STUCK BETWEEN GROWING UP AND GROWN UP: DELAYING THE SENTENCING PHASE FOR YOUNG ADULTS FACING CAPITAL PUNISHMENT IN TEXAS

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I. INTRODUCTION

"I came to death row a scared boy who made poor choices; I will leave death row a man that others admire because I weathered the storms of life

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with the help of the people that loved me."[1] These were the last words that forty-five year old Billy Joe Wardlow wrote to the Board of Texas before he was strapped to a gurney and executed for a crime he committed at eighteen.[2] Although his character changed drastically as he went from an eighteen-year-old into adulthood, Texas courts rarely second guess the jury's determination that a capital offender will be a "future danger" and must, therefore, be put to death.[3]

The need for the justice system to begin treating individuals between the ages of 18–24 differently has become more prevalent as scientific studies continue to state that adults before the age of 25 lack the brain maturity of a fully grown adult.[4] Defendants 18–25 present a unique group because they are expected to act like adults but, developmentally, they still maintain a propensity for risky behavior.[5] Therefore, this Comment argues that young adults should be treated differently than both juveniles and adults when they commit a capital crime. In Texas, juries assessing a defendant guilty of a capital crime must navigate through a multitude of evidence to determine whether they think the defendant will be a danger in the future.[6] This already difficult task becomes impossible for juries to perform when assessing defendants between the ages of 18–24 because these defendants lack the brain maturity and life experiences that establish a reliable pattern of violence.[7]

Because it is impossible to accurately determine whether a young adult will be a future danger, Texas courts violate the Eighth Amendment of the United States Constitution by allowing the jury to make this determination for young offenders.[8] This Comment argues that because Texas already has a separate sentencing trial for capital offenders, juries could make a more accurate "future danger" determination by waiting to sentence a defendant until they are twenty-five years old. This would involve capital offenders between the ages of 18–24 waiting in prison until they reach age twenty-five to go through the sentencing trial.

Part II of this Comment discusses in more detail the case of Billy Joe Wardlow, the studies discussing the brain development of young adults, the factors used in making a "future danger" determination, and the cases that

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1. Kelli Dugan, *Texas puts Billy Joe Wardlow to death for 1993 slaying, ends 5-month Coronavirus delay of executions*, KIRO 7 (July 9, 2020 9:49 AM) https://www.kiro7.com/news/trending/texas-puts-billy-joe-wardlow-death-1993-slaying-ends-5-month-coronavirus-delay-executions/6WRYPDYWQVCJ7FJUSAKEDKRVYU/.

2. *Id.*

3. *See id.*

4. *What Are the Implications of Adolescent Brain Development for Juvenile Justice?*, COAL. FOR JUV. JUST. https://www.juvjustice.org/sites/default/files/resource-files/resource_138_0.pdf (last visited Oct. 18, 2020).

5. *See* Roper v. Simmons, 543 U.S. 551, 570 (2005).

6. 26 Tex. Jur. 3d *Criminal Procedure: Posttrial Proceedings* § 256 (2021).

7. COAL. FOR JUV. JUST., *supra* note 4.

8. U.S. CONST. amend. VIII.

have impacted the death penalty in Texas.[9] Part III of this Comment addresses the decision in *Roper v. Simmons* and how the majority's holding in conjunction with the scientific studies on the brain development of young adults makes a special solution with regard to young capital offenders necessary.[10] Additionally, this section of the Comment talks about how applying the most commonly used "future danger" factors to defendants between the ages of 18–25 leads to inaccurate "future danger" predictions.[11] Part IV. of this Comment states that new legislation should be implemented that delays the sentencing phase for individuals 18–24 and how this will render more predictable future danger predictions.[12]

II. YOUNG ADULTS & THE FUTURE DANGER STANDARD IN CAPITAL CASES

Capital punishment in Texas and throughout the United States continues to be an area of controversy.[13] The Supreme Court has rendered opinions that have continuously required Texas to change its death penalty statute so that defendants are not arbitrarily executed.[14] However, the future danger standard that Texas came to adopt requires juries to assess a number of factors that frequently lead to an inaccurate assessment about the danger a defendant poses.[15] Because studies continue to show that individuals before the age of twenty-five lack brain maturity, scholars continue to push for reformative efforts when it comes to applying the death penalty to young adults.[16]

A. The Case of Billy Joe Wardlow and the Adolescent Brain

Of all the states in America, Texas takes the lead in the number of executions it performs.[17] Texas has put to death 570 people since 1982 and does not seem to show any signs of slowing down.[18] Texas is one of only two states to execute defendants while the COVID-19 pandemic remains

9. *See infra* Part 0 (explaining the factors used in building a death penalty case).

10. *See infra* Part 0 (explaining how case law shows us why an alternative solution is necessary).

11. *Infra* Section III.0 (explaining how using common future danger factors can lead to inaccurate predictions).

12. *Infra* Part 0 (showing how new legislation would improve future danger predictions).

13. *See generally* Furman v. Georgia, 408 U.S. 238 (1792).

14. *Id.* at 240; Penry v. Lynaugh, 492 U.S. 302, 322–25 (1989).

15. *Deadly Speculation: Misleading Texas Capital Juries With False Predictions of Future Dangerousness*, ACLU, https://www.aclu.org/other/deadly-speculation-misleading-texas-capital-juries-false-predictions-future-dangerousness (last visited Mar. 24, 2021).

16. *Id.*

17. *Texas Death Penalty Facts*, TEX. COAL.TO ABOLISH THE DEATH PENALTY, https://tcadp.org/get-informed/texas-death-penalty-facts/#:~:text=The%20State%20of%20Texas%20has,people%20were%20put%20to%20death (last visited Mar. 24, 2021).

18. *Id.*

prominent.[19] One of these defendants was Billy Joe Wardlow.[20] On July 8, 2020, Texas executed him for a murder he committed at only eighteen-years-old.[21] Billy's case received national recognition because his lawyers, and many others, believed that Billy was too young at the time of his crime to be subjected to a death sentence.[22] This belief comes from the considerable studies on the brain development of young adults, individuals 18–21 or 18–25, that have been published since the Supreme Court's *Roper v. Simmons* decision.[23]

In *Roper*, the Court reasoned that it violated the Eighth Amendment of the United States Constitution to sentence a juvenile to death.[24] The Court stated that because juveniles lacked maturity and have "an underdeveloped sense of responsibility," are susceptible to "negative influences," and have character that is not developed in the same way as an adult, sentencing them to the death penalty would subject a group of individuals to the ultimate punishment for a crime which they have a diminished culpability for because of their age.[25] Since the *Roper* decision, scientists have conducted studies that show the brain of a young adult differs little from that of a juvenile.[26]

Neuroimaging has allowed scientists the opportunity to better understand how the brain of individuals between the ages of 18–25 develops.[27] For one thing, adolescents do not have a fully developed limbic system.[28] The limbic system makes up multiple different areas of an individual's brain but ultimately, it is responsible for "managing emotion and motivation" and "[w]hen operating at full capacity," it is the area of a person's brain that can keep them from becoming overly upset or "losing control of their behavior."[29] Perhaps most important in the development process is the development of the prefrontal cortex.[30] This area of the brain is responsible for executive functions like "reasoning, advance thought[,] and

19. *Id.*

20. Dugan, *supra* note 1.

21. Petition for Writ of Certiorari at 12–17, Wardlow v. Texas, 19-8835, 2020 WL 3818897, (Tex. 2020) [hereinafter *Wardlow Petition*].

22. Brant Bingamon, *A Dangerous Man*, AUSTIN CHRON. (June 26, 2020) https://www.Austinchronicle.com/news/2020-06-26/a-dangerous-man/#:~:text=The%20jury%20found%20Wardlow%20guilty,t%20much%20of%20a%20stretch.&text=The%20jury%20gave%20him%20death.

23. *Wardlow Petition*, *supra* note 21, at 12–17 (discussing the scientific studies that have come out since the Roper v. Simmons decision).

24. Roper v. Simmons, 543 U.S. 551, 551–79 (2005).

25. *Id.* at 569.

26. COAL. FOR JUV. JUSTICE, *supra* note 4.

27. *Id.*

28. *Id.*

29. *Id.* at 6–8.

30. Mariam Arain, *Maturation of the Adolescent Brain*, NEUROPSYCHIATRIC DISEASE AND TREATMENT (Apr. 3, 2013), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3621648/#:~:text=The%20development%20and%20maturation%20of%20the%20prefrontal%20cortex%20occurs%20primarily,the%20age%20of%2025%20years.

impulse control."[31] Essentially, the prefrontal cortex is the area of the brain that allows a person to think before they act.[32] This area of the brain begins to mature in an individual's early twenties and "is fully accomplished at the age of 25 years."[33]

Because of these studies, Billy's lawyers pushed for what is known as a *Roper* extension.[34] This is essentially a categorical exclusion of individuals between the ages of 18–21 from the death penalty.[35] They reasoned that given the similarities between a juvenile and adolescent's brain, applying the controversial future danger standard as set out in the Texas capital punishment statute to young adults rendered unpredictable results.[36]

B. The "Future Danger" Standard Examined

In Texas, before a jury sentences a defendant to death, they must find that the defendant will continue to pose a threat to those around them if left alive.[37] A jury makes this decision during what is known as the sentencing trial.[38] This is the trial that occurs with the same jury that found the defendant guilty as soon after the initial trial as possible.[39] This trial determines whether a defendant will be sentenced to life without parole or executed.[40] All the evidence set forth during this trial is meant to help the jury determine a defendant's punishment.[41] The jury's decision is mostly based on whether they find that a defendant will be a threat to others if left alive—this determination is known as the future danger standard.[42]

Texas' initial failure to use any standard in sentencing people to death lead to its eventual implementation of the future danger standard in 1973.[43] The Supreme Court, in *Furman v. Georgia*, held that the death penalty statutes in thirty-five states, including Texas, arbitrarily sentenced defendants to death.[44] The Court reached this conclusion because states were imposing the death penalty without the use of any sentencing guidelines or objective evidence.[45] Thus, courts across the United States were not using any method

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31. COAL. FOR JUV. JUST., *supra* note 4, at 7.
32. Arain, *supra* note 30.
33. *Id.* at 459.
34. *Wardlow Petition*, *supra* note 21, at 1–32.
35. *Id.*
36. *Id.* at 12–17.
37. TEX. CODE CRIM. PRO. ANN. art. 37.071 § 2(b)(1).
38. TEX. CODE CRIM. PRO. ANN. art. 37.071 § 2(a)(1).
39. *Id.*
40. *Id.*
41. *Id.*
42. Ana M. Otero, *The Death of Fairness: Texas's Future Dangerousness Revisited*, 4 U. DENV. CRIM. L. REV. 1, 2 (2014).
43. *Id.* at 9–10.
44. *Id.*
45. *See* Furman v. Georgia, 408 U.S. 238, 240 (1972).

for deciding who to sentence to death which, too often, resulted in the execution of defendants based on their race, socioeconomic status, or social position.[46]

The Court recognized that while it may have upheld executions by random choice as constitutional at one point in time, the behavior forbidden by the Eighth Amendment is not static.[47] As society continues to change and progress, what constitutes "cruel" and "unusual" punishment is expected to evolve, and the Eighth Amendment is designed to protect society's evolving standard of decency.[48] With this in mind, the plurality held that society reached a point where discriminating against defendants based on race, status, and placement within society constitutes the kind of "unusual" punishment that the Eighth Amendment forbids.[49]

Because of the court's holding in *Furman*, the Texas legislature began using the future danger standard.[50] This standard was supposed to constitute a more thoughtful and objective process for juries to use by requiring the jury to answer two questions at a defendant's sentencing trial:

> (1) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and (2) in cases in which the jury charge at the guilt or innocence stage permitted the jury to find the defendant guilty as a party under [statute], whether the defendant actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken.[51]

Despite what was supposed to be a more predictable standard, defendants continued to challenge this new statute as impossible to apply.[52]

In *Jurek v. Texas*, the Supreme Court once again analyzed the Texas Capital Punishment Statute.[53] In this case, the Supreme Court assessed whether the questions presented to the jury were broad enough for it to consider mitigating evidence—evidence that can potentially result in a reduced sentence.[54] The Court held that the broad future danger question would naturally require the jury to consider potentially mitigating evidence.[55] However, thirteen years later in *Penry v. Lynaugh*, the Supreme Court took a stricter view with regard to mitigating evidence.[56] It determined that the

46. *Id.* at 242 (Douglas, J., concurring).
47. *Id.* at 328 (Brennan, J., concurring).
48. *See id.*
49. *See id.*
50. Otero, *supra* note 42, at 9–10.
51. TEX. CODE CRIM. PRO. ANN. art. 37.071 § 2(b)(1)(2).
52. *See* Otero, *supra* note 42, at 17–18.
53. Jurek v. Texas, 428 U.S. 262, 277 (1976).
54. *Id.* at 271–74.
55. *Id.*
56. Penry v. Lynaugh, 492 U.S. 302, 328 (1989).

questions presented to the jury needed to draw more attention to mitigating evidence.[57] Consequently, the Texas legislature added another question for the jury to answer in its sentencing deliberations.[58]

> Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed.[59]

The jury is allowed to consider a plethora of information when deciding the question on future dangerousness in addition to answering the question about mitigating evidence.[60] In answering the future danger question, the jury may consider:

> [T]he circumstances of the capital offense including the defendant's state of mind and whether the defendant was working alone or with other parties[;] the calculated nature of the defendant's acts[;] the forethought and deliberateness exhibited by the crime's execution[;] the existence of a prior criminal record and the severity of the prior crimes[;] the defendant's age and personal circumstances at the time of the offense[;] whether the defendant was acting under duress or the domination of another at the time of the commission of the offense[;] psychiatric evidence; and character evidence.[61]

Mitigating evidence is also an important aspect of the sentencing phase.[62] As pointed out in the *Penry* holding, issues presented to the jury must draw their attention to mitigating evidence, and the jury is required to consider this type of evidence in determining punishment.[63] Defense attorneys can point out a bad home environment, past abuse, whether the defendant was intoxicated at the time of the murder, and whether they maintained good behavior in prison to sway the jury into giving a life sentence without parole rather than death.[64] The purpose of allowing the jury to hear this extensive amount of evidence to support its determination is that the jury will render a reliable prediction about whether a defendant will be a danger in the future.[65]

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57. *Id.*
58. TEX. CODE CRIM. PRO. ANN. art. 37.071 § 2(e)(1).
59. *Id.*
60. 26 Tex. Jur. 3d *Criminal Procedure: Posttrial Proceedings* § 256 (2021).
61. *Id.*
62. *See* Otero, *supra* note 42, at 19–20.
63. *Penry v. Lynaugh*, 492 U.S. 301, 328 (1989); TEX. CODE CRIM. PRO. ANN. art. 37.071 § 2(e)(1).
64. 26 Tex. Jur. 3d *Criminal Procedure: Posttrial Proceedings* § 256 (2021).
65. *See id.*

A reliable prediction about the danger a defendant presents is crucial because the Eighth Amendment of the United States Constitution, which forbids cruel and unusual punishment, requires that the death sentence not be arbitrarily imposed.[66] Additionally, the evolving standards of decency that the Eighth Amendment protects forbids punishing individuals whose level of culpability does not match the crime.[67] By requiring the jury to find that a defendant will present a danger in the future, the Texas legislature limits those with a capital punishment sentence to defendants who pose a risk to others.[68] However, the way evidence is presented to the jury, the standard's effectiveness in aiding the jury's predictions, and the standard's ability to accurately reveal whether a young adult is capable of change are the subjects of significant criticism and Eighth Amendment challenges.[69]

C. Case Law Applying Different "Future Danger" Factors

Although the prosecution and defense may present evidence on almost anything that can help establish that a defendant is a future danger or to mitigate the harshness of a defendant's potential punishment, certain types of evidence are more commonly used than others.[70] The prosecution typically uses expert testimony to help establish that an offender is likely to commit some type of dangerous crime again in the future.[71] Because a defendant has the right to refuse to meet with the prosecution's expert, experts are not required to meet the defendant and do a personal assignment.[72] Instead, the prosecution may simply pose hypothetical questions about the defendant's behavior and ask the expert to testify as to whether or not they believe the "hypothetical defendant" is likely to commit crime in the future.[73]

In *Barefoot v. Estelle*, the defendant challenged the prosecution's use of expert testimony and the prosecution's ability to pose hypotheticals to an expert. [74] However, the Court rejected the defendant's argument that the use of hypotheticals and expert testimony violated the Eighth Amendment.[75] It found that it was not impossible for experts to determine whether a person

66. *See* Furman v. Georgia, 408 U.S. 238, 239–40 (1972).

67. *Id.* at 242 (Douglas, J., concurring).

68. *See* Coble v. State, 330 S.W. 3d 253, 268 (Tex. Crim. App. 2010).

69. Otero, *supra* note 42, at 36–58; Meghan Shapiro, *An Overdose of Dangerousness: How "Future Dangerousness" Catches the Least Culpable Defendants and Undermines the Rationale for the Executions it Supports*, 35 AM. J. CRIM. L. 145, 146–99 (2009).

70. John H. Blume, *An Overview of Significant Findings from the Capital Jury Project and Other Empirical Studies of the Death Penalty Relevant to Jury Selection, Presentation of Evidence and Jury Instructions in Capital Cases*, CORNELL L. SCH. 19–42 (2008), https://www.in.gov/ipdc/files/Overview%20of%20CJP%20and%20Other%20Findings-spring-2010.pdf.

71. Barefoot v. Estelle, 463 U.S. 880, 904 (1983).

72. *Id*.

73. *Id.* at 903–06.

74. *Id.* at 884–85.

75. *Id.* at 903–06.

posed a risk in the future.[76] Additionally, the Court held that the use of hypotheticals was a common practice when an expert testifies.[77] Despite the criticism that the majority opinion in *Barefoot v. Estelle* has received, of the 570 people that Texas has put to death, prosecutors used expert testimony in at least 155 of these cases.[78] To establish that a defendant poses a risk in the future, experts will commonly testify that a defendant shows signs of sociopathic behavior or antisocial personality disorder.[79]

Aside from expert testimony, statements from the victim's families, and the nature of the crime itself, the prosecution also uses character evidence and criminal history to establish that a defendant will be a repeat offender.[80] Evidence used to show the defendant's bad character comes up in a multitude of ways.[81] In *Escobar v. State*, the court held that membership in a gang can be used to establish bad character.[82] In another case, evidence that the defendant read satanic books came in to prove that it was likely that the defendant would commit crime again.[83] Additionally, any evidence regarding the way a defendant acted after the commission of a crime or evidence that shows a lack of remorse can come in to show the jury the nature of the defendant's personality.[84]

One of the most common and most effective pieces of evidence that the prosecution can present to establish that the defendant is a future danger is the defendant's criminal history.[85] A violent criminal history is likely the difference between the defendant receiving a life without parole sentence as opposed to a death sentence.[86] However, prosecutors also introduce a history of non-violent crime to establish a pattern of disobedience for the law.[87]

Meanwhile, the defense will commonly present evidence regarding external factors that may have impacted the defendant's decision to commit a crime in hopes that this will act as a mitigating factor in the sentencing phase.[88] An abusive home environment or substance abuse problems may be used to show that, once in prison, the defendant will be away from external factors that induced their desire to commit crime.[89] Additionally, if an expert

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76. *Id.* at 896–902.
77. *Id.* at 903.
78. ACLU, *supra* note 15.
79. *See* Coble v. State, 330 S.W. 3d 253, 266 (Tex. Crim. App. 2010).
80. 26 Tex. Jur. 3d *Criminal Procedure: Posttrial Proceedings* § 256 (2021).
81. *See id.*
82. Escobar v. State, No. AP-76, 571, 2013 WL 6098015, at *1, *26 (Tex. Crim. App. 2013).
83. Davis v. State, 329 S.W.3d 798, 804–06 (Tex. Crim. App. 2010).
84. *Id.* at 822; Trevino v. State, 991 S.W.2d 849, 854 (Tex. Crim. App. 1999).
85. Blume, *supra* note 70, at 20–21.
86. *See id.*
87. Howard v. State, 153 S.W.3d 382, 384 (Tex. Crim. App. 2004) (allowing the defendant's prior drug use to come in as some of the evidence establishing that he would be a future danger).
88. 26 Tex. Jur. 3d *Criminal Procedure: Posttrial Proceedings* § 256 (2021).
89. *See* Jenkins v. State, 912 S.W.2d 793, 818 (Tex. Crim. App. 1993) (stating that the defense put in its brief that the use of drugs made the defendant more dangerous than he normally is).

testifies for the defense, they will commonly try to establish that the defendant suffers from some form of a mental illness in hopes that this will result in life without parole as opposed to death.[90]

In Texas, if a person is found to be intellectually disabled, meaning they have an IQ of less than seventy, they will not be sentenced to death.[91] Defendants struggling with mental illness, on the other hand, are generally found to have a rational enough understanding of the circumstances to be executed.[92] Therefore, once a case has reached the sentencing trial, it is left to defense attorneys to present evidence on how the defendant's mental illness may have played a role in their offense.[93] While allowing the prosecution and defense to present to the jury a non-exhaustive showing of evidence is meant to render predictable results, in a majority of cases the jury's assignment is incorrect.[94]

D. Critics of the Future Danger Standard and Its Application to Young Adults

The overall criticism of using future danger to determine whether a defendant should be put to death is that a person simply cannot predict whether another person will be a danger in the future.[95] Studies indicate that a jury's prediction of future violence is false in a number of cases, and most inmates awaiting their execution do not commit violent crimes while locked up.[96] Critics believe this incorrect assignment may be a result of Texas courts' failure to define whether a future threat to "society" means a threat to the outside world or a threat to others in prison.[97] The essence of this argument is that juries may interpret "society" too broadly.[98] Thus, failing to consider that a "continuing threat to society" actually means a threat to the prisoners

90. Stevenson v. State, 73 S.W.3d 914, 915 (Tex. Crim. App. 2002), *habeas corpus granted*, No. AP-75,639, 2007 WL 841127, (Tex. Crim. App. Mar. 21, 2007).

91. Atkins v. Virginia, 536 U.S. 304, 316 (2002).

92. Jodie McCullough, *Texas House OKs Bill to Ban Death Penalty for those with Severe Mental Illness*, TEX. TRIB. (May 8, 2019), https://www.texastribune.org/2019/05/08/texas-death-penalty-rules-could-change-some-mentally-ill-defendants/#:~:text=Texas%20House%20OKs%20bill%20to,to%20the%20more%20conservative%20Senate (explaining that no law restricts putting the mental ill to death, but legislation may prevent the execution of those with severe mental illness).

93. *See Stevenson*, 73 S.W.3d at 915.

94. Blume, *supra* note 70, at 21 (stating that capital verdicts are substantially shaped by juror determinations that future serious violence in prison is likely when violence predictions of capital juries have very high rates of error).

95. Otero, *supra* note 42, at 2.

96. Blume, *supra* note 70, at 21–22.

97. *See* Earnhart v. State, 877 S.W.2d 759, 767 (Tex. Crim. App. 1994) (stating that the Court of Criminal Appeals continues to hold that "society" does not need a special definition despite the defendant's argument).

98. Shapiro, *supra* note 69, at 150–53.

and guards that a defendant with a life without parole sentence will be exposed to in the required placement of a G3 or G4 prison.[99]

Critics also point out that, using this standard, prosecutors are able to transform what is often thought of as mitigating evidence into aggravating evidence.[100] For example, although a substance abuse problem is generally thought of as a mitigating factor because it can show that the defendant only committed crime because of addiction issues, in some cases prosecutors have guards testify that inmates get ahold of drugs in prison.[101] Thus, prosecutors can lead the jury to believe that the defendant's violent nature when under the influence of drugs would remain prominent if they were not executed because there is a possibility that they will get ahold of drugs in prison.[102] Despite these well-founded criticisms, the standard—if applied through the use of reliable evidence—is meant to "ensur[e] that no defendant, regardless of how heinous his capital crime, will be sentenced to death unless the jury finds that he poses a real threat of future violence."[103]

Given that applying this standard frequently leads to inaccurate determinations, the ability of a jury to apply this standard to defendants barely entering their adult lives becomes impossible.[104] In *Wardlow v. State*, the jury found testimony from a prison expert who claimed that because Billy had already threatened his fellow inmates, he would be a danger to others in prison to be persuasive on the issue of future danger.[105] The prosecution also made it a point to repeatedly quote the words used by Billy in his confession that he killed the victim "[j]ust because he pissed me off."[106] The jury's prediction about the threat Billy would pose to those around him turned out to be incorrect as evidenced by the thirty years on death row during which Billy committed zero acts of violence to those around him.[107]

In his lawyers' petition to the Supreme Court, they argued that the maturity that came along with Billy aging was responsible for his reform in prison.[108] They claimed that "Billy Wardlow's character deficiencies were reformed by the time he was in his 20's."[109] Once Billy reached an age where he had better control over his impulses and emotions, he proved not to be a

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99. *Id.*; Greg Tsioros, *What is Life Without Parole in Texas?*, L. OFF. OF GREG TSIOROS (Jan. 31, 2018), https://txparolelaw.com/what-is-life-without-parole-in-texas/#:~:text=LWOP%20ensures%20that%20a%20death,three%20out%20of%20four%20cases (discussing the custody level required for a life without parole sentence).

100. Shapiro, *supra* note 69, at 169–71; Jenkins v. State, 912 S.W.2d 793, 800 (Tex. Crim. App. 1993).

101. *Jenkins*, 912 S.W.2d at 800–02.

102. *Id.*

103. Coble v. State, 330 S.W. 3d 253, 268 (Tex. Crim. App. 2010).

104. *See Wardlow Petition*, *supra* note 21, at 17–19.

105. Bingamon, *supra* note 22.

106. *Id.*

107. *Id.*

108. *Wardlow Petition*, *supra* note 21, at 19–24.

109. *Id.* at 23.

future danger at all.[110] His lawyers claimed that applying the controversial Texas standard to young adults simply failed to render reliable results.[111]

III. DISTINGUISHING BETWEEN BROKEN CHARACTER AND TRANSIENT IMMATURITY: AN IMPOSSIBLE TASK FOR JURIES

The majority's holding in *Roper*, and the studies on the brain development of young adults, make it clear that young defendants should be treated differently than adults twenty-five and older and juveniles under the age of eighteen.[112] While offenders between the ages of 18-24 may maintain a stronger sense of culpability than juveniles, a jury cannot accurately apply the most common future danger factors to this group of defendants because of their age.[113] The inability of juries to come to an accurate prediction on whether young adults pose a future danger results in arbitrary death sentences and, therefore, violates the Eighth Amendment and its evolving standard of decency.[114]

A. Young Adults Present a Unique Age Group

Since studies have begun to come out explaining the brain development of young adults, attorneys and authors of scholarly articles have argued that the judicial system should treat these offenders differently.[115] Most of these arguments apply the reasoning used in *Roper v. Simmons* to claim that courts should categorically exclude adults before the age of twenty-one or twenty-five, depending on the argument, from the death penalty.[116] The logic is that given that the brains of young adults are still developing, they too maintain the same diminished blameworthiness that the court in *Roper* found present in juveniles; therefore, like juveniles, should not be put to death.[117]

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110. *Id.*

111. *Id.* at 17–19.

112. *See* Roper v. Simmons, 543 U.S. 551, 579 (2005); *see Coal. for Juv. Just.*, *supra* notes 26–33 (explaining how the brain development of young adults differs from adults over twenty-five).

113. *See infra* Section III.B (discussing why certain factors cannot be reliably applied to young offenders).

114. *See infra* Section III.0 (explaining how inaccurate "future danger" predictions violates the Eighth Amendment).

115. Andrew Michaels, *A Decent Proposal: Exempting Eighteen-To-Twenty-Year-Olds From the Death Penalty*, 40 N.Y.U REV. L. & SOC. CHANGE 139, 150–68 (2016); John H. Blume, et. al., *Death by Numbers: Why Evolving Standards Compel Extending Roper's Categorical Ban Against Executing Juveniles from Eighteen to Twenty-One*, 98:921 TEX. L. REV. 922, 922–50 (2019).

116. Andrew Michaels, *A Decent Proposal: Exempting Eighteen-To-Twenty-Year-Olds From the Death Penalty*, 40 N.Y.U REV. L. & SOC. CHANGE 139, 150–52 (2016); John H. Blume, et. al., *Death By Numbers: Why Evolving Standards Compel Extending Roper's Categorical Ban Against Executing Juveniles from Eighteen to Twenty-One*, 98:921 TEX. L. REV. 922, 930–50 (2019).

117. Blume, *supra* note 115, at 930–50.

However, as pointed out by the majority in *Roper*, this reasoning ignores the level of responsibility that comes with turning eighteen.[118]

When the court in *Roper* discusses why they chose to draw the line at eighteen, it states that "the age of 18 is the point where society draws the line for many purposes between childhood and adulthood . . . it is . . . the age at which the line for death eligibility ought to rest."[119] The Court's note that society draws the line for adulthood at 18 is crucial to understanding other parts of the Court's reasoning for excluding juveniles from the death penalty. One reason for the Court's exclusion of the death penalty to juveniles is that there is a diminished sense of responsibility because juveniles are not treated like adults.[120] Juveniles "lack. . .control over their immediate surroundings [which] means juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment."[121] Essentially, the court recognized that the ability of a juvenile to change their living environment in addition to society's treatment of juveniles results in a diminished level of blameworthiness for their crime.[122]

This same logic cannot be applied in its entirety to defendants between the ages of 18–25.[123] After the age of eighteen, a person has more liberties at their disposal to change their environment.[124] By the time someone turns eighteen their parents are no longer their legal guardian.[125] This means a person can consent to their own medical treatment, withdraw from school, and decide their own living arrangements.[126] At eighteen, a person can also sign up to fight for their country and if they get into legal trouble, they will be tried as an adult.[127] Ideally, with these freedoms comes a stronger sense of responsibility over oneself and, in turn, a higher degree of "blameworthiness."[128]

Although with age comes a heightened sense of personal responsibility, it would be unfair to claim that young adults maintain the exact same level of culpability that an individual over the age of twenty-five does. *Roper* points out that juveniles maintain a "greater possibility" for character reformation.[129] Given that the parts of a person's brain responsible for impulse and emotional control do not fully develop until twenty-five, the

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118. Roper v. Simmons, 543 U.S. 551, 554 (2005).
119. *Id.*
120. *See id.*
121. *Id.* at 570.
122. *See id.*
123. *See id.*
124. *Life Changing Privileges of Turning 18*, THE L. DICTIONARY https://thelawdictionary.org/article/privileges-of-turning-18/ (last visited Mar. 24, 2021).
125. *Id.*
126. *See id.*
127. *Id.*
128. *Roper*, 543 U.S. at 570.
129. *Id.*

same can be said for young adults.[130] Moreover, the developing brain of a person before the age of twenty-five may still fall into the pressure of their peers or negative influences.[131] Ultimately, young adults present a group of individuals that society begins to treat like adults, which means they likely have more control over their environment and a heightened sense of responsibility but developmentally they still maintain a propensity for risky behavior and lack the ability to fully control their emotions.[132] This developmental immaturity makes what is already a highly flawed standard impossible to apply to people within this age range.[133]

B. Applying the "Future Danger" Factors to Young Adults Renders Unreliable Predictions

Because age cannot be ruled out as a reason for a young defendant's behavior, the most commonly used future danger factors fail to accurately show the risk that a defendant poses.[134] Experts generally do not spend enough time with a defendant to rule out immaturity as a potential cause for their behavior or to determine if a potential disorder will subside.[135] Like juveniles, the possibility for character reformation with defendants in this age range is too strong for a jury to determine if character evidence establishes a likelihood that a defendant will be a danger moving forward.[136] Additionally, the role that age plays in a person's likelihood to commit crime makes criminal history a poor indicator of whether a young adult will be a threat to others.[137]

1. Too Young for Expert Testimony

Numerous concerns arise when prosecutors use expert testimony from a psychologist to establish that a still-developing defendant will pose a risk in the future.[138] Experts generally make a determination about whether a defendant will be a future danger by reviewing the information provided to them, considering the nature of the crime at issue, and then drawing their own inferences from it.[139] While juries rely heavily on an expert's assignment of

130. *See* COAL. FOR JUV. JUST., *supra* note 4.
131. *Id.*
132. *See id.*; *Roper*, 543 U.S. at 570.
133. *See* COAL. FOR JUV. JUST., *supra* note 4; *Roper*, 543 U.S. at 570–72; *see* ACLU, *supra* note 15.
134. *See* COAL. FOR JUV. JUST., *supra* note 4; TX. CODE CRIM. PRO. ANN. art. 37.071, § 2(b)(1)(2).
135. Barefoot v. Estelle, 463 U.S. 880, 903 (1983); *Roper*, 543 U.S. at 570–73.
136. *Roper*, 543 U.S. at 570; *see* COAL. FOR JUV. JUST., *supra* note 4.
137. *See* COAL. FOR JUV. JUST., *supra* note 4; *Roper*, 543 U.S. at 570.
138. *Barefoot*, 463 U.S. at 903; *Roper*, 543 U.S. at 570–73.
139. Erinrose Lavin, *Psychiatric Prediction of Future Dangerousness* SETON HALL UNIV. (2014), https://scholarship.shu.edu/cgi/viewcontent.cgi?article=1629&context=student_scholarship.

a defendant, these assignments frequently turn out incorrect.[140] The Texas Court of Criminal Appeals conducted a study in 2004 that assessed post-sentence prison behavior of defendants deemed a future threat by experts at trial and found that the expert's assignment was correct in only 5% of cases.[141] Considering the difficulty in determining the threat posed by a defendant that is well into their adult life with years of behavior to assess, the developing brain of a young adult makes it even more difficult to predict whether a defendant will pose a future threat.[142]

The issue with an expert assessing young adults is the same concern that the majority in *Roper* pointed out when discussing experts assessing juveniles: "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption."[143] In a 2014 article by Dr. Melissa Deuter, she warned psychologists to take extra time when diagnosing young adults stating that: "young brains are different than the average adult['s]."[144]

An ongoing study of individuals who tested positive for personality disorders continues to assess the severity of each subjects' symptoms over the course of their lives and helps establish the impact age has on mental illness.[145] One of the leading psychologists in the study said that a major decrease in the subjects' symptoms occurred just between the ages of 18–21.[146] The study notes that it continues to monitor these individuals past the age of twenty-one expecting to see an even further decrease in symptoms as the subjects continue to age.[147] This a reasonable expectation since studies and scientists agree that the age of full maturity is twenty-five and reaching this age can play a role in the development and diagnosis of mental disorders.[148]

Despite the difficulty and care that should be used in assessing young adults, experts at trial testify after having only met defendants briefly, or worse, after never meeting the defendant at all and basing their opinion on a set of hypotheticals posed by an attorney.[149] These assignments are dangerous to young offenders because even when psychologists determine that a

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140. Blume, *supra* note 70, at 38; ACLU, *supra* note 15.

141. ACLU, *supra* note 15.

142. *See* COAL. FOR JUV. JUST., *supra* note 4; *see supra* notes 139–40 and accompanying text (highlighting the problems with expert's opinions on future dangerousness).

143. *Roper*, 543 U.S. at 573.

144. Melissa Deuter M.D., *5 Shortcomings of Young Adult Psychiatric Care*, PSYCH. TODAY (Aug. 11, 2014), https://www.psychologytoday.com/us/blog/the-in-between/201408/5-shortcomings-young-adult-psychiatric-care.

145. Jeanie Lerche Davis, *Personality Disorders Can Change With Age*, WEBMD (Oct. 7, 2004), https://www.webmd.com/mental-health/news/20041007/personality-disorders-change-over-lifetime#2.

146. *Id.*

147. *Id.*

148. *See id.*; *see* COAL. FOR JUV. JUST., *supra* note 4.

149. Barefoot v. Estelle, 463 U.S. 880, 903 (1983).

defendant shows signs of a personality disorder, the severity of their symptoms could likely decrease with age, and the risk a defendant poses to society may subside along with their symptoms.[150] Experts in criminal trials offering opinions that impact whether a defendant will be put to death fail to use the care that is recommended when simply prescribing a young adult medicine.[151] If the courts insist on allowing experts to testify based on a brief encounter with a defendant or no encounter at all, it is crucial that the defendant is at least old enough that age can be ruled out as a reason for their behavior.[152] Otherwise, the jury may base their future danger prediction on an expert's incorrect assignment that a defendant's character indicates "irreparable corruption."[153]

2. Character Evidence That Fails to Accurately Reflect Character

Because studies show that young adults greatly resemble juveniles in their ability to control their impulses, presenting character evidence for young adults may be a greater reflection of the defendant's age than their character.[154] In addition to impulse control issues, like juveniles, external factors and peer pressure can easily influence young adults.[155] With these considerations in mind, it is alarming to learn about the type of character evidence that the jury is allowed to hear about young defendants in capital cases.

Courts allow evidence about the level of guilt the defendant feels, membership in a gang, and testimony about any "bad acts" performed by the defendant during the punishment phase.[156] Generally, a defendant's reason for entering a gang involves lack of parental involvement, a need for friendship, or low economic status.[157] Given that peers can easily influence defendants between the ages of 18–25, testimony discussing a young defendant's membership in a gang could reflect the influential nature of the defendant resulting from their age rather than a desire to perform bad acts.[158] Yet, testimony and evidence about a defendant's gang membership, even when no evidence that the membership resulted in instances of violence, is admissible to establish that they are a future danger.[159]

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150. Lerche Davis, *supra* note 145.

151. Deuter, *supra* note 144.

152. *See Barefoot*, 463 U.S. at 896–98; *see* Roper v. Simmons, 543 U.S. 551, 573 (2005).

153. *Roper*, 543 U.S. at 573.

154. COAL. FOR JUV. JUST., *supra* note 4, at 3.

155. *Id.* at 16.

156. Blume, *supra* note 70, at 19–20; Coble v. State, 330 S.W.3d 253, 266–67 (Tex. Crim. App. 2010); Ybarra v. State, 890 S.W.2d 98, 114 (Tex. App.—San Antonio 1994, pet. ref'd).

157. *Perspectives on Gangs and Gang Violence*, NONPROFIT RISK MGMT. CTR., https://nonprofitrisk.org/resources/articles/perspectives-on-gangs-and-gang-violence/ (last visited Mar. 23, 2021).

158. *See* COAL. FOR JUV. JUST., *supra* note 4.

159. Escobar v. State, No. AP-76, 571, 2013 WL 6098015, at *1, *26 (Tex. Crim. App. 2013).

Prosecutors even use a defendant's membership in a gang outside of prison to establish that they will join a gang once in prison and be forced to engage in violent behavior.[160] This is exactly what occurred in *United States v. Bernard*, when a forensic psychologist testified for the prosecution and stated that because the defendant was a member of a street gang, he was certain to be a member of a prison gang, and certain to engage in violent behavior.[161] This certainty is contrary to the finding of a 2016 survey of Texas inmates stating that only 10% of inmates "imported their gang affiliation from the street."[162] The eighteen-year-old defendant in *United States v. Bernard* remained on death row for twenty-one years, never again engaged in criminal activity, and dedicated the rest of his life to helping at-risk teenagers.[163]

Additionally, evidence of previous bad acts fails to accurately reflect whether the defendant will be a danger in the future.[164] For one thing, young adults simply have not lived long enough for their previous bad acts to show a predictable pattern of their violent nature.[165] For example, in *Coble v. State*, the defendant was convicted of a triple homicide at forty-one years old.[166] In making their determination that the defendant would pose a threat in the future, the jury considered testimony and evidence establishing a history of violence and hostility towards women that spanned from age fifteen well into adulthood.[167] Unfortunately, any character evidence presented to the jury for young adult offenders generally comes from acts performed by the defendant as a juvenile, or only shows the defendant's behavior for the few years they have lived as a still-developing adult.[168] Judging the defendant based on acts performed while an individual still maintains a propensity for risky and impulsive behavior renders less reliable results than assessing character evidence for a defendant well into adulthood.[169]

3. Juvenile History Equals Criminal History

Because criminal history makes a huge impact on the jury's decision about the danger that a defendant poses, it should be able to establish a

160. United States v. Bernard, 299 F. 3d 467, 482 n.11 (5th Cir. 2002).

161. *Id.*

162. David Pyrooz & Scott H. Decker, *We Spoke to Hundreds of Prison Gang Members–Here's What They Said About Life Behind Bar*s, THE CONVERSATION (Apr. 3, 2020), https://theconversation.com/we-spoke-to-hundreds-of-prison-gang-members-heres-what-they-said-about-life-behind-bars-132573.

163. Angela Moore, *Op-ed: I helped put Brandon Bernard on Federal Death Row. I now think he Should Live*, INDYSTAR (Nov. 18, 2020 7:02 AM), https://www.indystar.com/story/opinion/2020/11/18/op-ed-brandon-bernard-execution-prosecutor-says-he-should-live/6329685002/.

164. *See* Coble v. State, 330 S.W.3d 253, 272 (Tex. Crim. App. 2010).

165. *See id.* 266–68.

166. *Id.*

167. *Id.*

168. *See* Roper v. Simmons, 543 U.S. 551, 569–70 (2005).

169. *See id.* at 570.

predictable pattern of violence.[170] For this reason, using nothing more than a defendant's juvenile history, which is often the case when dealing with young offenders, can lead to dangerous predictions.[171] Studies show that age "is one of the strongest factors associated with criminal behavior."[172] The prime age group for committing criminal activity in the U.S. is between the age of 15–24 years old.[173] Offenders who begin committing crime as teens often continue to offend up until reaching the age of twenty-five.[174] Once an individual reaches twenty-five, the percentage of people that continue to commit offenses after the age of twenty-five "drop[s] by two-thirds . . . in the next five years."[175] Because of the impact age has on whether a defendant will continue to commit crime, using the criminal history of an individual before they reach twenty-five is less predictable of future criminal activity than using the criminal history of a defendant who has reached the age of full maturity.[176]

For example, if a defendant continues to commit crime after they have aged out of any propensity to engage in risky behavior, a jury can safely rule out underdevelopment as a potential cause for criminal activity.[177] It is established that once the defendant reaches the age of full development, they continue to engage in criminal activity.[178] In a case such as this, evidence of the defendant's criminal history demonstrates a pattern of disrespect for the law rather than "transient immaturity."[179] There is no hope that as the defendant's prefrontal cortex develops their criminal nature will subside or that as they gain more control of their living environment and external circumstances their criminal behavior subsides.[180]

Therefore, the juvenile record of a twenty-five-year-old capital offender serves as a more reliable indicator that the defendant will continue to commit crime. Criminal history simply does not provide the same level of predictability when age and lack of control over external circumstances cannot be ruled out as a factor.[181] Based on the statistics about age and

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170. *See Coble*, 330 S.W.3d at 369–70.

171. *See Roper*, 543 U.S. at 573–74.

172. Jeffery T. Ulmer & Darrell Steffensmeier, *The Age and Crime Relationship*, SAGE 378, https://www.sagepub.com/sites/default/files/upm-binaries/60294_Chapter_23.pdf (last visited Mar. 23, 2021).

173. *Id.*

174. *From Juvenile Delinquency to Young Adult Offending*, NAT'L INST. OF JUST. (Mar. 10, 2014), https://nij.ojp.gov/topics/articles/juvenile-delinquency-young-adult-offending (finding that 52–54% of teen offenders stop committing crime at age twenty-five).

175. *Id.*

176. *See id.*

177. *See id.*

178. Coble v. State, 330 S.W.3d 253, 263 (Tex. Crim. App. 2010) (holding that the defendant's long history of violence that continued well into adulthood established that he would be a danger to others in the future).

179. *Id.*; Roper v. Simmons, 543 U.S. 551, 573 (2005).

180. *Coble*, 330 S.W.3d at 263.

181. *See* NAT'L INST. OF JUST., *supra* note 174.

criminal activity, the majority of offenders are likely to stop engaging in criminal activity once they reach age twenty-five.[182] However, an argument can be made that the criminal history of an individual who commits a capital crime at age twenty-four, only a year away from full maturity, demonstrates a reliable pattern of disregard for the law, and therefore is a reliable indicator that the defendant will be a future danger. It is true that as a person continues to get closer to reaching age twenty-five their decision to still engage in criminal activity may become a more reliable indicator that they will be a future danger.[183] Still, a jury obtains the most reliable criminal history by waiting to see if, as studies established, criminal activity stops when a defendant reaches early adulthood.[184]

C. The Eighth Amendment Issue

The inability of these factors to establish whether a young adult presents a future danger defeats the very purpose of the standard because it leads to sentencing without guidance.[185] Although the standard is meant to guide the jury in determining what punishment to impose on the defendant, if the most commonly used factors fail to establish who does and does not present a future danger, the death penalty is being arbitrarily imposed.[186] This is exactly the type of punishment that the Eighth Amendment forbids.[187]

The Eighth Amendment requires that punishment directly relate to a "defendant's personal culpability."[188] The factors attorneys present during the sentencing phase are meant to guide the jury in determining the level of moral culpability the defendant maintains.[189] They do this by pointing to potential disorders that could diminish a defendant's blameworthiness, a criminal history that indicates a lack of respect for the law, and evidence that establishes the type of person a defendant is in general.[190]

However, these factors fail to adequately reflect the moral culpability of a young offender because age can play a role in all the evidence that attorneys present to the jury.[191] Although a defense attorney can point to a defendant's age as a mitigating factor, the failure of the other factors to prove what they

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182. *Id.*

183. *See id.*

184. *Id.* ("[s]tudies agree that 40 to 60 percent of juvenile delinquents stop offending by early adulthood.").

185. *Coble*, 330 S.W. 3d at 268.

186. *See* Furman v. Georgia, 408 U.S. 238, 300 (1972) (Brennan, J., concurring).

187. *Id.*

188. Penry v. Lynaugh, 492 U.S. 302, 304 (1989), abrogated, 536 U.S. 304 (2002), modified, 494 U.S. 370 (1990).

189. *See* 26 Tex. Jur. 3d *Criminal Procedure: Posttrial Proceedings* § 256 (2021).

190. *See id.*

191. *See supra* text accompanying notes 139–184 (describing how age plays a role in factors presented to the jury).

are designed to makes only using age as a mitigating factor insufficient.[192] The result of this insufficiency is that the jury executes defendants based on factors that only portray the present character of an underdeveloped offender rather than the future character that the legislature intended the standard to convey.[193]

Furthermore, as pointed out in the holdings of prior cases, the purpose of the Eighth Amendment is to protect against uncivilized punishment in a society that continues to evolve and mature.[194] In considering what constitutes "cruel" and "unusual" in a contemporary society, courts consider the laws set out in states across the United States and how science has changed our understanding over particular issues.[195] Society's belief that defendants who could potentially change their character should not be put to death is the very basis of the *Roper v. Simmons* decision.[196]

The idea that the death penalty should be reserved for the very worst offenders—those incapable of reformation—is integrated into the future danger standard itself.[197] The very purpose of the standard is to execute those who will continue to commit crime and spare the lives of those who the jury believes will no longer pose a threat.[198] Because we now know that young adults maintain an ability to change their character, any standard that fails to aid the jury in predicting whether this reformation will occur is failing to adhere to the evolving standard of decency that the Eighth Amendment requires.[199]

IV. A MORE PREDICTABLE PROPOSAL: LEGISLATION TO DELAY THE SENTENCING PHASE FOR YOUNG ADULT OFFENDERS

The Texas Legislature should recognize that young adults present a unique group that should not be treated like adults whose brains have reached full development, or like individuals under the age of eighteen who do not have the same liberties as grownups.[200] In recognition of the distinctions that

192. *See supra* text accompanying notes 139–184 (explaining the future danger factors' inability to show whether a young offender presents a threat to others).

193. *See* 26 Tex. Jur.3d *Criminal Procedure: Posttrial Proceedings* § 237 (2021).

194. Trop v. Dulles, 356 U.S. 86, 100–01 (1958); Roper v. Simmons, 543 U.S. 551, 561–64 (2005).

195. *Roper*, 543 U.S. at 564–70 (comparing the national consensus against putting the intellectually disabled to death to the growing consensus of not sentencing juveniles to death).

196. *Id.* at 570.

197. *See* 26 Tex. Jur.3d *Criminal Procedure: Posttrial Proceedings* § 237 (2021) (discussing how the future danger special issue reserves the death penalty for those who "pose[] a real threat of future violence").

198. *Id.*

199. *See id.*

200. *See supra* text accompanying notes 115–132 (discussing why young adults should be treated differently than adults over twenty-five and juveniles under eighteen).

individuals between the ages of 18–24 present,[201] it should implement legislation that requires a delayed sentencing phase when individuals within this age range are eligible for capital punishment. A capital offender between the ages of 18–24 should not go through a punishment trial until they have reached age twenty-five. Additionally, the jury should be told before the punishment trial begins that the purpose of this delay is for them to assess a defendant once they have reached twenty-five, the age where your brain has fully developed.

Delaying the sentencing phase for offenders between the ages of 18–24 will allow juries to reach more accurate results when determining whether a person will present a future danger.[202] Moreover, the explanation to the jury before the sentencing trial will assure that the jury understands the importance of considering the age of the defendant at the time of the offense, and the importance of assessing whether a person will be a threat in the future once their brain is done developing. By reducing the unpredictability involved in applying the future danger standard to young adults, courts in Texas avoid violating the Eighth Amendment of the United States Constitution by applying the standard to individuals whose ages make it impossible to predict if they will be a danger in the future.[203] This section discusses the two new sections that the legislature should enact to the Texas Code of Criminal Procedure, how these sections will affect having a unitary jury system in capital cases, and how this proposal positively effects the most common factors used in the sentencing phase of a capital trial.[204]

A. Enacting Legislation that Delays the Sentencing Trial for Young Adult Offenders to Twenty-Five

This proposal would require the Texas Legislature to enact two new sections to Article 37.071 Procedure in Capital Cases. The language of the proposed legislations is as follows:

> *(a) In cases where the capital offender is between the ages of 18–24 the sentencing trial will be delayed until the defendant reaches the age of twenty-five. The defendant will remain imprisoned at a facility where they can be placed in a single cell, until they reach age twenty-five and go through their sentencing trial.*[205]

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201. *See supra* text accompanying notes 115–132 (discussing why young adults should be treated differently than adults over twenty-five and juveniles under eighteen).

202. *See* 26 Tex. Jur. 3d *Criminal Procedure: Posttrial Proceedings* § 237 (2021).

203. *See supra* text accompanying notes 185–199 (concluding that continuing to apply the future danger standard to young adults violates the Eighth Amendment).

204. *See* TEX. CODE CRIM. PRO. ANN. art. 37.071; *see infra* Section IV.B (discussing the effects of a bifurcated jury); *see infra* Section IV.C (describing how this proposal can make the factors used at the sentencing phase more reliable).

205. *See* TEX. CODE CRIM. PRO. ANN. art. 37.071 (the proposed legislation is modeled after this code).

> *(b) The jury will be read the following instruction at the beginning of the sentencing trial: "The purpose of delaying the defendant's sentencing trial was so that you could assess whether the defendant will be a danger in the future and any mitigating evidence once the defendant reached the age of twenty-five. Once an individual reaches age twenty-five, their brain has fully developed, and this may result in more controlled behavior and a reduced desire to engage in risky behavior. You should consider the defendant's behavior while reaching the age twenty-five in answering the questions given to you after trial."*[206]

Delaying the sentencing phase for young offenders allows the jury to apply the future danger factors in a more predictable way.[207] It also allows juries to consider the time that the defendant spent locked up rather than having to guess what a defendant's behavior will be once imprisoned.[208] Naturally, one concern with this is that the defendant will be left waiting in jail with an uncertain fate. Because of this issue, legislation that enacts a delayed sentencing phase would need to allow the defendant to waive their right to a delayed trial. This would involve informing the defendant that if they choose to waive this right, they will be tried as soon as possible and will not receive the benefit of a jury assessing their behavior while imprisoned.[209]

Part (b) allows the jury to understand the reason for the delay in sentencing. It gives juries an idea of the impact age can have on a defendant's propensity to commit crime. By providing the jury with this piece of information, the court assures that age is a mitigating factor during the punishment phase.[210] Without this instruction, juries may choose to overlook the impact a defendant's age played in their offense, and the concern discussed in *Roper v. Simmons*, that defendants will be characterized as a future danger for crimes that did not reflect "irretrievably depraved character" will persist.[211]

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206. *See id.*

207. *See infra* Section IV.C (explaining how a delayed sentencing phase can improve the jury's assessment).

208. 26 Tex. Jur. 3d *Criminal Procedure: Posttrial Proceedings* § 237 (2021) (stating that juries must determine whether they *think* a defendant will be a danger going forward during the sentencing trial for a capital crime).

209. *Waiver of Constitutional Rights*, ENCYCLPEDIA.COM, https://www.encyclopedia.com/politics/encyclopedias-almanacs-transcripts-and-maps/waiver-constitutional-rights#:~:text=A%20potential%20beneficiary%20may%20waive,dimension%20also%20may%20be%20waived.&text=The%20most%20frequent%20waiver%20issue,right%20to%20trial%20by%20jury (last visited Mar. 23, 2021).

210. Bingamon, *supra* note 22 (pointing out Billy's lawyers' failure to present mitigating evidence to the jury and the impact this may have had on his sentencing).

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

B. Procedural Considerations

One important consideration for this proposal is that by delaying the sentencing phase for certain offenders it will likely result in having a different jury during the second part of a defendant's trial.[212] While it is not necessary to implement legislation requiring that a separate jury try the defendant, it is unlikely that the same jury will be able or willing to return for a sentencing phase that in some cases takes place seven years later.[213] However, having a separate jury for the punishment phase could potentially reduce bias from having the same jury for both trials.[214]

When attorneys select juries in a capital case, they go through what is known as the "death-qualification" process.[215] This means that the juries selected to sit for a capital case must not be strictly opposed to the death penalty, but they should also not believe that the death penalty needs to be imposed in all cases.[216] Because courts use the same jury for both the initial trial and punishment trial, juries must be "death qualified" before they even determine a defendant's guilt.[217] Studies have shown that when a defendant has a death qualified jury, they are more likely to be found guilty.[218]

Additionally, death qualifying a jury can be a lengthy and expensive process.[219] Under this proposal, a jury would only need to be "death qualified" if the defendant is found guilty because attorneys can generally assume that the same jury will not be available years later. This could reduce the concern that a death qualified jury is more likely to find the defendant guilty and balance out the costs of having to re-present pieces of evidence to a jury that did not see them at the trial where the verdict was decided.[220]

Another consideration with having separate juries is something known as "residual doubt."[221] The idea of this concept is that a jury may still have leftover doubt over whether the defendant committed the crime, and therefore choose not to sentence them to death.[222] It is less likely that a jury assembled solely for sentencing will have the same level of doubt that a jury who sat through an entire trial where attorneys presented evidence for the defense

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212. *See* Susan D. Rozelle, *The Principled Executioner: Capital Juries' Bias and the Benefits of True Bifurcation*, 38 ARIZ. ST. L.J. 769, 795 (2006).

213. *See id.*

214. *Id.* at 777–98.

215. Alice Chao et. al, *Death-Qualified Juries and the Flowers Trials*, CORNELL UNIV. L. SCH. SOC. SCI. AND L., https://courses2.cit.cornell.edu/sociallaw/FlowersCase/deathqualifiedjuries.html#:~:text=Overview%3A%20what%20is%20a%20death,all%20cases%20of%20capital%20murder (last visited Mar. 23, 2021).

216. *Id.*

217. *Id.*

218. Rozelle, *supra* note 212, at 778–80.

219. *Id.* at 796.

220. *Id.* at 802–03.

221. *Id.* at 803.

222. *Id.*

will. While this is a valid concern, proponents of having separate trials for all capital offenders point out that the same jury who heard a defendant proclaim their innocence repeatedly will not be convinced that the defendant feels any remorse—another important factor in the jury's determination.[223] Given that the arguments in favor of having separate juries can be applied to all capital offenders, having a delayed sentencing phase for young adult offenders has the potential to render more predictable results and allows the state of Texas to assess the benefits of a bifurcated jury system generally.[224]

One opposing argument and potential concern to this proposal is that if Texas courts wait to sentence a defendant, a risk exists that a dangerous offender will harm a fellow inmate or guard while awaiting trial. Because of this possibility, offenders should be placed at a facility where they can remain in single cell while awaiting trial. This will limit the interactions that a defendant has with others and limit their potential to harm fellow inmates. This proposal will also not result in a significant increase in time that a defendant spends locked up because most inmates remain on death row for an average of sixteen years before they are executed.[225] Either a defendant will wait on death row for years after their sentence and potentially appeal the jury's future danger prediction as inaccurate or, under this solution, the sentencing phase can be delayed and the jury may use the time that a defendant already spends locked up in their assignment.

C. Assuring a More Predictable Result

This proposal reaches more accurate results because (1) delaying the sentencing phase will provide more time for psychologists to analyze the effects or emergence of any psychological or personality disorders, since age can play a factor in the development of these disorders;[226] (2) Character evidence would more accurately reflect an individual's personality because the jury will be able to consider an individual's behavior once age has slowed down a defendant's impulse control and propensity for risky behavior;[227] and (3) Using a defendant's criminal history will be more reliable under this proposal. Although the jury will still be able to consider a defendant's juvenile record, this solution could potentially mitigate the effects of a bad juvenile record caused by an inadequate home environment or substance

223. *Id.* at 804.

224. *See id.* at 806–07 (considering many arguments on either side of the debate and concluding that a bifurcated jury system is necessary).

225. Jolie McCullogh & Ben Hasson, *Faces of Death Row*, TEX. TRIBUNE, https://apps.texastribune.org/death-row/ (last updated Feb. 25, 2021).

226. *See infra* text accompanying notes 232–234 (discussing how expert testimony would be more reliable under this proposal).

227. *See infra* text accompanying notes 237–241 (explaining how this proposal improves character evidence).

abuse by showing a defendant's reformative efforts in prison.[228] A jury can assess a defendant's interactions with guards, limited interaction with other inmates, and any psychological assignments performed during a defendant's time in prison during the sentencing trial.[229] Thus, providing a much less subjective determination of whether the defendant is capable of change.[230]

Ultimately, this proposal changes little with regard to the future danger standard or capital punishment in Texas. Prosecutors will still be able to present all the evidence they previously presented to the jury before the legislature enacted a delayed sentencing phase.[231] Whether a defendant will be a threat moving forward will remain the overarching inquiry at the punishment trial, and even young offenders will receive the ultimate punishment if a jury determines they are a future danger. The main goal of this proposal is not to reduce the number of individuals executed, but rather to assure that juries make a more reliable assignment about the danger that young adults pose with a decreased number of executions as the anticipated but unintended result.

Under this proposal, expert testimony is more likely to aid the jury in its future danger prediction. By the time of trial, if a personality disorder or mood disorder has improved, the defendant's behavior in prison up until the time of trial should reflect this.[232] A person suffering from antisocial personality disorder, which experts commonly diagnose defendants with to establish that they pose a threat to others, is likely to exhibit impulsive behavior, a disregard for authority, and a tendency to lie.[233] If the sentencing trial is delayed until a defendant reaches twenty-five, an expert will, at least, have to consider a defendant's time in prison in their future danger hypotheticals.[234]

Alternatively, if the defendant exhibited all the symptoms of a personality disorder while imprisoned, then an expert can confidently claim that a mood disorder is present without the concern that the diagnosis is really just the result of an aging offender.[235] In either case, a more predictable assessment on any mood or personality disorder would be reached by allowing an expert to assess the defendant's behavior once they are done maturing.[236]

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228. *See infra* text accompanying notes 246–249 (describing the impact a delayed sentencing phase has on a defendant's criminal history).

229. *See* Shapiro, *supra* note 69, at 180.

230. *Id.* at 194 (discussing how the future danger standard takes the juries attention away from more objective evidence).

231. 26 Tex. Jur. 3d *Criminal Procedure: Posttrial Proceedings* § 256 (2021).

232. Lerche Davis, *supra* note 145.

233. *Antisocial Personality Disorder*, MAYO CLINIC https://www.mayoclinic.org/diseases-conditions/antisocial-personality-disorder/symptoms-causes/syc-20353928 (last visited Mar. 23, 2021).

234. Barefoot v. Estelle, 463 U.S. 880, 904 (1983).

235. *See* Coble v. State, 330 S.W.3d 253, 266 (Tex. Crim. App. 2010).

236. *See* Roper v. Simmons, 543 U.S. 551, 572 (2005).

Delaying the sentencing phase will also produce more reliable character evidence because the jury will simply have more of it to consider. By assuring that the jury has at least twenty-five years of character evidence to potentially be presented to them, the court avoids requiring the jury to make a future danger prediction by only assessing a defendant's behavior as a juvenile.[237] This is important because we now know the role that age plays in the maturity of young adults and that, like juveniles, they too maintain a possibility for character reformation.[238]

Under this proposal, a jury can see whether a defendant's character was actually reformed as they aged. If Billy Wardlow had been able to rebut the prison expert's claim that he would be a threat to others by showing that he was involved in zero violent incidents up until his trial, the jury may have rethought sentencing him to death.[239] A sentence based on what turned out to be a completely inaccurate prediction that Billy would be a danger to those around him.[240] At the very least, under this proposal Billy's defense attorneys would have been able to present evidence that Billy's character had been reformed in prison, and the jury could have based its future danger prediction on more objective evidence.[241]

One concern with delaying the sentencing phase is that defendants will simply put on a good show for a few years until their sentencing trial begins in hopes that the jury will choose not to sentence them to death and then revert back to violent behavior once receiving a life sentence. However, the concern that a defendant will falsely represent themselves is less prominent when considering the evidence that a prosecutor is still able to use to establish that the defendant is a future danger.[242] In *Emery v. State*, unexpected delays resulted in the defendant going through a sentencing trial eight years after his guilty conviction.[243] The jury considered the defendant's perfect prison history but still found that he posed a risk to others because of the nature of his offense and his prior history of violence.[244] The defendant's prison history is not meant to overcome an especially heinous crime but rather it assures that a jury does not execute a young offender before he has had the opportunity to reform his character.[245]

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237. United States v. Bernard, 299 F.3d 467, 482 (5th Cir. 2002) (considering that the defendant was only nineteen at the time of his sentencing, the prosecution's evidence of Bernard's previous bad acts occurred before he even reached the age of eighteen).

238. *Wardlow Petition*, *supra* note 21, at 19–25 (discussing the evidence of Billy's character reformation as he aged in prison).

239. Bingamon, *supra* note 22.

240. *Id.*

241. *See id.*

242. *See* 26 Tex. Jur. 3d *Criminal Procedure: Posttrial Proceedings* § 256 (2021).

243. Emery v. State, 881 S.W.2d 702, 707 (Tex. Crim. App. 1994).

244. *Id.*

245. *See supra* Section III.C (discussing reformation and its relationship to the future danger standard).

By waiting to sentence a defendant until they reach twenty-five, the jury will be able to consider the crimes the defendant committed before they went to prison and their behavior while in prison. Given the role that age plays in whether an individual engages in crime, it is crucial that juries are able to consider whether a defendant continued to exhibit signs of violent behavior up until reaching twenty-five.[246] A jury should not base whether a defendant will be a threat to others solely on crimes committed by the defendant as a juvenile.[247]

Furthermore, this proposal eliminates some of the difficulty a defendant endures when trying to use their nonviolent nature in prison to prove that a jury got it wrong. A history of violence is one of the most probative pieces of evidence that the state can present against a defendant.[248] However, this evidence often leads to false predictions that the defendant will be a future danger, and defendants end up appealing the jury's ruling and arguing that their behavior in prison establishes that the jury got it wrong.[249] Because the court of appeals gives great discretion to a jury's ruling, these appeals rarely result in a death sentence being overturned.[250] Under this proposal, a defendant can use the time leading up to the sentencing phase to either confirm their violent nature or disprove it.

V. CONCLUSION

Young adults are a unique group of individuals that should have an increased sense of responsibility from that of juveniles but who still maintain a possibility for character reformation that cannot be attributed to adults.[251] Because of their lack of brain development, applying the future danger standard as set out in the Texas Capital Punishment statute renders unreliable predictions about whether a defendant will be a danger in the future.[252] The standard's failure to accurately reflect whether a young defendant is a future danger results in the execution of defendants who turn out to never commit another crime while imprisoned.

In order for a jury to apply this standard in a way that renders more accurate predictions, courts in Texas should delay the sentencing phase for

246. Ulmer & Steffensmeier, *supra* note 172, at 379.

247. *See id.*

248. Blume, *supra* note 70, at 20 ("Over half of the jurors interviewed said they were more likely to impose the death sentence if the defendant had a history of violent crime . . . .").

249. *See* United States v. Bernard, 299 F.3d 467, 482 (5th Cir. 2002); *see Emery*, 881 S.W.2d at 707; *see* Coble v. State, 330 S.W.3d 253, 265–70 (Tex. Crim. App. 2010).

250. *Bernard*, 299 F.3d at 482 (stating that an appellate court reviews a jury's finding on aggravating factors by "[v]iewing the evidence in the light most favorable to the government, [and asking whether] a rational trier of fact could find the existence of . . . [the future danger standard] . . . beyond a reasonable doubt.").

251. *See supra* Section III.A (discussing the mental development of young adults).

252. *See supra* Section III.B (discussing how the future danger factors fail to take into account a young adult's development).

defendants who commit capital crimes between the age of 18–24 until they reach the age of twenty-five. This will give the jury an objective piece of evidence to make their future danger assignment, in addition to making the factors used to show a defendant will be a danger to others more reliable. Even capital offenders should be given the opportunity to reform their character. For Billy Wardlow, this opportunity could have been the difference between life and death.