

# Neuroscience and Criminal Law: The Post-Jones Landscape for Late Adolescents and Emerging Adults

## Part One

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## PART ONE - AGENDA

- Developmentally tailored justice
- Neuroscience overview as related to caselaw
- Relevant court decisions
- Implications

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## RESOURCES

- Center for Law, Brain & Behavior at Massachusetts General Hospital (2022). White Paper on the Science of Late Adolescence: A Guide for Judges, Attorneys and Policy Makers (January 27th, 2022). <https://clbb.mgh.harvard.edu/white-paper-on-the-science-of-late-adolescence/>
- Francis X. Shen et al., *Justice for Emerging Adults after Jones: The Rapidly Developing Use of Neuroscience to Extend Eighth Amendment Miller Protections to Defendants Ages 18 and Older*, 97 N.Y.U. L. Rev. Online (forthcoming 2022)

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## DEVELOPMENTALLY TAILORED JUSTICE

- Extending range of juvenile court jurisdiction to young adults
- Young adult rehabilitative interventions
- Young adult diversion programs
- Special young adult parole hearings

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<hr/> <h2>YOUNG ADULT COURTS</h2>	<h3>Brooklyn Young Adult Court</h3> <ul style="list-style-type: none"><li>• 18 – 24</li><li>• Misdemeanors</li></ul> <h3>San Francisco Young Adult Court</h3> <ul style="list-style-type: none"><li>• 18 – 25</li><li>• Certain felonies, misdemeanors</li></ul> <h3>Chicago Restorative Justice Community Court</h3> <ul style="list-style-type: none"><li>• 18 – 26</li><li>• Nonviolent felonies, misdemeanors</li></ul>
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<hr/> <h2>TREATING YOUNG ADULTS DIFFERENTLY</h2>	<hr/> <ul style="list-style-type: none"><li>■ Prior to 1942, the age of military conscription was 21</li><li>■ Prior to 1972, the voting age was 21</li></ul>
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## TREATING YOUNG ADULTS DIFFERENTLY

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- Drinking age 21
  - Under the Credit Card Accountability, Responsibility, and Disclosure Act (CARD) a cosigner is required until age 21 to open a credit card
  - Under the ACA, individuals can stay on a parent's health insurance until age 26
  - Parental support obligations

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## NEUROSCIENCE

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- Adolescent and late adolescent brains are different from adult brains

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## NEUROSCIENCE

- “Hot cognition” v. “cold cognition” decision making
- Sensation seeking
- Preference for risk
- Threat sensitivity
- Less future orientation
- Presence of peers increases risk taking behaviors

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## NEUROSCIENCE

- Adolescents and young adults are resilient
  - Affiliation with prosocial peers
  - Provided support
  - Access to opportunities and safety
  - Develop a sense of personal self-efficacy

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## DEVELOPMENTAL JURISPRUDENCE

- “Children are **constitutionally different** from adults in their levels of culpability”
  - Miller v. Alabama

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Roper v. Simmons (2005) : Barred execution for juveniles as a class

- “**scientific and sociological studies**”
- "lack of maturity" "*impetuous and ill-considered actions and decisions*"
- “adolescents are overrepresented statistically in virtually every category of *reckless behavior*.”

Graham v. Florida (2010): Barred life without parole for non-homicides for juveniles

- “**developments in psychology and brain science** continue to show fundamental differences between juvenile and adult minds. For example, parts of the *brain involved in behavior control continue to mature through late adolescence*.
- greater possibility exists that a minor’s character deficiencies will be reformed.

Miller v. Alabama (2012): Barred mandatory life without parole for juveniles for homicide

- “[A]n ever-growing body of research in **developmental psychology and neuroscience** continues to confirm and strengthen the Court’s conclusions” “It is increasingly clear that adolescent **brains are not yet fully mature** in regions and systems related to higher-order executive functions such as impulse control, planning ahead, and risk avoidance” (citations omitted)
- “**Numerous studies** post-Graham indicate that exposure to deviant peers leads to increased deviant behavior and is a consistent predictor of adolescent delinquency.” (citations omitted)

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## JONES V. MISSISSIPPI (2021)

- Life without parole sentence for juveniles only require consideration of youth as a mitigating factor

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### JONES V. MISSISSIPPI (2021)

- “In short, Miller followed the Court’s many death penalty cases and required that a sentencer **consider youth** as a mitigating factor when deciding whether to impose a life-without-parole sentence. Miller did not require the sentencer to make a separate finding of **permanent incorrigibility** before imposing such a sentence.”

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## JONES V. MISSISSIPPI (2021)

- Neuroscience and social science absent

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## NEUROSCIENCE AND THE COURT

- *Miller* cited in over 5000 court cases
- 494 cases involving defendants over 18 substantively discuss neuroscience to extend *Miller* protections to 18+
- None were successful

Francis X. Shen et al., *Justice for Emerging Adults after Jones: The Rapidly Developing Use of Neuroscience to Extend Eighth Amendment Miller Protections to Defendants Ages 18 and Older*, 97 N.Y.U. L. Rev. Online (forthcoming 2022)

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IN RE  
MONSCHKE  
(SUPREME  
COURT OF  
WASHINGTON)  
(2021)

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- Mandatory life without parole sentences unconstitutional for offenders younger than 21

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IN RE MONSCHKE (SUPREME COURT OF WASHINGTON)

- Question: Whether the constitutional requirement that prohibit mandatory LWOP sentences for defendants under 18, also prohibits mandatory LWOP sentences for defendants 18 – 21.

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## IN RE MONSCHKE (SUPREME COURT OF WASHINGTON)

In the majority, concurrence, and dissent

- “Brain” = nearly 2 dozen times
- “Neuroscience” or “neurological” = 13 times

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## IN RE MONSCHKE (SUPREME COURT OF WASHINGTON)

- The overarching conclusion compelled by these sources is clear: **“biological and psychological development continues into the early twenties, well beyond the age of majority.”**

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## IN RE MONSCHKE (SUPREME COURT OF WASHINGTON)

- Neuroscientists now know that all three of the “**general differences between juveniles under 18 and adults**” recognized by *Roper* are **present in people older than 18**. While not yet widely recognized by legislatures, we deem these objective **scientific differences** between 18- to 20-year-olds (covering the ages of the two petitioners in this case) on the one hand, and persons with fully developed **brains** on the other hand, to be constitutionally significant under article I, section 14 (citations omitted).

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## IN RE MONSCHKE (SUPREME COURT OF WASHINGTON)

- Heading: No Meaningful Developmental Difference Exists Between the Brain of a 17-year-old and the Brain of an 18-year-old

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## IN RE MONSCHKE (SUPREME COURT OF WASHINGTON)

- What they have shown is that **no meaningful neurological bright line** exists between age 17 and age 18 or, as relevant here, between age 17 on the one hand, and ages 19 and 20 on the other hand. Thus, sentencing courts must have discretion to take the mitigating qualities of youth—those qualities emphasized in *Miller* and *Houston-Sconiers*—into account for defendants younger and older than 18. Not every 19- and 20-year-old will exhibit these mitigating characteristics, just as not every 17-year-old will.

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## IN RE MONSCHKE (SUPREME COURT OF WASHINGTON)

“G to I” problem

- But the **variability in individual attributes** of youthfulness are exactly why courts must have discretion to consider those attributes as they apply to each individual youthful offender. That is why mandatory sentences for youthful defendants are unconstitutional.

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## IN RE MONSCHKE (SUPREME COURT OF WASHINGTON)

- There is **no meaningful cognitive difference** between 17-year-olds and many 18-year-olds. When it comes to *Miller*'s prohibition on mandatory LWOP sentences, there is no constitutional difference either. Just as courts must exercise discretion before sentencing a 17-year-old to die in prison, so must they exercise the same discretion when sentencing an 18-, 19-, or 20-year-old. We grant Monschke's and Bartholomew's PRPs and vacate their mandatory LWOP sentences. We remand each case for a new sentencing hearing at which the **trial court must consider whether each defendant was subject to the mitigating qualities of youth.**

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## IN RE MONSCHKE (SUPREME COURT OF WASHINGTON)

- "The petitioners have shown that many youthful defendants older than 18 **share the same developing brains** and impulsive behavioral attributes as those under 18. Thus, **we hold that these 19- and 20-year-old petitioners must qualify for some of the same constitutional protections as well.**"

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## IN RE MONSCHKE (SUPREME COURT OF WASHINGTON)

- Dissent
- “But I struggle to identify at **what precise age we will stop** redrawing these lines based on this **brain development evidence**, be it 20, 22, 25, or even older.”

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