

# ADOLESCENT BRAIN DEVELOPMENT AND CRIME: WHY NEW YORK STATE SHOULD INCREASE THE AGE OF CRIMINAL CULPABILITY TO TWENTY-ONE YEARS OLD

*Julia Patz\**

## TABLE OF CONTENTS

I.	INTRODUCTION .....	795
II.	JUVENILES, ADULTS, AND CRIMINAL LAW .....	799
	A. <i>Ways in Which Children Differ Intellectually and Developmentally from Adults</i> .....	799
	B. <i>The Science of Adolescent Brain Development</i> .....	801
	C. <i>Historical Legal Treatment of Juvenile Culpability</i> .....	803
III.	THE PROBLEM WITH THE CURRENT TREATMENT OF JUVENILE OFFENDERS.....	805
IV.	CONFORMING WITH SCIENCE AND JUSTICE .....	808
	A. <i>The Balancing of Interests</i> .....	808
	B. <i>State Progression Towards Increased Age of Criminal Culpability</i> .....	810
V.	CONCLUSION.....	817

## I. INTRODUCTION

In 2010, four days after his seventeenth birthday, Ben Van Zandt hopped on his bike and rode down to a specific home in a wealthy suburban neighborhood.<sup>1</sup> He had recently learned that the homeowners were out of town on vacation, so he broke a window, stole some credit cards, then lit the house ablaze.<sup>2</sup> According to his family and friends, this incident was out of

---

\* Julia Patz received her J.D. from the Benjamin N. Cardozo School of Law, where she focused her studies on criminal law and participated in the Criminal Defense Clinic. Julia was a Staff Editor on Volume 28 of the Cardozo Journal of Equal Rights and Social Justice. Julia would like to thank all the friends, family, and editors that supported her throughout this writing process.

<sup>1</sup> Mark Hay, *Why is New York Still Prosecuting 16-Year-Olds as Adults?*, GOTHAMIST (Nov. 3, 2016), <https://gothamist.com/news/why-is-new-york-still-prosecuting-16-year-olds-as-adults>.

<sup>2</sup> *Id.*

796 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 29:3]

character for Van Zandt—it seemingly came out of nowhere.<sup>3</sup> Unbeknownst to the people closest to him, Van Zandt had recently started hearing voices telling him to light fires to subdue his depression.<sup>4</sup> Van Zandt was arrested a few days later, after he used one of the homeowner’s stolen credit cards.<sup>5</sup> Because he was seventeen years old at the time, the police denied him any parental contact during his interrogation and eventual confession, and he was automatically placed in the adult criminal legal system once he was charged.<sup>6</sup> Like many others in the criminal legal system,<sup>7</sup> Van Zandt took a plea deal that sent him to an adult prison in upstate New York for the next ten years of his life.<sup>8</sup> While Van Zandt was incarcerated, he was allegedly sexually abused by a forty-five-year-old fellow prisoner, was coerced into selling drugs for a prison gang, and was accused of fighting in the prison yard.<sup>9</sup> Then, just four years after his arrest, Ben Van Zandt was found dead, having hung himself in his cell at only twenty-one years old.<sup>10</sup>

In a different part of New York in 2010, ten days before his seventeenth birthday, Kalief Browder was walking home from a party with his friend.<sup>11</sup> They were stopped by police officers who claimed that the two boys had been identified as the perpetrators of a robbery by a witness who was currently in the back of the squad car.<sup>12</sup> Browder allowed the police to search him for the stolen items, but they found nothing and went back to speak with the witness.<sup>13</sup> When they returned to Browder, the police told him that the robbery actually happened two weeks ago, and the witness was sure Browder was the person who robbed him.<sup>14</sup> Browder was arrested, charged as an adult, and unable to make bail, he was thrown into the adult criminal legal system to await trial.<sup>15</sup> Even while Browder was held at the infamous Riker’s Island jail, he maintained his innocence and refused to plea guilty for the next three

---

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Alice Fontier, Christopher W. Adams, Jennifer L. Van Ort, & Norman L. Reimer, *The New York State Trial Penalty: The Constitutional Right to Trial Under Attack*, N.Y. STATE ASS’N OF CRIM. DEF. LAWS. & NAT’L ASS’N OF CRIM. DEF. LAWS. 3 (2021), [https://www.nacdl.org/getattachment/1d691419-3dda-4058-bea0-bf7c88d654ee/new\\_york\\_state\\_trial\\_penalty\\_report\\_final\\_03262021.pdf](https://www.nacdl.org/getattachment/1d691419-3dda-4058-bea0-bf7c88d654ee/new_york_state_trial_penalty_report_final_03262021.pdf) (stating that “[r]ecent data shows that in New York State 99 percent of misdemeanor charges and 94 percent of felony charges are resolved by a guilty plea”).

<sup>8</sup> Hay, *supra* note 1.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Jennifer Gonnerman, *Before the Law*, NEW YORKER (Sept. 29, 2014), <https://www.newyorker.com/magazine/2014/10/06/before-the-law>.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

2023] *INCREASED AGE OF CULPABILITY* 797

years of his life.<sup>16</sup> In addition to the disastrously poor conditions at Riker's Island, he was repeatedly held in solitary confinement.<sup>17</sup> After 634 days of being held without trial, Kalief Browder fashioned a noose out of his bedsheets and tried to hang himself.<sup>18</sup> The next couple of years of Browder's life were filled with coercive plea deals offered by prosecutors and judges, continued delays in trial dates, and additional suicide attempts.<sup>19</sup> Finally, in 2013 prosecutors dropped their case against Browder, and he was released from Riker's Island.<sup>20</sup> Even though he was released, Kalief Browder had already lost; the damage had already been done.<sup>21</sup> At twenty years old, he had now missed his junior and senior years of high school, his graduation, and his prom.<sup>22</sup> He missed the rest of his childhood.<sup>23</sup> Six months after he was released, Kalief Browder again tried to take his own life.<sup>24</sup> Tragically, Browder spent the rest of his life trying to grapple with what he went through while locked up as a teenager,<sup>25</sup> but he died of suicide June of 2015.<sup>26</sup> Kalief Browder was only twenty-two years old when he died.<sup>27</sup>

Many of the details of Van Zandt and Browder's stories are exceedingly different.<sup>28</sup> Their races, the neighborhoods they lived in, and their supposed offenses were divergent, and one took a plea deal while the other refused to do so.<sup>29</sup> Yet, their stories also have extremely crucial similarities: they were both placed in the adult criminal legal system, they were both destroyed by the New York State prison system, they both died of suicide, and most importantly, they were both children.<sup>30</sup> While the outcomes of these two boys' stories are heartbreaking, they are by no means unexpected. The effects of placing children in the adult prison system are unsurprisingly harmful, with children that are housed in adult incarceration facilities being

---

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* (discussing how the prior Executive Director of Mental Health for New York City Jails, Daniel Selling, acknowledged that, "'It's a way to control an environment that feels out of control—lock people in their cell,' he said. 'Adolescents can't handle it. Nobody could handle that.'").

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *See id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* (quoting Kalief Browder, "'Being home is way better than being in jail,' he told me. 'But in my mind right now I feel like I'm still in jail, because I'm still feeling the side effects from what happened in there.'").

<sup>26</sup> Jennifer Gonnerman, *Kalief Browder, 1993-2015*, *NEW YORKER* (June 7, 2015), <https://www.newyorker.com/news/news-desk/kalief-browder-1993-2015>.

<sup>27</sup> *Id.*

<sup>28</sup> Gonnerman, *supra* note 11; *see also* Hay, *supra* note 1.

<sup>29</sup> Gonnerman, *supra* note 11; *see also* Hay, *supra* note 1.

<sup>30</sup> Gonnerman, *supra* note 11; *see also* Hay, *supra* note 1.

798 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 29:3]

nine times more likely to attempt suicide than those who are housed in juvenile detention facilities.<sup>31</sup>

Given these statistics, it is difficult to understand why children like Ben Van Zandt and Kalief Browder were sent to adult incarceration facilities.<sup>32</sup> Primarily, it is because New York State was one of the last states in the nation to end mandatory adult incarceration for children who were sixteen or seventeen years of age in 2017.<sup>33</sup> New York State's hesitancy in passing this legislation, which is known as "Raise the Age" legislation,<sup>34</sup> was in sharp contrast to modern adolescent brain development scientific findings that explicitly detail the failings of young brains to operate in the same way that fully-developed adult brains do regarding risky behaviors and decision making.<sup>35</sup> Put simply, adolescents make bad decisions.<sup>36</sup>

Surely, this poor decision-making is not a groundbreaking revelation for many. Most people can think back to their late teenage years and remember a decision they made that, upon reflection with the wisdom of age, was a bad decision. This diminished capacity for decision-making in children is why they have been historically treated differently than adults when it comes to criminal culpability, meaning people believe children hold less blame for their bad choices.<sup>37</sup> While it is true that the belief in diminished capacity for children has been recognized, it has also been arbitrarily applied.<sup>38</sup> Specifically, the definition of what age constitutes a "child," in terms of the criminal status of a juvenile offender has been set at an age that lacks empirical support.<sup>39</sup>

This Note will begin by discussing the historical categorical separation of children and adults regarding criminal culpability in the specific areas of criminal legal treatment and the creation of the juvenile justice system in the United States. Next, this Note will delve into modern scientific research regarding adolescent brain development and the effects of this neurological stage upon behavior and decision-making abilities in adolescents.

---

<sup>31</sup> *Children in Adult Prison*, EQUAL JUST. INITIATIVE, <https://eji.org/issues/children-in-prison> (last visited Feb. 20, 2022) (further saying, "[i]ncarcerating children with adults needlessly puts kids at great risk of sexual and physical violence, increased trauma, and suicide.").

<sup>32</sup> See Gonnerman, *supra* note 11; see also Hay, *supra* note 1.

<sup>33</sup> *Improving the Way New York's Justice System Treats Young People*, N.Y. STATE, <https://www.ny.gov/programs/raise-age-0> (last visited Feb. 22, 2022).

<sup>34</sup> *Id.*

<sup>35</sup> Laurence Steinberg, *Should the Science of Adolescent Brain Development Inform Public Policy?*, 50 CT. REV. 70 (2014).

<sup>36</sup> *Id.*

<sup>37</sup> *Roper v. Simmons*, 543 U.S. 551 (2005); *Culpability*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("Blamable; censurable; involving the breach of a legal duty or the commission of a fault").

<sup>38</sup> Jonathan Todres, *Maturity*, 48 HOUS. L. REV. 1107, 1110-11 (2012).

<sup>39</sup> See Jack L. Andrews, Saz P. Ahmed, & Sarah-Jayne Blakemore, *Navigating the Social Environment in Adolescence: The Role of Social Brain Development*, 89 BIO. PSYCH.109 (Jan. 2021).

2023] *INCREASED AGE OF CULPABILITY* 799

Subsequently, a discussion about the history and methodology of how the Supreme Court has incorporated the findings of adolescent brain development research within its judicial holdings will follow. Further, this Note will then detail the inherent flaw in how adolescent brain development is understood and implemented in the modern-day criminal context: that criminal law throughout the United States, and particularly in New York State, arbitrarily and harmfully creates a cut-off of diminished capacity at ages inconsistent with the brain science that has been recognized as valid in the legal system. The next section will contain an overview of other states' legislative schemes that have recognized this fragmentary application of diminished culpability and have begun implementing reforms to increase the age of adult criminal culpability. Finally, this Note will conclude by proposing that New York continue to reform its criminal legal system to reflect the understanding that diminished capacity scientifically continues beyond the current cut-off of eighteen years old, and that the punitive laws of the state should encompass and reflect this science by increasing the age of adult criminal culpability to twenty-one years old.

## II. JUVENILES, ADULTS, AND CRIMINAL LAW

### A. *Ways in Which Children Differ Intellectually and Developmentally from Adults*

The United States has long recognized children as a separate category from adults in most aspects of life.<sup>40</sup> A Pew Charitable Trusts poll reflects “wide national support for a bedrock principle behind almost every juvenile justice reform attempt: the notion that children are different from adults, both in their brain function and capacity for change and development.”<sup>41</sup> In the legal realm specifically, the concept of maturity is a foundational principle that dictates a pivotal shift that can drastically shape the outcomes of a person involved in the legal system.<sup>42</sup> This shift is grounded in the type of reaction to a supposed wrong committed against society depending upon the perception of the wrongdoer as either a child that needs help or an adult that does not.<sup>43</sup> Depending on this perceived classification, the subsequent

---

<sup>40</sup> See Andrew Cohen, *Kids Are Different: The Sweet Spot in Criminal Justice Reform*, MARSHALL PROJECT (Dec. 13, 2014, 11:37 AM), <https://www.themarshallproject.org/2014/12/12/kids-are-different#.xml1roMKSsw>.

<sup>41</sup> *Id.*; *About The Pew Charitable Trusts*, PEW CHARITABLE TRUSTS, <https://www.pewtrusts.org/en/about> (last visited Feb. 22, 2022) (“[e]stablished in 1948, The Pew Charitable Trusts is a global nongovernmental organization that seeks to improve public policy, inform the public, and invigorate civic life”).

<sup>42</sup> Todres, *supra* note 38, at 1109-10.

<sup>43</sup> NAT'L RSCH. COUNCIL & INST. OF MED., *JUVENILE CRIME, JUVENILE JUSTICE* 154 (Joan McCord, Cathy Spatz Widom, & Nancy A. Crowell, eds., 2001) [hereinafter “NAT'L RSCH. COUNCIL & INST. OF MED.”].

800 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 29:3]

reaction is then based in either treatment or punishment respectively.<sup>44</sup> This distinction is best exemplified by the fact that the United States has two systems of justice: the juvenile justice system and the adult justice system.

Historically, the juvenile justice system was created in recognition of the notions that children are psychological, physically, and emotionally different than adults and that they need education and rehabilitation rather than the traditional punishment administered by the adult criminal system.<sup>45</sup> The juvenile justice system was originally based in the legal principle of *parens patriae*, which means the “State as the Parent,” and was intended to provide specialized interventions for children based on their needs.<sup>46</sup> The juvenile system also differed from the adult system because it was less formal and less public.<sup>47</sup> The presiding judge in a juvenile case had more discretion in the adjudication to act in the best interest of the child, and the court records were private and confidential to facilitate the young offender’s rehabilitation and reintegration into society post-adjudication.<sup>48</sup> Even the legal language used in the juvenile system reflected these inherent differences, as, “[j]uveniles are not charged with crimes, but rather with delinquencies; they are not found guilty, but rather are adjudicated delinquent; they are not sent to prison, but to training school or reformatory.”<sup>49</sup> While it is true that the United States’ juvenile justice system has undergone many changes in both philosophy and practice in the over one hundred and twenty years since its inception, the underlying concept that children are different from adults has remained the same.<sup>50</sup> Moreover, this concept of difference between children and adults has recently been further illuminated in the context of scientific understandings of the processes involved in human brain development.<sup>51</sup>

---

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Juvenile Justice History*, CTR. ON JUV. & CRIM. JUST., <http://www.cjcrj.org/education1/juvenile-justice-history.html> (last visited Dec. 28, 2021).

<sup>47</sup> NAT’L RSCH. COUNCIL & INST. OF MED., *supra* note 43.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *See id.* at 222-23;

The origin of the juvenile court reflects an abiding tension between safeguarding children and protecting society. This tension has been present historically and continues to be present today in the policy debates dealing with the juvenile justice system. The balance between rehabilitative goals and concerns about the best interests of the child, on one hand, and punishment, incapacitation, and protecting public safety, on the other, has shifted over time and differed significantly from jurisdiction to jurisdiction.”

*Id.*

<sup>51</sup> *See* Steinberg, *supra* note 35; *see also* Jenny E. Carroll, *Brain Science and the Theory of Juvenile Mens Rea*, 94 N.C. L. REV. 539, 585 (2016).

*B. The Science of Adolescent Brain Development*

A vast array of relevant research throughout the last decade has started to solidify the understanding of how the human brain develops throughout the lifespan, specifically during the period of development known as adolescence.<sup>52</sup> In a 2021 literature review of how brain development in adolescences impacts the navigation of social environments, adolescence is defined as, “the period of life between 10 and 24 years and is characterized by biological, psychological, and social change.”<sup>53</sup> During this stage of brain development, there are a multitude of physical changes to the brain that affect the critical thinking and decision-making abilities of the adolescent.<sup>54</sup> Most notably, the area of the brain known as the frontal cortex is one of the last areas to fully develop during adolescence.<sup>55</sup> The frontal cortex is the “seat of the powers of executive decision-making, coordination of emotions and cognition, goal driven planning, forethought, and impulse control.”<sup>56</sup>

There is an additional series of brain developments throughout adolescence that contribute to the diminished thinking capacity of adolescents.<sup>57</sup> Specifically, there are four distinct stages of brain development that occur during this period that help explain diminished thinking capacity in young people.<sup>58</sup> The first is synaptic pruning, which is the process by which the brain eliminates certain neural pathways that are unused by the brain.<sup>59</sup> Synaptic pruning usually occurs in early adolescence and is reflective of an increase in, “basic cognitive abilities and logical reasoning.”<sup>60</sup> The second stage is an increase in the brain receptors for the neurotransmitter dopamine, which has a strong effect on the experience of pleasure.<sup>61</sup> During this stage—occurring around puberty—the increase in dopamine receptors feeds into the third stage of brain development of forging stronger neural connections between the frontal cortex and an area of the brain called the limbic system, which is associated with the experience of emotions, rewards, and punishments.<sup>62</sup> Because this pleasure neurotransmitter is increased in these specific areas and aids in their neural growth, these two stages of development are highly correlated with the

---

<sup>52</sup> See Steinberg, *supra* note 35; see Carroll, *supra* note 51.

<sup>53</sup> Andrews, Ahmed, & Blakemore, *supra* note 39.

<sup>54</sup> Steinberg, *supra* note 35.

<sup>55</sup> Carroll, *supra* note 51.

<sup>56</sup> *Id.*

<sup>57</sup> Steinberg, *supra* note 35.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

802 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 29:3]

traditional sensation-seeking behaviors found in adolescents around puberty.<sup>63</sup> Finally, the fourth stage of adolescent brain development, known as myelination, involves an increase in white matter in the frontal cortex due to increased myelination of neural pathways.<sup>64</sup> The process of myelination can be best understood as the counterpart to the first stage of synaptic pruning.<sup>65</sup> As the brain is eliminating the unused neural pathways through synaptic pruning, it is also making the used neural pathways more efficient by coating them in a white, fatty material known as myelin sheath, which in turn increases white matter in the brain.<sup>66</sup> However, myelination continues well into late adolescence within the frontal cortex, long after the first stage of synaptic pruning is complete.<sup>67</sup> The heightened efficiency of the neural connections in the frontal cortex towards the end of adolescence, around the age of mid-twenties, is what helps solidify higher cognitive functions such as, “planning ahead, weighing risks and rewards, and making complicated decisions.”<sup>68</sup>

Compared to a fully developed adult brain in the mid-to-late twenties, these ongoing developments in the adolescent brain can result in adolescents engaging in risky behaviors that may be deemed criminal, which are especially exacerbated when in certain social contexts and in the presence of peers.<sup>69</sup> Specifically, these continuing developments can be exemplified by three tendencies of adolescents that result in these risky behaviors:

---

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> Elizabeth Scott, Natasha Duell, & Laurence Steinberg, *Bringing Science to Law and Policy: Brain Development, Social Context, And Justice Policy*, 57 WASH. U. J.L. & POL’Y 13, 20 (2018).



2023] *INCREASED AGE OF CULPABILITY* 803

impulsivity,<sup>70</sup> sensation-seeking,<sup>71</sup> and a failure to recognize long-term consequences.<sup>72</sup>

*C. Historical Legal Treatment of Juvenile Culpability*

The Supreme Court has already recognized the relationship between criminal culpability and the modern science of adolescent brain development in criminal law.<sup>73</sup> Beginning with the decision in *Atkins v. Virginia* in 2002, the Supreme Court started to define this relationship between diminished cognitive capacity and criminal culpability.<sup>74</sup> In *Atkins*, the Court held that because people with cognitive impairments have lessened abilities in “areas of reasoning, judgment, and control of their impulses,” they are naturally less morally culpable than those without such impairments.<sup>75</sup> Also, the execution of those with diminished cognitive capacity would do little to serve either the deterrent effect of capital punishment or the retributive nature of capital punishment.<sup>76</sup> With this, the Court held that allowing capital punishment for intellectually disabled people violates the Eighth Amendment’s prohibition on cruel and unusual punishment due to their diminished capacity.<sup>77</sup>

In 2005, the Court extended the reasoning from its decision in *Atkins* to the context of juvenile offenders in *Roper v. Simmons*.<sup>78</sup> In *Roper*, the Court reiterated that neither deterrence nor retribution is served by executing

---

<sup>70</sup> *Id.* (citing a MacArthur Foundation study on impulse and self-control under both emotionally arousing and non-emotionally arousing conditions, both the thirteen to seventeen-year-old group and the eighteen to twenty-one-year-old group performed poorer than the twenty-two to twenty-five-year-old group in terms of self-control and the younger groups displayed higher stimulation in the emotional processing centers of their brains.); see also Alexandra O. Cohen, Danielle V. Dellarco, Kaitlyn Breiner, Chelsea Helion, Aaron S. Heller, Ahrareh Rahdar, Gloria Pedersen, Jason Chein, Jonathan P. Dyke, Adriana Galvan, & BJ Casey, *The Impact of Emotional States on Cognitive Control Circuitry and Function*, 28 J. COGNITIVE NEUROSCIENCE 446, 446-59 (2016).

<sup>71</sup> Beatriz Luna, *The Relevance of Immaturities in the Juvenile Brain to Culpability and Rehabilitation*, 63 HASTINGS L.J. 1469 (2012) (explaining that the increase in dopamine during adolescence across brain regions contributes to reward-seeking behaviors, meaning that adolescence is particularly susceptible to, “behaviors driven by rewards and is believed to contribute to known peaks in risk-taking behavior”).

<sup>72</sup> Sally Terry Green, *The Admissibility of Expert Witness Testimony Based on Adolescent Brain Imaging Technology in the Prosecution of Juveniles: How Fairness and Neuroscience Overcome the Evidentiary Obstacles to Allow for Application of a Modified Common Law Infancy Defense*, 12 N.C. J.L. & TECH. 1, 24 (2010) (describing how frontal lobe development throughout adolescence affects the control of emotions, thinking, and behavior, which results in adolescents’, “tendency to engage in risky behavior because they do not anticipate the negative outcomes,” as well as adolescents’ tendencies to, “overstate rewards and not fully evaluate the risks or consequences of their acts” due to reduced use of the decision-making areas of the brain in conjunction with synaptic pruning).

<sup>73</sup> *Roper v. Simmons*, 543 U.S. 551 (2005); *Graham v. Florida*, 560 U.S. 48 (2010); *Miller v. Alabama*, 567 U.S. 460 (2012).

<sup>74</sup> *Atkins v. Virginia*, 536 U.S. 304 (2002).

<sup>75</sup> *Id.* at 306.

<sup>76</sup> *Id.* at 321.

<sup>77</sup> *Id.* at 304; see also U.S. CONST. amend. VIII.

<sup>78</sup> *Roper*, 543 U.S. at 551; see *Atkins*, 536 U.S. at 304; see also U.S. CONST. amend. VIII.

804 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 29:3]

minors due to their diminished capacity.<sup>79</sup> Based on “scientific and sociological studies,” the Court said that “[t]he reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult.”<sup>80</sup> The Court outlined three general differences between juveniles and adults, stating that juveniles have “a lack of maturity and an underdeveloped sense of responsibility,” are “more vulnerable to or susceptible to negative influences and outside pressures, including peer pressure,” and have an underdeveloped sense of character.<sup>81</sup> Therefore, the Court found that capital punishment for juveniles constitutes cruel and unusual punishment under the Eighth Amendment 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.”<sup>82</sup> In *Roper*, the Court acknowledged the inherent differences between juveniles and adults regarding criminal culpability by articulating that modern understandings of adolescent brain science indicate that incomplete juvenile brain developments are often a contributing factor to the commission of the crime itself.<sup>83</sup>

The Supreme Court continued expanding the concept of diminished capacity of juveniles in 2010 in the case of *Graham v. Florida*, holding that a sentence of life without the possibility of parole for a juvenile for non-homicide crimes also violates the Eighth Amendment’s prohibition on cruel and unusual punishment, likening the punishment to death.<sup>84</sup> Relying on *Roper*, the Court reiterated that, because juveniles have inherently diminished culpability, “they are less deserving of the most severe punishments,” and that, “developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds.”<sup>85</sup> Even more explicitly, the Court directly recognized and accepted modern adolescent brain science as explanatory of the diminished capacity of young offenders by stating that “parts of the brain involved in behavior control continue to mature through late adolescence.”<sup>86</sup> Further, the Court acknowledged young offenders’ increased capability for rehabilitation compared to that of adults, citing this capability as an additional reason to

---

<sup>79</sup> *Roper*, 543 U.S. at 551; see *Atkins*, 536 U.S. at 304; see also U.S. CONST. amend. VIII.

<sup>80</sup> *Roper*, 543 U.S. at 561 (citing *Thompson v. Oklahoma*, 487 U.S. 815 (1988)).

<sup>81</sup> *Id.* at 569-70.

<sup>82</sup> *Id.* at 571; see also U.S. CONST. amend. VIII.

<sup>83</sup> *Roper*, 543 U.S. at 578.

<sup>84</sup> *Graham v. Florida*, 560 U.S. 48 (2010); see also U.S. CONST. amend. VIII.

<sup>85</sup> *Graham*, 560 U.S. at 68.

<sup>86</sup> *Id.*

2023] *INCREASED AGE OF CULPABILITY* 805

view young offenders as inherently different, and explaining why it would be morally misguided to liken the wrongdoing of a juvenile to that of an adult.<sup>87</sup>

Consequently, in the subsequent case of *Miller v. Alabama* in 2012, the Supreme Court found that a sentence of mandatory life imprisonment without the possibility of parole for juveniles in regard to any crime is violative of the Eighth Amendment, and is thus unconstitutional.<sup>88</sup> The Court held that since punishment is meant to be proportional to both the crime committed and the offender—based upon continually evolving societal standards—setting mandatory sentences of life without at least the possibility of parole for juveniles for any crime is unconstitutional.<sup>89</sup> Utilizing the same reasoning of the preceding cases, the Court again recognized and required courts to take into account the fact that, “children are different.”<sup>90</sup> The Court reasoned that juveniles’ “transient rashness, proclivity for risk, and inability to assess consequences” lessened moral culpability and strengthened the prospect of reformation, “as the years go by and neurological development occurs.”<sup>91</sup>

This series of decisions stemming from the highest court in the nation sets an important baseline minimum for the nation’s treatment of juvenile offenders as inherently different than adults based on their diminished cognitive capacity—and, in turn, lessened moral and criminal culpability—in addition to their heightened capacity for rehabilitation as their cognitive development continues throughout adolescence. These decisions also assert that the traditional justifications for criminal punishment are neglected by harshly sentencing juvenile offenders, irrespective of their cognitive capacity and capability of reform.<sup>92</sup>

### III. THE PROBLEM WITH THE CURRENT TREATMENT OF JUVENILE OFFENDERS

Even though the Supreme Court has recognized this scientifically-based, crucial cutoff of maturity as valid in the courts of the United States, the legal applications of the underlying concepts of adolescent brain development science by both the federal government and individual states has been fragmentary and arbitrary across platforms.<sup>93</sup> Because of this, “[t]he result is a legal construct of maturity that is anything but consistent or

---

<sup>87</sup> *Id.*

<sup>88</sup> *Miller v. Alabama*, 567 U.S. 460 (2012); *see also* U.S. CONST. amend. VIII.

<sup>89</sup> *Miller*, 567 U.S. at 460; *see also* U.S. CONST. amend. VIII.

<sup>90</sup> *Miller*, 567 U.S. at 480.

<sup>91</sup> *Id.* at 472.

<sup>92</sup> Madison Ard, *Coming of Age: Modern Neuroscience and the Expansion of Juvenile Sentencing Protections*, 72 ALA. L. REV. 511, 514-15 (2020).

<sup>93</sup> Todres, *supra* note 38, at 1110.

806 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 29:3]

coherent.”<sup>94</sup> For instance, the federal government set the national maturity threshold for voting at eighteen years old,<sup>95</sup> yet, it also effectively set the national maturity threshold for drinking alcohol at twenty-one years old.<sup>96</sup> The arbitrariness of the legal recognition of when a person crosses the threshold of maturity creates confusion, especially when legal authorities such as the United States Supreme Court recognize brain immaturity through adolescence—which modern science has found to continue into the mid-twenties—yet continue to draw lines irrespective of the science behind this immaturity.<sup>97</sup>

The rationale behind all age-limiting legislation is evident: generally, society believes there is a difference between those who can handle the responsibility of a certain action and those who cannot. With this, it is fairly simple to explain away the inconsistencies in threshold requirements for the examples listed above, as they are very different acts that have very different consequences. However, this notion is defeated by differing applications of maturity cutoffs for the *same* act. For example, the federal government states that, in federal jurisdictions, the threshold for consenting to sexual encounters is sixteen years old.<sup>98</sup> However, New York legislates that, within its jurisdiction, the threshold for consenting to sexual encounters is seventeen years old.<sup>99</sup> It is difficult to find a logical basis for these differences. There is no difference between a sixteen-year-old agreeing to a sexual encounter in New York City and that same sixteen-year-old agreeing to the same sexual encounter in Washington D.C.; except that one is illegal and the other one is not.<sup>100</sup> Similarly, the arbitrary nature of criminal culpability across the nation is even harder to explain. The science of adolescent brain development and thinking capabilities does not change simply because an adolescent has crossed an imaginary dotted line on a map that changes the legal jurisdiction. These well-researched, thoroughly documented, and formally acknowledged decision-making deficiencies in adolescents should have consistent applications.

Furthermore, brain development research on the diminished capacity of adolescents in areas of decision-making has been widely validated and utilized in policy considerations.<sup>101</sup> However, the research has been

---

<sup>94</sup> *Id.* at 1110-11.

<sup>95</sup> U.S. CONST. amend. XXVI.

<sup>96</sup> 23 U.S.C.S. § 158 (LEXIS through Pub. L. No. 117-327, with a gap of Pub. L. No. 117-263).

<sup>97</sup> Andrews, Ahmed, & Blakemore, *supra* note 39.

<sup>98</sup> 18 U.S.C.S. § 2243(a)(1) (LEXIS through Pub. L. No. 117-327, with a gap of Pub. L. No. 117-263).

<sup>99</sup> N.Y. PENAL LAW § 130.05(3)(a) (Consol. 2021).

<sup>100</sup> 18 U.S.C.S. § 2243(a)(1); *Id.*

<sup>101</sup> See *Roper v. Simmons*, 543 U.S. 551 (2005); see *Graham v. Florida*, 560 U.S. 48 (2010); see *Miller v. Alabama*, 567 U.S. 460 (2012); *Raise the Age (RTA)*, N.Y. STATE UNIFIED CT. SYS. (Dec. 23, 2019) <https://nycourts.gov/courthelp/Criminal/RTA.shtml>.

2023] *INCREASED AGE OF CULPABILITY* 807

employed incorrectly, or more aptly, incompletely.<sup>102</sup> The brain science that the Supreme Court has already recognized as valid in regard to diminished criminal culpability refers to the stage of adolescence.<sup>103</sup> While it is true that young people up to seventeen years old are classically considered to be in this stage of adolescence, research clearly finds that, on average, the human brain does not fully develop the brain areas related to impulsivity, sensation-seeking behaviors, and recognition of long-term consequences until their early to mid-twenties.<sup>104</sup> This means that the brains of eighteen to twenty-year-olds are still plagued by the same effects of underdevelopment that traditionally give rise to lessened criminal culpability.<sup>105</sup> The hallmark of the nation's understanding of criminal justice rests in punishing those that are culpable.<sup>106</sup> So, why do the federal government and almost all state governments continue to set the cutoff at arbitrary ages when individuals are proven to be insufficiently developed to reach the criminal culpability threshold of the ability to appreciate the wrongfulness of their conduct? Perhaps the best, and only, explanation is public policy and practical considerations. In other words, the limit must exist somewhere for the system to function properly and efficiently. This argument has merit, but only because it is so vague; yes, the limit must exist *somewhere*. However, it is to the benefit of society that this limit is scientifically supported to produce the best outcomes. Governments have a strong interest in both punishing wrongdoing and protecting the public.<sup>107</sup> However, both interests are underserved when adolescents are improperly treated as fully developed adults capable of the same level of brain function and decision-making. Rather than providing a young offender with the traditional elements of rehabilitation present in the juvenile system, those adolescents are subjected to a punitive environment that has historically diminished outcomes.<sup>108</sup>

---

<sup>102</sup> Todres, *supra* note 38, at 1110.

<sup>103</sup> Joshua Olmsted, *A New Era in Juvenile Sentencing: Why Montgomery, Adolescent Neuroscience, and a Shift in the National Conversation Point Toward a Need for Measure 11 Reform*, 23 LEWIS & CLARK L. REV. 465, 489 (2019).

<sup>104</sup> *Id.*

<sup>105</sup> See Colleen M. Berryessa & Jillian Reeves, *The Perceptions of Juvenile Judges Regarding Adolescent Development in Evaluating Juvenile Competency*, 110 J. CRIM. L. & CRIMINOLOGY 551 (2020) (“the frontal areas, which are responsible for skills associated with executive function, such as controlling inhibition, judgment, decision-making, and planning, do not finish development until an individual is around twenty-five years old.”); see also Kathryn Monahan, Laurence Steinberg, & Alex R. Piquero, *Juvenile Justice Policy and Practice: A Developmental Perspective*, 44 CRIME & JUST. 557 (2015) (“There is more than ample evidence that most forms of risky behavior follow an inverted U-shaped curve, rising during early adolescence and peaking in mid to late adolescence, and declining in early adulthood and, especially dramatically, through the 20s.” (internal citations omitted)).

<sup>106</sup> See Michele Cotton, *Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L. REV. 1313, 1314 (2000).

<sup>107</sup> *Id.*

<sup>108</sup> NAT'L RSCH. COUNCIL & INST. OF MED., *supra* note 43.

By treating young offenders as fully developed adults in need of punishment rather than young people in need of education, the criminal legal system is stunting positive outcomes for the nation's youth and, consequently, the nation's future.<sup>109</sup> Continuing to treat young offenders as adults effectively labels the young person as incorrigible. This is in complete contrast to the ideals and morals underlying the creation of the juvenile justice system, which hinge on the theory that children can learn to be better with help.<sup>110</sup> Punishing young offenders as adults with incarceration has negative physical and mental outcomes for young people<sup>111</sup> that repeatedly robs the next generation of productive members of society who could have been rehabilitated as young offenders. The negative impact upon a future society of favoring punishment over rehabilitation is not a question of "if," but a question of magnitude.<sup>112</sup> An eighteen-year-old young offender who undergoes mental health counseling and vocational training through the juvenile justice system has a better chance of returning to their community with positive outcomes.<sup>113</sup> Instead, the current criminal legal system creates an eighteen-year-old adult offender who spent their formative years in a prison, and who is subsequently released in a worse condition than when they entered the system.<sup>114</sup> The former is objectively preferable.

#### IV. CONFORMING WITH SCIENCE AND JUSTICE

##### *A. The Balancing of Interests*

The question of how to best handle young offenders concerns different interests on different sides that tend to conflict with one another. However, the most appropriate outcome for all interested parties is to increase the age of maturity for criminal culpability to twenty-one years of age in New York State. On one side, there are the governmental interests in punishing crime and maintaining public safety. On the other side, there are the individual interests of young offenders in being treated appropriately with respect to

---

<sup>109</sup> Elizabeth S. Barnert, Rebecca Dudovitz, Bergen B. Nelson, Tumaini R. Coker, Christopher Biely, Ning Li, & Paul J. Chung, *How Does Incarcerating Young People Affect their Adult Health Outcomes?*, 139 *PEDIATRICS* 1, 7 (Feb. 2017).

<sup>110</sup> See NAT'L RSCH. COUNCIL & INST. OF MED., *supra* note 43 ("A separate juvenile justice system was established in the United States about 100 years ago with the goal of diverting youthful offenders from the destructive punishments of criminal courts and encouraging rehabilitation based on the individual juvenile's needs. This system was to differ from adult or criminal court in a number of ways. It was to focus on the child or adolescent as a person in need of assistance, not on the act that brought him or her before the court").

<sup>111</sup> Barnert, Dudovitz, Nelson, Coker, Biely, Li, & Chung, *supra* note 109.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

2023] *INCREASED AGE OF CULPABILITY* 809

their mental capacity. On a semi-peripheral side, there is a societal interest in implementing the best practices overall for the betterment of the collective. In order to ensure the greatest outcomes that best protect the interests of everyone, there must be a balancing test that focuses on long-term benefits of rehabilitation rather than short-sighted reflexes towards retribution. Essentially, the desired end result of a proper balancing of the governmental interests and the individual interest equates to the overall interests of society stated above, which is the best outcomes overall to better the whole. Thus, raising the age of criminal culpability is a promising avenue for producing these best outcomes for society and achieving a harmonious balance of interests.

To properly understand and discuss the individual interests in including young offenders in the juvenile system until the age of twenty-one, it is important to revisit the initial goals of the juvenile justice system at its inception.<sup>115</sup> There are two primary assertions that crucially underpin the juvenile justice system's innovative rehabilitative approach: (1) that "young offenders were misguided children rather than culpable wrongdoers," and (2) that "the sole purpose of state intervention was to promote their welfare through rehabilitation."<sup>116</sup> These assertions remain true to this day.<sup>117</sup> The need to educate, rehabilitate, and then reintegrate children who had committed some wrongdoing is still a present concern as showcased in several Supreme Court cases explicitly holding that children are, fundamentally, different than adults.<sup>118</sup> These Supreme Court decisions discuss two reasons that support the need for differential treatment of young offenders with respect to punishment: "(1) juveniles are entitled to more lenient sentences than adult offenders because of their incomplete brain development; and (2) time allows juvenile brains to develop and thus reduces the need for punitive intervention to accomplish reform."<sup>119</sup>

As previously discussed, the government has valid interests in maintaining the public welfare and safety of its citizens through the punishment of crime.<sup>120</sup> Traditionally, the justifications for punishment

---

<sup>115</sup> Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 804-05 (Feb. 2003).

<sup>116</sup> *Id.*

<sup>117</sup> See *Roper v. Simmons*, 543 U.S. 551 (2005); see *Graham v. Florida*, 560 U.S. 48 (2010); see *Miller v. Alabama*, 567 U.S. 460 (2012); see also Brittany L. Briggs, *Children Are Our Future: Resurrecting Juvenile Rehabilitation Through "Raise the Age" Legislation in Missouri*, 85 MO. L. REV. 191, 215 (2020).

<sup>118</sup> See *Roper*, 543 U.S. at 551 (holding that children are a category of offenders that are different from adults based on scientific and sociological studies); see also *Graham*, 560 U.S. at 48 (finding young offenders' diminished capacity to create additional punitive limits based on the Eighth Amendment prohibition on cruel and unusual punishment); *Miller*, 567 U.S. at 460 (extending limits on punishments of young offenders based on diminished capacity and the Eighth Amendment's ban on cruel and unusual punishment).

<sup>119</sup> Briggs, *supra* note 117; *Roper*, 543 U.S. at 551; *Graham*, 560 U.S. at 48; *Miller*, 567 U.S. at 460.

<sup>120</sup> Briggs, *supra* note 117.

810 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 29:3]

within the criminal justice system have revolved around the theories of retribution, rehabilitation, incapacitation, and deterrence.<sup>121</sup> However, continuing to treat adolescents between the ages of eighteen and twenty as adults for the purposes of criminal punishment serves only three of the four stated goals of punishment, because doing so actively ignores the capacity for reformation of people within this age range. Consequently, extending the age of criminal culpability to twenty-one years old would better serve the stated governmental interest in punishing crime by also including the fourth justification for punishment: rehabilitation. This is because, rather than simply locking away young offenders as incorrigible criminals who receive minimal education and life skills for re-entry after prison, the general welfare of society would be supplemented by treating these young offenders with respect to their mental capacity and educating them on how to be productive members of society with a rehabilitative focus towards punishment. With the understanding of adolescents' capacity for education and behavior change, it is clear that the governmental interest in halting and preventing crime for the benefit of society should also be based upon rationales for rehabilitation rather than retribution, deterrence, or incapacitation.

The addition of young offenders up to age twenty-one into the juvenile justice system is logical, stemming from not only the goals of the juvenile justice system, but also from the Supreme Court's recognition of the scientific research proving lessened culpability through diminished capacity.<sup>122</sup> Even though adolescent brain development is fluid and individualized,<sup>123</sup> there is sufficient evidence to show that moving the age of adult criminal culpability to twenty-one years would appropriately reflect both the reasoning provided by the Supreme Court for diminished capacity in juveniles under eighteen and the modern science of adolescent brain development while appropriately balancing all interests involved. Thus, New York should increase the age of criminal culpability to include eighteen-through-twenty-year-old young offenders in the juvenile system.

*B. State Progression Towards Increased Age of Criminal Culpability*

In October 2018, New York State implemented the first phase of its Raise the Age Legislation by incorporating sixteen-year-olds into a newly developed system designed to address adolescent criminal offenders.<sup>124</sup> Traditionally, New York State handled juvenile offenders within the Family

---

<sup>121</sup> Cotton, *supra* note 106.

<sup>122</sup> See *Roper*, 543 U.S. at 551; see also *Graham*, 560 U.S. at 48; see also *Miller*, 567 U.S. at 460; see also NAT'L RSCH. COUNCIL & INST. OF MED., *supra* note 43.

<sup>123</sup> See Ard, *supra* note 92, at 529-30.

<sup>124</sup> N.Y. CRIM. PROC. L. § 1.20(44) (Consol. 2021); see also *Raise the Age (RTA)*, *supra* note 101.



2023] *INCREASED AGE OF CULPABILITY* 811

Court system rather than the Criminal Court system; however, this new legislation created a new Youth Part of the Criminal Court system that is specifically designed to handle a new statutory category of offender.<sup>125</sup> This new category is called “Adolescent Offenders” and includes sixteen-year-old felony offenders as of October 2018 and seventeen-year-old felony offenders as of October 2019.<sup>126</sup> Importantly, with the Raise the Age Legislation, all sixteen and seventeen-year-old offenders arrested for misdemeanor offenses are automatically placed within the Family Court System just like any other juvenile offender.<sup>127</sup> However, when a sixteen or seventeen-year-old commits a felony offense, they are automatically placed within the Youth Part of the Criminal Courts, and there is a legal presumption of removal to Family Court depending upon certain circumstances.<sup>128</sup> If the Adolescent Offender committed a violent felony offense that included the use of a firearm or a deadly weapon, if the offense was a sex crime, or if the offense caused substantial physical injury, then the case will stay within the Youth Part of Criminal Court and will not be removed to Family Court to be adjudicated as a juvenile.<sup>129</sup> Also, the District Attorney may move to keep the case in the Youth Part based upon a showing of special circumstances.<sup>130</sup>

Critically, when an Adolescent Offender’s case is adjudicated through the Family Court system, like all other juvenile offenders, there are significantly more resources available to them.<sup>131</sup> The Adolescent Offender will receive age-appropriate services with a program treatment model that focuses on enhancing cognitive skills through academic planning with a school psychologist to help transition the adolescent to education programs, vocational training, and employment opportunities.<sup>132</sup> Further, the adolescent will receive services to help with re-entry and post-discharge planning, as well as eligibility for Supervision and Treatment Services, including substance use treatment if needed.<sup>133</sup> Promisingly, the initial data from the implementation of New York’s Raise the Age Legislation is notable and encouraging regarding Adolescent Offenders adjudicated as juveniles, as

---

<sup>125</sup> *Raise the Age (RTA)*, *supra* note 101.

<sup>126</sup> N.Y. CRIM. PROC. L. § 1.20(44).

<sup>127</sup> N.Y. STATE OPPORTUNITY, NEW YORK STATE IMPLEMENTATION TASK FORCE: FINAL REPORT 33 (2020), [https://www.ny.gov/sites/default/files/atoms/files/FINAL\\_Report\\_Raise\\_the\\_Age\\_Task\\_Force\\_122220.pdf](https://www.ny.gov/sites/default/files/atoms/files/FINAL_Report_Raise_the_Age_Task_Force_122220.pdf).

<sup>128</sup> *Id.*; *Raise the Age (RTA)*, *supra* note 101 (If a sixteen or seventeen-year-old commits a violation of the Vehicle or Traffic Law, they are considered adults and the case is handled in local Criminal Court).

<sup>129</sup> N.Y. STATE OPPORTUNITY, NEW YORK STATE IMPLEMENTATION TASK FORCE: FINAL REPORT, *supra* note 127.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

812 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 29:3]

eighty-three percent of these sixteen and seventeen-year-old offenders throughout New York were removed to Family Court from the program's implementation through September 2019.<sup>134</sup> With such a high percentage of Adolescent Offenders removed to Family Court, this statistic effectively means that eighty-three percent more teenagers were eligible for cognitive development programs as juvenile delinquents than the year before.

Even more, in November 2021, New York Governor Kathy Hochul announced that the age restriction for New York's Youthful Offender status would be extended to include young offenders up to the age of nineteen years old.<sup>135</sup> New York's Youthful Offender Program allows young offenders who were convicted of a crime when they were between the ages of sixteen and nineteen to have their criminal record replaced with a sealed, confidential adjudication in Family Court.<sup>136</sup> The intent of the Youthful Offender status statute is to relieve young people of the stigma and challenges associated with having a criminal record.<sup>137</sup> Extending this opportunity to more young people through nineteen years of age plays a vital role in rehabilitating young offenders to better reintegrate into and participate in society as productive members. This reformatory Youthful Offender program could have an even higher beneficial impact if it were to be extended further to include young offenders up to twenty-one years of age—in conjunction with the Raise the Age legislation.

The existing array of hardline cut-offs for ages of consent throughout the nation<sup>138</sup> are piecemeal and arbitrary. New York legislators setting the current age of criminal culpability at eighteen<sup>139</sup> exemplifies this. The 2019 legislation in New York State that raised the age of criminal culpability to

<sup>134</sup> N.Y. STATE OPPORTUNITY, NEW YORK STATE RAISE THE AGE IMPLEMENTATION TASK FORCE, RAISE THE AGE IMPACT BY THE NUMBERS: OCTOBER 1, 2018 THROUGH SEPTEMBER 30, 2019 (May 11, 2020), [https://www.governor.ny.gov/sites/default/files/atoms/files/RTA\\_First\\_Year\\_Data\\_FINAL.pdf](https://www.governor.ny.gov/sites/default/files/atoms/files/RTA_First_Year_Data_FINAL.pdf).

<sup>135</sup> Nick Reisman, *Hochul Approves Second Chance at Youthful Offender Status*, SPECTRUM NEWS NY1 (Nov. 2, 2021, 2:36 PM), <https://www.ny1.com/nyc/all-boroughs/ny-state-of-politics/2021/11/02/hochul-approves-second-chance-at-youthful-offender-status>.

<sup>136</sup> *Youthful Offender & Sealing*, N.Y. STATE UNIFIED CT. SYS., [https://ww2.nycourts.gov/courts/7jd/courts/city/criminal/youthful\\_offender\\_sealing.shtml#:~:text=%22Youth%22%20means%20a%20person%20charged,of%20having%20a%20criminal%20record](https://ww2.nycourts.gov/courts/7jd/courts/city/criminal/youthful_offender_sealing.shtml#:~:text=%22Youth%22%20means%20a%20person%20charged,of%20having%20a%20criminal%20record) (last visited Feb. 21, 2022).

<sup>137</sup> *Id.*; see also Reisman, *supra* note 135 (“[f]ar too many New Yorkers who made poor choices at a young age are forced to deal with the lifelong consequences of criminal convictions that deny them a second chance at a productive, fulfilling life,” Hochul said. ‘Communities thrive when every member has the opportunity to contribute and it's time for New York to make the changes necessary for ensuring everybody has a fair shot at success. Thanks to this legislation, we can now support those who have learned from their mistakes by doing away with the stigma of a criminal conviction, and giving them the opportunity to get back on their feet’”).

<sup>138</sup> N.Y. PENAL LAW § 130.05(3)(a) (Consol. 2021); see 18 U.S.C.S. § 2243(a)(1) (LEXIS through Pub. L. No. 117-327, with a gap of Pub. L. No. 117-263); see U.S. CONST. amend. XXVI; see 23 U.S.C.S. § 158 (2021) (LexisNexis, Lexis Advance through Public Law 117-41, approved September 24, 2021).

<sup>139</sup> N.Y. CRIM. PROC. L. § 1.20(44); see also *Raise the Age (RTA)*, *supra* note 101.

2023] *INCREASED AGE OF CULPABILITY* 813

eighteen was based on the understanding that, “scientific research has shown that prosecuting and placing children in the adult criminal justice system does not work.”<sup>140</sup> Yet, the science that supports this legislation also supports the existence of adolescent brain underdevelopment beyond the age of eighteen, as there are still significant developments in pre-frontal lobe and limbic system growth past eighteen years old that contribute to risky, sometimes criminal, behaviors that underlie judicial reasoning for diminished criminal culpability.<sup>141</sup> Importantly, adolescents under the age of twenty-one are still capable of formative learning and of internalizing best behavior practices.<sup>142</sup> New York State should focus on rehabilitating young offenders up to the age of twenty-one as Adolescent Offenders in order to foster rehabilitated members of society, rather than seeking punitive retribution through the adult criminal legal system.

With the newly created Youth Part of the Criminal Court system in New York in 2018, the inclusion of eighteen through twenty-year-old offenders within the Youth Part could be accomplished relatively seamlessly. The current process for sixteen and seventeen-year-old Adolescent Offenders would not require any massive changes or overhauls to include eighteen through twenty-year-old offenders, apart from expanded funding streams to accommodate the increase in individuals within the Youth Part. However, given that the current legislation allocated \$19 million to the renovation of existing facilities and the creation of new juvenile detention facilities for Adolescent Offenders,<sup>143</sup> the housing capabilities these facilities offer the current juvenile system could potentially already accommodate the addition of eighteen through twenty-year-old offenders that are adjudicated within the Youth Part of the Criminal Court system. This is especially true considering that initial data shows that approximately forty-three percent of Adolescent Offenders cases adjudicated in the Youth Part within the first year of its implementation resulted in non-detention based sentences.<sup>144</sup> Moreover, the rehabilitative, educational, and vocational programs within New York State that the previously implemented Raise the Age Legislation already provides for Adolescent Offenders through the Family Court system are designed to assist people to the age of twenty-one.<sup>145</sup> Additionally, the current Raise the

---

<sup>140</sup> *Raise the Age (RTA)*, *supra* note 101.

<sup>141</sup> Berryessa & Reeves, *supra* note 105.

<sup>142</sup> Steinberg, *supra* note 35.

<sup>143</sup> *Frequently Asked Questions*, N.Y. STATE, <https://www.ny.gov/raise-age/frequently-asked-questions> (last visited Dec. 30, 2021).

<sup>144</sup> N.Y. STATE OPPORTUNITY, NEW YORK STATE RAISE THE AGE IMPLEMENTATION TASK FORCE, RAISE THE AGE IMPACT BY THE NUMBERS: OCTOBER 1, 2018 THROUGH SEPTEMBER 30, 2019, *supra* note 134 (Table 2.8 explains that 23 out of 79 Adolescent Offenders were sentenced to Probation, and 11 out of 79 Adolescent Offenders were sentenced to Conditional Discharge).

<sup>145</sup> *Frequently Asked Questions*, N.Y. STATE, *supra* note 143.

814 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 29:3]

Age Legislation already has a phased implementation strategy that can also be easily extended to incrementally include eighteen through twenty-year-old offenders within the current scheme, slowly over the next few years to avoid a massive influx upon the juvenile system.<sup>146</sup>

Crucially, other states have begun to recognize and consider legislation that will raise the age of criminal culpability.<sup>147</sup> Vermont serves as a good example, being the first state to officially pass legislation that raised the age of criminal culpability to encompass eighteen-year-olds, which went into effect in July 2020.<sup>148</sup> In the time since, Vermont has also introduced legislation that would incrementally increase the maturity threshold for the adult criminal system by including nineteen-year-olds in the juvenile system in the year 2022 and twenty-year-olds in the year 2024.<sup>149</sup> The reasoning behind the legislation is based on prior increased positive outcomes for young offenders within the juvenile justice system, when sixteen and seventeen-year-olds were initially included in the juvenile system in 2019, and that resulted in “increased public safety, improved outcomes for youth, increased accountability and personal responsibility, reduced costs.”<sup>150</sup> Additionally, these positive outcomes are supported by the statistics from 2019 showing that Vermont’s young offender population had an observed decline in offending overall from the previous two years after inclusion.<sup>151</sup> The data on the implementation of raise the age and juvenile offending clearly shows that Vermont’s juvenile system handled the previous inclusion of sixteen and seventeen-year-olds well, and that eighteen and nineteen-year-old young offenders are committing similar offenses as this age group.<sup>152</sup> Furthermore, approximately eighty percent of the potential cases that will be shifted to the juvenile justice system should be considered for diversion programs out of the system regardless, with around forty-five percent of the cases of eighteen

---

<sup>146</sup> *Improving the Way New York’s Justice System Treats Young People*, *supra* note 33.

<sup>147</sup> See Peter Hirschfeld, *Scott Administration Wants to ‘Pause’ Plan to Send 19-Year-Olds Through the Juvenile Court System*, VT. PUB. RADIO (Oct. 6, 2021, 6:00 AM), <https://www.vpr.org/vpr-news/2021-10-06/scott-administration-wants-to-pause-plan-to-send-19-year-olds-through-the-juvenile-court-system>; see also *Frequently Asked Questions*, RAISE AGE MA, <https://www.raisetheagma.org/faqs> (last visited Sept. 30, 2021).

<sup>148</sup> Hirschfeld, *supra* note 147.

<sup>149</sup> Katie Dodds, *Why All States Should Embrace Vermont’s Raise the Age Initiative*, COAL. FOR JUV. JUST. (July 22, 2020), <https://www.juvjustice.org/blog/1174>.

<sup>150</sup> Karen Vastine & Lael Chester, *Act 201 Implementation Vermont’s Raise the Age Initiative* (Nov. 13, 2019), <https://legislature.vermont.gov/Documents/2020/WorkGroups/Justice%20Oversight/Juvenile%20Justice/W~Karen%20Vastine~Act%20201%20Implementation-%20Vermont's%20Raise%20the%20Age%20Initiative%20~11-13-2019.pdf>.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

2023] *INCREASED AGE OF CULPABILITY* 815

and nineteen-year-old offenders convicted in the adult system resulting in a fine only.<sup>153</sup>

Importantly, this new Vermont bill has not yet been signed into law.<sup>154</sup> Vermont Governor Phil Scott vetoed the bill, citing concerns about effective tools and resources for the shift.<sup>155</sup> Governor Scott's concerns are valid because, without proper implementation, the intended results of the legislation could be doomed from the start. However, Massachusetts is considering similar legislation to Vermont, with a different view towards implementation.<sup>156</sup> The Massachusetts Raise the Age legislation proposes a similar incremental implementation plan as Vermont, with the law gradually increasing the ages that fall under the juvenile justice system's jurisdiction to encompass eighteen-year-olds through twenty-year-olds over the course of the next five years.<sup>157</sup> However, the proposed Massachusetts bill specifies that the periods between age progression integration are meant, "to allow the various agencies to adjust to the programming and staffing to accommodate this newer population."<sup>158</sup>

Additionally, similarly to the Vermont legislation, the Massachusetts bill to raise the age focuses on the documented positive effects of previously increasing the age of adult criminal culpability within the state to eighteen years old to support the legislation.<sup>159</sup> Since Massachusetts raised its age of culpability to eighteen years old in 2013, "juvenile crime has declined by 34% in the Commonwealth—outperforming national trends in property and violent crime reductions."<sup>160</sup> Similarly, the effects of the proposed legislation are expected to significantly improve public safety and decrease crime rates among young offenders in the target age group.<sup>161</sup> Further, the overall outcomes of the juvenile system in Massachusetts are far better than the adult system, as only forty-six percent of young offenders are re-arrested in the state after their release from the Massachusetts Department of Youth Services, compared to seventy-six percent of young offenders aged eighteen to twenty-four years old who were discharged from the House of Corrections.<sup>162</sup> Moreover, the re-conviction rates respectively were twenty-

---

<sup>153</sup> *Id.*

<sup>154</sup> See Associated Press, *Governor Vetoes Raising Age of Juvenile Offenders*, U.S. NEWS & WORLD REP. (May 21, 2021, 9:46 AM), <https://www.usnews.com/news/best-states/vermont/articles/2021-05-21/governor-vetoes-raising-age-of-juvenile-offenders>.

<sup>155</sup> Associated Press, *supra* note 154.

<sup>156</sup> *Frequently Asked Questions, RAISE AGE MA, supra* note 147.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

816 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 29:3]

six percent compared to fifty-five percent.<sup>163</sup> Regarding the programs available to accommodate the new range of ages encompassed in the young offender category, Massachusetts has outlined methods that have specific policies against comingling of certain age groups and has a wide range of programs available—beginning with a thorough evaluation to determine the proper program placement for each person.<sup>164</sup>

In addition to the examples outlined by proposed legislation in Vermont and Massachusetts, there are other states throughout the nation that have either introduced similar legislation or have allocated specific task forces towards studying the potential for such legislation.<sup>165</sup> As the legal community continues to recognize the science behind adolescent brain development,<sup>166</sup> mobilizing both programs and legislation that incorporate brain science is an ongoing necessity to facilitate the best outcomes among the nation’s youth. For this reason, New York State should not hesitate to begin the process of raising the age of maturity for criminal culpability to twenty-one years old.

Critically, New York has already used a very similar scheme when it incrementally raised the age of criminal culpability to include sixteen and seventeen-year-olds.<sup>167</sup> Simply continuing this phased implementation for eighteen through twenty-year-olds would have beneficial outcomes requiring little adjustment. Depending on how the current legislation is executed over time, the Raise the Age legislation could be tweaked with simple amendments that shift the applicable ages and, potentially, the funding required. However, to be beneficial, the legislation must be implemented effectively. In 2021, the New York City Criminal Justice Agency released statistics regarding recidivism rates among sixteen and seventeen-year-old young offenders after the 2017 Raise the Age Legislation was passed in New York.<sup>168</sup> Shockingly, the statistics for sixteen-year-olds whose cases were

---

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> See Sen. Nancy Skinner Announces Bill to Raise the Age to be Tried as an Adult, CAL. STATE SENATE (Jan. 28, 2021), <https://sd09.senate.ca.gov/news/20200128-sen-nancy-skinner-announces-bill-raise-age-be-tried-adult> (“Sen. Nancy Skinner, D-Berkeley, announced today Senate Bill 889, which would raise the age at which young people in California are automatically tried as adults to 20 years old. Under the bill, 18- and 19-year-olds would be treated as juveniles in criminal proceedings”); see also *New Emerging Adult Justice Reform Bills in Illinois and Connecticut*, COLUMBIA JUST. LAB, <https://justicelab.columbia.edu/new-EAJ-reform-bills-IL-and-CT> (last visited Oct. 29, 2021).

<sup>166</sup> See *Roper v. Simmons*, 543 U.S. 551, 571 (2005); see also *Graham v. Florida*, 560 U.S. 48, 68 (2010); see also *Miller v. Alabama*, 567 U.S. 460 (2012).

<sup>167</sup> *Improving the Way New York’s Justice System Treats Young People*, supra note 33 (“The Raise the Age legislation will take effect for 16-year-olds on October 1, 2018, and 17-year-olds on October 1, 2019.”).

<sup>168</sup> Marian J. Gewirtz, René Ropac, & Katie Bent-Koerick, *Re-Arrest Among 16-Year-Olds Arrested in the First Year of Raise the Age*, N.Y.C. CRIM. JUST. AGENCY (Dec. 2021).

2023] *INCREASED AGE OF CULPABILITY* 817

handled by the family court system in New York show a forty-five percent re-arrest rate for all felonies.<sup>169</sup> This reflects a general increase in re-arrest rates from the previous year before the Raise the Age Legislation was employed.<sup>170</sup> While pinning down the exact causes of this increase is difficult, it is likely the case that New York did not properly utilize the financial resources necessary to achieve the intended positive outcomes. It is important to note that New York State has only spent about one-third of the allocated funding to successfully incorporate sixteen and seventeen-year-olds in the five years since the legislation went into effect.<sup>171</sup> For reasons similar to those enumerated by Vermont Governor Phil Scott in vetoing Vermont's proposed Raise the Age bill,<sup>172</sup> the proper allocation and spending of financial resources is vital to the effective implementation and success of Raise the Age legislation. To successfully continue the current Raise the Age Legislation in New York, and to effectively extend the legislation to include eighteen through twenty-year-old adolescent offenders in the future, New York must make organizing and implementing the necessary programs and facilities a priority in the upcoming years.

## V. CONCLUSION

Modern recognition of the United States' problematic history regarding the punitive nature of mass incarceration has sparked much research and conjecture on how to rectify a system that is so tragically broken.<sup>173</sup> This fractured system is directly linked to the negative outcomes and deaths of so many children throughout the nation, like Ben Van Zandt and Kalief Browder.<sup>174</sup> The 1980s spawned a decades-long age of juvenile justice policies that focused on retributive punishment of children that "reject[ed] traditional concerns for diversion and rehabilitation in favor of a get-tough approach to juvenile crime and punishment."<sup>175</sup> However, the historical underpinnings of the initial creation of the juvenile justice system, in conjunction with the Supreme Court's decisions relating to the diminished capacity of juveniles regarding criminal culpability, demonstrate that, after

---

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> See Brendan J. Lyons, 'Raise the Age' Falling Short on Transforming Troubled Youth, *TIMES UNION* (Feb. 7, 2022, 1:29 PM), <https://www.timesunion.com/state/article/Raise-the-age-16802730.php> (stating specifically that New York State has spent \$270 million of the allocated \$800 million).

<sup>172</sup> Associated Press, *supra* note 154.

<sup>173</sup> See James Cullen, *The History of Mass Incarceration*, BRENNAN CTR. FOR JUST. (July 20, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/history-mass-incarceration> ("U.S. incarcerates more people than any nation in the world, including China. And the U.S. is also the leader in the prison population rate. America's approach to punishment often lacks a public safety rationale, disproportionately affects minorities, and inflicts overly harsh sentences").

<sup>174</sup> See Hay, *supra* note 1; see also Gonnerman, *supra* note 11.

<sup>175</sup> NAT'L RSCH. COUNCIL & INST. OF MED., *supra* note 43.

818 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 29:3]

all, children are different than adults.<sup>176</sup> The recognition of this crucial distinction, both in terms of children's moral culpability and their capacity for rehabilitation, demands that juveniles be treated differently than adults regarding punishment and criminal culpability.

Furthermore, the current age cut-offs for legal maturity and criminal culpability within New York State are arbitrarily set at an age that disregards the full application of modern science that has been recognized as valid by the Supreme Court. Contemporary adolescent brain development research warrants an extension of the demographic of the juvenile justice system to include adolescent offenders up to the age of twenty-one.<sup>177</sup> Given this, this New York State should raise the current age of criminal culpability from eighteen years old to twenty-one years old. Raising the current age of criminal culpability can be accomplished by implementing a phased application of legislation similar to the previously enacted New York legislation that raised the age of criminal culpability to eighteen years old and the proposed legislation in both Vermont and Massachusetts to raise the age of criminal culpability to twenty-one years old.<sup>178</sup> New York State, and consequently the nation as a whole, should focus on educating and reforming young offenders up until the age of twenty-one who scientifically have the capacity for improved thinking patterns and long-lasting behavioral change to improve the outcomes for society as a whole. Truthfully, as Frederick Douglass once said, "it is easier to build strong children than to repair broken men."<sup>179</sup>

---

<sup>176</sup> See *Roper v. Simmons*, 543 U.S. 571 (2005); see also *Graham v. Florida*, 560 U.S. 48, 68 (2010); see also *Miller v. Alabama*, 567 U.S. 460 (2012); see also NAT'L RSCH. COUNCIL & INST. OF MED., *supra* note 43.

<sup>177</sup> See Steinberg, *supra* note 35; see also Carroll, *supra* note 51.

<sup>178</sup> See *Improving the Way New York's Justice System Treats Young People*, *supra* note 33 ("The Raise the Age legislation will take effect for 16-year-olds on October 1, 2018, and 17-year-olds on October 1, 2019."); see also *Frequently Asked Questions*, RAISE AGE MA, *supra* note 147; see also Dodds, *supra* note 149.

<sup>179</sup> Andrew Rowland, "It Is Easier to Build Strong Children than to Repair Broken Men" (Frederick Douglass, 1817-1895), WORDPRESS (Apr. 25, 2014), <https://drandrewrowland.wordpress.com/2014/04/25/it-is-easier-to-build-strong-children-than-to-repair-broken-men-frederick-douglass-1817-1895/comment-page-1/#:~:text=In%201855%20Frederick%20Douglass%20had,than%20to%20repair%20broken%20men%E2%80%9C>.