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The Intersection Between Young Adult Sentencing and Mass Incarceration

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THE INTERSECTION BETWEEN YOUNG ADULT SENTENCING AND MASS INCARCERATION

JOSH GUPTA-KAGAN*

This Article connects two growing categories of academic literature and policy reform: arguments for treating young adults in the criminal justice system less severely than older adults because of evidence showing brain development and maturation continue until the mid-twenties; and arguments calling for reducing mass incarceration and identifying various mechanisms to do so. These categories overlap, but research has not previously built in-depth connections between the two.

Connecting the two bodies of literature helps identify and strengthen arguments for reform. First, changing charging, detention, and sentencing practices for young adults is one important tool to reduce mass incarceration. Young adults commit a disproportionate number of crimes. Because so many offenders are young adults, treating young adults less severely could have significant impacts on the number of individuals incarcerated.

Second, focusing on young adults responds to retributive arguments in defense of existing sentencing policies, especially for violent offenses. The mass incarceration literature shows that sentences for violent offenses explain much, if not most, of recent decades' prison growth. Young adult violent offenders deserve punishment, but their youth mitigates their culpability and thus offers a response to retributive calls for long sentences.

Third, considering mass incarceration can add both urgency and new ideas to the growing debate about reforming sentencing of young adults. Such reforms have thus far been tentative, following well-grounded desires to test different alternative interventions for young adults. The mass incarceration literature adds an important consideration—the status quo demands prompt and far-reaching reform—and new ideas, such as prosecutorial charging guidelines that encompass defendants' age.

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INTRODUCTION

This Article connects two growing categories of academic literature and policy reform—arguments for treating young adults (those

18–24 years old)¹ in the criminal justice system less severely than older adults, and arguments calling for reducing mass incarceration and identifying various mechanisms to do so. Connecting the two bodies of literature provides important benefits to both. It adds an important policy reason—reducing mass incarceration—to calls for reforming treatment of young adult offenders. It provides one crucial argument for reducing the frequency and length of incarceration for violent offenses committed by young adults—a topic which the mass incarceration literature shows must be addressed to fight mass incarceration effectively.

The young adult sentencing literature begins with well-established justifications for treating children differently than adults: they are developmentally less mature, more impulsive, more susceptible to various external pressures, and have reduced decision-making abilities. As a result, as the Supreme Court has repeatedly explained, retribution is less appropriate for them, deterrence is less effective, and rehabilitation is more effective.

These basic principles apply to young adult offenders—albeit with lesser force—because neurological and psychological development continues past age 18 and into the mid-20s. As the Court has noted, drawing a line at 18 comes from history and the social meaning of age, not developmental psychology.² The law’s present treatment of young adults the same as older adults, therefore, exists in tension with the developmental evidence.

A growing literature seeks to reduce that tension and treat young adults differently, with some commentators calling for states to raise juvenile court jurisdiction above 18 and others to treat young adults

1. The lower boundary of this age range comports with states’ typical age of majority and upper line of juvenile court jurisdiction, and the U.S. Supreme Court’s line for capital punishment eligibility. *Roper v. Simmons*, 543 U.S. 551, 574 (2005). Jeffrey Jensen Arnett coined the term “emerging adulthood” to refer to individuals 18–25 years old. Jeffrey Jensen Arnett, *Emerging Adulthood: A Theory of Development from the Late Teens Through the Twenties*, 55 AM. PSYCHOLOGIST 469, 469 (2000). The 18–24 year old range used in this article finds support in the developmental science, and is frequently used in the legal and policy literature. *E.g.*, COUNCIL OF STATE GOV’TS JUSTICE CTR., REDUCING RECIDIVISM AND IMPROVING OTHER OUTCOMES FOR YOUNG ADULTS IN THE JUVENILE AND ADULT CRIMINAL JUSTICE SYSTEMS 1, (2015) [hereinafter REDUCING RECIDIVISM], <https://csgjusticecenter.org/wp-content/uploads/2015/11/Transitional-Age-Brief.pdf> [https://perma.cc/DT4H-QJ2L]; LAURENCE STEINBERG ET AL., U.S. DEP’T OF JUSTICE, PSYCHOSOCIAL MATURITY AND DESISTANCE FROM CRIME IN A SAMPLE OF SERIOUS JUVENILE OFFENDERS 1 (2015), <https://www.ojjdp.gov/pubs/248391.pdf> [https://perma.cc/E3XX-PAAV]. Whether to draw a line at age 24 or 25 is beyond the scope of this Article.

2. *Roper*, 543 U.S. at 574 (“The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest.”).

more leniently in the adult criminal system. This debate, like the child sentencing cases out of which it grows, begins with two foundational principles. First, young adults are presumptively different than older adults. Second, those differences apply regardless of the crime an individual may have committed—so if the law offers greater leniency to 20-year-olds who commit non-violent offenses than to older adults, no principled reasons justify denying analogous leniency to 20-year-olds who commit violent offenses.³

Separately, the mass incarceration literature has bemoaned the tremendously large number of people that the American criminal justice system incarcerates, both at any given point in time and over the course of lifetimes. This literature has noted the age distribution of individuals impacted by the criminal justice system—because crime is disproportionately a young person’s activity, young adults are particularly affected by the criminal justice system. More precisely, given the racial disparities highlighted in the mass incarceration literature, young black men are particularly affected by our criminal justice system’s treatment of young adults. Yet efforts to reform mass incarceration have not generally focused on offenders’ age and have instead focused on the categories of offenses—calling for less frequent incarceration for non-violent offenses, probation, and parole violations. To the extent the literature examines offenders’ age, it is usually on the back end, noting that there is little incapacitation benefit to incarcerating people who have aged enough to be a low risk for recidivism, rather than asking if young adults are less deserving of long sentences at the front end.

Despite their overlaps, these two bodies of literature thus far largely developed in parallel. This Article seeks to connect them, and makes several preliminary claims about the value of analyzing young adult sentencing and mass incarceration together. First, changing charging, detention, and sentencing practices for young adults is one important tool to reduce mass incarceration. Crime of all kinds rises during adolescence, peaks in the late teens, and then declines precipitously to age 25, and then more gradually as individuals age, creating a bell-shaped graph known as the age-crime curve.⁴ This well-

3. This does not mean young adults should not face stiffer punishment for more severe crimes, only that if young adults should face more lenient sentences than older adults for less severe crimes, then the same should be true for more severe crimes.

4. The age-crime curve is well-established and “is universal in Western populations.” NAT’L INST. OF JUSTICE, FROM JUVENILE DELINQUENCY TO YOUNG ADULT OFFENDING (2014) [hereinafter FROM JUVENILE DELINQUENCY], <https://www.nij.gov/topics/crime/Pages/delinquency-to-adult-offending.aspx> [<https://perma.cc/R8QD-6KZ4>].

established part of the criminology literature reflects the developmental science regarding childhood and young adulthood—crime declines as people age through their twenties because they mature, become less impulsive, and can make better decisions under stress. And because so many offenders are young adults, treating young adults less severely could have significant impacts on the number of individuals incarcerated.

Second, focusing on young adults responds to retributive arguments in defense of existing sentencing policies and provides an important argument for less severe punishment of young violent offenders. The mass incarceration literature has focused on aggregate incarceration numbers, and the large and varied costs of that incarceration. In addition, that literature establishes that while much policy reform has focused on decreasing incarceration for non-violent offenses, the sheer number of individuals incarcerated for violent crimes means that we must address sentences for violent crimes to address mass incarceration comprehensively.⁵ But this literature addresses less directly the retributive beliefs which contribute to mass incarceration—that individuals who commit violent offenses, in particular, deserve prison time, often long prison time. Young adult violent offenders deserve punishment, but their youth mitigates their culpability and thus the retribution proportionate to their offense.

Third, considering mass incarceration can add both urgency and new ideas to the growing debate about reforming sentencing of young adults. Such reforms have thus far been tentative, following well-grounded desires to test different alternative interventions for young adults. The mass incarceration literature adds an important consideration—the status quo of mass incarceration demands prompt and far-reaching reform. Moreover, this point extends the reasons for a categorical prohibition on executing children (and a near-categorical prohibition on sentencing children to die in prison)—we cannot determine which individual children or young adults may warrant full adult sanctions, so some kind of categorically more lenient treatment of young adults is necessary. Only a categorical rule could have a strong enough effect on incarceration trends to contribute meaningfully to mass incarceration significantly. And ideas from the mass incarceration literature—such as establishing prosecutorial charging guidelines—can be adapted to incorporate young adult offenders' age.

Finally, empirical research should work to identify and evaluate programs which can serve as alternatives to incarceration for young

5. For instance, the United States could release all non-violent offenders and still imprison three times more people than it did in decades past. *Infra* note 222 and accompanying text.

adults, and focus on young adults as a distinct age group when considering mass incarceration.

Part I will review the emerging literature regarding young adults who commit crimes, and why that population can make a valid claim that the same details which mitigate children's offenses should (more modestly) mitigate their offenses. Part I will also explore different proposals for taking young adults' age into account when considering their sentences, and explain why a categorical approach is preferable to the existing case-by-case approaches. Part II will review the literature regarding mass incarceration, and how that literature establishes that sentences of young adults, including for violent crime, is an important contributor to America's high incarceration rates. Yet that literature has not featured age as prominently as the emerging discussion of young adult sentencing would suggest. Part III connects the two bodies of literature, and explores how each can strengthen arguments made by the other.

I. SENTENCING YOUNG ADULTS

Relying on developmental science, the Supreme Court has now repeatedly held that "children are different" and thus enjoy constitutional protections against the most severe punishments.⁶ The Court focused these repeated holdings on children under 18, drawing a line at that age in *Roper v. Simmons*.⁷ But the Court was clear that this line depended not only on the developmental literature which informed other parts of its holdings.⁸ Rather, *Roper's* line at age 18 depends on the social, cultural, and legal meaning assigned to that age.⁹

The Supreme Court's reliance on developmental research begs the question of why treat only children under 18 differently. In the dozen years since *Roper*, scholars and advocates have begun questioning the line drawn at age 18, especially in light of research showing that the brain continues to develop—and, in particular, portions of the brain which enhance executive function and decision-making capabilities—until age 25.¹⁰ The gradual development that continues past teenagers' 18th birthdays suggest better policy¹¹ is to provide gradual sentencing

6. *Miller v. Alabama*, 567 U.S. 460, 481 (2012); see also *id.* at 471 (“[C]hildren are constitutionally different from adults for purposes of sentencing.”); *infra* Section I.A.1 (discussing quartet of Supreme Court cases).

7. 543 U.S. 551, 574 (2005).

8. *Id.* at 569–74.

9. *Id.* at 574.

10. See *infra* Sections I.A.1 & I.C.

11. In this Article, I focus on policy arguments rather than constitutional arguments. That is, I explore how developmental psychology research—adopted into

change after turning 18 rather than the bright line at 18 that currently exists—and this idea has begun to get traction in both academic and policy circles.

This Part explores the Supreme Court’s children’s sentencing cases and its age line at 18, the reasons to question a bright line at 18, various ways legal developments have already started to question that line, and competing proposals to treat young adults differently for criminal sentencing purposes. This Part will also address a central question in both the child sentencing cases and in designing young adult sentencing policies—is a categorical or a case-by-case approach preferable? Put more precisely, should the law apply young adult sentencing to *all* individuals of a certain age, or only when some individualized circumstances are present? The Supreme Court has been conflicted on this question for child sentencing, and proposals for young adult sentencing are similarly split. This Part will explore the few states that permit a case-by-case approach to young adult sentencing and argue that they show how such an approach fails to account for young adults’ developmental status effectively—at least under existing, narrowly-drawn statutes. Relatedly, this Part will discuss empirical literature demonstrating how current law permits young adults to face disproportionately more severe sentences—a phenomenon which emphasizes the need for a different approach to spark more dramatic reforms.

A. The Supreme Court’s Eighth Amendment Quartet: Reduced Sentences for Crimes Committed by Children Under 18

In a quartet of Eighth Amendment cases, the Supreme Court has limited constitutionally-permissible punishments for crimes committed by children under 18—it has banned capital punishment,¹² life without the possibility of parole for non-homicide crimes,¹³ and the mandatory application of life without the possibility of parole for homicides.¹⁴ Most recently, it applied that ban on mandatory life sentences retroactively, clarifying that the Court has substantively banned life without the possibility of parole “for all but the rarest of juvenile

constitutional law and helpfully articulated in legal terms by the Supreme Court—can justify broader reforms. Whether such arguments should justify expansions of the *Roper* protections to offenders above age 18, see *infra* notes 69–70, or whether the Court will (or should) hesitate to expand Eighth Amendment protections is beyond the scope of this Article.

12. *Roper*, 543 U.S. at 574.

13. *Graham v. Florida*, 560 U.S. 48, 82 (2010).

14. *Miller v. Alabama*, 567 U.S. 460, 489 (2012).

offenders, those whose crimes reflect permanent incorrigibility.”¹⁵ These cases often use broad language—describing children as always different, regardless of the crime committed,¹⁶ suggesting that sentencing courts should always punish children differently than adults.

The Supreme Court’s holdings and subsequent policy developments rest in large part on psychological and neurological literature showing that children really are different—in particular, that they make decisions to participate in crime differently than adults do.¹⁷ As a result of those differences, the Supreme Court found that various theories of punishment operate differently with children—they are less culpable and so retribution is less appropriate, they are less subject to deterrence, and more subject to rehabilitation, and thus lifelong incapacitation is less warranted.¹⁸

1. DEVELOPMENTAL REASONS FOR TREATING CHILDREN—AND YOUNG ADULTS—DIFFERENTLY

The Court rested its Eighth Amendment holdings on its understanding of developmental psychology—that because 16- and 17-year-old children were still developing, they were insufficiently culpable to warrant the death penalty and, in all but the most extreme cases, life sentences without the possibility of parole. The Court’s first decision—banning the juvenile death penalty in *Roper v. Simmons*—rested on three developmental principles, repeated through the later cases of the quartet. Crucially for this Article, each of these factors continues for young adults.¹⁹

First, adolescents are less mature and have an “underdeveloped sense of responsibility,” leading teenagers to engage in a range of risky behaviors, including crime.²⁰ The lack of maturity leads teenagers to

15. *Montgomery v. Louisiana*, 136 S. Ct. 718, 734, 736 (2016).

16. *Miller*, 567 U.S. at 473.

17. Indeed, the Court’s reliance on developmental evidence represents a shift from prior decisions. Laurence Steinberg, *Adolescent Brain Science and Juvenile Justice Policymaking*, 23 PSYCH. PUB. POL’Y & L. 410, 413 (2017).

18. *Id.*

19. See, e.g., Kelsey B. Shust, Comment, *Extending Sentencing Mitigation for Deserving Young Adults*, 104 J. CRIM. L. & CRIMINOLOGY 667, 684–89 (2014) (summarizing developmental data suggesting young adults over 18 are similar to adolescents under 18).

20. *Roper v. Simmons*, 543 U.S. 551, 569 (2005) (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)).

exhibit poor self-control, over-value short-term rewards, and under-value the long-term costs to themselves and others.²¹

These same descriptions apply to older adolescents and young adults in their early twenties.²² Studies measuring individuals' self-control found that under more stressful conditions,²³ young adults perform more like adolescents than older adults.²⁴ Individuals' future-orientation—their ability to balance long-term consequences with more immediate effects—gradually grows “over an extended period between childhood and young adulthood.”²⁵

While quantifying the maturation that occurs between turning 18 and 25 is difficult, psychological and neurological research shows that “[b]iological changes in the prefrontal cortex during adolescence and the early 20s lead to improvements in executive functioning, including reasoning, abstract thinking, planning, anticipating consequences, and impulse control.”²⁶ Graphically, scholars have represented this development by drawing a line for intellectual maturity—individuals' ability to reason—and a line for psychosocial maturity—the ability to make decisions which account for short and long-term risks and benefits accurately.²⁷ While intellectual maturity reaches its peak and levels off around age fifteen, the psychosocial maturity line does not reach that level until about age 25.²⁸ The resulting gap—labeled “the immaturity gap” in one influential summary of the research—remains large at age 18 and continues until the two lines meet at age 25.²⁹

Second, the Supreme Court concluded that “juveniles are more vulnerable or susceptible to negative influences and outside pressures,

21. Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1012 (2003).

22. Elizabeth S. Scott et al., *Young Adulthood as a Transitional Legal Category: Science, Social Change, and Justice Policy*, 85 FORDHAM L. REV. 641, 647 (2016).

23. Stressful conditions are considered analogous to situations in which an individual decides whether to commit a crime. Steinberg & Scott, *supra* note 21, at 1014.

24. Scott et al., *supra* note 22, at 650. Absent the stressors imposed during the experiment, young adults performed better than adolescents. *Id.*

25. Steinberg & Scott, *supra* note 21, at 1012.

26. David P. Farrington et al., *Young Adult Offenders: The Need for More Effective Legislative Options and Justice Processing*, 11 CRIMINOLOGY & PUB. POL'Y 729, 733 (2012).

27. MACARTHUR FOUND. RES. NETWORK ON ADOLESCENT DEV. & JUVENILE JUSTICE, *LESS GUILTY BY REASON OF ADOLESCENCE 2* (2006), http://www.adjj.org/downloads/6093issue_brief_3.pdf [https://perma.cc/XHB9-2VUD].

28. *Id.*

29. *Id.*

including peer pressure.”³⁰ In part, this is because, as children, they have less control over their environment, including less ability to extricate themselves from their environment.³¹ That factor changes legally at age 18, though one may reasonably question how much that changes practically, especially for individuals who lack resources. Teenagers are also more susceptible to outside influences because they over-value short-term rewards, especially peer approval.³²

Although not all psychological studies reach the same conclusion, multiple psychological studies show similar factors continuing into young adulthood.³³

Third, an adolescent’s character “is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed.”³⁴ The psychological literature describing the period between turning 18 and 25 as “emerging adulthood” asserts that “identity development continues through the late teens and the twenties.”³⁵ Others are open to that conclusion, but caution that the research may be ambiguous—some studies have found that it continues to be “transitory” into young adulthood, while others suggest it is more stable.³⁶

Beyond that psychological debate, crime data has long made clear that young adult crime does not define offenders, but rather is “a transitory state that they age out of.”³⁷ This is reflected in age-crime curves—graphs with offenders’ age on the x-axis and crime rates on the y-axis, and which show that crime rates peak in the late teens and remain high in the early twenties and then drop precipitously around the mid-twenties.³⁸ As the National Institute of Justice has noted, a majority (52–57 percent) of juvenile offenders continue offending “up to age 25,” but this figure plummets by two-thirds in the following five years.³⁹ As a result of committing a disproportionate number of crimes,⁴⁰ young adults make up a disproportionate number of admissions to prison systems. In California, for instance, twenty-six

30. *Roper v. Simmons*, 543 U.S. 551, 569 (2005).

31. *Id.* (citing Steinberg & Scott, *supra* note 21, at 1014).

32. Steinberg & Scott, *supra* note 21, at 1012.

33. Scott et al., *supra* note 22, at 649.

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

35. Arnett, *supra* note 1, at 473.

36. Scott et al., *supra* note 22, at 649–50.

37. JOHN PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM 190–91 (2017).

38. FROM JUVENILE DELINQUENCY, *supra* note 4.

39. *Id.*

40. This is particularly so for violent crime. See *infra* notes 301–304 and accompanying text.

percent of all new felony admissions to the state prison system are of 18 to 24-year-olds.⁴¹

The age-crime curves make clear that for most young adults who commit crimes, as with most children who commit crimes, crime is “transitory” and not a “fixed” character trait.⁴² Desistance from crime is particularly frequent in these young adult years, which account for “the highest concentration of desistance” of any age band.⁴³ The Council of State Governments has observed that the concentration of crime, especially violent crimes, committed by young adults is “[n]ot coincidental[]” given all the ongoing neurological and psychological development.⁴⁴ Consistent with that view, other risky behaviors—unprotected sex, binge drinking and other forms of substance use, and risky driving—peak between ages 18 and 25.⁴⁵

When the Court revisited juvenile sentencing questions in cases following *Roper*, it heard from multiple experts who made clear that the three principles applied to young adults. Amicus briefs summarized research, explaining that development continues past age 18 and into

41. CAL. DEP’T OF CORR. & REHAB., CHARACTERISTICS OF FELON NEW ADMISSIONS AND PAROLE VIOLATORS RETURNED WITH A NEW TERM: CALENDAR YEAR 2013, at 17 (2014), http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/ACHAR1/ACHAR1d2013.pdf [<https://perma.cc/TDP5-AG9T>]. If anything, this figure understates the number of young adults entering prison every year. The state agency reports new inmates based on their age when admitted to the Department of Corrections and Rehabilitation, not their age at the time of offense. *Id.* at 34. So, some proportion of the 25–29-year-olds who entered state custody (accounting for 17.5 percent of new inmates) were incarcerated for crimes committed in their younger twenties. *Id.* at 17. California reports similar proportions in earlier years. See *Characteristics of Felon Admissions to Prison Report Archive*, CAL. DEP’T OF CORR. & REHAB., http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/Achar1Archive.html [<https://perma.cc/5SN9-6W64>].

42. The Court used these terms in *Roper*. See *Roper v. Simmons*, 543 U.S. 551, 570 (2005).

43. Farrington et al., *supra* note 26, at 734.

44. REDUCING RECIDIVISM, *supra* note 1, at 1.

45. Arnett, *supra* note 1, at 474–75. Recognizing young adults’ risky driving, car rental companies either prohibit them from renting cars or charge extra. See, e.g., *Renting a Car Under 25*, ALAMO, https://www.alamo.com/en_US/car-rental/age-requirements.html [<https://perma.cc/6GAG-SJ6K>] (noting that it will not rent cars to most individuals under 21, and that “rental rates may be higher for renters between the ages of 21 and 24”); *Car Rental for 20–24 Year Olds*, DOLLAR, https://www.dollar.com/TravelCenter/TravelTools/under_25.aspx [<https://perma.cc/98DD-59S3>] (“Renters under 25 years old are subject to a Young Renter Fee.”); *Restrictions and Surcharges for Renters Under 25 Years of Age*, BUDGET, <https://www.budget.com/budgetWeb/html/en/common/agePopUp.html> [<https://perma.cc/D543-GN99>] (noting a general minimum rental age of 25, and listing surcharges for exceptions to that rule).

young adulthood,⁴⁶ human brains are not “fully mature until an individual reaches his or her twenties,” and, in particular, portions of the brain which improve decision-making and help control impulses do not fully develop until then.⁴⁷

The Supreme Court drew a legal inference from the developmental literature it relied upon—“the distinctive attributes of youth diminish the penological justifications” for punishment.⁴⁸ Youth are less blameworthy, so retribution is less appropriate.⁴⁹ Youth are less likely to consider the consequences of their actions, including possible punishment, so deterrence is less effective.⁵⁰ The circumstances of youth “most suggest” the value of rehabilitation,⁵¹ and render incapacitation (at least through lifetime sentences) suspect.⁵² Because the developmental literature applies to young adults as well, these same inferences should as well.

2. THE SUPREME COURT’S AGE LINE AT 18

In the context of the Court’s prior opinions, *Roper* pushed the age line up from 16 to 18.⁵³ In doing so the Court’s opinion “speaks in the language and with the authority of the developmental psychologists whose writings are the only sources cited for all three of the differences identified,”⁵⁴ but it rested its age line at 18 on the legal and social meaning of age:

Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. *The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. . . . [H]owever, a line must be drawn. . . . The age of 18 is the point where society draws the line for many purposes between childhood and*

46. Brief for American Psychological Association et al. as Amici Curiae Supporting Petitioners at 5, 9, *Miller v. Alabama*, 567 U.S. 460 (2012) (Nos. 10-9646, 10-9647).

47. Brief for J. Lawrence Aber et al. as Amici Curiae Supporting Petitioners at 15–16, *Miller*, 567 U.S. 460 (Nos. 10-9646, 10-9647).

48. *Miller*, 567 U.S. at 472.

49. *Id.*

50. *Id.*

51. *Id.* at 478.

52. *Id.* at 472.

53. *Roper v. Simmons*, 543 U.S. 551, 574 (2005); *Thompson v. Oklahoma*, 487 U.S. 815, 815 (1988) (drawing the line at age 16).

54. Emily Buss, *What the Law Should (and Should Not) Learn from Child Development Research*, 38 HOFSTRA L. REV. 13, 36 (2009).

adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest.⁵⁵

Roper's line at age 18—and the Court's abrupt shift from developmental authorities to “where society draws the line”⁵⁶—has engendered criticism. Emily Buss labels it “particularly troubling, because age eighteen may not even be the right place to draw the line for the most typical child.”⁵⁷ Indeed, young adults have a similar claim that their developmental status means that the best policy is to sentence them differently than older adults. Psychologists have suggested that the years between 18 and 25 are not full adulthood, but “emerging adulthood.”⁵⁸ There are surely social and cultural elements in this concept—it emerged after the median age for marriage and parenthood pushed into the late twenties, and as a majority of Americans attended at least some college, pushing education into the twenties.⁵⁹ Emerging adult is thus analogized to adolescence, which has social and cultural, in addition to developmental, meaning.⁶⁰ The social meaning of emerging adulthood as a distinct status coupled with strong evidence showing that development continues until age 25 provides a solid foundation for policy reforms regarding young adults in the criminal justice system.

Roper's focus on the social basis for drawing an age line at 18 also helps explain its reliance on international law's condemnation of the juvenile death penalty, which reveals a global consensus of the meaning of a line at 18.⁶¹ The Court found that international law “confirm[s]” that the death penalty is a disproportionate punishment for a child.⁶² The Convention on the Rights of the Child codifies that global social and legal norm, defining children as under 18 and prohibiting capital punishment of children.⁶³ Commentators have confirmed the understanding that the constitutional line at 18 is, at best, “interpreting

55. *Roper*, 543 U.S. at 574 (2005) (emphasis added).

56. *Id.*

57. Buss, *supra* note 54, at 39. Buss warns that failing to match the Court's age line to the developmental research undermines its reliance on developmental research. *Id.*

58. Arnett, *supra* note 1, at 469.

59. *Id.*

60. Arnett makes this point explicitly: “*Like adolescence*, emerging adulthood is a period of the life course that is culturally constructed, not universal and immutable.” *Id.* at 470 (emphasis added).

61. *Roper*, 543 U.S. at 575–78.

62. *Id.* at 575.

63. United Nations Convention on the Rights of the Child art. 1 & 37(a), Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990) (cited in *Roper*, 543 U.S. at 576).

the science to fit our social and legal reality, one in which we've decided to regard 18 as an important turning point."⁶⁴

The Court has avoided further consideration of the age line at 18 it drew in *Roper*. In each of the subsequent cases of the quartet, the Court reaffirmed *Roper*'s three developmental points.⁶⁵ In *Graham v. Florida*⁶⁶, Justice Kennedy's opinion even noted that the science had gotten stronger and acknowledged that development continued into "late adolescence."⁶⁷ But all of the defendants had committed crimes when they were under 18, so the Court had no reason to address evidence showing similar developmental features for young adults.

B. Expanding Legal Provisions Regarding Young Adults

Treating young adults who commit crimes less severely than older adults would represent a dramatic change in our criminal justice system. Nonetheless, criminal law, and the law more broadly, has increasingly treated young adulthood as a distinct category in recent years. Such efforts have thus far been relatively small, and certainly not universal in scope or consistent in application.⁶⁸ More dramatic reform proposals are discussed in Section I.C. The existing trend towards treating young adulthood as a distinct category provides important context for those proposals and demonstrates that they are not far-fetched.

Most directly connected to the *Roper* line of cases and evidence showing psychological and neurological development continues into the mid-twenties discussed in Section I.A., some litigation has begun questioning the age line drawn in *Roper* at 18. Experts have testified in death penalty cases that "if a different version of *Roper* were heard

64. Terry A. Maroney, *The Once and Future Juvenile Brain*, in CHOOSING THE FUTURE FOR AMERICAN JUVENILE JUSTICE 189, 206 (Franklin E. Zimring & David S. Tanenhaus eds., 2014).

65. *Graham v. Florida*, 560 U.S. 48, 68 (2010); *Miller v. Alabama*, 567 U.S. 460, 471–72 (2012); *Montgomery v. Louisiana*, 136 S. Ct. 718, 733 (2016).

66. 560 U.S. 48 (2010).

67. *Id.* at 68.

68. Efforts in the United Kingdom have been described similarly. The House of Commons Justice Committee has noted "an emerging interest in criminal justice agencies in treating young adults more appropriately," but also described the absence of clear policy and legislation leading "the distinct needs of young adults . . . [to be] largely overlooked and at best treated inconsistently." HOUSE OF COMMONS JUSTICE COMMITTEE, HC 169, THE TREATMENT OF YOUNG ADULTS IN THE CRIMINAL JUSTICE SYSTEM, SEVENTH REPORT OF SESSION 2016–17, ¶ 52 (2016) [hereinafter TREATMENT OF YOUNG ADULTS], <https://publications.parliament.uk/pa/cm201617/cmselect/cmjust/169/169.pdf> [https://perma.cc/Y83Z-9BQK].

today, knowing what we know now, one could've made the very same arguments about eighteen (18), nineteen (19), and twenty (20) year olds that were made about sixteen (16) and seventeen (17) year olds in *Roper*.”⁶⁹ One trial court has declared the death penalty unconstitutional as applied to individuals under 21, explaining that “[i]f the science in 2005 mandated the ruling in *Roper*, the science in 2017 mandates this ruling.”⁷⁰ Scholars have similarly argued for the abolition of capital punishment and life without parole sentences for young adult offenders.⁷¹

Broader trends seek to treat a larger group of young adult offenders as a distinct category. Some criminal sentencing laws have long treated young adults differently than older adults. Several states have youthful offender statutes, which mitigate sentences for certain crimes up to age 25, and, somewhat like the juvenile justice system, shield young adults from some of the collateral consequences of adult convictions and provide a range of rehabilitative services.⁷² In recent years, two states—Colorado and Vermont—have expanded their youthful offender statutes to include more young adults.⁷³ Scholars have advocated expanding these statutes by making them presumptively applicable to some young adults.⁷⁴

A growing number of jurisdictions have developed court procedures and programs to treat young adult offenders differently. A 2016 survey by the U.S. Department of Justice identified fifty-six

69. *Kentucky v. Bredhold*, No. 14-CR-161, at 2 (Fayette Cir. Ct. Aug. 1, 2017) (quoting testimony of Dr. Laurence Steinberg), <https://deathpenaltyinfo.org/files/pdf/TravisBredholdKentuckyOrderExtendingRoperVsSimmons.pdf> [<https://perma.cc/9HG4-6MYN>].

70. *Id.* at 6. The State filed an appeal of this ruling. *Kentucky v. Bredhold*, Motion to Stay Proceedings, 2017 WL 8895509 (2017). As of October 9, 2018, no appellate decision had issued.

71. ROLF LOEBER, DAVID P. FARRINGTON & DAVID PETECHUK, BULLETIN 1: FROM JUVENILE DELINQUENCY TO YOUNG ADULT OFFENDING (STUDY GROUP ON THE TRANSITIONS BETWEEN JUVENILE DELINQUENCY AND ADULT CRIME) 22 (2013); Farrington et al., *supra* note 26, at 743.

72. Scott et al., *supra* note 22, at 660–61. *E.g.*, D.C. CODE §§ 24-901 to -907 (West 2018); GA. CODE ANN. § 42-7-1 to -9 (West 2018); MICH. COMP. LAWS § 762.11–.13 (West 2018); S.C. CODE ANN. § 24-19-5 to -160 (West 2018); W. VA. CODE § 25-4-1 to -12 (West 2018).

73. Colorado expanded its youthful offender statute, which previously only included children tried as adults, to include 18- and 19-year-olds. 2009 Colo. Legis. Serv. 278–79 (West 2018) (codified at COLO. REV. STAT. § 18-1.3-407.5 (2013)). For a brief discussion of Colorado’s program, see *infra* notes 341–343 and accompanying text. Vermont’s legislature expanded youthful offender status to include individuals under 22-years-old at the time of the offense. 2016 Vt. Acts & Resolves, No. 153 §§ 1–2 (codified at VT. STAT. ANN. tit. 33, § 5280 (2018)). These provisions took effect on July 1, 2018. *Id.* at § 39(c).

74. Scott et al., *supra* note 22, at 660–61.

programs or networks or programs across the country.⁷⁵ Those programs included six “young adult courts” modeled after drug courts or juvenile courts.⁷⁶ These courts arose in geographically and politically diverse jurisdictions—including Manhattan and San Francisco, but also Idaho Falls, Idaho; Omaha, Nebraska; Kalamazoo, Michigan; and Lockport, New York.⁷⁷ All are relatively recent innovations, with most established since 2010.⁷⁸ Longer lists of probation departments and prosecutors’ offices have established distinct units to work with young adults both pre-trial and post-adjudication.⁷⁹ As with young adult courts, the majority of these programs were established since 2010.⁸⁰

Prison systems have also begun treating young adults differently than older inmates. Some commentators have called for “special correctional facilities for young adult offenders” with a variety of rehabilitative programs.⁸¹ The growing attention to the problems of solitary confinement also reflects a growing recognition of young adulthood as a distinct category. The U.S. Department of Justice issued guidelines describing sharply limited use of “restrictive housing” for children.⁸² DOJ simultaneously identified 18–24-year-olds as their own category, distinct both from older adults and “less so, from adolescence,”⁸³ and noted its development of services for young adult inmates designed to prevent disciplinary incidents which lead to the use of restrictive housing.⁸⁴ Other jurisdictions have gone further. Faced with a critical U.S. Attorney’s investigation into the use of punitive solitary confinement on adolescents,⁸⁵ New York City authorities

75. CONNIE HAYEK, NAT’L INST. OF JUSTICE, ENVIRONMENTAL SCAN OF DEVELOPMENTALLY APPROPRIATE CRIMINAL JUSTICE RESPONSES TO JUSTICE-INVOLVED YOUNG ADULTS 6 (2016), <https://www.ncjrs.gov/pdffiles1/nij/249902.pdf> [<https://perma.cc/PUC5-8Z3E>].

76. *Id.*

77. *Id.* at 24–29.

78. *Id.*

79. *Id.* at 30–47.

80. *Id.* at 30–47.

81. Farrington et al., *supra* note 26, at 742–43.

82. U.S. DEP’T OF JUSTICE, REPORT AND RECOMMENDATIONS CONCERNING THE USE OF RESTRICTIVE HOUSING 61–62 (2016), <https://www.justice.gov/archives/dag/file/815551/download> [<https://perma.cc/E5VH-Y4D6>].

83. *Id.* at 59.

84. *Id.* at 60.

85. Letter from Preet Bhara, U.S. Attorney, S.D.N.Y., to Bill de Blasio, Mayor, New York City, Joseph Ponte, Comm’r, New York City, Zachary Carter, Corp. Counsel, New York City (Aug. 4, 2014), <https://www.justice.gov/sites/default/files/usao-sdny/legacy/2015/03/25/SDNY%20Rikers%20Report.pdf> [<https://perma.cc/P3BF->

determined to stop the practice of solitary confinement for all inmates 21 and younger.⁸⁶ The decision to ban solitary confinement for young adults (and not only children) was based in part on developmental psychology showing brain development past age 18,⁸⁷ and commentators have begun challenging solitary confinement for anyone under 15.⁸⁸

State and local governments have also begun experimenting with various programs and facilities specifically for young adult offenders,⁸⁹ something the Department of Justice recommended in 2014.⁹⁰ These programs and facilities seek to apply lessons from juvenile justice programs and facilities.⁹¹ In at least one instance, a state has repurposed a juvenile prison for young adults.⁹² Such efforts have critics who argue that appealing descriptions of young adult prisons will lead states to increase the number of young adults incarcerated,⁹³ they nonetheless

Q89J] (regarding CRIPA Investigation of the New York City Department of Correction Jails on Rikers Island).

86. Michel Winerip & Michael Schwartz, *Rikers to Ban Isolation for Inmates 21 and Younger*, N.Y. TIMES (Jan. 13, 2015), https://www.nytimes.com/2015/01/14/nyregion/new-york-city-to-end-solitary-confinement-for-inmates-21-and-under-at-rikers.html?_r=0 [https://perma.cc/ZK4Z-ASW3].

87. Jessica Lee, *Lonely Too Long: Redefining and Reforming Juvenile Solitary Confinement*, 85 FORDHAM L. REV. 845, 847 (2016) (arguing that “the effects of solitary confinement are just as damaging for young adults as they are for juveniles”).

88. *Id.* at 848; Deema Nagib, *Jail Isolation After Kingsley: Abolishing Solitary Confinement at the Intersection of Pretrial Incarceration and Emerging Adulthood*, 85 FORDHAM L. REV. 2915, 2945 (2017).

89. Scott et al., *supra* note 22, at 663–64; *see also* Maureen Washburn, *Young Adult Prison Movement Deepens Reliance on Incarceration, Shortchanges Reform*, JUV. JUST. INFO. EXCHANGE (Apr. 17, 2017), http://jjie.org/2017/04/17/young-adult-prison-movement-deepens-reliance-on-incarceration-shortchanges-reform/?utm_source=JJIE+Website+Updates&utm_campaign=11c65c3606-EMAIL_CAMPAIGN_2017_04_20&utm_medium=email&utm_term=0_a8f2f6272f-11c65c3606-124960533 [https://perma.cc/AHA3-D5CB].

90. *Young Offenders: What Happens and What Should Happen*, U.S. DEP’T OF JUST. OFF. OF JUST. PROGRAMS Feb. 2014, at 2 <https://www.ncjrs.gov/pdffiles1/nij/242653.pdf> [https://perma.cc/JN5L-PMJQ] (recommending states “[c]onsider creating special correctional facilities for young adult offenders”).

91. Scott et al., *supra* note 22, at 663–64.

92. Caitlin Burchill, *Charleston Youth Correctional Facility Transitioning to Specialized Facility for Adult Inmates*, WABI5 (Aug. 4, 2015) (describing shifting a juvenile prison to an adult prison, in part to “expand[] the young adult offender program for inmates 18 through 26-year[s]-old”).

93. Washburn, *supra* note 89.

demonstrate the trend toward treating young adults as a distinct category.

Simultaneous legal developments beyond criminal law also reflect the increased recognition that children continue to develop into their mid-20s, and the decreased social meaning of turning 18. In 2008, Congress enacted legislation to support state efforts to extend foster care from age 18 to age 21, recognizing that 18-year-olds are unlikely to be able to support themselves effectively on their own.⁹⁴ More than half of all states now provide some kind of foster care past age 18.⁹⁵ In 2018, Congress expanded these provisions to support state efforts to provide independent living services to former foster youth until age 23, and education and vocational training assistance until age 26.⁹⁶ In 2009, Congress prevented credit card companies from contracting with anyone below age 21 without someone 21 or older co-signing.⁹⁷ In 2010, Congress ensured that young adults could remain on their parents' health insurance until turning 26.⁹⁸ In 2015, Texas raised the age at which an individual who has not graduated high school may drop out to 19.⁹⁹ States have expanded the scope of child support obligations past age 18,¹⁰⁰ especially for young adults who are attending college or who have a disability, with some calls to broaden this coverage to

94. Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, § 201 (codified at 42 U.S.C. § 675(8)(B) (2018)).

95. The Center for the Study of Social Policy lists twenty-three states plus the District of Columbia as having “extended” foster care. STATES WITH EXTENDED FOSTER CARE, CENTER FOR THE STUDY OF SOCIAL POLICY, <http://www.cssp.org/policy/2016/STATES-with-extended-foster-care-MAP.pdf> [<https://perma.cc/B6K5-67ML>]. Some states not listed on that map have also extended foster care past age 18. FLA. STAT. § 39.013(2) (2017); N.C. GEN. STAT. § 108A-48(c) (2017). Many of these states treat the years after turning 18 as transitional by, for instance, giving 18–20-year-olds the choice to remain in foster care. FLA. STAT. § 39.013(2)(a)–(b) (2017).

96. Bipartisan Budget Act of 2018, Family First Prevention Services Act, Pub. L. No. 115-123, § 50753(a) & (c)(1)(A) (codified at 42 U.S.C. § 677(b)(3)(A) (2012)).

97. Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. No. 111-24, § 301(c)(8)(B)(i) (codified at 15 U.S.C. § 1637(c)(8) (2012)).

98. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 2714(a) (codified at 42 U.S.C. § 300gg-14(a) (2012)). This provision is one of a short list which conservative health care legislation did not seek to repeal in the American Health Care Act of 2017. *See* H.R. 1628, 115th Cong. (1st Sess. 2017) (contains no change to 42 U.S.C. § 300gg-14).

99. TEX. EDUC. CODE ANN. § 25.085(b) (West 2018).

100. *E.g.*, 2002 Conn. Legis. Serv. 02-128 (West), An Act Concerning Educational Support Orders (codified at CONN. GEN. STAT. § 46b-56c(a) (2015)); Anna Stepień-Sporek & Margaret Ryznar, *Child Support for Adult Children*, 30 QUINNIPIAC L. REV. 359, 364–68 (2012) (describing several states' post-18 child support law).

young adults more generally.¹⁰¹ In the wake of the February 2018 Parkland, Florida, school shooting, the Florida and Vermont legislatures prohibited the sale of a firearm to anyone under 21,¹⁰² and such age limits on young adult gun purchases were one of the few proposals to gain bipartisan traction to ban purchasing firearms below the age of 21.¹⁰³

These developments followed other longer-standing laws that recognize the ongoing development past age 18 to full adulthood. The drinking age is generally 21.¹⁰⁴ The Higher Education Act requires applicants for federal financial aid to report their parents' income—expecting that parents will continue to support their children through college—until they turn 24.¹⁰⁵ Some age lines well into adulthood date to the eighteenth century—the Constitution set a minimum age of 25 for

101. Sally F. Goldfarb, *Who Pays for the “Boomerang Generation”?: A Legal Perspective on Financial Support for Young Adults*, 37 HARV. J.L. & GENDER 45, 86 (2014). The case for expanding post-18 child support begins by noting that just as young adulthood is marked by a gradual psychological and neurological development, young adults have “prolonged financial dependency” in this period. *Id.* at 50.

102. Fla. S.B. 7026, 2018 Leg., 2nd Sess., Marjory Stoneman Douglas High School Public Safety Act, § 11, (codified at FLA. STAT. § 790.065(13) (2018)); 2018 Va. Acts No. 94, An act relating to the disposition of unlawful and abandoned firearms, § 7 (codified at 13 VER. STAT. ANN. § 4020 (2018)). The same day the Florida governor signed the Florida legislation, the National Rifle Association sued to declare the age restriction unconstitutionally infringes on 18–20-year-olds' rights under the Second and Fourteenth Amendments. Complaint, *Nat'l Rifle Ass'n. v. Bondi*, No. 4:18-cv-00137-MW-CAS (Mar. 9, 2018). The NRA alleges that “[a]t 18 years of age, law-abiding citizens in this country are considered adults for almost all purposes and certainly for the purposes of the exercise of fundamental constitutional rights.” *Id.* ¶ 3.

103. Beyond Florida and Vermont, commentators of various political stripes and private gun-sellers have proposed laws or adopted policies that are similar or even broader. See, e.g., Julie Creswell & Michael Corkery, *Walmart and Dick's Raise Minimum Age for Gun Buyers to 21*, N.Y. TIMES (Feb. 28, 2018), <https://www.nytimes.com/2018/02/28/business/walmart-and-dicks-major-gun-retailers-will-tighten-rules-on-guns-they-sell.html>; Ross Douthat, *No Country for Young Men with AR-15s*, N.Y. TIMES (Feb. 17, 2018), <https://www.nytimes.com/2018/02/17/opinion/sunday/no-country-for-young-men-with-ar-15s.html> (arguing for individuals' right to obtain guns to be “staggered” through young adulthood with semiautomatic pistols banned until age 25 and semiautomatic rifles banned until age 30). While these proposals may serve as alternatives to further-reaching gun control proposals, they also signify a recognition that age lines above 18 are well justified.

104. E.g., S.C. CODE ANN. § 61-6-4080 (2018) (criminalizing selling alcohol to individuals under 21); S.C. CODE ANN. § 63-19-2450 (2018) (criminalizing purchase and possession of alcohol by individuals under 21).

105. Federal law defines children 24 and older as “independent student[s].” 20 U.S.C. § 1087vv(d)(1)(A) (2012). Parental income is only used to determine financial aid for dependent students; independent students need only report their own income and a spouse's. 20 U.S.C. § 1087nn(b)(1) (2012).

members of the House of Representatives,¹⁰⁶ 30 for U.S. Senators,¹⁰⁷ and 35 for Presidents.¹⁰⁸

C. Applying Age-Based Mitigation to Young Adults

Advocates and scholars have begun to consider the implications of *Roper*'s acknowledgement that "[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18,"¹⁰⁹ and the developmental and neurological science showing that the factors which *Roper* found applicable to children also apply to young adults, as described in Section I.A.i. At whatever upper age one might draw a line,¹¹⁰ calls to change how the justice system responds to young adults who commit crimes have grown significantly in recent years. While some of these calls are dramatic, others seek relatively modest reforms to existing adult sentencing laws.

A growing body of social science work supports the idea that young adults deserve less severe and more rehabilitative punishment than older adults. Developmental literature has convinced many scholars that young adults are "in many respects . . . more similar to

106. U.S. CONST. art. I, § 2.

107. U.S. CONST. art I, § 3.

108. U.S. CONST. art. II, § 1.

109. *Roper v. Simmons*, 543 U.S. 551, 574 (2005). This advocacy and scholarship has not sought to extend *Roper*'s Eighth Amendment age line. Just as *Roper* increased the Eighth Amendment age line from 16 to 18, one might consider if a future Court might increase it yet higher—perhaps to 21, if the Court continues to look for a line with legal, social, and historical resonance. That said, a fuller Eighth Amendment argument is beyond the scope of this Article.

110. No consistent age line exists in the literature. While age 25 is commonly used, some policy proposals focus on younger ages. Arnett, *supra* note 1, at 469–70, 476–77; REDUCING RECIDIVISM, *supra* note 1; STEINBERG ET AL., *supra* note 1, at 1, 8. Lael Chester and Vincent Schiraldi's call to raise the age of juvenile court jurisdiction, for instance, would apply to young adults under 21. LAEL CHESTER & VINCENT SCHIRALDI, PUBLIC SAFETY AND EMERGING ADULTS IN CONNECTICUT: PROVIDING EFFECTIVE AND DEVELOPMENTALLY APPROPRIATE RESPONSES FOR YOUTH UNDER AGE 21, at iv–v, 2 (2016), [https://www.cga.ct.gov/app/tfs/20141215 Juvenile Justice Policy and Oversight Committee/20170120/Public Safety Emerging Adults in Connecticut.pdf](https://www.cga.ct.gov/app/tfs/20141215%20Juvenile%20Justice%20Policy%20and%20Oversight%20Committee/20170120/Public%20Safety%20Emerging%20Adults%20in%20Connecticut.pdf) [<https://perma.cc/FT9H-WY9U>]. Elizabeth Scott et al.'s call for presumptive youthful offender status would apply to young adults under 21. Scott et al., *supra* note 22, at 660–61. The developmental literature does show that brain development continues to age 25, but drawing a line for full criminal responsibility could logically come younger. For instance, one study noted by the U.S. Department of Justice shows that psychosocial maturity increases at about the same rate from age fourteen through age 22. Between 22 and 25, maturation continues, but more slowly. STEINBERG ET AL., *supra* note 1, at 1, 8. Whether that study supports drawing a line at 22 or 25 or elsewhere is subject to debate, but that debate is beyond the scope of this Article.

juveniles than to adults,”¹¹¹ or that purposes of punishment apply with “lesser or no force to youthful offenders.”¹¹² This proposition has also been gaining acceptance in other countries.¹¹³ Scholars have also noted the reduced salience of turning 18, which “no longer marks the assumption of mature adult roles.”¹¹⁴

The most dramatic application of the *Roper* line of cases to young adults has been in calls to raise the age of juvenile court jurisdiction from 18 to 21. As of this writing, only one state, Vermont, has expanded juvenile court jurisdiction to include those 18 and older.¹¹⁵ Bills in Connecticut, Massachusetts, Florida, and Illinois would raise the age to 21¹¹⁶ and are supported by arguments that the same factors which render children under 18 less culpable for crime and more susceptible to rehabilitative efforts apply to young adults into their mid-twenties.¹¹⁷ Like younger adolescents, these “[e]merging adults are more volatile in emotionally charged settings, more susceptible to peer and other outside influences, more impulsive and less future-oriented,” factors that are “amplified for those who have experienced trauma.”¹¹⁸ Following this logic, Schiraldi proposes a system for young adults

111. JAMES C. HOWELL ET AL., BULLETIN 5, YOUNG OFFENDERS AND AN EFFECTIVE RESPONSE IN THE JUVENILE AND ADULT JUSTICE SYSTEMS: WHAT HAPPENS, WHAT SHOULD HAPPEN, AND WHAT WE NEED TO KNOW (STUDY GROUP ON THE TRANSITIONS BETWEEN JUVENILE DELINQUENCY AND ADULT CRIME) 24 (2013), <https://www.ncjrs.gov/pdffiles1/nij/grants/242935.pdf> [<https://perma.cc/7FES-SRJS>].

112. Samantha Buckingham, *Reducing Incarceration for Youthful Offenders with a Developmental Approach to Sentencing*, 46 LOY. L.A. L. REV. 801, 847–49 (2013).

113. See, e.g., TREATMENT OF YOUNG ADULTS, *supra* note 68, at ¶¶ 14, 24 (concluding that young adults 18–25 years old form a “distinct group with needs that are different” from children and older adults and calling for a “distinct approach to the treatment of young adults in the criminal justice system”); see also Farrington et al., *supra* note 26, at 737–39 (summarizing European treatment of young adults and counting 18 countries which treat 18–20-year-olds less severely than older adults).

114. Scott et al., *supra* note 22, at 643; see also Farrington et al., *supra* note 26, at 735 (“All available age-crime curves show that the legal age of adulthood at 18 . . . is not characterized by a sharp change in offending at exactly that age, and it has no specific relevance to the downslope of the age-crime curve.”).

115. Vermont enacted a statute in 2018 which will expand juvenile court jurisdiction to include 18-year-olds in 2020 and 19-year-olds in 2022. 2018 Vt. Acts & Resolves No. 201, sec. 13, 17 (to be codified at VT. STAT. ANN. § 5201(d)).

116. H.B. 7045, Gen. Assemb., Jan. Sess. (Conn. 2017); H.B. 6191, 99th Gen. Assemb., Reg. Sess. (Ill. 2016) (proposing to raise the age for all offenses); H.B. 6308, 99th Gen. Assemb., Reg. Sess. (Ill. 2016) (proposing to raise the age for misdemeanors only); S.B. 816, 190th Gen. Court, Reg. Sess. (Mass. 2017); S.B. 947, 190th Gen. Court, Reg. Sess. (Mass. 2017); H.B. 3037, 190th Gen. Court, Reg. Sess. (Mass. 2017); S.B. 892, 119th Leg., Reg. Sess. (Fla. 2016).

117. CHESTER & SCHIRALDI, *supra* note 110, at v.

118. *Id.*

which largely tracks juvenile court procedures—young adult defendants should have a juvenile probation officer, and their court records should be confidential, for instance.¹¹⁹ More modest proposals include creating new “special courts for young adult offenders” that would impose less severe punishment than adult courts.¹²⁰

Proposals to raise the age of juvenile court jurisdiction are controversial, even among scholars who also see a need to change the law’s treatment of young adults but question whether enough scientific data exists to support treating people up to age 24 as children. Four leading scholars—each of whom had some significant influence over the application of new social science research regarding children under eighteen to juvenile justice law—cautioned that treating young adults like teenagers “is premature at best.”¹²¹

Importantly, however, this controversy centers on the degree to which we treat young adults like children—not whether we should treat young adults differently from older adults. The same scholars who opposed raising the age of juvenile court jurisdiction above 18 also wrote that “[c]hanges in the ways in which we treat young adult offenders are long overdue,” and that they should be treated “as a special category of offenders in the adult justice system.”¹²² That idea is not limited to academics but is mainstream enough that the U.S. Department of Justice (at least under the Obama Administration) supported the idea,¹²³ and mainstream organizations like the Council of State Governments has described young adults 18–24 years old “as a distinct developmental group with heightened impulsive behavior, risk taking, and poor decision making,”¹²⁴ ideas which have found some application in some of the reforms discussed above.¹²⁵

Scholars have also proposed several mechanisms for what treating young adult offenders as a “special category” might entail. A leading

119. *Id.* at 62; *see also* Farrington et al., *supra* note 26, at 742 (listing raising the age of juvenile court jurisdiction “to age 21 or preferably 24 so that fewer young offenders are dealt with in the adult criminal justice system” as one policy option).

120. Farrington et al., *supra* note 26, at 742.

121. Laurence Steinberg et al., *Don’t Treat Young Adults as Teenagers*, N.Y. TIMES (Apr. 29, 2016), <https://www.nytimes.com/2016/05/01/opinion/Sunday/dont-treat-young-adults-as-teenagers.html>.

122. *Id.*; *see also* Steinberg, *supra* note 17, at 417 (calling for “an intermediate category designated for late adolescents and/or young adults”).

123. Karol V. Mason, *Rethinking Our Approach to Young Adults*, OFF. OF JUST. PROGRAMS: OJP BLOG (Jan. 13, 2017), <https://ojp.gov/ojpblog/blog-mason-young-adults.htm> [<https://perma.cc/ZRY9-TUP3>].

124. REDUCING RECIDIVISM, *supra* note 1, at 1.

125. *Supra* notes 73–92 and accompanying text.

option is what Barry Feld has called a “youth discount”¹²⁶—“fractional reductions in sentence-lengths” for all youthful offenders based on the notion that a young adult offender is less culpable than older offenders.¹²⁷ Under this proposal, age would create a sliding scale of punishment; a child tried as an adult could receive no more than a fraction of an adult sentence, with the size of that fraction gradually increasing until the young adult reached a certain age, at which point full adult sentences would become available.¹²⁸ Legislatures would have to set the precise age ranges and fractional amounts,¹²⁹ but the youth discount would categorically apply to all young adults.

Other reformers propose more case-by-case approaches. Elizabeth Scott, Richard Bonnie, and Laurence Steinberg have proposed a set of reforms to create a “[d]evelopmental [a]pproach to [y]oung [a]dult [o]ffenders.”¹³⁰ This approach includes expanded youthful offender acts and prison facilities built for young adult offenders.¹³¹ Regarding the length of time young adults spend in prison, they propose a case-by-case approach intended to reduce the length of time young adults spend incarcerated. First, they argue that young adults’ “relative youth should be considered at sentencing.”¹³² Once sentenced, young adult offenders should be able to seek parole earlier than older adults “to demonstrate, on an expedited basis, that [they] no longer represent[] threat[s] to society.”¹³³ In context of their calls for recognizing “young adults as a transitional category between juveniles and older adult offenders,”¹³⁴ these proposals are intended to spur frequent use to meaningfully reduce young adults’ time incarcerated.

California has enacted a limited version of Scott, Bonnie, and Steinberg’s proposal, granting modestly earlier parole eligibility for individuals serving long prison sentences for crimes committed before the age of 23.¹³⁵ When considering such parole applications, the parole board must “give great weight to the diminished culpability” of the individual prisoner “and any subsequent growth and increased

126. Barry C. Feld, *Adolescent Criminal Responsibility, Proportionality, and Sentencing Policy*: Roper, Graham, Miller/Jackson, and the Youth Discount, 31 L. & INEQ. 263, 264 (2013).

127. HOWELL ET AL., *supra* note 111, at 28.

128. Feld, *supra* note 126, at 322–23.

129. *Id.*; Farrington et al., *supra* note 26, at 743.

130. Scott et al., *supra* note 22, at 660.

131. *Id.* at 660–63. These two reforms are discussed *infra* Section I.B.

132. *Id.* at 661.

133. *Id.* at 662.

134. *Id.* at 644.

135. S.B. 261, 2015–16 Leg., Reg. Sess. (Cal. 2015) (codified at CAL. PENAL CODE §§ 3051 & 4801(c)).

maturity” that prisoner can show.¹³⁶ The statute covers individuals serving long sentences, rendering them eligible for parole after 15, 20, or 25 years (depending on the severity of their sentence).¹³⁷ The statute thus excludes individuals serving shorter sentences, who, as will be discussed *infra*, contribute significantly to mass incarceration.¹³⁸ In addition, this statute relies on parole boards, which some advocates have criticized as routinely denying parole.¹³⁹ While the impact of this statute remains to be seen, one study of an earlier statute which granted earlier parole opportunities to individuals sentenced as adults for crimes committed as children found that affected individuals were more likely to be granted parole and at a younger age than other offenders.¹⁴⁰

Less dramatically, the American Law Institute’s revisions to the Model Penal Code would permit state courts, on a case-by-case basis, to sentence young adults under 21 like they sentence children under 18.¹⁴¹ This provision would only be triggered “when substantial circumstances establish that this will best effectuate the purposes” of sentencing, requiring some individualized determination of those facts.¹⁴² Other, more limited, sentencing consideration for young adults’ age is available, also only on a case-by-case basis. ALI’s scheme would permit sentencing judges to treat a young adult’s age as mitigation and “[i]n an extraordinary case, a young adult’s developmental deficits may even provide grounds for departure from any mandatory penalty . . . or might supply the basis for a proportionality ceiling on the severity of any punishment.”¹⁴³ While Scott, Bonnie, and Steinberg’s case-by-case approach appears intended to be applied liberally, the ALI’s limiting

136. CAL. PENAL CODE § 4801(c) (West 2018).

137. CAL. PENAL CODE § 3051(b)(1)–(3) (West 2018).

138. *Infra* Section II.A.

139. *E.g.*, AM. CIVIL LIBERTIES UNION, FALSE HOPE: HOW PAROLE SYSTEMS FAIL YOUTH SERVING EXTREME SENTENCES 49 (2016), https://www.aclu.org/sites/default/files/field_document/121416-aclu-parolereportonlineingle.pdf [<https://perma.cc/5MG5-YK5G>]; Marc Mauer, *A 20-Year Maximum for Prison Sentences*, DEMOCRACY (2016), <http://democracyjournal.org/magazine/39/a-20-year-maximum-for-prison-sentences/> [<https://perma.cc/W37K-NJXC>] (asserting that political demands to appear tough on crime “have made parole release increasingly difficult to secure in many states.”).

140. Beth Caldwell, *Creating Meaningful Opportunities for Release: Graham, Miller and California’s Youth Offender Parole Hearings*, 40 N.Y.U. REV. L. & SOC. CHANGE 245, 272–75 (2016).

141. MODEL PENAL CODE SENTENCING § 6.11A(k) (AM. LAW INST., Tentative Draft No. 2, 2011) at 37, <https://robinainstitute.umn.edu/publications/model-penal-code-sentencing-tentative-draft-no-2> [<https://perma.cc/F9ZA-CPYY>].

142. *Id.*

143. *Id.* § 6.11A(b) cmt., at 38.

language—“substantial circumstances” and “extraordinary case”—suggests an intention for conservative application.

D. Categorical vs. Case-by-Case Approaches

One of the central points of dispute between proposals for treating young adults differently is between the ALI’s call for individualized determinations whether young adults’ age should mitigate sentences, and Feld and others’ insistence on a categorical approach. Those arguing for a categorical approach argue that courts cannot accurately determine which young adults are likely to become long-term repeat offenders, and that the facts of any specific offense are likely to disproportionately sway sentencing judges, compared to defendants’ age. In addition to those concerns, this section will argue that experience with existing case-by-case approaches and empirical evidence regarding the impact of age at sentencing demonstrates the weakness of such approaches in implementing changes to young adult sentencing—at least as current law structures those approaches.

1. CATEGORICAL VS. CASE-BY-CASE APPROACHES IN THE SUPREME COURT QUARTET

The Supreme Court’s Eighth Amendment quartet incorporates this tension between categorical and case-by-case approaches to children’s sentencing. *Roper* and *Graham* categorically prohibited capital punishment and life without parole for non-homicide crimes for children, respectively, rejecting arguments that states should be able to impose those punishments based on individual case considerations.¹⁴⁴ Echoing scholars who sought a categorical ban on the juvenile death penalty,¹⁴⁵ the Court held in *Roper* that a categorical rule was necessary because “marked and well understood” differences between children and adults exist, because neither psychological experts nor our legal system can determine which children exhibit “true depravity” as to justify such punishments, and because an unacceptable risk exists that the facts of specific crimes would outweigh more general evidence about age and development.¹⁴⁶ The Court reaffirmed this reasoning in *Graham*, rejecting arguments that case-by-case consideration of

144. See *Graham v. Florida*, 560 U.S. 48, 77–82 (2010); *Roper v. Simmons*, 543 U.S. 551, 572 (2005).

145. See, e.g., Steinberg & Scott, *supra* note 21, at 1016 (arguing that a case-by-case approach “is likely to count as mitigating only when the juvenile otherwise presents a sympathetic case or when other irrelevant factors, such as a childlike physical appearance, lead others to view the offender as relatively less blameworthy”).

146. *Roper*, 543 U.S. at 572–73.

defendants' age would suffice; the Court saw little reason to think any fact-finder could apply such consideration "with sufficient accuracy."¹⁴⁷

The Court shifted in *Miller v. Alabama*,¹⁴⁸ declining to prohibit juvenile life without parole categorically, and instead prohibiting the application of statutes which make life without parole mandatory for children.¹⁴⁹ The Court thus required states to give some weighty consideration to a child's youth as mitigation before imposing that severe sentence.¹⁵⁰

*Montgomery v. Louisiana*¹⁵¹ represents a partial step back towards a categorical approach.¹⁵² The Court granted certiorari to determine if *Miller* had adopted a procedural rule—in which case it would not apply retroactively—or a new substantive rule that would.¹⁵³ Declaring *Miller* to be procedural would have been consistent with a case-by-case approach—on that understanding, all *Miller* did was require a state to consider a defendant's age in each individual case before imposing a life without parole sentence on a child. But the Court declared *Miller* to be substantive—banning life without parole for "juvenile offenders whose crimes reflect the transient immaturity of youth."¹⁵⁴ Moreover, while *Montgomery* did not declare life without parole unconstitutional for all children, it nudged states to end such sentences categorically by statute.¹⁵⁵

147. *Graham*, 560 U.S. at 77–78.

148. 567 U.S. 460 (2012).

149. *Id.* Many scholars critiqued this shift. *E.g.*, Mary Berkheiser, *Developmental Detour: How the Minimalism of Miller v. Alabama Led the Court's "Kids Are Different" Eighth Amendment Jurisprudence Down a Blind Alley*, 46 AKRON L. REV. 489 (2013).

150. Thomas Grisso & Antoinette Kavanaugh, *Prospects for Developmental Evidence in Juvenile Sentencing Based on Miller v. Alabama*, 22 PSYCHOL. PUB. POL'Y & L. 235, 235 (2016) (describing *Miller* as raising the question of whether courts will have to apply developmental evidence in individual cases).

151. 136 S. Ct. 718 (2016).

152. *Id.* at 736.

153. *Id.* at 727.

154. *Id.* at 734.

155. The Court noted that states can comply with *Miller* by offering anyone sentenced as a child parole, a step which would eliminate juvenile life without parole sentences. *Id.* at 736. Justice Scalia, in dissent, interpreted the majority as making juvenile life without parole sentences "a practical impossibility." *Id.* at 744 (Scalia, J., dissenting). More colorfully, Scalia described the majority's nudge towards offering parole opportunities as "in Godfather fashion, . . . mak[ing] an offer they can't refuse." *Id.*

2. THE COMPARATIVE BENEFITS OF A CATEGORICAL APPROACH FOR YOUNG ADULTS

Many of the proposals described in Section I.C. involve some form of a categorical approach to sentencing; young adults would, by virtue of their age, be tried in a specialty court, or benefit from a youth discount or other age-specific sentencing, or be committed to an age-specific facility. But some proposals fall on the other side of the spectrum; in particular, the ALI's proposed Model Penal Code, and its relatively narrow path towards finding that a lesser sentence is appropriate due to a defendant's youth, follows a pure case-by-case approach.

The proposals for categorical approaches reflect the policy judgment that young adults are generally less culpable than adults, and that the best policies avoid the problems of case-by-case analysis, just as categorical approaches to juvenile sentencing is needed.¹⁵⁶ Similarly, following the Court's discussion in *Roper* and *Graham*, many commentators have similarly proposed categorical approaches for young adult sentencing.¹⁵⁷

Both the limited number of cases addressing claims for youthful mitigation for young adults and empirical studies into sentencing more generally reveals the weakness of case-by-case approaches—at least those case-by-case approaches under existing law. If youthful offenders are generally less culpable, less subject to deterrence, and more susceptible to rehabilitation than older adults, then they should generally receive lesser sentences. Yet, often following narrowly drawn statutes, case law shows courts recognizing youth as mitigation only in narrow instances, and empirical research shows sentencing judges imposing a youth penalty rather than a youth discount.

a. Case Law Illustrating the Risks of a Case-by-Case Approach

This section analyzes cases in those state statutes which, like the ALI, permit a limited consideration of youth at sentencing. These statutes recognize the general idea that age-based mitigation may continue past age 18. But in application, these statutes' case-by-case administration reveals that those narrow laws lead to courts inadequately weighing the mitigating aspects of age and treat young adults whose age distinguishes them from older adults as the exception rather than the norm. Either a more categorical approach to young adult mitigation or a case-by-case standard that weighs such mitigation more

156. Feld, *supra* note 126, at 316–22.

157. HOWELL ET AL., *supra* note 111, at 29.

heavily is necessary to more effectively and consistently account for youth.

Several cases have reduced young adults' sentences based on their age. In *People v. House*,¹⁵⁸ an Illinois appellate court voided a mandatory life without parole sentence imposed on a 19-year-old defendant convicted for homicide on an accomplice liability theory, applying Eighth Amendment principles from the *Roper* line of cases.¹⁵⁹ The Illinois court described *Roper*'s line at age 18 as "somewhat arbitrary" given the ongoing brain development past that line.¹⁶⁰ This defendant "at age 19 years and 2 months, was barely a legal adult and still a teenager."¹⁶¹ Just as *Miller* required sentencing courts to consider age and other mitigating factors before imposing a life without parole sentence for children, the Illinois court remanded this 19-year-old's sentence for similar consideration.¹⁶² The court emphasized the defendant's lesser role in the crime—acting as a lookout away from the scene of the murder, having no role in planning the crime, and following "orders from higher ranking [gang] members"¹⁶³ and various challenges in his youth which may have mitigated the crime.¹⁶⁴

State v. O'Dell,¹⁶⁵ a 2015 Washington Supreme Court decision, also reduced a young adult's sentence based on his age.¹⁶⁶ But that holding is heavily dependent on a narrow set of facts. The defendant committed the crime at issue ten days after he turned 18, a fact the court noted twice.¹⁶⁷ The defendant was still in high school,¹⁶⁸ and presented evidence that he still had legos and a "stuffed kitty that had been on his bed since he was born" in his room and otherwise behaved as a child.¹⁶⁹ These facts were particularly important to mitigating the defendant's crime—sex with a 12-year-old child without the use of force. The defense argued that as a high school student, he continued to see children of various ages and "was not some mid-twenties man hanging out at the local high school or trolling the internet for young

158. 72 N.E.3d 357, 383 (Ill. App. Ct. 2015).

159. *Id.* at 383.

160. *Id.* at 387.

161. *Id.* at 388.

162. *Id.* at 399.

163. *Id.* at 384. The Court acknowledged he remained criminally responsible due to his actions, which included carrying a gun while other gang members kidnapped the victim and serving as a lookout. *Id.* at 383.

164. *Id.* at 389.

165. 358 P.3d 359 (Wash. 2015).

166. *Id.* at 360.

167. *Id.* at 360, 366.

168. *Id.* at 371.

169. *Id.* at 367.

people.”¹⁷⁰ Citing the *Roper* line of cases’ conclusion that youth have diminished culpability and *Roper*’s concession that youthful features do not disappear at age 18, the court concluded that age could sometimes mitigate culpability and justify a sentence below state guidelines.¹⁷¹ *O’Dell* was clear that sentencing courts had to consider youth on a case-by-case basis,¹⁷² thus raising the question of how frequently courts would apply an “exceptional”¹⁷³ below-guidelines sentence for defendants other than *O’Dell*.

While *House* and *O’Dell* are leading examples of reducing young adults’ sentences due to their age,¹⁷⁴ courts have not widely applied the juvenile Eighth Amendment cases to young adults. Subsequent Illinois cases have limited *House* to case-specific factors, especially *House*’s accomplice liability and life without parole sentence.¹⁷⁵ Courts in several other states have rejected arguments seeking to apply the *Roper* line of cases directly to a young adult defendant.¹⁷⁶

Several other states have statutes similar to the one at issue in *O’Dell*, requiring defendants to establish some narrow unusual circumstance. North Carolina lists age as a mitigating factor when it “significantly reduced the defendant’s culpability for the offense.”¹⁷⁷ Tennessee lists youth as a mitigating factor when it leads a defendant to have “lacked substantial judgment in committing the offense.”¹⁷⁸ Alaska permits sentences below its guidelines when a “youthful defendant was substantially influenced by another person more mature than the

170. *Id.* at 361. The defense also argued that the defendant’s status as a high school student was particularly important given the circumstances of the case. The defendant was convicted of a sex crime with a twelve-year old-child, and his defense was that he was reasonably mistaken about her age based on the child’s declarations. *Id.* at 360–61.

171. *Id.* at 366.

172. *Id.* at 366–67.

173. *Id.* at 368.

174. *See, e.g.*, Scott et al., *supra* note 22, at 662 (citing *People v. House* 72 N.E.3d 357 (Ill. App. Ct. 2015)).

175. *People v. Thomas*, 74 N.E.3d 127, 134–35 (Ill. App. Ct. 2017).

176. *State v. Hadnot*, 2015 WL 3548396, at *5 (La. Ct. App. Jun. 3, 2015) (noting 18-year-old defendant “was not a juvenile” and affirming mandatory life without parole sentence); *State v. Hopkins*, 2016 WL 3128776, at *5 (N.M. May 26, 2016) (“Defendant was twenty-one years old at the time he committed these murders and certainly not within the parameters established by *Roper*.”); *People v. Moore*, 2015 Ill. App. (1st) 132826-U, *13 (Ill. App. Ct. 2015) (declining to apply *Roper*, *Graham*, or *Miller* to 19-year-old defendant); *United States v. Marshall*, 736 F.3d 492, 498 (6th Cir. 2013) (“The reasons for according special protections to offenders under 18 cannot be used to extend the same protections to offenders over 18.”).

177. N.C. GEN. STAT. § 15A-1340.16(e)(4) (2018) (emphasis added).

178. TENN. CODE ANN. § 40-35-113(6) (West 2018).

defendant.”¹⁷⁹ This statutory provision excludes a common scenario for both juvenile and young adult offenses—offenses committed with similarly-aged (and similarly immature) peers.

Cases in all of these states suggest that youth-based mitigation is rarely applied for young adult defendants. Washington courts have refused to mitigate a sentence of a 23-year-old who, testimony showed, had “maturity and academic drive.”¹⁸⁰ North Carolina courts have required defendants to produce evidence of immaturity beyond their age to mitigate a crime.¹⁸¹ Alaska courts refused to reduce the sentence of a 23-year-old who had committed a crime with two older offenders due to his drug problem.¹⁸² Tennessee requires evidence beyond chronological age to demonstrate that a defendant lacked “substantial judgment.”¹⁸³ Other states have similarly refused to reduce offenses by young adults based on their age alone.¹⁸⁴ It thus appears unlikely that narrow case-by-case proposals like the ALI’s would lead to dramatic changes in young adult sentencing.

b. Evidence of a Young Adult Penalty

The above survey of case law suggests that courts have so far largely resisted efforts to reduce young adults’ sentences based on their age via case-by-case decision-making. Empirical research suggests a more disturbing pattern. Although the data regarding the effect of age is limited, several studies suggest that sentencing courts use their existing discretion to punish young adults more harshly than older adults—contrary to what developmental research suggests is appropriate.

179. ALASKA STAT. § 12.55.155(d)(4) (2018).

180. *State v. Alden*, 2016 WL 901027, at *14 n.4 (Wash. Ct. App. 2016).

181. *State v. Moore*, 345 S.E.2d 217, 221 (N.C. 1986). This case was decided before *Roper* but remains good law.

182. *Lewis v. State*, 769 P.2d 450, 452 (Alaska Ct. App. 1989) (“the fact that Lewis used cocaine while he was released on bail undermines any advantage which he might have” based on his age). This case was decided before *Roper* but remains good law.

183. *State v. Adams*, 45 S.W.3d 46, 60–61 (Tenn. Crim. App. 2000). This case predates *Roper*. More recent cases affirm trial courts’ refusal to mitigate an offender’s actions based on youth. *E.g.*, *State v. Gutierrez*, 2017 WL 2274644, at *14 (Tenn. Crim. App. 2017); *State v. Martin*, 2016 WL 3563661, at *6 (Tenn. Crim. App. 2016).

184. *E.g.*, *State v. Leverett*, 44 So. 3d 634, 637 (Fla. Dist. Ct. App. 2010) (denying 21-year-old’s request for a downward departure due to lack of “evidence . . . to show that Leverett suffered from a mental defect which inhibited his ability to appreciate the consequences of his offenses”); *State v. Williams*, 963 So. 2d 281, 283 (Fla. Dist. Ct. App. 2007) (reversing downward departure due to lack of evidence beyond 22-year-old defendant’s age).

A growing body of work¹⁸⁵ has demonstrated that, under current law, young adult offenders do not receive any meaningful discount in sentencing, contrary to what developmental research suggests they should. Several studies show a young adult penalty—where defendants in their twenties face the harshest sentences, with adolescent defendants receiving more leniency, and older adults facing gradually less severe sentences as they age.¹⁸⁶ One study shows no benefit to young adults in sentencing as compared with older defendants.¹⁸⁷

Some research shows that any effect from a defendant's age varies with defendants' race and sex. In particular, some studies show that young black and Latino men face the most severe sentences.¹⁸⁸ In particular, young black men face a significant youth penalty compared to black men who are 31 and older.¹⁸⁹ And racial disparities are the widest for young men.¹⁹⁰

This empirical data shows how much reform is needed. If sentences took into account the full timeline of human brain development, young adults would receive shorter sentences, and older (and thus more culpable) offenders would receive more severe

185. The effect of a defendant's age on sentencing has been the focus of less study than other demographic factors. Jill K. Doerner & Stephen Demuth, *The Independent and Joint Effects of Race/Ethnicity, Gender, and Age on Sentencing Outcomes in U.S. Federal Courts*, 27 JUST. Q. 1, 2 (2010); Barbara A. Koons-Witt et al., *Gender and Sentencing Outcomes in South Carolina: Examining the Interactions with Race, Age, and Offense Type*, 25 CRIM. JUST. POL'Y REV. 299, 304 (2014); Darrell Steffensmeier, Jeffery Ulmer & John Kramer, *The Interaction of Race, Gender, and Age in Criminal Sentencing: The Punishment Cost of Being Young, Black, and Male*, 36 CRIMINOLOGY 763, 765 (1998). The same point holds for the intersection of age with race and sex. Jeffrey S. Nowacki, *An Intersectional Approach to Race/Ethnicity, Sex, and Age Disparity in Federal Sentencing Outcomes: An Examination of Policy Across Time Periods*, 17 CRIMINOLOGY & CRIM. JUST. 97, 98 (2017), <http://journals.sagepub.com/doi/pdf/10.1177/1748895816642502> [<https://perma.cc/RR3Q-JD2H>].

186. Doerner & Demuth, *supra* note 185, at 13, 21; Darrel Steffensmeier, John Kramer & Jeffery Ulmer, *Age Differences in Sentencing*, 12 JUST. Q. 583, 595–96 (1995); Steffensmeier, Ulmer & Kramer, *supra* note 185, at 777, 786.

187. Koons-Witt et al., *supra* note 185, at 313.

188. Doerner & Demuth, *supra* note 185, at 20; Koons-Witt et al., *supra* note 185, at 304; Nowacki, *supra* note 185, at 104–06, 110.

189. Nowacki, *supra* note 185, at 105–06.

190. Doerner & Demuth, *supra* note 185, at 20; Steffensmeier, Ulmer & Kramer, *supra* note 185, at 779. The most recent national data also confirm that racial disparities in imprisonment are greatest for young adults. Black 18–19 year old males are 11.8 times as likely to be in state or federal prisons as similarly-aged white males. U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2016 13, 15 (2018), <https://www.bjs.gov/content/pub/pdf/p16.pdf> [<https://perma.cc/8SH5-V334>]. Black males 20–24 years old are 7.4 times as likely to be imprisoned as white males of that age, and the rate declines below 6.0 for all older age groups. *Id.* at 15.

sentences. If a dramatic change to young adult sentencing is to occur, more dramatic reforms to sentencing laws are required.

II. MASS INCARCERATION

David Garland coined the term “mass incarceration” (and its synonym “mass imprisonment”) to define the tremendous scope and systematic operation of our criminal justice and prison systems.¹⁹¹ Mass incarceration has two central features: “sheer numbers” and “the systemic imprisonment of whole groups of the population.”¹⁹² The number of individuals incarcerated in American prisons and jails grew from about 540,000 in 1980 to 2.3 million in 2010.¹⁹³ Both the absolute numbers of incarcerated individuals and the incarceration rate continued to increase through the 1990s and 2000s, even as crime rates declined.¹⁹⁴ A spike of this scale had never before occurred in American history, and makes the United States unique internationally.¹⁹⁵ The American incarceration rate now exceeds the incarceration rate in undemocratic nations like Russia and Cuba and is four times greater than the rate in advanced European democracies.¹⁹⁶

Racial disparities among those incarcerated are also well established, and research has documented how mass incarceration has exacerbated those disparities¹⁹⁷ and catalogued the individual and aggregate community harms of the levels of incarceration among blacks, especially young black men, and called for civil rights activism

191. David Garland, *Introduction: The Meaning of Mass Imprisonment*, in *MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES* 1 (David W. Garland ed., 2001).

192. *Id.* at 1–2.

193. TODD R. CLEAR & NATASHA A. FROST, *THE PUNISHMENT IMPERATIVE: THE RISE AND FAILURE OF MASS INCARCERATION IN AMERICA* 18 (2014).

194. John Pfaff provides illustrative graphs, one showing the U.S. incarceration rate rising steeply from the late 1970s and peaking in 2008, with a second showing crime rates peaking by the 1990s. Pfaff, *supra* note 37, at 2–3. Pfaff estimates that the increasing crime rates of the 1970s and 1980s can account for only half of the increase in incarceration over those decades, and crime rates can explain even less of the growth in the 1990s and 2000s “as prison populations continued to rise even as crime declined.” *Id.* at 3–4. *See also* CLEAR & FROST, *supra* note 193, at 35–36 (showing the inverse relationship between incarceration and crime rates since 1990).

195. NAT’L RESEARCH COUNCIL OF THE NAT’L ACADS., *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES* 2, (Jeremy Travis et al. eds., 2014), <https://www.nap.edu/catalog/18613/the-growth-of-incarceration-in-the-united-states-exploring-causes>.

196. Pfaff, *supra* note 37 at 18–19.

197. *See, e.g.*, NAT’L RESEARCH COUNCIL OF THE NAT’L ACADS., *supra* note 195, at 94–95 (showing an increase in racial disparities “[n]ot ‘[e]xplained’” by variables other than race expanding as incarceration rates increased).

to reform mass incarceration.¹⁹⁸ Those disparities are greatest among young adults.¹⁹⁹

Total incarceration numbers peaked in 2008 and have subsequently dipped under 2.2 million (a 5.9 percent decrease).²⁰⁰ That decline, however, is localized rather than a steady national trend,²⁰¹ and incarceration rates remain incredibly high by historic and international comparisons.²⁰²

The mass incarceration literature has generally focused on large systems and the collective or aggregate harms imposed. Two leading scholars describe the rise of mass incarceration as “an extraordinary story of remarkable raw numbers.”²⁰³ This literature has grown, and it has argued how and why mass incarceration must be reduced,²⁰⁴ as have efforts to reduce the number of individuals incarcerated in American jails and prisons—especially individuals who have committed less severe non-violent crimes. While criticisms of mass incarceration have increased in strength and political bipartisanship,²⁰⁵ this literature has

198. *E.g.*, MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 9 (rev. ed. 2012).

199. *Supra* note 190 and accompanying text.

200. U.S. DEP’T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2015, at 2 (2016), <https://www.bjs.gov/content/pub/pdf/cpus15.pdf> [<https://perma.cc/46EK-6NNM>].

201. Each state’s change in prison populations between 2015 to 2016 varied from 5.5 percent increase to a 16.9 percent decrease. U.S. DEP’T OF JUSTICE, *supra* note 190, at 4. *See also* Barry Krisberg, *How Do You Eat an Elephant? Reducing Mass Incarceration in California One Small Bite at a Time*, 664 ANNALS AM. ACAD. POL. & SOC. SCI. 136, 137 (2016) (noting the decrease of about 40,000 state prisoners in California and arguing that “[t]he current national drop in state prisoners is virtually all attributable to California”).

202. Scholars have debated whether this dip is the beginning of the end of mass incarceration or something much more modest. *Compare* CLEAR & FROST, *supra* note 193, at 3 (“As we write [in 2014] there are signs—strong signs—that the experiment is coming to an end.”), *with* Pfaff, *supra* note 37, at 7 (“I believe that sizable cuts in the US incarceration rate are possible. But I believe that they will be harder to achieve than many hope, and that they will be far more tentative and vulnerable to reversal than many expect.”). The state and federal politics of mass incarceration reform since the election of President Trump remain unclear. *See id.* at vii–viii (contrasting Trump’s tough-on-crime rhetoric with ongoing reform efforts, including in strongly pro-Trump jurisdictions).

203. CLEAR & FROST, *supra* note 193, at 1.

204. *See, e.g., id.* at 4–5 (describing evolution in scholarship regarding mass incarceration).

205. *See* Carl Takei, *From Mass Incarceration to Mass Control, and Back Again: How Bipartisan Criminal Justice Reform May Lead to a For-Profit Nightmare*, 20 U. PA. J.L. & SOC. CH. 125, 151, 163–68 (2017) (describing “new bipartisan consensus that the United States holds too many people in prison” and various dimensions of bipartisan advocacy to reduce mass incarceration).

not generally focused on young adults and age-based reasons for reforming sentencing of young offenders.

This section will discuss several core causes of the “remarkable raw numbers”²⁰⁶ that make up mass incarceration. Those include dramatic increases in both the number of individuals imprisoned for violent offenses and the length of their imprisonment, and expanded use of pre-trial detention. This section will also discuss how the existing mass incarceration literature has largely not explored the overlap between these trends and young adults sentencing, and thus limiting the ability to craft young adult-specific reforms of these trends.

A. The Challenge of Sentences, Long and Short, for Violent Offenders

The public discourse surrounding mass incarceration conflicts somewhat with the numerical reality of who is imprisoned for what crimes. There is significant traction for reduced sentences for nonviolent crimes—more diversion programs, more drug court and drug treatment, and less severe sentences for these crimes—but not necessarily other—are all hallmarks of sentencing reform efforts.

Bipartisan sentencing reform in South Carolina, enacted in 2010, illustrates this trend. The Omnibus Crime Reduction and Sentencing Reform Act²⁰⁷ reduced sentences for non-violent offenders and reformed probation and parole practices.²⁰⁸ Simultaneously, South Carolina increased sentences for some violent crimes.²⁰⁹ This tradeoff was a core selling point for advocates of the legislation; as the Pew Charitable Trusts put it, “the legislation ensures there is more prison space for the state’s violent and career criminals while helping stop the

206 CLEAR & FROST, *supra* note 193, at 1.

207. Omnibus Crime Reduction and Sentencing Reform Act of 2010, S.C. Acts 273 (2010), http://www.scstatehouse.gov/sess118_2009-2010/bills/1154.htm [<https://perma.cc/RLG5-MAKA>].

208. *Id.*; *see also* Press Release, Pew Ctr. on the States, Pew Applauds South Carolina’s Leaders for Comprehensive Sentencing Reforms (June 6, 2010), <http://www.pewtrusts.org/en/about/news-room/press-releases/2010/06/06/pew-applauds-south-carolinaand39s-leaders-for-comprehensive-sentencing-reforms> [<https://perma.cc/28Q7-94FK>].

209. *See, e.g.*, Omnibus Crime Reduction and Sentencing Reform Act of 2010, S.C. Acts at §§ 3(A), 20, 26 (2010), http://www.scstatehouse.gov/sess118_2009-2010/bills/1154.htm [<https://perma.cc/RLG5-MAKA>] (increasing sentences for certain arson offenses, expanding the list of past crimes which can trigger life without parole sentences, and expanding the list of offenses defined as “violent offenses”); PEW CTR. ON THE STATES, SOUTH CAROLINA’S PUBLIC SAFETY REFORM: LEGISLATION ENACTS RESEARCH-BASED STRATEGIES TO CUT PRISON GROWTH AND COSTS 6 (2010), http://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/sentencing_and_corrections/psppsouthcarolinabriefpdf.pdf [<https://perma.cc/7HDE-MPU9>].

revolving door for lower-risk, non-violent offenders.”²¹⁰ The results have tracked this initial frame—crime rates have continued to fall, and the prison population (excluding those in local jails) fell from more than 25,000 in 2009²¹¹ to 20,345 in 2017.²¹² In particular, South Carolina prisons saw far fewer admissions of non-violent offenders.²¹³ But the number of incarcerated violent offenders actually increased in the same time period,²¹⁴ as did inmates’ average sentence length.²¹⁵ While South Carolina’s prison population has declined faster than the national rate,²¹⁶ the long sentences imposed on remaining inmates makes further dramatic reductions more difficult. And the overall inmate population remains quite high—especially compared to the beginning of the prison boom when only about 9,000 individuals were incarcerated, less than half the current figure.²¹⁷

Reforms like South Carolina’s are positive initial steps, but they will not on their own end mass incarceration; for that task, we need to incarcerate fewer violent offenders and for less long. Ending mass incarceration depends on what Todd Clear and James Austin have called the “Iron Law of Prison Populations”—the number of prisoners depends entirely on “how many people go to prison and how long they stay.”²¹⁸ The iron law requires focusing on violent crime because the majority of incarcerated individuals are sentenced for violent crime.²¹⁹

210. Pew Ctr. on the States, *supra* note 208.

211. S.C. SENTENCING REFORM OVERSIGHT COMM., STATUS REPORT (2015), <https://www.scstatehouse.gov/citizensinterestpage/SentencingReformOversightCommittee/Reports/StatusReportJune2015.pdf> [<https://perma.cc/Z67F-GDW2>].

212. S.C. DEP’T OF CORR., SENTENCE LENGTH DISTRIBUTION OF TOTAL INMATE POPULATION AS OF JUNE 30, FISCAL YEARS 2013-2017 (2017), <http://www.doc.sc.gov/research/InmatePopulationStatsTrend/ASOFTrendSentenceLengthDistributionFY13-17.pdf> [<https://perma.cc/HMG5-JHRL>].

213. S.C. SENTENCING REFORM OVERSIGHT COMM., *supra* note 211.

214. *Id.*

215. The average sentence length increased from thirteen years, two months, in 2013 to fourteen years, four months in 2017. S.C. DEP’T OF CORR., *supra* note 212.

216. See, e.g., THE PEW CHARITABLE TR., DATA TRENDS: SOUTH CAROLINA CRIMINAL JUSTICE REFORM (2017), <https://www.pewtrusts.org/-/media/data-visualizations/infographics/2017/data-trends-south-carolina-criminal-justice-reform.pdf> [<https://perma.cc/5N55-9PBT>]; Adam Gelb & Phillip Stevenson, *U.S. Adult Incarceration Rate Declines 13% in 8 Years*, PEW (Jan. 12, 2017), <https://www.pewtrusts.org/en/research-and-analysis/articles/2017/01/12/us-adult-incarceration-rate-declines-13-percent-in-8-years> [<https://perma.cc/77R9-6L2K>].

217. S.C. DEP’T OF CORR., *supra* note 212.

218. Todd R. Clear & James Austin, *Reducing Mass Incarceration: Implications of the Iron Law of Prison Populations*, 3 HARV. L. & POL’Y REV. 307, 312 (2009).

219. James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 24–25, 45–52 (2012).

“[T]he incarceration of people who have been convicted of violent offenses explains almost two-thirds of the growth in prison populations since 1990.”²²⁰ John Pfaff offers the illustration of dramatic (and perhaps unrealistic) reductions in people imprisoned for property, public order, and drug offenses.²²¹ Even with such reductions in incarceration, our incarceration rates would still be more than three times as large as it was when the prison boom began,²²² because that boom centered on violent offenders.

This growth resulted from both harsher sentences for the most severe violent crimes and more frequent and longer sentences for less severe crimes. About 300,000 people are now incarcerated for murder, manslaughter, or armed robbery, and these individuals face extremely long sentences.²²³ About 160,000 people are now serving life sentences or their close equivalent.²²⁴ “Truth-in-sentencing” statutes for violent crimes—which require individuals to serve a large proportion of their sentence, usually 85 percent, before becoming parole-eligible—have significantly increased the amount of time individuals spend in prison for violent offenses, and thus represent a major contributor to mass incarceration.²²⁵

As importantly, mass incarceration results from states’ increased use of shorter sentences for violent crimes which would have been tried as less severe charges or led to less severe sentences in decades past. For instance, from 1980 to 2010, the average sentence in California for violent crimes increased more than 10 months to 48.0 months, a 26 percent increase.²²⁶ Nationally, John Pfaff has shown that a large proportion of prison population result from individuals incarcerated for relatively short periods of time.²²⁷ The average sentence nationally for a violent crime is 3.2 years.²²⁸ Pfaff has shown that a significant cause of mass incarceration is the near doubling of felony charges as a proportion of all charges—without a corresponding increase in the

220. PFAFF, *supra* note 37, at 11. *See also* Krisberg, *supra* note 201, at 138 (concluding that the sharp rise in incarceration resulted from “a huge shift in the scale of punishment, especially for violent offenders and for sex offenders”).

221. PFAFF, *supra* note 37, at 185.

222. *Id.*

223. *Id.* at 187–88.

224. Mauer, *supra* note 139.

225. CLEAR & FROST, *supra* note 193, at 86.

226. Krisberg, *supra* note 201, at 139.

227. PFAFF, *supra* note 37, at 188.

228. *Id.* The category of violent offenses can include less serious offenses, which helps bring the average down. CLEAR & FROST, *supra* note 193, at 21. All categories of crime include offenses with a range of seriousness, and violent crime as a category leads to higher average sentences than other crime categories. *Id.* at 22.

severity of crimes committed.²²⁹ From 1994 to 2008, the rate of felony filings per arrest increased by 37.4 percent²³⁰—these are cases that would have been filed as misdemeanors or not filed at all in previous years. Other reforms had increased the “likelihood that a person convicted of a felony offense would be sentenced to a term of imprisonment.”²³¹ In the same period prison admissions increased 40 percent, tracking the increased felony filings nearly identically.²³² As a result, more individuals face some time incarcerated when they may have been placed on probation if they faced less severe charges, and more individuals serving sentences of several months or several years for what are charged as violent crimes.

Achieving dramatic reductions in mass incarceration—such as the bipartisan effort to “Cut 50,” that is, reduce the American prison population by half²³³—thus requires reduced sentences for violent crimes.²³⁴ Reducing sentences for non-violent offenders may be the proverbial low-hanging fruit, but truly reducing mass incarceration requires “building ladders to pick the fruit higher up the tree.”²³⁵

Such reform efforts face a severe political challenge, of course—many people simply do not want to punish violent offenders less. That reality creates the “third-rail in criminal justice reform” —focus on non-violent, less serious offenders only, and continue or even extend existing punishments for violent offenders.²³⁶

B. Pre-Trial Detention, Bail, and Mass Incarceration

Calls for bail reform have grown increasingly prominent as tools to both reduce the number of incarcerated individuals and treat defendants more fairly.²³⁷ While a full exploration of our current system

229. PFAFF, *supra* note 37, at 127.

230. John F. Pfaff, *The Micro and Macro Causes of Prison Growth*, 28 GA. ST. U. L. REV. 1239, 1250 (2012).

231. CLEAR & FROST, *supra* note 193, at 82.

232. PFAFF, *supra* note 37, at 120–52.

233. *Our Mission & Work*, CUT50, www.cut50.org/mission [<https://perma.cc/YZ8K-JL6E>].

234. *E.g.*, Dana Goldstein, *How to Cut the Prison Population by 50 Percent*, MARSHALL PROJECT (Mar. 4, 2015), <https://www.themarshallproject.org/2015/03/04/how-to-cut-the-prison-pupulation-by-50-percent#.OmygAqSA7> [<https://perma.cc/YP4X-Z4WB>].

235. PFAFF, *supra* note 37, at 186.

236. Goldstein, *supra* note 234. *See also* PFAFF, *supra* note 37, at 23–24, 186 (describing such examples in South Carolina and Maryland).

237. *E.g.*, Megan Stevenson & Sandra G. Mayson, *Pretrial Detention and Bail*, in 3 REFORMING CRIMINAL JUSTICE 21 (Erik Luna ed., 2017), http://academyforjustice.org/wp-content/uploads/2017/10/2_Reforming-Criminal-

and calls to reform it are beyond the scope of this Article, the essential argument consists of several related points.

First, our current bail and bond system has evolved into a system which incarcerates hundreds of thousands of individuals pre-trial. Prominent reformers assert that 450,000 individuals are jailed pending trial on any given day—a significant proportion of the roughly 2.2 million people incarcerated on any given day.²³⁸ Pre-trial detention involves a large number of individuals jailed relatively briefly, and thus the effects of this detention are more widespread across the population than daily incarceration statistics suggest.²³⁹ The proportion of releases requiring money payments increased at the same time as the number of individuals detained pretrial, indicating a temporal link between the two issues.²⁴⁰

Second, the current system determines who is released and who is detained as much (if not more) based on defendants' ability to pay bail or bond than on which defendants pose the greatest risk of

Justice_Vol_3_Pretial-Detention-and-Bail.pdf [https://perma.cc/89VG-FH9P]; Kamala D. Harris & Rand Paul, *To Shrink Jails, Let's Reform Bail*, N.Y. TIMES, (July 20, 2017), <https://www.nytimes.com/2017/07/20/opinion/kamala-harris-and-rand-paul-lets-reform-bail.html?r=0>; Andrew M. Cuomo, *Governor Cuomo: The Way to a More Just New York State*, N.Y. TIMES (Jan. 15, 2018), <https://www.nytimes.com/2018/01/15/opinion/cuomo-prison-reform-new-york.html>; AM. CIVIL LIBERTIES UNION & COLOR OF CHANGE, *SELLING OFF OUR FREEDOM: HOW INSURANCE CORPORATIONS HAVE TAKEN OVER OUR BAIL SYSTEM* 18 (2017) [hereinafter *SELLING OUR FREEDOM*], <https://www.aclu.org/report/selling-our-freedom-how-insurance-corporations-have-taken-over-our-bail-system> [https://perma.cc/PSZ8-W7X8] (linking “[t]he growth of money bail” and “the massive expansion of mass incarceration”).

238. This figure is based on the following rough math: There are about 750,000 individuals in county and city jails on any given day, and about sixty percent of them are pre-trial detainees. Alexander Shalom, *Bail Reform as a Mass Incarceration Reduction Technique*, 66 RUTGERS L. REV. 921, 922 nn.7–8 (2014). The sixty percent figure has been documented in New York State's county jails, with higher numbers reported in New York City. N.Y. STATE COMM'N OF CORR., *NON-NEW YORK CITY JAIL POPULATION ANALYSIS OF 10 YEAR Trends: 2008–2017*, at 1 (2017), http://www.criminaljustice.ny.gov/crimnet/ojsa/jail_pop_y.pdf [https://perma.cc/X9TR-GAHF]; Cuomo, *supra* note 237. Between 2010 and 2015, average daily populations of unconvicted individuals in local jails have ranged from 446,000 to 467,500. TODD D. MINTON & ZHEN ZENG, U.S. DEP'T OF JUSTICE, *JAIL INMATES IN 2015*, at 4 (2016), <https://www.bjs.gov/content/pub/pdf/ji15.pdf> [https://perma.cc/Q7AU-B24N].

239. Annual jail admissions are measured in the millions, and have exceeded 10 million. MINTON & ZHENG, *supra* note 238, at 3.

240. THOMAS H. COHEN & BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, 1990–2004: *PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS* (2007), <https://www.bjs.gov/content/pub/pdf/prfdsc.pdf> [https://perma.cc/VND2-KXJX]; Marcia Johnson & Lockett Anthony Johnson, *Bail: Reforming Policies to Address Overcrowded Jails, the Impact of Race on Detention, and Community Revival in Harris County, Texas*, 7 NW. J.L. & SOC. POL'Y 42, 47–49 (2012).

reoffending.²⁴¹ Such concerns echo those raised nearly a century ago by Roscoe Pound and Felix Frankfurter.²⁴² Reformers call for greater reliance on risk assessments to determine who should be detained and seek to detain significantly fewer individuals pre-trial,²⁴³ and several jurisdictions have adopted or are considering reforms along these lines.²⁴⁴

Third, incarcerating defendants pre-trial contributes to mass incarceration by increasing their chances of convictions and the length of sentences served.²⁴⁵ Pre-trial detention gives leverage to prosecutors to induce a plea that will either let a defendant out of jail immediately or lead to the defendant serving less time than the defendant fears he or she would spend waiting for trial.²⁴⁶ Such concerns are particularly strong for less-severe offenses (including violent offenses); if the average sentence for a violent crime is a little more than 36 months,²⁴⁷ than many defendants would rationally fear that they could be jailed pre-trial for as long as they could be imprisoned after trial, if not longer. This added leverage can induce defendants to plead guilty even when innocent²⁴⁸ or when different negotiation posture could lead to a shorter sentence. Jailing unconvicted individuals for timespans which approach the length of a likely sentence undermines the presumption of innocence.²⁴⁹

241. Shalom, *supra* note 238, at 923.

242. *Id.* at 924 (quoting and discussing Pound and Frankfurter's critiques from the 1920s).

243. Harris & Paul, *supra* note 237. Senators Harris and Paul have proposed funding federal grants to state and local entities who shift to using risk assessments for pre-trial detention decisions. Pretrial Integrity and Safety Act of 2017, S. 1593, 115th Cong. (2017), <https://www.congress.gov/bill/115th-congress/senate-bill/1593> [https://perma.cc/PUF6-GYZ3]. Alex Shalom describes recommended shifts in New Jersey "from a largely 'resource-based' system of pretrial release to a 'risk-based' system of pretrial release." Shalom, *supra* note 238, at 926 (citation omitted). Shalom suggests a twenty to thirty percent reduction in pre-trial detentions is a fair goal and calculates that in one state a thirty percent reduction would translate to a ten percent reduction in the total number of individuals incarcerated at any given time.

244. See *SELLING OUR FREEDOM*, *supra* note 237, at 7 (summarizing several such reforms and proposed reforms).

245. Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585, 589 (2017); Shalom, *supra* note 238, at 921–22.

246. Charlie Gerstein, *Plea Bargaining and the Right to Counsel at Bail Hearings*, 111 MICH. L. REV. 1513, 1515 (2013).

247. See *supra* note 228 and accompanying text.

248. John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 CORNELL L. REV. 157, 173–74 (2014).

249. See Cuomo, *supra* note 237 (noting the presumption of innocence to critique the large numbers of individuals "incarcerated awaiting trial").

Fourth, the status quo money bail system imposes a significant financial cost on impoverished defendants and their families.²⁵⁰ When defendants cannot pay the full amount of bail imposed, they typically pay a portion of that bail to a bail bond company—money that they will not recoup, even if they appear for all court dates and even if they are exonerated.²⁵¹ Thus defendants can win their case and still lose financially—paying money they can ill-afford and accumulating significant debt.²⁵²

C. Hidden in Plain Sight²⁵³: How the Mass Incarceration Literature Does Not Focus on Offenders' Age

Imprisoning young adults is one significant driver of mass incarceration.²⁵⁴ Much writing on mass incarceration focuses on how young black and Latino men are disproportionately incarcerated.²⁵⁵ But the age of offenders is often a muted consideration, and there is less focus on how the youth of this disproportionately affected population affects their incarceration or might suggest a tool for reducing the frequency of incarceration.

250. SELLING OUR FREEDOM, *supra* note 237, at 2.

251. *Id.*

252. *Id.* at 2, 8–10.

253. Barbara Bennett Woodhouse uses this phrase to describe the absence of children from many accounts of American history, including those in which children and children's rights played essential roles. BARBARA BENNETT WOODHOUSE, HIDDEN IN PLAIN SIGHT: THE TRAGEDY OF CHILDREN'S RIGHTS FROM BEN FRANKLIN TO LIONEL TATE 6–7 (2008).

254. *Supra* note 41 and accompanying text.

255. See, e.g., ALEXANDER, *supra* note 198, at 9 (“One in three young African American men will serve time in prison if current trends continue, and in some cities more than half of all young adult black men are currently under correctional control—in prison or jail, on probation or parole.”); Forman, *supra* note 219, at 31–32 (“[M]ass imprisonment encourages the larger society to see a subset of the black population—young black men in low-income communities—as potential threats.”); Cassia Spohn, *Race and Sentencing Disparity*, in 4 REFORMING CRIMINAL JUSTICE 169 (Erik Luna ed. 2017), http://academyforjustice.org/wp-content/uploads/2017/10/9_Criminal_Justice_Reform_Vol_4_Race-and-Sentencing-Disparity.pdf [<https://perma.cc/MQJ7-DSCL>]; Bruce Western & Christopher Wildeman, *The Black Family and Mass Incarceration*, 621 ANNALS AM. ACAD. POL. & SOC. SCI. 221, 228–29 (2009), http://prisonstudiesproject.org/wp-content/uploads/2011/07/west_wild_blackfamincarc20091.pdf [<https://perma.cc/J3PA-HBCE>] (noting particularly large incarceration rates for young black men, especially those without high school degrees); Joseph E. Kennedy, *The Jena Six, Mass Incarceration, and the Remoralization of Civil Rights*, 44 Harv. C.R.-C.L. L. Rev. 477, 477 (2009) (describing the criminal justice system as having “produced a collective experience for young black men that is wholly different from the rest of American society”).

Reform efforts similarly focus on categories of offenses rather than offenders' age. The National Research Council of the National Academy of Sciences published a book-length examination of mass incarceration with a set of recommended reforms that, while generally thoughtful, did not address young adults as a distinct group.²⁵⁶ The group Academy for Justice published an otherwise comprehensive four-volume book in 2017 entitled *Reforming Criminal Justice* addressing a range of essential topics, including an entire volume on "Punishment, Incarceration, and Release"—but without a chapter addressing young adult offenders.²⁵⁷ As a popular example, the Urban Institute developed a web tool in 2016 for anyone to project how specific policy reforms in specific states would affect those states' prison populations.²⁵⁸ All of the reform options were offense specific—one can project the effect of either reducing new admissions or length of stay for violent offenses, nonviolent offenses, property offenses, drug offenses, and probation or parole revocations.²⁵⁹ There was no focus on offenders' characteristics.

Consider also the prominent proposal by Marc Mauer (of the Sentencing Project, a leading think tank) to cap virtually all violent crime sentences at 20 years.²⁶⁰ Mauer notes the harm to families from lifelong incarceration, how life sentences deprive all prisoners (without regard to age) "of the chance to turn his or her life around," and the high cost of incarcerating individuals for life, especially given high health costs of older prisoners.²⁶¹ Mauer also notes how young adults will generally age out of crime,²⁶² but makes this point after others, and does not tailor the proposal to young adult offenders.

Academic calls for reform in the mass incarceration literature do not generally address young adults as a specific category. Leading

256. NAT'L RESEARCH COUNCIL, *supra* note 195, at 343–53.

257. THE ACADEMY FOR JUSTICE, *REFORMING CRIMINAL JUSTICE* (Erik Luna ed. 2017), academyforjustice.org. The publication includes a chapter on juvenile justice, but nothing on young adults in the criminal justice system. Barry C. Feld, *Juvenile Justice*, in 1 *REFORMING CRIMINAL JUSTICE* 329 (Erik Luna ed., 2017), http://academyforjustice.org/wp-content/uploads/2017/10/14_Reforming-Criminal-Justice_Vol_1_Juvenile-Justice.pdf [<https://perma.cc/32TA-S9D6>].

258. Ryan King et al., *Reducing Mass Incarceration Requires Far-Reaching Reforms*, URBAN INST. (Aug. 2015), <http://webapp.urban.org/reducing-mass-incarceration> [<https://perma.cc/79T4-3X3M>].

259. *Id.*

260. Mauer, *supra* note 139; Dana Goldstein, *Too Old to Commit Crime?*, N.Y. TIMES (Mar. 20, 2015), <https://www.nytimes.com/2015/03/22/sunday-review/too-old-to-commit-crime.html?r=0>. Mauer's proposal would permit exceptions to the 20-year cap for "unusual cases such as a serial rapist who has not been amenable to treatment in prison or a mass murderer." Mauer, *supra* note 139.

261. Mauer, *supra* note 139.

262. *Id.*

reform proposals include repealing mandatory sentences, reducing the length of prison stays, expanding efforts to help inmates re-enter society and thus reduce recidivism,²⁶³ establishing guidelines for prosecutors' charging decisions, and a variety of reforms regarding drug crime enforcement and prosecution.²⁶⁴ The proposals are all fair proposals, but none addresses young adults in particular.

Other proposals focus on reducing prosecutors' power to leverage the threat of long prison sentences to induce relatively punitive plea bargains.²⁶⁵ Cynthia Alkon, for instance, proposes narrowing definition of felony offenses, recategorizing crimes as misdemeanors or less serious felonies and eliminating mandatory minimums to reduce the sentences which attach to them.²⁶⁶ John Pfaff proposes establishing charging guidelines.²⁶⁷ Limiting prosecutors' power is no doubt crucial to reducing mass incarceration. For this Article's purposes,²⁶⁸ the key point is that proposals to check prosecutors' power have not focused on young adult offenders,²⁶⁹ and connecting such proposals to the young adult sentencing literature can yield important benefits, as Section III.D.1 explores.

Similarly, efforts to reform pre-trial detention and release decisions²⁷⁰ focus on all defendants. Some advocates note particularly large racial disparities for relatively younger defendants,²⁷¹ but do not frame the issue as one whose problem or solution connects with age. Nonetheless, a discussion of age would be particularly helpful. Juvenile court pre-trial detention decisions generally rest not on bail but on predictions of defendants' risk of non-appearance or crime pending

263. CLEAR & FROST, *supra* note 193, at 163–80.

264. ALEXANDER, *supra* note 198, at 120–39.

265. *E.g.*, Cynthia Alkon, *An Overlooked Key to Reversing Mass Incarceration: Reforming the Law to Reduce Prosecutorial Power in Plea Bargaining*, 15 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 191 (2015).

266. *Id.* at 202–05.

267. PFAFF, *supra* note 37, at 206–16. Pfaff's proposal will be discussed *infra* Section III.C.2.

268. A full exploration of prosecutors' role in furthering mass incarceration and on checking that role is beyond the scope of this Article.

269. I have offered one proposal for checking prosecutorial authority regarding juvenile offenders—shift that authority from elected prosecutor's offices to juvenile justice agencies. Josh Gupta-Kagan, *Rethinking Family Court Prosecutors: Elected and Agency Prosecutors and Prosecutorial Discretion in Juvenile Delinquency and Child Protection Cases*, 85 U. CHI. L. REV. 743, 743 (2018).

270. *Supra* note 243 and accompanying text.

271. The ACLU has asserted that “Black defendants between 18 and 29 received higher bail amounts and were less likely to be released on recognizance than were white defendants.” SELLING OUR FREEDOM, *supra* note 237, at 18.

trial, and juvenile reform efforts have focused on improving those predictions and thus reducing pre-trial detention.²⁷²

D. Need for Empirical Work Connecting Young Adult Sentencing and Mass Incarceration

The mass incarceration literature has featured a strong empirical focus. That focus is to be expected given the field's goal; *mass* incarceration involves very large numbers of people, and effectively reducing those numbers requires a close understanding of the impact of different reforms. It is essential to know what category of offenders are sentenced to what types of sentences.²⁷³ And existing empirical work regarding mass incarceration, like mass incarceration literature more broadly, frequently leaves out young adults.

As one illustration, consider a 2013 report on life sentences by the Sentencing Project.²⁷⁴ The report begins by noting how the number of individuals serving life sentences (both with and without the possibility of parole) has increased significantly in recent years, and thus represents a growing proportion of our prison population.²⁷⁵ The report breaks down the age of individuals sentenced to life into two categories—juvenile and adults.²⁷⁶ Following the Supreme Court's Eighth Amendment decisions regarding children under 18, a separate category for under 18-year-olds makes obvious sense. But the vast majority—about 149,000 out of 159,000 individuals serving life sentences, by the Sentencing Project's count—were sentenced for crimes committed as adults, not under 18.²⁷⁷ The message of these statistics in the mass incarceration literature is that if we want to reduce the *mass* use of life sentences, we need to look at older individuals. But how many of those life sentences are imposed on individuals who were under 21 or 25 years of age at the time of their offenses? Those young adults may also command a particularly strong moral claim to sentences other than life.

272. *Infra* notes 358–363 and accompanying text.

273. *Cf.* Krisberg, *supra* note 201, at 139 (“For any jurisdiction, a careful assessment of the composition [of] the current state’s prison population is key to meaningful reforms.”).

274. ASHLEY NELLIS, SENTENCING PROJECT, LIFE GOES ON: THE HISTORIC RISE IN LIFE SENTENCES IN AMERICA 1 (2013), <http://www.sentencingproject.org/publications/life-goes-on-the-historic-rise-in-life-sentences-in-america/> [<https://perma.cc/RK96-8TCS>].

275. *Id.*

276. *Id.*

277. *Id.* at 11.

That report is but one illustration. Other advocacy documents regarding mass incarceration also do not focus on young adults in particular, listing data for 18–29 year olds, for instance, rather than focusing more precisely on young adults under 25 (or even more narrowly under 21).²⁷⁸ Academic empirical literature on mass incarceration also often does not categorize offenders' age with developmental literature. Many studies on the effect of age on sentencing review an age band of all 21–29 year olds, for instance, rather than drawing a line at age 25, when human brains generally complete development.²⁷⁹ Other leading scholarship cited throughout this section does not generally address young adults in particular.

Government data often do not discuss young adults explicitly. Some government agencies reporting data regarding inmates draw lines by decades—inmates in their twenties, thirties, forties, etc.—rather than counting young adults more precisely. Other reports identify children under 18 as the only group reported by age—ignoring young adults as a category worth studying in particular.²⁸⁰ Others report some young adults but not others.²⁸¹ Others report young adults separately,²⁸² to

278. See, e.g., *SELLING OUR FREEDOM*, *supra* note 237, at 18 (describing racial disparities among 18–29-year-olds).

279. See, e.g., Doerner & Demuth, *supra* note 185, at 15 (listing studied age groups).

280. The Bureau of Justice Statistics annual “Jail Inmates” report, for instance, counts the juvenile population in jail but no other age ranges. MINTON & ZENG, *supra* note 238, at 3–5.

281. For example, Texas and New York agencies report the total number of inmates on a given date, inmates admitted to its custody, and inmates released from its custody, and report some young adults, but place older inmates in decade-long age bands (i.e. 20–29-year-olds). TEX. DEP’T OF CRIMINAL JUSTICE, FISCAL YEAR 2015 STATISTICAL REPORT 8, 20, 36, https://www.tdcj.state.tx.us/documents/Statistical_Report_FY2015.pdf [<https://perma.cc/MMZ6-GMCM>]; N.Y. DEP’T OF CORR. & CMTY. SUPERVISION, UNDER CUSTODY REPORT: PROFILE OF UNDER CUSTODY POPULATION 4 (2016), http://www.doccs.ny.gov/Research/Reports/2016/UnderCustody_Report_2016.pdf [<https://perma.cc/GVY2-6LLG>] (reporting inmates 18–20 years old, those 21–29, and those in their 30s, 40s, 50s, and age 60+).

282. California reports the number of 18–19- and 20–24-year-old new inmates every year. CAL. DEP’T OF CORR. & REHAB., CHARACTERISTICS OF FELON NEW ADMISSIONS AND PAROLE VIOLATORS RETURNED WITH A NEW TERM: CALENDAR YEAR 2013, at 17 (2014), http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/ACHAR1/ACHAR1d2013.pdf [<https://perma.cc/C8F6-YUVS>]. The South Carolina Department of Corrections, for instance, reports how many children under seventeen, 17–19-year-olds, and 20–24-year-olds are admitted to its custody every year, and catalogues the total population admitted to its custody under 24 years of age. S.C. DEP’T OF CORR., AGE DISTRIBUTION OF INMATES ADMITTED TO SCDC FY 2016, <http://www.doc.sc.gov/research/Admissions/ADMAgeDistribFY16.pdf> [<https://perma.cc/C7AV-M9FA>].

their credit, but there is certainly no norm for age groups to be reported.

Empirical studies ought to focus on the age of offenders more closely. Age bands should reflect not only the existing constitutional line *Roper* drew at 18, but the developmental line drawn at 25, and other possible legal lines in between (such as at 21). Such data would give a clearer picture of how many inmates are incarcerated for crimes committed at young ages.

III. CONNECTING YOUNG ADULT SENTENCING AND MASS INCARCERATION

As Parts I and II establish, there is a rich body of literature regarding the sentencing of adolescents and young adults, and, separately, the challenge of mass incarceration. The topics are sometimes linked rhetorically—noting especially that prison populations have increased through more frequent and lengthier incarceration of relatively young people, especially black and Latino men.²⁸³ But deeper exploration of how the two bodies of literature can inform each other is largely lacking.²⁸⁴

This section connects those two bodies of literature and explains the benefits of such a connection. Connecting the two literatures strengthens calls in both for less punitive approaches to sentencing young adults. The moral case for reducing mass incarceration, and the importance of young adult sentencing to that goal, adds urgency to calls

283. See, e.g., Jonathan Simon, *Is Mass Incarceration History?*, 95 TEX. L. REV. 1077, 1096 (2017) (book review) (describing tactics which “maintain[] surveillance and control over young black people, especially men living in segregated neighborhoods of concentrated poverty”); Anne R. Traum, *Mass Incarceration at Sentencing*, 64 HASTINGS L.J. 423, 432, 434 (2013) (noting relative youth of Latino and black men who disproportionately make up state prison populations); Lynn Adelman, *What the Sentencing Commission Ought to Be Doing: Reducing Mass Incarceration*, 18 MICH. J. RACE & L. 295, 310 (2013) (“Young men grow up thinking prison is a normal part of experience.”); Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023, 1030 (2010) (“Serious time behind bars has become overwhelmingly common, a destructive rite of passage for many young, disadvantaged nonwhites; it is thus also an omnipresent torsion on families and neighborhoods, an implacable pressure on poor communities of color.”); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1272 (2004) (“On any given day, nearly one-third of black men in their twenties are under the supervision of the criminal justice system.”).

284. One exception is a recent student note which argues for a restoration of a repealed federal law permitting reduced sentences for 18 to 25 year olds as part of federal efforts to reverse policies which “contributed to mass incarceration.” Emily Graham, *Emerging Adults in the Federal System: A Case for Implementing the Federal Youth Corrections Act*, 11 HARV. L. & POL’Y REV. 619, 628 (2017).

for treating young adults more leniently. The moral case that young adult development renders them less culpable than adults who commit the same crime helps respond to retributive arguments in favor of severe responses to violent crime that have stymied efforts for reform. Connecting these bodies of literature also points towards an initial legal reform program, outlined in this section, that draws justifications from both the young adult and mass incarceration literature.

A. Arguments Against Long Sentences for Violent Offenses Benefit from Consideration of Age

Connecting the young adult and mass incarceration literatures makes one critical point clear: the youth of many violent offenders provides a powerful point in the argument for less severe sentences for violent offenses youthful offenders commit. The young adult sentencing literature establishes that the reasons for punishing such offenders are weaker than when adult offenders commit the same offenses. Young adult offenders are less culpable, rendering retribution less appropriate. Young adults are less subject to deterrence, and more amenable to rehabilitation. And young adult offenders are likely to age out of crimes, reducing any incapacitation benefits of long sentences.²⁸⁵

This section builds this argument at the intersection of the young adult sentencing and mass incarceration literature. The argument, like much of the young adult literature, refers to well-established purposes of punishment. This section builds that argument off of key points from the mass incarceration literature, especially the importance of sentences for violent crimes, including both long sentences for the most severe crimes and shorter sentences for less severe crimes, both of which are significant drivers of mass incarceration.

1. RETRIBUTION

Considering how youth affects the retributive purposes of incarceration is important because the mass incarceration literature often explicitly avoids retributive arguments. The mass incarceration literature has generally taken a more empirical focus,²⁸⁶ and moral arguments have focused on the aggregate harms of imprisoning so many people, especially so many black people.²⁸⁷ Compelling work

285. *Infra* Section III.A.3.

286. *Supra* Section II.

287. Michelle Alexander describes mass incarceration “as a stunningly comprehensive and well-disguised system of racialized social control that functions in a manner strikingly similar to Jim Crow.” ALEXANDER, *supra* note 198, at 4; *see also id.*

arguing why fewer and shorter sentences for violent crimes would make good policy explicitly avoids discussions of retribution because it is essentially a moral, not an empirical, question.²⁸⁸

The young adult sentencing literature adds a moral argument explaining why a 20-year-old who commits a violent offense deserves a less severe sentence than a 30-year-old, and a less severe sentence than our system currently assigns. Different development renders young adult offenders less culpable than those whose brains are fully developed. Those young adult offenders may be different than children, but they remain less culpable than older adults.

This argument about retribution is particularly important for responding to critics of less severe sentences in both the mass incarceration and young adult sentencing literatures. In the former, calls for limiting long sentences for severe crimes are criticized for failing to account for their retributive purposes.²⁸⁹ At a minimum, such arguments create a political barrier to limiting long sentences. At a maximum, they provide a strong argument that some crimes are so severe that the costs of decades-long or lifelong sentences are justified. The young adult sentencing literature provides an important response.

In addition, engaging in a retributive argument counteracts a potentially harmful implication of the age-crime curve—legislators, judges, or parole boards seeking to incapacitate offenders may be more likely to sentence young adults to longer sentences in order to incapacitate them during peak crime years, when recidivism rates are higher than for older individuals.²⁹⁰ That is, an incapacitation-minded judge sentencing a defendant convicted of, say, burglary or aggravated assault might sentence a 30-year-old to two years in prison and a 21-year-old to four years—knowing that the 21-year-old’s likelihood of recidivism declines sharply up to age 25.²⁹¹ Indeed, the revised Model

at 179–80 (describing the metaphorical “birdcage” created by mass incarceration’s connection with a variety of other laws and institutions).

288. PFAFF, *supra* note 37, at 287 n.7.

289. See Goldstein, *supra* note 260 (criticizing the Sentencing Project’s director’s call for a 20-year cap on sentences for violent crimes).

290. Recidivism rates are higher for young adults. *E.g.*, REDUCING RECIDIVISM, *supra* note 1, at 3. The young adult penalty, *supra* Section I.D.2.b, and proposals to permit greater consideration of incapacitation when sentencing young adults, *infra* note 292, illustrate how that fact can lead to longer sentences for young adults.

291. For a graph of this decline, see KIDEUK KIM & BRYCE PETERSON, URBAN INST., AGING BEHIND BARS: TRENDS AND IMPLICATIONS OF GRAYING PRISONERS IN THE FEDERAL PRISON SYSTEM 6 (2014), <https://www.urban.org/research/publication/aging-behind-bars-trends-and-implications-graying-prisoners-federal-prison-system> [<https://perma.cc/B9YU-54VW>] (graphing U.S. Bureau of Justice Statistics data based on Urban Institute analysis).

Penal Code endorses this approach in some circumstances,²⁹² and such concerns may explain the young adult penalty discussed above.²⁹³ But if proportional punishment is the goal, this penalty makes little sense because younger offenders deserve less time in prison than the older ones.

Recall data discussed earlier showing reduced sentences for adolescents but stiffer sentences for those in their twenties.²⁹⁴ If incapacitation concerns were the primary reason for punishing youth, teenagers should face longer sentences than young adults so they could be incapacitated until after the peak crime-committing years. But the reduced sentences assigned to adolescents illustrates a widespread acceptance that retributive arguments outweigh incapacitation. But in practice, the youth penalty suggests that those two punishment factors flip in importance when judges sentence young adults. The developmental literature suggests that it should not flip as adolescent brains continue to gradually develop until age 25. Young adult offenders' moral claim that they, like teens, are less culpable and deserve less severe punishment should trump incapacitation concerns. Vindicating that hierarchy of sentencing goals is a key step towards reducing sentences imposed on this population, and thus in reducing mass incarceration.

2. DETERRENCE

Just as the Supreme Court recognized that children under 18 are less subject to the deterrent effect of harsh punishments,²⁹⁵ deterrence is less effective for young adults. The potential of long sentences is not an effective source of general deterrence, “particularly [for] young people.”²⁹⁶ Any deterrence will come from increased expectation of being caught;²⁹⁷ longer sentences provide “no material deterrent

292. The ALI's revised *Model Penal Code*, for instance, would permit states to give such incapacitation arguments “priority” when “there is a reliable basis for belief that the offender presents a high risk of serious violent offending.” MODEL PENAL CODE SENTENCING § 6.11A(c) (AM. LAW INST., Tentative Draft No. 2, 2011) at 36, <https://robinainstitute.umn.edu/publications/model-penal-code-sentencing-tentative-draft-no-2> [<https://perma.cc/F9ZA-CPYY>]. ALI suggests “validated actuarial-risk-assessment instruments” could satisfy the “reasonable basis” standard. *Id.* at 40.

293. *Supra* Section I.D.2.b.

294. *Supra* notes 187–190 and accompanying text.

295. *See, e.g., Miller v. Alabama*, 567 U.S. 460, 472 (2012) (explaining that the characteristics which define youth—“their immaturity, recklessness, and impetuosity—make them less likely to consider potential punishment”) (citing *Graham v. Florida*, 560 U.S. 48, 72 (2010) and *Roper v. Simmons*, 543 U.S. 551, 571 (2005)).

296. PFAFF, *supra* note 37, at 190.

297. *Id.* at 193.

effect.”²⁹⁸ Specific deterrence is also ineffective; longer sentences do not correlate with reduced recidivism, so we should doubt the specific deterrence value of longer sentences.²⁹⁹

Youth and young adult crime is also less subject to deterrence because young men are more likely to commit crimes in groups and locking up some portion of these young men does not prevent their replacement. As Todd R. Clear and James Austin write, “loosely formed and intermittently criminally active groups quickly find new members when old ones go to prison.”³⁰⁰

3. INCAPACITATING OR REHABILITATING YOUTHFUL OFFENDERS

Incapacitation presents the most complicated issue at the intersection of young adult sentencing and mass incarceration. The criminology literature has long established that most young offenders desist from crime as they get older, a principle reflected in age-crime curves.³⁰¹ Peak crime rates occur in the late teens and early twenties, depending on the type of offense, and then fall. As one illustration, nearly two-thirds of everyone arrested in the United States for robbery in one year were under the age of 25.³⁰² Local statistics are similarly telling—more than 40 percent of all violent crime reported to the Richland County (Columbia, South Carolina) Sheriff’s Department over the past five years involves suspects under the age of 25,³⁰³ and half of all defendants for violent offenses in San Francisco, California are

298. NAT’L RESEARCH COUNCIL, *supra* note 195, at 134–40. *See also* Daniel S. Nagin, *Deterrence*, in 4 REFORMING CRIMINAL JUSTICE 19, 20–21 (Erik Luna ed., 2017), http://academyforjustice.org/wp-content/uploads/2017/10/2_Criminal_Justice_ReformVol4Deterrence.pdf [<https://perma.cc/PA4V-PCCG>] (arguing that “the certainty of apprehension not the severity of the ensuing consequences” provides effective deterrence, and that this conclusion questions the policy wisdom of long sentences).

299. Clear & Austin, *supra* note 218, at 310.

300. *Id.*

301. *E.g.*, PFAFF, *supra* note 37, at 191.

302. Buckingham, *supra* note 112, at 817.

303. More than twenty-seven percent of all reported violent crimes had suspects between the ages of 18–24. Data is taken from annual Violent Crime by Age of Suspect reports from 2011–15. *Pro-ACT*, RICHLAND CTY. SHERIFF’S DEP’T, <http://www.rcsd.net/gen/proact.htm> [<https://perma.cc/E5RR-ACP5>]. Crimes when the suspect’s age was listed as “unknown” were excluded from data calculations. The author totaled the number of violent crimes for each age group reported over five years to reach the reported data. Data tabulations are on file with author. Richland County, South Carolina includes Columbia, South Carolina and is the home of the author and the author’s academic institution (the University of South Carolina).

young adults, who make up only eight percent of the city's population.³⁰⁴

The basic point that as individuals age, they are less likely to commit new crimes is also evident in recidivism data of individuals released from prison. A study of parolees from Florida's prison system concluded that a significant decline in recidivism rates appears for individuals released after age 25.³⁰⁵ Indeed, Florida authorities found that age at release is the third most important variable (out of nineteen found to impact recidivism) on parolees' recidivism rates.³⁰⁶ The ALI's revised Model Penal Code reflects the reality that most young adult offenders will desist from crime, noting that "only a tiny fraction bec[o]me serious, repeat offenders."³⁰⁷

The normal desistence from crime as offenders age leads to two important implications for sentencing, though they operate differently for long and short sentences. This desistence shows that incapacitation concerns do not support long sentences for young offenders because most will simply age out of crime. Shorter sentences are more complicated—they may provide some short-term incapacitation benefits through offenders' young adult years, but at the cost of inhibiting their long-term path towards desistence.

a. Long Sentences of Young Offenders

Decades-long or life sentences serve little incapacitation purposes, because older individuals are unlikely to reoffend. Understanding the natural progression of criminal activity is important because "incarceration after the career ends, or when a career is abating, is wasted for incapacitation purposes."³⁰⁸ This is a crucial point in the

304. *The Documentary: Neurolaw and Order*, BBC WORLD SERVICE (2017), <http://www.bbc.co.uk/programmes/w3cswcll> [<https://perma.cc/9YN2-PVGM>].

305. FLA. DEP'T OF CORR., FLORIDA PRISON RECIDIVISM REPORT: RELEASES FROM 2010 TO 2016, at 11 (2018), <http://www.dc.state.fl.us/pub/recidivism/RecidivismReport2018.pdf> [<https://perma.cc/Z9PE-C9P>].

306. *Id.* at 17.

307. MODEL PENAL CODE SENTENCING § 6.11A (AM. LAW INST., Tentative Draft No. 2, 2011) at 49, <https://robinainstitute.umn.edu/publications/model-penal-code-sentencing-tentative-draft-no-2> [<https://perma.cc/F9ZA-CPYY>].

308. Alex R. Piquero, David P. Farrington & Alfred Blumstein, *The Criminal Career Paradigm*, 30 CRIME & JUSTICE 359, 469 (2003). *See also* NAT'L RESEARCH COUNCIL, *supra* note 195, at 337 ("Because recidivism rates decline markedly with age, lengthy prison sentences, unless they specifically target very high-rate or extremely dangerous offenders, are an inefficient approach to preventing crime by incapacitation."); Michael Millemann et al., *Releasing Older Prisoners*, 4 REFORMING CRIMINAL JUSTICE 325 (Erik Luna ed., 2017) http://academyforjustice.org/wp-content/uploads/2017/10/15_Criminal_Justice_Reform_Vol_4_Releasing-Older-

mass incarceration literature, because, as noted above, harsh sentences for some of the most severe crimes account for a large proportion of incarcerated individuals.³⁰⁹

The young adult sentencing literature suggests an important additional point: long-term incapacitation is more appropriate for older offenders who are still committing crimes than it is for young adult offenders who are more likely to desist from crime.³¹⁰ Most young offenders age out of offending while those who continue to offend at older ages are more likely to continue offending for longer.³¹¹ To the extent longer sentences for repeat offenders reflects a retributive goal—that so-called “career criminals” deserve longer sentences because of their long-term commitment to crime—retribution is less appropriate for younger offenders because we cannot say with any confidence that they have committed to a career in crime.

Relatedly, the young adult sentencing literature helps explain why incapacitation offers little justification for long sentences imposed on young adults. If it were possible to determine which 21-year-old violent offender is likely to repeat such offenses over many years, then it might be fair to argue for long sentences to incapacitate such offenders and thus prevent their crimes. But we lack the ability to do so. The Supreme Court justified its categorical prohibitions on certain severe punishments for children in part on the inability to distinguish the rare child who may arguably warrant such punishments from the more typical child offender who does not.³¹² Our inability to determine which young adults will be the rare ones to *not* desist from crime similarly counsels in favor of categorical limits on long punishments for young adult offenders (at least for incapacitation purposes). The mass incarceration literature has recognized this point as well.³¹³

Prisoners.pdf [https://perma.cc/HG36-ZT5M] (arguing for expanded release policies for older offenders).

309. *Supra* notes 223–225 and accompanying text.

310. Some have suggested that younger repeat offenders are more deserving of long sentences than older repeat offenders because younger offenders have had less time to compile their criminal history and thus have committed crimes in a shorter period of time. Shawn D. Bushway & Anne Morrison Piehl, *The Inextricable Link Between Age and Criminal History in Sentencing*, 53 *CRIME & DELINQ.* 156, 161–63 (2007). But this argument ignores younger offenders’ greater likelihood to desist from crime and the greater need to incapacitate an older offender who is still committing crimes.

311. Piquero, Farrington & Blumstein, *supra* note 308, at 447.

312. *Graham v. Florida*, 560 U.S. 48, 77–79 (2010); *Roper v. Simmons*, 543 U.S. 551, 573–74 (2005).

313. *See, e.g.*, PFAFF, *supra* note 37, at 192 (“[Despite] all the ‘big data’ advances in predicting human behavior, we still cannot really predict in advance who will end up on which paths.”).

These points overlap with retributive arguments. Behavior that emerges from a developmental state is less morally reprehensible. “For almost all [young] people who commit violent crimes, however, violence is not a defining trait but a transitory state that they age out of. They are not violent people; they are simply going through a violent phase.”³¹⁴ An aggravated assault by a 35-year-old is more blameworthy than the same assault by a 22-year-old because the 35-year-old’s behavior more likely reflects a longer-term commitment to such crimes; the criminal justice system is more justified in labeling the 35-year-old as a violent person than the 22-year-old and punishing accordingly.

b. Shorter Sentences: Incapacitate Young Adults or Help Them Desist from Crime?

Shorter sentences pose a more complicated analysis, because incapacitation concerns could justify longer sentences for young adults who commit less severe offenses. A Shakespeare character put it this way—troublemaking youth should “sleep out” ages “between sixteen and three-and-twenty” and thus avoid the “stealing, fighting” and other youthful misbehavior which occurs in between.³¹⁵ Somewhat longer sentences for less severe crimes—say, four years instead of two, or six or nine months in a local jail instead of probation—could effectively let young adults “sleep out” a portion of their peak crime-committing years behind bars. The revised Model Penal Code suggests such considerations.³¹⁶ Indeed, a superficial reading of age-crime curves suggest some likely short-term benefits of such sentencing.

The problem with seeking short-term incapacitation of young adult offenders is that any short-term benefit comes at the cost of longer-term pathways to crime desistance, and the longer-term relationship between incarceration and crime is more complicated.³¹⁷ While re-offending is particularly common among young adults, so is desistance from crime.³¹⁸ Sentencing young adults should seek to facilitate such desistance rather than impede it. This goal follows Emily Buss’s call to consider “how can the law spur or thwart children’s achievement.”³¹⁹

314. PFAFF, *supra* note 37, at 190–91.

315. WILLIAM SHAKESPEARE, *THE WINTER’S TALE*, act 3, sc. 3, 59–63 (F.N. Moorman ed., Methuen & Co. 1963). In this line, a shepherd complains of youthful mischief makers.

316. MODEL PENAL CODE SENTENCING § 6.11A(k) (AM. LAW INST., Tentative Draft No. 2, 2011) at 37, <https://robinainstitute.umn.edu/publications/model-penal-code-sentencing-tentative-draft-no-2> [<https://perma.cc/F9ZA-CPYY>].

317. CLEAR & FROST, *supra* note 193, at 38–39.

318. *Supra* note 43 and accompanying text.

319. Buss, *supra* note 54, at 14.

Applying that goal to young adult sentencing suggests a need to develop sentencing policies that help young adult offenders desist from crime.

Using somewhat longer sentences to incapacitate young adults until their mid or late twenties fails to facilitate their desistance from crime. Employment and marriage help lead individuals to desist from crime,³²⁰ and incarcerating young adults “undermine[s] [those] pathways to desistance in the longer run once they are released.”³²¹ Incarceration’s negative effects on employment is well established,³²² and poor employment coupled with the stigma of incarceration do not make formerly incarcerated young adults proverbial “good catches,”³²³ reducing their prospects for stable long-term relationships which can lead to desistance.³²⁴ Incarceration has particularly damaging effects on offenders’ relationship with their children,³²⁵ (and 44 percent of young adult inmates have children)³²⁶ thus harming stable family relationships that should help offenders desist from crime.

Strict child support policies offer one illustration of these harms.³²⁷ When a young non-custodial parent (usually a father) is incarcerated, child support obligations often accrue, leaving many individuals with

320. FROM JUVENILE DELINQUENCY, *supra* note 4; Ann Cammett, *Reflections on the Challenge of Inez Moore: Family Integrity in the Wake of Mass Incarceration*, 85 *FORDHAM L. REV.* 2579, 2582 (2017).

321. PFAFF, *supra* note 37, at 193. See also NAT’L RESEARCH COUNCIL, *supra* note 195, at 6.

322. Harry J. Holzer, *Declining Employment Among Young Black Less-Educated Men: The Role of Incarceration and Child Support*, 24 *J. POL’Y ANALYSIS & MGMT.* 329, 346 (2005).

323. June Carbone and Naomi Cahn use the “good catches” metaphor to describe the overall decline in the number of young men considered marriageable. JUNE CARBONE & NAOMI CAHN, *MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY* 75–77 (2014).

324. *Id.* at 72–74.

325. Andrea L. Dennis, *Criminal Law as Family Law*, 33 *GA. ST. U. L. REV.* 285, 328–29 (2017); Shani King et al., *Cost-Effective Juvenile Justice Reform: Lessons from the Just Beginning “Baby Elmo” Teen Parenting Program*, 93 *N.C. L. REV.* 1381, 1396–404 (2015).

326. LAUREN E. GLAZE & LAURA M. MARUSCHAK, BUREAU OF JUSTICE STATISTICS, *SPECIAL REPORT: PARENTS IN PRISON AND THEIR MINOR CHILDREN* 3 (2010), <https://www.bjs.gov/content/pub/pdf/pptmc.pdf> [<https://perma.cc/Q6L2-UJ27>].

327. E.g., Tonya L. Brito, *Fathers Behind Bars: Rethinking Child Support Policy Toward Low-Income Noncustodial Fathers and Their Families*, 15 *J. GENDER, RACE & JUST.* 617, 657–59 (2012); Ann Cammett, *Deadbeats, Deadbrokes, and Prisoners*, 18 *GEO. J. ON POVERTY L. & POL’Y* 127, 141–45 (2011) [hereinafter Cammett, *Deadbeats, Deabrokes, and Prisoners*]. Cammett, in particular, has tied concerns about such child support policies to mass incarceration. *Id.* at 153–54; Ann Cammett, *Expanding Collateral Sanctions: The Hidden Costs of Aggressive Child Support Enforcement Against Incarcerated Parents*, 13 *GEO. J ON POVERTY L. & POL’Y* 313 (2006).

effective tax rates higher than sixty percent.³²⁸ Research has found child support arrears negatively impact labor force participation of young black men,³²⁹ leading some to resort to future crime.³³⁰ Even when such policies do not lead directly to crime, they undermine ex-offenders' economic prospects and thus hinder their path to desistance from crime. As the D.C. Court of Appeals euphemistically wrote in 1994, such policies have “unintended consequences,” especially “[f]rom the standpoint of rehabilitation.”³³¹

Incarceration can also worsen inmates' substance abuse or mental health conditions, “undermine romantic and family relationships,” and damage inmates' “reputation in the community and in the family.”³³² All of these effects make it more difficult for young ex-offenders to find and maintain stable employment and enter stable relationships—key factors which encourage desistance from crime.

Research regarding juvenile sentences supports the insight that longer sentences can harm young offenders' paths to desistance through overly punitive punishments. Leading research sponsored by the U.S. Department of Justice has demonstrated that longer periods of juvenile incarceration do not reduce recidivism, and incarceration may even increase recidivism of lower-level adolescent offenders.³³³ Adolescents desisted from crime better when they had more “stability in living arrangements and work and school attendance.”³³⁴ The bottom line of this research is that “incarceration may not be the most appropriate or effective option, even for many of the most serious adolescent offenders.”³³⁵ Any short-term incapacitation benefit from incarceration is outweighed by the criminogenic nature of incarceration, including its

328. Brito, *supra* note 327, at 657.

329. Holzer, *supra* note 322, at 346. Holzer also found that incarceration generally “is strongly and negatively associated with” less employment and labor force participation, and that child support enforcement including policies described in the text exacerbate that impact, especially for 25–34-year-old men—the cohort in which young adult offenders soon find themselves. *Id.*

330. Brito, *supra* note 327, at 657–59; Cammett, *Deadbeats, Deabrokes, and Prisoners*, *supra* note 327, at 145.

331. *Lewis v. Lewis*, 637 A.2d 70, 73 (D.C. 1994). *Lewis* reversed a trial court order imposing ongoing child support while the father was incarcerated. *Id.* That result does not always apply in many states, as the authorities cited *supra* note 327 establish.

332. King et al., *supra* note 325, at 1393.

333. EDWARD P. MULVEY, U.S. DEP'T OF JUSTICE, PREVENTION HIGHLIGHTS FROM PATHWAYS TO DESISTANCE: A LONGITUDINAL STUDY OF SERIOUS ADOLESCENT OFFENDERS 1–2 (2011).

334. *Id.* at 3.

335. *Id.* The research also demonstrated the importance of effective substance abuse treatment, which reduced re-offense rates, at least in the short term. *Id.*

interference with establishing stable school and work patterns, and adolescents' moral claim to lesser culpability.³³⁶

The social and developmental status of young adults also suggests similar conclusions likely apply to them. A longitudinal study of serious adolescent offenders found dramatic psychosocial maturation continues through age 22 and more gradual maturation continues until age 25.³³⁷ From a perspective of facilitating young adult offenders' maturation so that they sooner desist from crime, the study's authors conclude that our legal system should avoid interventions that "impede" psychosocial maturation and, in particular, note that incarceration "in institutional settings that do not facilitate positive development" may exacerbate young offenders' lack of maturity.³³⁸ The jails and prisons in which our legal system incarcerates many young adult offenders often have limited mental health and substance abuse treatment, and vocational development and education offerings, and feature high degrees of violence.³³⁹ As Samantha Buckingham has concluded, "incarceration has a uniquely detrimental impact on the specific category of youthful offenders."³⁴⁰

Evaluations of Colorado's youthful offender system illustrate these points. Colorado expanded that system in 2009 to include individuals who were 18 or 19 at the time they committed a serious or violent felony and under 21 at the time of sentencing.³⁴¹ When such individuals were incarcerated, the state spent about twice as much on housing them as with other inmates to provide a higher staff-to-inmate ratio and a range of education and treatment services.³⁴² About half of individuals discharged from the youthful offender system had new criminal charges filed against them after two years, but less than one-quarter had new

336. Buckingham, *supra* note 112, at 815–16.

337. STEINBERG ET AL., *supra* note 1, at 7.

338. *Id.* at 9.

339. Buckingham, *supra* note 112, at 822–23.

340. *Id.* at 808.

341. MICHELLE LIVENGOOD, COLO. DEP'T OF CORR., *YOUTHFUL OFFENDER SYSTEM FISCAL YEAR 2013*, at 5 (2014). *See also* Alex A. Stamm, Note, *Young Adults Are Different, Too: Why and How We Can Create a Better Justice System for Young People Age 18 to 25*, 95 TEX. L. REV. 72, 80–81 (2017). The average age at intake is now 18.8. GERMAINE MIERA ET AL., COLO. DEP'T OF PUB. SAFETY, *EVALUATION OF THE YOUTHFUL OFFENDER SYSTEM (YOS) IN COLORADO 14* (2014), [hereinafter *EVALUATION OF YOS 2014*], <http://cjd.org/wp/wp-content/uploads/2015/01/YOS-2014-DCJ-Evaluation.pdf> [<https://perma.cc/B4ML-8VBT>].

342. COLO. DEP'T OF CORR., *COST PER OFFENDER BY FACILITY: FY 2016–17*, <https://drive.google.com/file/d/1Qrox9ESHsgM8wOhW2U4F1af7qvws6RkC/view> (last visited Oct. 5, 2018); RICK RAEMISCH, COLO. DEP'T OF CORR., *STATISTICAL REPORT 2014* 17 <https://drive.google.com/file/d/0B8WLSXAb0Mg8N2NyTUpWRUotWFU/view> (last visited Oct. 5, 2018); LIVENGOOD, *supra* note 341, at 31.

felony convictions and only ten percent had a new violent felony conviction, figures which “are very encouraging . . . given that most YOS offenders were sentenced there for a violent offense, and considering the very high need level of the population.”³⁴³

B. The Mass Incarceration Literature Adds Urgency to Young Adult Sentencing Reforms

Many calls for reforming young adult sentencing have been tentative, recognizing the need for more research into young adults’ development and rehabilitative programs for young adults.³⁴⁴ This hesitation is well-placed. But it leads to a dilemma for policy-makers—waiting for more research means continuing with a system that creates moral qualms by overly punishing young adult defendants. The mass incarceration literature adds a strong moral imperative to reform young adult sentencing.³⁴⁵ If current charging and sentencing practices regarding young adults contribute significantly to the moral problem that is mass incarceration, then a more aggressive approach might be appropriate.

One of the most concerning features of our criminal justice system highlighted by the mass incarceration literature are the gaping racial disparities in our criminal justice system. Eliminating those disparities has no single solution, but mitigating treatment of young offenders should be an important tool. As discussed above, racial disparities are greatest for young, black men.³⁴⁶ Commentators have attributed these disparities, at least in part, to social views of “young black males as the ‘dangerous class.’”³⁴⁷ These points lead to two conclusions. First, reducing sentences for all young adults could disproportionately benefit minority male defendants and thus reduce the immense racial disproportionality that features prominently in the mass incarceration literature. Second, requiring sentencing judges to consider explicitly

343. EVALUATION OF YOS 2014, *supra* note 341, at 42–43.

344. *E.g.* Scott et al., *supra* note 22, at 643–44; Steinberg, *supra* note 17, at 416.

345. As Jonathan Simon writes, “[b]ecause mass incarceration is a human rights problem, it requires a solution as an urgent priority ahead of the still speculative promise of evidence-based penological treatment and improved reentry supervision strategies.” Jonathan Simon, *Ending Mass Incarceration Is a Moral Imperative*, 26 FED. SENT’G REP. 271, 272 (2014).

346. *Supra* notes 189–190, and accompanying text.

347. Steffensmeier, Ulmer & Kramer, *supra* note 185, at 769.

that defendants' youth might mitigate offenses could counteract implicit biases that may contribute to racial disparities.³⁴⁸

C. Steps for Putting the Connection into Practice

Reducing mass incarceration depends on reducing both the number of people incarcerated and the length of incarceration. Both prongs apply to young adult offenders. This section will outline initial ideas how that may happen regarding young adults detained pre-trial, sentenced for minor and mid-level offenses, and those sentenced to long terms for more severe offenses. While none of these proposals would prescribe specific decisions in individual cases, these ideas either call for categorical reforms—that is, different procedures or standards to be applied to young adult offenders on the basis of their age—or standards to apply to case-by-case adjudication that require stronger consideration of youth than existing law, and more than in the few states which permit narrow age-based mitigation.³⁴⁹ This section will also explain how the connection between the young adult sentencing and mass incarceration literatures strengthen the justification for each proposal.

1. BAIL REFORM

Calls for bail reform have grown increasingly prominent as tools to both reduce the number of incarcerated individuals and to treat those accused of crimes more fairly.³⁵⁰ While these calls can apply generally regardless of defendants' age, they are particularly apt for young adult defendants, for whom pre-trial detention decisions should track juvenile court norms, focusing on documented flight or re-offense risks rather than ability to pay. They are also particularly apt for young adult defendants because they are particularly over-represented in local jails—representing 28 percent of the jail population, compared with 21 percent of prison admissions and 10 percent of the general population.³⁵¹

348. Such an effect would require reframing rules governing age-based mitigation for young adults; rather than asking why one particular young offender is so exceptional as to warrant a reduced sentence, the law should start with the presumption that a young adult is less culpable, absent evidence to the contrary.

349. *Supra* Section I.D.2.

350. *Supra* Section II.B.

351. JUSTICE POLICY INST., *IMPROVING APPROACHES TO SERVING YOUNG ADULTS IN THE JUSTICE SYSTEM 5* (2016) [hereinafter *IMPROVING APPROACHES*], http://www.justicepolicy.org/uploads/justicepolicy/documents/jpi_young_adults_final.pdf [<https://perma.cc/T6WR-RWJD>].

Jailing young adults is particularly risky. Even short-term incarceration can undermine employment prospects and thus young adults' paths to desist from crime. Moreover, young adults are over-represented among individuals placed in solitary confinement in local jails,³⁵² so they face a particularly high risk that a temporary stint in jail will lead to particularly severe harms. Indeed, one of the most prominent examples used to support bail reform involves a young defendant, Kalief Browder. Charged at age 16 as an adult³⁵³ in New York with petty theft, the local judge set his bail at \$3,000. The low bail amount suggests Browder presented a relatively low risk. But, unable to pay bail, Browder spent three years awaiting trial, much of that in solitary confinement. Eventually released (he never faced trial), Browder later committed suicide in 2015, at the age of 22.³⁵⁴ Browder's story illustrates both how money bail and bond can unnecessarily jail impoverished young adults and how it can have severe and tragic consequences.

The current money bail system also imposes collateral consequences that hit young adults particularly hard. Even when young adults can pay bail, they often do so by paying significant non-recoverable costs to bail bond companies or obligating themselves to lasting payments to these companies.³⁵⁵ For defendants who have committed crimes, such financial burdens may make the ability to become financially self-sufficient—or even to take care of family members—more difficult and thus impose additional obstacles to desistance from crime.

More fundamentally, determining who is incarcerated and who is released pending trial based on their ability to pay bail prevents courts from making decisions based on more important considerations. Setting bail or bond does not protect against a defendant committing crimes pre-trial, if the defendant or his family can pay. Conversely, a young man like Kalief Browder did not pose a greater risk because he and his family could not pay a modest bail.

352. Nagib, *supra* note 88, at 2918–19.

353. At the time, New York law considered all 16 year olds adults for criminal justice purposes. New York has since enacted legislation to raise the age of juvenile court jurisdiction to include 16- and 17-year-olds. 2017 N.Y. Sess. Laws Ch. 59, pt. WWW § 106(b), (codified at N.Y. Fam. Ct. Act. § 301.2 (2018)).

354. Michael Schwirtz & Michael Winerip, *Kalief Browder, Held at Rikers Island for 3 Years Without Trial, Commits Suicide*, N.Y. TIMES (June 8, 2015), <https://www.nytimes.com/2015/06/09/nyregion/kalief-browder-held-at-rikers-island-for-3-years-without-trial-commits-suicide.html>. For an example of the use of Browder's case to support bail reform, see Harris & Paul, *supra* note 237.

355. SELLING OUR FREEDOM, *supra* note 237, at 2–3.

A core proposed reform is to rely more on risk assessments rather than defendants' ability to pay money bail.³⁵⁶ Though the mass incarceration literature does not describe it this way,³⁵⁷ this reform would make adult pre-trial detention decisions more like juvenile court pre-trial detention decisions. The crucial point is that while in adult systems pre-trial detention depends on defendants' ability to pay bail, juvenile courts generally only detain children accused of crimes as a means to prevent further crimes.³⁵⁸ Most states require a finding that a child poses a significant flight risk or threat to the public through likely future crimes.³⁵⁹ The Supreme Court has noted relevant factors to such findings,³⁶⁰ and many states limit pre-trial detention to situations when no other steps can effectively mitigate the risk of flight or future crimes.³⁶¹ Long-running efforts to improve juvenile court detention decision-making—and thereby reduce the number of detained children—have focused on improving the use of risk assessment tools.³⁶²

Adding this juvenile justice analogy would strengthen calls for bail reform, especially for young adults, for whom many of the juvenile justice concerns are appropriate. Such a connection is generally lacking from both the young adult and mass incarceration literatures.³⁶³ Such analysis would prevent unnecessary pre-trial detention in cases like

356. See, e.g., *id.* at 7, 10; see also *3DaysCount™ for State-Level Change*, PRETRIAL JUST. INST., <https://www.pretrial.org/what-we-do/plan-and-implement/3dayscount-for-state-level-change/> [https://perma.cc/BNS7-XC9T]; *Kentucky Joins National Movement to Improve Pretrial Justice*, PRETRIAL JUST. INST., <https://www.pretrial.org/kentucky-joins-national-movement-to-improve-pretrial-justice/> [https://perma.cc/KFA5-DATA] (noting efforts in Kentucky and New Jersey to use risk assessments rather than bail).

357. E.g., *Kentucky Joins National Movement to Improve Pretrial Justice*, *supra* note 356.

358. RANDY HERTZ ET AL., TRIAL MANUAL FOR DEFENSE ATTORNEYS IN JUVENILE DELINQUENCY CASES 72 (2015), <http://njdc.info/wp-content/uploads/2015/09/Hertz-Trial-Manual-Update.pdf> [https://perma.cc/QD67-7365].

359. *Id.* at 75.

360. *Schall v. Martin*, 467 U.S. 253, 279 (1984).

361. HERTZ ET AL., *supra* note 358, at 75–76.

362. ANNIE E. CASEY FOUND., JDAI AT 25: JUVENILE DETENTION ALTERNATIVES INITIATIVE: INSIGHTS FROM THE ANNUAL RESULTS REPORTS (2017), <http://www.aecf.org/m/resourcedoc/aecf-jdaiat25-2017.pdf> [https://perma.cc/RSN2-BU39] (summarizing 25 years of efforts to reduce juvenile pre-trial detention and results of those efforts).

363. Alex Shalom connects juvenile pre-trial decision to adult pre-trial decisions in a different way. He notes successful efforts to reduce juvenile pre-trial detention were linked with reductions in post-trial juvenile incarceration, and suggests that this link shows how reducing the adult pre-trial population could reduce the number of later-incarcerated individuals. Shalom, *supra* note 238, at 928–29.

Browder's. Relatedly, any jurisdiction looking to pilot bail reforms with a particular population could do so with young adults.

Despite the general applicability of these reforms, attention is necessary to how pre-trial detention decisions are applied to young adults. Just as young adult offenders have higher recidivism rates—strengthening calls for incapacitation of such offenders—some data suggests that young adult defendants have higher rates of re-offending while released pending trial.³⁶⁴ But even when risks of re-offending or flight are heightened, courts should balance any such risks with the risk that pre-trial detention could disrupt a young adult's efforts to obtain or maintain employment and maintain family connections and thus remain crime-free. The result should be that courts detain young adults pre-trial only in limited circumstances, and less frequently than current bail and bond practices permit.

2. REDUCED INCARCERATION THROUGH AGE-BASED CHARGING GUIDELINES

As discussed in Section II.A, more frequently incarcerating individuals convicted of a variety of crimes for relatively short periods of time (several months through several years) is a significant driver of mass incarceration. This phenomenon has a particularly significant impact on young adult offenders. Young adults are slightly overrepresented in prisons, but much more dramatically overrepresented in local jails, which house individuals serving short sentences,³⁶⁵ confirming that many young adults pass through local jails for relatively brief periods of time.

Connecting the mass incarceration and young adult literatures can lead to a more nuanced reform proposal. Pfaff identified increasingly punitive prosecutorial charging decisions as a prime driver of mass incarceration,³⁶⁶ and proposes charging guidelines to structure and reduce the severity of those decisions.³⁶⁷ Such guidelines should be

364. COHEN & REAVES, *supra* note 240, at 1.

365. The Justice Policy Institute studied several large metropolitan areas and found large disproportionalities between the percentage of young adults in the general population and the percentage in local jails. In Cook County, Illinois (Chicago), 9 percent of all people, but 29 percent of people admitted to the Cook County jail were 18–24. In Maricopa County, Arizona (Phoenix), the figures were 4.8 and 25 percent, and in Washington, D.C., the figures were 12.7 and 38.2 percent, respectively. IMPROVING APPROACHES, *supra* note 351, at 5–7. These disproportionalities are larger than those in state prison systems. *Id.* at 5 (noting 2002 study showing 28.1 percent of jail population was 18–24-years-old, and presenting graph comparing young adult prison and jail populations, respectively, to their overall percentage of the population).

366. *Supra* notes 228–232 and accompanying text.

367. PFAFF, *supra* note 37, at 212–13.

particularly appealing when it comes to age. Some leading young adult sentencing scholars do not focus on prosecutorial discretion.³⁶⁸ In contrast, reforms in Britain have addressed young adult defendants' age in charging decisions; the Crown Prosecution Service has amended its Code of Conduct for Crown Prosecutors to require prosecutors to consider a suspect's "age or maturity as part of the public interest test."³⁶⁹ This consideration appears to be fairly narrow and case-specific,³⁷⁰ and thus vulnerable to the same criticisms discussed above for narrow and case-specific age mitigation provisions.³⁷¹ But it nonetheless represents precedent for considering defendants' age as reasons to decline prosecution or to file less severe charges. Consistent with that view, scholars in the young adult sentencing literature have also focused on keeping many young adults out of the existing criminal justice system. Samantha Buckingham has proposed a set of diversion programs open to a wide range of young adult offenders.³⁷² As she argues, "incarceration has a uniquely detrimental impact on the specific category of youthful offenders," who Buckingham "proposes to redirect to community-based sentences."³⁷³ The expanding list of young adult-specific diversion programs³⁷⁴ reflects a growing willingness of some prosecutors to consider age.

What has not yet been developed are a set of prosecution standards that reduce the frequency of felony filings against young adults through consistent recognition that young adult offenders are less culpable and more subject to rehabilitation than older offenders. Such a rule could require prosecutors, absent unusual circumstances, to choose less severe charges when the facts of a case might warrant multiple charges.³⁷⁵ Such a rule would also mitigate the risk that authorities would view any young adult rehabilitative services as so helpful as to create a net-widening problem.³⁷⁶ Charging guidelines could also

368. Scott, Boddie, and Steinberg, for instance, propose expanded youthful offender status, reformed sentencing and parole policies for young adults, and separate young adult correctional facilities, but nothing regarding the exercise of prosecutorial discretion. Scott et al., *supra* note 22, at 660–64.

369. TREATMENT OF YOUNG ADULTS, *supra* note 68, ¶ 69.

370. *See id.* (noting a leading prosecutor's view that maturity is only relevant when a suspect is "extremely immature" and another group's conclusion that prosecutors take age and maturity into account inconsistently).

371. *Supra* Section I.D.1.

372. Buckingham, *supra* note 112, at 866.

373. *Id.* at 808–09.

374. *Supra* notes 75–80 and accompanying text.

375. Enforcing such a rule is beyond the scope of this Article.

376. *See supra* note 93 and accompanying text (noting concern that expanded young adult rehabilitative programs could lead to prosecutions of young adults to access such programs).

require consideration of youthful offender statutes or young-adult specific rehabilitation options.

3. FEWER AND SHORTER SENTENCES THROUGH AGE-BASED SENTENCING STATUTES

The young adult sentencing literature has identified several proposals which, if taken to scale, would significantly reduce overall sentence lengths for young adults and increase rehabilitative programs for them. Barry Feld's proposal for a youth discount³⁷⁷ could significantly reduce sentences for young adults, though it would not, on its own, expand rehabilitative programming. Recognizing the lesser culpability of still-developing young adults, it would give a reduced sentence based on age. Reflecting the gradual maturation process, it would provide decreasing benefit to young adults as they age—a 20-year-old might get a 25 percent reduction off an adult sentence while a 24-year-old might only get 5 or 10 percent reduction.³⁷⁸ Such sentencing standards could provide a useful means of reducing sentences.

Another method to achieve the same goal, while also increasing the provision of rehabilitative services is to expand youthful offender statutes. Such statutes provide sentencing judges with the opportunity to both reduce or eliminate jail or prison sentences for young adults and require sentencing young adults to probation when older offenders would get prison time, or to shorter prison sentences or to sentences in young adult-specific facilities. State legislatures should expand these statutes and render them applicable to all young adult offenders³⁷⁹ unless judges find that the defendant is unusually mature for his or her age. Similarly, Emily Graham proposed resurrecting the federal Youth Corrections Act.³⁸⁰ That statute, repealed in 1984,³⁸¹ permitted federal judges to sentence 18–21 year old defendants to probation or to specialized young adult programs.³⁸² Similar statutes could lead to widely applied sentence reductions and greater use of rehabilitative

377. *Supra* notes 126-129 and accompanying text.

378. Legislatures would have to set the precise age range and percent reductions. *Supra* note 129 and accompanying text.

379. Legislatures would have to engage in the difficult task of drawing lines defining this category. *See supra* note 1 and accompanying text.

380. Graham, *supra* note 284, at 634.

381. Pub. L. 98-473, tit. II, § 218(a), 98 Stat. 2027 (1984).

382. 18 U.S.C. 5006(d), 5010 (repealed 1984). Graham described these provisions, as interpreted by caselaw, as establishing a presumption of applicability to “individuals aged eighteen through twenty-two.” Graham, *supra* note 284, at 628.

programs; lower level young adult offenders would avoid incarceration and more severe offenders would be sentenced to less time.

Less ambitious reforms would seek to revise existing sentencing statutes to permit more meaningful case-by-case consideration of whether a young adult's age mitigates his or her offense. Cases described above show that young adult status can mitigate an offense only in particularly narrow circumstances.³⁸³ These cases look for exceptional young adults—those who are dramatically different from other young adults. Instead, the law should permit youth to mitigate offenses when defendants exhibit features which correlate with the “hallmark features” of young adulthood,³⁸⁴ because those normal features render young adults less culpable than older adults. The burden should be placed on the state to prove why young adults should receive the same sentence as older adults.³⁸⁵

4. EARLIER PAROLE ELIGIBILITY FOR YOUNG ADULT OFFENDERS

When young adults are sentenced to prison, their relative youth should lead to generally shorter sentences, and earlier access to parole. With young adults accounting for about forty percent of all people arrested for murder, non-negligent manslaughter, and robbery³⁸⁶—and thus likely disproportionately serving long sentences associated with those crimes which contribute significantly to mass incarceration—analyzing how the criminal justice system sentences young adults for such crimes is particularly important. The young adult sentencing literature and related reform efforts—especially California's enactment of early parole eligibility for individuals incarcerated for crimes committed before age 23 discussed in Section I.c—have begun to seek this goal. But evaluating those efforts in light of the mass incarceration literature shows how much stronger those reform efforts must become.

California's early parole statute is a positive step, but too modest to address the problem fully. First, that statute is limited to individuals serving long sentences; depending on the sentence being served, individuals are eligible for parole after 15, 20, or 25 years.³⁸⁷ To state the obvious, that only provides early parole eligibility for those serving very long sentences. As discussed in Section II.A, however, the mass

383. *Supra* Section I.D.1.

384. *Miller v. Alabama*, 567 U.S. 460, 477 (2012).

385. This proposal adds strength to Scott, Bonnie and Steinberg's conclusion that young adults' “relative youth should be considered in sentencing,” but without proposing how, or under what standard, such consideration should occur. *Supra* note 132 and accompanying text.

386. REDUCING RECIDIVISM, *supra* note 1, at 2.

387. CAL. PENAL CODE § 3051(b) (West 2018).

incarceration literature demonstrates that most prisoners, including those serving sentences for violent crime, serve much shorter sentences and that an increase in such shorter sentences for violent crimes is a prime driver of mass incarceration.³⁸⁸ The California young adult parole reforms do nothing to make young adults serving 2, 5, or 10 year sentences eligible for parole earlier.

Second, comparing the California early parole statute to proposals from the mass incarceration literature demonstrates the statute's limits. That law requires the parole board to "give great weight" to inmates' youth at the time of their crimes.³⁸⁹ But the parole board must still balance that consideration with an examination of the "gravity" of the individuals' offense and whether "public safety requires a more lengthy period of incarceration."³⁹⁰ This balancing risks tension with *Roper* and *Graham's* insistence that the brutal facts of any specific crime not receive undue weight in comparison to an individual's age at the time of an offense.³⁹¹ The mass incarceration literature has led to more far reaching proposals; John Pfaff has proposed a blanket early release of inmates who are over 40 and who have served 15 or more years of their sentence.³⁹²

Pfaff suggests this proposal is "more politically palatable than a bigger change" and a way to address political opposition to less severe sentencing of violent offenders, as is necessary to address mass incarceration.³⁹³ An even more politically palatable approach would focus on young adult offenders. The recent success of efforts to prohibit firearm sales to young adults under 21 in the midst of political opposition from gun rights proponents³⁹⁴ suggests a possible political path for sentencing reform as well. An individual who has likely outgrown youthful violence is less worthy of long punishment than a forty-five year old who committed his most recent violent offense at age 30. Pfaff's proposal hints at a young adult focus; a forty year old who has served at least fifteen years of a sentence committed his crime when he was a young adult.³⁹⁵ Making that connection more explicit

388. *Supra* notes 228–232 and accompanying text.

389. CAL. PENAL CODE § 4801(c) (West 2018).

390. CAL. PENAL CODE § 3041(b)(1) (West 2018). This provision is explicitly made applicable to youth offender parole hearings. CAL. PENAL CODE § 3051(d) (West 2018).

391. *Supra* notes 146–147 and accompanying text.

392. PFAFF, *supra* note 37, at 230.

393. *Id.*

394. *See supra* note 102 and accompanying text.

395. PFAFF, *supra* note 37, at 230.

could increase both the political viability and proportionality of any reform proposal.³⁹⁶

A strong young-adult focused reform would provide for early parole eligibility for all young adult sentences. The California young adult parole reforms only modestly expedites parole eligibility. An individual serving a life sentence *less* than twenty-five years to life is eligible for parole after serving twenty years.³⁹⁷ Todd Clear and Natasha Frost note that prior to “truth-in-sentencing” laws, individuals were often parole eligible after serving about one-third of their sentences, and advocate for repealing truth-in-sentencing laws and returning to early parole eligibility.³⁹⁸ The mass incarceration literature thus illustrates the need to go significantly further than existing young adult sentencing reforms have gone. And the young adult literature demonstrates that inmates who committed crimes as young adults have a particularly strong claim to earlier parole eligibility, under a proposal like Clear and Frost’s. A state unwilling to repeal or reform truth-in-sentencing laws entirely should consider focusing such reforms on young adults. Similarly, states could take age into account when crafting good-time credits; young adults might get more good time credit for the same period of good behavior than older adult inmates.

D. Next Steps for Research

Connecting mass incarceration and young adult sentencing literature helps identify areas where further research is essential. First, the young adult literature has called for more research to identify effective programs at rehabilitating young adults by addressing their particular needs for assistance in obtaining education and employment records which will help them desist from crime.³⁹⁹ Considering the connection with mass incarceration strengthens these calls. To dramatically reduce the number of young adults prosecuted and

396. In addition, Pfaff proposes a gradual expansion of his proposal—tracking recidivism rates and, if they are reasonable, lowering the age line from 40 to 39, or the sentence length from 15 to 14 years. PFAFF, *supra* note 37, at 230. The same approach could be used for youth offender releases—it could start, as California did, with individuals who committed their crimes before age 25, and could subsequently raise that age, or decrease the amount of time required to spend in prison.

397. CAL. PENAL CODE § 3051(b)(2) (West 2018).

398. CLEAR & FROST, *supra* note 193, at 86.

399. *See, e.g.*, Scott et al., *supra* note 22, at 660 (noting that identifying effective programs is “an ongoing project” and that “few programs have been evaluated”); REDUCING RECIDIVISM, *supra* note 1, at 3–5 (describing dearth of research on programs to address core needs of young adults who commit crimes).

punished for felonies, we ought to have a stable of effective diversion and probation programs for them.

Second, it is important to study young adults in particular in criminology and sentencing studies, as articulated in Section II.C above. Basic data about those who are incarcerated is essential—how many are incarcerated for crimes committed as young adults, for how long are those individuals sentenced, and what impact would reforms to young adult sentencing have on incarceration figures. At a minimum, such reforms would help reduce mass incarceration “[o]ne [s]mall [b]ite at a [t]ime.”⁴⁰⁰ At a maximum, given the close connection between detention of young adults and mass incarceration, such studies could identify a very powerful lever of change.

CONCLUSION

Two significant reform programs and bodies of academic literature have developed, both with the independent capability to change the administration of criminal justice dramatically, and both with significant social science, legal, and moral claims behind them. These two reform programs—efforts to sentence young adults in a manner that reflects their transitional status between childhood and adulthood, and efforts to reform charging and sentencing practices leading to mass incarceration—deserve to be connected. Such reforms can have a significant impact on overall incarceration trends, because young adults commit a disproportionate number of crimes, including violent crimes.⁴⁰¹ Connecting the two reform programs helps strengthen arguments for both—adding important arguments to help achieve necessary reforms to sentencing individuals who commit violent crimes, and adding urgency to calls for reforming young adult sentencing and responding to arguments to keep young adult offenders incarcerated until their mid-twenties.

400. Krisberg, *supra* note 201, at 136.

401. *E.g.* *supra* notes 301–304 and accompanying text.