Bryan A. Stevenson & John F. Stinneford, *Common Interpretation: Eighth Amendment*, NAT'L CONSTITUTION CTR., <https://constitutioncenter.org/interactive-constitution/interpretation/amendment-viii/clauses/103> (last visited Nov. 6, 2019).

142. *Id.*

143. *Roper v. Simmons*, 543 U.S. 551, 561 (2005) (Warren, C.J., plurality opinion) (quoting *Trop*, 356 U.S. at 100–01)).

144. *Evolving Standards of Decency*, A.B.A. (Juv. Just. Ctr., Washington D.C.), Jan. 2004, at 1.

145. See *e.g.*, *Baze v. Rees*, 553 U.S. 35, 41 (2008) (holding that Kentucky's lethal injection protocol did not constitute cruel and unusual punishment).

146. *Hall v. Florida*, 572 U.S. 701, 708 (quoting *Weems v. United States*, 217 U.S. 349, 378 (1910)).

147. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (using “mentally retarded;” however, today such terminology would not be used); see also *Penry v. Lynaugh*, 492 U.S. 302 (1989), *abrogated by Atkins*, 536 U.S. at 321.

death penalty was cruel and unusual.¹⁴⁸ In 2008, the proportionality doctrine was extended to nonhomicide offenders.¹⁴⁹ Pertinently, in 2010 and 2012, the Court categorically exempted juvenile offenders found guilty of non-homicide offenses from life without parole.¹⁵⁰ In mapping the Court's development of the proportionality standard, the time has come for another categorical exemption to be imposed; *Roper* should be extended to eighteen- to twenty-year-olds.

2. *Imposing Death Sentences on Young Adults Violates Article I, Section 27 of the California Constitution*

During the sentencing phase of a case in which the State is seeking the death penalty, the trier of fact is required to take numerous aggravating and mitigating factors into account; one of which is the defendant's age.¹⁵¹ Currently, California law leaves room for the trier of fact to weigh a

148. *Roper*, 543 U.S. at 578–79.

149. *Kennedy v. Louisiana*, 554 U.S. 407, 446 (2008).

150. *Graham v. Florida*, 560 U.S. 48, 82 (2010).

151. CAL. PENAL CODE § 190.3 (West 2019). The factors to be considered include:

- (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.
- (b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.
- (c) The presence or absence of any prior felony conviction.
- (d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.
- (e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.
- (f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.
- (g) Whether or not defendant acted under extreme duress or under the substantial domination of another person.
- (h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the [e]ffects of intoxication.
- (i) *The age of the defendant at the time of the crime.*
- (j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.
- (k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

After having heard and received all of the evidence, . . . the trier of fact shall consider . . . the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances. If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances the trier of fact shall impose a sentence of confinement in state prison for a term of life without the possibility of parole.

Id. (emphasis added).

defendant's young age either in favor of or against imposing the death penalty on a young adult. Based on the breadth of research establishing that young adults have a diminished capacity to exercise self-control, adequately consider the consequences of their actions, and resist coercive pressures from others, a young adult's age should be seen, in the least, as a mandatory mitigating factor. Taking the culmination of this research a step further, however, California's courts should deliver a bright-line rule that categorically exempts anyone under the age of twenty-one from being sentenced to death. Although the California Constitution provides that the death penalty "shall not be deemed to be, or to constitute, the infliction of cruel or unusual punishments,"¹⁵² this statement speaks only to the use of the death penalty generally, and not to its application to young adults.

In the past, the California Constitution has afforded its citizens extra protections not found in the United States Constitution; this principle is known as California constitutionalism.¹⁵³ These extra provisions, however, decreased over the years as hard-on-crime rhetoric began to pervade the criminal justice system.¹⁵⁴ As a result, the court rarely finds that a ballot initiative is unconstitutional.¹⁵⁵ Generally, the California Supreme Court chooses not to strike down initiatives as unconstitutional and has established a reluctance to assert its power over decisions that affect the political realm. As recently as 2018, the California Supreme Court had the opportunity to afford criminal defendants more protections under the California Constitution but failed to do so.¹⁵⁶

Even with a reluctant Court, it is possible for a court in California to find that the implementation of the death penalty on young adults is cruel and unusual categorically, or even that the death penalty as applied to these young adults is unconstitutional. Such a decision arguably could be upheld under Article 1, section 27 of the California Constitution.

In determining whether a penalty constitutes cruel or unusual punishment, the California courts must consider the nature of "the particular person before

152. CAL. CONST. art. I, § 27; *accord* CAL. CONST. art. I, § 17 (existing formerly as Article I, § 6, now existing as Article I, § 17, and offering the basic declaration of rights that one shall not be subjected to cruel and unusual punishment).

153. David Aram Kaiser, *Opinion Analysis: People v. Buza*, SCOCABLOG (Aug. 29, 2018), <http://scocablog.com/opinion-analysis-people-v-buza>; *see also* David Aram Kaiser & David A. Carillo, *California Constitutional Law: Reanimating Criminal Procedural Rights After The "Other" Proposition* 8, 56 SANTA CLARA L. REV. 33, 40–42 (2016).

154. Kaiser, *supra* note 153.

155. *Id.*; *see Raven v. Deukmejian*, 801 P.2d 1077 (Cal. 1990); *see also* Kaiser & Carillo, *supra* note 153, at 40 (determining that the *Raven* court found a section of Proposition 115 unconstitutional on the basis "that [it] fundamentally limited the role of the state courts in interpreting and enforcing state constitutional protections" (footnote omitted)).

156. *People v. Buza*, 413 P.3d 1132 (Cal. 2018) (taking up the question of constitutionality in a DNA cheek swab); Kaiser, *supra* note 153. The Court of Appeal, however, found that it did violate the California Constitution. *People v. Buza*, 180 Cal. Rptr. 3d 753 (Ct. App. 2014).

the court,” asking “whether the punishment is grossly disproportionate to the defendant’s individual culpability as shown by such factors as his age, prior criminality, personal characteristics, and state of mind.”¹⁵⁷ Given the comprehensive body of research, this consideration creates the avenue by which the California courts can raise the minimum age for death penalty eligibility.

When considering the scientific and behavioral research regarding the culpability of a particular defendant, one can conclude that although the defendant’s crime may warrant significant punishment; imposing the most severe punishment—the death penalty—is not warranted. Regardless of the circumstances of the offense, a young adult’s punishment should reflect their physiological limitations, such as the diminished capacity to make well-thought-out decisions. As such, young adults should receive sentences that protect society without imposing death, for example, life without parole.¹⁵⁸ Even though the court has been hesitant to provide extra protections under the Constitution, such a decision would be a modest amendment to death penalty practices.

C. CALIFORNIA’S VOTERS SHOULD DEMAND REFORM THROUGH THE REFERENDUM PROCESS

Additionally, California’s initiative and referendum processes empower its citizens to demand change. This mechanism has contributed to California’s progressive political landscape and to occasional backslides such as the passage of Proposition 17. While California’s referendum process has favored application of the death penalty, the referendum process appears to be a viable avenue through which death penalty reform could be achieved.

In 1972, months after the Supreme Court of California found the death penalty unconstitutional, the people proposed Proposition 17 which would amend the constitution making the death penalty constitutional once again.¹⁵⁹ In the election that year, the proposition passed with a 67.5% approval rate, and seven years later the California Supreme Court upheld the proposition as constitutional.¹⁶⁰ In 1978, the people then added Proposition 7 to the ballot which, if passed, would have increased first and second-degree murder penalties and expanded the circumstances through which one could have received the death penalty.¹⁶¹ Proposition 7 passed by 70%.¹⁶²

157. *People v. Dillon*, 668 P.2d 697, 721 (Cal. 1983).

158. I do not argue or believe that life without parole is a better alternative. Such a punishment is still too severe; however, in this Note I am specifically addressing the impact of the death penalty on young adults.

159. *California Proposition 17, Death Penalty in the California Constitution (1972)*, BALLOTPEDIA, [https://ballotpedia.org/California_Proposition_17,_Death_Penalty_in_the_California_Constitution_\(1972\)](https://ballotpedia.org/California_Proposition_17,_Death_Penalty_in_the_California_Constitution_(1972)) (last visited Nov. 6, 2019).

160. *People v. Frierson*, 559 P.2d 587, 614 (Cal. 1979); *California Proposition 17*, *supra* note 159.

161. *California Proposition 7, the Death Penalty Act (1978)*, BALLOTPEDIA, https://ballotpedia.org/wiki/index.php/California_Proposition_7,_the_Death_Penalty_Act_%281978%29 (last visited Nov. 6, 2019).

The next major referendum-initiated statute was proposed in 2012. Proposition 34 would have repealed the death penalty and retroactively changed death penalty sentences to life without the possibility of parole.¹⁶³ The proposition was defeated 52% to 48%.¹⁶⁴ Four years later, California voted on two more propositions that were initiated by the people: Proposition 62 and 66.¹⁶⁵ As evidenced by the narrow results, abolitionist measures came close in 2012 and 2016, so perhaps the more moderate reform of raising the age of eligibility through referendum might succeed.

History has shown that the referendum process is the most likely avenue through which death penalty policies can be amended. Even though history appears to show a desire on behalf of the people to keep the death penalty active, the initiatives that have gained support and reached the ballot have been sweeping measures aimed at eliminating the death penalty altogether or maintaining it. However, a more conservative and moderate approach should be proposed in which the age eligibility is raised from eighteen to twenty-one, as science and the legislature have begun to coalesce around the idea that young adults cannot be considered among the most culpable.¹⁶⁶

CONCLUSION

Advances in neuroscience have proven that young adults—those between the ages of eighteen and twenty—have a diminished capacity to exercise self-control, to adequately consider the consequences of their actions, and to resist coercive pressures from others. The California Legislature has acknowledged this and responded by enacting numerous statutes targeted at insulating young adults from the harms to which they are so vulnerable. To that end, the legislature protects young adults from nicotine and marijuana addiction, from homelessness and destitution, from the rehabilitative deprivations experienced by more mature adults in the criminal justice system, and even from their own lack of civic engagement.

However, aside from stating that a defendant's age should be considered as a potential mitigating factor in determining whether a defendant should be

visited Nov. 6, 2019); Matthew Green, *To Kill or Not to Kill? California's Death Penalty Debacle*, KQED NEWS (Oct. 23, 2012), <https://www.kqed.org/lowdown/4301/should-california-kill-its-death-penalty>.

162. *California Proposition 7*, *supra* note 161.

163. *California Proposition 34, the End the Death Penalty Initiative (2012)*, BALLOTPEdia, [https://ballotpedia.org/California_Proposition_34_the_End_the_Death_Penalty_Initiative_\(2012\)](https://ballotpedia.org/California_Proposition_34_the_End_the_Death_Penalty_Initiative_(2012)) (last visited Nov. 6, 2019).

164. *Id.*

165. *See Proposition 62*, *supra* note 18; *See Proposition 66*, *supra* note 18; *see supra* text accompanying note 18.

166. California voters have been supporting *modest* criminal justice reform. In 2012, voters approved Proposition 36, which modified the three strikes law, and in 2014, voters approved Proposition 47, which allowed for certain felonies to be reduced to misdemeanors. The passage of these propositions signifies a willingness to adjust standards of justice.

sentenced to death, the law does not protect young adults from capital punishment. The fact that eighteen- to twenty-year-olds are eligible for the death penalty is not consistent with the legislature's acknowledgment of the "maturity gap" between young adults and the rest of the adult population. For the most part, however, young adults are escaping death penalty sentences because the practice of sentencing this age group to the death penalty is becoming increasingly rare, both inside and outside of California. This is a testament to shifting opinions on the practice of sentencing young adults to death that should be reflected in the law through a clear exemption. While the legislature can and should institute this rule, it could also be implemented by the courts, or by the people through the referendum process. However, now, even though California has a governor-issued moratorium, prosecutors can still seek the death penalty, and young adults are still threatened by such a severe punishment.

The cruel and/or unusual punishment standards are evaluated through the lens of "the evolving standards of decency that mark the progress of a maturing society."¹⁶⁷ Through that lens, the courts should see that the practice of subjecting young adults to death sentences is no longer proportional. California's voters have asserted their approval of the death penalty again and again, thwarting the efforts of the courts to ensure the decency of the criminal justice practice by impeding the tradition of killing criminal defendants. However, those same voters should not thwart efforts to insulate eighteen- to twenty-year-olds from the harsh realities of adulthood. Young adults do commit serious crimes; however, because of their developing brains, susceptibility to peer pressure, and because of the legislature's desire to give young adults added support as they transition into adulthood, young adults should not be eligible for the death penalty in California.

167. *Roper v. Simmons*, 543 U.S. 551, 561 (2005) (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (Warren, C.J., plurality opinion)).
