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I. INTRODUCTION

The early 2000s witnessed an important sea change in American death penalty jurisprudence. First, the Supreme Court's momentous 2002 decision in *Atkins v. Virginia* categorically exempted the intellectually disabled from the death penalty.[1] Central to the Court's reasoning was the proposition that societal standards of decency put the practice of executing such individuals within the scope of the Eighth Amendment's "cruel and unusual punishments" prohibition.[2] In *Atkins*, the Court did not initially prescribe a method for determining the presence of intellectual disability, leaving the states to carry out the Court's ruling.[3] Informed by the Court's analysis of intellectual disability, the states have relied on IQ testing and professional

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1. Atkins v. Virginia, 536 U.S. 304, 320–321 (2002).

2. *See id.* at 316.

3. *Id.* at 317.

evaluation of offenders' adaptive behaviors to determine who may fall into the intellectual disability exemption. Later Supreme Court guidance has made this methodology a requirement.

Three years after *Atkins*, the Supreme Court's decision in *Roper v. Simmons* created another categorical exemption in the form of a "bright-line" rule prohibiting the execution of offenders convicted of capital crimes committed before the age of 18. As in *Atkins*, the Court found that national evolving standards of decency regarded the practice of executing juvenile offenders as a form of cruel and unusual punishment proscribed by the Eighth Amendment. In the Court's words, "[Eighteen years old] is the point where society draws the line for many purposes between childhood and adulthood and [is] the age at which the line for death eligibility ought to rest."[4]

Sixteen years later, a new evolving standards of decency argument is emerging in support of raising the death eligibility age to twenty-one due to greater scientific understanding of the lingering developmental immaturity among such individuals. While well intentioned, this argument misses the mark. As this Comment will illustrate, duplicating *Roper*'s bright-line rule approach for older offenders is antithetical to demands that the death penalty be reserved for the most culpable offenders. This is because the criterion for inclusion in the *Roper* exemption is mere age, which excludes assessment of offenders on the basis of attributes and mental culpability. For this reason, the *Roper* bright-line rule suffers from arbitrary application.[5] Simply expanding the *Roper* exemption will only replicate this problem. Rather, any new exemption for young adult offenders should be made consistent with *Atkins* and its progeny, which require an attribute-driven assessment of death eligibility grounded on clinical tools for diagnosing

4. Roper v. Simmons, 543 U.S. 551, 554 (2005).

5. *See infra* Section II.B.2.

intellectual disability. The *Atkins* approach, much more so than *Roper*, emphasizes individual characteristics and the capacity for mental culpability, and presents a superior model for death penalty exemption.

Though adopting an *Atkins*-like approach for young offenders would require the rejection of age-defined bright-line rules, this Comment will further demonstrate that the current state of neuroscience and clinical psychology suggests that the idea may be much more feasible than is commonly presumed. It is important to emphasize that this Comment does not seek to present a complete framework for a new young offender exemption. Instead, the objective of the present inquiry is to challenge the assumption that the *Atkins* approach is impossible to apply to young offenders and to demonstrate its viability. In the process, this Comment provides some insight into what an attribute-driven assessment of young offenders might entail in the context of death penalty eligibility, including tools and methodologies already available from modern science.

II. THE ROAD TO EXEMPTING JUVENILES FROM THE DEATH PENALTY

A. *Evolving Standards*

The Fourteenth Amendment empowers the Supreme Court to review the states' imposition of the death penalty and hold such punishment up to the rigors of the Eighth Amendment's prohibition of "cruel and unusual punishments."[6] In full, the Cruel and Unusual Punishments Clause asserts, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[7] To date, the Court has declined to find that the death penalty is unconstitutional per se under the Eighth

6. *Roper*, 543 U.S. at 560.

7. U.S. CONST. amend. VIII.

Amendment.[8] However, the Court has deemed certain applications of the death penalty to be unconstitutional, such as its imposition in cases involving juveniles, the intellectually disabled, and non-homicide crimes.[9] In the twentieth century, the Court has principally used as its guide an "evolving standards of decency" test in delimiting such cruel and unusual punishments.[10]

Development of Eighth Amendment evolving standards of decency doctrine has roots in the 1910 case *Weems v. United States*.[11] In *Weems*, the Court considered the meaning of cruel and unusual punishment in evaluating the constitutionality of a fifteen-year sentence of imprisonment and "hard and painful labor" imposed on a US officer for the crime of falsifying government documents.[12] The Court noted that the meaning of the term was not static "but may acquire meaning as public opinion becomes enlightened by a humane justice."[13] In the later case *Trop v. Dulles*, which involved the

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8. For discussion, see John D. Bessler, *Tinkering Around the Edges: The Supreme Court's Death Penalty Jurisprudence*, 49 AM. CRIM. L. REV. 1913, 1916–19 (2012).

9. *See id.* at 1918–19. *Kennedy v. Louisiana*, 554 U.S. 407 (2008), prohibited imposition of the death penalty for non-homicide child rape, although the decision has been interpreted as applying to nonhomicide crimes generally. *See* Graham v. Florida, 560 U.S. 48, 61 (2010) (citing *Kennedy*, 551 U.S. at 437–38).

10. *Roper*, 543 U.S. at 561 (quoting Trop v. Dulles, 356 U.S. 86, 100–01 (1958) (plurality opinion)). As this Comment focuses on evolving standards of decency doctrine, earlier history of the constitutionality of the death penalty will not be explored.

11. Weems v. United States, 217 U.S. 349 (1910).

12. *Id.* at 357. Additional features of the sentence included "a chain at the ankle and wrist of the offender, . . . no assistance from friend or relative, no marital authority or parental rights or rights of property, no participation even in the family council," and post-imprisonment limitations in personal liberties. *Id.* at 366. The sentence was imposed by the Supreme Court of the Philippine Islands, which was a U.S. territory at the time. *See generally* Victoria Reyes, *After More Than a Century, Did the Philippines Finally Break Free from the United States?*, WASH. POST (Feb. 21, 2020, 6:00 AM) https://www.washingtonpost.com/outlook/2020/02/21/after-more-than-century-did-philippines-finally-break-free-united-states/.

13. *Weems*, 217 U.S. at 378.

constitutionality of stripping a military deserter of US nationality, the Court referred to the Eighth Amendment analysis of *Weems*, concluding that cruel and unusual punishment draws meaning from "evolving standards of decency that mark the progress of a maturing society."[14]

The Court in *Furman v. Georgia*, in a per curiam decision, ruled that the death penalty as applied in the cases at bar constituted cruel and unusual punishment.[15] The decision was 5-4, with each of the nine Justices issuing their own opinion.[16] Though the decision struck down existing US death penalty laws, the moratorium was short lived.[17] Four years after *Furman*, the Court issued a contrary decision in *Gregg v. Georgia*[18] (and in two companion cases, *Jurek v. Texas*[19] and *Proffitt v. Florida*[20]). In *Gregg*, the Court ruled that Georgia's death penalty statute, amended in the wake of *Furman*, was constitutional.[21] Important to the Court's reasoning was the legislative response to *Furman*, which appeared to militate against the standards of decency case for per se rejection of the death penalty.[22] At the time of the decision, thirty-five states had enacted new death penalty

14. Trop v. Dulles, 356 U.S. 86, 100–01 (1958) (plurality opinion).

15. Furman v. Georgia, 408 U.S. 238, 239–40 (1972) (per curiam).

16. *Id.*

17. Bessler, *supra* note 8, at 1913.

18. Gregg v. Georgia, 428 U.S. 153 (1976).

19. Jurek v. Texas, 428 U.S. 262 (1976) (holding that the death penalty is not per se unconstitutional and upholding Texas sentencing procedures).

20. Proffitt v. Florida, 428 U.S. 242 (1976) (holding that the death penalty is not per se unconstitutional and upholding Florida sentencing procedures).

21. *Gregg*, 428 U.S. at 162–63, 196–207 ("The basic concern of *Furman* centered on those defendants who were being condemned to death capriciously and arbitrarily. . . . The new Georgia sentencing procedures, by contrast, focus the jury's attention on the particularized nature of the crime and the particularized characteristics of the individual defendant. . . . No longer can a jury wantonly and freakishly impose the death sentence; it is always circumscribed by the legislative guidelines.").

22. *Id.* at 179–81.

statutes to address the concerns of the *Furman* Court.[23] Considering such facts, the Court reasoned, "[I]t is now evident that a large proportion of American society continues to regard [the death penalty] as an appropriate and necessary criminal sanction."[24]

The *Gregg* opinion is notable for presenting the evolving standards of decency analysis as a two-part test to be applied to death penalty cases. The two prongs of the Court's evolving standards of decency analysis are: first, a search for "objective indicia" of national consensus on the appropriateness of imposition of the death penalty for particular crimes;[25] and second, whether the death penalty serves the penological purposes of deterrence and retribution.[26] The modern test for death penalty constitutionality still employs this two-prong test, and it has been central to later cases most relevant to this Comment, namely, *Atkins v. Virginia*, decided in 2002, and *Roper v. Simmons*, decided in 2005. Using the evolving standards of decency doctrine, *Atkins* and *Roper* established, respectively, categorical exemptions to the death penalty for the intellectually disabled[27] and juvenile offenders. The following section explores these cases in more detail.

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23. *Id.* (finding, for example, that new state statutes "specif[ied] the factors to be weighed and the procedures to be followed in deciding when to impose a capital sentence . . .").

24. *Id.* at 179. In notable contrast, that same year, the Court ruled in *Woodson v. North Carolina* that mandatory death sentences violated the Eighth Amendment, describing such sentences as "unduly harsh and unworkably rigid" and concluding that they were no longer accepted in modern American society. 428 U.S. 280, 293 (1976); *see also* Bessler, *supra* note 8, at 1914.

25. *Gregg*, 428 U.S. at 173.

26. *Id.* at 183.

27. Note that Supreme Court in *Atkins* used the term "mentally retarded" in its decision. This Comment employs the term "intellectual disability," which is the preferred modern clinical terminology. *See infra* notes 37–39 and accompanying text.

B. *A Tale of Two Categorical Exemptions*

Of the categorical exemptions from the death penalty established by the Supreme Court, two cases, *Atkins* and *Roper*, are especially conceptually linked. Indeed, *Atkins* featured prominently in the Court's reasoning in *Roper*, decided a mere three years after the *Atkins* decision. As *Atkins* dealt with intellectually disabled defendants and *Roper* dealt with juveniles, at issue in each case was the peculiar mental deficiencies of each category of individuals, making them less criminally culpable and rendering the death penalty inappropriate.

However, the categorical approaches of *Atkins* and *Roper* differ significantly. In particular, while the Court in *Atkins* observed the importance of IQ tests in identifying intellectually disabled offenders, the justices did not insist on a bright-line rule establishing a maximum IQ cut-off point.[28] Rather, the Court acknowledged that intellectual disability involves not just "subaverage intellectual functioning" but also deficiencies in "adaptive skills," including "communication, self-care, and self-direction."[29] Noting these parameters, the Court left the task of determining which offenders fall into the exemption up to the states.[30]

In contrast, the *Roper* decision established a definitive bright-line rule, exempting from the death penalty offenders who committed their offenses before the age of eighteen. Under this rule, the inquiry into applicability of the exemption ends at identification of the offender's birthdate at the date of the crime. Unlike the intellectually disabled, a court need not examine a juvenile offender's mental

28. *See* Atkins v. Virginia, 536 U.S. 304, 308 n.3 (2002) (highlighting multifaceted definitions of "mental retardation" utilized by the medical community); Jeffrey Fagan, Atkins*, Adolescence, and the Maturity Heuristic: Rationales for a Categorical Exemption for Juveniles from Capital Punishment*, 33 N.M. L. REV. 207, 212–14 (2003).

29. *Atkins*, 536 U.S. at 318.

30. *Id.* at 317.

attributes to determine eligibility for the exemption. A detailed exploration of these crucial cases follows.

1. *Atkins* and Exempting the Intellectually Disabled

The Court in *Atkins* offered three primary rationales for exempting the intellectually disabled from the death penalty.[31] First, the Court recognized that a national consensus had developed against executing the intellectually disabled.[32] This determination was not based on the sheer number of states that had the exemption, but rather on the rapid "procession" of states that established the exemption from 1988 to 2001.[33] In this thirteen-year period, nineteen states and the federal government implemented the exemption.[34] Even in those states without the prohibition, actual execution of the intellectually disabled was uncommon.[35]

Second, the Court argued that the execution of the intellectually disabled failed to serve deterrent or retributive purposes, as required by Supreme Court death penalty jurisprudence.[36] With regard to retribution, the Court noted that it has consistently required that the death penalty be reserved for the most serious crimes.[37] As such, the Court has rejected the imposition of the death penalty when the offender did not exhibit depravity beyond that of the average

31. *See generally* Fagan, *supra* note 28.

32. *Atkins*, 536 U.S. at 313–16.

33. *Id.* at 313–15. The Court noted that the shift occurred in reaction to both the 1986 execution of Jerome Bowden, an intellectually disabled offender convicted of murder and the Court's refusal to prohibit the execution of the intellectually disabled in the 1989 case of *Penry v. Lynaugh*. For details of the case, abrogated by *Atkins*, see Penry v. Lynaugh, 492 U.S. 302 (1989).

34. *See id.*

35. *See id.* at 316.

36. *See* Gregg v. Georgia, 428 U.S. 153, 182–83 (1976); *Atkins*, 536 U.S. at 319.

37. *Atkins*, 536 U.S. at 319.

murderer.[38] The *Atkins* Court reasoned that if the culpability of the average murderer could not justify the death penalty, then the *lesser* culpability of an intellectually disabled offender certainly could not justify the death penalty. Furthermore, the Court rejected that executing the intellectually disabled could serve a deterrent purpose, because such individuals lack the capacity to evaluate the risk of the penalty before deciding to offend and would not likely be deterred by the penalty.[39] In addition, the *Atkins* Court observed that the intellectually disabled face a heightened risk of wrongful execution.[40] In particular, these individuals face an enhanced risk of false confessions, and they may also be less able to demonstrate mitigating factors that call for less severe punishment or assist their counsel in their defense.[41]

The Court cited the definition of intellectual disability provided by the American Association of Intellectual and Developmental Disabilities (AAIDD)[42] as well as the American Psychiatric Association's (APA) similar definition.[43] The current definition of intellectual disability

38. Godfrey v. Georgia, 446 U.S. 420, 432–33 (1980) (holding that a death sentence for two murders committed under conditions of "extreme emotional trauma" where the victims died instantaneously was not justified).

39. *Atkins*, 536 U.S. at 319–20 ("The theory of deterrence in capital sentencing is predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct. Yet it is the same cognitive and behavioral impairments that make these defendants less morally culpable—for example, the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses—that also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information.").

40. *Id.* at 321.

41. *Id.*

42. *Id.* at 308 n.3. The AAIDD was known at the time as the American Association on Mental Retardation ("AAMR") and, accordingly, provided a definition on "mental retardation" rather than "intellectual disability." *See About Us*, AM. ASS'N ON INTELL. & DEVELOPMENTAL DISABILITIES, https://www.aaidd.org/about-aaidd (last visited Feb. 15, 2020).

43. *Atkins,* 536 U.S. at 308 n.3. The APA definition used was also for "mental

involves limitations in intellectual functions, such as in learning, reasoning, and problem solving.[44] An IQ test of seventy or as high as seventy-five generally indicates intellectual limitation.[45] Adaptive behavior includes conceptual skills, such as language and literacy, number concepts, and self-direction; social skills, such as interpersonal skills and social responsibility; and practical skills, such as activities of daily living.[46] In addition, another key hallmark of intellectual disability is that symptoms manifest before the age of twenty-two.[47]

In order to conform to *Atkins*, the states have turned to clinical definitions of intellectual disability provided by the AAIDD, the APA, and the Diagnostic Statistical Manual of Mental Disorders.[48] As a result, the states have typically implemented *Atkins* by identifying a three-prong test for intellectual disability. These prongs include: (1) significant subaverage intellectual functioning; (2) deficient adaptive behaviors; and (3) onset of such symptoms before the age of eighteen.[49] The test has been set by state statutes or established by the courts themselves.[50] Significant subaverage intellectual functioning is regarded as measurable intelligence falling approximately two standard

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retardation."

44. *Definition of Intellectual Disability*, AM. ASS'N ON INTELL. & DEVELOPMENTAL DISABILITIES, https://www.aaidd.org/intellectual-disability/definition (last visited Feb. 15, 2020).

45. *Id.*

46. *Id.*

47. *Id.*

48. *See, e.g.*, United States v. Wilson, 170 F. Supp. 3d 347, 352–53 (E.D.N.Y. 2016).

49. *See, e.g.*, CAL. PENAL CODE § 1376 (West 2021).

50. *See* James W. Ellis et. al., *Evaluating Intellectual Disability: Clinical Assessments in Atkins Cases*, 46 HOFSTRA L. REV. 1305, 1312 (2018). As noted in *Wilson*, Cal. Penal Code § 1376 provides an example of a statutory definition of intellectual disability. 170 F. Supp. 3d at 352–53 (an example of court-developed doctrine).

deviations from the mean score of one hundred.[51] Thus, an IQ score of approximately seventy to seventy-five or less indicates intellectual disability.[52] The IQ tests likely to appear in court in *Atkins* cases are the Stanford-Binet Intelligence Scales and the Wechsler Adult Intelligence Scale.[53] Short-form versions of IQ tests, which take considerably less administration time, may be used and submitted to courts, though reliance on such tests may be considered controversial.[54]

2. *Roper* and Exempting Juvenile Offenders

Three years after *Atkins*, the Court decided the issue of juvenile death eligibility in *Roper v. Simmons*. Prior to *Roper*, the Court had set aside a death sentence for a fifteen-year-old offender in the plurality decision of *Thompson v. Oklahoma*.[55] Four Justices in that case ruled that evolving standards of decency precluded executing offenders under the age of sixteen at the time of their crimes.[56] However, Justice O'Connor, in her concurrence, did not endorse this proposition, asserting that more evidence was needed, and the issue was left undecided.[57] The following year, the majority of the Court denied that a national consensus regarded the execution of juvenile offenders[58] as cruel and

51. Ellis et al., *supra* note 50, at 1327.

52. *Id.* at 1328.

53. *Id.* at 1347–49.

54. *Id.* at 1354–56.

55. Thompson v. Oklahoma, 487 U.S. 815 (1988).

56. *Id.* at 818–38. The four Justices were Stevens, Brennan, Marshall, and Blackmun.

57. *Id.* at 848–49 (O'Connor, J., concurring) ("Although I believe that a national consensus forbidding the execution of any person for a crime committed before the age of 16 very likely does exist, I am reluctant to adopt this conclusion as a matter of constitutional law without better evidence than we now possess.").

58. Note that, prior to *Roper*, an offender who had committed a capital crime as a juvenile might not have been sentenced to death or actually executed until the offender surpassed the age of eighteen. This Comment uses the term "juvenile offender" to refer to those who committed their offenses before the age of eighteen

unusual punishment in *Stanford v. Kentucky*.[59]

Though juvenile offender executions were not prohibited before *Roper*, youth could be considered as a mitigating factor in deciding whether death was justified in capital cases involving juvenile offenders. In *Roper*, the defendant's youth was submitted to the jury as a mitigating factor to forestall the penalty of death.[60] Nonetheless, the jury recommended the death sentence, which the court subsequently imposed on the defendant.[61] In fact, the prosecution used the factor of youth as a *reason* to impose the death penalty, saying to the jury, "Think about age. Seventeen years old. Isn't that scary? . . . Mitigating? Quite the contrary I submit."[62]

Simmons unsuccessfully petitioned for postconviction relief on a theory of ineffective assistance of counsel.[63] However, after the *Atkins* decision in 2002, Simmons again petitioned for relief on the grounds that *Atkins* prohibited imposing the death penalty on juvenile offenders.[64] The Supreme Court of Missouri agreed with this proposition and set aside the death sentence.[65] The court specifically cited the development of a national consensus against executing juvenile offenders.[66]

The Supreme Court affirmed the Missouri high court's

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without respect to whether the individual would have been sentenced to death or executed while still a juvenile.

59. Stanford v. Kentucky, 492 U.S. 361, 380 (1989), *abrogated by* Roper v. Simmons, 543 U.S. 551 (2005).

60. *Roper*, 543 U.S. at 558.

61. *Id.*

62. *Id.*

63. *See* State v. Simmons, 944 S.W.2d 165, 169 (Mo.) (en banc), *cert. denied*, 522 U.S. 953 (1997) (affirming Simmons' conviction); Simmons v. Bowersox, 235 F.3d 1124, 1127, *cert. denied*, 534 U.S. 924 (2001) (denying Simmons' writ of habeas corpus).

64. State *ex rel.* Simmons v. Roper, 112 S.W.3d 397, 400 (Mo. 2003) (en banc).

65. *Id.*

66. *Id.* at 399.

decision in *Roper*.[67] With regard to the national consensus prong of the evolving standards of decency analysis, the Court observed that, even in the twenty states that did not prohibit juvenile execution at the time of the Court's opinion, the practice was not common, and only three states had performed such executions in the decade preceding the decision.[68] The rate of change in reducing or abolishing the practice was notably slower than the change that occurred between *Penry* and *Atkins* with respect to the intellectually disabled.[69] However, as in *Atkins*, the Court was focused on the "consistency of the direction of change," rather than raw numbers.[70] Significant to the Court in *Roper* was the fact that since *Stanford*, no state that had prohibited the death penalty for juveniles had reinstated the penalty.[71] That this occurred in an atmosphere of "general popularity of anticrime legislation" and signaled a trend toward "cracking down on juvenile crimes in other respects" was likewise notable.[72] The Court also speculated that the slow rate of change between *Stanford* and *Roper* could be explained by the fact that twenty-seven death penalty states had already created juvenile exemptions by the time *Stanford* was decided.[73] Furthermore, given that only two states had exempted the intellectually disabled by the time *Penry* was decided and *Stanford* and *Penry* were decided at the same time, the number of juvenile exemptions preceding *Stanford* suggested the prohibition had gained widespread support earlier than exempting the intellectually disabled.[74]

As to the second prong of the analysis, the Court, citing

67. *Roper*, 543 U.S. at 561.

68. *Id.* at 564–65.

69. *Id.* at 565.

70. *Id.* at 566.

71. *Id.*

72. *Id.*

73. *See id.* at 566–67.

74. *See id.*

Atkins, noted that the death penalty must be reserved for offenders who commit "a narrow category of the most serious crimes" and whose "extreme culpability" makes them the "most deserving of execution."[75] Three features of juveniles suggested that they should not be classified with the worst offenders. These features included being more prone to engage in reckless behavior, being more susceptible to negative peer influence, and having more transitory personality traits.[76] As juveniles are more vulnerable to immature, reckless behavior, the Court reasoned irresponsible juvenile conduct is not as morally reprehensible as that of an adult.[77] Moreover, this behavior did not denote a moral character failing on par with that of an adult since juveniles do not yet have fully formed characters and are amenable to reform.[78]

Due to the realities of juvenile psychology, the Court denied that the death penalty could be justified by deterrent or retributive considerations. Echoing the reasoning in *Atkins*, if the death penalty is not justified for the level of culpability for the "average murderer," then it cannot be justified for the lesser culpability of a juvenile.[79] As for deterrence, the Court stated that it was unclear whether juveniles could be deterred by the death penalty, but that their hallmark psychological features suggest that they are less likely to engage in the cost-benefit analysis that is at the heart of deterrence theory. Thus, since retribution and deterrence did not adequately justify the death penalty for juveniles, the punishment failed the second prong of the evolving standards of decency test. For these reasons, the Court established an unequivocal bright-line rule exempting

75. *Id.* at 568 (original quotation marks omitted).

76. *Id.* at 569–70.

77. *Id.* at 570.

78. *Id.*

79. *Id.* at 571; Atkins v. Virginia, 536 U.S. 304, 319 (2002); *see also* Godfrey v. Georgia, 446 U.S. 420, 432–33 (1980).

from the death penalty those who had committed capital offenses before the age of eighteen.[80] *Stanford* was, therefore, overturned.[81]

The Court in *Roper* was quick to acknowledge that its bright-line rule was vulnerable to criticisms of arbitrariness.[82] Giving short shrift to the concern, Justice Kennedy declared simply that "a line must be drawn" and noted the widespread societal acknowledgement that eighteen marks the line between childhood and adulthood.[83] The Court's statement no doubt reflects pragmatic intuitions that exempting young offenders from the death penalty necessitates the imposition of such a line. Indeed, the *Roper* bright-line rule approach is attractive for practical reasons alluded to by Justice Kennedy. The rule provides a clear, definitive test for exempting a class of individuals whom society, in the main, believes ought to be exempted from the death penalty. In addition, the bright-line approach precludes the occurrence of controversial borderline cases by eliminating gray areas of application. The pragmatic appeal of the *Roper* rule also preempts worries over how to objectively evaluate juvenile mental characteristics that might otherwise serve as a basis for exemption.

Nonetheless, the foregoing rationales do not allay the serious criticism that the *Roper* rule established an arbitrary exemption from the death penalty. The Court's reasoning, after all, relied on the fact that juvenile brain development and mental characteristics make them less culpable for crimes. But under the *Roper* rule, offenders with presumably very few developmental differences[84] are eligible for wildly

80. *Roper*, 543 U.S. at 578–79.

81. *Id.*

82. *See id.* at 574 ("The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach.").

83. *Id.*

84. For example, an offender who is 17 years and 11 months old and an offender who is 18 years and 1 month old.

different punishments. This result is contrary to the proposition, articulated in *Roper*, that the death penalty ought to be reserved for the most culpable offenders and for the most serious crimes.

The above considerations underscore the difficulty with proposals to cure the limitations of *Roper* by simply increasing the death penalty exemption age to twenty-one. In effect, advocates propose establishing another bright-line rule with an enlarged membership category. Though certainly this approach will exempt more individuals from the death penalty who ought to be exempt under the *Roper* rationale,[85] identical problems of arbitrariness arise. That is, the rule would deny exemption notwithstanding the fact that an individual's mental deficiencies and relative culpability may be identical to an individual who is eligible for the exemption due to age. The decision procedure would not be based on a coherent theory of culpability but a judicially imposed cut-off point and would be susceptible to the same inadequacies as the *Roper* decision itself.

But is this result truly necessary to exempt young offenders from the death penalty? This Comment will argue the answer is "no." An examination of *Atkins* and its implementation suggests that an alternative approach to young offenders is both possible and desirable. Although this Comment does not attempt to detail a specific model for such an approach, it instead demonstrates, as in *Atkins* cases, that a court can evaluate the mental attributes and relative culpability of young offenders in a way that is holistic, individualized, and without reliance on arbitrary cut-off points. To this end, the following section will set forth the grounds for the current evolving standards of decency argument for exempting young adults under twenty-one from the death penalty, followed by an examination of how *Atkins* has been applied in capital cases. This discussion will

85. I.e., on the basis that their mental deficiencies disqualify them from the death penalty.

serve as a basis for subsequent arguments that the approach to young offender death eligibility should emulate the *Atkins* approach and how it may be possible to do so.

III. THE EVOLVING STANDARDS OF DECENCY ARGUMENT FOR RAISING THE DEATH ELIGIBILITY AGE TO TWENTY-ONE

A. *Cultural Opinion*

Historically, subjecting those under the age of twenty-one to the death penalty has not been widely supported in America. For example, according to Gallup, just 26% of Americans supported the death penalty for offenders under twenty-one in 1936 (when 59% overall favored the death penalty). In 1965, just 21% supported the death penalty for those under twenty-one (when 45% favored the death penalty overall).[86] In 2018, the American Bar Association (ABA) adopted a resolution calling on death penalty jurisdictions to prohibit the execution of those who were twenty-one or younger at the time of their offense. The ABA cited the "growing medical consensus" that brain areas concerning decision-making and judgment continue to develop into the mid-twenties.[87] As a result, "late adolescents," or eighteen-to-twenty-one-year-olds, have "diminished capacity to understand the consequences of their actions and control their behavior" similar to those under eighteen.[88] This fact, according to the ABA, is contrary to the Eighth Amendment's demand that punishments be proportional and personalized to the offense and offender.[89] The death penalty, the most severe form of punishment,

86. Jeffrey M. Jones, *The Death Penalty*, GALLUP (Aug. 12, 2009), https://news.gallup.com/poll/9913/death-penalty.aspx.

87. ABA House Delegates Recommendation 111, 1 (adopted Feb. 5, 2018), https://www.americanbar.org/content/dam/aba/images/crsj/DPDPRP/2018_hod_midyear_111.pdf.

88. *Id.* at 7.

89. *Id.* at 11 (citing Graham v. Florida, 560 U.S. 48, 59 (2010)).

should be reserved for the most culpable offenders who have committed the worst crimes in society.[90] This cannot be true of late adolescent offenders because of their diminished rational capacities.

The ABA also cited the changing landscape of the application of the death penalty.[91] In particular, the ABA noted that fifty-two out of fifty-three jurisdictions had life without the possibility of parole options at the time the ABA resolution was passed.[92] Furthermore, the use of the death penalty nationwide has declined.[93] For example, the ABA observed that in 2016, only thirty-one individuals received the death penalty, and only two of those individuals were under twenty-one at the time of the offense.[94] Indeed, the decline in the death penalty has only continued in subsequent years. Though undoubtedly impacted by disruptions in the justice system due to the COVID-19 pandemic, in 2020 only seventeen people were executed in the US, and four were under twenty-one at the time of the offense.[95]

Andrew Michaels has argued that the rarity of imposing the death penalty on offenders eighteen to twenty-one is

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90. *Id.*

91. *Id.* at 2.

92. *Id.*

93. *Id.*

94. *Id.* For comparison, the peak number of U.S. executions since the 1970s was ninety-eight in 1999. Tom Jackman & Mark Berman, *Despite Recent Federal Flurry, Number of U.S. Executions Is Lowest Since 1991*, WASH. POST (Dec. 16, 2020, 6:00 AM), https://www.washingtonpost.com/nation/2020/12/16/us-executions-decline/.

95. DEATH PENALTY INFO. CTR., DEATH PENALTY IN 2020: YEAR END REPORT 10 (2020), https://reports.deathpenaltyinfo.org/year-end/YearEndReport2020.pdf [hereinafter 2020 YEAR END REPORT]. The Death Penalty Information Center attributes the particularly low number of executions in 2020 both to continued decline in public support for the death penalty and the COVID-19 pandemic, which delayed capital punishment proceedings. *See id.* at 10–12, 20. Notwithstanding the pandemic, both death sentences and executions have been on a precipitous decline since 1999. *See id.* at 9.

sufficient to satisfy the national consensus prong of the death penalty exemption test.[96] In particular, Michaels argues that under *Graham v. Florida*,[97] a national consensus against a practice can be found to exist, even if the practice is statutorily permitted in a majority of jurisdictions, when the punishment is rarely administered.[98] Michaels argues that executing eighteen- to-twenty-one-year-olds is relatively infrequent, especially in light of the fact that this age group leads in violent crimes, including murder.[99] This demonstrates "society's reluctance to execute young adults despite their high offense rate . . . ."[100] Furthermore, only a small number of states are responsible for the vast majority of executions of those in this age bracket, even though the punishment is available in a majority of jurisdictions.[101] Similarly, in *Graham*, the punishment rejected by the Court—life without parole for juvenile non-homicide offenders—was available in thirty-nine jurisdictions, but was imposed on very few juveniles, the majority of which were sentenced in just one state.[102]

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96. Andrew Michaels, *A Decent Proposal: Exempting Eighteen- To Twenty-Year-Olds from the Death Penalty*, 40 N.Y.U. REV. L. & SOC. CHANGE 139, 150 (2016).

97. 560 U.S. 48 (2010) (exempting juvenile non-homicide offenders from life imprisonment without the possibility of parole).

98. Michaels, *supra* note 96, at 149–50 (citing Graham v. Florida, 560 U.S. 48, 62–63 (2010)).

99. *Id.* at 170–71.

100. *Id.* at 171 n.197.

101. *See id.* at 169.

102. *Graham*, 560 U.S. at 64 ("[T]here are 123 juvenile nonhomicide offenders serving life without parole sentences. A significant majority of those, 77 in total, are serving sentences imposed in Florida. The other 46 are imprisoned in just ten States—California, Delaware, Iowa, Louisiana, Mississippi, Nebraska, Nevada, Oklahoma, South Carolina, and Virginia. Thus, only 11 jurisdictions nationwide in fact impose life without parole sentences on juvenile nonhomicide offenders—and most of those do so quite rarely. . . ." (citations omitted)).

B. *Judicial Opinions and Death Penalty Statistics*

A substantial challenge to the constitutionality of executing offenders under twenty-one recently emerged from the state of Kentucky. Defendants in the consolidated cases of *Commonwealth v. Bredhold* and *Commonwealth v. Diaz* successfully argued at the trial court level that such executions were unconstitutional. One of the defendants was Travis Bredhold, who was charged with murder and robbery (among other crimes) in the shooting death of a gas station employee, allegedly committed when Bredhold was eighteen years and five months old.[103] Efrain Diaz, Jr., and Justin Smith were co-defendants charged with murder and robbery, allegedly committed when Diaz was twenty years and seven months old and Smith was eighteen and five months old.[104] Though not yet convicted, the commonwealth initially gave notice of intent to seek the death penalty in the cases.[105] Citing *Roper*, the defendants moved for exclusion of the penalty.[106] In 2017, the Circuit Court of Kentucky, Seventh Division, agreed with the defendants, declaring the state's death penalty statute to be unconstitutional due to the statute's tolerance for permitting the death penalty for those under twenty-one at the time of offense.[107]

The Kentucky cases provide an instructive look at precisely how a challenge to young offender executions could succeed. Especially important was the court's reliance on science and neurobiological research to assess the appropriateness of the death penalty for under-twenty-one offenders. The court noted the "widely accepted" notion among neuroscientists that brain systems and structures

103. Commonwealth v. Bredhold, 599 S.W.3d 409, 412 (Ky. 2020).

104. *Id.* at 412–13.

105. *Id.* at 413.

106. *Id.*

107. Commonwealth v. Bredhold, No. 14-CR-161, 2017 WL 8792559, at *6 (Ky. Cir. Ct. Aug. 1, 2017).

which are key to "self-regulation" and "higher-order cognition" continue to develop into the mid-twenties.[108] Psychologically, these individuals are more likely to engage in "sensation-seeking," to have poorer impulse control, to be less cognitively able to consider "risks and rewards of alternate course of action," and are much more susceptible to peer pressure.[109] The court reasoned that these psychological features are likely attributable to a "maturational imbalance" between the "socio-emotional system," related to sensation and reward seeking, and the "cognitive control system," which "catches up" during the mid-twenties.[110] For example, studies have shown that the "peak age for risky decision-making" is between nineteen and twenty-one.[111] One study suggested that under stress, the brain of a twenty-year-old functions similarly to a sixteen- to seventeen-year-old.[112] Bredhold, for his part, was determined to be approximately "four years behind his peer group in multiple capacities" and to have a number of mental disorders, such as Attention Deficit Hyperactivity Disorder (ADHD) and Post-Traumatic Stress Disorder (PTSD).[113] Neuroplasticity also factored into the court's analysis. Those in their late teens and early 20s have heightened plasticity, which suggests "strong potential for behavioral change."[114] Thus, adult criminality or antisocial behavior is difficult to predict

108. *Id.* at *4.

109. *Id.*

110. *Id.* at *5.

111. *Id.* at *4.

112. *Id.* at *5 ("Under emotionally neutral conditions, individuals between eighteen (18) and twenty-one (21) were able to control their impulses just as well as those in their mid-twenties (20s). However, under emotionally arousing conditions, eighteen– (18) to twenty-one– (21) year-olds demonstrated levels of impulsive behavior and patterns of brain activity comparable to those in their mid-teens. Put simply, under feelings of stress, anger, fear, threat, etc., the brain of a twenty- (20) year-old functions similarly to a sixteen- (16) or seventeen- (17) year-old.").

113. *Id.* at *2.

114. *Id.* at *6.

from adolescence.[115] Some research suggests that 90% of "serious juvenile offenders" discontinue criminal behavior in adulthood.[116]

From the above observations, the court concluded that twenty-one-year-olds are "categorically less culpable" in the same ways the Supreme Court determined juveniles to be. Particularly, they lack impulse control and the ability to consider the consequences of their actions, and, therefore, knowledge of the prospective punishment of death does not have a deterrent effect.[117] Moreover, their neuroplasticity means they have a "much better chance at rehabilitation" than adults.[118] In the court's words, "If the science in 2005 mandated the ruling in *Roper*, the science in 2017 mandates this ruling."[119]

The court also evaluated "objective indicia of a national consensus" on the death penalty for offenders under twenty-one. The court noted that of the states with death penalty statutes and no governor-imposed moratorium on executions, seven had de facto bans on executing offenders under twenty-one.[120] Combined with the states without death penalty statutes and those with moratoria, thirty states would not execute an offender under the age of twenty-one.[121] Furthermore, only nine out of the thirty-one states with death penalty statutes had executed those under twenty-one at the time of offense between 2011 and 2016.[122] During this period, thirty-three such offenders were executed, with Texas accounting for nineteen of those

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at *4.

120. *Id.* at *2.

121. *Id.*

122. *Id.* at *3.

executions.[123] Excluding Texas as an outlier, the number of under twenty-one-year old offender executions dropped by 50% between the period of 2001-2006 (with twenty-nine executions of under twenty-one-year old offenders) and the period of 2011-2016 (with fourteen executions of under twenty-one-year old offenders).[124] Like the ABA, the *Bredhold* court also acknowledged the precipitous downward trend in the use of the death penalty overall.[125] Between 1999 and 2016, actual executions per year fell from ninety-eight to twenty, with only two individuals executed who had been under twenty-one at the time of their offenses.[126] These facts provided sufficient indication of a national consensus opposed to the death penalty and especially for those under twenty-one.[127]

However, following an interlocutory appeal by the commonwealth in 2020, the Supreme Court of Kentucky ruled that the issue of constitutionality of the death penalty for those eighteen-to-twenty-one was not justiciable before the circuit court and was not property before the state supreme court at the time.[128] As none of the defendants had yet to be convicted or sentenced, the injury at stake was merely hypothetical and, hence, none of the defendants had standing.[129] The supreme court vacated the circuit court orders and remanded the cases, while not weighing in on the constitutional issue.[130] Thus, the issue of constitutionality of executing under twenty-one-year-old offenders is unresolved

123. *Id.*

124. *Id.*

125. *Id.* Specifically, the court observed that from 1999 to 2016, the number of death sentences imposed fell from 279 to 30.

126. *Id.*

127. *Id.*

128. *See* Commonwealth v. Bredhold, 599 S.W.3d 409, 412 (Ky. 2020).

129. *See id.* at 416–18 (citing Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992)).

130. *See id.* at 423.

in Kentucky.

At first blush, the Kentucky decisions are vulnerable to criticism that they are outlier cases that represent the opinion of one trial court jurisdiction.[131] This criticism, however, overlooks judicial sentiment as expressed through actual sentences given to young adult offenders. As noted by the Kentucky circuit court, a look at national statistics shows executions and impositions of the death penalty on young adult offenders to be on the decline nationwide. A statistical examination of both the general use of the death penalty and the death penalty applied to young adult offenders give important insight into this trend.

Due to the COVID-19 pandemic in 2020, which significantly disrupted criminal justice proceedings nationally, including for capital cases, 2019 may present the most accurate picture of death penalty trends. In 2019, a total of twenty-two prisoners were executed and thirty-four new death sentences were imposed in the US.[132] Comparatively, in 1999, 279 death sentences were imposed and 98 executions were carried out.[133] Application of the death penalty remained highly regionalized, with 91% of all executions occurring in the American South, and Texas accounted for 41% of executions overall.[134] Of the eleven new death sentences imposed in 2019, seven were in Florida.[135] In contrast, no state in New England authorizes the death

131. In fact, on appeal, the prosecution in *Diaz* argued that no other jurisdiction recognized the unconstitutionality of sentencing eighteen- to twenty-one-year-olds to death. *See* Justin Madden & Jim Warner, *Victim of Gas Station Shooting Was a Family Man and a Man of Honor, Friend Says*, LEXINGTON HERALD LEDGER (Dec. 11, 2013), https://www.kentucky.com/news/local/crime/article44458410.html.

132. *See* DEATH PENALTY INFO. CTR., 2019 YEAR END REPORT 1 (2019), https://reports.deathpenaltyinfo.org/year-end/YearEndReport2019.pdf [hereinafter 2019 YEAR END REPORT].

133. *See id.*

134. *See id.* at 3.

135. *See id.* at 10.

penalty.[136]

In 2020, eighteen death sentences were imposed and seventeen executions were carried out.[137] Though these figures are undoubtedly artificially low due to the pandemic, the Death Penalty Information Center asserted that the United States was "poised for its sixth consecutive year with fifty or fewer new death sentences and thirty or fewer executions" even before the impact of the pandemic.[138] Especially telling is the death penalty's decline in both the eyes of public opinion and in state criminal justice systems. According to Gallup, in 2020, 55% of Americans favored the death penalty, a near fifty-year low.[139] 43% of Americans oppose the death penalty, which has not been as high since the 1960s.[140] Per the latest statistics, Americans prefer life imprisonment to the death penalty 60% to 36%.[141]

The retreat of the death penalty at the state level is also noteworthy. As of 2020, twenty-two states had abolished the death penalty.[142] Even among states that do permit the death penalty, many have not carried out an execution in a decade or more. To date, thirty-four states have either abolished the death penalty or have had no executions in over ten years.[143] Moreover, executions of young adult

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136. *See id.* at 2.

137. *See* 2020 YEAR END REPORT, *supra* note 95, at 1.

138. *Id.*

139. *See* Jeffrey M. Jones, *U.S. Support for Death Penalty Holds Above Majority Level,* GALLUP (Nov. 19, 2020), https://news.gallup.com/poll/325568/support-death-penalty-holds-above-majority-level.aspx. Support for the death penalty peaked in 1994 at 80% and has been on a continuous decline since then. *See id.*

140. *See id.*

141. *Id.*

142. Colorado joined the ranks of non-death penalty states in 2020. 2020 YEAR END REPORT, *supra* note 95, at 4. The year before, New Hampshire became the twenty-first state to abolish executions. *See* 2019 YEAR END REPORT, *supra* note 132, at 1.

143. *See* 2020 YEAR END REPORT, *supra* note 95, at 4.

offenders are on a definitive decline. Between 2006 and 2011, the execution of young adults averaged approximately eleven per year.[144] However only six such executions occurred in 2012, five in 2013, and only three occurred in 2014 and 2015.[145] Of the twenty-two individuals executed in 2019, four were under the age of twenty-one at the time of their crimes.[146] In 2020, four of the seventeen individuals executed were under twenty-one at the time of the offense.[147]

C. *Disparate Treatment of Young Adults in the Law*

It is a curious fact that in the United States today, the federal government considers a twenty-year-old to be too young to buy e-cigarettes but not too young to execute.[148] Indeed, the law is rife with examples of the disparate treatment of young adults due to their presumed immaturity. The federal minimum drinking age law is perhaps the most prominent example. The National Minimum Drinking Age Act, codified in 23 USC § 158, mandates the federal government to withhold 10% of highway funds from states that allow the purchase or possession of alcohol by those under twenty-one years of age.[149] The motivation for the act was the belief by lawmakers that immature and irresponsible behavior of individuals under the age of twenty-one contributed to traffic fatalities. Relatedly, a majority of states have implemented dram shop and social host liability laws that impose liability on those who serve alcohol to those under twenty-one.[150]

The Gun Control Act of 1968 (GCA) is another important

144. Zoe Jordan, *The Roper Extension: A California Perspective*, 71 HASTINGS L.J. 197, 204–05 (2019).

145. *Id.*

146. *See* 2019 YEAR END REPORT, *supra* note 132, at 16.

147. *See* 2020 YEAR END REPORT, *supra* note 95, at 20.

148. *See supra* note 139 and accompanying text.

149. *See* 23 U.S.C. § 158(a)(1)(A).

150. *See* Michaels, *supra* note 96, at 153.

example of the disparate treatment of under-twenty-one offenders. The GCA prohibited the sale of any firearm other than a shotgun or rifle, including concealable handguns, to individuals under twenty-one.[151] In a 2012 challenge to the prohibition, the Fifth Circuit observed that Congress had specifically noted that concealable firearms had been "widely sold" to "emotionally immature, or thrill-bent juveniles and minors prone to criminal behavior."[152] During one congressional hearing, a law enforcement officer reported, "The greatest growth of crime today is in the area of young people, juveniles, and young adults. The easy availability of weapons makes their tendency toward wild, and sometimes irrational behavior that much more violent, that much more deadly."[153] In upholding the sale restrictions as constitutional, the Fifth Circuit concluded that "Congress was focused on a particular problem: young persons under twenty-one, who are immature and prone to violence, easily accessing handguns, which facilitate violent crime[.]"[154] The Supreme Court declined to review the case and the ruling remains in place.[155]

Disparate treatment of those under twenty-one is evident in a number of other areas of the law. For example, the 2008 Foster Care Act also recognizes the immaturity of those under twenty-one. The Foster Care Act allows the federal government to offer financial incentives for states who extend the age of eligibility for foster care services to twenty-one.[156] In fact, the act permits states to define "child"

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151. 18 U.S.C. § 922(b)(1).

152. Michaels, *supra* note 96, at 151.

153. Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 700 F.3d 185, 207 (5th Cir. 2012) (citing *Federal Firearms Act: Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the Sen. Comm. on the Judiciary*, 90th Cong. 57 (1967) (testimony of Sheldon S. Cohen)).

154. *Id.* at 208.

155. Michaels, *supra* note 96, at 152.

156. *See id.* at 154.

as those under the age of twenty-one.[157] As Andrew Michaels describes, "Much like the GCA and the NMDA, the Foster Care Act reinforces the notion that there is an adolescent-like quality to eighteen- to twenty-year-olds."[158] Another area of disparate treatment is in the regulation of sexually oriented businesses. Some jurisdictions, for example, forbid those under twenty-one from operating sexually oriented businesses.[159] Others have upheld regulations preventing those under twenty-one from patronizing live nude entertainment businesses[160] or limiting their ability to perform in them.[161]

More recently, the federal government updated the Federal Food, Drug, and Cosmetic Act to raise the federal minimum tobacco products purchasing age to twenty-one.[162] Effective since December 2019, the law prohibits the sale of such products as cigarettes, cigars, and e-cigarettes to those under twenty-one.[163] Prior to the federal law's enactment, nineteen states had implemented their own "Tobacco 21"

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157. *See id.* at 154–55.

158. *Id.* at 155.

159. *See, e.g.*, Am. Entertainers, L.L.C. v. City of Rocky Mount, N.C., 888 F.3d 707, 722–23 (4th Cir. 2018) (upholding city ordinance forbidding those under twenty-one to "own, manage and operate an adult business").

160. *See, e.g.*, 7250 Corp. v. Bd. of Cnty. Comm'rs for Adams Cnty., 799 P.2d 917, 919, 926 (Colo. 1990) (en banc) ("[I]n light of the evidence concerning reported property destruction and criminal activity associated with nude entertainment establishments, we may reasonably presume that the age restrictions in the ordinance reflect a legitimate legislative judgment by the county commissioners that youths under 21 years of age should be protected from the potentially harmful consequences associated with such establishments.").

161. *See, e.g.*, Doe I v. Landry, 909 F.3d 99, 105, 118 (5th Cir. 2018) (holding that a state statute imposing twenty-one year age minimum on certain adult entertainment performers was not unconstitutionally overbroad or vague).

162. *Newly Signed Legislation Raises Federal Minimum Age of Sale of Tobacco Products to 21*, U.S. FOOD & DRUG ADMIN., https://www.fda.gov/tobacco-products/ctp-newsroom/newly-signed-legislation-raises-federal-minimum-age-sale-tobacco-products-21 (last visited Mar. 8, 2020).

163. *Id.*

laws.[164] According to the American Academy of Pediatrics, raising the tobacco buying age to twenty-one was necessary because adolescents and young adults are "uniquely susceptible" to nicotine addiction due to the still-developing nature of their brains.[165]

IV. APPLYING THE *ATKINS* APPROACH TO YOUNG OFFENDERS

Assuming that evolving standards of decency analysis justifies a categorical exemption from the death penalty for young offenders, the question is what form the exemption should take. Should the *Roper* bright-line rule merely be expanded to specified post-juvenile age groups, as advocated by the ABA? Or is a different approach possible? Part IV of this Comment will illustrate why the bright-line approach is not ideal for young offenders. In particular, a bright-line rule risks arbitrary imposition of the death penalty and is inimical to the Supreme Court's determination that the death penalty should be reserved for the most culpable offenders. Rather than expanding *Roper*, the holistic approach taken in *Atkins* is the superior alternative. The remainder of this Comment addresses how applying the *Atkins* approach to post-juvenile young offenders is not only more desirable, but also more feasible than one might initially presume.

A. *The Superiority of the* Atkins *Exemption*

As discussed *supra* Part II, the *Roper* bright-line rule is problematic due to its apparent arbitrariness and failure to ensure that the death penalty is reserved for the most culpable offenders.[166] In contrast, one of the most important

164. *Tobacco 21*, AM. ACAD. OF PEDIATRICS (Mar. 23, 2021), https://www.aap.org/en-us/advocacy-and-policy/aap-health-initiatives/Richmond-Center/Pages/Tobacco-21.aspx.

165. *Id.*

166. *See* discussion *supra* Section II.B.2.

features of the modern *Atkins* exemption is that, unlike *Roper*, it does not employ a bright-line cutoff point using IQ testing. In fact, the Supreme Court has expressly prohibited states from imposing a firm IQ score threshold. In 2014, the Supreme Court ruled in *Hall v. Florida* that states cannot impose a rigid IQ score to determine intellectual disability.[167] The defendant in that case had taken several IQ tests, with scores ranging from sixty to eighty.[168] The scores below seventy were excluded for evidentiary reasons, leaving seventy-one as the lowest remaining IQ score.[169] Under Florida law at the time, a defendant would have to show an IQ score of seventy or below before being allowed to present any other evidence of intellectual disability, such as adaptive behavioral evidence.[170] Thus, the defendant in *Hall* was prohibited from offering evidence of intellectual disability on the basis of his seventy-one IQ score alone.[171]

The Court found the Florida approach to determining intellectual disability inadequate. Justice Kennedy, writing for the majority, stated that the Court would consult the medical community for appropriate diagnosis procedures.[172] According to the Court, Florida's IQ threshold was not in line with the medical community in two primary ways. First, the medical field does not hold IQ scoring as the exclusive indicator of intellectual disability; it is assessed concurrently with adaptive behaviors and age of symptom onset.[173] By preventing a defendant with an IQ score one point above the threshold from presenting other evidence of intellectual disability, Florida law did not reflect established medical practice in diagnosing intellectual disability. Secondly, the

167. Hall v. Florida, 572 U.S. 701, 704 (2014).

168. *Id.* at 707.

169. *Id.*

170. *Id.*

171. *Id.* at 711–12.

172. *Id.* at 710.

173. *Id.* at 712.

medical community does not read IQ scores as a fixed number but as a *range*, taking into account the standard error of measurement (SEM) of each score.[174] Thus, Florida's use of a single, fixed IQ score, rather than interpreting the score in terms of the SEM range, did not reflect established community practice.[175]

Hall underscores the fact that a finding of intellectual disability is not determined by a precise metric. This is despite the fact that intellectual disability is a diagnosable condition[176] and despite the prevalence of standardized diagnostic tools, such as IQ testing. Nonetheless, clinical diagnosis of intellectual disability hinges on expert evaluation and a constellation of factors. This suggests that pragmatic intuitions, which exempt those with intellectual deficiencies due to youth requiring courts to employ bright-line criteria, are simply unfounded. For if clinical assessment of the mental deficiencies of young offenders can be brought into parity with assessment of the intellectually disabled—and a bright-line test has been ruled out for one group, i.e., the intellectually disabled—a bright-line rule need not be employed for either class of offenders.

In 2017, the Court further refined its guidance on IQ tests in *Moore v. Texas* by ruling that states could not develop idiosyncratic criteria to upwardly adjust the SEM range to deny a defendant an intellectual disability diagnosis.[177] In *Moore*, the defendant had scored a seventy-four on an IQ test, resulting in an SEM range of sixty-nine to seventy-nine.[178]

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174. *Id.*

175. *Id.* at 714. In addition to its analysis of the medical community's view of intellectual disability, the Court also compared Florida's bright-line cutoff rule with the practice of other jurisdictions and found that the vast majority of the states at the time rejected this approach. *Id.* at 718. Recall that such inter-jurisdictional comparison is a component of the national consensus inquiry in capital punishment cases. *See* discussion *supra* Part II.

176. As opposed to, say, intellectual immaturity.

177. *See* Moore v. Texas, 137 S. Ct. 1039, 1049 (2017).

178. *Id.*

As the low-end score of sixty-nine was below seventy, the trial court hearing the case was required to move on to evaluate the defendant's adaptive functioning.[179] However, the trial court decided that certain factors, such as taking the test in a depressed state, might have caused the defendant to underperform.[180] Disregarding the defendant's low-end score, and considering also the defendant's score of seventy-eight on another IQ test, the trial court concluded that the defendant was not in the intellectually disabled range.[181] The Supreme Court overruled this determination as contrary to *Hall*.[182] The Court stated that the SEM range of sixty-nine to seventy-nine put the defendant in the range of intellectual disability, which already accounted for testing error.[183] The lower court could not merely cite specific sources of error to *narrow* the standard-error range.[184]

Another important feature of the *Atkins* approach is its emphasis on in-depth investigation of the personal attributes of each offender through the adaptive behavior inquiry. In the simplest terms, adaptive behavior refers to the "collection of conceptual, social, and practical skills that have been learned and are performed by people in their everyday lives."[185] These skill areas can be assessed quantitatively using standardized measurement tools that yield adaptive behavior scores.[186] To this end, the AAIDD has developed the Diagnostic Adaptive Behavior Scale (DABS) for clinical use

179. *Id.*

180. *Id.* at 1047.

181. *Id.*

182. *Id.* at 1049.

183. *See id.*

184. *See id.*

185. Marc J. Tassé et al., *The Relation Between Intellectual Functioning and Adaptive Behavior in the Diagnosis of Intellectual Disability*, 54 INTELL. & DEVELOPMENTAL DISABILITIES 381, 382 (2016).

186. *Id.*

in determining levels of limitation in adaptive behavior.[187] However, adaptive behavior assessment is not simply a matter of administering a single instrument to an individual.[188] Evaluators examine the person's life functioning by performing interviews with those who know and have observed the individual in childhood or adulthood.[189] Personal records (e.g., school and juvenile) may also be reviewed.[190] Unlike IQ testing, it is the clinical evaluator who gathers and interprets information used in the adaptive behavior measurement, rather than gathering data from the offender directly.[191]

The Supreme Court in *Moore* also set limitations on the states' procedures for evaluating adaptive behavior in *Atkins* cases. In *Moore*, the criminal court had further decided that the defendant did not exhibit the requisite adaptive deficiencies to qualify as intellectually disabled. The Supreme Court overruled this finding as well, stating that the state's evaluation of the defendant's adaptive behavior "departed from clinical practice."[192] For example, the state required that the defendant prove that his adaptive deficits were not the product of a personality disorder.[193] However, modern clinical practice recognizes that many individuals with intellectual disabilities also have comorbid disorders, the presence of which is not considered evidence of the absence of intellectual disability.[194] The state also relied on "lay stereotypes" to assess intellectual disability, a

187. *DABS*, AM. ASS'N ON INTELL. & DEVELOPMENTAL DISABILITIES, https://www.aaidd.org/dabs (last visited Mar. 8, 2020).

188. *See* Ellis et al., *supra* note 50, at 1332.

189. *Id.* Such individuals may include family, friends, teachers, employers, neighbors, and others. *Id.* at 1380–81.

190. *Id.*

191. *Id.* at 1376–84.

192. Moore v. Texas, 137 S. Ct. 1039, 1051 (2017).

193. *Id.*

194. *Id.*

phenomenon eschewed by the medical profession.[195] In sum, the Supreme Court concluded that though the states have "some flexibility" in applying *Atkins*, they must be constrained by the "medical community's current standards."[196]

While the Supreme Court has rejected bright-line rules for intellectual disability, *Moore* demonstrates that the states do not have free rein to make their own determinations regarding identification of intellectually disabled offenders. In essence, *Moore* requires states to largely defer to the medical community's current practices with respect to both IQ testing and evaluation of adaptive functioning.[197] This ruling is relevant to the concern that an *Atkins*-like approach to young offenders, focused on a qualitative assessment of personal attributes, would result in a hollow exemption if left up to the states to implement. This may occur, for example, by giving the states the ability to define the category so narrowly that few people would fall into the exemption.[198] *Moore* demonstrates that adequate guidance from the Court is possible.

The mode of assessing adaptive functioning in *Atkins* cases is significant because it demonstrates a feasible method of systematically evaluating qualitative aspects of an offender's behaviors that show proof of intellectual deficiencies. Tools such as the DABS show that such evaluation need not be left up to subjective interpretation but, rather, can be standardized and made interpretable on the basis of quantifiable metrics. With its focus on individual characteristics, modern adaptive behavior assessment conforms to the Supreme Court's mandate that capital

195. *Id.* at 1051–52.

196. *Id.* at 1052–53; *see also* Ellis et al., *supra* note 50, at 1316.

197. *See* Ellis et al., *supra* note 50, at 1316.

198. *See* Hall v. Florida, 572 U.S. 701, 720 (2014) ("If the States were to have complete autonomy to define intellectual disability . . . , the Court's decision in *Atkins* could become a nullity. . . .").

punishment be reserved for the most culpable offenders.[199] This is a result that the *Roper* approach is less capable of achieving, because the bright-line age threshold will fail to exclude offenders who ought to be exempted under the very rationale of the rule.[200]

B. *Proposals for Evaluating Young Adult Offenders*

Even if the *Atkins* approach is methodologically superior to the *Roper* bright-line rule, the question is still whether such an approach could be feasibly applied to young adult offenders. Admittedly, tests of mental capacities of juveniles and young adults are not at the same level of development as those used in *Atkins* cases (i.e., IQ and adaptive behavior tests). However, this fact does not warrant the conclusion that such testing is *infeasible* or unrealistic. Indeed, based on current science, there is ample reason to believe that tests analogous to IQ or adaptive behavior tests could be developed for use in young adult offender cases.

On this point, one key issue to note is that brain under-development and its concomitant behavioral expressions are already the subject of much empirical science. As a result, a number of potential tools and techniques already exist that may serve as the foundation of courtroom evaluations of young adult offenders. Most noteworthy are brain imaging technology and brain structuring studies. Current neuroscience has gained a much clearer understanding of what some call the "transitional age brain," which extends roughly from the years thirteen to twenty-five.[201] During this period, morbidity and mortality rates increase by 200% compared to childhood.[202] This stage of development is

199. Roper v. Simmons, 543 U.S. 551, 568–69 (2005).

200. *See supra* Section II.B.

201. Winston W. Chung et al., *The Transitional Age Brain: "The Best of Times and the Worst of Times,"* 26 CHILD & ADOLESCENT PSYCHIATRIC CLINICS N. AM. 157, 157 (2017).

202. *Id.* at 162.

marked by "high rates of accident, suicide, violence, and health problems related to risky sexual behavior."[203]

Current research suggests this phenomenon is attributable to mismatches in the development of the nucleus accumbens, the amygdala, and prefrontal cortices.[204] The nucleus accumbens influences reward- and pleasure-seeking behavior and matures earlier than the frontal and prefrontal cortices, resulting in a "mismatch of drive without control."[205] Meanwhile, the amygdala, the seat of emotions, increases in volume during the transitional age period, and is believed to cause adolescents to respond with "hot" emotions rather than more controlled "cool" emotions.[206] Eventually, the amygdala becomes more linked to activities of the prefrontal cortex, resulting in greater emotional regulation.[207] As Winston W. Chung et al., explain, the connectivity between the amygdala and the prefrontal cortex "signals an end to the [transitional age brain] period and the beginning of a more neurologically regulated period known as adulthood."[208]

Another potential tool to gauge developmental status of young adults is impulsivity, which has been widely assessed using the Barratt Impulsiveness Scale for over sixty years.[209] Perhaps less well known, but equally impressive, is clinical psychology's assessment of "future orientation," which has gained more prominence in recent decades. Future orientation refers generally to one's ability to set future goals

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203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *See generally* Matthew S. Stanford et al., *Fifty Years of the Barratt Impulsiveness Scale: An Update and Review*, 47 PERSONALITY & INDIVIDUAL DIFFERENCES 385 (2009) (discussing the long-time clinical reliance on the scale).

and plans.[210] The study of future orientation is multidimensional, with research on such issues as the amount of time one thinks about or imagines the future, one's pessimism or optimism about the future, and one's beliefs that one's current decisions are linked to future well-being.[211] Research has suggested, for example, that focus on the present is associated with risk-taking and that higher levels of hope have been associated with less involvement in violence.[212] Delayed gratification is also a prominent area of future orientation study.[213] Methodologically, research on future orientation has frequently involved the use of surveys to assess subjects.[214]

A final area of study worth noting is the "maturity gap," an influential theory of adolescent delinquency and anti-social behavior developed by clinical psychologist Terrie E. Moffitt.[215] The maturity gap essentially postulates that adolescents engage in delinquent or antisocial behavior in an attempt to reconcile their growing biological maturity with their lack of social maturity. That is, adolescents, recognizing their physical likeness to adults, are nonetheless treated as socially immature by society, trapping such individuals in a "maturity gap."[216] Adolescent offenders rebel

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210. Sarah Lindstrom et al., *Future Orientation: A Construct with Implications for Adolescent Health and Wellbeing*, 26 INT'L J. ADOLESCENT MED. & HEALTH 459, 459 (2014).

211. Laurence Steinberg et al., *Age Differences in Future Orientation and Delay Discounting*, 80 CHILD DEV. 28, 28 (2009).

212. Lindstrom et al., *supra* note 210, at 462.

213. *Id.* at 462.

214. *See id.* at 466–68.

215. J.C. Barnes et al., *An Empirical Examination of Adolescence-Limited Offending: A Direct Test of Moffitt's Maturity Gap Thesis*, 38 J. CRIM. JUSTICE 1176, 1176–78 (2010). *See generally* Terrie E. Moffitt, *Life-Course-Persistent and Adolescence-Limited Antisocial Behavior: A Developmental Taxonomy*, 100 PSYCHOL. REV. 674 (1993).

216. Barnes et al., *supra* note 215, at 1177. Examples of disparate treatment include being prevented from voting, drinking, or making autonomous decisions. *Id.*

against their place in this gap by emulating the behavior of other offenders and their "adult-like" activities.[217] As the maturity gap narrows, however, delinquency drops off.[218] On an empirical level, Moffitt's theory has had some level of predictive success. One study, for example, found that the maturity gap hypothesis was a salient predictor of male drug use and delinquency.[219] The study relied primarily on self-report questionnaires followed by interviews of study subjects.[220]

The above sampling of current research presents hope that a system of measurable, standardized criteria for assessing young offender culpability may emerge. Brain imaging and brain structure research, for example, was immensely important to the *Roper* decision. As it stands today, brain imaging is playing an increasing role in criminal cases, with 5% of murder defendants and 25% of death penalty defendants making use of neurobiological evidence at trial.[221] As our knowledge of the brain expands and brain imaging technology progresses, identification of the hallmarks of neurocognitive limitations that would qualify offenders for death penalty exemption may be possible and may even represent the most straightforward method of evaluation.

In addition, it is notable that future orientation testing relies on underlying methods of data gathering similar to adaptive behavior testing, namely, interviews and surveys. Future orientation surveys may include such inquiries as "How often do you think about or plan your future?" or "[Are you] able to resist temptations when [you] know that there is

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217. *See id.*

218. *Id.*

219. *Id.* at 1182.

220. *Id.* at 1178.

221. Nita A. Farahany, *Neuroscience and Behavioral Genetics in US Criminal Law: An Empirical Analysis*, 10 J. LAW & BIOSCIENCE 485, 486 (2016).

work to be done[?]"[222] Such questions seek to uncover the same essential type of data as adaptive behavior testing, i.e., the behavior, skills, and conceptual abilities of the test subject. It is worth pointing out that, although adaptive behavior can be assessed on a numerical scale, the scale has meaning only because of the fact that it has been normed according to actual responses of intellectually disabled people compared to people without intellectual disabilities. Empirical future orientation research already employs quantitative scale-based metrics to assess test subject data and their correlative meaning.[223] It stands to reason that future orientation testing scales could be normed and utilized similarly to adaptive behavioral scales.

V. ADDRESSING CRITICISM

The notion that an *Atkins*-like exemption could be developed for young adult offenders is untested and, as such, is subject to criticism. One reasonable concern is that the proposal may suggest that *Roper*'s blanket exemption of juveniles should be replaced by a uniform assessment applicable to all young offenders, theoretically subjecting juveniles once again to the death penalty. However, this Comment does not advocate abandonment of the *Roper* bright-line cut-off point as applied to juveniles. There may be good reason to exempt juveniles as a class from the death penalty without regard to their measurable intellectual characteristics. One reason is that so many juveniles—indeed, likely all juveniles—would inevitably be exempted by a neurocognitive maturity assessment that it would be a waste of a court's time and resources to perform the analysis in the first place. Another possible reason is the unique repugnance with which society regards the execution of juvenile offenders, justifying an unqualified exemption. Thus, there are compelling reasons to retain the *Roper*

222. Lindstrom et al., *supra* note 210, at 467.

223. *See* Steinberg et al., *supra* note 211, at 34.

bright-line rule for juveniles, even if other ages were subject to a different test.

Another valid concern with taking an *Atkins* approach to young adult offenders is that it may fail to exempt offenders of relatively young ages due to their advanced neurocognitive status. However, given that young adults largely develop along a similar maturational curve, it is likely that an attribute-centric approach will include most or all young offenders. For those extraordinary cases that may exist—such as a twenty-year-old with abnormally advanced neurocognitive development—perhaps it is necessary to concede that such individuals should be considered to have the requisite culpability for death penalty eligibility under current US laws. Recall that under present Supreme Court jurisprudence, the death penalty is to be reserved for the most culpable offenders. If a twenty-year-old meets the culpability criteria on the basis of sound evidence, then under the law as it stands today, that individual qualifies for the death penalty. This result may certainly be unacceptable to some, but I would suggest the issue ultimately derives from abhorrence of capital punishment itself, not with the consistency of the exemption framework outlined here. As valid as concern over the legitimacy of the death penalty is, it is outside the scope of this Comment.

VI. CONCLUSION

Since the *Roper* decision in 2005, a compelling argument for exempting individuals under twenty-one from the death penalty has emerged. Public opinion and sentencing statistics, in particular, suggest American society is on the cusp of adopting such an exemption. Proponents of the exemption have advocated for the implementation of another bright-line rule demarcating twenty-one as the maximum age for death eligibility. However, bright-line age thresholds are undesirable because of their arbitrariness and discontinuity with the Supreme Court's mandate that the death penalty be reserved for the most culpable offenders. In

contrast, the attribute-driven approach in *Atkins* is uniquely suited to assessing culpability on the basis of individual mental features. This Comment has sought to demonstrate that the *Atkins* approach is capable of translation into the sphere of young adult criminal culpability. As it stands, many of the clinical tools and empirical frameworks used to study young adult and adolescent behavior mirror those used in the adaptive behavior assessments in *Atkins*' cases. This fact suggests attribute-driven measures of young adult maturity (and hence, criminal culpability) are capable of development for use in the courtroom. Adopting such an approach obviates the difficulties raised by *Roper* and would result in a categorical exemption for young adult offenders that would more adequately conform to Supreme Court capital punishment jurisprudence.