

ARTICLES

Kids Are Not So Different: The Path from Juvenile Exceptionalism to Prison Abolition

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Inspired by the Supreme Court’s embrace of developmental science in a series of Eighth Amendment cases, “kids are different” has become the rallying cry, leading to dramatic reforms in our response to juvenile crime designed to eliminate the incarceration of children and support their successful transition to adulthood. The success of these reforms represents a promising start, but the “kids are different” approach is built upon two flaws in the Court’s developmental analysis that constrain the reach of its decisions and hide the true implications of a developmental approach. Both the text of the Court’s opinions and the developmental and neuroscientific research on which the opinions rely reveal that the developmental approach is not coherently defined by the legal line between childhood and adulthood. This lack of alignment has led to calls to extend the age of juvenile exceptionalism to young adulthood. But extending the exceptionalist frame obscures the central role that immaturity plays in most offenders’ full criminal careers and preserves a destructive fiction that youthful offenders are a distinctive, more sympathetic, and less corrupt subset of the millions of people charged with committing crimes. This Article argues that the developmental approach, followed to its logical conclusion, calls not for an age extension for juvenile exceptionalism but rather for a wholesale remaking of the entire criminal justice system in line with an abolitionist vision.

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INTRODUCTION

In 2005, the Supreme Court struck down the juvenile death penalty and ignited a new “developmental approach” to juvenile crime. In *Roper v. Simmons*¹ and a series of cases that followed, the Supreme Court relied on developmental psychology and neuroscience to draw a bright line at age eighteen between the law’s treatment of juvenile and adult offenders. “Kids are different”² became the rallying cry, and the Court’s analysis led to dramatic reforms in states’ approaches to juvenile crime and a precipitous drop in youth incarceration. These reforms represent a promising start, demonstrating that we can more effectively reduce crime by supporting youths’ successful transition to adulthood than by impairing that successful maturation by incarcerating them. But

¹ 543 U.S. 551 (2005).

² See generally Stephen St. Vincent, *Kids Are Different*, 109 MICH. L. REV. FIRST IMPRESSIONS 9 (2010); Jody Kent Lavy, *Notion that “Kids Are Different” Takes Hold in Youth Justice Policy Reform*, JUV. JUST. INFO. EXCH. (Dec. 31, 2012), <https://perma.cc/LGP5-7W4K>.

the “kids are different” approach is built upon two flaws in the Court’s developmental analysis that constrain the reach of its decisions and hide the true implications of a developmental approach. Followed to its logical conclusion, the developmental approach calls not for a child-specific exception to criminal justice policies but for a wholesale remaking of the criminal justice system.

One flaw in the Court’s developmental analysis—visible in the decisions themselves—is its confusion of lifelong development (relevant to parole decisions) with childhood development (relied on by the Court in justifying children’s special parole rights). The Court fails to explain why a youth’s greater ability to change before the age of eighteen should determine whether that individual has a right to prove that he has changed over the many years between eighteen and the date he is eligible for parole. A second flaw—increasingly apparent in developmental science—is that the relevant attributes of neurological and psychosocial development identified by the Court to justify special legal rules for children continue to exist significantly past the legal age of majority and well into the twenties. Both these flaws reveal that the developmental approach is not coherently defined by the legal line between childhood and adulthood. This lack of alignment has led to calls to extend the age of juvenile exceptionalism to young adulthood. But extending the exceptionalist frame to young adults obscures the central role that immaturity plays in most offenders’ full criminal careers and preserves a destructive fiction that youthful offenders are a distinctive, more sympathetic, and less corrupt minority among the millions charged with committing crimes.

This Article argues that we should abandon, not extend, the separate juvenile-exceptionalist system and instead incorporate our understanding of youth into a single system that takes account of human development over the life course. Such a unitary approach would reconceive most criminal offending as a manifestation of immaturity and the primary role of the justice system as addressing that immaturity by managing the harm done by it, fostering healthy growth, and minimizing the criminogenic impact of the system. Applying what we have learned from successful juvenile exceptionalist reforms and the research on which it relies, a life-course developmental approach would eliminate incarceration for all offenders still in the process of growing up. Because most offenders fall into this group (and some who currently offend beyond their youth do so because their immaturity was

mismanaged under our current system), a life-course developmental approach can be understood as a form of abolitionist vision.

Part I of this Article describes the twenty-first-century juvenile-exceptionalist movement in criminal law and the developmental analysis on which it is grounded. It discusses *Roper v. Simmons* and the other Supreme Court cases that followed, and it describes the broad impact that these cases—particularly their reliance on developmental science—have had on states' responses to juvenile crime. While the Supreme Court's developmental analysis has been limited to cases applying the Eighth Amendment to the most serious sentences—capital punishment and life without parole—for offenses committed by those under eighteen, this analysis has been applied by state courts, legislatures, and policy makers to implement reforms in all aspects of the juvenile justice system. These reforms have included dramatically limiting the authority of prosecutors to transfer juveniles to adult court, sharply cutting the number of juveniles brought into court at all, and shifting sentences imposed for offenses away from incarceration and toward community-based programming designed to support a healthy transition to adulthood. Notably, these reforms have been correlated with reduced recidivism and cost. As significant, these changes in juvenile justice policy have produced a dramatic reduction in the incarceration of Black and Brown youth. Although they are still disproportionately represented in the system, the dramatic reductions in the use of incarceration overall have produced substantial reductions for those disproportionately represented.

Part II describes the increasingly apparent lack of alignment between the age line drawn by law and our understanding of human development. One aspect of this misalignment is demonstrated in the Court's decisions in *Graham v. Florida*³ and *Miller v. Alabama*,⁴ where the Court conflated youths' special ability to change (which justifies a future opportunity for parole) with adults' ongoing ability to change (which is actually assessed at parole). Put another way, the Court identified a relevant aspect of development in childhood to justify affording an opportunity to demonstrate a distinct course of development that occurs well into adulthood. The Court's jarring suggestion that crimes committed by minors reflect either the "transient immaturity of

³ 560 U.S. 48 (2010).

⁴ 567 U.S. 460 (2012).

youth”⁵ or “irreparable corruption”⁶ underscores this developmental lacuna, and the Court’s recent decision in *Jones v. Mississippi*⁷ buried the issue without addressing it. The other aspect of the misalignment of law and development has been highlighted by advances in developmental science. Psychological studies and, more starkly, brain imaging have made clear that the attributes of young people’s brains and behavior relied upon by the Court to justify special treatment of minor offenders continue to develop into young adulthood. It is now clear that developmental science cannot be relied upon to justify drawing the line for juvenile exceptionalism at eighteen.

Parts III and IV explore three possible ways of correcting for the current misalignment between the legal age line drawn for juvenile exceptionalism and its developmental rationale. Part III considers two different juvenile-exceptionalist approaches. Part III.A explores the possibility of abandoning, or at least softening, the law’s reliance on developmental science and instead deferring to decades long conventions, reinforced in many other areas of the law, about when adulthood begins. There is much to be said for drawing a line for criminal law at the same point at which we draw the line for other legal rights and responsibilities. Children are afforded a significantly different package of rights and responsibilities from adults, and full-adult criminal liability can coherently be aligned with full-adult legal autonomy and citizenship. The developmental science would remain relevant, as it could help justify extending special rights and protection up to the limit of childhood—but it would ultimately be trumped by a distinct legal age line. Any consideration of development would end, as it conventionally does in law, in adulthood. Adhering to the majority–minority age line would be consistent with the Supreme Court’s case outcomes but would require an abandonment of the primary rationale upon which those outcomes rely. With that could come the loss of political support for the extension to young adults of improvements in justice policies for adolescents that have been inspired by the developmental approach.

Part III.B considers correcting the misalignment in the opposite direction—remaining faithful to the developmental logic and therefore moving the line for juvenile exceptionalism up, perhaps as far as age twenty-five. Advocates are increasingly calling for this approach, and some policy makers are beginning to adopt it.

⁵ *Montgomery v. Louisiana*, 577 U.S. 190, 208 (2016).

⁶ *Miller*, 567 U.S. at 479–80 (quoting *Roper*, 543 U.S. at 573).

⁷ 141 S. Ct. 1307 (2021).

This approach has the advantage of being most true to the analysis in the Supreme Court's cases (but not its holdings) and the rationale underlying subsequent reforms throughout the juvenile justice system. There is reason to expect that extending these reforms to age twenty-five will extend the crime-reduction benefits of these reforms significantly and produce similar benefits for minority youth in this age group. The primary limitation of this approach, however, is in its conception as an extended "exception." Because much offending occurs in adolescence and young adulthood—and most offenders offend *only* in adolescence and young adulthood—expanding juvenile exceptionalism to include young adults would belie its exceptional status. A criminal justice system that extends its juvenile justice approach to most offenders for their full criminal careers should be understood for what it is: the primary, baseline system.

Part IV suggests that our emerging understandings of development argue for an abandonment of juvenile exceptionalism altogether and an embrace of a unitary system that takes account of human development over the life course. Part IV.A addresses the costs associated with preserving two distinct systems—a favored "exceptional" system and a disfavored standard system. Maintaining two distinct systems comes at a cost to system coherence and accountability and invites sorting that disproportionately harms Black and Brown people.

Part IV.B sketches out a vision of a unitary system that incorporates our understanding of development rather than relying on that understanding to exclude. Because most offending is a manifestation of immaturity, the core focus of this unitary criminal justice system would be on managing immaturity, that is, facilitating rather than undermining healthy growth and minimizing the harm done—to either the offender or others—during that maturation process. Reforms in the juvenile justice system have taught us a lot about how our response to immature offending can support or undermine young people's maturation out of crime, and these lessons could be extended into the midtwenties, to the full reach of the normal maturation process. Such an approach would dramatically reduce our reliance on incarceration and, if the developmental logic holds, would lead to a significant decrease in those who continue to offend into middle age. If this approach were implemented comprehensively through young adulthood, ongoing criminal conduct beyond the midtwenties would not be attributable to normal psychosocial immaturity or the state's destructive interference with the maturation process and would

call for distinct responses that could not rely as directly on the juvenile-exceptionalist reformers' experience. In Part IV.B, I tentatively explore how a system's response to these aberrant persisters might be coherently integrated into a unitary system that accounts for development across the life course.

Of the three options explored, this last option is most true to the logic first set in motion in the juvenile exceptionalist context and, relatedly, offers considerable promise in promoting more just and effective crime control. The strongest argument against this third approach is pragmatic. Popular opinion is increasingly ready, it seems, to embrace youth-specific departures—even significant departures—from our draconian system of criminal justice, but similar changes in the adult system, especially when cast as prison abolition, are widely perceived as radical and dangerous. This suggests that the best path forward may well be to begin with children and extend the logic into young adulthood, as youth advocates are doing with considerable success. The third option might best be understood as a logical future step along the current path, allowing for the introduction of the reforms championed by abolitionists through a relatively unthreatening evolution. But if this is the vision, advocates and lawmakers should be alert to the risk that their exceptionalist approach will entrench the status quo for all those deemed unexceptional. Solidifying gains around the “kids are different” motto—however “kids” are defined—may come at the unjust expense of their older selves.

I. JUVENILE EXCEPTIONALISM IN CRIMINAL LAW

A. A Brief History of Juvenile Exceptionalism Through the Twentieth Century

The law has long treated children accused of committing crimes differently than it treats adults. Since the seventeenth century, English (and then U.S.) common law recognized the infancy defense which—based on the law's conclusion that young children lacked the mental capacity required for the commission of a crime—barred any child under seven at the time of the alleged offense from being prosecuted and recognized a rebuttable presumption against the prosecution of children between the ages

of seven and fourteen.⁸ For those not protected by the defense, the state could (and did) prosecute and sentence minors⁹ as adults.

Growing concern for the harm done to children subject to the same harsh sanctions as the adults with whom they were imprisoned, and optimism that children could be helped through rehabilitative interventions, led progressives at the turn of the twentieth century to create a separate system altogether for youth under age sixteen.¹⁰ The aims of these separate juvenile systems, first codified in Illinois's Juvenile Court Act,¹¹ were twofold: first, to separate juveniles from the negative influence of older offenders and, second, to rehabilitate rather than punish.¹² Within twenty-five years of Illinois's enactment of its Juvenile Court Act, nearly every state had established a juvenile justice system through legislation.¹³ These systems suffered immediately and deeply from a lack of attention and resources.¹⁴ As a result, juve-

⁸ Andrew Walkover, *The Infancy Defense in the New Juvenile Court*, 31 UCLA L. REV. 503, 510–11 (1984); *State v. Nickleson*, 14 So. 134, 135 (La. 1893); *State v. Adams*, 76 Mo. 355, 357 (1882); see also A.W.G. Kean, *The History of the Criminal Liability of Children*, 53 LAW Q. REV. 364, 369–70 (1937).

⁹ See Walkover, *supra* note 8, at 510–11. Throughout this period, individuals were treated as minors—that is, they were treated as under the control of their parents and not afforded full adult rights—until age twenty-one. See T.E. James, *The Age of Majority*, 4 AM. J. LEGAL HIST. 22, 30 (1960); 1 WILLIAM BLACKSTONE, COMMENTARIES *452 (“[T]he power of a father, I say, over the persons of his children ceases at the age of twenty-one: for they are then enfranchised by arriving at years of discretion.”); 42 AM. JUR. 2D *Infants* § 5 (2021) (“At a minimum, absent some clear exception to the contrary, a person reaches the age of majority, and is considered emancipated by an act of law, when that person reaches the age of 21.”).

¹⁰ By 1909, a plurality of states with juvenile courts included youth up through age sixteen. By 1919, a plurality of the then-forty-six states had juvenile court systems that included youth up to age eighteen. See JUVENILE COURT LAWS IN THE UNITED STATES: A SUMMARY BY STATES 4–118 (Hastings H. Hart ed., 1910); Arthur W. Towne, *Shall the Age Jurisdiction of Juvenile Courts Be Increased?*, 10 J. AM. INST. CRIM. L. & CRIMINOLOGY 493, 514–15 (1919).

¹¹ 1899 Ill. Laws 131.

¹² Franklin E. Zimring, *The Common Thread: Diversion in the Jurisprudence of Juvenile Courts*, in A CENTURY OF JUVENILE JUSTICE 143, 143–45 (Margaret K. Rosenheim et al. eds., 2002) (noting that the creation of the juvenile justice system had two aims—diversion and rehabilitation—and arguing that diversion, i.e., the separation of children from adult criminals, was the more important of the two rationales).

¹³ See ROBERT M. MENNEL, THORNS AND THISTLES: JUVENILE DELINQUENTS IN THE UNITED STATES, 1825–1940, at 132 (1973) (reporting that ten states and the District of Columbia had juvenile courts by 1909, all but two states had separate juvenile courts by 1925, and Wyoming created the last juvenile court in 1945). Maine authorized municipal courts to act occasionally as juvenile courts in 1931. James A. MacKeen, *Maine*, in 3 CRIME & DELINQUENCY 431, 431 (1957).

¹⁴ See Theodore N. Ferdinand, *History Overtakes the Juvenile Justice System*, 37 CRIME & DELINQUENCY 204, 214–15 (1991) (noting that state juvenile courts were established without any centralized state support for treatment programs and that they instead

nile justice systems were widely perceived as failures, and recidivism rates—intended to be reduced by a caring, needs-focused response to juvenile crime—showed no sign of going down.¹⁵

In the latter half of the twentieth century, criticism of the operation and outcomes of the juvenile justice system led to two significant steps back from juvenile exceptionalism in criminal law, the first step procedural and the second step substantive. In a procedural move away from juvenile exceptionalism driven by fairness concerns, the Supreme Court ruled in *In re Gault*¹⁶ and subsequent cases that defendants in juvenile court were entitled to most of the criminal procedural protections afforded in adult criminal court.¹⁷ In subsequent years, “tough on crime” movements—fueled by a spike in juvenile crime and warnings from social scientists that a mass of juvenile “super-predators” would soon be on the streets¹⁸—led to substantive reforms by legislatures that sharply harshened states’ responses to juvenile crime.¹⁹ As a result of these reforms, individuals tried in juvenile court

depended on community programs and treatment institutions, which were often underfunded or short term, provided by private philanthropy, religious groups, social welfare agencies, and the federal government); see also Lenore R. Kupperstein & Ralph M. Susman, *The Juvenile Court Process*, 10 J. OFFENDER THERAPY 66, 77–78 (1966) (describing weaknesses within the juvenile courts, including high caseloads, lack of staff, and low professional competence).

¹⁵ In 1967, the Task Force on Juvenile Delinquency of the President’s Commission on Law Enforcement and Administration of Justice concluded:

Studies conducted by the Commission, legislative inquiries in various States, and reports by informed observers compel the conclusion that the great hopes originally held for the juvenile court have not been fulfilled. It has not succeeded significantly in rehabilitating delinquent youth, in reducing or even stemming the tide of juvenile criminality, or in bringing justice and compassion to the child offender. . . . One reason for the failure of the juvenile courts has been the community’s continuing unwillingness to provide the resources—the people and facilities and concern—necessary to permit them to realize their potential.

TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 7 (1967).

¹⁶ 387 U.S. 1 (1967).

¹⁷ *Id.* at 31–57 (holding that, in delinquency proceedings that may result in incarceration, the Due Process Clause entitles juveniles to a right to counsel, a right to notice of charges, a right to subpoena and cross-examine witnesses, and a right to avoid self-incrimination); *In re Winship*, 397 U.S. 358, 368 (1970) (holding that facts supporting a juvenile adjudication need to be proved beyond a reasonable doubt); *Breed v. Jones*, 421 U.S. 519, 541 (1975) (applying the prohibition against double jeopardy to juvenile adjudications). *But see* *McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971) (plurality opinion) (declining to find a right to a jury trial in a juvenile adjudication); *Schall v. Martin*, 467 U.S. 253, 281 (1984) (allowing preventive detention of juveniles under terms disallowed in the adult system).

¹⁸ See, e.g., John DiLulio, *The Coming of the Super -- Predators*, WEEKLY STANDARD (Nov. 27, 1995), <https://perma.cc/E25A-YFER>.

¹⁹ See, e.g., Shelly S. Schaefer & Christopher Uggen, *Blended Sentencing Laws and the Punitive Turn in Juvenile Justice*, 41 LAW & SOC. INQUIRY 435, 435–36 (2016).

were subject to increasingly harsh sanctions for longer periods and to blended sentences that dangled the prospect of future adult sentences over those adjudicated delinquent.²⁰ At the same time, more juvenile offenders were carved out of the juvenile justice system altogether and subjected to trial and sentencing as adults.²¹ By the end of the twentieth century, juvenile exceptionalism in criminal law was in serious decline.

B. The Supreme Court's Rejuvenation of Juvenile Exceptionalism Through Developmental Science

The harshening of the states' response to juvenile crime, coupled with growing worldwide opposition to the juvenile death penalty, inspired a collaboration between lawyers, developmental psychologists, and criminologists²² to press for a more sophisticated, scientifically supported case for juvenile exceptionalism. Their approach, transformed into a set of amicus briefs, found a willing ear in the Supreme Court. In a series of cases beginning with *Roper* in 2005, the Court embraced the argument that adolescents' developmental immaturity, particularly their psychosocial immaturity, justified special constitutional protections.

In *Roper*, building on both precedent and developmental science, the Court identified three "general differences between juveniles under 18 and adults" that renders juvenile offenders less culpable than adults.²³ First, their psychosocial immaturity causes them to act impetuously and recklessly, without being constrained by a consideration of the consequences of their actions.²⁴ Second, they are more susceptible to negative influences, including antisocial peer pressure, and this is, in part, because they have less control over their own environment and "lack the [legal]

²⁰ See, e.g., *id.* at 436.

²¹ See, e.g., *Juvenile Justice Reform Initiatives in the States, 1994–1996*, OFF. OF JUV. JUST. & DELINQ. PREVENTION, <https://perma.cc/G8L2-MPVL>. See generally THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT (Jeffrey Fagan & Franklin E. Zimring eds., 2000) (analyzing the evolution and proliferation of juvenile transfer policies, effects of transfer on juvenile behavior, and policy implications based on developmental psychology).

²² See generally, e.g., Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCH. 1009 (2003) (arguing that research in developmental psychology indicates multiple mitigating factors for adolescents that lessens their culpability and argues against imposition of harsh adult sanctions including the death penalty).

²³ *Roper*, 543 U.S. at 569.

²⁴ *Id.*

freedom that adults have to extricate themselves from a criminogenic setting.”²⁵ And, third, the character of juvenile offenders is “less fixed” than that of adults.²⁶ “The reality,” the court explained, “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.”²⁷ These three factors led the *Roper* Court to conclude that “juvenile offenders cannot with reliability be classified among the worst offenders”²⁸ and that, therefore, imposition of the death penalty, intended to be reserved for those worst offenders, is a disproportionate sanction for juveniles, qualifying as cruel and unusual punishment under the Eighth Amendment.²⁹

In drawing the line at eighteen, the Court conceded that “[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18[, and by] the same token, some under 18 have already attained a level of maturity some adults will never reach.” It concluded, however, that “a line must be drawn” at some age, and the “age of 18 is the point where society draws the line for many purposes between childhood and adulthood.”³⁰ Thus, the Court suggested that drawing the line for juvenile exceptionalism at eighteen was justified by some combination of developmental science and legal convention. While the Court recognized that no age line offered a perfect fit with every individual’s development, the strong suggestion in *Roper* was that the legal line of eighteen correlates well, if imperfectly, with the developmental line. The differences between those under and over eighteen, the Court explained, were so “marked and well understood”³¹ that they justified a categorical line distinguishing the treatment of minor and adult offenders.

In the subsequent cases of *Graham* and *Miller*, addressing the imposition of life-without-parole sentences on juvenile offenders, the Supreme Court expanded its analysis in two important ways: First, the Court added neuroscience to its developmental account of children’s differences.³² Where developmental psychologists could study only changes in juvenile behavior, with all

²⁵ *Id.* (quoting Steinberg & Scott, *supra* note 22, at 1014).

²⁶ *Id.* at 570.

²⁷ *Id.*

²⁸ *Roper*, 543 U.S. at 569.

²⁹ *Id.* at 568–69.

³⁰ *Id.* at 574.

³¹ *Id.* at 572.

³² *See Graham*, 560 U.S. at 68 (referring to “developments in psychology and brain science” to justify a continued difference in the legal treatment of juvenile offenders and

the limitations associated with that research as it applied to juveniles' conduct in contexts that could not be replicated in a laboratory, neuroscientists could chart (and illustrate) concrete physical and related operational changes in the human brain between adolescence and adulthood.³³ Second, spurred by the focus on access to parole in these cases, the Court identified juveniles' greater capacity for change as a distinct developmental difference justifying juvenile exceptionalism, rather than simply a factor bearing on the culpability assessment.³⁴

The neurological research relied on in *Graham* revealed that the brain, and particularly the prefrontal cortex, continued to develop in important ways through adolescence. These physiological differences between adolescent and adult brains tracked behavioral differences that had been relied upon by developmental psychologists to argue that juvenile offending was an attribute of immaturity. The Court opined in *Graham* that:

No recent data provide reason to reconsider the Court's observations in *Roper* about the nature of juveniles. As petitioner's *amici* point out, developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence.³⁵

This embrace of neuroscience was reinforced two years later in *Miller*, where the Court noted that “[t]he evidence presented to us in these cases indicates that the science and social science supporting *Roper*'s and *Graham*'s conclusions have become even stronger.”³⁶ The *Miller* Court cited the amicus brief of the American Psychological Association, which reported that “an ever-growing body of research in developmental psychology and neuroscience continues to confirm and strengthen the Court's conclusions” and that “[i]t is increasingly clear that adolescent brains are not yet fully mature in regions and systems related to

adult offenders); *Miller*, 567 U.S. at 472 n.5 (referring to the “science and social science” that supported the Court's conclusions in *Roper* and *Graham*).

³³ See, e.g., František Váša et al., *Conservative and Disruptive Modes of Adolescent Change in Human Brain Functional Connectivity*, 117 PROC. NAT'L ACAD. SCIS. 3248, 3251 (2020), (showing changes in cortical connectivity in the age range of fourteen to twenty-six years using fMRI data of healthy human brains).

³⁴ See *Graham*, 560 U.S. at 74 (identifying “capacity for change and limited moral culpability” as two different reasons why it was inappropriate to deny juvenile nonhomicide offenders an opportunity to demonstrate their entitlement to parole).

³⁵ *Id.* at 68.

³⁶ *Miller*, 567 U.S. at 472 n.5.

higher-order executive functions such as impulse control, planning ahead, and risk avoidance.”³⁷

The other important developmental contribution of *Graham* and *Miller* was the identification of ability to change as a feature of youth distinct from their reduced culpability. In *Roper*, juveniles’ “less fixed” nature constituted one of three factors justifying their lesser blameworthiness: offenders, the argument goes, should be blamed less for offenses that do not manifest a fixed criminal character. When the Court turned its attention to juveniles’ access to an opportunity for parole, however, the Court suggested that juveniles’ greater ability to be reformed constituted a second, independent justification for juvenile exceptionalism.³⁸ Adolescents’ special ability to change, the Court reasoned, justified imposing severe constraints on a state’s ability to impose a sentence that deprived them of the opportunity to demonstrate change.

Between *Graham* and *Miller*, the Supreme Court decided one case addressing the relevance of youth to criminal law that fell outside the Eighth Amendment context. In *J.D.B. v. North Carolina*,³⁹ the Court held that a suspect’s young age must be taken into account in determining whether the suspect felt “free to leave”⁴⁰ an interrogation setting and therefore was not “in custody”⁴¹ for purposes of law enforcement’s obligations. This sent a clear message that the Court’s developmental accounting was not limited to its assessment of culpability and related modifications to sentencing and invited reformers to remake their entire juvenile justice systems to account for adolescents’ ongoing development.⁴²

C. The Broad Impact of the Supreme Court’s Developmental

³⁷ *Id.* (quoting Brief for American Psychological Association et al. as Amici Curiae in Support of Petitioners at 3–4, *Miller*, 567 U.S. 460 (No. 10-9646)).

³⁸ *See id.* at 471 (identifying “diminished culpability and greater prospects for reform” as two relevant qualities that distinguish children from adults).

³⁹ 564 U.S. 261 (2011).

⁴⁰ *Id.* at 265.

⁴¹ *Id.* at 268.

⁴² *See id.* at 273 n.5 (“Although citation to social science and cognitive science authorities is unnecessary to establish these commonsense propositions, the literature confirms what experience bears out.”).

Approach

Roper and the cases that followed, heralded as the new “developmental approach,”⁴³ have spurred dramatic, ongoing reforms in some states’ juvenile and criminal justice systems that reach well beyond the Supreme Court’s holdings. Supported by the Supreme Court’s recognition that juvenile offenders are less culpable and more amenable to change,⁴⁴ states have amended their laws to reduce the number of juveniles subject to transfer to adult court for their crimes⁴⁵ and have decreased their rates of discretionary transfer in individual cases.⁴⁶ Several states have raised the end age of juvenile court jurisdiction, previously set in those states at seventeen or even sixteen, to eighteen, and similar legislation has been introduced in the three remaining states with lower jurisdictional age limits.⁴⁷

At the same time, *J.D.B.* has motivated important procedural reforms. Recognizing the high rate of false confessions⁴⁸ and developmental limitations on juveniles’ ability to knowingly waive

⁴³ See, e.g., COMM. ON ASSESSING JUV. JUST. REFORM, COMM. ON L. & JUST., DIV. ON BEHAV. & SOC. SCIS. & EDUC., NAT’L RSCH. COUNCIL OF THE NAT’L ACADS., REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH 44 (Richard J. Bonnie et al. eds., 2013).

⁴⁴ See KAREN U. LINDELL & KATRINA L. GOODJOINT, RETHINKING JUSTICE FOR EMERGING ADULTS: SPOTLIGHT ON THE GREAT LAKES REGION 3 (2020) (reporting significant reforms in the juvenile justice system inspired by the *Roper* line of cases); Joy Radice, *The Juvenile Record Myth*, 106 GEO. L.J. 365, 389 (2018) (“A quartet of recent Supreme Court decisions has played a major role in the revival of rehabilitation as a central goal for juveniles charged with even the most serious crimes.”); see also COMM. ON ASSESSING JUV. JUST. REFORM ET AL., *supra* note 43, at 32–33.

⁴⁵ Within a few years of the Court’s decision in *Miller*, some states that previously had statutes providing for mandatory waiver for certain offenses eliminated mandatory waiver, some that previously had statutes providing for presumptive waiver for certain offenses eliminated presumptive waiver, and some reduced the number of offenses for which their courts have the discretion to waive juveniles to adult court. See *Jurisdictional Boundaries*, JUV. JUST. GEOGRAPHY, POL’Y, PRAC. & STAT., <https://perma.cc/367C-EBNH>.

⁴⁶ Nationally, the number of cases judicially waived to criminal court decreased from 7,200 in 2006 to 4,200 in 2014—a nearly 42% decrease. *Id.*

⁴⁷ See Anne Teigen, *Juvenile Age of Jurisdiction and Transfer to Adult Court Laws*, NAT’L CONF. OF STATE LEGISLATURES (Apr. 8, 2021), <https://perma.cc/2N9R-Q2WX>; John Kelly, *Michigan Raise the Age Law on Track to Pass, Leaving Three States with Juvenile Age Under 18*, THE IMPRINT (June 4, 2019), <https://perma.cc/L86L-3JGE>. At the time of this writing, the three remaining states that end jurisdiction in juvenile court at seventeen have all introduced legislation that would raise the age to eighteen if enacted. H.B. 272, 156th Gen. Assemb., Reg. Sess. (Ga. 2021) (passed the House of Representatives but failed to receive a floor vote in the Senate before the end of the legislative session); H.B. 967, 87th Leg., Reg. Sess. (Tex. 2021) (failed to receive a floor vote in either chamber before the end of the legislative session); S.B. 111, 105th Leg., Reg. Sess. § 3189 (Wis. 2021) (including a “raise the age” provision as part of the state budget proposal).

⁴⁸ See Brandon L. Garrett, *Contaminated Confessions Revisited*, 101 VA. L. REV. 395, 400 (2015) (finding that, of all persons exonerated by DNA evidence from 1989 to 2014, over one-third of those who falsely confessed were minors); Steven A. Drizin & Richard A.

their rights,⁴⁹ states have begun to alter their interrogation policies for juveniles, sometimes requiring the presence of a lawyer or another concerned adult or requiring the videotaping of the interrogation.⁵⁰ States have also created special procedures for evaluating juveniles' competence to stand trial⁵¹ and have expanded the definition of "competence" to include social and cognitive development.⁵²

Most significantly, the reforms have dramatically reduced the involvement of juveniles in the system. Large numbers of juvenile offenders are being kept out of the justice system

Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 944–45 (2004) (noting that minors were overrepresented in their sample of 113 false-confession cases).

⁴⁹ See JENNIFER WOOLARD, NAT'L INST. FOR JUST., WAIVER OF COUNSEL IN JUVENILE COURT 26 (2019) (finding that young people understand the role of a lawyer less completely than adults do and that young people identify fewer risks of waiving the right to counsel than adults do); Barry C. Feld, *Juveniles' Competence to Exercise Miranda Rights: An Empirical Study of Policy and Practice*, 91 MINN. L. REV. 26, 41 (2006) ("[D]evelopmental and social psychologists strongly question whether a typical juvenile has the capacity to make 'knowing, intelligent, and voluntary' waiver decisions."); Thomas Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 CALIF. L. REV. 1134, 1166 (1980) ("[Y]ounger juveniles as a class do not understand the nature and significance of their *Miranda* rights to remain silent and to counsel.");

⁵⁰ See Laurel LaMontagne, *Children Under Pressure: The Problem of Juvenile False Confessions and Potential Solutions*, 41 W. ST. U. L. REV. 29, 51–53 (2013) (summarizing various reforms designed to protect youth in the interrogation setting). Parallel developments in law enforcement and legal representation have been inspired by the Supreme Court's developmental approach generally and *J.D.B.* in particular.

Since 2005, at least twenty-three states and the District of Columbia have either started to require videotaping for interrogations regarding some offenses or expanded videotaping requirements to more offenses; at least three states added videotaping requirements for juveniles suspected of certain offenses but not for adults suspected of the same offenses. See THOMAS P. SULLIVAN, A COMPENDIUM OF THE LAW RELATING TO ELECTRONIC RECORDING OF CUSTODIAL INTERROGATIONS 7 (2019), <https://perma.cc/UDG6-YLJD>; Brandon L. Bang, Duane Stanton, Craig Hemmens & Mary K. Stohr, *Police Recording of Custodial Interrogations: A State-by-State Legal Inquiry*, 20 INT'L J. POLICE SCI. & MGMT. 3, 11–12 (2018).

⁵¹ COMM. ON ASSESSING JUV. JUST. REFORM ET AL., *supra* note 43, at 47. The Court in *Graham* also pointed to "difficulties encountered by counsel in juvenile representation," including that "[j]uveniles mistrust adults and have limited understandings of the criminal justice system and the roles of the institutional actors within it," as one of the justifications for rejecting a case-by-case approach in determining whether nonhomicide offenders could be sentenced to life without parole. 560 U.S. at 78.

⁵² SARAH ALICE BROWN, NAT'L CONF. OF STATE LEGISLATURES, TRENDS IN JUVENILE JUSTICE STATE LEGISLATION 2011-2015, at 8 (2015), <https://perma.cc/L6DG-WEFA>.

altogether—some diverted to other programs⁵³ and some not subject to any state intervention at all.⁵⁴ Those who do enter the juvenile justice system are being detained and incarcerated less often and for less long,⁵⁵ increasingly in smaller community-based placements closer to the families, schools, and other potential systems of support.⁵⁶ Most notably, some states have begun shutting down their youth prisons altogether.⁵⁷

Although motivated and justified by the Court's developmental reasoning, states would not have been so ambitious in their reforms had they not had reason to believe that the reforms would

⁵³ See, e.g., Diane Geraghty, *Bending the Curve: Reflections on a Decade of Illinois Juvenile Justice Reform*, 36 CHILD LEGAL RTS. J. 71, 78 (2016) (“[S]ince its inception Redepty Illinois has reduced overall commitments to secure confinement by fifty-three percent and diverted over 1,200 youth away from the Illinois Department of Juvenile Justice, saving nearly \$60 million in unnecessary incarceration costs.”); LINCOLN/LANCASTER CNTY. HUM. SERVS., JUVENILE DIVERSION, <https://perma.cc/9N6T-7U8U>; *Youth Diversion Program*, CITY OF CHARLOTTE: CHARLOTTE-MECKLENBURG POLICE DEP'T, <https://perma.cc/A27M-BWV7>.

⁵⁴ See, e.g., Ben Chapman, *NYPD Arrests of Teens Drop Under 'Raise the Age' Law*, WALL ST. J. (June 19, 2019), <https://perma.cc/GD4W-J9AZ> (noting that the New York Police Department has increasingly been using internal records instead of arrests and summonses when juveniles are caught in possession of marijuana or are accused of low-level assault); Eileen Grench, *'Raise the Age' Observers Find Progress and Pain in Courts Following Juvenile Justice Reforms*, THE CITY (Sept. 13, 2020), <https://perma.cc/3WJZ-EER9> (citing lower rates of youth arrests in New York City following New York State's passage of legislation to raise the age of eligibility for prosecution in adult courts).

⁵⁵ See JOSHUA ROVNER, THE SENT'G PROJECT, DECLINES IN YOUTH COMMITMENTS AND FACILITIES IN THE 21ST CENTURY 1–4 (2015), <https://perma.cc/ZF48-BWX7>; see also JUV. SENT'G PROJECT, ENDING MANDATORY MINIMUM SENTENCES FOR CHILDREN 2–3 (2020), <https://perma.cc/8CPY-YQ5G>.

⁵⁶ See, e.g., Jamie Munks, *Gov. J.B. Pritzker Lays Out Plan to Overhaul State's Juvenile Justice System, Shift to Smaller, 'Community-Based' Regional Facilities*, CHI. TRIB. (July 31, 2020), <https://perma.cc/LCT3-C6YU>; Associated Press, *Wisconsin Gov. Walker to Close Troubled Juvenile Prison, Open 5 Regional Teen Prisons*, CHI. TRIB. (Jan. 4, 2018), <https://perma.cc/T6B3-SEZ7>; CTR. FOR CHILD.'S L. & POL'Y, IMPLEMENTATION OF NEW YORK'S CLOSE TO HOME INITIATIVE: A NEW MODEL FOR YOUTH JUSTICE 9–10 (2018), <https://perma.cc/9CAZ-YGTS>; Patrick McCarthy, Vincent Schiraldi & Miriam Shark, *The Future of Youth Justice: A Community-Based Alternative to the Youth Prison Model*, NAT'L INST. OF JUST. 20–27 (2016) (listing examples of community-based reforms in Texas, California, New York, Virginia, Missouri, Washington, D.C., and Ohio).

⁵⁷ See, e.g., Munks, *supra* note 56 (reporting Illinois's plans to close all juvenile facilities and replace them with smaller regional centers); Holly Ramer, *States Grapple with Closing Youth Detention Centers*, AP NEWS (June 23, 2021), <https://perma.cc/8ZAL-A53W> (reporting on New Hampshire's consideration of a proposal to eliminate its juvenile facility and noting a similar trend in other states); James Rainey, *California Plans to Close Troubled Youth Prisons After 80 Years. But What Comes Next?*, L.A. TIMES (Feb. 15, 2021), <https://perma.cc/3ANG-A8A6>; *Youth Prison and Juvenile Detention Facility Closures During Covid-19*, YOUTHFIRST (June 16, 2020), <https://perma.cc/8BBX-ASCJ> (reporting that the COVID-19 outbreak has led several states to finalize plans to close facilities); *Advances in Juvenile Justice Reform: Facility Closures and Downsizing*, NAT'L JUV. JUST. NETWORK (2013), <https://perma.cc/53LQ-V24E> (reporting on moves to close or reduce the size of facilities in numerous states).

serve their interests in crime control and cost savings. There is considerable and growing empirical support for the conclusion that a reduced reliance on incarceration, and an increased reliance on community-based programming, in responding to juvenile crime, serves both of these ends. Studies can be divided into those that demonstrate the ineffectiveness, and even harmfulness, of incarceration and those that identify the most effective among the community-based alternatives.

Numerous studies demonstrate the ineffectiveness of incarceration in reducing recidivism among youth. Other research associates incarceration with an increase in recidivism risk.⁵⁸ A

⁵⁸ See, e.g., ED MULVEY, CAROL SCHUBERT & ALEX PIQUERO, *PATHWAYS TO DESISTANCE* 12–14 (2014) (finding that, in a comprehensive longitudinal study, most adolescents outgrew their offending, regardless of intervention, and that periods of incarceration longer than six months did not reduce recidivism); Emilie Phillips Smith, Angela M. Wolf, Dan M. Cantillon, Oseela Thomas & William S. Davidson, *The Adolescent Diversion Project: 25 Years of Research on an Ecological Model of Intervention*, 27 J. PREVENTION & INTERVENTION CMTY. 29, 38–39 (2004) (finding that diversion with programming leads to lower recidivism than both diversion with no programming and incarceration); PEW CHARITABLE TRS., *RE-EXAMINING JUVENILE INCARCERATION 2* (2015) (“[D]iversion programs demonstrated lower recidivism rates compared with more restrictive options[,] and [] out-of-home placement was associated with the highest recidivism rates.”); McCarthy et al., *supra* note 56, at 13 (“Mounting evidence from the best statistical analyses suggests that incarceration of youth may actually increase the likelihood of recidivism.”) (first citing STEVE AOS, ROXANNE LIEB, JIM MAYFIELD, MARNA MILLER & ANNIE PENNUCCI, *THE WASH. INST. ON PUB. POL’Y, BENEFITS AND COSTS OF PREVENTION AND EARLY INTERVENTION PROGRAMS FOR YOUTH* (2004), <https://perma.cc/7LAJ-NSU3>; then citing Michael T. Baglivio, *The Assessment of Risk to Recidivate Among a Juvenile Offending Population*, 37 J. CRIM. JUST. 596 (2009); then citing PETER W. GREENWOOD, KARYN E. MODEL, C. PETER RYDELL & JAMES CHIESA, *DIVERTING CHILDREN FROM A LIFE OF CRIME: MEASURING COSTS AND BENEFITS* (1996); and then citing Mark W. Lipsey, *The Effect of Treatment on Juvenile Delinquents: Results from Meta-Analysis*, in *PSYCHOLOGY AND LAW: INTERNATIONAL PERSPECTIVES* 131, 131 (Friedrich Lösel et al. eds., 1992)); Francis T. Cullen, Michael L. Benson & Matthew D. Makarios, *Developmental and Life-Course Theories of Offending*, in *THE OXFORD HANDBOOK OF CRIME PREVENTION* 23, 35 (David P. Farrington & Brandon C. Welsh eds., 2012) (“[S]everal longitudinal studies have shown that imprisonment has a criminogenic rather than a deterrent effect.”); BARRY HOLMAN & JASON ZIEDENBERG, *JUST. POL’Y INST., THE DANGERS OF DETENTION: THE IMPACT OF INCARCERATING YOUTH IN DETENTION AND OTHER SECURE FACILITIES* 4–6 (2006), <https://perma.cc/727H-4ULX> (summarizing studies finding that commitment to youth facilities can dramatically increase the chances of recidivism and impede the aging-out process that normally diminishes criminal behavior); David P. Farrington, Rolf Loeber & James C. Howell, *Young Adult Offenders: The Need for More Effective Legislative Options and Justice Processing*, 11 CRIMINOLOGY & PUB. POL’Y 729, 735 (2012) (“It seems unlikely that desistance is caused by justice processing because convictions were followed by an increase in self-reported offending in this sample.”); PEW CHARITABLE TRS., *supra*, at 1 (citing meta-analyses finding that placement in correctional facilities may increase the likelihood of juvenile recidivism in some cases).

The correlation between transfer (the trial and sentencing of juveniles as adults) and recidivism has been particularly well documented. See, e.g., JAMES C. HOWELL, BARRY C. FELD, DANIEL P. MEARS, DAVID P. FARRINGTON, ROLF LOEBER & DAVID PETECHUK,

related body of research focuses on the harm done to individuals by their periods of incarceration. Incarceration impairs youths' ability to engage in activities and develop skills and relationships associated with a successful transition to adulthood.⁵⁹ Studies focused on pathways to desistance note the importance of young people's opportunities to assume adult roles, classically in work and family, which in turn require access to education, prosocial peers, housing, job training, and stable community supports.⁶⁰ In-

BULLETIN 5: YOUNG OFFENDERS AND AN EFFECTIVE RESPONSE IN THE JUVENILE AND ADULT JUSTICE SYSTEMS: WHAT HAPPENS, WHAT SHOULD HAPPEN, AND WHAT WE NEED TO KNOW 10–11 (2013), <https://perma.cc/2VNG-W85B>; James C. Howell, *Juvenile Transfers to the Criminal Justice System: State of the Art*, 18 LAW & POL'Y 17, 49 (1996); see also Robert Hahn et al., *Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System: A Report on Recommendations of the Task Force on Community Preventive Services*, MORBIDITY & MORTALITY WKLY. REP., Nov. 30, 2007, at 1, 9 (“The findings in this report indicate that transfer policies have generally resulted in increased arrest for subsequent crimes, including violent crime To the extent that transfer policies are implemented to reduce violent or other criminal behavior, available evidence indicates that they do more harm than good.”); cf. James C. Howell & Megan Q. Howell, *Violent Juvenile Delinquency: Changes, Consequences, and Implications*, in THE CAMBRIDGE HANDBOOK OF VIOLENT BEHAVIOR AND AGGRESSION 501, 507 (Daniel J. Flannery et al. eds., 2007) (“The few available comparative studies suggest that transferred juveniles are more likely to re-offend, to re-offend more quickly and at a higher rate, and perhaps to commit more serious offenses after they are released from prison than juveniles retained in the juvenile justice system.”).

⁵⁹ Barry C. Feld, *Competence and Culpability: Delinquents in Juvenile Courts, Youths in Criminal Courts*, 102 MINN. L. REV. 473, 545–46 (2017) (“Prisons are developmentally inappropriate places for youths to form an identity, acquire social skills, or make a successful transition to adulthood. Imprisoning them . . . disrupts normal development . . . and ground lost may never be regained.”); James C. Howell, Barry C. Feld & Daniel P. Mears, *Young Offenders and an Effective Justice System Response: What Happens, What Should Happen, and What We Need to Know*, in FROM JUVENILE DELINQUENCY TO ADULT CRIME 200, 220 (Rolf Loeber & David Farrington eds., 2012); see also Laurence Steinberg, He Len Chung & Michelle Little, *Reentry of Young Offenders from the Justice System: A Developmental Perspective*, 2 YOUTH VIOLENCE & JUV. JUST. 21, 32 (2004); ELIZABETH S. SCOTT & LAURENCE STEINBERG, RETHINKING JUVENILE JUSTICE 208–10 (2008) (describing how placement in out-of-home facilities impairs young people's opportunities to develop prosocial skills and relationships).

⁶⁰ See Sonja E. Siennick & D. Wayne Osgood, *A Review of Research on the Impact on Crime of Transitions to Adult Roles*, in THE LONG VIEW OF CRIME: A SYNTHESIS OF LONGITUDINAL RESEARCH 161, 162–63 (Akiva M. Liberman ed., 2008) (discussing how the transition to adult roles like marriage, work, and parenthood might affect offending); see also Franklin E. Zimring, *Toward a Jurisprudence of Youth Violence*, 24 CRIME & JUST. 477, 492 (1998) (“Related to the hope for natural processes of remission over time is the tendency for persons who view youth crime policy as a branch of youth development policy to worry that drastic countermeasures that inhibit the natural transition to adulthood may cause more harm than they are worth.”); MULVEY ET AL., *supra* note 58, at 14.

We might be hopeful that detention and incarceration would offer an opportunity to compel students, many of whom have records of poor attendance, to attend school. But the education provided to most students in state custody is extremely poor. Effective job prep-

carceration, which disrupts access to these opportunities, undermines offenders' chance for the successful prosocial maturation that allows them to grow out of, in the words of the Supreme Court, the "unfortunate yet transient immaturity"⁶¹ that led to their offending.⁶²

In addition to cutting off pathways to this normal, healthy maturation process, incarceration has also been shown to affirmatively promote antisocial development in a number of ways.⁶³ Even in well-run and nonabusive environments, young offenders will be housed with other offenders, maximizing the negative influence of antisocial peers.⁶⁴ And where juveniles are incarcerated, they are exposed to high rates of trauma, including brutal physical discipline, sexual assault, and solitary confinement.⁶⁵

aration programs and supports within facilities are equally absent, and some job preparation programs in the community will not accept juvenile offenders until their period of probation is complete. See Katherine Twomey, *The Right to Education in Juvenile Detention Under State Constitutions*, 94 VA. L. REV. 765, 807–09 (2008) ("[I]nsufficient instruction time, lack of a curriculum, unqualified teachers, and sub-standard facilities—highlight some of the gravest deficiencies in the current education provided in juvenile detention."); see also Karen Sullivan, *Education Systems in Juvenile Detention Centers*, 2018 BYU EDUC. & L.J. 71, 91–92 (2018) (reporting on studies and instructor estimates which suggest clear majorities of incarcerated students do not advance a full grade level per year, do not earn a GED or high school diploma after release, and read at or below a sixth-grade reading level).

⁶¹ *Roper*, 543 U.S. at 573.

⁶² See, e.g., Anna Aizer & Joseph J. Doyle, Jr., *Juvenile Incarceration, Human Capital and Future Crime: Evidence from Randomly-Assigned Judges* 28 (Nat'l Bureau of Econ. Rsch., Working Paper No. 19102, 2013) (finding that a period of incarceration was extremely disruptive to school progress, greatly reducing the likelihood that a youth would finish high school).

⁶³ Holman & Ziedenberg, *supra* note 58, at 5.

⁶⁴ See Uberto Gatti, Richard E. Tremblay & Frank Vitaro, *Iatrogenic Effect of Juvenile Justice*, 50 J. CHILD PSYCH. & PSYCHIATRY 991, 991–92 (2009) ("Any intervention that places youths within a deviant group therefore risks exacerbating and consolidating their antisocial behavior."); Holly Nguyen, Thomas A. Loughran, Ray Paternoster, Jeffrey Fagan & Alex R. Piquero, *Institutional Placement and Illegal Earnings: Examining the Crime School Hypothesis*, J. QUANT. CRIMINOLOGY 207, 211 (2016) (discussing research suggesting that correctional institutions and interventions could promote longer and more successful criminal careers); COMM. ON ASSESSING JUV. JUST. REFORM ET AL., *supra* note 43, at 126.

⁶⁵ See ANDREA J. SEDLAK, KARLA S. MCPHERSON & MONICA BASENA, OFF. OF JUST. PROGRAMS, NATURE AND RISK OF VICTIMIZATION: FINDINGS FROM THE SURVEY OF YOUTH IN RESIDENTIAL PLACEMENT 6–8 (2013), <https://perma.cc/6LJ3-UFLF>; McCarthy et al., *supra* note 56, at 6–7 (documenting endemic abuse in juvenile facilities throughout the United States). Juveniles transferred to adult court have significantly higher rates of prison victimization. SCOTT & STEINBERG, *supra* note 59, at 209–10 ("[F]ive times as many youths in prison report sexual assaults as do youths in juvenile facilities.")

In addition to reducing their use of confinement altogether, states have attempted to minimize harms associated with incarceration by prohibiting the use of solitary confinement, see Anne Teigen, *States that Limit or Prohibit Juvenile Shackling and Solitary Confinement*, NAT'L CONF. OF STATE LEGISLATURES (Aug. 30, 2021), <https://perma.cc/N8C7->

States' developmentally inspired reforms have been further facilitated by a growing understanding of the relative efficacy of the range of programs offered to address youthful offending. In a series of meta-analytic studies conducted at the turn of the twenty-first century, social scientists began to isolate intervention factors that were effective in reducing recidivism.⁶⁶ These studies, in addition to demonstrating the ineffectiveness of punitive responses, identified aspects of community-based programming that were most strongly correlated with promoting desistance. These researchers found that interventions that involved "counseling and skills training," particularly where focused on criminogenic factors such as antisocial attitudes and peer relationships and lack of prosocial skills, were more effective than those based on "strategies of control or coercion."⁶⁷ Family-based interventions, support in schools, and the employment context have all been identified as important elements of successful community-based programming.⁶⁸ After a century of well-informed pessimism about the potential for rehabilitation in the

NP2R (noting that seven states that have recently passed laws limiting or prohibiting the use of solitary confinement in juvenile detention facilities); *see also* Juliet Eilperin, *Obama Bans Solitary Confinement for Juveniles in Federal Prisons*, WASH. POST (Jan. 26, 2016), https://www.washingtonpost.com/politics/obama-bans-solitary-confinement-for-juveniles-in-federal-prisons/2016/01/25/056e14b2-c3a2-11e5-9693-933a4d31bcc8_story.html, and shackling, *see* BROWN, *supra* note 52, at 11 (reporting that from 2012 to 2015, five states ended the indiscriminate, automatic shackling of juveniles, and two states eliminated the shackling of juveniles entirely); Teigen, *supra* ("Laws, court decisions or rules in 32 states and the District of Columbia prohibit the use of unnecessary restraints."), reducing the disadvantages associated with a criminal record by protecting the confidentiality of juvenile records, BROWN, *supra* note 52 (reporting that, between 2004 and 2011, sixteen states enacted measures to protect the confidentiality of juvenile records) and increasing the ease with which records can be expunged. *Id.* (describing changes in expungement and related policies, some of which provide for the automatic sealing or expungement of juvenile records and some of which provide for procedures for juveniles to apply to have their records sealed or expunged).

⁶⁶ *See, e.g.*, Mark W. Lipsey, *The Primary Factors That Characterize Effective Interventions with Juvenile Offenders: A Meta-Analytic Overview*, 4 VICTIMS & OFFENDERS 124, 139 (2009).

⁶⁷ *Id.* at 143. For a description of some of the most successful therapeutic and skills training programs, including functional family therapy, multisystemic therapy, and multidimensional treatment foster care, and the studies documenting their effectiveness, *see* Christopher Slobogin & Mark R. Fondacaro, *Juvenile Justice: The Fourth Option*, 95 IOWA L. REV. 1, 28–30 (2009).

⁶⁸ *See* COMM. ON ASSESSING JUV. JUST. REFORM ET AL., *supra* note 43, at 152–53.

juvenile and adult criminal justice systems alike,⁶⁹ social scientists and policy makers began to demonstrate that some interventions can work, at least for juveniles.

The skeptics' fear that the reforms would lead to an increase in youth crime by those no longer incapacitated or deterred has not materialized. In fact, youth crime rates have plummeted alongside the dramatic drops in incarceration and the shift to supportive community interventions.⁷⁰ This is not to say that the drop can be credited to the reforms. Crime rates have dropped throughout the country, whether or not reforms have been implemented. There is some reason to think rates may have dropped more in jurisdictions that have instituted reforms,⁷¹ but a causal connection has been only thinly studied to date, and recent pandemic-related increases in some crime will complicate the data further. What is clear is that the drop in crime made it easier to close juvenile prisons faster, and the cost savings realized and dollars diverted increase the chance that the reforms will endure.⁷² Moreover, the fact that reforms have been accomplished in harmony

⁶⁹ See Mark R. Fondacaro, Stephen Koppel, Megan J. O'Toole & Joanne Crain, *The Rebirth of Rehabilitation in Juvenile and Criminal Justice: New Wine in New Bottles*, 41 OHIO N.U. L. REV. 697, 701–03 (2015).

⁷⁰ See STEVE AOS, POLLY PHIPPS, ROBERT BARNOSKI & ROXANNE LIEB, WASH. ST. INST. FOR PUB. POL'Y, *THE COMPARATIVE COSTS AND BENEFITS OF PROGRAMS TO REDUCE CRIME* 8 (2001). From 2005 to 2018, arrests for violent crimes committed by juveniles decreased by 48%, and arrests for property crimes committed by juveniles decreased by 67.5%. See *Juvenile Arrest Rate Trends*, OFF. OF JUV. JUST. & DELINQ. PREVENTION (Nov. 16, 2020), <https://perma.cc/7D74-7WL8> (charting a decrease in juvenile arrest rates for violent crimes); *Juvenile Arrest Rate Trends*, OFF. OF JUV. JUST. & DELINQ. PREVENTION (Nov. 16, 2020), <https://perma.cc/6VJT-PB73> (charting a decrease in juvenile arrest rates for property crimes); see also Radice, *supra* note 44, at 388–89 (“Since 1994, juvenile crimes, particularly violent crimes, have dropped dramatically.”); Franklin E. Zimring & Stephen Rushin, *Did Changes in Juvenile Sanctions Reduce Juvenile Crime Rates: A Natural Experiment*, 11 OHIO ST. J. CRIM L. 57, 58 (2013) (“[B]etween 1993 and 2010, national violent crime rates amongst juveniles declined substantially.”).

⁷¹ See, e.g., Shannon M. Sliva & Mark Plassmeyer, *Effects of Restorative Justice Pre-file Diversion Legislation on Juvenile Filing Rates: An Interrupted Time-Series Analysis*, 20 CRIMINOLOGY & PUB. POL'Y 19, 29–34 (2020) (finding both immediate and sustained statistically significant declines in juvenile filing rates in some districts that instituted diversion reforms compared to control districts without such reforms); see also JUST. POL'Y INST., *RAISING THE AGE: SHIFTING TO A SAFER AND MORE EFFECTIVE JUVENILE JUSTICE SYSTEM* 53 (2017) (showing that crime in the “first generation” of raise-the-age states—Illinois, Connecticut, and Massachusetts—declined at a higher rate than the national average for both property and violent crime between 2005 and 2015).

⁷² See LINDELL & GOODJOINT, *supra* note 44, at 13–14 (noting that the costs incurred in the juvenile justice systems of states that recently raised the jurisdictional age have, in some cases contrary to expectations, actually dropped); JUST. POL'Y INST., *supra* note 71, at 39 (finding that the estimated increased costs of raise-the-age laws in various states never materialized).

with reductions in crime and cost has inspired other states to undertake similarly bold reforms.⁷³

Wherever these reforms are championed, the twin developmental differences of youth identified by the Supreme Court—their lesser culpability and greater capacity for change—are highlighted, but the role played by the two is distinct. The message of reduced culpability, now tied to neurological fact, has played an important role in developing political support for reforms. The public, persuaded that they should blame teens less, will be more comfortable punishing them less. But it is youths' greater capacity to change—and, importantly, both the negative and positive side of that malleability—that has given shape to the reforms. The capacity for change, recognized by the Court as a virtue of youth,⁷⁴ and the vulnerability to negative influences, recognized by the Court as a hazard of youth,⁷⁵ are two sides of the same developmental coin. The reforms aim to provide the supports necessary to develop important opportunities for growth, while protecting youth from the destructive influence of the state in its carceral garb.⁷⁶

The recognition of the harm done to youth—and, through them, to society—by prisons is especially important for youth of color because they have been disproportionately the victims of that harm. And although their disproportionate involvement in the juvenile justice system has long been identified as a concern by policy makers, attempts to address the problem of disproportionality have been unsuccessful.⁷⁷ In contrast, while doing nothing to address the serious problems of disproportionality, reforms that have shifted the entire juvenile justice system away from prisons have given thousands of youth of color their freedom and created new opportunities for them to grow out of their offending and into a prosocial adulthood.⁷⁸

⁷³ See, e.g., *Our Transformation*, VA. DEP'T OF JUV. JUST., <https://perma.cc/9XSY-BCMX>.

⁷⁴ *Roper*, 543 U.S. at 570.

⁷⁵ *Id.* at 569.

⁷⁶ For youth, prison can be seen as the sort of “criminogenic setting” from which they have less “freedom [than] adults have to extricate themselves.” *Id.* at 569 (quoting Steinberg & Scott, *supra* note 22, at 1014).

⁷⁷ See JAMES BELL & LAURA JOHN RIDOLFI, W. HAYWOOD BURNS INST., *ADORATION OF THE QUESTION: REFLECTIONS ON THE FAILURE TO REDUCE RACIAL AND ETHNIC DISPARITIES IN THE JUVENILE JUSTICE SYSTEM* 11–14 (Shadi Rahimi ed., 2008).

⁷⁸ See M. Sickmund, T.J. Sladky, C. Puzzanchera & W. Kang, *Easy Access to the Census of Juveniles in Residential Placement*, OFF. OF JUV. JUST. & DELINQ. PREVENTION (2021), <https://perma.cc/L7SS-24W2> (showing that the number of Black and Hispanic

II. THE INCREASINGLY EVIDENT MISALIGNMENT BETWEEN LEGAL AND DEVELOPMENTAL AGE LINES

Fueled by the Supreme Court's new "developmental approach," state efforts to support young people's successful maturation and to minimize harmful interventions have led to dramatic and continuing juvenile-exceptionalist reforms best understood as a prison-abolitionist movement. These reforms, built on young people's developmental distinctiveness, have been tied to the age of eighteen—the age at which the law divides childhood from adulthood for most purposes. This is the line drawn throughout *Roper* and its progeny, and in *Miller*, Justice Elena Kagan added emphasis to this distinction by frequently referring to the offenders in question as "children," rather than "juveniles."⁷⁹ But the fit between the legal and developmental age lines has proved awkward. I consider first the misalignment between developmental and legal age lines reflected in the Court's own analysis, an analysis that confounds development in childhood with lifelong development. I then consider the misalignment highlighted by the very science upon which the Court's developmental approach relies.

A. The Misalignment Reflected in the Court's Reasoning

As noted in Part I, the Court in *Graham* and *Miller* acknowledged capacity to change as a developmental attribute of adolescents that was distinct from their lesser culpability.⁸⁰ This attention to adolescents' capacity to change stemmed from the Court's focus in these cases on the right to parole. Access to parole allows

youth committed to long-term secure confinement—including training schools, reformatories, and juvenile correction facilities—has declined from over 19,000 to about 6,000 youth from 2001 to 2019); THE ANNIE E. CASEY FOUND., REDUCING YOUTH INCARCERATION IN THE UNITED STATES 2 (2013), <https://perma.cc/PU39-2YLW> (showing that youth confinement declined among all racial groups from 1997 to 2010).

⁷⁹ In *Roper* and *Graham*, Justice Anthony Kennedy, writing for the Court, generally used the term "juvenile" to refer to a juvenile offender and "child" and "children" only a handful of times each—primarily in sections discussing international human rights and the "Rights of the Child" or quoting another case. See generally *Roper*, 543 U.S. 551; *Graham*, 560 U.S. 48. In *Miller*, Justice Kagan used "children" or "child" interchangeably with "juveniles" or "juvenile" thirty-three times, excluding citations to Louisiana's Child Code. See generally *Miller*, 567 U.S. 460. After *Miller*, Justice Kennedy used "child" or "children" twenty-four times in *Montgomery v. Louisiana*, 577 U.S. 190 (2016), both in his discussion of *Miller* and separately. See generally *Montgomery*, 577 U.S. 190. Justice Antonin Scalia criticized this language in dissent and exclusively used "juvenile." *Id.* at 225 n.2 (Scalia, J., dissenting) ("The majority presumably regards any person one day short of voting age as a 'child.'").

⁸⁰ See *supra* note 34 and accompanying text.

offenders to demonstrate that they have mended their ways and thus is most justified for those most likely to change. There is a noteworthy developmental disconnect, however, between the special attribute that adolescents are said to possess and the nature of the special protection that they are afforded in *Graham* and *Miller*. By the time these individuals are convicted and sentenced for crimes that subject them to a possible life-without-parole sentence, they are often no longer minors, and for those individuals, any change associated with their minority will already have occurred. For most others, the window for reform during minority will be closing fast.⁸¹ More significantly, by the time they are eligible for parole, the behavior and character they manifest will likely reflect years of change that emerged over decades, not just the change that may have occurred in those most malleable years of youth. Drawing a sharp line at eighteen makes sense if the system is simply designed to give special protections to children, but it makes less sense if the system claims to take account of the human development that continues from the time of sentencing to the time of parole.

This developmental disconnect shows up again in *Miller*, which concludes that juvenile homicide offenders should only be sentenced to life without parole if their crimes “reflect[] irreparable corruption.”⁸² In essence, sentencers are directed to look multiple decades into juvenile offenders’ futures to determine whether they might someday be worthy of parole and, if so, to ensure that they will have the opportunity to demonstrate their worthiness. The development that matters in answering the question of irreparability is future development that extends well into adulthood and will eventually be achieved by most offenders,⁸³ but the development that matters in determining whether that future-looking question even gets asked is only the development associated with youth.

⁸¹ Based on data from the Federal Bureau of Prisons and forty of the forty-two states in which youth offenders may be sentenced to life without parole, in 2004, 52.2% of juveniles serving life-without-parole sentences committed the offense at age seventeen, 32% at sixteen, 13.3% at fifteen, 2.2% at fourteen, and 0.5% at thirteen. AMNESTY INT’L & HUM. RTS. WATCH, *THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR CHILD OFFENDERS IN THE UNITED STATES*, 25–26 (2005).

⁸² *Miller*, 567 U.S. at 479–80 (quoting *Roper*, 543 U.S. at 573).

⁸³ See SHADD MARUNA, *MAKING GOOD: HOW EX-CONVICTS REFORM AND REBUILD THEIR LIVES* 6 (2001) (“The pessimistic notion of the irredeemable criminal simply does not fit one of the best established empirical findings in criminology: Almost everyone who is labeled as a superpredator eventually ‘goes straight’—or desists—from crime.”).

The awkwardness of this fit was highlighted after the Court ruled in *Montgomery v. Louisiana*⁸⁴ that *Miller* was to be applied retroactively. This meant that those sentenced to categorical life without parole for offenses committed when they were minors, even decades earlier, were entitled to a resentencing hearing to determine whether they should have been found, in their youth, to be irredeemably corrupt. In his dissenting opinion in *Montgomery*, Justice Antonin Scalia noted that, despite the *Montgomery* Court's dicta to the contrary,⁸⁵ the logical implication of the Court's reasoning was that the resentencing hearings should be limited to the evidence that was available at the time of sentencing. "Under *Miller*," he argued, "the inquiry is whether the inmate was seen to be incorrigible when he was sentenced [half a century ago]—not whether he has proven corrigible and so can safely be paroled today."⁸⁶

Based on this logic, there was uncertainty after *Montgomery* was decided about whether evidence of a prisoner's *actual* redemption years into his sentence could be introduced in a resentencing hearing required to assess his *potential* for redemption at the time of the original sentencing.⁸⁷ In many resentencing hearings that have occurred, including in states with the highest numbers of juveniles serving life without parole, courts have, in fact,

⁸⁴ 577 U.S. 190 (2016).

⁸⁵ *Id.* at 212–13 (stating that "[t]hose prisoners who have shown an inability to reform will continue to serve life sentences. The opportunity for release will be afforded to those who demonstrate the truth of *Miller*'s central intuition—that children who commit even heinous crimes are capable of change" and offering, as a relevant fact to be considered at resentencing, petitioner's "evolution from a troubled, misguided youth to a model member of the prison community").

⁸⁶ *Id.* at 226 (Scalia, J., dissenting).

⁸⁷ See, e.g., Thomas Grisso & Antoinette Kavanaugh, *Prospects for Developmental Evidence in Juvenile Sentencing Based on Miller v. Alabama*, 22 PSYCH., PUB. POL'Y & L. 235, 239 (2016).

disregarded Justice Scalia's interpretation and accepted contemporary evidence of redemption.⁸⁸ This is a sensible and just solution to be sure,⁸⁹ but it is one that extends *Miller's* adolescence-limited developmental analysis to the full reach of a prisoner's lifelong development up to the time that the resentencing occurs.

In *Jones v. Mississippi*, the Court obscured this difficulty by eliminating any requirement that resentencers make any finding at all about a defendant's incorrigibility, whether viewed at the time of the original sentencing or at the resentencing hearing.⁹⁰ That said, *Jones* did not alter the *Graham* and *Miller* rulings and analysis,⁹¹ and therefore the logical gap between the capacity for change in youth and the right to establish change in middle age remains.

B. The Misalignment Revealed Through Neuro- and Social Science

Ongoing developments in psychology and neuroscience have also surfaced another gap between the legal and developmental age lines addressed in the cases, calling into question the appropriateness of drawing the line between childhood and adulthood at eighteen. The "brain science" first embraced by the Court in *Graham* had an especially powerful impact on political support for juvenile exceptionalism, as it represented "hard" science that offered concrete proof that juveniles were different from adults in ways deemed to matter in assessing the appropriate response to

⁸⁸ See, e.g., *People v. Lozano*, 197 Cal. Rptr. 3d 257, 265 (Cal. Ct. App. 2016) (requiring trial courts to consider postconviction behavior in a *Miller* resentencing hearing); *State v. Hauser*, 317 So. 3d 598, 622 (La. Ct. App. 2019) (resentencing defendant to life with the possibility of parole based on postconviction behavior reflecting rehabilitation); *People v. Bennett*, No. 350649, 2021 WL 220035, at *11 (Mich. Ct. App. Jan. 21, 2021) (vacating a life-without-parole sentence based in part on postconviction behavior reflecting rehabilitation); *Commonwealth v. Lekka*, 210 A.3d 343, 352–53 (Pa. Super. Ct. 2019) (finding that the trial court correctly considered postconviction behavior in resentencing). *But see* *State v. McCleese*, 215 A.3d 1154, 1171–73 (Conn. 2019) (citing Justice Scalia's *Montgomery* dissent to conclude, in dicta, that postconviction behavior could not be considered in a *Miller* resentencing hearing).

⁸⁹ A different injustice sometimes comes with the consideration of the prisoner's prison record in assessing redeemability. Henry Montgomery himself—who was considered for parole after serving fifty-four years in prison—was denied parole at seventy-one because his list of completed prison courses was somewhat limited, despite the fact that he was prevented from participating in many prison programs because of his life-without-parole sentence. See Ashley Nellis, *For Henry Montgomery, a Catch-22*, THE MARSHALL PROJECT (Feb. 28, 2018), <https://perma.cc/R8XA-FS2H>.

⁹⁰ *Jones*, 141 S. Ct. at 1311.

⁹¹ *Id.* at 1321 ("Today's decision does not disturb [*Miller's*] holding.").

their offenses.⁹² Early research focused on the late development of the prefrontal cortex, which controls the brain’s executive functions, including planning, weighing consequences before acting, and controlling impulses. Subsequent imaging studies have emphasized an asymmetry between the slow maturation of this region of the brain, particularly its interconnections with other brain regions, and the earlier full maturation of brain regions associated with emotional arousal, sensation seeking, and sensitivity to social stimuli. The different pace of maturation of these two brain regions is now understood by developmental scientists to create a “maturity gap,”⁹³ between cognitive and psychosocial development that accounts for the impulsivity and vulnerability to peer influence identified by the Court in the *Roper* line of cases. Most significant for our focus, these imaging studies, which have now been conducted on individuals across the globe,⁹⁴ demonstrate that this maturity gap persists well into the twenties,⁹⁵ closing gradually as the brain matures.

⁹² See Richard J. Bonnie & Elizabeth S. Scott, *The Teenage Brain: Adolescent Brain Research and the Law*, 22 CURRENT DIRECTIONS PSYCH. SCI. 158, 160 (2013); see also, e.g., CAMPAIGN FOR YOUTH JUST., RAISE THE AGE: NATIONAL POLICY STATEMENTS, <https://perma.cc/8GZS-53Z5> (listing the policy statements of multiple organizations who advocate for raising the juvenile age in light of research and data); ILL. JUV. JUST. COMM’N, RAISING THE AGE OF JUVENILE COURT JURISDICTION: THE FUTURE OF 17-YEAR-OLDS IN ILLINOIS’ JUSTICE SYSTEM 17 (2013), <https://perma.cc/ES79-CSU6> (“There is a reason that a teenager may at times seem blithely unaware of sensible decision-making: . . . even at seventeen, [the brain is] still deep into the process of remodeling itself and maturing toward adulthood. Modern brain scanning technology has enabled scientists to understand how the brain changes over time.”); Audiotope: N.C. House Debate on HB 280, 152d Leg. (May 17, 2017) (on file with the N.C. State Legislature) (statement of Rep. Carla Cunningham at 1:23:25) (available at <https://perma.cc/KG2V-52ZR>):

We all make mistakes, young and old, but it’s one thing scientifically has been proven, is that the brain is not fully developed until after twenty-one years old. This is a good start. This is a good beginning to see our children, to see juveniles, as still children until the brain development catches up. It’s an opportunity for us.

⁹³ See generally Grace Icenogle et al., *Adolescents’ Cognitive Capacity Reaches Adult Levels Prior to Their Psychosocial Maturity: Evidence for a “Maturity Gap” in a Multinational, Cross-Sectional Sample*, 43 LAW & HUM. BEHAV. 69 (2019).

⁹⁴ *Id.* at 79–80 (reporting on the worldwide presence of the maturity gap and a common pattern of brain development into the midtwenties).

⁹⁵ See Laurence Steinberg, Elizabeth Cauffman, Jennifer Woolard, Sandra Graham & Marie Banich, *Are Adolescents Less Mature than Adults? Minors’ Access to Abortion, the Juvenile Death Penalty, and the Alleged APA “Flip-Flop”*, 64 AM. PSYCH. 583, 590–91 (2009) (summarizing study results revealing significant psychosocial maturity differences between those sixteen to seventeen and those twenty-two and older as well as between those eighteen to twenty-one and those twenty-six and older, indicating that significant psychosocial maturation occurs in the twenties); Alexandra O. Cohen, Richard J. Bonnie, Kim Taylor-Thompson & BJ Casey, *When Does a Juvenile Become an Adult? Implications*

Accompanying this neuroscientific recognition that the relevant brain and related behavioral maturation continues into the midtwenties is a parallel sociological recognition that individuals' achievement of the markers of adulthood correlated with desistance now extend into the midtwenties. Sociologists note that these markers of adulthood (financial independence, employment, the establishment of an independent family household), which once were largely achieved by the early twenties, are now coming later.⁹⁶

This trend led developmental psychologist Jeffrey Arnett to coin the term "emerging adulthood" to describe a new developmental stage during which individuals transition from dependence on parents and others for supervision, financial support, and guidance, into mature adults who engage independently in work, community, and the development and maintenance of new family relationships.⁹⁷ During this transition, individuals have acquired adult rights and responsibilities under the law and legal independence from their parents,⁹⁸ while not yet functioning as adults

for Law and Policy, 88 TEMP. L. REV. 769, 788 (2016) (describing findings from neuroscience and psychological experiments that "provide empirical support for extending the juvenile court's dispositional age to twenty-one or older and for reconsideration of sentencing statutes for young adult offenders").

⁹⁶ See Frank F. Furstenberg Jr., *On a New Schedule: Transitions to Adulthood and Family Change*, 20 FUTURE CHILDREN 67, 72 (2010).

⁹⁷ See Jeffrey Jensen Arnett, *Emerging Adulthood: A Theory of Development from the Late Teens Through the Twenties*, 55 AM. PSYCH. 469, 469 (2000); cf. LAURENCE STEINBERG, AGE OF OPPORTUNITY: LESSONS FROM THE NEW SCIENCE OF ADOLESCENCE 48 (2014) (noting trends in development that lead to the prediction that "by 2020, adolescence will take almost twenty years from start to finish"). Interestingly, the term "adolescence" (a French term that derives from the Latin "adolescere," meaning "to grow up or to grow into maturity") was earlier coined to capture this same transition from youth to adulthood. *Adolescent*, OXFORD ENGLISH DICTIONARY (3d ed. 2011). The fact that developmental psychologists have identified and named a new stage, after adolescence, during which the work of becoming an adult continues captures the lengthening of this developmental process. See NAT'L ACADS. OF SCIS., ENG'G, & MED., THE PROMISE OF ADOLESCENCE: REALIZING OPPORTUNITY FOR ALL YOUTH 24 (2019).

⁹⁸ Not completely, in either respect: laws limiting individuals during this transition period include the National Minimum Drinking Age Act, 23 U.S.C. § 158, the federal Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (1968) (codified as amended at 18 U.S.C. § 921) (prohibiting those under twenty-one from purchasing a gun other than a shotgun or rifle from a federal licensee), and the Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, 122 Stat. 3949 (2008) (codified at 42 U.S.C. §§ 627, 679c) (allowing for continued federal support for youth ages eighteen and older who are in foster care).

Many individuals in this age group remain dependent on their parents, guardians, or other authority figures in meaningful ways. For example, they may still be on their parents' insurance plans, and in some states, a designated noncustodial parent may still be paying child support. Additionally, colleges act quasi-parentally toward students in this age range. See *Young Adult Coverage*, U.S. DEPT OF HEALTH & HUM. SERVS. (Jan. 31,

in most of the ways that matter for individuals' life experience and self-perception.

As noted, achieving these markers of adulthood strongly correlates with young people's desistance from offending, although the reason for the correlation is imperfectly understood. Perhaps the same developmental changes that inspire desistance also inspire the undertaking of adult responsibilities at home and work. Some social scientists and policy makers draw a causal connection between the achievement of adult roles and desistance,⁹⁹ with somewhat differing accounts of the causal mechanism.¹⁰⁰ Program evaluations that tie success in reducing recidivism to interventions that facilitate achievement of these adult markers support the causal account.¹⁰¹ Whatever the account of the correlation, it is undisputed that offending tends to end with the achievement of the basic markers of adulthood and that, for many youth, these twin transitions do not occur until their midtwenties. Notably, brain maturation, criminal desistance, and the assumption of adult roles all occur at roughly the same age.

The increasingly evident gap between the legal age of eighteen and the achievement of the developmental milestones on which the Supreme Court grounded its rulings and policy makers have built important reforms calls into question the ongoing validity of juvenile exceptionalism in criminal law. To render the doctrine coherent, the special treatment of those under eighteen

2017), <https://perma.cc/4X3Y-729C>; *Termination of Child Support*, NAT'L CONF. OF STATE LEGISLATURES (Apr. 29, 2020), <https://perma.cc/A9HD-QR85>; Kerry Robert Brittain, Comment, *Colleges and Universities: The Demise of In Loco Parentis*, 6 LAND & WATER L. REV. 715, 724–27 (1971) (discussing the history of the quasi-parental authority of colleges and universities).

⁹⁹ See, e.g., ROLF LOEBER, DAVID P. FARRINGTON & DAVID PETECHUK, BULLETIN 1: FROM JUVENILE DELINQUENCY TO YOUNG ADULT OFFENDING 11 (2013) (“There is also strong evidence that, for males, getting married and holding a stable job foster desistance from offending.”).

¹⁰⁰ Psychologist Terrie Moffitt, for example, suggests that for most young people—whose offending is transitory—a primary cause of offending is the discomfort caused by the maturity gap between their biological and social maturity, which increases the appeal of deviant behavior that makes them feel older or that gives them access to some of the trappings of adulthood. Terrie E. Moffitt, *Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 PSYCH. REV. 674, 686–87 (1993). When the maturity gap closes with the assumption of adult roles, the inclination to offend dissipates. *Id.* at 690. Others focus on the shift in values and opportunities that come with these markers of adulthood. “Steady employment, in the context of a stable family,” policy makers writing for the National Institute of Justice explain, “builds routines in everyday life and develops a stake in conformity that ultimately diverts youth from crime.” VINCENT SCHIRALDI, BRUCE WESTERN & KENDRA BRADNER, COMMUNITY-BASED RESPONSES TO JUSTICE-INVOLVED YOUNG ADULTS 4 (2015).

¹⁰¹ See Lipsey, *supra* note 66, at 141–43.

could be disentangled from the Supreme Court's developmental analysis. Alternatively, young people's special treatment could be extended into their midtwenties to bring that developmental analysis in line with the science on which it relies. After considering the virtues and problems with both of these approaches, in Parts III.A and III.B respectively, I consider a third approach: the abandonment of juvenile exceptionalism altogether in favor of a unitary criminal legal system that recognizes and addresses the central roles that immaturity and the state's response to immaturity play in most criminal offending. Applying the learnings of state reform efforts to this regime would eliminate incarceration for most offenders altogether. This approach, widely viewed as radical and dangerous when cast as prison abolition, can be better understood as the logical end point of the developmental analysis and related policy reforms set in motion by the Court's decisions in *Roper*, *Graham*, and *Miller*.

III. ADDRESSING THE MISALIGNMENT THROUGH VERSIONS OF JUVENILE EXCEPTIONALISM

A. Qualifying the Developmental Approach to Preserve the Legal Age Line

The introduction of developmental science into criminal law began as a justification for a juvenile-exceptionalist approach that ended with legal majority. Early analysis of *Roper* and advocacy of further juvenile-exceptionalist reforms based on the decision assumed that it applied only to minors and fell within a larger set of distinct rights and constraints applied to children by the law. In their seminal work *Rethinking Juvenile Justice*, written shortly after *Roper* was decided, law professor Elizabeth Scott and developmental psychologist Laurence Steinberg explain:

[T]hose who commit crimes after their eighteenth birthday, should be dealt with as adults. Age eighteen is the presumptive marker between childhood and adulthood, the age of majority for most legal purposes, and it should also be the presumptive age of adult status for purposes of criminal adjudication. . . . Although studies of brain development indicate that continued maturation takes place until at least age twenty-five or so, policy-makers would not likely endorse treating individuals who offend in their early twenties as juveniles, nor should they. These criminals are mature enough

to be held fully accountable, and public safety requires that they be punished as adults.¹⁰²

Scott and Steinberg were ahead of their time in recognizing that the line drawn by neuroscience was several years beyond the line drawn by the law. But they were of their time in relying on the legal line to avoid considering the full significance of the Supreme Court's new developmental approach. The authors do not explain how, despite the immaturity reflected in the research on brain development, they reach the conclusion that twenty-year-olds are "mature enough to be held fully accountable." And they make assumptions about public safety and political support that have been challenged by the success of some subsequent reforms.¹⁰³ Before turning to those policy developments and their implications in Part III.B, I consider other justifications for keeping the line at eighteen.

There is much to be said for tying juvenile exceptionalism in criminal law to the many other forms of juvenile exceptionalism recognized in law, most of which are tied to the minority–majority line.¹⁰⁴ We comprehensively compromise children's autonomy

¹⁰² SCOTT & STEINBERG, *supra* note 59, at 238.

¹⁰³ Scott and Steinberg have more recently taken the position, in an article coauthored with Professor Richard Bonnie, that young adulthood should be treated as a "distinct, transitional category" between adolescence and older adulthood "subject to reduced sanctions for less serious crimes, special expedited parole policies, and correctional programs and settings designed to serve their developmental needs." Elizabeth S. Scott, Richard J. Bonnie & Laurence Steinberg, *Young Adulthood as a Transitional Legal Category: Science, Social Change, and Justice Policy*, 85 FORDHAM L. REV. 641, 644 (2016).

¹⁰⁴ I set out this analysis at greater length in Emily Buss, *Developmental Jurisprudence*, 88 TEMP. L. REV. 741 (2016).

rights¹⁰⁵ and afford them special benefits¹⁰⁶ as well as protections,¹⁰⁷ all with an eye to preparing them more effectively for the exercise of full rights and responsibilities in adulthood. These legal exceptions made for childhood have a developmental justification, but it is a rough one, and its scope is set by the law rather than the other way around. Consistency across rights and responsibilities is an important aspect of this legal design. For this reason, we adjudged it only fair to give young people the right to vote at the same age that they lost their protection from the draft.¹⁰⁸ Tying juvenile exceptionalism in criminal law to this legal line allows it to be grounded on a simpler logic: as part of a special package of rights and protections afforded to children to help them grow up, we shield them from the worst consequences of their mistakes during that protected childhood period.¹⁰⁹

This approach is consistent with the Court's approach in *Roper*, and it avoids the problematic implications of *Graham* and *Miller*. As noted in Part I.B, the *Roper* Court suggested that the legal line of eighteen and the findings of developmental science

¹⁰⁵ Children cannot vote, serve on juries, enter enforceable contracts, or marry. In most circumstances, their parents' choices will trump theirs. Even in contexts in which their autonomy rights are recognized, they are circumscribed. *See, e.g.*, *Bellotti v. Baird*, 443 U.S. 622, 650 (1979) (recognizing a minor's right to obtain an abortion without parental consent but imposing special substantive and procedural limitations on the exercise of that right).

¹⁰⁶ Each state's constitution provides for a free public education system, which, in most states, has been extended by statute through high school and at least the age of eighteen. *See* Trish Brennan-Gac, *Educational Rights in the States*, AM. BAR ASS'N (Apr. 1, 2014), <https://perma.cc/6LJE-MTDT>. Although many states extend access to education to twenty or twenty-one, this is sometimes only for those who have not yet received a high school diploma before then, and, even for this group, often only if they have been in school continuously since they were minors. *See 50-State Comparison: Free and Compulsory School Age Requirements*, EDUC. COMM'N OF THE STATES (Aug. 2020), <https://perma.cc/UE88-972T>; EMILY PARKER, EDUC. COMM'N OF THE STATES, *50-STATE REVIEW: CONSTITUTIONAL OBLIGATIONS FOR PUBLIC EDUCATION 1* (2016), <https://perma.cc/P3Q4-3R5H>.

¹⁰⁷ State child-welfare systems obligate the state to intervene to protect children from abuse and neglect and to ensure that their financial, educational, and health needs are met where parents are unable or unwilling to do so. *See, e.g.*, OKLA. STAT. tit. 10a, § 1-1-102 (2022); WYO. STAT. ANN. § 14-3-201 (2021). Children are protected from military conscription through the age of eighteen. *See* 50 U.S.C. §§ 3802–3803.

¹⁰⁸ *See* U.S. CONST. amend. XXVI, § 1; Dante A. Ciampaglia, *How the Vietnam War Draft Spurred the Fight for Lowering the Legal Voting Age*, HISTORY (May 12, 2020), <https://perma.cc/6QCD-A4AZ> (noting that pressure to lower the voting age to eighteen began during World War II and increased during the Vietnam War, when roughly one-third of U.S. troops were under the voting age of twenty-one).

¹⁰⁹ *See, e.g.*, Christopher D. Berk, *Children, Development, and the Troubled Foundations of Miller v. Alabama*, 44 LAW & SOC. INQUIRY 752, 764–66 (2019) (arguing that the age of adult criminal culpability should align with adult autonomy rights).

were roughly, if imperfectly, correlated and stopped short of declaring which justification was paramount, should they diverge. The actual age line drawn in the cases was eighteen, and it would take a second wave of cases to extend the line beyond eighteen, however compelling the developmental advances. And the disconnect between an amenability to change in minority and the right to demonstrate change in middle age becomes less problematic if the reason for affording a right to parole to minor offenders but not to adult offenders is based, not on likely differences in their qualification for future parole, but, again, on the special breaks we afford minor offenders as part of the law's developmental package. Applying this logic, the Court can justify an abrupt end to the right to demonstrate change at the point of legal adulthood despite the ongoing nature of that change across the life course.

Although confining juvenile exceptionalism in criminal law to minors is in line with the outcomes of the Supreme Court's cases and can be coherently justified, this approach is not true to the developmental logic at the heart of the Court's decisions. An embrace of the Court's suggestion of developmental imperatives, and the successful reforms this embrace has occasioned for minors, has increasingly led advocates and policy makers to call for an extension of juvenile exceptionalism into young adulthood. In the next Section, I set out these developments and consider the benefits and limitations of taking this approach.

B. Adjusting the Legal Age Line to Preserve the Developmental Approach

1. The raise-the-age movement.

The Supreme Court pointed to three developmental distinctions between children and adults—their greater impulsivity and risk taking; their greater vulnerability to negative influences, particularly from peers and family; and their less fixed characters—to justify children's lesser culpability for their crimes and to underscore their capacity to change. As developmental science and particularly neuroscience increasingly demonstrated that these qualities continue to be present, to varying degrees, into our midtwenties,¹¹⁰ advocates and policy makers began to argue that

¹¹⁰ See Laurence Steinberg, Dustin Albert, Elizabeth Cauffman, Marie Banich, Sandra Graham & Jennifer Woolard, *Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model*, 44 DEVELOPMENTAL PSYCH. 1764, 1774 (2008) (noting that while sensation seeking dwindles in adolescence, problems with impulse control continue into young adulthood).

individuals between the ages of eighteen and twenty-four are “more similar to juveniles than to adults”¹¹¹—or, as put colloquially in *Scientific American*, that “[t]wenty-five is the new 18.”¹¹² This reframing inspired a call for the extension of benefits currently limited to those who offend as minors to young adult offenders as well.¹¹³ If young adults’ brains and behavior are still in the process of maturing, the argument goes, then they, too, should be recognized as less culpable and more amenable to change and afforded the benefit of processes and programs shown to work well for youth.

Chief among the recommendations is the extension of juvenile court jurisdiction to at least twenty-one and, ideally, twenty-four or twenty-five. Criminologists David Farrington, Rolf Loeber, and James Howell, who oversaw an extensive study conducted through the United States National Institute of Justice on the transitions between juvenile delinquency and adult crime,¹¹⁴ summarized their recommendation of expanded juvenile court jurisdiction:

We recommend increasing the minimum age for referral of young people to the adult court to age 21 or preferably 24 so that fewer young offenders are dealt with in the adult crimi-

¹¹¹ HOWELL ET AL., *supra* note 58, at 24; Farrington et al., *supra* note 58, at 741 (“We conclude that young adult offenders aged 18–24 are more similar to juveniles than to adults with respect to features such as their executive functioning, impulse control, malleability, responsibility, susceptibility to peer influence, and adjudicative competence.”); *see also* LAURENCE STEINBERG, AGE OF OPPORTUNITY 5–6 (2014) (explaining that he uses the term “adolescence” to refer to the period between ten and twenty-five both because individuals often do not achieve economic and social independence from their parents until then and because the brain does not completely mature until sometime in the early twenties).

¹¹² Bret Stetka, *Extended Adolescence: When 25 is the New 18*, SCI. AM. (Sept. 19, 2017), <https://perma.cc/343V-GNE3> (quoting Columbia University psychiatrist Mirjana Domakonda); *see also* Lucy Wallis, *Is 25 the New Cut-Off Point for Adulthood?*, BBC NEWS (Sept. 23, 2013), <https://perma.cc/ZEU6-MUPE>.

¹¹³ *See, e.g.*, Alex A. Stamm, *Young Adults Are Different, Too: Why and How We Can Create a Better Justice System for Young People Age 18 to 25*, 95 TEX. L. REV. 72, 73 (2016) (“There is a chance to take the lessons of the juvenile system—lots of treatment and programming, age-limited facilities, shorter sentences, and sealed records—and apply them to the developmentally similar young adult population.”); *see also* *Why Raise the Age to Include 18–20 Year Olds in the Juvenile Justice System?*, RAISE THE AGE MA, <https://perma.cc/B382-PMYN>; H.B. 1826, 192d Gen. Ct. (Mass. 2021) (currently before the Joint Judiciary Committee); *cf.* Andrew Michaels, *A Decent Proposal: Exempting Eighteen- to Twenty-Year-Olds from the Death Penalty*, 40 N.Y.U. REV. L. & SOC. CHANGE 139, 142–43 (2016).

¹¹⁴ *See generally* *Transitions Between Juvenile Delinquency and Adult Crime - NIJ Publications Update*, U.S. DEP’T OF JUST., OFF. OF JUST. PROGRAMS (July 24, 2013), <https://perma.cc/XK9Y-5DLG>.

nal justice system. . . . [and] exposed to the criminogenic influences of incarceration, and more of them can receive alternative, noncustodial, and rehabilitative sanctions.¹¹⁵

This recommendation has been echoed by numerous scholars,¹¹⁶ advocates,¹¹⁷ and policy makers¹¹⁸ and has already found modest success in state legislatures. Vermont has taken the first step in this direction with legislation raising juvenile court jurisdiction up to age twenty by 2022.¹¹⁹ Legislation has been proposed in three other states (Connecticut,¹²⁰ Massachusetts,¹²¹ and Illinois¹²²) that would raise the age of juvenile jurisdiction to twenty-one. Moreover, courts have occasionally extended the Supreme Court's developmental logic to young adults to justify less punitive sanctions.¹²³

Many other reforms have followed the developmental logic to create a third division that duplicates some of the programming

¹¹⁵ Farrington et al., *supra* note 58, at 742; *see also* LOEBER ET AL., *supra* note 99, at 20 (recommending changes in legislation, including “rais[ing] the minimum age for referral of young people to the adult court to age 21 or 24.”)

¹¹⁶ *See, e.g.*, Cohen et al., *supra* note 95, at 788 (noting that new findings on young adults' compromised decision making under conditions of emotional arousal “provide empirical support for extending the juvenile court's dispositional age to twenty-one or older”).

¹¹⁷ *See, e.g.*, LINDELL & GOODJOINT, *supra* note 44, at 13–14; *Emerging Adult Justice Campaign*, CITIZENS FOR JUV. JUST., <https://perma.cc/EL2N-82E2> (advocating for gradually raising the juvenile age to twenty and implementing “developmentally appropriate” approaches for offenders under twenty-six); *Raise the Age on Juvenile Justice*, MORE THAN WORDS, <https://perma.cc/T8R6-3CEA> (“Emerging ages, 18-20, need to move out of the adult justice system and into the more developmentally appropriate juvenile system.”).

¹¹⁸ *See, e.g.*, SCHIRALDI ET AL., *supra* note 100, at 3 (“Our central recommendation is that the age of juvenile court jurisdiction be raised to at least 21 years old with additional, gradually diminishing protections for young adults up to age 24 or 25.”); *IL Judge Suggests New Young Adult Circuit Court Branch*, WAND 17 (Dec. 29, 2020), <https://perma.cc/W2QX-JTSD> (“[T]his third branch of circuit court, named ‘Young Adult Court,’ would specifically address conduct of emerging adults, or people between 18 and 26 years old.”).

¹¹⁹ 2018 Vt. Acts & Resolves 234.

¹²⁰ Governor's B. No. 7045, 2017 Gen. Assembly (Conn. 2017).

¹²¹ S.B. 947, 190th Gen. Ct. (Mass. 2017) (defining “juvenile” as a person under eighteen in delinquency proceedings and as a person under twenty-one in youthful offender proceedings).

¹²² H.B. 4581, 100th Gen. Assembly (Ill. 2017); S.B. 239 101st Gen. Assembly (Ill. 2019).

¹²³ *See, e.g.*, *United States v. C.R.*, 792 F. Supp. 2d 343, 496–502 (E.D.N.Y. 2011) (describing research on brain development in young adulthood to justify imposing a reduced sentence on a nineteen-year-old convicted of distributing child pornography and holding that imposing a longer, statutory minimum, sentence would violate the defendant's Eighth Amendment rights); *People v. House*, 72 N.E.3d 357, 389 (Ill. App. Ct. 2015) (finding that a sentence of life without parole imposed on a nineteen-year-old convicted on two counts of murder violated the defendant's Eighth Amendment rights).

provided to juveniles for young adults.¹²⁴ Thus, many jurisdictions have created “young adult courts,”¹²⁵ or young adult probation units,¹²⁶ whose approach builds on reforms implemented in the juvenile system. Other reforms carve out comparable exceptional systems within the adult system.¹²⁷ In many cases, the best way to understand justice systems that have added this third young adult category is as a binary system with two subparts on the exceptional side of the ledger. Whether these young adult units simply mimic the services and approaches that have previously been afforded to juveniles or introduce variation to capture distinctions between juveniles and young adults,¹²⁸ these systems are all designed to pull young adults out of the standard adult

¹²⁴ See generally, e.g., CONNIE HAYEK, NAT’L INST. OF JUST., ENVIRONMENTAL SCAN OF DEVELOPMENTALLY APPROPRIATE CRIMINAL JUSTICE RESPONSES TO JUSTICE-INVOLVED YOUNG ADULTS (2016), <https://perma.cc/EM9E-5M2R> (cataloging specialized young adult courts and programming). See also Farrington et al., *supra* note 58, at 742 (recommending special correctional facilities for young adult offenders that “include programs such as cognitive-behavioral therapy, drug treatment, restorative justice, mentoring, education and vocational training, and work release”).

¹²⁵ See, e.g., *Young Adult Court*, SUPERIOR CT. OF CAL.: CNTY. OF SAN FRANCISCO, <https://perma.cc/67CN-DHM5>; Christine S. Scott-Hayward, *Rethinking Federal Diversion: The Rise of Specialized Criminal Courts*, 22 BERKELEY J. CRIM. L. 47, 75 (2017) (“Despite [the advice of the advisory sentencing guidelines not to consider age], four districts operate specialized courts for younger defendants, generally ages 18 to 25, which result in sentences substantially below the federal Guidelines.”); *Young Adult Court*, DOUGLAS CNTY. DIST. CT., <https://perma.cc/WV4Q-WTV9> (explaining the structure of the Young Adult Court, which typically covers nonviolent felony charges but can take up violent felony cases at the deputy county attorney’s discretion); Ruth Brown, *Young Adult Court Helps Offenders Change Habits*, WASH. TIMES (Feb. 8, 2014) <https://perma.cc/U3M3-3CCY> (stating how the Bonneville Young Adult Court is “designed for [] 18- to 24-year-olds” and that the court covers both misdemeanor and felony crimes).

¹²⁶ See, e.g., SCHIRALDI ET AL., *supra* note 100, at 11 (describing the San Francisco Adult Probation Transitional Age Youth Unit and its successful community-based programming).

¹²⁷ See, e.g., COMM. ON CRIM. JUST., FLA. SEN., INTERIM REPORT ON YOUTHFUL OFFENDER DESIGNATION IN THE DEPARTMENT OF CORRECTIONS, S. 2011-114, at 3 (2010) (providing for special educational, employment, and therapeutic programs for young adult offenders within the adult system); GERMAINE MIERA, PEG FLICK, CHRISTINE ADAMS, LAURENCE LUCERO & KIM ENGLISH, COLO. DEP’T OF PUB. SAFETY, EVALUATION OF THE YOUTHFUL OFFENDER SYSTEM (YOS) IN COLORADO 3–8, 14–17 (2014) <https://perma.cc/G7HB-PZGG>; see also Scott et al., *supra* note 103, at 657–59 (calling for reforms within the adult system that recognize that young adulthood is a critical developmental period distinct from either adolescence or adulthood).

¹²⁸ See generally Kevin Lapp, *Young Adults & Criminal Jurisdiction*, 56 AM. CRIM. L. REV. 357 (2019) (arguing for separate, specialized young adult courts); TRACY VELÁZQUEZ, YOUNG ADULT JUSTICE: A NEW FRONTIER WORTH EXPLORING 7–8 (2013), <https://perma.cc/L6LX-Z8KF>; Farrington et al., *supra* note 58, at 742 (“Alternatively, special courts for young adult offenders aged 18–24 could be established on an experimental basis in a small number of areas (building on the experience of the U.K. Transition to Adulthood Alliance. . .).”).

criminal system and afford them, like juveniles, exceptional status.

Extending juvenile justice reforms to young adults into their midtwenties represents a straightforward application of the Court's developmental logic to advances in our understandings of development. And where young adults have been given access to programming modeled after some of the most successful programming originally designed for adolescents, there is already some evidence that community-based placements and therapeutic services in lieu of incarceration can lead to reduced recidivism rates and increased job placement and stability among the older group.¹²⁹ But conceiving of these reforms as an extension of juvenile exceptionalism improves the accuracy of the age-policy fit while ignoring the broader implications of the age correction. Because it would sweep in most offenders for their full criminal careers, extending the reach of the reforms to age twenty-five could be understood as an opportunity to transform the entire criminal justice system rather than to simply extend the reach of the alternative exceptional system. After setting out some basic data about age and crime, I explore the potential of a criminal justice system whose primary focus is effectively addressing the "unfortunate yet transient immaturity"¹³⁰ that plays a central role in most criminal careers.

2. When every criminal becomes a juvenile exception.

One of the most well-known graphs in criminology depicts the age-crime curve, showing that the rate of offending¹³¹ by age rises in midadolescence, peaks in the later teen years, and then begins

¹²⁹ See, e.g., SCHIRALDI ET AL., *supra* note 100, at 12 (describing Roca, a nonprofit organization in Massachusetts, that has "reduced recidivism by two-thirds" through its work with high-risk young men); ROCA, ROCA: LESS JAIL, MORE FUTURE: 2014 ANNUAL REPORT 9 (2014), <https://perma.cc/Z7M3-3WGV> (reporting that of the young adults identified as at high risk of reoffending who were enrolled in Roca for twenty-four months or longer, 92% had no new arrests and 89% had retained employment for three months or more); Maryann Davis, Ashli J. Sheidow & Michael R. McCart, *Reducing Recidivism and Symptoms in Emerging Adults with Serious Mental Health Conditions and Justice System Involvement*, 42 J. BEHAV. HEALTH SERVS. & RSCH. 172, 183 (2015) (discussing a feasibility study revealing significant reductions in mental-health symptoms, justice system involvement, and associations with antisocial peers among recently arrested or incarcerated young adults who were provided with multisystemic therapy).

¹³⁰ *Roper*, 543 U.S. at 573.

¹³¹ All measures of offending are inexact. Offense rates are generally calculated based on self-reports, arrests, or convictions.

coming down fairly steeply around age twenty.¹³² By the midtwenties, the rate of offending for most crimes¹³³ is much lower, but the curve continues to reflect a significant amount of offending through middle age. By sixty-five, the rate of offending is negligible. What this simple curve fails to capture, however, is the profound shift that occurs between age eighteen and twenty-five, during which period most offenders stop offending.¹³⁴ Complementing this high rate of desistance is a low rate of first offending after twenty-five.¹³⁵ Most of the still-substantial-but-decreasing number of offenses that occur after twenty-five are committed by a small number of persistent offenders who began offending in adolescence.¹³⁶

What these numbers suggest is that the gradual achievement of psychosocial maturity—and particularly impulse control¹³⁷—and the gradual assumption of adult roles do not mark off a special group of offenders entitled to special treatment during their ongoing development but rather define and explain the course of most individuals' entire course of offending. Most criminal offenders begin their criminal careers manifesting the “unfortunate yet

¹³² See J.C. Barnes, Cody Jorgensen, Daniel Pacheco & Michael TenEyck, *The Puzzling Relationship Between Age and Criminal Behavior: A Biosocial Critique of the Criminological Status Quo*, in *THE NURTURE VERSUS BIOSOCIAL DEBATE IN CRIMINOLOGY* 397, 398 (Kevin M. Beaver et al. eds., 2015). Note that although the overall age-crime curve has been remarkably stable for decades, there is some variation in the curve among types of offenses. Some offenses, such as burglary, larceny, and robbery, peak in earlier years, whereas others, including forgery, fraud, and gambling, peak in later years or decline more slowly. See Darrell Steffensmeier & Cathy Streifel, *Age, Gender, and Crime Across Three Historical Periods: 1935, 1960, and 1985*, 69 *SOC. FORCES* 869, 878 (1991).

¹³³ See, e.g., LOEBER ET AL., *supra* note 99, at 5–6.

¹³⁴ See Farrington et al., *supra* note 58, at 734–35 (“[T]he highest concentration of desistance takes place during early adulthood *irrespective* of age of onset.” (emphasis in original)); cf. Scott et al., *supra* note 103, at 645 (noting that because “young adulthood is both the stage during which criminal behavior is most common and the period during which the vast majority of offenders begin desisting from crime,” it “is arguably the most significant transitional period in the development of criminal behavior”).

¹³⁵ See Alex R. Piquero, *Taking Stock of Developmental Trajectories of Criminal Activity over the Life Course*, in *THE LONG VIEW OF CRIME: A SYNTHESIS OF LONGITUDINAL RESEARCH* 23, 49 (Akiva M. Liberman ed., 2008) (describing “late-onset” chronic offenders as those who begin offending in the “late portion of adolescence,” not later).

¹³⁶ See Ronald Christensen, *Projected Percentage of U.S. Population with Criminal Arrest and Conviction Records*, in *PRESIDENT’S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE: TASK FORCE REPORT: SCIENCE AND TECHNOLOGY* 216, 218 (1967) (reporting “virgin arrest” data showing that first arrests peak in adolescence, decline significantly by twenty, and are extremely low by twenty-five).

¹³⁷ Steinberg et al., *supra* note 110, at 1772.

transient immaturity”¹³⁸ of youth, and most criminal offenders end their criminal careers by growing up.¹³⁹

But as the experience in the juvenile justice system attests, state interventions can help individuals grow up or can stand in their way. Where most young adults will desist, regardless of state intervention,¹⁴⁰ some will be thwarted by the state’s incarceration policies. As of 2010, nearly half a million young adults ages eighteen to twenty-four were incarcerated and therefore deprived of the opportunities to develop the skills and relationships shown to be important for desistance.¹⁴¹ And the state’s role in thwarting the successful maturation of youth of color is especially great: the disproportionate representation of individuals of color, a well-recognized problem at all ages in the prison system, is particularly great among young adults.¹⁴²

A juvenile-exceptionalist system that includes all those manifesting the attributes of immaturity first set out in *Roper* and later illustrated by magnetic resonance images of young brains would extend to young adults. Brain and behavioral maturation continues, in a normally developing individual, until roughly twenty-five. Extending juvenile exceptionalism to this age would therefore be consistent with the Court’s developmental logic. But framing a system with such a broad reach as an “exceptional” system introduces serious distortions into the criminal justice system and undersells the importance of the shift. A system that reaches most offenders throughout their entire criminal career should be conceived not as the exception but as the rule.

This shift in conception is important. As long as the special treatment is cast as an exception, it will be applied too narrowly and will serve to shore up the status quo. In the next Part, I consider the virtues of abandoning juvenile exceptionalism in favor

¹³⁸ *Roper*, 543 U.S. at 573.

¹³⁹ See *supra* notes 134–36.

¹⁴⁰ See Farrington et al., *supra* note 58, at 735 (reporting study results that found that “most offenders desisted naturally in their early 20s” and concluding that it seemed unlikely desistance was caused by state intervention because convictions were followed by an increase in self-reported offending).

¹⁴¹ See Scott et al., *supra* note 103, at 658 (“It is well understood that criminal convictions and incarceration negatively affect employment, educational attainment, and civic engagement, diminishing the prospect that young adult offenders will become productive citizens or assume conventional adult roles.”); see also COMM. ON CAUSES & CONSEQUENCES OF HIGH RATES OF INCARCERATION, NAT’L RSCH. COUNCIL OF THE NAT’L ACADS., *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES* 174–75 (Jeremy Travis et al. eds., 2014) (describing the psychological and emotional toll of prison life).

¹⁴² LINDELL & GOODJOINT, *supra* note 44, at 10.

of a unitary criminal justice system that applies our growing understanding of the relationship of development and crime to refocus the system on managing and supporting young offenders' successful transition to adulthood. Followed in full force to its logical conclusion, the developmental approach sets us on a path to prison abolition.

IV. ABANDONING JUVENILE EXCEPTIONALISM TO PRESERVE THE DEVELOPMENTAL APPROACH

In this part, I begin by considering the harm done by maintaining two separate systems, particularly when one is cast as the favored "exceptional" system. I then sketch out an alternative: a single system that follows the connection between offending and development through the life course. I end by drawing the connection between the life-course developmental approach and the abolitionist vision.

A. The Harm Done to the Unexceptional by Juvenile Exceptionalism

Many advocates of juvenile exceptionalism in criminal law would generally favor similar reforms in the adult system. They have advocated for the special treatment of juveniles in part out of political expediency: it is easier to create a constituency that supports reforms for children than one that supports reforms in the adult corrections system. But the strategy comes at a cost. Dividing the state's response to criminal offending in two and developing the two systems separately threatens the integrity of the law's criminal legal response in several ways, addressed in the sections that follow. The first is rhetorical: the account of why children deserve better treatment is also, by implication, an account of why adults don't. Second, separating the systems disrupts any continuity in response to one individual over time and—most importantly—allows the state, when responding to offending in the adult system, to avoid any accountability for the harm that it did to the healthy development of the now-adult offender when he was earlier in the juvenile system. Third, separating the systems shields the state from any obligation to rationalize similarities and differences across the systems. Finally, separating the systems creates opportunities for sorting between the systems that can produce racially disparate effects. I discuss each of these concerns in the sections that follow, and I address racial disparities last, to underline how all the problems listed can come together dangerously. A system that sorts and paints

an ugly picture of one group to burnish the shine on the other and that fails to hold itself responsible for disparate treatment between the two systems—let alone for the damage it does to youth in the first system that leads them to end up in the second system—poses a special danger to Black and Brown people.

1. Disparaging rhetoric.

The rhetoric of juvenile exceptionalism makes adult criminals into a foil. Children are less blameworthy than adults, therefore not deserving of what adults deserve. They are still malleable and worthy of hope,¹⁴³ whereas adult offenders, as so-called hardened criminals, are unworthy of such hope.

The Court's analysis in the *Roper* line of cases offers an example of this comparatively harsh and caricatured description of adult offenders. In all these cases, the Court draws a line between "the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption."¹⁴⁴ The clear, if patently false, implication of this dichotomy is to suggest that all offenders whose crimes do not reflect transient immaturity—that is, all mature offenders—are irreparably corrupt.¹⁴⁵

The danger of carving out an exceptional group at any age is that it can reinforce all that the juvenile exceptionalists reject in the separate system to which the juvenile system is being compared.¹⁴⁶ The more that special qualities and treatment are identified and justified for the exceptionalist group, the more the unexceptional group is defined by their lack of these qualities and their disqualification for this special treatment. Even if purely

¹⁴³ See *Graham*, 560 U.S. at 74.

¹⁴⁴ *Roper*, 543 U.S. at 573.

¹⁴⁵ During the oral argument in *Jones v. Mississippi*, Justice Samuel Alito expressed concern with this dichotomy. See Oral Argument Transcript at 50, *Jones*, 141 S. Ct. 1307 (No. 18-1259) (noting that one of the statements in *Miller* and *Montgomery* "is the statement that a judge has to determine whether a particular defendant's crime, a particular minor's crime reflects transient immaturity or incorrigibility, as if those are the opposite sides of the . . . same coin. But they're not."). The implication of the Court's decision in *Jones*, however, was not to recognize an ongoing ability to change into adulthood but rather to reject any protected right to prove that ability to change, even in youth. See *Jones*, 141 S. Ct. at 1311 (holding that *Miller* conferred on juvenile homicide offenders a right to an individualized sentencing hearing that could take account of their youth before being sentenced to life without parole but not a right to be protected from a life-without-parole sentence absent a finding that they were irreparably corrupt).

¹⁴⁶ Cf. Adrienne Pon, Note, *The Dreamer Divide: Aspiring for a More Inclusive Immigrants' Rights Movement*, STAN. J. C.R. & C.L. 33, 40 (2018) (arguing that the championing of DACA recipients as an immigrant group especially entitled to protections has the effect of disparaging the claims of other undocumented immigrants).

rhetorical, this othering of adult offenders should be a source of concern. But the negative impact of the sorting goes beyond the rhetorical, and the rhetorical serves to shield these other problems from view.

2. The lack of connection and accountability between systems.

A properly functioning developmental-exceptionalist system, reflecting the reforms discussed in Part I.C, should assist youth, through community- and family-based programming, to develop the skills and relationships that facilitate the successful assumption of adult roles and desistance from crime. It should also avoid imposing consequences known to thwart achievement of important milestones like educational attainment and employment. If the juvenile-exceptionalist system is disconnected from the adult criminal system, however, the adult system's ability to ascertain what assistance was provided to the offender previously, and what harm to development was caused by the state's previous interventions, will be at least attenuated. More important, whether or not that information is available, the state, in its guise as a law enforcer in the adult system, will not be held accountable for the actions and inactions of the state in its guise as a fashioner and implementer of the juvenile court disposition that is meant to facilitate the youth's healthy development. Even if the state bears considerable responsibility for blocking a youth's opportunity to mature out of crime (by, for example, incarcerating him or maybe even incarcerating him under particularly detrimental conditions) the state's contribution to the adult's ongoing offending will make no difference in the adult system, and the offender's failure to mature into desistance blamed exclusively on him.¹⁴⁷

3. Unreasoned (and unjust?) inconsistencies.

A core principle of a just legal system is that like cases should be treated alike, and distinctions in treatment should be justified.¹⁴⁸ Juvenile exceptionalism in criminal law began as a departure from the traditional legal response to crime for young people,

¹⁴⁷ Cf. Christopher Lewis, *The Paradox of Recidivism*, 70 EMORY L.J. 1209, 1243 (2021) (arguing that because incarceration impairs an individual's ability to engage in lawful pursuits, including lawful employment, recidivists should be given a sentencing discount, rather than a sentencing enhancement).

¹⁴⁸ H.L.A. HART, *THE CONCEPT OF LAW* 159 (3d ed. 2012); see also H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 624 (1957) (“[O]ne

justified by identified distinctions in the capacity, circumstances, and behavior of young people. But the juvenile exceptionalism fostered by these distinctions has led increasingly to a walling off of the two systems, and, as juvenile exceptionalism has evolved, differences in analysis between the juvenile exception and adult standard systems have proliferated, with little ongoing attention to any coherence across systems. Treating the juvenile and criminal justice systems as two separate systems has allowed the criminal justice system to escape the usual disciplining pressure for coherence exerted by the law and has prevented the retrograde baseline system from learning from the insights and innovations of the juvenile system.

The juvenile-exceptionalist system relies on ever more subtle understandings of juveniles' brains, behavior, and life circumstances to support its determination that juvenile offenders are less culpable and to shape a more effective response to their offending that reflects our understanding of how and why they change. But the adult criminal system pays little or no attention to these factors of the human condition—physical and environmental—that influence criminal behavior and the prospects for desistance. If the response to most criminals (that is, all criminals up until their midtwenties) takes these subtle factors into account as the age-extension movement advocates, perhaps the same attention to the brains, behavior, and life circumstances of older adult offenders should shape our response to these rare adult persisters. If not, the distinction should be explained.

4. Racial inequities.

People of color suffer the harms imposed by our harsh incarceration practices in gross disproportion, and attempts to reduce racial disparities in the criminal justice system have been overwhelmingly unsuccessful.¹⁴⁹ Similar efforts in the juvenile justice system have been unsuccessful as well, but the dramatic categorical reductions in the total number of youth coming into the juvenile justice system and the heavy constraints imposed on the

essential element of the concept of justice is the principle of treating like cases alike.” (emphasis omitted).

¹⁴⁹ See, e.g., Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1197–99 (2015) (noting that racial disparities in the criminal justice system are deeply entrenched and therefore resistant to targeted efforts at reform within the system); see also Dorothy E. Roberts, *Constructing a Criminal Justice System Free of Racial Bias: An Abolitionist Framework*, 39 COLUM. HUM. RTS. L. REV. 261, 269–72 (2007) (describing the history and mechanisms underpinning mass incarceration of African Americans).

depth and duration of youths' systems involvement implemented through the juvenile justice reforms, have, in raw numbers, protected tens of thousands of youth of color from state-imposed harms.¹⁵⁰ Extending the reach of juvenile-exceptionalist programs to young adults holds the hope of greatly increasing the number of people of color shielded.

The more categorically the exceptionalist programs are applied—that is, the truer the law is to its developmental justifications—the greater the protection for young people of color. But the danger of any binary system is that it facilitates the recognition of exceptions to the exception. The standard, unexceptional criminal justice system is a readily available alternative. In the juvenile justice system, the availability of juvenile transfer to the adult system has always undermined the protections afforded in the juvenile-exceptionalist system, and it has done so in a severely race-skewing manner.¹⁵¹ And as recent reforms have reduced—but not eliminated—the use of adult transfer, the overrepresentation of Black and Brown youth subject to transfer has increased.¹⁵² We should expect an age-raised juvenile-exceptionalist system to function the same way.

Systemic racism thrives on sorting. Studies of every aspect of the criminal justice system—from policing to prosecution to sentencing—demonstrate that opportunities to exercise discretion, for decision makers to make individualized decisions, have race skewing effects.¹⁵³ Sorting predicated on assessments of maturity and criminal sophistication are particularly likely to introduce racist distortions. We see this in the tendency to adjudge Black

¹⁵⁰ *But see* THE SENT'G PROJECT, BLACK DISPARITIES IN YOUTH INCARCERATION 1 (2017), <https://perma.cc/P24T-MN2G> (reporting that, though the total numbers of detained youth dropped by over 50% between 2001 and 2015, the disparities between Black and white youth rose over the same time period).

¹⁵¹ *See, e.g.*, Samuel R. Sommers & Satia A. Marotta, *Racial Disparities in Legal Outcomes: On Policing, Charging Decisions, and Criminal Trial Proceedings*, 27 JURY EXPERT 16, 19 (2015) (observing that transfer decisions involve the exercise of considerable discretion and noting that this discretion helps to account for the large proportion of minority youth subject to transfer).

¹⁵² *See* CAMPAIGN FOR YOUTH JUST. & JUST. POL'Y INST., THE CHILD NOT THE CHARGE: TRANSFER LAWS ARE NOT ADVANCING PUBLIC SAFETY 11 (2020), <https://perma.cc/9HMJ-DNF3> (noting that the proportion of minority youth subject to transfer has increased with the overall reduction in rate of transfer).

¹⁵³ *See* ASHLEY NELLIS, JUDY GREENE & MARC MAUER, THE SENT'G PROJECT, REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM: A MANUAL FOR PRACTITIONERS AND POLICYMAKERS 11–15 (2008); Tamar R. Birckhead, *The Racialization of Juvenile Justice and the Role of the Defense Attorney*, 58 B.C. L. REV. 379, 419 (2017) (noting the opportunity for discretion at each decision point of a juvenile case); *see also, e.g.*, JOSHUA ROVNER, THE SENT'G PROJECT, RACIAL DISPARITIES IN YOUTH COMMITMENTS AND ARRESTS 8 (2016) (noting that racial disparities are largest in arrest rates).

boys as older, and therefore more culpable for their misdeeds, than their same-age white counterparts.¹⁵⁴ Similarly, research has shown that young Black men are more likely to be adjudged as hardened criminals than their same-age white counterparts.¹⁵⁵ The categorical approach increasingly favored in the juvenile-exceptionalist reforms, which ties access to the reforms to actual age rather than a judge or prosecutor's independent assessment of maturity or sophistication, enhances youth of color's ability to benefit from the reforms. Any escape valve to the adult criminal justice system built into an extended juvenile-exceptionalist system will be invoked disproportionately for them.

B. Incorporating the Developmental Approach into a Unitary System

1. Development over the life course.

Developmental psychology began as a study of children. Rousseau in the 1700s,¹⁵⁶ and many others who followed, marked out various stages from birth to adulthood, studying the course of development over childhood in a variety of domains.¹⁵⁷ Eventually, however, the field expanded to recognize that development continues over the life course, with dramatic changes at both ends of that course, and more modest but still important changes occurring in between.¹⁵⁸ A division of our system into a standard

¹⁵⁴ See Phillip Atiba Goff, Matthew Christian Jackson, Brooke Allison Lewis Di Leone, Carmen Marie Culotta & Natalie Ann DiTomasso, *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PSYCH. 526, 532 (2014) (showing that Black boys are perceived to be older than they are and thus to be more culpable for their actions).

¹⁵⁵ See Jeffrey S. Nowacki, *An Intersectional Approach to Race/Ethnicity, Sex, and Age Disparity in Federal Sentencing Outcomes: An Examination of Policy Across Time Periods*, 17 CRIMINOLOGY & CRIM. JUST. 97, 109 (2017) (finding that young Black men were sentenced more punitively than both young white men and young Hispanic men); Darrell Steffensmeier, Jeffery Ulmer & John Kramer, *The Interaction of Race, Gender, and Age in Criminal Sentencing: The Punishment Cost of Being Young, Black, and Male*, 36 CRIMINOLOGY 763, 783–84 (1998) (finding that young Black men were the most harshly sentenced group).

¹⁵⁶ See generally JEAN-JACQUES ROUSSEAU, *EMILE, OR ON EDUCATION* (Barbara Foxley trans., 1762).

¹⁵⁷ For a comprehensive history of the field of developmental psychology, see Robert B. Cairns & Beverley D. Cairns, *The Making of Developmental Psychology*, in 1 HANDBOOK OF CHILD PSYCHOLOGY 89, 89–165 (William Damon & Richard M. Lerner eds., 6th ed. 2006).

¹⁵⁸ See, e.g., Glen H. Elder Jr. & Michael J. Shanahan, *The Life Course and Human Development*, in 1 HANDBOOK OF CHILD PSYCHOLOGY, *supra* note 157, at 665, 706 (explaining how the life-course paradigm has replaced child-based, growth-oriented (“ontogenetic”)

criminal justice system with a juvenile carve out echoes the former, narrow vision of human development and fails to follow the law's interest in change, potential and inevitable, through the full arc of the human life.

This is not to say that all life stages call for the same kind or degree of attention in either psychology or law. Human development from birth to adulthood is of special importance in large part because it is heavily subject to influence and because it has a profound effect on everything that follows. A life-course developmental response to crime should, therefore, concentrate its resources and attention on young offenders.

Because most offenders only offend in their youth, and a portion of those who continue to offend into adulthood do so because the state has thwarted their development in response to their juvenile offending, a retooled unitary justice system that takes account of development over the life course would still begin with the innovations that have been inspired by the developmental insights endorsed by the Court: young people's psychosocial immaturity and the associated incomplete brain development justify a transformed response to their offending that largely, if not exclusively, keeps them out of jail and holds them accountable in ways that encourage, rather than undermine, their healthy development and desistance from crime.¹⁵⁹ Advances in developmental science suggest that this approach should continue into young adulthood, thus including most offenders for their full criminal careers. A unitary criminal justice system that took this approach to early offending would be reconceived as a system predominantly focused on managing the costly consequences, to individual offenders and society, of a period of immaturity¹⁶⁰ and supporting young offenders' maturation into healthy adult roles.

An effective response that manages youthful offenders' criminogenic period of immaturity in a manner that facilitates, or at

accounts of the person with models that emphasize the timing, social context, and organization of lives from birth to death).

¹⁵⁹ For a discussion of successful programming, see *supra* Part I.C.

¹⁶⁰ Managing and facilitating a successful transition to adulthood has also been recognized as an important attribute of higher education and military service. See Glenn D. Walters, *College as a Turning Point: Crime Deceleration as a Function of College Attendance and Improved Cognitive Control*, 6 EMERGING ADULTHOOD 336, 343 (2017) (finding that college can decelerate crime by increasing cognitive control in former delinquents who attend college during their emerging adult years); Ryan Keltz, Meredith Kleykamp & David R. Segal, *The Military and the Transition to Adulthood*, 20 FUTURE CHILDREN 181, 183 (2010) (discussing military facilitation of the transition to adulthood through emphasis on responsibility, self-improvement, community and civic engagement, job security, and family support).

a minimum does not obstruct, their transition to adulthood can be expected to reduce the numbers of those who continue to offend past the traditional young adult period of immaturity. How the state should respond to crimes committed by the small number of offenders who would continue to offend beyond their midtwenties despite the state's developmentally appropriate response to their previous offending raises complex questions; taking up this topic in any detail goes beyond the scope of this Article or my expertise. I note briefly some basic implications that follow from a commitment to continuity and coherence in a unitary system across the life span.

First, a unitary system would need to justify any distinctions in treatment across age groups. This would mean, for example that a system that assigns lesser culpability to youth based on the qualities highlighted by the Court (impulsivity, vulnerability to negative social pressure, or an underdeveloped prefrontal cortex) would either need to similarly discount culpability for the aberrant adult who continues to manifest these same qualities, or explain why it is treating him differently. The law might treat as equally culpable all those whose crimes are associated with similar brain deficiencies, regardless of the cause of those deficiencies, or it might distinguish between deficiencies that were a necessary and normal part of the developmental process and those that reflected aberrational neurological development—but either way, the relationship between the approach to similar characteristics at different life stages would need to be accounted for. Similarly, an account of capacity to change throughout the life span could clarify the connection between change in adolescence and change in middle age awkwardly drawn in *Graham* and *Miller*.¹⁶¹

Second, if the state's response to crimes of those under twenty-five is categorical and developmentally effective, those who continue to offend should be only the small minority of offenders whose crimes do not reflect "unfortunate yet transient immaturity."¹⁶² Thus, a well-designed, development-focused front end should act as a filter, not only to reduce the pool of persisters but also to help identify those whose crimes reflect other crimino-

¹⁶¹ See *supra* Part II.A.

¹⁶² *Roper*, 543 U.S. at 573.

genic factors, including histories of trauma, neurological pathologies and mental illness, and addictions, that could lead to a more effective, tailored, response to persistent offending.¹⁶³

Third, the justifications embraced by the Court for taking a categorical approach to developmentally grounded sentencing of juveniles should be realized at other life stages as well. In *Roper* and *Graham*, the Court emphasized both the value of making development-based determinations and the inability of this development to be properly taken into account by sentencers in individual cases.¹⁶⁴ This same analysis might appropriately support categorical end-age rules correlated with the age at which even persistent offenders usually stop offending.¹⁶⁵

In the next sections, I consider how an account of development across the life course might affect our assessment and application of the various purposes of punishment. As the preceding analysis makes clear, the goal of rehabilitation plays a central role in this life-course developmental approach. After reviewing the justification for that focus and suggesting how that rehabilitative goal could be carried beyond the years of immature offending, I go on to briefly consider what roles incapacitation, deterrence, and retribution might play under this approach.

2. Reflections on the purposes of punishment under a life-course developmental approach.

a) Rehabilitation over the life course. An essential contribution of the juvenile-exceptionalist reforms is their demonstration that rehabilitation¹⁶⁶ is a valid, achievable goal, at least for young

¹⁶³ Terrie E. Moffitt, *Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 PSYCH. REV. 674, 680–85 (1993) (describing neurological and environmental factors responsible for life-course persistent offending).

¹⁶⁴ *Id.* at 572–73; *Graham*, 560 U.S. at 73 (“It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.”).

¹⁶⁵ For a brief discussion of this point, see *infra* Part IV.B.2.b.

¹⁶⁶ Rehabilitation is a fraught term, with multiple meanings. See, e.g., Slobogin & Fandocaro, *supra* note 67, at 3 (associating the goal of rehabilitation with improving the character of a child, rather than preventing future criminal behavior, and, relatedly, suggesting that the goal justifies state intervention in children’s lives even if they have not committed a crime); cf. Francis T. Cullen, *Rehabilitation: Beyond Nothing Works*, 42 CRIME & JUST. 299, 308 (2013) (arguing that the term rehabilitation is “pregnant with the understanding that offenders are not like us—normal people who do not break the law. There is something wrong with them that needs to be fixed.”). Although I have my own objection to its application to young people, see Buss, *supra* note 104, at 759–60 (arguing that the use of the term “rehabilitation” is incompatible with an account that describes juvenile offending as developmentally normal), I use the term here to describe the category

people. Although the juvenile justice system was created, in large part, to allow for a more rehabilitative response to juvenile crime than was provided in the criminal justice system,¹⁶⁷ both the juvenile and the adult systems began the twentieth century optimistic about the state's ability to help offenders stop offending, and both systems ended the twentieth century discouraged by research suggesting that "nothing works."¹⁶⁸ A presidential task force on juvenile delinquency noted the significance of the two systems' equally pessimistic conclusions in its 1967 report:

Studies conducted by the Commission, legislative inquiries in various States, and reports by informed observers compel the conclusion that the great hopes originally held for the juvenile court have not been fulfilled. It has not succeeded significantly in rehabilitating delinquent youth, in reducing or even stemming the tide of juvenile criminality, or in bringing justice and compassion to the child offender. To say that juvenile courts have failed to achieve their goals is to say no more than what is true of criminal courts in the United States. But failure is most striking when hopes are highest.¹⁶⁹

In the juvenile justice system, this pessimism justified the Supreme Court's introduction of criminal procedural protections into juvenile court¹⁷⁰ and subsequently bolstered the move to a more punitive response to juvenile crime.¹⁷¹

The same pessimism about rehabilitation that afflicted the juvenile justice system largely eliminated its application in the adult system altogether.¹⁷² This abandonment of rehabilitation as an aim of the criminal justice system went hand in hand with an increased embrace of both retributive and incapacitation aims.¹⁷³ If offenders could not be prevented from reoffending in any other

of responses to criminal offending aimed at strengthening attributes of the offender—including skills, relationships, perceptions, and behavior—associated with desistance.

¹⁶⁷ See Zimring, *supra* note 12, at 145–46.

¹⁶⁸ Robert Martinson, *What Works?—Questions and Answers About Prison Reform*, 35 PUB. INT. 22, 48–50 (1974).

¹⁶⁹ TASK FORCE REPORT, *supra* note 15, at 7.

¹⁷⁰ *In re Gault*, 367 U.S. at 19–20 (noting that “[f]ailure to observe the fundamental requirements of due process has resulted in instances, which might have been avoided, of unfairness to individuals and inadequate or inaccurate findings of fact and unfortunate prescriptions of remedy” in the juvenile justice system).

¹⁷¹ See Fondacaro et al., *supra* note 69, at 702–03.

¹⁷² See *id.* at 703 (describing “the collapse of the rehabilitative ideal” in the adult criminal justice system).

¹⁷³ See FRANKLIN E. ZIMRING & GORDON HAWKINS, *INCAPACITATION: PENAL CONFINEMENT AND THE RESTRAINT OF CRIME* 13 (1995) (noting that incapacitation became the primary goal of punishment after the goal of rehabilitation was abandoned).

way, lawmakers reasoned, then they needed to be detained to prevent their future offending. And if offenders were immune from any prosocial influence that the state could offer, then a just-deserts approach could be taken without concern for the state's contribution to the offender's past or future acts.

With the resurgence of juvenile exceptionalism in the twenty-first century, rehabilitation is being reestablished as the central aim of the juvenile justice system. As noted throughout this Article, many developments in social science and law have facilitated this resurgence: Research documenting the effectiveness of community-based programs in reducing recidivism suggested, for the first time, that *some* things work for juveniles, and offered an account of why.¹⁷⁴ At the same time, a growing body of research demonstrates the criminogenic impact of a punitive, incarceration-focused response to criminal law.¹⁷⁵ The Supreme Court's emphasis on juveniles' capacity for change, narrowly applied in its cases to restrict life-without-parole sentences for juveniles, has been highlighted throughout the entire juvenile justice system by advocates, policy makers, and courts to justify reforms that keep youth out of jails and support a successful transition to adulthood.¹⁷⁶ Increasingly, these reforms have been applied to young adults as well.¹⁷⁷

These changes in law and social scientific understanding tell us less about how rehabilitative interventions should change for adults who continue to offend, despite developmentally appropriate responses to their youthful offending. Such persisters might well be amenable to treatment, but that treatment is likely to require something different from an intervention designed to promote the normal maturation process. Adopting a life-course developmental approach does, however, suggest ways in which we might reframe our analysis of rehabilitative possibilities for this group as well.

As previously noted, a categorical rehabilitative response to youthful offending should filter out, from persistence, all but the small number whose offending reflects neither transient immaturity nor the state's destructive response to such youthful offending. This in turn suggests that rehabilitative responses to these aberrant persisters could be much more effectively designed to address their atypical conditions and circumstances. Moreover,

¹⁷⁴ See, e.g., Lipsey, *supra* note 66, at 136–39.

¹⁷⁵ See *supra* note 58.

¹⁷⁶ See *supra* Part I.C.

¹⁷⁷ See *supra* Part III.B.

applying the increasingly nuanced attention to the physical, psychological, and environmental circumstances that have enhanced policies and practices in the juvenile system to this group will likely enhance this tailoring and therefore the effectiveness of programming for them. If persistent offending, like youthful offending, can be tied to unique aspects of their brain development, personal disposition, and life circumstances, perhaps rehabilitative programming can be tailored, as it has been for youth, to addressing those distinctive underlying causes.¹⁷⁸

b) *Incapacitation over the life course.* Incarcerating an offender prevents the offender from committing crimes outside of prison for the period during which he is incarcerated. This self-evident statement applies to young and old alike.¹⁷⁹ The challenge to incapacitation theory offered by the developmental approach focuses on the tradeoffs: whatever extra-prison crime is stopped during the period of incarceration must be offset against the future crime engendered by that period of incarceration. Because most criminals stop offending by their early twenties if not before, and because imprisonment is understood to interfere with that normal developmental process, the developmental approach favors giving up some immediate control over youthful offenders to allow the development leading to desistance to occur.

For midtwenties persisters, however, the tradeoffs will look different. For this group, the prospects of near-term desistance drop considerably. However, even where incapacitation is viewed as necessary in light of the risks posed by the persister, a developmental approach requires that this incapacitation be employed with ongoing attention to lifelong patterns of desistance. While the timeline slows significantly, aggregate patterns of desistance

¹⁷⁸ For examples of rehabilitative programming focused on particular neurological or substance abuse diagnoses, see Susan Young et al., *Identification and Treatment of Offenders with Attention-Deficit/Hyperactivity Disorder in the Prison Population: A Practical Approach Based Upon Expert Consensus*, 18 BMC PSYCHIATRY 281, 6–11 (2018); Sandra Fielenbach, Franc CL Donkers, Marinus Spreen & Stefan Bogaerts, *Neurofeedback as a Treatment for Impulsivity in a Forensic Psychiatric Population with Substance Use Disorder: Study Protocol of a Randomized Controlled Trial Combined with an N-of-1 Clinical Trial*, 6 JMIR RSCH. PROTOCOLS 1, e13 (2017), <https://perma.cc/R7MF-TC67>. Drug and mental health courts can be understood as specific, if imperfect, examples of adults systems tailoring a response to adult crime to address the underlying sources of criminal behavior. See Slobogin & Fondacaro, *supra* note 67, at 26–30 (2009) (noting the efficacy of treatment responses that focus on identified criminogenic risk factors in juveniles).

¹⁷⁹ Elizabeth S. Scott & Laurence Steinberg, *Social Welfare and Fairness in Juvenile Crime Regulation*, 71 LA. L. REV. 35, 62 (2010) (interpreting data to conclude that incarceration has some incapacitation effect in both the adult and juvenile systems).

remain marked and predictable, even for persisters who continue to offend into middle age.

A public-safety-focused system that takes account of development over the life course would not incarcerate offenders, for purposes of incapacitation, beyond the age when even persisters have been shown to age out of their offending. It might be appropriate to find, as the Court did in *Roper* and *Graham*, that, because sentencers are not in a position to distinguish, here between the extremely rare aged offender who will continue to offend in old age and the majority of aged offenders who are done offending, there should be a categorical rule that prevents sentences that extend incarceration beyond a certain age, perhaps sixty-five. Or, perhaps, consistent with the analysis in *Miller* and *Montgomery*, the extreme rarity of the aged offender should require the release of all those at sixty-five except the few shown, even at sixty-five, to be “irreparab[ly] corrupt.”¹⁸⁰

Applying a life-course developmental approach to tailor our use of institutional confinement to those who require incapacitation would also allow us to avoid our inhumane and financially profligate policy of keeping elderly individuals incarcerated long after they have lost the inclination, and often the ability, to commit crimes, and sometimes after they have lost the ability to even remember why they are imprisoned.¹⁸¹ Some of these elderly inmates have been imprisoned since they were convicted in their midtwenties.¹⁸² This fact should concern the developmentalist, not only because such sentences reflect a *past* failure to take into account the young offender’s brain—whose prefrontal cortex was insufficiently developed to manage his highly developed sensation-seeking amygdala¹⁸³—but also because it reflects a *current* failure to take into account the brain function of the aged prisoner, whose sensation-seeking impulses are largely a thing of the past.

c) *Deterrence over the life course.* As with incapacitation, any deterrence value associated with punitive sentences for crimes committed by young people must be balanced against the increase in recidivism risks associated with those sentences. But unlike incapacitation, where at least some reduction in extra-prison offending can be presumed for offenders in the aggregate while they

¹⁸⁰ *Miller*, 567 U.S. at 479–80 (quoting *Roper*, 543 U.S. at 573).

¹⁸¹ See Kimberly A. Skarupski, Alden Gross, Jennifer A. Schrack, Jennifer A. Deal & Gabriel B. Eber, *The Health of America’s Aging Prison Population*, 40 EPIDEMIOLOGIC REV. 157, 160 (2018).

¹⁸² See *Old Behind Bars: The Aging Prison Population in the United States*, HUM. RTS. WATCH (Jan. 27, 2012), <https://perma.cc/64JW-UR2W>.

¹⁸³ Steinberg et al., *supra* note 110, at 1764.

are imprisoned, it is unclear whether harsh sentences have any appreciable general deterrent effect on young offenders. The Court, in its application of developmental science, concluded that juveniles were unlikely to be deterred by severe sanctions because their crimes are committed impulsively, without deliberation.¹⁸⁴ Most, but not all, attempts to study deterrent effects of harsh sanctions on juvenile crime bear the Court's conclusion out.¹⁸⁵ A developmentalist might well conclude that any uncertain deterrence value associated with imposing punitive sanctions on young offenders is outweighed by the more certain criminogenic harms imposed by those sanctions.

The deterrent value of harsher sentences on mature offenders is also contested.¹⁸⁶ Less contested is the finding that certainty of punishment has more deterrent power than severity of punishment.¹⁸⁷ This fact suggests that a sensitivity to lifelong development that provides ongoing tailored opportunities for rehabilitation and that imposes age limits on sentences designed to incapacitate does not foreclose a consideration of deterrence among the system's sentencing aims.

¹⁸⁴ See *Graham*, 560 U.S. at 72.

¹⁸⁵ Compare Simon I. Singer & David McDowall, *Criminalizing Delinquency: The Deterrent Effects of the New York Juvenile Offender Law*, 22 LAW & SOC'Y REV. 521, 529 (1988) (tracking arrest rates for thirteen- to fifteen-year-olds in New York before and after the state lowered the age of criminal court jurisdiction and finding no effect on juvenile crime rates), and Eric L. Jensen & Linda K. Metsger, *A Test of the Deterrent Effect of Legislative Waiver on Violent Juvenile Crime*, 40 CRIME & DELINQ. 96, 100–01 (1994) (finding that waiver statutes are not always effective in deterring juvenile crime), and Jacob M. Cohn & Hugo M. Mialon, *The Impact of Juvenile Transfer Laws on Juvenile Crime* 14–15 (Mar. 2011) (Emory Univ. Dep't of Econ. working paper) (on file with author) (finding that tough transfer laws are positively correlated with juvenile crime rates for certain offenses, while weaker transfer laws are negatively correlated), and Zimring & Rushin, *supra* note 70, at 64 (2013) (finding that juvenile homicide rates did not decline after the passage of harsh sentencing laws), with Steven D. Levitt, *Juvenile Crime and Punishment*, 106 J. POL. ECON. 1156, 1156 (1998) (suggesting that “[j]uvenile offenders are at least as responsive to criminal sanctions as adults”). See also MULVEY ET AL., *supra* note 58, at 13 (concluding, based on a seven-year longitudinal study of juveniles convicted of serious offenses, that “[a]s in adult offenders, the power of deterrence in serious adolescent offenders appears to rest in the perceptions of the certainty, not the severity, of the punishment for criminal involvement”).

¹⁸⁶ See Aaron Chalfin & Justin McCrary, *Criminal Deterrence: A Review of the Literature*, 55 J. ECON. LITERATURE 5, 23–32 (2017) (surveying economic literature studying deterrent effects of certainty and severity of crime and labor market opportunities); Scott & Steinberg, *supra* note 179, at 52–56 (summarizing the uncertain research on deterrent effects).

¹⁸⁷ See, e.g., Chalfin & McCrary, *supra* note 186, at 32 (finding that crime likely responds less to severity of sanctions than to certainty of sanctions); Daniel S. Nagin, *Criminal Deterrence Research at the Outset of the Twenty-First Century*, 23 CRIME & JUST. 1, 21 (1998) (finding, in the tax-evasion context, that crime could be deterred by simply “the perception of a nonzero chance of criminal prosecution”).

d) *Retribution over the life course.* The Supreme Court grounded its Eighth Amendment holdings in *Roper*, *Graham*, and *Miller* on its conclusion that adolescents' psychosocial immaturity made them less blameworthy. They could not constitutionally be subject to those most severe sanctions (or, in the case of *Miller*, categorically subject to those most severe sanctions), the Court concluded, because they were not among the worst offenders. This analysis relates most directly to retribution, which assigns punishments in accordance with the severity of the crime and the blameworthiness of the offender. That said, retributive aims may be the least definitively governed by developmental understandings. Unlike crime control, where there are facts of the matter about how development—and various influences on development—affect the rate of criminal offending (however hard those facts of the matter are to ascertain), there is, in the end, no fact of the matter about culpability. There is now a legally relevant connection between development and culpability, but that is because the Court drew the connection, not because it discovered its truth.¹⁸⁸

A retributivist, therefore, might bridle at the whole developmental approach. Unlike incapacitation and deterrence, which need to be netted out against the criminogenic harms an incapacitating or deterring sentence might cause, retribution theory does not depend on any effectiveness in controlling crime. To a retributivist, the fact that harsh sentences breed criminals is irrelevant. What matters is that the criminal deserved the harsh sentence for the previous crime.

But recognizing that the Court *has* tied aspects of immaturity to lesser blameworthiness, as a matter of law, the life-long developmental approach presses the question of consistency mentioned above: What justifies assigning lesser culpability to individuals because they have certain qualities, but only while those qualities are developmentally normative? Moreover, a shift in the juvenile justice systems approach to “holding youth accountable” designed to conform to developmental goals might be applied, across the life span, to alter and improve our retributive aims.

Increasingly, juvenile justice systems have recognized the value of imposing consequences for youth crimes that impress upon the youth the significance of what they have done. Where the tough-on-crime punitive reformers called for “adult time for

¹⁸⁸ For a lengthier discussion of the limited role developmental science should play in assigning culpability, see generally Emily Buss, *What the Law Should (and Should Not) Learn from Child Development Research*, 38 HOFSTRA L. REV. 13 (2009).

adult crimes,”¹⁸⁹ reformers employing the developmental approach seek to ensure that the consequences imposed on youth for their crimes were not only felt, but also understood. The language of “holding juveniles accountable”—first articulated to champion tough, incarceration focused punishments¹⁹⁰—has been recast under the reforms to describe a response to crime that communicates a meaningful moral lesson to the offender.¹⁹¹ Requiring the offender to confront his victim and to hear the pain his crime inflicted is just one example of a response to crime that conveys the severity of a youth’s actions.¹⁹² Putting the pieces together, policy makers now emphasize that holding youth accountable should be understood as an aspect of rehabilitation rather than a conflicting purpose of the system, and that methods of holding youth accountable that fail to serve the rehabilitative ideal are counterproductive.¹⁹³ Although holding offenders accountable in this way is most obviously appropriate for young people, who are still in the process of maturation, it would surely have value whenever an offender can be made to feel the import of his crime.

C. The Developmental Path to Prison Abolition

Following the implications of the developmental approach through the life course shares much in common with the prison abolitionist vision.¹⁹⁴ The developmental logic first framed by the Court and increasingly elaborated and vindicated through policy and practice supports an exclusion of most offenders (that is, all

¹⁸⁹ Cully Stimson, *Adult Time for Adult Crimes*, 43 THE PROSECUTOR, no. 4, 2009, at 36, 36.

¹⁹⁰ See, e.g., Juvenile Crime Control and Delinquency Prevention Act of 1997, H.R. 1818, 105th Cong. §§ 101–102 (July 16, 1997) (proposed to “assist State and local governments in promoting public safety by encouraging accountability for acts of juvenile delinquency” and emphasizing using accountability-based mechanisms such as graduated sanctions to address a “dramatic increase” in juvenile delinquency and particularly violent crimes).

¹⁹¹ See OFF. OF JUV. JUST. & DELINQ. PREVENTION, JUVENILE DRUG TREATMENT COURT GUIDELINES 14–15 (2016), <https://perma.cc/6ZFY-78HR> (emphasizing the role of families and judges in holding youth accountable for their own well-being).

¹⁹² See, e.g., DAVID B. WILSON, AJIMA OLAGHERE & CATHERINE S. KIMBRELL, OFF. OF JUV. JUST. & DELINQ. PREVENTION, U.S. DEP’T OF JUST., EFFECTIVENESS OF RESTORATIVE JUSTICE PRINCIPLES IN JUVENILE JUSTICE: A META-ANALYSIS 5–6 (2017), <https://perma.cc/G7R8-7E93>; *Restorative Justice*, JUV. JUST. INITIATIVE, <https://perma.cc/T48B-BJTZ>.

¹⁹³ See, e.g., Scott & Steinberg, *supra* note 179, at 73; Slobogin & Fondacaro, *supra* note 67, at 31–40. Conversely, one justification for the shift to retribution was the expectation that efforts at rehabilitation would fail.

¹⁹⁴ See generally McLeod, *supra* note 149.

those who stop offending by the time they are in their midtwenties) from incarceration altogether. Were this achieved, the developmental logic further predicts that the numbers subject to incarceration after twenty-five (the persistent offenders who did not grow out of their offending) would be even smaller than it is today. Where the juvenile exceptionalist concept relies upon the existence of a punitive adult system to justify a dramatic reduction in reliance on incarceration in the juvenile system, a unified system would recognize this front-end response as a significant step in dismantling the system altogether.¹⁹⁵ And, like the abolitionists who oppose efforts at reform within the system for fear that such reforms will reinforce the legitimacy of incarceration,¹⁹⁶ the lifelong-developmental vision opposes a carve out for juveniles that reinforces the legitimacy of the adult status quo.¹⁹⁷

The two visions are also aligned in their focus on the elimination of racial disparities in incarceration. While the disproportionate incarceration of Black and Brown people is a widely recognized source of concern that has inspired innumerable reforms, the abolitionist and lifelong-developmental visions share a view that the problem will never be effectively addressed while the current baseline system remains. That said, the role that race plays in the two contexts is distinct. Where prison abolitionists focus on the history and purpose of incarceration as a means of exercising brutal social control over Black and Brown people,¹⁹⁸ the focus of

¹⁹⁵ Some who advocate raising the age of the juvenile exceptionalist system do note the connection between this move and the reduction in older incarcerated individuals. *See, e.g.,* Farrington et al., *supra* note 58, at 742 (suggesting that, if young adults are shifted to the juvenile justice system, “the number of adult prisoners will decrease and considerable savings for taxpayers will accrue”). *See generally* Josh Gupta-Kagan, *The Intersection Between Young Adult Sentencing and Mass Incarceration*, 2018 WIS. L. REV. 669 (2018).

¹⁹⁶ *See* Liat Ben-Moshe, *The Tension Between Abolition and Reform*, in *THE END OF PRISONS* 87, 87 (Mechthild E. Nagel & Anthony J. Nocella, II, eds., 2013) (discussing the difference between “reformist reforms,” which risk strengthening the system of incarceration in the long run, and “non-reformist reforms” allowing for incremental progress toward a new vision).

¹⁹⁷ Both visions also contemplate universal change while recognizing uncertainty about the application of this universal change to a diminishingly small subgroup. Within the abolitionist vision, some advocates recognize the possibility that there will be a small group—the so-called “dangerous few”—whose freedom of movement may need to be restrained in some way, *see, e.g.,* Ben-Moshe, *supra* note 196, at 90 (explaining the concept of “the dangerous few” in the context of abolition literature), and within the life-long developmental vision set out here, I recognize that the system’s response to a small group of “aberrant persisters” is not well defined by the vision. Under both visions, however, the principles shaping the vision, as a whole, suggest important limits on the treatment of these groups, however ill-defined.

¹⁹⁸ *See, e.g.,* ANGELA Y. DAVIS, *ARE PRISONS OBSOLETE?* 31, 40, 50 (2003).

the developmental approach is on the destructive impact of incarceration on human development without regard to race. Incarceration is as destructive to the healthy maturation process for people of color as for white people, and the disproportionate incarceration of people of color means that they are disproportionately suffering this developmental harm at the hands of the state. Unlike juvenile exceptionalism, which leaves some room for distinctions among the young people who will be harmed by their involvement in the system, the lifelong-developmental approach calls for a categorical ban on the incarceration of young people that should protect all Black and Brown youth from this carceral harm.

Much of the resistance to abolitionism focuses not on its account of history but on its feasibility.¹⁹⁹ In dramatically reducing the incarceration rates of juvenile offenders, including very serious offenders, while reducing recidivism, lawmakers have demonstrated the feasibility of keeping offenders out of jail. Moreover, in doing so, they have demonstrated that the best way, and possibly the only way, of keeping Black and Brown people from filling the jails is to shut them down. If we can overcome our exceptionalist mindset, the recent and growing reforms in our response to crimes committed by young people serve as a relatively unthreatening demonstration that radical transformation is possible and advisable in our criminal justice system.

CONCLUSION

There is a simplistic, utopian quality to this discussion of the lifelong-developmental approach. The proposed approach starts on firm ground, taking the law's developmental approach at its word, bolstered by the striking successes in its application to adolescents. But the extension of the approach to all those shown to share the relevant developmental attributes, while not without support, is far more speculative. And the consideration of how a unitary system with a heavy front-end focus on managing immaturity and a tailored response to persistent offending in adulthood could affect rates of criminal offending is more speculative still.

The value of an incremental approach that begins with the youngest, most sympathetic offenders is that it allows for more radical experimentation, which, if successful, can be extended. The risk of this approach is that the very rationale licensing the

¹⁹⁹ *Id.* at 9–10.

experimentation, however successful, could foreclose its extension. A motivating concern in writing this Article was that juvenile exceptionalism could entrench distinctions between younger and older offenders in ways that would reduce the reach of the developmental analysis to the detriment of older offenders. A more optimistic view appreciates the value of starting slow. Juvenile exceptionalism, grounded in developmental science, has created an opening for dramatic reforms not thought politically possible two decades ago. Going forward, the challenge will be to ensure that the “kids are different” maxim that has inspired these reforms is not misunderstood as a reason to stop with them.