Emerging Adults in the Federal System: A Case for Implementing the Federal Youth Corrections Act

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Introduction

Over the past two decades, the Supreme Court has, in *Roper v. Simmons*, *Graham v. Florida*, and *Miller v. Alabama*, embraced neuroscience as an important source of evidence when determining appropriate sentencing for juveniles in the criminal justice system.[1] Alongside the development of the Court's juvenile justice jurisprudence, there is a growing bipartisan consensus that current federal sentencing policy is unnecessarily punitive and in need of reform.[2] The Federal Youth Corrections Act (YCA), an important element of federal sentencing law from 1950 to 1984, is an existing model through which to take both the Court's findings and Congressional will seriously.[3] The Act allowed adult defendants aged eighteen through twenty-five to be sentenced to probation services instead of prison, serve lower sentences than older adults, and have aspects of their criminal history sealed. The Act was repealed in 1984 by the same omnibus crime control bill that abolished parole in the federal system and established the federal sentencing commission. Today, emerging adults aged eighteen through twenty-five are subject to the same mandatory minimum sentences as are adults in the criminal justice system.[4] All jurisdictions in the United States treat individuals charged as juveniles and those charged as adults differently at every step of criminal justice involvement, including sentencing, with no gradations to ac-

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[1] *See* Roper v. Simmons, 543 U.S. 551, 551 (2005); Graham v. Florida, 560 U.S. 48, 68 (2010); Miller v. Alabama, 132 S. Ct. 2455, 2463 (2012).

[2] *See* Jennifer Steinhauer, *Bipartisan Push Builds to Relax Sentencing Laws*, N.Y. Times (July 28, 2015), https://www.nytimes.com/2015/07/29/us/push-to-scale-back-sentencing-laws-gains-momentum.html [https://perma.cc/ZV7E-9RPB].

[3] 18 U.S.C. § 5010 (repealed 1984).

[4] "Emerging adults" is a category coined by Jeffrey Jensen Arnett based on the unique developmental status of individuals aged eighteen through twenty-five. *See* Jeffrey Jensen Arnett, *Emerging Adulthood: A Theory of Development from the Late Teens Through the Twenties*, 55 Am. Psychologist 469, 471 (2000). Advocates have argued for treating this group differently in contexts outside of criminal law, including mental health. *See* Barbara L. Atwell, *Rethinking the Childhood-Adult Divide: Meeting the Mental Health Needs of Emerging Adults*, 25 Alb. L.J. Sci. & Tech. 1, 5 (2015) ("[E]merging adults between the ages of eighteen and twenty-five should be recognized as a separate legal category in matters involving mental health. Laws and policies should be implemented to meet the specific needs of this demographic.").

count for age once a defendant is in the adult system.[5] In the vast majority of states and in the federal system, this distinction is between those under and over the age of eighteen.[6] The Supreme Court has recognized, however, that the choice of eighteen as the age to draw this categorical distinction is largely arbitrary, and current research indicates it is misaligned with the most effective treatment of young offenders aged eighteen through twenty-five. Treating this class of young people indistinguishably from adults fails to consider the neurological and developmental status of emerging adults. Emerging adults are developmentally distinct from both juveniles and adults, and they merit a distinct sentencing scheme. On average, the group is less culpable and has significant capacity for rehabilitation. Based on the reasoning in *Graham* and *Miller*, criminal sentencing schemes should reflect these conclusions drawn from the research. Congress, in reviewing and redrafting its federal sentencing scheme, should view neuroscience as a tool to help devise a structure that is more just and more effective.

I. Defining Emerging Adults

A. Application of Neuroscience in Sentencing

The Supreme Court has embraced the legitimacy of developmental neuroscience in a series of recent cases concerning the constitutionality of sentencing juveniles to capital punishment and life in prison without the possibility of parole.[7] In *Roper v. Simmons*, the Court outlawed capital punishment for crimes committed by a defendant under age eighteen; in *Graham v. Florida*, the Court outlawed life without the possibility of parole for non-homicide crimes for juveniles; and in *Miller v. Alabama*, the Court outlawed juvenile life without parole for all offenses.[8] In all of these cases, the Su-

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[5] *See generally* Alexandra O. Cohen et al., *When Does a Juvenile Become an Adult? Implications for Law and Policy*, 88 Temp. L. Rev. 769 (2016); Vincent Schiraldi, Bruce Western & Kendra Bradner, *Community-Based Responses to Justice-Involved Young Adults*, New Thinking in Community Corrections, Sept. 2015, https://www.ncjrs.gov/pdffiles1/nij/248900.pdf [https://perma.cc/7GEJ-XGRD].

[6] There are some outliers, but in most states the age is eighteen. In most states where the age is not eighteen, the age is even lower (sixteen or seventeen) or the states allow younger defendants to be waived into adult court for certain offenses. *See* Anne Teigen, *Juvenile Age of Jurisdiction and Transfer to Adult Court Law*, Nat'l Conf. St. Ct. Legislators (Feb. 1, 2017), http://www.ncsl.org/research/civil-and-criminal-justice/juvenile-age-of-jurisdiction-and-transfer-to-adult-court-laws.aspx [https://perma.cc/29Z4-NEQZ]. It is the rare exception where juvenile court jurisdiction extends to those older than eighteen. *See* Dana Goldstein, *Who's a Kid?*, Marshall Project (Oct. 27, 2016), https://www.themarshallproject.org/2016/10/27/who-s-a-kid#.HLZowvzXB [https://perma.cc/FVZ3-CXXM].

[7] *See* Roper v. Simmons, 543 U.S. 551, 551 (2005); Graham v. Florida, 560 U.S. 48, 68 (2010); Miller v. Alabama, 132 S. Ct. 2455, 2463 (2012); Terry A. Maroney, *Adolescent Brain Science After* Graham v. Florida, 86 Notre Dame L. Rev. 765, 766 (2011) ("Justice Kennedy's opinion in *Graham* clarified what his opinion in *Roper* had left ambiguous: the Court . . . believed neuroscience relevant to general propositions as to the normal developmental course of adolescence.").

[8] *See Roper*, 543 U.S. at 578; *Graham*, 560 U.S. at 82; *Miller*, 132 S. Ct. at 2469.

preme Court cited neuroscience research for the proposition that juveniles are fundamentally different from adults in certain key aspects.[9] First, that a "lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young."[10] Second, that juveniles are more susceptible to peer and adult pressure, and have less ability to remove themselves from a "criminogenic setting."[11] And third, that the personality of a juvenile is less fully formed than that of an adult.[12] Importantly, the Court was explicit in the role neuroscience played in its conception of appropriate sentencing, citing "developments in psychology and brain science" which "'continue to show fundamental differences between juvenile and adult minds'—for example, in 'parts of the brain involved in behavior control.'"[13]

The research cited by the Court posits that adolescent brains are not yet fully developed, as the key developmental processes of myelination and neurological pruning continue through adolescence,[14] with the parts of the brain controlling behavioral inhibition and control, risk assessment, and decision-making developing later in life than other areas. As a result, young people have difficulty comprehending future consequences of their actions, have poor impulse control, and are more likely to be capable of rehabilitation.[15]

The Court reasoned that because of these underlying differences in ability to assess consequences, consider future punishment, and amenability to rehabilitation, none of the purposes underlying extreme sentences, specifically, retribution, deterrence, and permanent incapacitation, justified sentences of capital punishment or life without the possibility of parole for individuals under eighteen.[16]

The Court used the research to support the conclusion that, as a group, juveniles neurologically have both a diminished capability to understand consequences and the potential to change. Further, the Court concluded that

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[9] *See Roper*, 543 U.S. at 551; *Graham*, 560 U.S. at 68; *Miller*, 132 S. Ct. at 2463.

[10] *Roper*, 543 U.S. at 569.

[11] *Id.* (citing Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1014 (2003)).

[12] *See Roper*, 543 U.S. at 570.

[13] *Miller*, 132 S. Ct. at 2464 (quoting *Graham*, 560 U.S. at 68).

[14] *See generally* PAUL I. YAKOVLEV & ANDRE-ROCH LECOURS, *The Myelogenetic Cycles of Regional Maturation of the Brain*, *in* REGIONAL DEVELOPMENT OF THE BRAIN IN EARLY LIFE 3–70 (Alexandre Minkowski ed., 1967) (summarizing the authors' studies of post-mortem brains that revealed connections between myelination and brain maturation).

[15] *See* MACARTHUR FOUND. RESEARCH NETWORK ON ADOLESCENT DEV. & JUVENILE JUSTICE, LESS GUILTY BY REASON OF ADOLESCENCE 2 (2006), http://www.adjj.org/downloads/6093issue_brief_3.pdf [https://perma.cc/7D7F-X37H]. *See generally* YAKOVLEY & LECOURS, *supra* note 14 (finding that the brain areas that are among the last to mature are those that are associated with key behavioral functions, including impulse control, planning, and reasoning).

[16] *See Roper*, 543 U.S. at 551; Graham v. Florida, 560 U.S. 48, 68 (2010); *Miller*, 132 S. Ct. at 2463.

it is this capacity that is relevant for both assessments of culpability and rehabilitative potential, at least in extreme sentences.[17]

The Court's decisions also relied on considerations about the legal status of children in society, including other areas of the law that treat individuals under eighteen as incapable of making fully informed decisions.[18] By pointing to other legal contexts in which those under and over age eighteen are distinguished, such as serving on juries and voting, the Court indicated that the legal distinction between juveniles and adults in contexts outside of the criminal justice system is one factor in establishing a fundamental difference between the two groups.

It is important to note that some have argued that while the Court considered and appeared to rely on neuroscience to establish fundamental differences between children and adults, it may have only done so because the science reaffirmed the majority's own instinctive beliefs about the different status of children. In other words, the use of scientific arguments was because those arguments supplied by respondents and amici supported what Justice Kennedy characterized as what "any parent knows" about youths.[19] If this is so, then the relevance of neuroscience findings concerning emerging adults may be less persuasive to a future Court weighing these issues.

The Court acknowledged that limiting its holdings to individuals younger than eighteen did not foreclose the possibility that future research might reveal additional post-adolescent cognitive development. The Court admitted that selecting age eighteen was arbitrary line-drawing based on sociological factors and congruence with other areas of the law.[20]

The Court has thus far only relied on neuroscience research in establishing categorical bans for some of the most extreme sentences for juveniles—capital punishment and life without the possibility of parole. These cases demonstrate, however, that the highest court has embraced the legitimacy of the underlying scientific research and indicated that research is one basis upon which to analyze appropriate sentencing under the Eighth Amendment. Congress has the opportunity to follow the Court and proac-

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[17] *See* Maroney, *supra* note 7, at 781 ("Blameworthiness hinges partially on the degree to which the defendant's behavior was subject to deliberate control. Similarly, assessment of dangerousness hinges partially on the degree to which capacity for such control is likely to increase and be exercised. The former assessment informs moral judgment as to the offender's intent and character, while the latter informs utilitarian determination of the most effective response. More, that juveniles tend for this reason to be both less blameworthy and (eventually) less dangerous affects the likelihood that the same will be true of any given juvenile.").

[18] *See Roper*, 543 U.S. at 569 ("In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under eighteen years of age from voting, serving on juries, or marrying without parental consent.").

[19] *Id. See generally* Terry A. Maroney, *The False Promise of Adolescent Brain Science in Juvenile Justice*, 85 NOTRE DAME L. REV. 89 (2009) (arguing that the Court did not identify which briefs or neuroscience arguments it found persuasive and questioning the application of this research in cases beyond the circumstances of *Roper*).

[20] *See Roper*, 543 U.S. at 574 ("For the reasons we have discussed, however, a line must be drawn . . . . The age of eighteen is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest.").

tively consider the fundamental differences between youths and adults when designing appropriate sentencing procedures in the federal system beyond those for juveniles and beyond these extreme penalties.[21]

B. Emerging Adult Offenders: Research Findings

The Court has thus supported the conclusion that evidence of the mental capacity of emerging adults should be considered in sentencing determinations. Much of the same scientific research cited by the Court in *Roper*, *Graham*, and *Miller* for the proposition that juveniles are unique posits that brain development continues after age eighteen, rendering emerging adult brains similarly distinct from those of adults.[22] The Court did not limit its holding to individuals under eighteen on neuroscientific grounds, choosing instead to conform to other areas of law and sociological concerns.[23] The Court cited the work of Professor Jeffrey Jensen Arnett to support its conclusions on juvenile development,[24] a researcher who has subsequently published findings showing that significant behavioral and cognitive development continues through the twenties.[25]

Today, neuroscience research from noninvasive brain imaging and postmortem studies reveals that the brain continues to undergo significant changes after the age of eighteen. Areas of the brain that regulate behavior, impulse control, and executive function are not yet fully formed at age eighteen, and continue to develop into the twenties.[26] This delayed development can be assessed by measuring the amount of gray matter compared to the amount of white matter in the brain. Gray matter becomes white matter as the brain undergoes the process of myelination, which improves the processing speed of parts of the brain and improves cognitive ability.[27] Greater levels of white matter correlate with levels of executive function.[28] The prefrontal cortex, which governs judgment, reasoning, planning, and foresight of consequences, is located in the front of the brain, and as myelination begins at the back of the brain and moves forward, the prefrontal cortex is

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[21] Additionally, the Court has taken youth into account in other criminal justice contexts. *See* J.D.B. v. North Carolina, 564 U.S. 261, 281 (2011) (ruling that age must be taken into consideration when determining whether an individual was in police custody).

[22] *See* Arnett, *supra* note 4.

[23] *See Roper*, 543 U.S. at 554 ("While drawing the line at eighteen is subject to the objections always raised against categorical rules, that is the point where society draws the line for many purposes between childhood and adulthood and the age at which the line for death eligibility ought to rest."); Emily Buss, *What the Law Should (and Should Not) Learn from Child Development Research*, 38 HOFSTRA L. REV. 13, 38–39 (2009) (arguing that the Court's decision to place the cutoff at eighteen in *Roper* was arbitrary).

[24] *See Roper*, 543 U.S. at 569.

[25] *See* Arnett, *supra* note 4.

[26] *See* Melissa S. Caulum, *Postadolescent Brain Development: A Disconnect Between Neuroscience, Emerging Adults, and the Corrections System*, 2007 WIS. L. REV. 729, 742 (2007).

[27] *See id.*

[28] *See id.*

among the last to mature.[29] A recent study showed that, similar to adolescents, individuals between the ages of eighteen and twenty-one rely less on the prefrontal cortex in decision-making.[30]

However, different processes occur in the brains of emerging adults than in adolescents. This suggests that emerging adults, in addition to their differences from mature adults, are also a distinct population from juveniles. Emerging adults are more cognitively developed than adolescents due to their age, but emerging adults engage in more risk-seeking behavior, have more impulsivity than adolescents, and are more vulnerable to peer and outside influences.[31] At least until age twenty-one, if not beyond, emerging adults exhibit "the imbalance model of adolescence" wherein the parts of the brain that respond emotionally hijack the other parts of the brain, leading to an overreliance on regions of emotional response in situations of heightened emotion or stress.[32] This background of heightened emotional reactivity combines with the reality that emerging adults have "a greater degree of independence from family" and greater "access to both employment opportunities and to alcohol or controlled substances" than juveniles do.[33] Importantly, it also appears that emerging adults exhibit this "diminished cognitive capacity" more in emotionally heightened situations than non-emotional ones and retain the ability comparable to that of adults in situations that are not emotionally charged.[34]

Additionally, recent research shows that environmental factors can influence brain development beyond the age of eighteen.[35] This is important because individuals of this age group are increasingly less likely to be part of healthy, stabilizing environments due to delayed marriage, decreased parental oversight, and greater access to negative peer influence.[36] There is further

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[29] *See id.* at 743.

[30] *See* Cohen et al., *supra* note 5, at 783.

[31] *See id.*; Schiraldi et al., *supra* note 5. *See generally* Vivian E. Hamilton, *Immature Citizens and the State*, 2010 BYU L. Rev. 1055, 1115–16 (2010) (discussing high risk-taking levels and brain development in individuals eighteen through twenty-five).

[32] The "imbalance model of adolescence" posits that in emotionally charged situations, particularly in response to rewards, threats or peers, "the limbic regions of the brain may hijack less mature prefrontal regions leading to an imbalance or overreliance on these emotional regions." Cohen et al., *supra* note 5, at 783–84. It is argued this is present only in emerging adults because these parts of the brain are balanced in adolescence and only in emerging adulthood do they become out of whack. *Id.*

[33] Schiraldi et al., *supra* note 5.

[34] *See* Cohen et al., *supra* note 5, at 786.

[35] A Dartmouth study tracked neurological changes in seventeen- to nineteen-year-olds based on responses to their environment over time. *See generally* Craig M. Bennett & Abigail A. Baird, *Anatomical Changes in the Emerging Adult Brain: A Voxel-Based Morphometry Study*, 27 Hum. Brain Mapping 766 (2006).

[36] Vincent Schiraldi & Lael Chester, Harv. Kennedy Sch. Malcolm Wiener Ctr. for Soc. Pol'y, Public Safety and Emerging Adults in Connecticut: Providing Effective and Developmentally Appropriate Responses for Youth Under Age Twenty-One 11 (2016), https://www.hks.harvard.edu/content/download/82447/1848994/version/2/file/public_safety_and_emerging_adults_in_connecticut.pdf [https://perma.cc/N54S-S34X] (discussing the delayed transition to traditional markers of adulthood, including employment and marriage); *see also* Schiraldi et al. *supra* note 5, at 4 (discussing the changing context of adulthood and family structure in the United States).

evidence that exposure to trauma in childhood influences brain development and functioning.[37] If neuroscience can be an indication of diminished capacity that is relevant for criminal culpability, then the neurological status of emerging adults should be a potential mitigating factor within the federal sentencing structure.

In addition to new understandings of emerging adult development, the legal status of this population is changing, a relevant consideration given that *Graham* and *Miller* took the line of eighteen as a fairly uniform indicator of adulthood. The Court in *Graham* and *Miller* noted that the age of eighteen was a bright line for childhood and adulthood in most other areas of the law. Arguably, that consensus view of adulthood is shifting today. While the legal age to purchase alcohol has been twenty-one since 1984,[38] many cities and states have raised the age at which an individual can legally purchase cigarettes and marijuana to twenty-one as well.[39] Furthermore, other areas of the law have extended the age to which the government allows emerging adults to remain legally dependent on their parents in certain circumstances.[40] These legal changes have coincided with, and perhaps reflect, sociological changes, including deferred age of marriage and childbearing. These changes, combined with reduced access to employment, further disconnect young adults from historical stabilizing factors and "compound[ ] the challenges for this age cohort."[41] These sociological changes call into question whether this legal distinction between juveniles and adults should continue to hold significant bearing as a bright-line rule, given underlying social shifts and society's increased understanding of cognitive development.[42]

C. Applications and Limitations of Emerging Adults Neuroscience Research

Emerging adults are a distinct and heterogeneous group that merit a distinct sentencing scheme. The research points toward recognizing emerging adults as a unique category of individuals distinct from juveniles and adults based on their developmental and behavioral status, a group that on average may be less culpable and have a greater capacity for rehabilitation. Based on the reasoning articulated by the Court in *Graham* and *Miller*, crim-

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[37] *See* Schiraldi et al., *supra* note 5, at 4 ("[J]ustice-involved individuals are more likely to have experienced a traumatic incident, including sustaining a traumatic brain injury—more than twice as likely as the general population.").

[38] 23 U.S.C. § 158 (2012).

[39] *See* Cohen et al., *supra* note 5, at 777.

[40] *See* Reed Abelson, *Donald Trump Says He May Keep Parts of Obama Health Care Act*, N.Y. TIMES (Nov. 11, 2016), https://www.nytimes.com/2016/11/12/business/insurers-unprepared-for-obamacare-repeal.html [https://perma.cc/4MQ9-KPE4] (quoting President-elect Donald J. Trump stating he would like to retain the popular Affordable Care Act provision which allows children to remain on their parents' insurance plan until age twenty-six).

[41] Schiraldi et al., *supra* note 5, at 6.

[42] *See* Cohen et al., *supra* note 5, at 770–71.

inal sentencing schemes should reflect these conclusions drawn from the research.

This research works in the aggregate but not on the individual level: it cannot be applied to individuals to direct the sentencing court on what to do in a specific defendant's case.[43] Additionally, as a group, emerging adults are heterogeneous: some nineteen-year-olds have the cognitive capacity of adults, while some twenty-five-year olds are more equivalent to juveniles.[44] Further, whether an individual will exhibit diminished cognitive capacity is very context dependent.[45] Emerging adults, at least *in certain contexts*, should be sentenced differently than adults. These findings indicate that the use of presumptions may be the most effective way to incorporate neuroscience research into federal sentencing, rather than adopting a bright-line rule for all individuals under twenty-five.

Criminal behavior peaks in emerging adulthood, as does offending for serious crimes, and a disproportionate share of offenses are committed by emerging adults.[46] Not only does this demonstrate that many young adult offenders go on to lead law-abiding lives, it also highlights the importance of sentencing such individuals in an effective way. The focus on punitive incarceration as the primary sentencing tool has been ineffective at reducing crime committed by emerging adults and in promoting public safety.[47] Due to the disproportionately large presence of emerging adults in the system, finding a mechanism to more effectively rehabilitate this group of offenders would have a positive impact on the criminal justice system.

II. Alternative Ways to Treat Eighteen to Twenty-Five Year Olds in the Federal System

A. History and Implementation of the YCA

Congress should reinstate the YCA because it provided invaluable discretion and flexibility for federal judges sentencing emerging adults. The original provisions of the YCA as it was enacted in 1950 are supported by the neuroscience research of today. An overview of the provisions, the unfortunate repeal of the Act in 1984, and elements that Congress could improve upon today will demonstrate why this law is an essential step in reforming emerging adult justice.

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[43] *See* Maroney, *supra* note 7, at 769.

[44] *See* Caulum, *supra* note 26, at 740 ("There are nineteen-year-olds who have reached adulthood—demographically, subjectively, and in terms of identity formation—and twenty-nine-year-olds who have not. Nevertheless, for most people, the transition from emerging adulthood to young adulthood intensifies in the late twenties and is reached by age thirty.").

[45] *See id.*

[46] *See* The Council of State Gov'ts Justice Ctr., Reducing Recidivism and Improving Other Outcomes for Young Adults in the Juvenile and Adult Criminal Justice Systems 1–2 (2015), https://csgjusticecenter.org/wp-content/uploads/2015/11/Transitional-Age-Brief.pdf [https://perma.cc/R5VE-RGXP].

[47] *See id.*

Reinstating the YCA would be a meaningful way to move toward more effective treatment of emerging adults in the federal system and could be a model for state-level reforms. The understanding that emerging adults are different is not new to the federal system: under the repealed YCA, federal law treated these individuals as a unique group in the context of criminal justice involvement.[48] The YCA established an optional sentencing regime for certain offenders between the ages of eighteen through twenty-six in the District of Columbia and the federal courts.[49] The YCA was passed in 1950 based on Congress's recognition of the overrepresentation of eighteen through twenty-two year olds in the criminal justice system, and with the understanding that younger offenders were more likely to benefit from rehabilitation and training programs than from incarceration.[50]

The YCA established new treatment facilities, segregated incarcerated young offenders from older populations, and provided for the "setting aside" of convictions for individuals who were granted probation or parole before the maximum expiration of their sentence.[51] The setting-aside provision was not uniformly implemented in all circuits, but in all cases involved a mechanism for criminal convictions to be sealed from public view in some way. Importantly, it also established an optional sentencing regime for individuals between the ages of eighteen and twenty-six; the district court judge was given flexibility in her sentencing and could depart from "traditional sentencing patterns," instead focusing on a sentence that would promote "correction and rehabilitation."[52] Judicial discretion was key to the success of the YCA as it allowed a judge to determine what she believed was the appropriate sentence for a particular young adult, rather than being forced to sentence a young person to a mandatory minimum. After the repeal of the YCA, emerging adults are subject to the same mandatory minimum sentences and sentencing guidelines as older adults, with no provision to give judges discretion.

Repealed in 1984 as a part of a series of new crime control measures, the YCA provided an opportunity to consider the age of younger offenders in sentencing in a manner geared toward minimizing recidivism and reducing collateral consequences. The YCA operated in the framework of significant judicial discretion and indeterminate sentencing, and the repeal of the YCA was one component of the backlash to indeterminate sentencing in the

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[48] 18 U.S.C. § 5010 (repealed 1984).

[49] *Id.*

[50] The YCA was designed "to promote the rehabilitation of those youths who the sentencing judge believes show promise of becoming useful citizens." Alexander v. U.S. Parole Comm'n, 514 F.3d 1083, 1084 (10th Cir. 2008). Legislative history also shows that Congress thought that "dealing with young offenders at an early stage was the only way to turn them from a life of habitual crime; offenders within the relevant age group were seen to be at a crossroads, with one fork leading to rehabilitation, the other to indefinite recidivism." Fred C. Zacharias, *The Uses and Abuses of Convictions Set Aside Under the Federal Youth Corrections Act*, 1981 DUKE L.J. 477, 481 (1981).

[51] 18 U.S.C. § 5010 (repealed 1984).

[52] Watts v. Hadden, 651 F.2d 1354, 1374 (10th Cir. 1981).

1980s.[53] The law that repealed the YCA also abolished the federal parole system and established the federal sentencing commission. Some of the pushback to the YCA was rooted in the same progressive arguments that led to the creation of the Sentencing Commission: that judicial discretion led to racial disparities in sentencing.[54] Other critiques of indeterminate sentencing at the time believed that juvenile offending was becoming more serious and that a more punitive rather than rehabilitative approach was needed.[55] Today, there is an understanding that the introduction of the federal sentencing guidelines, increased use of mandatory minimums, and additional sentencing enhancements contributed to mass incarceration. While attempts have been made to roll back some of these reforms, little attention has been paid to the potential of restoring the YCA.

The YCA established a presumption that its sentencing provisions applied to individuals aged eighteen through twenty-two.[56] It required judges to make a finding on the record if they wished to depart from YCA sentencing provisions.[57] Additionally, judges could make an explicit finding that its provisions applied to defendants aged twenty-three to twenty-six appearing before them.[58] Under the YCA, judges could sentence individuals to up to six years of probation, up to four years of treatment or a diversionary program or, if they made a finding on the record that the individual would not benefit from rehabilitation, to any other sentence authorized by law, regardless of any mandatory minimum sentence.[59] Upon discharge from custody or probation, there was an automatic setting aside of convictions, essentially vacating them from an individual's criminal record.[60] This provision allowed young adults to have a second chance without the looming stigma of a criminal record as a barrier to employment, housing, and educational opportunities.

For the thirty-six years the YCA was in force there was also disagreement between courts about precisely what was required by the provision on setting aside criminal records. In some jurisdictions the sentencing judge did not have to give any explanation or reasons on the record for why she be-

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[53] *See* Ed Bruske, *Youth Act Repealed*, WASH. POST (Oct. 13, 1984), https://www.washingtonpost.com/archive/local/1984/10/13/youth-act-repealed/bc7189d0-1f2e-4881-a633-6b938d053fe7 [https://perma.cc/NA4L-CUTA] ("Some federal officials, including those in the Justice Department, said the change was necessary. They said there was too much disparity in the way judges sentenced and the crimes being committed by eligible offenders have become more serious.").

[54] *See id.*

[55] *See generally* WILLIAM BENNETT ET AL., BODY COUNT (1996) (coining the term "superpredators" to refer to young people under sixteen who commit serious offenses and arguing that longer prison sentences were needed to curb a rising crime rate).

[56] 18 U.S.C. § 5006(d) (repealed 1984).

[57] *See* Dorszynski v. United States, 418 U.S. 424, 425 (1974) (interpreting §5010(d) of the Federal Youth Corrections Act to require a judge to make a finding on the record if he or she believed the defendant would not benefit from a rehabilitative sentence and thus found the defendant ineligible for YCA sentencing).

[58] 18 U.S.C. § 4209 (repealed 1984).

[59] 18 U.S.C. § 5010(d) (repealed 1984).

[60] 18 U.S.C. § 5021(a) (repealed 1984).

lieved the offender would not benefit from rehabilitation, a decision that was unreviewable by circuit courts.[61] Other circuits, however, found the decision reviewable if the judge made a finding that seemed to be based on improper considerations.[62]

When it came to the "setting aside" of criminal records, there was additional disagreement between courts concerning what the setting-aside provision required. Some circuits held that the sealing was automatic,[63] some that records set aside under the YCA were fully sealed, others that the court would not publicize the information but would retain the records.[64] Additionally, courts disagreed as to whether the setting-aside provision was intended to be akin to a full expungement provision or whether YCA records set aside could legally be used as the basis of termination of employment or be available to private background check corporations.[65] The legislative history indicates that the setting-aside provision was intended to prevent young adults sentenced under the YCA from being burdened by the lifelong stigma of a criminal record and to give them a second chance, but that Congress also rejected a full expungement provision.[66] The question was not settled at the time of the YCA's repeal.

Some of the same criticism leveled against other rehabilitation-focused reforms could be said about the YCA. For example, some individuals sentenced to indeterminate sentences under the YCA mounted due process challenges because they served the same length of time as adult offenders or in some cases served even longer because the same parole standards for release

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[61] *See generally* Michelle Migdal Gee, Annotation, *Application of Rule of* Dorszynski v. United States *Requiring that Sentencing Court Make Express Finding of "No Benefit" from Treatment Under Youth Corrections Act (18 U.S.C.A. § 5005 et seq.)*, 54 A.L.R. FED 382 (1981) (collecting and analyzing the federal cases between 1974 and 1981 in which a federal court decided a defendant was ineligible for a Federal Youth Corrections Act sentence as he or she would not benefit from rehabilitation).

[62] In *United States v. Wardlaw*, the First Circuit held that the trial judge exceeded the bounds of his sentencing discretion when he made express findings that the defendant would not benefit from YCA treatment but made no reference to the defendant's age, his positive presentence reports, and that this was his first offense, and that the trial judge instead detailed on the record his negative view of "drug peddlers." *See* 576 F.2d 932, 936 (1st Cir. 1978).

[63] *See* Gee, *supra* note 56.

[64] *Compare* United States v. Purgason, 565 F.2d 1279, 1280 (4th Cir. 1977) (holding that a felony conviction that has been set aside cannot constitute a prior felony conviction for the purposes of the firearms crime for which the defendant was convicted), *with* Bear Robe v. Parker, 270 F.3d 1192, 1195 (8th Cir. 2001) (finding that a set-aside conviction may nonetheless serve as a basis for termination of employment), *and* United States v. McMains, 540 F.2d 387, 389 (8th Cir. 1976) (holding that the YCA set-aside provision does not entail expungement of the record); *see also* Margaret Colgate Love, *Starting over with a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 FORDHAM URB. L. J. 1705 (2003) (explaining that just prior to the repeal of the Federal Youth Corrections Act in 1984, a House Judiciary Committee was considering a bill that would "settle the judicial disagreement about the legal effect of a 'set aside' order" of the Act).

[65] *See* Love, *supra* note 59, at 1725–26.

[66] *See* Zacharias, *supra* note 50.

were applied to them as to adults.[67] It would be important to collect data on individuals sentenced under the renewed YCA to evaluate whether this frequently occurs as well as to gauge other aspects of the Act's efficiency.

B. Implementing the YCA Today

The YCA should be re-implemented today with many of the same provisions as its original enactment in order to reorient emerging adult justice to a fairer and more effective system. Individuals eighteen through twenty-two would be presumed to benefit from rehabilitation and could be sentenced to a term of probation not to exceed six years, rehabilitative programming not to exceed four years, or, if a finding were made that the individual would not benefit from rehabilitative programming, to any sentence of incarceration up to the maximum allowed by law. Individuals aged twenty-three through twenty-five could be found eligible for a YCA sentence by their sentencing judge. Much can be learned today from issues that arose in YCA litigation when the Act was in force. Disagreements about the setting aside provision could be avoided with a clearer statement of a full sealing provision for YCA records. A stronger indication of record sealing would more fully effectuate the original Act's purposes of giving young people a second chance. With the proliferation of private criminal history and credit reporting agencies and the rise of the use of background checks in employment decisions,[68] a stringent sealing provision that would limit the use of YCA records to law enforcement and prohibit their disclosure to private parties could be one of the most beneficial components of the Act for young people. [69]

The YCA would allow sentencing courts to make individualized determinations for each defendant considering the facts at hand, including the defendant's age, which judges are currently unable to fully consider in the federal system.[70] Additionally, courts will retain the ability to sentence an

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[67] Courts have upheld this on the grounds that individuals sentenced under the YCA were conferred other compensatory benefits from the Act. *See* Mark J. Hulkower, *Sentencing*, 72 GEO. L.J. 599, 562 (1983).

[68] *See generally* MICHELLE NATIVIDAD RODRIGUEZ & MAURICE EMSELLEM, THE NAT'L EMP'T LAW PROJECT, 65 MILLION "NEED NOT APPLY": THE CASE FOR REFORMING CRIMINAL BACKGROUND CHECKS FOR EMPLOYMENT (2011), http://www.nelp.org/content/uploads/2015/03/65_Million_Need_Not_Apply.pdf [https://perma.cc/P99J-XQS4] (exploring the rise of the use of criminal background checks in hiring, including one study that found ninety percent of employers used a background check in hiring decisions).

[69] A potential model is the Youthful Offender sealing statute in New York, for which the charge and conviction information is not publically available and cannot be used by private parties or as the basis of employment, housing or educational charges, but remains on file with the court for law enforcement purposes as opposed to juvenile records, which are fully expunged and destroyed in New York. *See* N.Y. CRIM. PROC. LAW § 720.35 (McKinney, Westlaw through L.2017, chapters 1 to 6 (2015)).

[70] *See generally* Nancy Gertner, *From Omnipotence to Impotence: American Judges and Sentencing*, 4 OHIO ST. J. CRIM. L. 523 (2007) (discussing the shift from indeterminate to guideline sentencing and the need for individualized sentencing so that the punishment adequately fits the offense).

individual to incarceration, as they do now, if the judge believes that the defendant would not benefit from rehabilitation.

Allowing judges to utilize their discretion in this way, with a presumption toward rehabilitation but retaining the option of incarceration, reflects the neuroscience research. The research demonstrates that this is a heterogeneous group of offenders, with some individuals more mature than others, and the YCA allows a judge to consider indications of maturity and planning when making the decision to apply the YCA to a given defendant appearing before her.

III. The Case for Implementing the YCA

A. The Current System is Unjust and Ineffective

Research indicates that the developmental needs of young people are not currently being met in the federal system.[71] The current system does not allow for an individualized assessment of an emerging adult. She is subject to the same mandatory minimums that have been criticized as being too harsh, even for adults, as well as the same advisory guidelines and limited sentencing options: prison or probation. The current system does not reflect the science that the Supreme Court has recognized as legitimate as it does not allow for leniency in sentencing based on youth or the use of diversionary programs on a large scale. By refusing to allow judges to consider the neurological and developmental differences between young adults and older defendants in sentencing, incarceration, and sealing of criminal records, the federal system currently sets up young people aged eighteen through twenty-five for failure.

B. The YCA Embodies Effective Ways to Support Emerging Adults

Alongside the growing body of research concerning adolescent brain development is increased evidence concerning which interventions are most effective in reducing recidivism and improving youth outcomes.[72] Punitive incarceration is largely ineffective in reducing offending, which may be because of the cornerstones of incarceration. Incarceration is punishment-focused, isolating, and largely devoid of rehabilitative, individualized programming, all of which are antithetical to the developmental needs of emerging adults.[73] Not only does incarceration fail to prevent reoffending, it may exacerbate the issues that young people who enter the justice system have. Incarceration is thus an ineffective tool for emerging adults, as demonstrated by high recidivism rates among this population.[74] Effective systems

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[71] *See* Chester & Schiraldi, *supra* note 36; Schiraldi et al., *supra* note 5.
[72] *See* Schiraldi et al., *supra* note 5.
[73] *See id.*
[74] *See id.*

of punishment and rehabilitation would look quite different from how the current federal system operates.[75]

Young people need programming that works to address their fundamental needs, frequently through cognitive-behavioral or multi-systemic therapy.[76] Rehabilitative programming for youth should address these needs in addition to addressing the direct offense for which the defendant was sentenced. This includes educational opportunities, employment, skills training, and mental health and substance abuse supports.[77] Youth especially need "positive adult-youth interactions, feedback loops and learning opportunities" during which they can exercise and develop "impulse control, judgment, future orientation and emotional maturity."[78] Many successful programs that prevent reoffending are community-based and involve family members as part of a systemic approach to meeting the needs of young defendants.

Beyond what is outlined in this Note, gaps in the research remain as to the most effective programming to target the needs of emerging adult offenders. Perhaps this is in part because there are fewer opportunities for individuals to be sentenced to programming in lieu of incarceration in this age range, as opposed to in the juvenile system. There are some promising projects on the local level that have effectively supported this subgroup of criminal justice-involved youth and that are thus deserving of further study.[79]

Evidence further shows that after exiting the criminal justice system, employment, housing, and education are stabilizing factors that contribute to successful reentry, positive life outcomes, and reduced recidivism.[80] Most emerging adults sentenced to prison will eventually be released.[81] When developing an effective sentencing system, policymakers should consider what is most likely to contribute to individual success and public safety in the long run. Public lifelong criminal records are incredibly stigmatizing and act as barriers to obtaining employment licenses, other job opportunities, housing, and education, as they can be the basis of legal discrimination. The current federal system does not treat emerging adults differently from older individuals: all criminal convictions remain on an individual's criminal record forever.[82]

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[75] *See* Caulum, *supra* note 26.

[76] *See* THE COUNCIL OF STATE GOV'TS JUSTICE CTR., *supra* note 46.

[77] *See* CHESTER & SCHIRALDI, *supra* note 36.

[78] Caulum, *supra* note 26.

[79] For example, Roca, a Massachusetts-based program focused on providing support for high-risk young people, has reduced recidivism among the emerging adult population it targets. *See* Schiraldi et al., *supra* note 5, at 12.

[80] *See id*.

[81] *See* Jessica Lahey, *The Steep Costs of Keeping Juveniles in Adult Prison*, ATLANTIC (Jan. 8, 2016), http://www.theatlantic.com/education/archive/2016/01/the-cost-of-keeping-juveniles-in-adult-prisons/423201 [https://perma.cc/HDC3-TKV6].

[82] The federal criminal code currently provides no process for expungement of criminal records. *See* S. 675, 114th Cong. (2015) (a bill unsuccessfully introduced in 2015 which would have amended the criminal code to provide a mechanism for expungement). Currently some federal circuits have held that a judge may order the expungement of a criminal record in

Sealing an individual's record would remove a lifelong stigmatizing barrier and provide the opportunity for a fresh start. Improving access to the stabilizing structures of employment and education would contribute to a reduction in recidivism, making this policy relevant for public safety concerns as well.

C. Critiques of the YCA Model

Courts and legislatures are increasingly grappling with the role neuroscience should play in individual case outcomes and policymaking.[83] The research is accurate in the aggregate but cannot be used on an individual basis to determine an individual defendant's moral culpability or propensity for reform. Questions remain, therefore, about how judges should, if discretion is returned to them through the YCA, exercise such discretion. Fears that discretionary decisions regarding which individuals are eligible for rehabilitative programming could lead to differential outcomes along racial or socioeconomic lines are not entirely misplaced. Such criticism of discretion, after all, helped lead to the abolition of the indeterminate sentencing schemes in the first instance.[84] Furthermore, even absent fears of implicit bias, there are worries about how judges can accurately determine whether a person would benefit from rehabilitation, and questions about the accuracy of risk assessment tools that are used as part of such a determination.[85]

The proposal to reenact the YCA also rests on an assumption that probation departments and alternative programs available as sentencing options would work well, with the goal of supporting young people rather than returning individuals on their caseload to prison for technical violations.[86] One circular issue is the lack of sufficient data on what programming for this age group is most effective, which may be driven by the fact that most individu-

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extreme circumstances, while others have held that federal courts lack the jurisdiction to do so. *See* Raj Mukherji, Note, *In Search of Redemption: Expungement of Federal Criminal Records* (Law Sch. Student Scholarship, Paper 163, 2013), http://scholarship.shu.edu/cgi/viewcontent.cgi?article=1163&context=student_scholarship [https://perma.cc/R3HS-CXK7]. Moreover, even in jurisdictions where judges have this ability, circumstances that meet the extreme circumstances standard are rare. *Id.* at 2.

[83] *See generally* Francis X. Shen, *Neurolegislation: How U.S. Legislators Are Using Brain Science*, 29 HARV. J.L. & TECH. 495 (2016) (reviewing legislation introduced at state legislatures that has incorporated neuroscience and noting that through 2009 neuroscience was mentioned in nearly one thousand bills).

[84] *See* Nancy Gertner, *A Short History of American Sentencing*, 100 J. CRIM. L. & CRIMINOLOGY 691, 696–97 (2010).

[85] *See* Julia Angwin et al., *Machine Bias*, PROPUBLICA (May 23, 2016), https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing [https://perma.cc/S6C3-YZXS].

[86] The probation system used in the Pre-trial Opportunities Program at the Eastern District of New York could be a good example to use as a model nationwide as it combines holistic services, treatment, and supervision. *See* U.S. DIST. CT. E.D.N.Y., REPORT TO THE BOARD OF JUDGES, ALTERNATIVES TO INCARCERATION IN THE EASTERN DISTRICT OF NEW YORK: THE PRETRIAL OPPORTUNITY PROGRAM AND THE SPECIAL OPTIONS SERVICES PROGRAM (2014), http://www.ussc.gov/sites/default/files/pdf/training/annual-national-training-seminar/2014/article_EDNY.pdf [https://perma.cc/9ZFA-PEZM].

als in this age range are not given the option of alternatives to incarceration programming.

There is also a fear that the underlying neuroscience could be adopted to argue for prolonged incapacitation if an individual seems statistically less likely to reform, or could be taken to mean that all individuals in the justice system under twenty-five should presumptively be incarcerated because they lack the capacity to understand their actions.[87] This is a risk for advocates who endorse embracing neuroscience to push for leniency in sentencing and should not be taken lightly.

Lastly, pushback to sentencing that some criticize as too lenient remains, as evidenced by recent reporting on the District of Columbia's Youth Act.[88] This pushback raises the question of whether representatives in Congress might fear political risks for endorsing a more rehabilitative-focused approach.

Conclusion

The rise of developmental neuroscience, alongside other scientific and technological advancements, should change how and when Congress uses research to develop a more effective and just criminal justice system. The Supreme Court has embraced this neuroscience as evidence that juveniles under age eighteen ought to be sentenced differently than adults. This same type of research now shows that as a group, emerging adults between eighteen and twenty-five also have reduced cognitive abilities and are more amenable to rehabilitation. The current federal sentencing system, however, bars judges from considering these factors when sentencing emerging adults, leaving them sentenced to the same prison terms as older defendants. The YCA presents an opportunity for the federal system to take an effective step in changing the way the courts respond to and treat young adult offenders and should be seriously considered by the next Congress.

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[87] *See* Graham v. Florida, 560 U.S. 48, 117 (2010) (Thomas, J., dissenting) (arguing that studies cited by the majority appeared to make somewhat reliable predictions as to future dangerousness and indicating that some of the risk factors were present in the defendant, in which case a more severe punishment might be justified); Maroney, *supra* note 7.

[88] *See* Amy Brittain et al., *Second-Chance Law for Young Criminals Puts Violent Offenders back on the Streets*, Wash. Post (Dec. 3, 2016), https://www.washingtonpost.com/investigations/second-chance-law-for-young-criminals-puts-violent-offenders-back-on-dc-streets/2016/12/02/fcb56c74-8bc1-11e6-875e-2c1bfe943b66_story.html?utm_term=.0a3d84c3e39c [https://perma.cc/J755-JKFP].