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Capital Punishment of Young Adults in Light of Evolving Standards of Science and Decency: Why Ohio Should Raise the Minimum Age for Death Penalty Eligibility to Twenty-Five (25)

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CAPITAL PUNISHMENT OF YOUNG ADULTS IN LIGHT OF EVOLVING STANDARDS OF SCIENCE AND DECENCY: WHY OHIO SHOULD RAISE THE MINIMUM AGE FOR DEATH PENALTY ELIGIBILITY TO TWENTY-FIVE (25)

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ABSTRACT

Up until the Supreme Court's 2005 ruling in *Roper v. Simmons*, juveniles could constitutionally be executed for qualifying criminal offenses. The *Roper* Court raised the minimum age for execution to eighteen, citing both a national consensus against executing minors, as well as recent research (at the time) showing that juveniles are more vulnerable to negative influences and outside pressures. Since *Roper*, the Supreme Court has remained silent regarding the requisite minimum age for execution and has left the decision up to individual states. While a slim majority of states have now abolished the death penalty in its entirety, Kentucky chose to retain the death penalty, but prohibit its use for offenders under the age of twenty-one. This Note proposes that Ohio, like Kentucky, raise the minimum eligibility age for execution. However, Ohio should raise the minimum age to twenty-five. As this Note will explore, compelling reasons exist for Ohio to raise the execution age to twenty-five. Most notably is the recent scientific research that the brain does not fully mature until the age of twenty-five. Additionally, there have been evolving standards of decency shifting public opinion away from the death penalty, national and international policies denouncing the use of the death penalty on youthful offenders, and case law supporting additional safeguards against less culpable offenders. This Note culminates in the proposal of an original statute to aid the Ohio legislature in amending the death penalty age requirement to twenty-five. To ensure that only the worst of the worst offenders are deprived of a second chance at life, Ohio is urged to adopt a minimum eligibility age of twenty-five for the death penalty.

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I. INTRODUCTION

Twenty-two-year-old David Steffen's upbringing can only be described in one word: traumatic. Steffen was the victim of brutal physical abuse, perpetrated by his stepfather.[1] To escape the wrath of his stepfather, Steffen was sent to a Catholic school where he became active in a church youth group.[2] There, he had normal relationships with women and could often be found writing poetry.[3] Steffen was able to secure gainful employment as a door-to-door salesman of a household cleaning product,[4] and

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[1] State v. Steffen, 509 N.E.2d 383, 397 (Ohio 1987).

[2] *Id.*

[3] *Id.*

[4] *Id.* at 383.

he was beloved by his sister, whom he zealously protected.[5] It truly appeared Steffen created a positive life for himself into his twenties. However, the afternoon of August 19, 1982 proved otherwise. While peddling the household cleaning products in a neighborhood of Cincinnati, Ohio, Steffen encountered nineteen-year-old Karen Range in her front yard.[6] Sensing that Range was interested in purchasing cleaning products, Steffen demonstrated how the cleaning product worked on Range's front steps and doorbell.[7] Upon Range's invitation, the pair entered the Range family home to further test the cleaner on indoor household surfaces.[8] While demonstrating the product's efficacy on the toilet, Steffen bumped up against Range's breast,[9] and Range began screaming.[10] In an effort to silence Range's screams, Steffen knocked her to the ground and cut her throat three times.[11] Next, Steffen unbuttoned Range's blouse in preparation to rape her; however, due to his inability to achieve an erection, Steffen abandoned the sexual assault and left Range bleeding out on the floor.[12] Realizing that his employer might question his absence, Steffen contacted the police and fabricated a story wherein he was the victim of a robbery.[13] During police questioning regarding the alleged robbery, Steffen initially denied involvement in the Range murder case on which the police were working.[14] Eventually, Steffen confessed to police that he had killed Karen Range.[15]

Steffen was indicted for and convicted of aggravated murder, rape, and aggravated robbery.[16] The aggravated murder, with specifications that the offense was committed during a rape or aggravated burglary, was in violation of Ohio Revised Code (O.R.C.) § 2903.01 and carried a death penalty specification.[17] After the jury weighed the requisite aggravating and mitigating factors, Steffen was sentenced to death.[18] The jury declined to consider Steffen's youthful age as a substantial mitigating factor in its

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[5] *Id.* at 397.

[6] *Id.* at 383.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

decision.[19] On appeal in 1987, the Ohio Supreme Court affirmed Steffen's death sentence and noted that it was proper for the jury to not give deference to Steffen's young age.[20]

David Steffen is just one of many young adults sentenced to death despite his young age. While Steffen's case is a suitable illustration of young adults under twenty-five committing capital offenses, this next offender's case demonstrates the devastating effects of peer pressure on cognitively developing young adults. On February 12, 1992, twenty-year-old Gary Otte left Terre Haute, Indiana and drove overnight to Parma, Ohio to visit some friends.[21] Prior to embarking on his fatal adventure, Otte stole his grandfather's red 1962 Chevrolet Impala, a .22 caliber revolver, and two credit cards.[22] Otte met his friend, J.J., at Gypsy and Rob's, a local Ohio bar.[23] J.J. informed Otte that he planned to "hit" a young woman for her Visa gold card, and an older drunk man with a lot of money.[24] Both victims lived at J.J.'s apartment complex.[25] Later that night, Otte went to the apartment complex and saw an older man, who appeared to have been drinking, get out of his car.[26] Otte approached the man, Robert Wasikowski, and asked to use his phone.[27] Once inside Wasikowski's apartment, Otte pulled out a gun, Wasikowski offered Otte $10, and then Otte shot and killed Wasikowski in the head from a distance of less than two feet.[28] Otte took $413 from Wasikowski's wallet before returning to the bar for a night of drinking and doing drugs.[29]

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19 *Id.* at 390. *Contra* OHIO REV. CODE ANN. § 2929.04(B)(4) (West, Westlaw through file 48 of the 134th General Assembly (2021-2022)) (instructing courts and jurors to consider the youth of an offender during a capital punishment sentencing hearing).

20 *Steffen*, 509 N.E.2d at 390. For an update on Steffen's ultimate fate, see WKRC, *David Steffen Resentenced for 1982 Roselawn Murder*, LOCAL12 (Mar. 31, 2016), https://local12.com/news/local/david-steffen-resentenced-for-1982-roselawn-murder (following numerous failed appeals, new evidence recently came to light to reduce Steffen's sentence. Steffen was initially convicted of raping Karen Range, and that rape charge was found to be an aggravated circumstance warranting the imposition of the death penalty. However, new evidence showed that it was actually Kenneth Douglas, a former Hamilton County morgue employee, who had had sex with Range's body. Consequently, Steffen was taken off of death row and his sentence was reduced to life in prison without parole).

21 State v. Otte, 660 N.E.2d 711 (Ohio 1996).

22 *Id.*

23 *Id.*

24 *Id.*

25 *Id.*

26 *Id.*

27 *Id.*

28 *Id.*

29 *Id.*

The following night, Otte returned to the apartment complex to rob Sharon Kostura.[30] Otte immediately shot Kostura in the head, stole $45 from her purse, and took her car keys and checkbook.[31] After returning again to the bar for a night of post-murder fun, Otte was arrested when his friends tipped off the police.[32]

Otte was charged with and convicted of aggravated murder, aggravated robbery, and aggravated burglary for both nights' criminal adventures.[33] The aggravated murder charges, in violation of O.R.C. § 2903.01(A) and § 2903.01(B), each carried death penalty specifications.[34] A three-judge panel found that the aggravating circumstances of these heinous crimes outweighed any mitigating circumstances, so Otte was sentenced to death.[35] Otte unsuccessfully appealed his convictions and sentence several times.[36] Following the issuance of two reprieves by then Ohio Governor, John Kasich, Otte's execution date was set for September 13, 2017.[37]

On August 21, 2017, Otte filed a lawsuit against the state of Ohio. Otte sought a declaration that Ohio's death penalty statute, O.R.C. § 2929.03, violated the Eighth Amendment's guarantee against cruel and unusual punishment. Otte sought an additional declaration that the Fourteenth Amendment's evolving standards of decency prohibit the execution of an offender who commits his crime while under the age of twenty-one.[38] On appeal, the Eighth District Court of Appeals affirmed the dismissal of Otte's complaint partially because Otte relied on a Kentucky state court decision, *Commonwealth v. Bredhold*, which was not binding in Ohio.[39] The Ohio Court of Appeals upheld the constitutionality of Otte's death sentence because the United States Supreme Court did not recognize the Eighth Amendment right of eighteen to twenty year olds decided upon in *Bredhold*, as it was non-binding on Ohio courts, and thus, the Ohio Court of Appeals was not bound to any prior precedents.[40]

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30 *Id.*

31 *Id.*

32 *Id.*

33 Otte v. State, 96 N.E.3d 1288, 1289 (Ohio Ct. App. 2017).

34 *Id.*

35 *Id.*

36 *Id.*

37 *Id.*

38 *Id.* at 1290.

39 *Id.* at 1292. *See generally* Commonwealth v. Bredhold, No. 14-CR-161, 2017 WL 8792559, at *12 (Ky. Cir. Ct. Aug. 1, 2017) (ordering that Kentucky's death penalty statute is unconstitutional as applied to offenders under the age of twenty-one).

40 *Otte*, 96 N.E.3d at 1292.

Since the influential 2005 Supreme Court ruling in *Roper v. Simmons*,[41] thirty states have declined to execute offenders who are between the ages of eighteen- and twenty-years-old at the time of the offense.[42] This statistic is composed of states that have abolished the death penalty in its entirety, those with moratoria on executions, and the state of Kentucky.[43] These thirty states demonstrate the increasingly recognized notion that executing an offender who was under the age of twenty-one at the time of his or her crimes is inconsistent with the Eighth Amendment. Ohio, however, remains firm in its stance that anyone over the age of eighteen at the time of the offense is eligible for capital punishment.[44]

Not only should Ohio abolish the death penalty for offenders under the age of twenty-one, but Ohio should also prohibit the use of capital punishment for any offender who was under the age of twenty-five at the time of his or her offense. This Note will examine the history of the death penalty in America as it has been applied to juvenile and adult offenders and how the Supreme Court has come to eliminate capital punishment for its least culpable offenders. In doing so, this Note presents an in-depth look at Ohio's use of its death penalty statute. Scientific research on brain development will be assessed in making the claim that Ohio should raise the age of its death penalty eligibility to twenty-five due to the lack of maturity in young adult offenders. Part II of this Note delves into the progression of the juvenile death penalty, from its origins of unrestricted execution to the modern-day rule of law prohibiting the execution of anyone under the age of eighteen. Part II also examines the evolution of Ohio's death penalty statue since the groundbreaking United States Supreme Court ruling that invalidated Ohio's then-death penalty statute.[45] Part III explores the most compelling arguments for Ohio raising its minimum age for death penalty eligibility to twenty-five. The heart of this Part will focus on the neurological and psychological development illustrating that the human brain is not fully mature until the age of twenty-five, and Ohio's readiness to use scientific research to combat any pandemic that adversely affects its citizens. Additionally, arguments will be made regarding the shifting public opinion on the integrity of capital punishment, national and international policy denouncing the use of the death penalty on youthful offenders, and the two-prong analysis conceived in *Atkins* to abolish the death penalty for mentally disabled offenders.[46] Part IV proposes an original statute to aid the Ohio

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[41] *See* Roper v. Simmons, 543 U.S. 551 (2005) (holding that the Eighth Amendment prohibits the use of the death penalty on juvenile offenders under the age of eighteen).

[42] *Kentucky Trial Judge Rules Death Penalty Unconstitutional for Offenders Younger than Age 21*, DEATH PENALTY INFO. CTR. (Aug. 7, 2017), https://deathpenaltyinfo.org/news/kentucky-trial-judge-rules-death-penalty-unconstitutional-for-offenders-younger-than-age-21.

[43] *Id.* (Kentucky has declined to execute offenders between the ages of eighteen and twenty since the landmark decision in *Commonwealth v. Bredhold*).

[44] OHIO REV. CODE ANN. § 2929.03 (West, Westlaw through file 48 of the 134th General Assembly (2021-2022)); *see id.* § 2929.023.

[45] *See generally* Lockett v. Ohio, 438 U.S. 586 (1978).

[46] *See generally* Atkins v. Virginia, 536 U.S. 304 (2002).

legislature in amending the death penalty age requirement to twenty-five. Part V concludes with the undeniable fact that the Ohio legislature must take swift action to ensure that its citizens under the age of twenty-five are not unconstitutionally executed. While David Steffen's and Gary Otte's offenses were heinous, neither a twenty-two-year-old offender nor a twenty-year-old offender is cognitively culpable enough to warrant the ultimate punishment: death.

II. THE HISTORY OF THE JUVENILE DEATH PENALTY IN THE UNITED STATES

The first documented use of the death penalty on a juvenile offender occurred in Plymouth Colony in 1642.[47] Young Thomas Granger was indicted for buggery "with a mare, a cow, two goats, five sheep, two calves, and a turkey."[48] Granger was executed by hanging.[49] Since Granger's execution, an estimated 366 children[50] have been executed in the United States.[51] In 1786, Hannah Ocuish, a twelve-year-old Native American girl, was executed for killing a six-year-old child.[52] In 1885, James Arcene, then ten years old, was executed for his involvement in a murder and robbery.[53] In 1944, fourteen-year-old George Stinney Jr. was executed for murdering two girls.[54] This archaic pattern of executing juveniles continued until 2005.[55] The last juvenile to be executed was seventeen-year-old Scott Hain, who died by lethal injection in 2003.[56] In contrast to the small amount of, but problematic, juvenile executions, American jurisdictions have executed about 20,000 persons total since Granger's 1642 execution.[57]

Use of the death penalty was scarcely restricted until 1972, when the Supreme Court held that the current administration of the death penalty was a violation of both the Eighth Amendment's Cruel and Unusual Punishments clause and the Fourteenth

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47 Lisa M. Lauria, *Sexual Misconduct in Plymouth Colony*, PLYMOUTH COLONY ARCHIVE PROJECT, http://www.histarch.illinois.edu/plymouth/Lauria1.html (last modified Dec. 14, 2007).

48 *Id.*

49 *Id.*

50 For purposes of this article, "children" are individuals under the age of eighteen.

51 Amy Linn, *History of Death Penalty for Juvenile Offenders*, JUV. JUST. INFO. EXCH. (Feb. 13, 2016), https://jjie.org/2016/02/13/history-of-death-penalty-for-juvenile-offenders/.

52 *Id.*

53 *Id.*

54 *Id.*

55 *See* Roper v. Simmons, 543 U.S. 551 (2005).

56 *Executions of Juveniles in the U.S. 1976-2005*, DEATH PENALTY INFO. CTR. (Oct. 10, 2020), https://deathpenaltyinfo.org/policy-issues/juveniles/executions-of-juveniles-since-1976.

57 *Id.*

Amendment.[58] While some of the Justices in the majority argued that the death penalty was unconstitutional in all aspects, some concurring Justices argued that the death penalty was only unconstitutional in its current administration because of its inherent racial bias against minority offenders.[59] Nonetheless, *Furman* did not nullify the death penalty in its entirety; rather, it urged states to reform their current death penalty statutes if they wanted to continue executing offenders.[60]

Ohio was one of many states that reformed its death penalty statute following *Furman*. Ohio's new death penalty statute, codified in 1974, mandated the use of capital punishment in qualifying offenses unless the victim induced the offense, the defendant acted under duress or coercion, or the offender was mentally incompetent or psychotic.[61] Following Sandra Lockett's conviction for aggravated murder, she appealed the constitutionality of her death sentence, prescribed by O.R.C. § 2929.04(B), up to the Supreme Court in 1978.[62] The Supreme Court reversed Lockett's death sentence because it found Ohio's death penalty statute to be unconstitutionally narrow for failing to consider other necessary mitigating factors, such as the defendant's character, age, record, or the circumstances of the crime.[63] Following the Supreme Court's decision in *Lockett v. Ohio*, over 100 death row inmates' sentences were reduced to life imprisonment.[64] It was not until 1981 that Ohio resumed executions under a new death penalty statute enacted by the state legislature.[65]

Ohio's 1981 death penalty statute redefined the circumstances for sentencing offenders to death.[66] Ohio's new version of O.R.C. § 2929.04 prevented imposing the

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[58] Furman v. Georgia, 408 U.S. 238, 239–40 (1972).

[59] *Id.* (Brennan, J., concurring; Marshall, J., concurring; Stewart, J., concurring; White, J., concurring; Douglas, J., concurring) (explaining that Justices Brennan and Marshall found the death penalty to be unconstitutional in relation to the Eighth and Fourteenth Amendments in all instances due to its immoral nature; Justice Stewart would invalidate the use of the death penalty because its current use is "so wantonly and so freakishly imposed" as only a select handful of offenders receive capital punishment for the same offenses for which other offenders receive only life sentences; Justice White reasoned that the death penalty was handed down so infrequently that the threat of such a punishment was too attenuated to be of assistance to the goals of the criminal justice system; and Justice Douglas reasoned that the death penalty was unconstitutional in so far as it was currently administered because it was disproportionately handed out to black defendants).

[60] *Id.* (majority opinion).

[61] OHIO REV. CODE ANN. § 2929.04(B) (West 1974) (current version at OHIO REV. CODE ANN. § 2929.04(B) (West, Westlaw through file 48 of the 134th General Assembly (2021–2022)).

[62] Lockett v. Ohio, 438 U.S. 586 (1978).

[63] *Id.*

[64] AM. BAR ASS'N, EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE OHIO DEATH PENALTY ASSESSMENT REPORT 9 (2007).

[65] *Id.*

[66] *Id.*

death penalty unless at least one of the following aggravating circumstances was proven beyond a reasonable doubt:

1. The offense was the assassination of the President of the United States, the governor or lieutenant governor of the State, or a person in line of succession to or candidate for the presidency of the United States or the governor or lieutenant governor of the State, or a candidate for any of the above offices;
2. The offense was committed for hire;
3. The offense was committed for the purpose of escape from detention, apprehension, trial or punishment for another offense committed by the offender;
4. The offense was committed while the offender was in a detention facility;
5. Prior to the offense at bar, the offender was convicted of an offense an essential element of which was the purposeful killing of or attempt to kill another, or the offense at bar was part of a course of conduct involving the purposeful killing or attempt to kill two or more persons by the offender;
6. The victim of the offense was a peace officer whom the offender had reasonable cause to know or knew to be such, and either the victim, at the time of the commission of the offense, was engaged in his duties or it was the offender's specific purpose to kill a peace officer;
7. The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery or aggravated burglary, and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design; and
8. The victim of the aggravated murder was a witness to an offense who was purposely killed to prevent his/[her] testimony in any criminal proceeding and the aggravated murder was not committed during the commission, attempted commission, or flight immediately after the commission or attempted commission of the offense to which the victim was a witness, or the victim of the aggravated murder was a witness to an offense and was purposely killed in retaliation for his/[her] testimony in any criminal proceeding.[67]

Lockett required that in addition to considering "the nature and circumstances of the offense, the history, character, and background of the offender," the following mitigating circumstances must be considered during a defendant's sentencing hearing:

1. Whether the victim of the offense induced or facilitated [the murder];

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[67] OHIO REV. CODE ANN. §§ 2929.04(A)(1)–(8) (West 1981) (current version at OHIO REV. CODE ANN. §§ 2929.04(A)(1)–(8) (West, Westlaw through file 48 of the 134th General Assembly (2021–2022)).

2. Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;
3. Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law;
4. *The youth of the offender;*
5. The offender's lack of a significant history of prior criminal convictions and delinquency adjudications;
6. The offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim; and
7. Any other factors that are relevant to the issue of whether the offender should be sentenced to death.[68]

From 1973 to 2004, Ohio sentenced six juvenile offenders to death[69] despite its newly revised death penalty statute, which considers the age of the youthful offender.[70] The infliction of death sentences on these juvenile offenders occurred during a nationwide reform on the constitutionality of the death penalty, as it applied to juveniles.[71] In 1982, the Supreme Court held in *Eddings v. Oklahoma* that the death sentence for a sixteen-year-old offender must be vacated as it was imposed without the consideration of individualized mitigating factors, as required by the Eighth and Fourteenth Amendments.[72] In 1988, the Supreme Court, for the first time, upheld a

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[68] OHIO REV. CODE ANN. §§ 2929.04(B)(1)–(7) (current version at OHIO REV. CODE ANN. §§ 2929.04(B)(1)–(7) (West, Westlaw through file 48 of the 134th General Assembly (2021–2022)) (emphasis added).

[69] VICTOR L. STREIB, THE JUVENILE DEATH PENALTY TODAY: DEATH SENTENCES AND EXECUTIONS FOR JUVENILE CRIMES, JANUARY 1, 1973–FEBRUARY 29, 2004, at 2 (2005).

[70] § 2929.04(B)(4).

[71] STREIB, *supra* note 69, at 2.

[72] Eddings v. Oklahoma, 455 U.S. 104 (1982) (citing Lockett v. Ohio, 438 U.S. 586, 606 (1978)). The Petitioner in *Eddings* was a sixteen-year-old boy convicted of first-degree murder after he shot a police officer during a traffic stop. Consequently, Petitioner was sentenced to death. Petitioner appealed to the Supreme Court, contending that the trial court erred in not considering any mitigating factors presented, other than his youth. The Oklahoma death penalty statute called for the sentencing judge to consider "any mitigating circumstances," along with the aggravating circumstances. Petitioner presented evidence not only of his young age, but also of his unsettled family history, experience with physical abuse by his father, and serious emotional disturbance. Nonetheless, the sentencing judge refused to consider the mitigating circumstances pleaded by the Petitioner. The sentencing judge found that the aggravating circumstances proven by the State outweighed the sole mitigating circumstance of Petitioner's age. On appeal to the Supreme Court, this Court held that Petitioner's sentence was to be vacated. On remand, the trial judge would be required to consider all of the individualized mitigating factors pleaded by the Petitioner, as this was a requirement of the Eighth and Fourteenth Amendments.

minimum age requirement for the imposition of capital punishment.[73] In *Thompson v. Oklahoma*, the court found that the execution of a juvenile under the age of sixteen was offensive to "civilized standards of decency" and was in violation of the Eighth and Fourteenth Amendments due to a juvenile's lower level of criminal culpability.[74] However, the constitutionality of executing sixteen- and seventeen-year-old offenders was reaffirmed in *Stanford v. Kentucky*.[75] In *Stanford*, the Supreme Court found that it should not totally ban the execution of juvenile offenders because many state legislatures still found a societal consensus approving the use of the death penalty for juveniles aged sixteen to seventeen, and the court should defer to the states for criminal punishments.[76]

In 2005, the Supreme Court finally decided that the execution of anyone under the age of eighteen was unconstitutional in *Roper v. Simmons*.[77] Thus, the juvenile death penalty was abolished nationwide. The Court used a two-pronged rationale to reach its conclusion. First, the Court determined that there was a national consensus against executing juvenile offenders because a majority of states had either outlawed the practice or rarely imposed the sentence.[78] Second, the Court found that juvenile

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[73] Thompson v. Oklahoma, 487 U.S. 815 (1988).

[74] *Id.* at 815. Petitioner in *Thompson* murdered his brother-in-law because he was abusing Petitioner's sister. Petitioner was fifteen years old at the time of the offense. Despite his youthful age, the State tried Petitioner for first-degree murder as an adult and consequently sentenced him to death. The State of Oklahoma defended its choice to impose the death penalty on Petitioner because he was tried as an adult, and thus could be punished like an adult. On appeal, the Supreme Court vacated Petitioner's death sentence because the imposition of the death penalty on all offenders under the age of sixteen violated the cruel and unusual punishment clause of the Eighth Amendment. The categorical ban on the use of capital punishment for offenders under the age of sixteen was supported by the notion that "civilized standards of decency" have evolved to show a preference against executing these youthful offenders. Additionally, juveniles under the age of sixteen are less culpable because of their lower level of education, lower level of intelligence, and greater likelihood to be influenced by peer pressure and emotions.

[75] Stanford v. Kentucky, 492 U.S. 361 (1989). *Stanford* is a combination of two cases—one from a Kentucky state court, and the other from a Missouri state court. In the Kentucky case, Petitioner was seventeen years old when he robbed a gas station, raped the attendant, and then murdered her to cover up the robbery and rape. Petitioner was tried as an adult and sentenced to death for his commission of the heinous crimes. In the Missouri case, Petitioner was sixteen years old when he robbed a convenience store and stabbed the store clerk to death. Petitioner was tried as an adult and sentenced to death. On appeal, the Supreme Court upheld the imposition of each Petitioner's death sentence. The Court found that there was no national consensus against executing sixteen- and seventeen-year-old offenders as a majority of states still provided for the juvenile death penalty. Ultimately, the Court believed that the decision on whether to execute sixteen- and seventeen-year-old offenders should be left up to the individual states.

[76] *Id.*

[77] Roper v. Simmons, 543 U.S. 551 (2005).

[78] *Id.* at 564–65. By the time *Roper* was decided:

offenders were less deserving of execution because they are "more vulnerable or susceptible to negative influences and outside pressures, including peer pressure."[79] The Court added that "juveniles have less control, or less experience with control, over their own environment."[80] Given those considerations, the Court found it appropriate to ban the imposition of the death penalty on those juvenile offenders who, because of "their own vulnerability and comparative lack of control over their immediate surroundings," had a "greater claim than adults to be forgiven for failing to escape negative influences" in their environment.[81] As an individual's cognitive functions are not fully developed by the age of eighteen, the Court had difficulty concluding that "even a heinous crime committed by a juvenile is evidence of irretrievably depraved character."[82]

When *Roper* was decided, only 21 states still authorized the execution of a juvenile offender,[83] thus showing that the majority of state legislatures already disapproved of executing their youngest offenders. Ohio was one of the many states that had raised the minimum age for execution to eighteen prior to *Roper*.[84] Nationwide, 72% of citizens in 2002 supported the use of the death penalty in general, but only 26% supported its use for juveniles convicted of murder.[85] In comparison, in October 2019, 60% of the nation preferred that the sentence for murder be life imprisonment without parole, rather than the death penalty.[86]

> 30 States prohibit[ed] the juvenile death penalty, comprising 12 that have rejected the death penalty altogether and 18 that maintain it but, by express provision or judicial interpretation, exclude juveniles from its reach . . . . [I]n the 20 States without a formal prohibition on executing juveniles, the practice is infrequent. Since *Stanford*, six States have executed prisoners for crimes committed as juveniles. In the past 10 years [1995-2005], only three have done so: Oklahoma, Texas, and Virginia. *Id.*

79 *Id.* at 569; *see also* Eddings v. Oklahoma, 455 U.S. 104, 115 (1982) (holding that "[e]ven the normal 16-year-old customarily lacks the maturity of an adult").

80 *Roper*, 543 U.S. at 569; *see also* Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility and the Juvenile Death Penalty*, 58 AM. PSYCH. 1009, 1014 (2004) ("As legal minors, [juveniles] lack the freedom that adults have to extricate themselves from a criminogenic setting.").

81 *Roper*, 543 U.S. at 570.

82 *Id.*

83 STREIB, *supra* note 69, at 7.

84 *Id.*

85 *Public Opinion Regarding the Juvenile Death Penalty*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/stories/public-opinion-regarding-the-juvenile-death-penalty (last visited Oct. 14, 2020).

86 *Death Penalty*, GALLUP, https://news.gallup.com/poll/1606/Death-Penalty.aspx (last visited Oct. 14, 2020) [hereinafter GALLUP]; Jeffrey M. Jones, *Americans Now Support Life in Prison over Death Penalty*, GALLUP (Nov. 25, 2019), https://news.gallup.com/poll/268514/americans-support-life-prison-death-penalty.aspx.

It is evident that the American public has changed its view on capital punishment. Accordingly, to ensure that only the most culpable offenders are sentenced to death, the Ohio legislature should abolish the death penalty for those offenders younger than twenty-five. In determining the proper age for imposition of the death penalty, Ohio should examine not only the abundance of scientific research indicating that neurological adulthood begins at twenty-five, but also considers both public opinion and national and international policies when determining how to best enact death-penalty reform.

III. COMPELLING REASONS FOR OHIO TO RAISE ITS MINIMUM AGE FOR DEATH PENALTY ELIGIBILITY TO TWENTY-FIVE

Since the Supreme Court's decision in *Roper*,[87] the minimum eligibility age for the death penalty has remained at eighteen.[88] However, this Note argues that *Roper* is flawed, and proposes that Ohio limit its usage to offenders over the age of twenty-five rather than prohibit the use of the death penalty in its entirety. Such a novel shift in legislation is supported not only by general changes in the public's opinion on capital punishment, but also by international policy, national policy resolutions, precedent set by the Supreme Court of the United States, and recent research in neurological and psychological development suggesting that the brain does not fully mature until the age of twenty-five.[89] When judges and juries sentence offenders to death, the most permanent punishment of all, it is imperative that the offenders' crimes are of the most extreme circumstances, and that the offenders are beyond all hope for rehabilitation.

While many people believe that capital punishment is a deterrent to future crime, there is no credible data behind this contention. [90] States that impose the death penalty

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87 *Roper*, 543 U.S. at 578.

88 *See* Commonwealth v. Bredhold, No. 14-CR-161, 2017 WL 8792559 (Ky. Cir. Ct. Aug. 1, 2017) (explaining that the minimum eligibility age for the death penalty has remained at eighteen for all death penalty states except for Kentucky, which outlawed the execution of offenders under the age of twenty-one in 2017). *See generally Roper*, 543 U.S. 551 (holding executions of persons under eighteen at the time of the offense unconstitutional).

89 Tony Cox, *Brain Maturity Extends Well Beyond Teen Years*, NAT'L PUB. RADIO (Oct. 10, 2011), https://www.npr.org/templates/story/story.php?storyId=141164708#:~:text=Brain%20Maturity%20Extends%20Well%20Beyond%20Teen%20Years%20Under%20most%20laws,maturity%20until%20the%20age%2025; *Public Opinion Regarding the Juvenile Death Penalty*, *supra* note 85; Andrew Michaels, *A Decent Proposal: Exempting Eighteen- to Twenty-Year-Olds from the Death Penalty*, 40 N.Y.U. REV. OF L. & SOC. CHANGE 139, 144 n.27 (2016); AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES, RESOLUTION 111 (Feb. 2018), *available at* https://www.americanbar.org/content/dam/aba/administrative/crsj/policy/2018_mm_111.pdf; Gregg v. Georgia, 428 U.S. 153, 207 (1976) (affirming constitutionality of the death penalty); Thompson v. Oklahoma, 487 U.S. 815, 838 (1988) (prohibiting execution of individuals under the age of sixteen at the time of the offense); *Roper*, 543 U.S. at 578 (prohibiting execution of individuals under the age of eighteen at the time of the offense). Precedent evidences that the Supreme Court revisited the age issue before and raised the minimum age requirement.

90 *The Death Penalty: Questions and Answers*, AM. CIV. LIBERTIES UNION (Sept. 2011), https://www.aclu.org/other/death-penalty-questions-and-answers-september-2011?redirect=files/pdfs/capital/2007_deathpen_questionsanswers.pdf.

do not have lower crime rates or murder rates than non-death-penalty jurisdictions.[91] Moreover, the threat of execution serves no deterrent effect because many offenders do not rationalize before they act, as a vast majority of murders are committed in the heat of passion, under drugs and/or alcohol, or under the guise of mental illness.[92] Thus, no recognized objective of criminal punishment, other than incapacitation, is achieved by sentencing an offender to death. Do we really want to inflict such a permanent punishment on young adults, who are often influenced by external factors when committing crimes and still have their whole lives ahead of them to rehabilitate?

Urging a state legislature to amend its death penalty statute to exclude offenders under the age of twenty-five is a ground-breaking idea as nearly all raise-the-age proposals urge a minimum age of twenty-one.[93] However, these proposals do not extend to an age old enough to meet their stated purpose. If the purpose is to keep up with "evolving standards of decency"[94] regarding the potential cruel and unusual nature of capital punishment, states should utilize all of their resources—not just what various international and national policy groups are recommending, but also what psychologists and other scientists have proven. The history of the death penalty demonstrates that it has repeatedly evolved to prohibit certain offenders from falling within its dominion based on their young age.[95] Prior to the decision in *Roper*, relatively little scientific research existed to support the court's premise that juveniles are less mature than adults. Now that there is an abundance of research supporting the biological differentiation between those over and under the age of twenty-five, Ohio should implement legislative change to achieve a modernized standard of decency in criminal sentencing.

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91 *Id.*

92 *Id.*

93 *See generally Bredhold*, 2017 WL 8792559; AMERICAN BAR ASSOCIATION , *supra* note 89; *American Bar Association Resolution: Ban Death Penalty for Offenders Age 21 or Younger*, DEATH PENALTY INFO. CTR. (Feb. 8, 2018), https://deathpenaltyinfo.org/news/american-bar-association-resolution-ban-death-penalty-for-offenders-age-21-or-younger; *New Neuroscience Research Suggests Age Limit for Death-Penalty Eligibility May be Too Low*, DEATH PENALTY INFO. CTR. (Aug. 17, 2018), https://deathpenaltyinfo.org/news/new-neuroscience-research-suggests-age-limit-for-death-penalty-eligibility-may-be-too-low; Michaels, *supra* note 89, at 165.

94 *Roper*, 543 U.S. at 587 (Stevens, J., concurring).

95 *See supra* Part II.

A. Eighteen Is an Arbitrary Cutoff Age Because Scientific Research Shows That No Biological Difference Exists Between an Individual Over Eighteen and an Individual Just Shy of Eighteen

"The qualities that distinguish juveniles from adults do not disappear when an individual turns 18."[96] As Justice Kennedy opined, once the clock strikes midnight on an individual's eighteenth birthday, that person is not automatically granted new wisdom. He or she is the same adolescent with the same immature mindset as he or she had just one day prior. So why have the Supreme Court of the United States and the Ohio legislature implemented an arbitrary age of eighteen as the minimum age for capital punishment? No evidence exists that a seventeen-year-old offender should be set apart from his eighteen-year-old counterpart developmentally. The only apparent difference is legally-based—the government granting legal majority to those over the age of eighteen.

Justice Kennedy's majority opinion in *Roper*— which stated the death penalty was unconstitutional for those offenders who were under the age of eighteen at the time of their offense—contradicts his notion that the difference between juveniles and adults does not appear overnight.[97] Justice Kennedy briefly described how those under the age of eighteen were less morally culpable because they were more susceptible to peer pressure, less able to understand the consequences associated with their actions, and less able to control their impulses.[98] However, the court omitted one crucial word from its opinion: "brain."[99]

1. Neurological Research: The Prefrontal Cortex Is Not Mature Until the Age of Twenty-Five

In the United States, the age of eighteen is commonly used to separate adolescents from adults. Eighteen is the age at which an individual can legally vote, enlist in the military, marry without parental consent, and make all legal decisions for oneself. However, a growing number of scientists suggest that this is an arbitrary age to distinguish adults from adolescents because the human brain is not fully developed until the age of twenty-five.[100] Apryl Alexander, a professor of psychology at the University of Denver, explained that the scientific consensus is that most human brains are not fully developed until the age of twenty-five.[101] Due to the conflict of what society deems to be adulthood (i.e., age eighteen), and the new scientific research that adulthood actually begins at twenty-five, members of the scientific community have

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96 *Id.* at 574. Justice Kennedy articulates that the legal standard to differentiate juveniles from adults is recognized to be eighteen, and that society has attributed many rights to those over the age of eighteen, while it has shielded those under the age of eighteen from certain acts.

97 *Id.* at 572–74, 578.

98 *Id.* at 569–70.

99 *New Neuroscience Research Suggests Age Limit for Death-Penalty Eligibility May be Too Low*, *supra* note 93.

100 Cox, *supra* note 89.

101 Maria Cramer, *When Are You Really an Adult?*, N.Y. TIMES, https://www.nytimes.com/2020/01/18/us/usa-legal-age.html (last updated Jan. 19, 2020).

advocated for reforming the criminal justice system in the area of punishing young adult offenders.[102] As Warren Binford, professor of law at Willamette University, has pointed out, the conflicting standards have led to confusion on what young adults should and should not be allowed to do since they are known to use less restraint and discipline than their older adult counterparts.[103]

When the Supreme Court decided *Roper*, scientists did not have a thorough understanding of the extent to which adolescent brains differed from adult brains. When the American Bar Association ("A.B.A.") adopted its resolution to end capital punishment for offenders under the age of twenty-one,[104] the A.B.A. reiterated that "there is a growing medical consensus that key areas of the brain relevant to decision-making and judgment continue to develop into the early twenties."[105] Brain development studies show that the areas of the brain responsible for planning, judgment, impulse control, and decision making are still maturing throughout late adolescence.[106] Thus, there is good reason to suppose that adolescents are "more susceptible to influence, less future oriented, less risk averse, and less able to manage their impulses and behavior . . . ."[107]

Researchers have found that the last portion of the brain to develop is the frontal lobe.[108] The frontal lobe is divided into two systems: the prefrontal cortex and the limbic system.[109] While the latter controls a person's fight-or-flight response, the prefrontal cortex is tasked with "reasoning, planning, and impulsivity."[110] Because these two systems develop at different rates, an imbalance exists in the adolescent brain that leads to excess emotionality and vulnerability.[111] "It seems clear that teenagers are simply not as capable as adults at inhibiting behavior."[112]

A longitudinal study of brain development, conducted by Dr. Jay Giedd and sponsored by the National Institute of Mental Health, followed 5,000 adolescents and found that the participants' brains were not mature until *at least* the age of twenty-

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102 *Id.*

103 *Id.*

104 AMERICAN BAR ASSOCIATION, *supra* note 89.

105 *American Bar Association Resolution: Ban Death Penalty for Offenders Age 21 or Younger*, *supra* note 93.

106 Steinberg & Scott, *supra* note 80, at 1013.

107 *Id.*

108 Brooke Troutman, *A More Just System of Juvenile Justice: Creating a New Standard of Accountability for Juveniles in Illinois*, 108 J. OF CRIM. L. & CRIMINOLOGY 197, 203 (2018).

109 *Id.*; *see* ELKHONON GOLDBERG, THE EXECUTIVE BRAIN: FRONTAL LOBES AND THE CIVILIZED MIND 23 (2001).

110 Troutman, *supra* note 108, at 203–04.

111 Kevin Saunders, *The Role of Science in the Supreme Court's Limitations on Juvenile Punishment*, 46 TEX. TECH L. REV. 339, 351 (2013).

112 *Id.*

five.[113] While the study was meant to conclude upon each participant's sixteenth birthday, Dr. Giedd repeatedly extended the conclusion of the study because he found that the participants' brains were still changing at each subsequent examination.[114] The most noteworthy changes occurred in the prefrontal cortex and the cerebellum—two areas of the brain known for emotional control and cognitive function.[115] Dr. Giedd, astounded at the results of his study, joked that "[t]he only people who got this right were the car-rental companies,"[116] who prohibit the rental of a car to anyone under the age of twenty-five, or charge astronomically higher rates than for older adults.[117]

The prefrontal cortex in those under the age of twenty-five is particularly deficient in two ways.[118] First, the brain's gray matter is not fully developed until the mid-twenties.[119] Gray matter is a compilation of brain cells that assist in the brain's higher functions.[120] While one would expect an increase in gray matter to advance the level of brain maturity, the opposite is true. Gray matter is at its maximum between the ages of ten and twenty years old, and only through pruning, does the amount of gray matter diminish.[121] Scientist Phillip Shaw, Dr. Giedd's colleague, opined that the brain's gray matter has "completed its most dramatic structural change by age 25,"[122] thus demonstrating the ongoing maturity of the prefrontal cortex well into the mid-twenties. Second, the brain's white matter is also not fully developed until the mid-twenties.[123] White matter is the brain tissue that oversees communication between several areas of the brain.[124] Myelin, a component of white matter, coats the brain's axons in an attempt to ease the cross-brain communication in a process known as

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113 Michaels, *supra* note 89 (emphasis added).

114 Robin Marantz Henig, *What is it About 20-Somethings?*, N.Y. TIMES (Aug. 18, 2010), https://www.nytimes.com/2010/08/22/magazine/22Adulthood-t.html?pagewanted=all&_r=0.

115 *Id.*

116 *Id.*

117 Michaels, *supra* note 89.

118 Brief for the Am. Med. Ass'n and the Am. Acad. of Child and Adolescent Psychiatry as Amici Curiae Supporting Neither Party at 18, Graham v. Florida, 560 U.S. 48 (2010) (Nos. 08-7412, 08-7621) [hereinafter Brief for the A.M.A.].

119 *Id.* at 20.

120 *Id.* at 19.

121 *Id.* at 19–20.

122 Henig, *supra* note 114.

123 Catherine Lebel & Christian Beaulieu, *Longitudinal Development of Human Brain Wiring Continues from Childhood into Adulthood*, 31 J. NEUROSCIENCE 10937, 10939 fig. 2 (2011).

124 Brief for the A.M.A., *supra* note 118, at 22.

myelination.[125] Myelination, when incomplete, can lead to young adults becoming more susceptible to peer pressure.[126] Studies have shown a positive correlation between "self-regulatory abilities" and the presence of white matter from myelination.[127]

Neuroscientist Dr. Sandra Aamodt contends that the maturity of an adolescent's brain begins during puberty, but by the time an individual is eighteen, his brain is only about halfway developed.[128] Not only is the prefrontal cortex not fully developed at age eighteen, but the brain's reward system[129] is highly active throughout puberty and does not decline to its final level until the age of twenty-five.[130] Young adults may be more vulnerable to peer pressure due to this increase in the activity of the reward system.[131] Dr. Aamodt's research concluded that "a 20 year old is 50 percent more likely to do something risky if two friends are watching than if he's alone."[132] Christopher Simmons, the respondent in *Roper*, was seventeen-years-old when he committed a first degree murder that resulted in the death penalty.[133] Prior to killing Mrs. Shirley Crook, Simmons expressed to his two friends, Charles Benjamin and John Tessmer, then aged fifteen and sixteen respectively, that he wanted to murder someone.[134] Simmons described his dream murder plan to his friends and assured them that he would not get in trouble because he was just a kid.[135] After murdering Mrs. Crook (by tying her hands and feet together, throwing her off a bridge, and leaving her in the water below to drown), Simmons went around school bragging about the killing and telling all his friends about his "grand" night.[136] The behavior exhibited by Simmons is evidence that young adults are easily influenced by their peers and are not yet risk-averse. Additionally, as Dr. Aamodt's findings show, the presence of

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125 *Id.*

126 *Id.*

127 *Id.* at 24.

128 Cox, *supra* note 89.

129 In simplified terms, the brain's reward system refers to neurological structures that are activated with rewarding or reinforcing stimuli. When the brain is exposed to such stimuli, it responds by ramping up production of dopamine. *Know Your Brain: Reward System*, NEUROSCIENTIFICALLY CHALLENGED (Jan. 16, 2015), https://neuroscientificallychallenged.com/posts/know-your-brain-reward-system.

130 Cox, *supra* note 89.

131 *Id.*

132 *Id.*

133 Roper v. Simmons, 543 U.S. 551, 556 (2005).

134 *Id.*

135 *Id.*

136 *Id.* at 557.

Simmons's two friends greatly increased the odds that he would engage in the criminal behavior.[137]

2. Psychological Research: Young Adults Under the Age of Twenty-Five are More Vulnerable to Peer Pressure and Risky Behaviors

In the last twenty years, scientists have explored the diminished culpability of young adult offenders in more depth. Dr. Laurence Steinberg, a psychologist and professor at Temple University, found that young adults are unable to anticipate future consequences as well as older adults.[138] This study observed 935 people between the ages of ten and thirty.[139] The results showed that those aged eighteen to twenty-one and twenty-two to twenty-five had a statistically lower ability to anticipate future consequences than those between the ages of twenty-six and thirty.[140] In a study conducted by Dr. Kathryn Lynn Modecki, it was shown that no statistical difference exists in the temperance ("the ability to evaluate a situation before acting"[141]) of those aged fourteen to seventeen, eighteen to twenty-one, and twenty-two to twenty-seven.[142] However, a statistically significant difference in temperance exists between those adolescents and young adults compared to older adults ages twenty-eight to forty,[143] with the latter having more of an ability to evaluate a situation before acting. Thus, there is a greater similarity in temperance between those fourteen to twenty-five years of age compared to older adults in their thirties. Accordingly, young adults between the ages of twenty-one and twenty-five have the same ability (or lack thereof) to ponder the future implications of their actions as do those under the age of eighteen. Nonetheless, Ohio only views those under the age of eighteen as deficient in this critical cognitive skill. This disparity is only one of many reasons why Ohio's current death penalty statute—authorizing execution for anyone over eighteen—is flawed and needs reform.

Peer influence, as described above with respect to Christopher Simmons's easy decision to engage in killing,[144] runs high in adolescents and young adults. One study of 380 young adults aged eighteen to twenty-five found that "antisocial peer pressure was a highly significant . . . predictor of . . . total recklessness . . . ."[145] Some

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137 Cox, *supra* note 89.

138 Laurence Steinberg et al., *Age Differences in Future Orientation and Delay Discounting*, 80 CHILD DEV. 28, 35 (2009).

139 *Id.* at 32.

140 *Id.* at 35.

141 Michaels, *supra* note 89, at 162.

142 Kathryn L. Modecki, *Addressing Gaps in the Maturity of Judgment Literature: Age Differences and Delinquency*, 32 LAW & HUM. BEHAV. 78, 81–82, 85 (2008).

143 *Id.* at 82, 85.

144 *See generally* Roper v. Simmons, 543 U.S. 551, 556 (2005).

145 Graham Bradley & Karen Wildman, *Psychosocial Predictors of Emerging Adults' Risk and Reckless Behaviors*, 31 J. YOUTH & ADOLESCENCE 253, 257, 263 (2002).

psychologists suggest that just as "coercion or duress is a mitigating factor," peer pressure should lessen culpability.[146]

In particular, peer pressure can run rampant in gang involvement.[147] Juveniles and young adults are often pressured by antisocial peer influences to join gangs.[148] The age demographic of gangs further supports the theory that young adults under the age of twenty-five can be heavily influenced by their peers. The National Youth Gang Survey found that young adults aged eighteen to twenty-four comprised 37% of gang members in the United States.[149] In contrast, those ages fifteen to seventeen made up only 34% of gang members and those under the age of fifteen accounted for only 16% of gang members.[150] Gang members over twenty-five accounted for merely 13% of gang members.[151] While gang involvement certainly leads to violent crime, it is important to consider one of the main reasons why youths and young adults join gangs: peer pressure.[152] An analysis of the demographic of gang membership clearly indicates that young adults under the age of twenty-five are still heavily influenced by the antisocial pressure of their peers. Those over the age of twenty-five have statistically significant lower rates of gang membership because they are less at risk of being influenced by negative peers to engage in reckless behavior.[153] Both the scientific studies previously discussed and the surveys of gang membership support a notion that young-adult gang members are not as morally culpable due to the external influences involved in committing group offenses.

Justice Kennedy articulated in *Roper* that the personality traits of a juvenile "are more transitory [and] less fixed."[154] Relatively few juvenile offenders will continue this pattern of committing criminal offenses into adulthood, as for most juveniles, "risky or antisocial behaviors are fleeting; they cease with maturity . . . ."[155] The Court found that the evolving nature of juveniles implied higher potential for reform and

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146 *Less Guilty by Reason of Adolescence*, MACARTHUR FOUND. RSCH. NETWORK ON ADOLESCENT DEV. AND JUV. JUST. 1, 3 (2005), https://ccoso.org/sites/default/files/import/Less-guilty-by-reason-of-adolesence.pdf.

147 *Pressures of Gang Affiliation on Youth*, MST SERVS. (Oct. 2, 2018, 2:40 PM), https://info.mstservices.com/blog/pressures-of-gang-affiliation-on-youth.

148 *Id.*

149 Off. of Juv. Just. and Delinq. Prevention, *Age*, 1996 NAT'L YOUTH GANG SURV. (July 1999), https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/pubs/96natyouthgangsrvy/surv_6a.html.

150 *Id.*

151 *Id.*

152 *Pressures of Gang Affiliation on Youth*, *supra* note 147.

153 Bradley & Wildman, *supra* note 145, at 263; Office of Juvenile Justice and Delinquency Prevention, *supra* note 149.

154 Roper v. Simmons, 543 U.S. 551, 570 (2005).

155 *Id.* (quoting Steinberg & Scott, *supra* note 80, at 1014).

diminished culpability.[156] Similarly, since it is now known that offenders up to the age of twenty-five have a lower ability to anticipate future consequences, have less temperance, and are more susceptible to peer pressure, punishment should be no different for these young adult offenders than for juvenile offenders. For the same reasons that *Roper* found the death penalty unconstitutional for those under eighteen, the Ohio legislature should rewrite the law to prohibit the death penalty as unconstitutional for those offenders under the age of twenty-five.

The death penalty is reserved for "those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'"[157] While Simmons's, Steffen's, and Otte's crimes were certainly heinous and they deserve to be punished for murdering innocent people, their lack of brain development arguably makes them less culpable and less deserving of capital punishment than an older adult offender with a matured brain. The Ohio legislature should not disregard the new, modern research proving the lessened culpability of offenders under the age of twenty-five. Since scientists now realize that the brain is not fully developed until age twenty-five,[158] rather than age eighteen, the Ohio legislature should take this neurological and psychological research into account in considering a new death penalty statute that would raise the minimum age for such punishment to twenty-five.

3. In the Midst of the Global Coronavirus Pandemic, Ohio Has Emerged as a National Leader in Responses Based on Scientific Reliance

Listening to science is nothing new for Ohio. In March of 2020, when the coronavirus pandemic first emerged in the United States, Ohio was the pioneer in coronavirus response tactics.[159] Ohio Governor Mike DeWine was quick to respond to the impending threat of the coronavirus by shutting down public gatherings and schools.[160] The Governor's reasoning? "We're basing this on science."[161] This then-dramatic response to the coronavirus pandemic came about in mid-March 2020 when there were only three confirmed cases of the virus in the entire state.[162] Ohio imposed broad restrictions on its citizens when so few cases and such little scientific research existed (at the time). In contrast, an abundance of scientific research exists on the delayed neurological and psychological maturation of young adults, and how this can

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156 *Id.* at 570–71.

157 *Id.* at 568 (quoting Atkins v. Virginia, 536 U.S. 304, 319 (2002)).

158 Cox, *supra* note 89.

159 Jessie Balmert & Jackie Borchardt, *'We're Basing this on Science': Ohio Emerges as Leader in U.S. Coronavirus Response*, DES MOINES REG. (Mar. 16, 2020), https://www.desmoinesregister.com/story/news/nation/2020/03/14/coronavirus-ohio-emerges-leader-u-s-coronavirus-response/5049489002/?fbclid=IwAR1-7OysDbXcZRl8Wqr2gXvjtFjfxfv1MtCpIFSZq_ooe_vKhVItoyhC_14.

160 *Id.*

161 *Id.*

162 *Id.*

increase the propensity to commit criminal offenses. Thus, it is not senseless to think that Ohio should raise the age of eligibility for its death penalty punishment. Unlike when Governor DeWine shut down the state in mid-March, an abundance of scientific research exists showing that young adults under the age of twenty-five do not have the requisite brain maturity and cognitive skills to be as culpable for their poor criminal decisions as mature adults. When Governor DeWine began issuing harsh coronavirus restrictions on Ohioans in March 2020, 80% of Ohio citizens approved of the Governor's response to the pandemic.[163] Not only would Ohio now have much more scientific support to reform its death penalty statute than it did when issuing coronavirus restrictions, but it will also have a great deal of public support if it takes a firm stance and uses reliable scientific research to improve its death penalty standpoint. Ohio should once again be a pioneer in affecting national policy and reform its death penalty statute to exclude offenders under the age of twenty-five from state execution.

B. Public Opinion is Shifting Away from Supporting the Death Penalty in All Instances

The citizens of the United States have always had differing views regarding whether they support the death penalty.[164] In October 2020, only 55% of people were in favor of sentencing a convicted murderer to death.[165] This is a decrease in 15 percentage points from 2002.[166] In our modern day society, nearly half of the U.S. has lost faith in the benefits of the death penalty and now objects to it as a punishment entirely.[167] This differing view amongst U.S. citizens accurately reflects the divide amongst the U.S. states on the constitutionality of the death penalty. Currently, the country is essentially evenly divided amongst death penalty states and non-death penalty states. While 27 states and the federal government authorize the use of the death penalty, three of those states—California, Oregon, and Pennsylvania—have gubernatorial moratoria on the use of capital punishment.[168] A gubernatorial moratoria essentially prohibits the use of the death penalty, but does so under the governor's authority, rather than by state legislation.[169] This means that in practice,

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163 Tyler Carey, *Poll: Nearly 80% of Ohioans Approve of Gov. DeWine's Response to the Coronavirus Pandemic*, WKYC (Mar. 26, 2020), https://www.wkyc.com/article/news/health/coronavirus/poll-nearly-80-of-ohioans-approve-of-gov-dewines-response-to-the-coronavirus-pandemic/95-da1657db-eaa5-4958-b335-9a85da4ce676.

164 *See generally* GALLUP, *supra* note 86.

165 *Id.*

166 *Id.*

167 *Id.*

168 *States With and Without the Death Penalty*, DEATH PENALTY INFO. CTR. (Oct. 18, 2018), https://deathpenaltyinfo.org/states-and-without-death-penalty.

169 Hadar Aviram, *Death Penalty Moratorium in California – What it Means for the State and for the Nation*, THE CONVERSATION (Mar. 20, 2019), https://theconversation.com/death-penalty-moratorium-in-california-what-it-means-for-the-state-and-for-the-nation-113634.

only 24 states are willing to execute a convicted felon, while 26 states plus the District of Columbia are unwilling to do so.[170] For the first time since *Roper*, a majority of states prohibit the execution of anyone under the age of twenty-one. Kentucky, a death penalty-eligible state, officially ruled the death penalty to be unconstitutional in 2017 for those under the age of twenty-one at the time of the offense.[171] Kentucky's partial restriction based on age now brings the total to 27 states, plus the District of Columbia, which presently outlaw capital punishment for offenders younger than twenty-one.[172] With a majority of states now opposed to capital punishment not only for minors, but also for those under the age of twenty-one, it is time for Ohio to step up and raise its minimum age for death-penalty eligibility.

While Kentucky suggests twenty-one to be the minimum eligibility age for the death penalty, this standard is still premature. As previously mentioned, Justice Kennedy did not believe that the qualities differentiating seventeen-year-olds from eighteen-year-olds disappeared overnight.[173] As we now know from contemporary scientific research, not only is there not a statistically significant neurological or cognitive difference between seventeen- and eighteen-year-olds, but this difference is also not apparent when comparing those under eighteen and under twenty-one with those under twenty-five years of age.[174] Thus, Ohio should strive to start a precedent that is based on reliable research, in addition to public opinion, when reforming its death penalty statute to prohibit executing those under the age of twenty-five.

C. International and National Policy Recommendations Call for an End to Capital Punishment for the Least Culpable Offenders, Defined by Their Age

On November 20, 1989, the United Nations presented the Convention on the Rights of the Child.[175] This Treaty called for the condemnation of "torture or other cruel, inhuman or degrading treatment or punishment," including "capital punishment" and "life imprisonment without possibility of release" for "offenses committed by persons below eighteen years of age."[176] Every member of the United Nations has ratified this treaty except for the United States.[177] Even countries which are notorious for their lack of human rights, such as Saudi Arabia, Syria, and South

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170 *States With and Without the Death Penalty*, *supra* note 168.

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

172 *States With and Without the Death Penalty*, *supra* note 168.

173 Roper v. Simmons, 543 U.S. 551, 574 (2005).

174 Cox, *supra* note 89.

175 Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

176 Convention on the Rights of the Child art. 37(a), Nov. 20, 1989, 1577 U.N.T.S. 3.

177 *Convention on the Rights of the Child New York, 20 Nov. 1989*, UNITED NATIONS TREATY COLLECTION (Aug. 27. 2021), https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4 [hereinafter *Convention*].

Sudan,[178] have ratified this treaty.[179] Despite the United States' eventual ban on the death penalty—by judicial order—for those under the age of eighteen, Congress has still yet to ratify this treaty.[180] Meanwhile, 195 other United Nations member states have approved of this treaty.[181] Does the United States really want to be equated in its lack of human rights for juveniles to some of the most backward-looking and inhumane countries?

In 2018, the American Bar Association, the most "trusted voice of America's legal profession,"[182] approved Resolution 111, which urged every state that still authorizes the death penalty to prohibit the usage of such on any felon who was under the age of twenty-one at the time of the criminal offense.[183] The A.B.A.'s conclusion gathered support from many different fields, including the recent advances in adolescent brain development research, the lesser moral culpability for adolescents, and evolving societal views.[184] The A.B.A. found that because of these older adolescents' "ongoing neurological development," they are "not among the worst-of-the-worst offenders, for whom the death penalty must be reserved."[185] A similar resolution was adopted by the A.B.A. at its 1983 Annual Meeting, whereby the association called for a ban on the death penalty for any person under the age of eighteen.[186] While it was roughly two decades before the Supreme Court adopted the views of the 1983 A.B.A. members,[187] one can be hopeful that the Ohio legislature will listen to the A.B.A.'s 2018 resolution and take it into consideration in a more timely manner, unlike the highest court's undue delay of such consideration. Along with considering the A.B.A.'s 2018 resolution, Ohio should review all of the latest scientific research

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178 Daniel Brown, *The 25 Countries in the World with the Least Amount of Freedom*, BUS. INSIDER (Dec. 10, 2018), https://www.businessinsider.com/25-countries-with-least-amount-of-freedom.

179 *Convention*, *supra* note 177.

180 Roper v. Simmons, 543 U.S. 551 (2005) (holding that the Eighth Amendment prohibits the use of the death penalty on juvenile offenders under the age of eighteen); *see Convention*, *supra* note 177.

181 *Convention*, *supra* note 177.

182 William C. Hubbard, *Respect and Influence: The ABA's Voice is Strengthened by Members' Efforts*, A.B.A. J. (July 1, 2015, 6:15 AM), http://www.abajournal.com/magazine/article/respect_and_influence_the_abas_voice_is_strengthened_by_members_efforts.

183 AMERICAN BAR ASSOCIATION, *supra* note 89.

184 *Id.* at 6, 8, 10–11.

185 *Id.* at 13.

186 William W. Greenhalgh, *ABA House of Delegates Recommendation*, A.B.A. (1983), https://www.americanbar.org/groups/committees/death_penalty_representation/resources/dp-policy/juvenile-dp-1983/.

187 *See* Roper v. Simmons, 543 U.S. 551, 568 (2005).

concluding that the human brain does not fully mature until the age of twenty-five and the legislative proposal presented later in this Note.

D. The Two-Pronged Analysis in Atkins v. Virginia Mirrors the Most Compelling Reasons to Discontinue the Use of the Death Penalty for Offenders Under the Age of Twenty-Five

While the juvenile justice movement lobbied to abolish the juvenile death penalty, the Supreme Court focused on abolishing the imposition of the death penalty for those with mental disabilities.[188] Two significant reasons existed for the Court's 2002 decision to discontinue capital punishment for this category of offenders. First, the Court found that many states were no longer executing those with mental disabilities.[189] By 2002, twenty-one death penalty states and the federal government had abolished the death penalty for those with mental disabilities. The few remaining death penalty states rarely imposed this ultimate punishment on its mentally disabled citizens.[190] "The practice, therefore, has become truly unusual, and it is fair to say that a national consensus has developed against it."[191] Second, the Court found that executing those individuals with mental disabilities will not further "the deterrent or the retributive purpose of the death penalty."[192] Moreover, these individuals tend to have disabilities in the areas of "reasoning, judgment, and control of their impulses"

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188 Atkins v. Virginia, 536 U.S. 304 (2002). The Petitioner was convicted of abduction, armed robbery, and first-degree murder. Consequently, Petitioner was sentenced to death. *Id.* at 307. At the sentencing hearing, Petitioner introduced evidence to show that he was mentally disabled because he had an IQ of 59. *Id.* at 309. Despite Petitioner's low IQ score, the State contended that Petitioner was still deserving of capital punishment. *Id.* On appeal, the Supreme Court held that the imposition of the death penalty on those with mental disabilities was excessive under the Eighth Amendment's cruel and unusual punishment clause. *Id.* at 321.

189 *Id.* In 1986, Georgia became the first state to prohibit the execution of those with mental disabilities. *Id.* at 313–14. The federal government followed suit in 1988, with Maryland trailing close behind in 1989. *Id.* at 314.

> In 1990 Kentucky and Tennessee enacted statutes similar to those in Georgia and Maryland, as did New Mexico in 1991, and Arkansas, Colorado, Washington, Indiana, and Kansas in 1993 and 1994. In 1995, when New York reinstated its death penalty, it emulated the Federal Government by expressly exempting the mentally retarded. Nebraska followed suit in 1998 . . . . [I]n 2000 and 2001 six more states—South Dakota, Arizona, Connecticut, Florida, Missouri, and North Carolina—joined the procession. The Texas Legislature unanimously adopted a similar bill, and bills have passed at least one house in other States, including Virginia and Nevada . . . .

Id. at 314–15.

190 *Id.* "Some States, for example New Hampshire and New Jersey, continue to authorize executions [for the mentally disabled], but none have been carried out in decades." *Id.* at 316. The Court went on to discuss that even in the states which "have no prohibition with regard to the mentally retarded, only five have executed offenders possessing a known IQ less than 70 . . . ." since 1989. *Id.*

191 *Id.*

192 *Id.* at 321.

and thus "do not act with the level of moral culpability that characterizes the most serious adult criminal conduct."[193] The Court ultimately arrived at the conclusion that since those with mental disabilities are less morally culpable due to their underdeveloped cognitive skills, the goals of the death penalty (i.e., deterrence and retribution) will not be fulfilled by executing this population of offenders.

Similarly, as noted in Part III. B., offenders under the age of twenty-one are already not subject to execution in a majority of states,[194] either because the state finds the execution of this category of youthful offender against evolving standards of decency, or because the state has a comprehensive ban on the use of capital punishment. Thus, the rarity of executing those under the age of twenty-one demonstrates that a growing national consensus exists against executing these younger offenders. Additionally, as was discussed in Part III. A., those under the age of twenty-five are less morally culpable due to their underdeveloped cognitive skills. At the heart of *Atkins* was a focus on the deficient cognitive development of mentally disabled offenders. Likewise, this Note proposes that those under the age of twenty-five are similarly wanting in their cognitive abilities when weighing the pros and cons of committing a criminal offense. Thus, a direct parallel exists between the *Atkins* Court's reasoning in abolishing the death penalty for individuals with mental disabilities and the need for Ohio to abolish the death penalty for individuals under the age of twenty-five.

IV. A NEW STATUTORY PROPOSAL FOR THE OHIO STATE LEGISLATURE

The current statute governing the usage of capital punishment in Ohio is outdated and is in dire need of reform. Section 2929.023 of the Ohio Revised Code states,

> A person charged with aggravated murder and one or more specifications of an aggravating circumstance may, at trial, raise the matter of his age at the time of the alleged commission of the offense and may present evidence at trial that he was not eighteen years of age or older at the time of the alleged commission of the offense. The burdens of raising the matter of age, and of going forward with the evidence relating to the matter of age, are upon the defendant. After a defendant has raised the matter of age at trial, the prosecution shall have the burden of proving, by proof beyond a reasonable doubt, that the defendant was eighteen years of age or older at the time of the alleged commission of the offense.[195]

O.R.C. § 2929.023 places the burden of raising the matter of age on the defendant to assert that he or she was under the age of eighteen and is thus not fit for the punishment of death. Rather than the defendant raising the argument that he or she was under the age of eighteen at the time of the alleged commission of the offense, this Note seeks to reform the statute as follows:

> A person charged with aggravated murder and one or more specifications of an aggravating circumstance may, at trial, raise the matter of his or her age

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193 *Id.* at 306.

194 *States With and Without the Death Penalty*, *supra* note 168.

195 OHIO REV. CODE ANN. § 2929.023 (West, West, Westlaw through file 48 of the 134th General Assembly (2021–2022)).

> at the time of the alleged commission of the offense and may present evidence at trial that he or she was not *twenty-five years of age or older* at the time of the alleged commission of the offense. The burdens of raising the matter of age, and of going forward with the evidence relating to the matter of age, are upon the defendant. The prosecution shall have the burden of proving, by proof beyond a reasonable doubt, that the defendant was in fact *over the age of twenty-five* at the time of the alleged commission of the offense.

The proposed statute is unique, revolutionary, and absolutely necessary.[196] It may take time for the Ohio legislature to come around to this innovative proposal. Therefore, if Ohio declines to raise the minimum age to twenty-five, this Note proposes that the statute containing the aggravating and mitigating factors be amended. Specifically, this Note advocates for altering O.R.C. § 2929.04(A). This provision currently provides that the "imposition of the death penalty for aggravated murder is precluded unless one or more of the following is specified in the indictment or count in the indictment . . . and proved beyond a reasonable doubt."[197] This Note suggests that this provision be modified so as to ensure that only the "worst of the worst"[198] offenders are sentenced to such a severe sanction on their life and liberty. A modern version of this provision should read as follows: the imposition of the death penalty for aggravated murder is precluded unless *two or more* of the following are *proved beyond a reasonable doubt, at trial, by the prosecution*. This altered version of O.R.C. § 2929.04(A) requires two of the aggravating factors to be present,[199] rather than just one, and for them to both be proven beyond a reasonable doubt by the prosecution. If Ohio continues to execute offenders under the age of twenty-five, it needs to be confident in its decision to inflict such a harsh penalty.

The last aspect of Ohio's death penalty statute instructs "the court, trial jury, or panel of three judges" to consider and weigh several mitigating factors against the

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196 *See* Roper v. Simmons, 543 U.S. 551, 587 (2005); Commonwealth v. Bredhold, No. 14-CR-161, 2017 WL 8792559 (Ky. Cir. Ct. Aug. 1, 2017); AMERICAN BAR ASSOCIATION, *supra* note 89, at 8; AMNESTY INT'L, THE EXCLUSION OF CHILD OFFENDERS FROM THE DEATH PENALTY UNDER GENERAL INTERNATIONAL LAW 4 (2003); *Extending Roper: Is 18 Too Young?*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/policy-issues/juveniles/extending-roper (last visited Aug. 27, 2021).

197 § 2929.04(A).

198 AMERICAN BAR ASSOCIATION, *supra* note 89, at 13.

199 § 2929.04(A)(1)–(10) (Ohio has modified the list of aggravating factors in its death penalty statute since its overhaul in 1981. Specifically, Ohio has added two more aggravating factors to the list: "(9) the offender, in the commission of the offense, purposefully caused the death of another who was under thirteen years of age at the time of the commission of the offense, and either the offender was the principal offender in the commission of the offense or, if not the principal offender, committed the offense with prior calculation and design[; and] (10) the offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit terrorism." Additionally, Ohio has slightly modified the wording in provisions (A)(1)–(8), but the underlying principals remain the same as they did in the 1981 version).

established aggravating factor.[200] Not surprisingly, Ohio has not modified the list of mitigating factors since it established them in the 1981 version of the statute.[201] Therefore, this Note proposes that Ohio add the following mitigating factor to be specifically enumerated in the statute: the extent that peer pressure and/or temperance influenced the offender's commission of the offense. While gang involvement poses a high likelihood of peer pressure, this adaptation to the Ohio legislation would not prohibit the execution of gang members in its entirety. Amending the legislation would merely ensure that only the worst-of-the-worst offenders are sentenced to death by adding an additional mitigating factor considering outside influences. This factor would allow for the trier of fact to contemplate other external influences, which arguably can be compared to duress or coercion, in deciding whether an offender is deserving of capital punishment.

The final legislative proposal, in the event that Ohio does not elect to raise the minimum age of eligibility to twenty-five, is to require an independent psychological and neurological examination of the offender. This requirement should be implemented in all cases in which the defendant was under the age of twenty-five at the time of the alleged offense. The independent examiner would perform scientific tests on the offender, similar to those elaborated upon in Part III.A.2., to gain a better understanding of the offender's ability to anticipate future consequences, his or her ability to be influenced by antisocial peer pressure, and his or her temperance. The special consideration of these key psychological factors will better assist the trier of fact in assuring that the constitutional rights of the offender are not violated by the infliction of cruel and unusual punishments.[202]

V. CONCLUSION

Ohio's death penalty statute, as it is currently imposed, inflicts severe and eternal punishment on the state's less (or least) culpable offenders. With a national shift away from the use of the death penalty, evolving standards of decency are unveiling the problem of punishing such young and still-maturing offenders with death. These offenders, primarily characterized by their underdeveloped brain functions, do not think through the consequences of a criminal act in the same way that an older adult offender would. Thus, it is imperative that Ohio amends its death penalty statute before the lives of young adults, some of whom are capable of becoming productive members of society, are lost.

This Note proposes that the Ohio legislature raise the age for capital punishment to twenty-five to ensure proper justice for younger Ohioans. Most significantly, new scientific research has exposed the lack of maturity amongst older adolescent and young adult brains. It has been proven that the human brain does not fully mature until a person is approximately twenty-five-years-old.[203] The necessary areas of the prefrontal cortex, including the gray matter and white matter, are not mature until the

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200 *Id.* at § 2929.04(B).

201 *Id.* at § 2929.04(B)(1)–(7).

202 U.S. CONST. amend. VIII.

203 Cox, *supra* note 89.

mid-twenties.[204] An individual's ability to foresee future consequences is lacking in young adulthood, as is his temperance.[205] Additionally, young adults are far more susceptible to antisocial peer pressure than older adults.[206] Moreover, not only are the "evolving standards of decency"[207] gradually growing to disfavor the use of the death penalty in its entirety,[208] but several policy arguments exist as well to raise the minimum age. The United Nations' Convention on the Rights of the Child aimed to prohibit the use of the death penalty for all juveniles.[209] While the United States has still yet to ratify this treaty, immense international support exists for cautioning legislatures from sentencing its youngest, least culpable offenders to death. Even the American Bar Association has recommended that the federal government raise the minimum age for the death penalty.[210]

With all of the innovative scientific research arriving at the conclusion that human brains are not fully developed until the age of twenty-five, Ohio must carefully weigh that scientific evidence, along with the shifting public opinions and national and international policy, to modify its death penalty statute. Ohio has listened to science before with the onset of the coronavirus pandemic, so why not now? To ensure that only the worst-of-the-worst are deprived of a second chance at life, Ohio is urged to adopt a minimum age of twenty-five for its death penalty eligibility.

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204 Brief for the A.M.A., *supra* note 118, at 22; Lebel & Beaulieu, *supra* note 123, at 10939.

205 Modecki, *supra* note 142, at 85.

206 Bradley & Wildman, *supra* note 145, at 257–63.

207 *See* Roper v. Simmons, 543 U.S. 551, 587 (2005) (Stevens, J., concurring) (explaining that the Eighth Amendment, as originally written, most likely would have tolerated the execution of a seven-year-old child. However, our society's "evolving standards of decency" show that we have altered our understanding of the U.S. Constitution to preclude such a punishment).

208 *See* GALLUP, *supra* note 86 (Recent polls of the U.S. population show that support for the death penalty is declining, as almost half of the country is now opposed to the death penalty.).

209 Convention on the Rights of the Child art. 37(a), *supra* note 176.

210 AMERICAN BAR ASSOCIATION, *supra* note 89.