

# Expanding *Miller*: Legal Arguments for 18- 20 Year Old Offenders

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# Overview

- The Problem
- SCOTUS Rationale (*Roper, Graham, Miller, Montgomery*)
- Science of Juvenile Brain Development
- Legal Arguments to Expand *Miller*
- Educating Decision-Makers

# The Problem

- Youthful offenders (ages 18-20 or 21) are treated more harshly than offenders 17 and under
- Decision-makers find “almost 18” aggravating



His birthday followed almost immediately on the heels of his offense. Within two weeks of the offense he would have been of voting age, of an age to serve in the armed forces, and of an age to lawfully take up arms in defense of his country and constitution. Instead Morgan took a job, sized up his victim and with an accomplice murdered a man who had hired him and given him gainful employment. **To refer to him and others of his age as a “child” for constitutional purposes when they commit premeditated murder as he did is constitutionally abhorrent to the rights of victims.**

- Prosecutor Argument, *South Carolina v. Morgan*

# SCOTUS Rationale – Juvenile Sentencing Cases

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

**Holding:** the death penalty is categorically disproportionate for offenders under the age of 18 because:

- They have a “lack of maturity and an underdeveloped sense of responsibility” that “often result in impetuous and ill-considered actions and decisions”;
  - “[A]dolescents are overrepresented statistically in virtually every category of reckless behavior.”
  - “In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent.”
- They are “more vulnerable or susceptible to negative influences and outside pressures, including peer pressure”; and
  - “[E]xplained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment.”

## Court bars juvenile executions

A LOCAL CASE YIELDS A LANDMARK DECISION • 72 DEATH SENTENCES ARE THROWN OUT

**By The Staff**  
St. Louis Post-Dispatch

**THE SUPREME COURT'S DECISION**  
The Supreme Court's decision in Roper v. Simmons, 543 U.S. 551 (2005), is a landmark ruling that prohibits the execution of juveniles. The Court held that the death penalty is unconstitutional for offenders under the age of 18. This decision is based on the principle that juveniles have a "lack of maturity and an underdeveloped sense of responsibility" and are "more vulnerable or susceptible to negative influences and outside pressures, including peer pressure." The Court also noted that juveniles have less control over their own environment. As a result of this decision, 72 death sentences were thrown out.

**REAGAN'S REACTION**  
President George W. Bush's reaction to the Supreme Court's decision was mixed. He expressed disappointment that the Court had struck down the death penalty for juveniles, but he also acknowledged that the Court's decision was based on the Constitution. He stated that he would continue to support the death penalty for those who are 18 years of age or older.

**IN ST. LOUIS**  
The decision in Roper v. Simmons has a significant impact on the St. Louis area. It means that no one under the age of 18 can be executed in Missouri. This is a landmark change in the state's criminal justice system. The decision also means that 72 death sentences that had been imposed on juveniles are now void.

# *Roper*, cont.

- Their characters are “not as well formed” and their personalities “more transitory, less fixed” than those of adults.
  - “The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character.”
  - “The relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuosity and recklessness that may dominate in younger years can subside.”
- Penological considerations:
  - *Retribution*: “the case for [it] is not as strong with a minor as with an adult” because “[r]etribution is not proportional if the law’s most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.”
  - *Deterrence*: “it is unclear whether the death penalty has a significant or even measurable deterrent effect on juveniles” because, “as the plurality observed in *Thompson*, ‘[t]he likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent.’”

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

*Holding*: LWOP unconstitutional for juvenile (under the age of 18) non-homicide offenders

- No “reason to reconsider the Court’s observations in *Roper* about the nature of juveniles.”
- “[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds.”
- “Under this sentence a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender. A 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only.”

# *Miller v. Alabama*, 567 U.S. 460 (2012)

*Holding:* Mandatory LWOP sentences are unconstitutional for juveniles (under the age of 18)

- “Our decisions [*Roper* and *Graham*] rested not only on common sense – on what ‘any parent knows’ – but on science and social science as well.”
- “We reasoned that those findings – of transient rashness, proclivity for risk, and inability to assess consequences – both lessened the child’s ‘moral culpability’ and enhanced the prospect that, as the years go by and neurological development occurs, his ‘deficiencies will be reformed.’”
- Factors to be considered:
  - the chronological age of the offender and the hallmark features of youth, including “immaturity, impetuosity, and failure to appreciate the risks and consequence”;
  - the “family and home environment” that surrounded the offender;
  - the circumstances of the homicide offense, including the extent of the offender’s participation in the conduct and how familial and peer pressures may have affected him;
  - the incompetencies associated with youth—for example, [the offender’s] in ability to deal with police officers or prosecutors (including on a plea agreement) or [the offender’s] incapacity to assist his own attorneys”; and
  - the “possibility of rehabilitation.”

# *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016)

*Holding: Miller* was a substantive decision and is retroactive

- *Miller* protected a category of defendants from a particular punishment = substantive
- “[I]n light of ‘children’s diminished culpability and heightened capacity for change,’ *Miller* made clear that ‘appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.’”
- LWOP violates the Eighth Amendment if applied to a “child whose crime reflects ‘unfortunate yet transient immaturity’ and is “excessive for all but ‘the rare juvenile offender whose crime reflects *irreparable corruption*.’”



# The Science of Brain Development

# Recent Brain Development Research

- Research since *Roper* focuses on “emerging adulthood”
  - Neurobiological
  - Social
  - Psychological
- Research suggests similar characteristics in emerging adults as compared to juveniles:
  - Impulsivity
  - Tendency to engage in high-risk behavior
  - Deficits in self-regulation
  - Strong susceptibility to peer pressure
  - High degree of personality plasticity

Aude Henin & Noah Berman, *The Promise and Peril of Emerging Adulthood: Introduction to the Special Issue*, 23:3 COGNITIVE & BEHAVIORAL PRACTICE 263 (2016).

# Brain & White Matter Development

- Late teens & early 20s → rapid and substantial changes in the areas of the brain most closely connected with impulsivity and decision-making
- White matter relatively stable from 17-21, but increases dramatically from ages 21-25 (even more from 25-30)
  - White matter fibers transmit information between neurons, allowing different regions of the brain to communicate with each other.
  - Increased white matter volume, especially in the frontolimbic system enables individuals to:
    - Modulate anxiety
    - Deal with fear
    - Become social adept

Bradley Tabor-Thomas & Korlay Pérez-Edgar, *Emerging Adult Brain Development*, in THE OXFORD HANDBOOK OF EMERGING ADULTHOOD 2 (Jeffrey Jensen Arnett, ed. 2015); Lars T. Westlye et al., *Life-Span Changes of the Human Brain White Matter: Diffusion Tensor Imaging (DTI) and Volumetry*, 20 CEREBRAL CORTEX 2055, 2062 (2010).

# Development of Brain Regions

- Brains of people 18-21 remain immature in three areas that support self-control and emotional regulation:

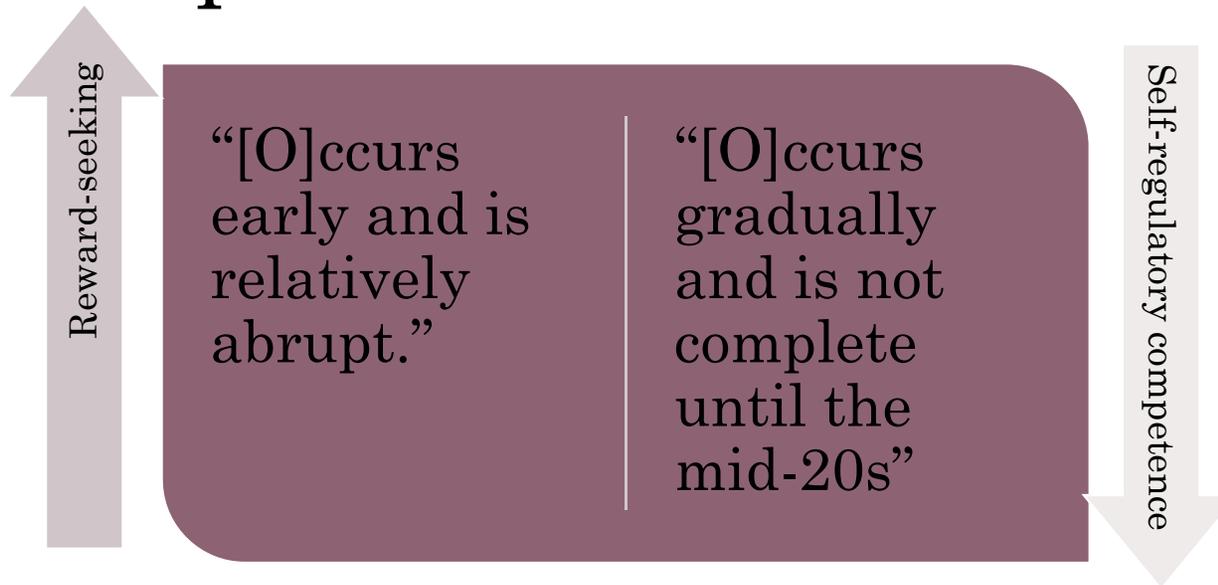
- Amygdala
- Prefrontal cortex
- Ventral striatum

B.J. Casey, *Beyond Simple Models of Self-Control to Circuit-Based Accounts of Adolescent Behavior*, 66 ANNUAL REV. OF PSYCHOLOGY 295, 300 (2015).

- fMRI studies – show the volume of cortical gray matter in areas critical to integrating higher thought processing does not peak until the mid-20s.
  - Results in lack of structural development necessary for higher level reasoning and emotional regulation.

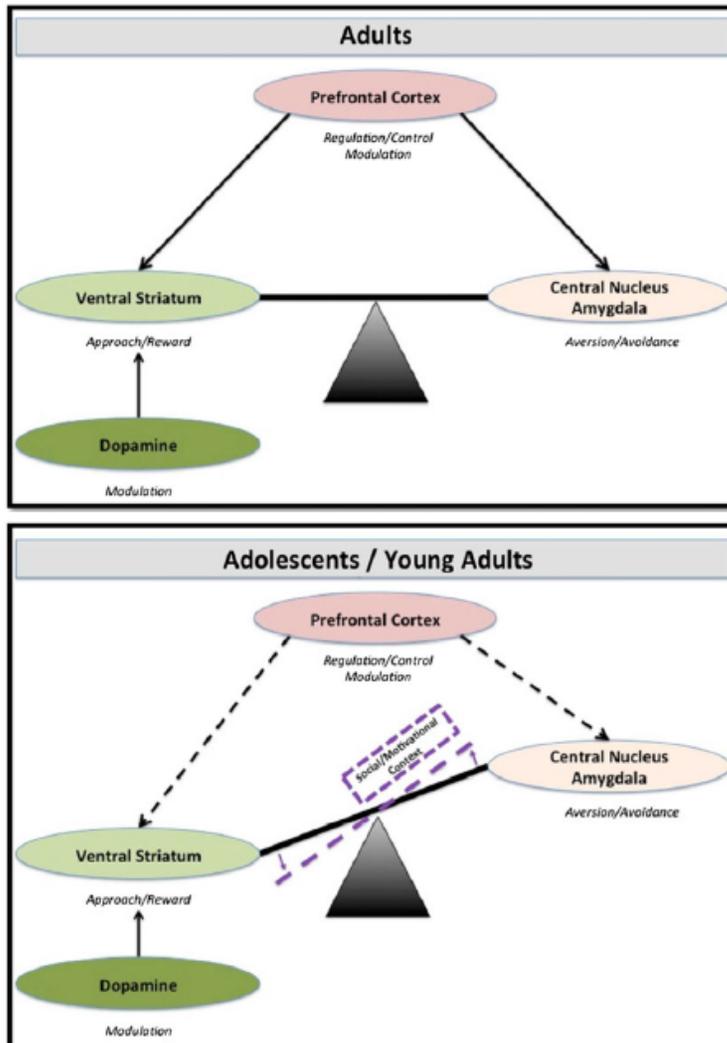
Nitin Gogtay *et al.*, *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101:21 PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCE 8174 (2004).

# Developmental Mismatch



- *Result:* the period from the late teens to early 20s is “a time of heightened vulnerability to risky and reckless behavior.”

Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 DEV. REV. 78, 83 (2008); Aude Henin & Noah Berman, *The Promise and Peril of Emerging Adulthood: Introduction to the Special Issue*, 23:3 COGNITIVE & BEHAVIORAL PRACTICE 263 (2016).



Elizabeth C. Victor &  
Ahmad R. Hariri, *A  
Neuroscience  
Perspective on Sexual  
Risk Behavior in  
Adolescence and  
Emerging Adulthood*,  
28 DEVELOPMENTAL &  
PSYCHOPATHOLOGY  
471, 472 (2016).

# Susceptibility to Negative Peer Pressure

- Risk-taking behavior is more frequent and more risky when a person 18-21 is around peers or older adults.
  - Company of peers correlated with increased activation of the reward-related regions of the brain (ventral striatum and orbitofrontal cortex)

Renata L.E.P. Reniers et al., *Is it all in the Reward? Peers Influence Risk-Taking Behaviour in Young Adulthood*, 108 BRIT. J. PSYCH. 276, 277 (2017).



# Legal Arguments

# Extending *Roper*, *Graham*, & *Miller*

- 18 years old is an arbitrary cutoff, set too low:
  - The *Roper* Court acknowledged that “[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18.” *Roper*, 543 U.S. at 574.
- *Commonwealth v. Brehold*, No. 14-CR-161, slip op. (Ky. Cir. Ct. Aug. 1, 2017) (Kentucky trial court granted a capital defendant’s motion to preclude the death penalty in his case, reasoning under *Roper* that the execution of an individual for an offense committed while under 21 violates the Eighth Amendment).

# Extending *Roper, Graham, & Miller*

- No significant distinctions with regard to juvenile and young adult brains

<i>Roper</i>	Scientific Research – Emerging Adults
“Lack of maturity and an underdeveloped sense of responsibility” that “often result in impetuous and ill-considered actions and decisions.”	Areas of the brain supporting self-control and emotional regulation remain immature.
“More vulnerable or susceptible to negative influences and outside pressures, including peer pressure.”	Risk taking more frequent in emerging adults when peers or older adults are around
“Adolescents are overrepresented statistically in virtually every category of reckless behavior.”	Developmental mismatch → late teens & early 20s “a time of heightened vulnerability to risky and reckless behavior.”
Characters are “not as well formed” and personalities are “more transitory, less fixed” than adults	Brain continues to develop into 20s

# Extending *Roper*, *Graham*, & *Miller*

- No penological justification for LWOP for youthful offenders
  - *Retribution*: less culpable than older offenders because of underlying neurological deficits that become increasingly less pronounced after they turn 21.
  - *Deterrence*: same neurological deficits as younger teenagers, meaning they similarly act on impulse rather than after premeditation and deliberation and are no persons who can be deterred.



# Justification for Line-Drawing at 21

- *Roper*: “The age of 18 is the point where society draws the line for many purposes between childhood and adulthood.” *Id.*
- Same applies to the age of 21
  - Minimum age to consume, purchase, or possess alcohol
  - 41 states impose a minimum age of 21 to obtain a concealed carry permit for firearms
  - Federal law prohibits licensed gun dealers from selling handguns and ammunition to people under the age of 21
  - Federal immigration law permits parents of US citizens to petition for an immigrant visa for any “unmarried children under 21” and requires children to be 21 to petition for an immigrant visa for a parent
- Age-of-candidacy requirements
  - US Constitution requires age of 25 to run for Congress
  - 27 states prohibit individuals from running for lower-house offices before the age of 21
- DOJ report recommends that legislators should raise the age for criminal court to at least 21 because “young adult offenders ages 18-24 are, in some ways, more similar to juveniles than to adults.” U.S. DEPT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, NATIONAL INSTITUTE OF JUSTICE, *Young Offenders: What Happens and What Should Happen*, Doc. No. NCJ 242653, at 2 (Feb. 2014).



# Evolving Standards of Decency Arguments

- Evolving standards review looks at “objective indicia of consensus, as expressed in particular by the enactments of legislatures.” *Roper*.
  - Also look at actual use of the sentencing scheme. *Graham & Miller*.
- Collect data
  - # of sentences
  - Rate of seeking LWOP against youthful offenders
  - Race data
- Collaborate on developing proportionality data



# Types of Motions

- Motion to Bar LWOP for Youthful Offenders
- Motion to Bar Mandatory LWOP for Youthful Offenders
- Motion to Strike Mandatory Minimum for Youthful Offenders
- Others?

# Confronting “Almost 18 as Aggravating”

- Constitutionally required to treat youth as mitigating when the defendant is under 18
  - *Roper*, *Graham*, and *Miller* were class-based/categorical decisions
  - Science shows that “almost 18” is not nearing the end of juvenile brain development

# Educating Decision-Makers

- Motions can help educate judges even if they do not prevail
- Use experts:
  - Teach about brain development
  - Describe how a particular youthful offender's crime reflects the characteristics of youth



# Characteristics of Youth Demonstrated



Questions?