THE INTERSECTION BETWEEN YOUNG ADULT SENTENCING AND MASS INCARCERATION

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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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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

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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

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. 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

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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).
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, life without the possibility of parole for non-homicide crimes, and the mandatory application of life without the possibility of parole for homicides. 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.  
13.  
14.  

Roper, 543 U.S. at 574.
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

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).
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, 

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).
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

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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.
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

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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.cdc.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 twentie. 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.cdc.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.

young adulthood, 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.

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. Youth are less blameworthy, so retribution is less appropriate. Youth are less likely to consider the consequences of their actions, including possible punishment, so deterrence is less effective. The circumstances of youth “most suggest” the value of rehabilitation, and render incapacitation (at least through lifetime sentences) suspect. 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. 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,” 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. . . . However, a line must be drawn. . . . The age of 18 is the point where society draws the line for many purposes between childhood and

48. Miller, 567 U.S. at 472.
49. Id.
50. Id.
51. Id. at 478.
52. Id. at 472.
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

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),
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.”

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. In *Graham v. Florida*, Justice Kennedy’s opinion even noted that the science had gotten stronger and acknowledged that development continued into “late adolescence.” 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. 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...
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


\(^70\) 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 Loebel, 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.


\(^74\) Scott et al., supra note 22, at 660–61.
programs or networks or programs across the country. Those programs included six “young adult courts” modeled after drug courts or juvenile courts. These courts arised in geographically and politically diverse jurisdictions—including Manhattan and San Francisco, but also Idaho Falls, Idaho; Omaha, Nebraska; Kalamazoo, Michigan; and Lockport, New York. All are relatively recent innovations, with most established since 2010. Longer lists of probation departments and prosecutors’ offices have established distinct units to work with young adults both pre-trial and post-adjudication. As with young adult courts, the majority of these programs were established since 2010.

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. 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. DOJ simultaneously identified 18–24-year-olds as their own category, distinct both from older adults and “less so, from adolescence,” and noted its development of services for young adult inmates designed to prevent disciplinary incidents which lead to the use of restrictive housing. Other jurisdictions have gone further. Faced with a critical U.S. Attorney’s investigation into the use of punitive solitary confinement on adolescents, New York City authorities...

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.
83. Id. at 59.
84. Id. at 60.
determined to stop the practice of solitary confinement for all inmates 21 and younger. 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, and commentators have begun challenging solitary confinement for anyone under 15.

State and local governments have also begun experimenting with various programs and facilities specifically for young adult offenders, something the Department of Justice recommended in 2014. These programs and facilities seek to apply lessons from juvenile justice programs and facilities. In at least one instance, a state has repurposed a juvenile prison for young adults. Such efforts have critics who argue that appealing descriptions of young adult prisons will lead states to increase the number of young adults incarcerated; they nonetheless


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


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. More than half of all states now provide some kind of foster care past age 18. 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. In 2009, Congress prevented credit card companies from contracting with anyone below age 21 without someone 21 or older co-signing. In 2010, Congress ensured that young adults could remain on their parents' health insurance until turning 26. In 2015, Texas raised the age at which an individual who has not graduated high school may drop out to 19. States have expanded the scope of child support obligations past age 18, especially for young adults who are attending college or who have a disability, with some calls to broaden this coverage to

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

young adults more generally. 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, 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.

These developments followed other longer-standing laws that recognize the ongoing development past age 18 to full adulthood. The drinking age is generally 21. 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. 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.


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.


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

C. Applying Age-Based Mitigation to Young Adults

Advocates and scholars have begun to consider the implications of \textit{Roper}'s acknowledgement that “[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18,”\textsuperscript{109} and the developmental and neurological science showing that the factors which \textit{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,\textsuperscript{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

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\begin{itemize}
  \item[106.] U.S. Const. art. I, § 2.
  \item[107.] U.S. Const. art. I, § 3.
  \item[108.] U.S. Const. art. II, § 1.
  \item[109.] \textit{Roper v. Simmons}, 543 U.S. 551, 574 (2005). This advocacy and scholarship has not sought to extend \textit{Roper}'s Eighth Amendment age line. Just as \textit{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.
  \item[110.] No consistent age line exists in the literature. While age 25 is commonly used, some policy proposals focus on younger ages. Arnett, \textit{supra} note 1, at 469–70, 476–77; REDUCING RECIDIVISM, \textit{supra} note 1; \textit{Steinberg et al.}, \textit{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://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., \textit{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. \textit{Steinberg et al.}, \textit{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.
\end{itemize}
\end{footnotesize}
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 21 116 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


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)).


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”).
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”\textsuperscript{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.\textsuperscript{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.\textsuperscript{128} Legislatures would have to set the precise age ranges and fractional amounts,\textsuperscript{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.”\textsuperscript{130} This approach includes expanded youthful offender acts and prison facilities built for young adult offenders.\textsuperscript{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.”\textsuperscript{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[s] threat[s] to society.”\textsuperscript{133} In context of their calls for recognizing “young adults as a transitional category between juveniles and older adult offenders,”\textsuperscript{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.\textsuperscript{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

\begin{footnotes}
\item 127. Howell et al., supra note 111, at 28.
\item 128. Feld, supra note 126, at 322–23.
\item 129. Id.; Farrington et al., supra note 26, at 743.
\item 130. Scott et al., supra note 22, at 660.
\item 131. Id. at 660–63. These two reforms are discussed infra Section I.B.
\item 132. Id. at 661.
\item 133. Id. at 662.
\item 134. Id. at 644.
\item 135. S.B. 261, 2015–16 Leg., Reg. Sess. (Cal. 2015) (codified at Cal. PENAL CODE §§ 3051 & 4801(c)).
\end{footnotes}
maturity” that prisoner can show. 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). The statute thus excludes individuals serving shorter sentences, who, as will be discussed infra, contribute significantly to mass incarceration. In addition, this statute relies on parole boards, which some advocates have criticized as routinely denying parole. 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.

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. 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. 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.” 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.
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

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

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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. Similarly, following the Court’s discussion in Roper and Graham, many commentators have similarly proposed categorical approaches for young adult sentencing.

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.
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, 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. The Illinois court described Roper’s line at age 18 as “somewhat arbitrary” given the ongoing brain development past that line. This defendant “at age 19 years and 2 months, was barely a legal adult and still a teenager.” 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. 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” and various challenges in his youth which may have mitigated the crime.

State v. O’Dell, a 2015 Washington Supreme Court decision, also reduced a young adult’s sentence based on his age. 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. The defendant was still in high school 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. 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 children.”

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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.\textsuperscript{170} Citing the \textit{Roper} line of cases' conclusion that youth have diminished culpability and \textit{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.\textsuperscript{171} \textit{O'Dell} was clear that sentencing courts had to consider youth on a case-by-case basis,\textsuperscript{172} thus raising the question of how frequently courts would apply an “exceptional”\textsuperscript{173} below-guidelines sentence for defendants other than O'Dell.

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

Several other states have statutes similar to the one at issue in \textit{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.”\textsuperscript{177} Tennessee lists youth as a mitigating factor when it leads a defendant to have “lacked substantial judgment in committing the offense.”\textsuperscript{178} Alaska permits sentences below its guidelines when a “youthful defendant was substantially influenced by another person more mature than the

\textsuperscript{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. \textit{Id.} at 360–61.

\textsuperscript{171} Id. at 366.

\textsuperscript{172} Id. at 366–67.

\textsuperscript{173} Id. at 368.

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


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

\textsuperscript{178} TENN. CODE ANN. § 40-35-113(6) (West 2018).
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.” North Carolina courts have required defendants to produce evidence of immaturity beyond their age to mitigate a crime. 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. Tennessee requires evidence beyond chronological age to demonstrate that a defendant lacked “substantial judgment.” Other states have similarly refused to reduce offenses by young adults based on their age alone. 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.

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.
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 work\(^{185}\) 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

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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 disparities\(^{197}\) 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.

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192. *Id.* at 1–2.


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).


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.\textsuperscript{198} Those disparities are greatest among young adults.\textsuperscript{199}

Total incarceration numbers peaked in 2008 and have subsequently dipped under 2.2 million (a 5.9 percent decrease).\textsuperscript{200} That decline, however, is localized rather than a steady national trend,\textsuperscript{201} and incarceration rates remain incredibly high by historic and international comparisons.\textsuperscript{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.”\textsuperscript{203} This literature has grown, and it has argued how and why mass incarceration must be reduced,\textsuperscript{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,\textsuperscript{205} this literature has

\begin{itemize}
\item \textsuperscript{198} E.g., MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 9 (rev. ed. 2012).
\item \textsuperscript{199} Supra note 190 and accompanying text.
\item \textsuperscript{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, \textit{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”).
\item \textsuperscript{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).
\item \textsuperscript{203} CLEAR & FROST, supra note 193, at 1.
\item \textsuperscript{204} See, e.g., id. at 4–5 (describing evolution in scholarship regarding mass incarceration).
\item \textsuperscript{205} See Carl Takei, \textit{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” 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 Act reduced sentences for non-violent offenders and reformed probation and parole practices. Simultaneously, South Carolina increased sentences for some violent crimes. 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

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206 Clear & Frost, supra note 193, at 1.
revolving door for lower-risk, non-violent offenders.” 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 2009 to 20,345 in 2017. In particular, South Carolina prisons saw far fewer admissions of non-violent offenders. But the number of incarcerated violent offenders actually increased in the same time period, as did inmates’ average sentence length. While South Carolina’s prison population has declined faster than the national rate, 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.

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.” The iron law requires focusing on violent crime because the majority of incarcerated individuals are sentenced for violent crime.

210. Pew Ctr. on the States, supra note 208.
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.
217. S.C. DEP’T OF CORR., supra note 212.
“[T]he incarceration of people who have been convicted of violent offenses explains almost two-thirds of the growth in prison populations since 1990.”

John Pfaff offers the illustration of dramatic (and perhaps unrealistic) reductions in people imprisoned for property, public order, and drug offenses. 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 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. About 160,000 people are now serving life sentences or their close equivalent. “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.

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. Nationally, John Pfaff has shown that a large proportion of prison population result from individuals incarcerated for relatively short periods of time. The average sentence nationally for a violent crime is 3.2 years. 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.\textsuperscript{229} From 1994 to 2008, the rate of felony filings per arrest increased by 37.4 percent\textsuperscript{230}—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.”\textsuperscript{231} In the same period prison admissions increased 40 percent, tracking the increased felony filings nearly identically.\textsuperscript{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 half\textsuperscript{233}—thus requires reduced sentences for violent crimes.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{237} While a full exploration of our current system

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{229} Pfaff, supra note 37, at 127.
\item \textsuperscript{231} CLEAR & FROST, supra note 193, at 82.
\item \textsuperscript{232} Pfaff, supra note 37, at 120–52.
\item \textsuperscript{233} Our Mission & Work, CUT50, www.cut50.org/mission [https://perma.cc/YZ8K-JL6E].
\item \textsuperscript{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-population-by-50-percent#0mygAqSA7 [https://perma.cc/YP4X-Z4WB].
\item \textsuperscript{235} Pfaff, supra note 37, at 186.
\item \textsuperscript{236} Goldstein, supra note 234. See also Pfaff, supra note 37, at 23–24, 186 (describing such examples in South Carolina and Maryland).
\item \textsuperscript{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

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 Corrs., 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 (linking “[t]he growth of money bail” and “the massive expansion of mass incarceration”).

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

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

Third, incarcerating defendants pre-trial contributes to mass incarceration by increasing their chances of convictions and the length of sentences served.\textsuperscript{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.\textsuperscript{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,\textsuperscript{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 innocent\textsuperscript{248} 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.\textsuperscript{249}

\begin{itemize}
\item \textsuperscript{241} Shalom, \textit{supra} note 238, at 923.
\item \textsuperscript{242} \textit{Id.} at 924 (quoting and discussing Pound and Frankfurter’s critiques from the 1920s).
\item \textsuperscript{243} Harris & Paul, \textit{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, 15th 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, \textit{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 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.
\item \textsuperscript{244} See \textit{Selling Our Freedom}, \textit{supra} note 237, at 7 (summarizing several such reforms and proposed reforms).
\item \textsuperscript{245} Jocelyn Simonson, \textit{Bail Nullification}, 115 Mich. L. Rev. 585, 589 (2017); Shalom, \textit{supra} note 238, at 921–22.
\item \textsuperscript{247} See \textit{supra} note 228 and accompanying text.
\item \textsuperscript{249} See Cuomo, \textit{supra} note 237 (noting the presumption of innocence to critique the large numbers of individuals “incarcerated awaiting trial”).
\end{itemize}
Fourth, the status quo money bail system imposes a significant financial cost on impoverished defendants and their families. 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. Thus defendants can win their case and still lose financially—paying money they can ill-afford and accumulating significant debt.

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

Imprisoning young adults is one significant driver of mass incarceration. Much writing on mass incarceration focuses on how young black and Latino men are disproportionately incarcerated. 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.
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. 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. 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. 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. 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. 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. Mauer also notes how young adults will generally age out of crime, 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


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, establishing guidelines for prosecutors’ charging decisions, and a variety of reforms regarding drug crime enforcement and prosecution. 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. 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. John Pfaff proposes establishing charging guidelines. Limiting prosecutors’ power is no doubt crucial to reducing mass incarceration. For this Article’s purposes, the key point is that proposals to check prosecutors’ power have not focused on young adult offenders, 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 decisions focus on all defendants. Some advocates note particularly large racial disparities for relatively younger defendants, 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

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263.  CLEAR & FROST, supra note 193, at 163–80.
264.  ALEXANDER, supra note 198, at 120–39.
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.
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.”).
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

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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. \(^{280}\) MINTON & ZENG, supra note 238, at 3–5.


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. But deeper exploration of how the two bodies of literature can inform each other is largely lacking.

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

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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.

Penal Code endorses this approach in some circumstances, and such concerns may explain the young adult penalty discussed above. 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. 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, deterrence is less effective for young adults. The potential of long sentences is not an effective source of general deterrence, “particularly [for] young people.” Any deterrence will come from increased expectation of being caught; longer sentences provide “no material deterrent

293. Supra Section I.D.2.b.
294. Supra notes 187–190 and accompanying text.
296. Peaff, supra note 37, at 190.
297. Id. at 193.
Specific deterrence is also ineffective; longer sentences do not correlate with reduced recidivism, so we should doubt the specific deterrence value of longer sentences.

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.”

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. 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. 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, and half of all defendants for violent offenses in San Francisco, California are


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

300. Id.

301. E.g., Pfaeff, 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 Dept., 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 become 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

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306. Id. at 17.
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

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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.
313. See, e.g., PFAFF, supra note 37, at 192 (“[D]espite 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.” 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. 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. 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 desistence, and the longer-term relationship between incarceration and crime is more complicated. While re-offending is particularly common among young adults, so is desistance from crime. 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.”

314. PFAFF, supra note 37, at 190–91.
317. CLEAR & FROST, supra note 193, at 38–39.
318. Supra note 43 and accompanying text.
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 desistence 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


\(^{321}\) PFAFF, supra note 37, at 193. See also NAT’L RESEARCH COUNCIL, supra note 195, at 6.


\(^{323}\) 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.


effective tax rates higher than sixty percent. Research has found child support arrears negatively impact labor force participation of young black men, leading some to resort to future crime. 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.”

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.” 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 desistence 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. Adolescents desisted from crime better when they had more “stability in living arrangements and work and school attendance.” 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.” 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.
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.
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

337.  STEINBERG ET AL., supra note 1, at 7.
338.  Id. at 9.
340.  Id. at 808.
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

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

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, 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 adult 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. 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. 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 desistence 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.

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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. Though the mass incarceration literature does not describe it this way, 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. Most states require a finding that a child poses a significant flight risk or threat to the public through likely future crimes. The Supreme Court has noted relevant factors to such findings and many states limit pre-trial detention to situations when no other steps can effectively mitigate the risk of flight or future crimes. 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.

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. Such analysis would prevent unnecessary pre-trial detention in cases like


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


359. Id. at 75.


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


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.\textsuperscript{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.”\textsuperscript{369} This consideration appears to be fairly narrow and case-specific,\textsuperscript{370} and thus vulnerable to the same criticisms discussed above for narrow and case-specific age mitigation provisions.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{373} The expanding list of young adult-specific diversion programs\textsuperscript{374} 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.\textsuperscript{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.\textsuperscript{376} Charging guidelines could also

\textsuperscript{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.

\textsuperscript{369}. TREATMENT OF YOUNG ADULTS, supra note 68, ¶ 69.

\textsuperscript{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).

\textsuperscript{371}. Supra Section I.D.1.

\textsuperscript{372}. Buckingham, supra note 112, at 866.

\textsuperscript{373}. Id. at 808–09.

\textsuperscript{374}. Supra notes 75–80 and accompanying text.

\textsuperscript{375}. Enforcing such a rule is beyond the scope of this Article.

\textsuperscript{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 discount\textsuperscript{377} 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.\textsuperscript{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 offenders\textsuperscript{379}
unless judges find that the defendant is unusually mature for his or her
age. Similarly, Emily Graham proposed resurrecting the federal Youth
Corrections Act.\textsuperscript{380} That statute, repealed in 1984,\textsuperscript{381} permitted federal
judges to sentence 18–21 year old defendants to probation or to
specialized young adult programs.\textsuperscript{382} Similar statutes could lead to
widely applied sentence reductions and greater use of rehabilitative

\textsuperscript{377}. \textit{Supra} notes 126-129 and accompanying text.
\textsuperscript{378}. Legislatures would have to set the precise age range and percent
reductions. \textit{Supra} note 129 and accompanying text.
\textsuperscript{379}. Legislatures would have to engage in the difficult task of drawing lines
defining this category. \textit{See supra} note 1 and accompanying text.
\textsuperscript{380}. Graham, \textit{supra} note 284, at 634.
\textsuperscript{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, \textit{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.
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 proponents\(^{394}\) 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

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388. _Supra_ notes 228–232 and accompanying text.
389. _Cal. Penal Code_ § 4801(c) (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.


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.” 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. 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.