

YOUNG ADULTS & CRIMINAL JURISDICTION

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ABSTRACT

As measured by developmental biology, cultural markers, and self-perception, adolescence is longer today than it has ever been in human history, with leading psychologists asserting that it lasts into the mid-twenties. This Article considers whether the extension of adolescence requires changing the allocation of criminal jurisdiction over young adults aged eighteen to twenty-five. It explores three possible responses: (1) keeping young adults within general jurisdiction criminal courts with greater accommodations, (2) expanding juvenile court jurisdiction beyond age seventeen, and (3) creating specialized Young Adult Courts.

The Article argues that criminal courts' emphases on punishment and incapacitation are ill-suited to the individualized interventions that best serve the public's long-term interest in safety and best promote a successful transition to adulthood. Expanding juvenile court jurisdiction would make its rehabilitative approach available to young adult offenders who, like juveniles, are not yet fully-developed adults. But it would also mean the loss of important procedural rights and a paternalistic, inquisitorial, interventionist approach that is not appropriate for young adults. Specialized courts dedicated to eighteen- to twenty-five-year-olds offer a developmentally-informed response at the front and back end of cases without unduly complicating the work of the juvenile court, avoid potential due process and rights problems, and communicate to these offenders that they are worthy of something other than punitive, assembly-line treatment as criminals. That said, creating Young Adult Courts across the nation faces several challenges and carries potential drawbacks for those diverted to young adult court and for the remainder left behind in criminal court.

INTRODUCTION

The differentiation of juveniles and adults in criminal law and punishment is evident “as far back as written records go.”¹ The division of the criminal justice system into two worlds—one for adults, another for juveniles—was institutionalized over a century ago with the creation of juvenile court.² Whereas criminal court assumes a fully responsible wrongdoer, focuses on the offense, and prioritizes

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1. JUVENILE OFFENDERS FOR A THOUSAND YEARS xviii (Wiley B. Sanders ed., 2011).

2. See DAVID S. TANENHAUS, JUVENILE JUSTICE IN THE MAKING (2004).

retribution and incapacitation, juvenile court acknowledges the immaturity and diminished culpability of youth, and aims to avoid incarceration and rehabilitate those before the court by focusing on their particular needs.³

The blunt instrument of age divides the two systems, with most states fixing the boundary at age eighteen.⁴ While the border between the two worlds has been porous, it has been so only in one direction. Juveniles have always been subject to being charged and punished as adults for their wrongs. Adults, by contrast, have traditionally not had access to a rehabilitative criminal justice institution like the juvenile court.

Today, three trends are converging in a way that threatens to upset the prevailing adult/juvenile division of criminal justice administration. First, the problem-oriented court movement of recent decades has diverted many adult offenders from general jurisdiction criminal courts to specialized courts—such as drug courts, mental health courts, veterans courts, and the like—that operate with distinct procedural and punishment styles that more closely resemble rehabilitative juvenile courts.⁵ Second, adolescence⁶ is encroaching on territory that used to firmly belong to adulthood. Each of the five traditional cultural markers of adulthood—completing education, obtaining a steady job, achieving financial independence, marriage, and child rearing—occurs years later than it did just a few decades ago.⁷ Moreover, research has established that the brain continues to develop for far longer than was previous thought, leading psychologists to conclude that adolescence today lasts into the mid-twenties.⁸ Third, courts, legislators, and institutional actors increasingly recognize the relevance of cognitive development to criminal

3. *Id.*

4. Only five states—Georgia, Michigan, Missouri, Texas, and Wisconsin—send all seventeen year-olds to criminal court. South Carolina also does at the moment, but will no longer as of July 1, 2019, due to a change in legislation. *Jurisdictional Boundaries*, JUV. JUST. GEOGRAPHY, POL'Y, PRAC. & STATS., <http://www.ijgps.org/jurisdictional-boundaries> (last visited Nov. 11, 2018).

5. For a scholarly discussion of problem-solving courts, see Allegra McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L.J. 1587, 1591 (2012); Eric J. Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism*, 65 OHIO ST. L.J. 1479, 1479 (2004); Candace McCoy, *The Politics of Problem-Solving: An Overview of the Origins and Development of Therapeutic Courts*, 40 AM. CRIM. L. REV. 1513, 1515 (2003); Anthony C. Thompson, *Courting Disorder: Some Thoughts on Community Courts*, 64 J. L. & POL'Y 63, 81 (2002). These diversionary courts are variously called “problem-solving courts,” “problem-oriented courts,” and “community courts,” among other names. I will use “problem-oriented” throughout.

6. Conventionally, adolescence describes the stage of development that begins with puberty and ends with economic and social independence from parents. LAURENCE STEINBERG, *AGE OF OPPORTUNITY: LESSONS FROM THE NEW SCIENCE OF ADOLESCENCE* 5 (2014).

7. *See infra* § I(B).

8. Jay Giedd, *The Amazing Teen Brain*, 312 SCI. AM., June 2015, at 32, 34 (MRI studies show that the adolescent brain is not an old child brain or a half-baked adult brain, but a unique entity characterized by changeability, with the prefrontal cortex, which controls impulses, not maturing until the twenties); STEINBERG, *supra* note 6, at 46 (adolescence lasts from ages ten to twenty-five); JEFFREY JENSEN ARNETT, *EMERGING ADULTHOOD: THE WINDING ROAD FROM THE LATE TEENS THROUGH THE TWENTIES* 227 (2004) (emerging adulthood can last until the late twenties). Notably, the researcher credited with inventing the notion of adolescence over 100 years ago, G. Stanley Hall, considered adolescence to last from ages fourteen to twenty-

justice.⁹ Courts have issued constitutional rulings that restrict the ability to punish young offenders as if they were adults,¹⁰ and jurisdictions have created Young Adult Courts, probation units, and detention facilities that provide services tailored to the distinct developmental needs of those ages eighteen to twenty-five.¹¹

These cultural, biological, and legal developments undermine both the binary structure of criminal justice administration and the use of age eighteen to sort offenders between a rehabilitative model of justice and a retributive one. In response, scholars, legislators, and institutional actors are beginning to experiment with new criminal justice approaches for young adults. Some, for example, have called for criminal courts to better accommodate the developmental characteristics of young adult defendants through a “youth discount” at sentencing.¹² Others have urged that juvenile court jurisdiction should be expanded beyond the age of eighteen.¹³ Others still support creating a new criminal justice institution—Young Adult Court—that specializes in offenders aged eighteen to twenty-five.¹⁴

As jurisdictions across the nation consider and experiment with different criminal justice responses to young adult offending, this Article offers a critical assessment of three potential responses: (1) accommodating the distinguishing

four. G. STANLEY HALL, *ADOLESCENCE: ITS PSYCHOLOGY AND ITS RELATIONS TO PHYSIOLOGY, ANTHROPOLOGY, SOCIOLOGY, SEX, CRIME, RELIGION AND EDUCATION* VOLUME 1, at xix (1904).

9. See *infra* § II.

10. See *Miller v. Alabama*, 567 U.S. 460, 489 (2012) (prohibiting mandatory incarceration of life without parole for juvenile offenders); *Graham v. Florida*, 560 U.S. 48, 79 (2010) (prohibiting incarceration of life without parole for non-homicide offenses committed by juveniles); *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (prohibiting death penalty for juvenile offenders).

11. For example, San Francisco has a Transitional Age Youth Unit that serves probationers ages eighteen to twenty-four. *Transition Age Youth Housing*, S.F. MAYOR’S OFF. OF HOUSING & COMMUNITY DEV., <https://sfmohcd.org/transition-age-youth-housing> (last visited Nov. 11, 2018). The Pine Grove Correctional Facility in Pennsylvania focuses on fifteen to twenty year-olds and “is run as a therapeutic community providing this unique population the opportunity to mature in a nurturing environment.” *SCI Pine Grove*, DEP’T OF CORR., <http://www.cor.pa.gov/Facilities/StatePrisons/Pages/Pine-Grove.aspx> (last visited Nov. 11, 2018). Maine expanded a juvenile facility to include offenders under twenty-six, in which it provides “educational, therapeutic, and substance abuse” services that facility staff were already providing to juveniles. *Mountain View Correctional Facility*, STATE OF ME. DEP’T OF CORR., <http://maine.gov/corrections/juvenile/Facilities/MVYDC/index.htm> (last visited Nov. 11, 2018).

12. See, e.g., Barry C. Feld, *The Youth Discount: Old Enough to Do the Crime, Too Young to Do the Time*, 11 OHIO ST. J. CRIM. L. 107, 108 (2013) (arguing that “legislators should provide all young offenders with substantially shorter sentences”); Andrew Michaels, *A Decent Proposal: Exempting Eighteen- to Twenty-Year-Olds from the Death Penalty*, 40 N.Y.U. L. REV. & SOC. CHANGE 139, 144 (2016).

13. See Henry Gass, *Why Connecticut May Try 21-Year-Olds as Juveniles*, CHRISTIAN SCI. MONITOR (Nov. 18, 2015), <https://www.csmonitor.com/USA/Justice/2015/1118/Why-Connecticut-may-try-21-year-olds-as-juveniles>; H. 95, 2016 Leg., 153 (Vt. 2016) (directing the Joint Legislative Justice Oversight Committee to examine increasing the top-end age of juvenile jurisdiction to twenty and the age of youthful offender jurisdiction to twenty-five); H.B. 6308, 99th Gen. Assemb. (Ill. 2017) (raising age to twenty-one for misdemeanors); Kayleigh Skinner, *Judge seeks to expand juvenile court’s jurisdiction to include young adults up to age 25*, MEMPHIS COM. APPEAL (Aug 9, 2016, 2:33 PM), <https://www.commercialappeal.com/story/news/courts/2016/08/09/judge-seeks-to-expand-juvenile-courts-jurisdiction-to-include-young-adults-up-to-age-25/90574986/>.

14. See *infra* § III(C).

characteristics and developmental needs of young adult offenders within general jurisdiction criminal courts, (2) extending juvenile court jurisdiction beyond age eighteen, and (3) creating distinct Young Adult Courts.¹⁵ While some scholarship and advocacy promotes one or more of the above options, little research has critically analyzed them. Moreover, because Young Adult Courts have only just emerged, and despite a rich body of scholarship on all manner of problem-oriented courts and diversionary justice, a critical scholarly literature regarding Young Adult Courts has not yet developed.¹⁶ This Article hopes to jump-start that critical scholarly conversation.

Part I of this Article documents the cultural and biological extension of adolescence. Part II then explains the law's withering commitment to age eighteen as the line that marks entry to adulthood. Part III identifies and examines the benefits and drawbacks to three potential criminal justice responses to young adults.¹⁷ The Article concludes that Young Adult Courts offer the best opportunity to moderate criminal justice interventions for young adults by making available to them a developmentally-informed response at the front and back end of criminal cases without unduly complicating the work of the juvenile court. They also avoid potential due process and rights problems, while communicating to these offenders that they are worthy of something other than punitive, assembly-line treatment as criminals. Finally, they can serve as models for reforms that need not be reserved for a diversionary problem-oriented court (or for young adults), but can be taken up by general jurisdiction criminal courts across the country.

I. DOCUMENTING YOUNG ADULTHOOD

This part traces the history of American adolescence, from its pre-history to today. It notes how culture and science have combined in recent decades to extend adolescence (or distinguish young adulthood from adolescence), and identifies the developmental benefits to delaying the transition to adulthood. It then explains how some young people—particularly those who are economically poor and people of color—have limited access to young adulthood, making them more likely than other youth to experience a quick transition to adulthood.

15. Each of the other options mentioned—sentencing reforms and expanded juvenile court jurisdiction—deserves careful consideration on its own.

16. The only law review article published on this issue appears to be Alex A. Stamm, Note, *Young Adults Are Different, Too: Why and How We Can Create A Better Justice System for Young People Age 18 to 25*, 95 TEX. L. REV. 72, 74 (2017) (providing an overview of various criminal justice system responses to those age eighteen to twenty-five); see also Christine S. Scott-Hayward, *Rethinking Federal Diversion: The Rise of Specialized Criminal Courts*, 22 BERKELEY J. CRIM. L. 47, 75–76 (2017) (discussing federal district court programs aimed at defendants under age twenty-five).

17. Throughout the article, I predominantly refer to eighteen-to twenty-five year-olds as “young adults” and to that time period in life as “young adulthood.” Occasionally, primarily for variety, but also to remind readers that individuals in this period in life share as much in common with adolescents as they do with adults, I also use the term “extended adolescence.”

A. A Brief History of Adolescence

Adolescence was not invented until the turn of the twentieth century. Nevertheless, seventeenth-century American colonists identified a distinct stage of life—youth—amongst childhood, middle age, and old age.¹⁸ Youth was vaguely defined and not rigidly linked to a specific age range, covering somewhere from age seven at the low end to thirty at the top end.¹⁹ While it may have been a separate category, colonists did not isolate youth from the adult world: they lacked institutions designed for youth, generally did not set aside special rooms in their homes for them, and did not consider youth to have a unique psychology.²⁰

A new conception of childhood emerged in the middle of the eighteenth century that viewed children “not as little adults but as special creatures requiring attention, love, and time to mature.”²¹ Age-segregated environments and institutions began to emerge in the early nineteenth century, like high schools and Young Men’s Christian Associations (YMCAs).²² Scientific and medical discoveries (fueled in part by the emergence of pediatrics as a distinct medical field in the second half of the nineteenth century) increased knowledge about and concern with life stages and proper chronological development.²³ This led to childhood, youth, and adulthood being more precisely identified as biologically and psychologically distinct phases of life. In 1904, G. Stanley Hall published the 1300-page *Adolescence: Its Psychology and Its Relations to Physiology, Anthropology, Sociology, Sex, Crime, Religion and Education*.²⁴ The book earned him credit for discovering adolescence and legitimated adolescence as an area of scholarly and scientific research. According to Hall, adolescence lasted from age fourteen to twenty-four.²⁵ It was a time of “storm and stress” when “all young people go through some degree of emotional and behavioral upheaval before establishing a more stable equilibrium in adulthood.”²⁶

Once the case for adolescence as a distinct developmental stage was made, social institutions quickly adapted. Education, health care, social services and law all changed to address the particular needs of adolescents. Progressive-era legislative reforms, like compulsory education and the prohibition on child labor,

18. STEVEN MINTZ, *THE PRIME OF LIFE: A HISTORY OF AMERICAN ADULTHOOD* 6 (2015).

19. *Id.*

20. *Id.* at 8.

21. *Id.*

22. *Id.* at 30 (noting the class motivations behind these separate institutions, which “shield[ed] middle-class youth from contamination by the ‘dangerous classes’ and the corruptions of urban life”).

23. The Children’s Hospital of Philadelphia, founded in 1855, was the nation’s first hospital dedicated to treating children. *About Children’s Hospital of Philadelphia*, CHILD. HOSP. OF PHILA., www.chop.edu/about_chop/index.shtml (last visited Nov. 11, 2018). The American Pediatric Society was formed in 1888. *Our History*, AM. PEDIATRIC SOC’Y, www.aps1888.org (last visited Nov. 11, 2018).

24. HALL, *supra* note 8.

25. *Id.*

26. Jeffrey Jensen Arnett, *G. Stanley Hall’s Adolescence: Brilliance and Nonsense* 9 *HISTORY OF PSYCHOL.* 186, 186 (2006).

protected youth by delaying their entrance into the adult world of labor. The creation of a separate juvenile court system institutionalized the distinction between adulthood and adolescence.²⁷ Juvenile courts were grounded in the belief that juveniles were different from adults, and that developmentally-appropriate processes and interventions could reduce offending and facilitate the transition to adulthood.²⁸ Notably, the juvenile court founders did not agree with Stanley Hall that adolescence lasted until twenty-four. The cut-off for juvenile court jurisdiction was fixed much earlier, at eighteen or even sixteen.²⁹

Especially after World War II, a defining script for the cultural transition to adulthood took hold.³⁰ The vast majority of people achieved the markers of adulthood—completing education, obtaining a steady job, achieving financial independence from parents, marriage, and reproduction—soon after eighteen, and most of them did so enthusiastically.³¹

Legal reforms after World War II reinforced the notion of a quick transition to adulthood. In 1971, the Twenty-sixth Amendment to the U.S. Constitution lowered the voting age from twenty-one to eighteen.³² At least twenty-nine states followed this by lowering the drinking age from twenty-one, usually to eighteen.³³ Other reforms enabled broader legal recognition of the maturity of those under eighteen. The mature minor doctrine, for example, allowed individual youth under eighteen to overcome a presumption that they were not mature enough to make certain decisions for themselves.³⁴ Beginning in the 1980s, nearly all states shrunk the jurisdiction of their juvenile courts, making it easier, and more common, to charge juveniles in criminal court and to punish them as adults.³⁵ These reforms affirmed that the transition to legal adulthood and full membership in society was complete by eighteen.

27. TANENHAUS, *supra* note 2.

28. See generally Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1910).

29. See FRANK ZIMRING, *AMERICAN JUVENILE JUSTICE* 11 (2005) (noting that the Denver Juvenile Court's jurisdiction originally ended at sixteen and that the youth who were "the objects of . . . juvenile court control near the beginning of [the twentieth] century were younger than the current clientele of these institutions"). The upper age of jurisdiction was not chosen based on scientific data. The founders envisioned the court as a court for children, and eighteen was the predominant age used in the law marking the end of status as a minor. For example, the word "child" or "children" appears more than twice as many times as "juvenile" in early Chicago Juvenile Court Judge Julian W. Mack's *Harvard Law Review* article about the new court. Mack, *supra* note 28.

30. MINTZ, *supra* note 18, at 13.

31. Women were less likely to achieve all of these traditional markers of adulthood because of their limited participation in the full-time labor market. This did not, however, undermine their status as adults. Culturally, for much of the twentieth century, the dominant social role for women was parent and homemaker, while for men it was the wage-earner. See SUSAN MOLLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* 140–46 (1989) (explaining that these roles are not biologically determined but the product of socialization patterns).

32. U.S. CONST. amend. XXVI.

33. Mary Pat Treuthart, *Lowering the Bar: Rethinking Underage Drinking*, 9 N.Y.U. J. LEGIS. & PUB. POL'Y 303, 308, 308 n.23 (2006).

34. See *Belotti v. Baird*, 443 U.S. 622, 647 (1979) (holding a minor who is mature enough and sufficiently well-informed may make abortion decisions independent of parental consent or notification or judicial interference).

35. See PATRICIA TORBET ET AL., NAT'L CTR. FOR JUVENILE JUST., *STATE RESPONSES TO SERIOUS AND VIOLENT JUVENILE CRIME* 3 (1996).

B. Today's Extended Adolescence

The general uniformity in the sequencing and timing of events marking the transition to adulthood began to fade in the last decades of the twentieth century. Today, the transition to adulthood is a more gradual and varied process, with many individuals taking much longer to achieve, if at all, the traditional markers of adulthood. This section briefly summarizes what has changed.

1. Puberty and Brain Development

Before the discovery of adolescence, the traditional marker of the beginning of adulthood was puberty, or sexual reproductive capacity. During the twentieth century, puberty came to signify the start of adolescence.³⁶ Today, adolescence lasts longer than ever in part because puberty begins earlier than ever. When the twentieth century opened, the onset of menstruation for women occurred sometime between the ages of fourteen and fifteen.³⁷ By 1950, the average American female went through menarche at around thirteen.³⁸ Today, the average age of menarche for American females is approximately twelve.³⁹ Girls begin puberty before menarche. The first observable sign of puberty is breast budding, and studies have shown that the average age of breast budding has fallen from close to thirteen years of age in the 1960s to a little under ten today.⁴⁰

While there is no comparable biological event for boys to identify puberty, the ages at which youth in a given society hit puberty are highly correlated, with boys usually doing so a year or two after girls.⁴¹ Research indicates that, as with girls, boys are maturing physically earlier today than in the past, beginning puberty by no later than twelve.⁴²

Adolescence is lengthening on the back end as well. The main biological endpoint of adolescence—cognitive maturity—extends much later than previously thought. Researchers and psychologists have discovered that the brain continues to develop during the adolescent years and is not fully formed until the early

36. See STEINBERG, *supra* note 6, at 48 (2014).

37. *Id.*

38. See Susan Y. Euling, Ph.D. et al., *Examination of US Puberty-Timing Data From 1940 to 1994 for Secular Trends: Panel Findings*, 121 PEDIATRICS (SUPPL. 3) (2008); Frank M. Biro, M.D. et al., *Puberty in Girls of the 21st Century*, 25 J. PEDIATRIC & ADOLESCENT GYNECOLOGY, 289–90 (2012).

39. See William Cameron Chumlea et al., *Age at Menarche and Racial Comparisons in U.S. Girls*, 111 PEDIATRICS 110 (Jan. 2003) (finding a median age for menarche for U.S. girls at age 12.43, approximately four months earlier than in 1973); Elizabeth Weil, *Puberty Before Age 10: A New Normal?*, N.Y. TIMES, Mar. 30, 2012.

40. According to a recent U.S. study, based on data from mid-2000s, ten percent of white girls, and nearly twenty-five percent of black girls, had developed breasts by age seven, and pediatricians are seeing menstruation in second-grade girls. STEINBERG, *supra* note 6, at 50.

41. STEINBERG, *supra* note 6, at 47.

42. Marcia E. Herman-Giddens et al., *Secondary Sexual Characteristics in Boys: Data From the Pediatric Research in Office Settings Network*, 130 PEDIATRICS 1058, 1062 (2012) <http://pediatrics.aappublications.org/content/early/2012/10/15/peds.2011-3291>.

twenties.⁴³ Some studies place the age of complete development at age twenty-five.⁴⁴ Researchers have concluded that young adults aged eighteen to twenty-four are cognitively more similar to juveniles than adults.⁴⁵ Their decision-making ability is still developing,⁴⁶ and they remain more likely than adults to engage in risky behavior, discount the future, and struggle to moderate their responses to emotionally charged situations.⁴⁷ In addition, researchers have shown that adolescence is a period of heightened malleability.⁴⁸ This makes extended adolescence “the last real opportunity we have to put individuals on a healthy pathway and to expect our interventions to have substantial and enduring effects.”⁴⁹ In sum, many of the cognitive features that distinguish juveniles from adults also distinguish young adults from adults.

2. Education

The introduction of common (public) schools, especially high schools, and compulsory education in the nineteenth century did much to segregate youth by age and culturally distinguish adolescence from adulthood.⁵⁰ Prior to World War II, most young people finished school by eighteen. College arguably delayed the transition to adulthood, but the number of people who pursued higher education was

43. See Jay N. Giedd et al., *Brain Development During Childhood and Adolescence: A Longitudinal MRI Study*, 2 NATURE NEUROSCIENCE 861–63 (Oct. 1999); Tomáš Paus et al., *Structural Maturation of Neural Pathways in Children and Adolescents: In Vivo Study*, 283 SCIENCE 1908, 1908 (1999); Elizabeth R. Sowell et al., *Mapping Continued Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships during Postadolescent Brain Maturation*, 21 J. NEUROSCIENCE 8819, 8819 (Nov. 2011); Kerstin Konrad et al., *Brain Development During Adolescence: Neuroscientific Insights Into this Developmental Period*, 110(25) DEUTSCHES ARZTEBLATT INT'L 425, 425 (2013); *American Academy of Pediatrics Study Documents Early Puberty Onset In Boys*, AM. ACAD. OF PEDIATRICS (Oct. 20, 2012), <https://www.aap.org/en-us/about-the-aap/aap-press-room/pages/AAP-Study-Documents-Early-Puberty-Onset-In-Boys.aspx>.

44. Nancy Ginsburg, *Reimagining the Role of Defense Counsel for Adolescents in the Adult Criminal Court System: Bringing the Community and Policymakers into the Process to Achieve the Goals of Gideon*, 35 CARDOZO L. REV. 1117, 1121 (2014).

45. David P. Farrington et al., *Young Adult Offenders: The Need for More Effective Legislative Options and Justice Processing*, 11 CRIMINOLOGY & PUB. POL'Y 729, 741 (2012).

46. See Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEXAS L. REV. 799, 801 (2003); Claire Bryan-Hancock & Sharon Casey, *Psychological Maturity of At-Risk Juveniles, Young Adults and Adults: Implications for the Justice System*, 17 PSYCHIATRY, PSYCHOL. & L. 57 (2010).

47. See Kathryn C. Monahan et al., *Trajectories of Antisocial Behavior and Psychosocial Maturity From Adolescence to Young Adulthood*, 45 DEVELOPMENTAL PSYCHOL. 1654, 1658 (2009); Edward P. Mulvey et al., *Theory and Research on Desistance from Antisocial Activity Among Serious Adolescent Offenders*, 2 YOUTH VIOLENCE AND JUVENILE JUST. 213, 213 (2004).

48. D. Wayne Osgood et al., *Introduction: Why Focus on the Transition to Adulthood for Vulnerable Populations?*, in ON YOUR OWN WITHOUT A NET: THE TRANSITION TO ADULTHOOD FOR VULNERABLE POPULATIONS 12 (D. Wayne Osgood et al. eds., 2005) (“Given the malleability of the young adult period and the potential for continued growth and development, extending systems of support during the transition should increase the likelihood that more members of these groups will lead productive adult lives.”).

49. STEINBERG, *supra* note 6, at 9, 17 (noting adolescents are “far more sensitive to experience than anyone previously imagined.”).

50. MINTZ, *supra* note 18, at 10.

quite small.⁵¹

After World War II, college enrollment expanded.⁵² Traditionally, men attended college at higher rates than women, but by 1980 the number of women enrolled in college exceeded the number of men.⁵³ Today, young people attend higher education at historically high rates. Over two-thirds of high school graduates enroll in a four-year or community college in the fall after graduating, seventy-two percent of women and sixty-seven percent of men.⁵⁴ Just over one-third of college graduates remain in school to pursue a graduate degree.⁵⁵

Post-secondary education extends adolescence in a couple of ways. College typically delays entry into the full-time labor force. At the same time, it is a protected space full of support to aid the transition to a successful adulthood. College students have access to education, health care, counselors, teachers, internships, study-abroad programs, federally subsidized loans, and subsidized tuition at public universities. Until only very recently, rampant unlawful drinking, drug use, and sexual assault occurred largely untouched by the criminal justice system.⁵⁶ This extended, protected period of education and identity-exploration sets up graduates for better-paying employment once they enter the full-time labor market.⁵⁷

3. *Work and Financial Independence*

It used to be that most young women worked outside the home only for a short time, until they were married or their first child was born, and most young men went to work full-time when they finished school or military service. For a good portion of the twentieth century, the jobs young men entered right out of school were full-time, perhaps even life-long, employment. In addition, those jobs were likely to pay well, even for working class laborers.⁵⁸

51. In 1900, only two percent of eighteen- to twenty-four-year-olds enrolled in college. *120 Years of American Education: A Statistical Portrait*, NAT'L. CTR. FOR EDUC. STATS. 76 (Thomas D. Snyder ed., 1993). "In 1940, more than half of the U.S. population had completed no more than an eighth-grade education. Only 6 percent of males and 4 percent of females had completed 4 years of college." MINTZ, *supra* note 18, at 7.

52. Many colleges, especially elite colleges, did not admit female undergraduates until the 1960s or 1970s. See NANCY WEISS MALKIEL, "KEEP THE DAMNED WOMEN OUT": THE STRUGGLE FOR COEDUCATION (2016). Yale and Princeton did not enroll women until 1969, Harvard not until 1977, and Columbia not until 1981.

53. Snyder *supra* note 51, at 77.

54. See *Immediate College Enrollment Rate*, NAT'L CTR. FOR EDUC. STATS. (Jan. 2018), https://nces.ed.gov/programs/coe/indicator_cpa.asp. The number of African-Americans attending college is near a historical high. Still, a smaller percentage of African-American high school graduates immediately enrolled in college in 2016 (fifty-six percent) than white high school graduates (seventy-one percent). See *id.*

55. Sandy Baum, Ph.D. et al., *Who Goes to Graduate School and Who Succeeds*, URBAN INST. 1, 2 (Jan. 2017), https://www.urban.org/sites/default/files/publication/86981/who_goes_to_graduate_school_and_who_succeeds_1.pdf.

56. See, e.g., *Why College Campuses Adjudicate Their Own Campus Crimes*, NAT'L. PUB. RADIO (Nov. 30, 2014), <https://www.npr.org/2014/11/30/367544499/why-colleges-adjudicate-their-own-campus-crimes>.

57. See *The Rising Cost of Not Going to College*, PEW RES. CTR. (Feb. 2014), <http://www.pewsocialtrends.org/2014/02/11/the-rising-cost-of-not-going-to-college/>.

58. See Ahmed A. White, *The Depression Era Sit-Down Strikes and the Limits of Liberal Labor Law*, 40 SETON HALL L. REV. 1, 21 (2010) (recounting the "unprecedented increases in wages and economic security for

The expansion of college has both delayed entry into the full-time labor force and, because of rising tuition costs, meant that more young people begin adulthood tens, if not hundreds of thousands, of dollars, in the red.⁵⁹ At the same time, most entry-level jobs no longer pay a living wage. Wages have stagnated for all but those at the far edge of the income spectrum⁶⁰ and have declined in real terms for those without a college education.⁶¹ And while those who go right to work in their late teens are earning more money than those in college, it is typically a short-term advantage.⁶² Young people today are also more likely to experience a prolonged period of career instability, with frequent job changes.⁶³ Depressed wages, frequent job changes, and educational debt mean that it can take longer today to secure a full-time job that pays enough to support a family.⁶⁴

These changes have led more young people to rely for a longer period of time on support from parents. According to one study, some parents provide thousands of dollars a year in support, and hundreds of hours of time assistance, to their children past age eighteen.⁶⁵ More young people today live at home with their parents

the industrial working class, laying the foundation of an unparalleled period of post-[World] War [II] middle-class prosperity”).

59. According to the Federal Reserve, as of March 2018, Americans held almost \$1.5 trillion in student loan debt. *Consumer Credit—G.19*, FED. RES. (2018), <https://www.federalreserve.gov/releases/g19/current/default.htm>. Over eleven percent of student borrowers were more than ninety days delinquent. *Quarterly Report on Household Debt and Credit*, FED. RES. BANK OF N.Y. (Nov. 2017), https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/pdf/HHDC_2017Q3.pdf.

60. Adjusted for inflation, the federal minimum wage grew steadily from 1940 to a peak in 1968 and has declined or stagnated since then. Drew Desilver, *5 Facts About the Minimum Wage*, PEW RES. CTR. (Jan. 4, 2017), <http://www.pewresearch.org/fact-tank/2015/07/23/5-facts-about-the-minimum-wage/>.

61. “Among white non-college men in their 20s and early 30s, median earnings declined in real terms from over \$40,000 a year in 1973 to around \$30,000 a year in 2007. Among African-American men of the same age and education, median earnings declined from about \$34,000 to \$25,000 a year in that same period.” Vincent Schiraldi et al., *Community Based Responses to Justice-Involved Young Adults*, 1 NEW THINKING IN CMTY. CORR. 1, 5 (2015), <https://www.hks.harvard.edu/sites/default/files/centers/wiener/programs/pcj/files/ESCC-CommunityBasedResponsesJusticeInvolvedYA.pdf>. The job market increasingly requires a college degree for access to a living wage. Anthony P. Carnevale et al., *The College Advantage: Weathering the Economic Storm*, GEO. PUB. POL’Y INST. CTR. ON EDUC. & THE WORKFORCE 1, 3 (2012).

62. See *The Rising Cost of Not Going to College*, *supra* note 57. Those who decide to go to work instead of attend college may do so because of fewer economic resources. The immediate college enrollment rate for those from high income families was eighty-three percent in 2016, but only sixty-seven percent for those from low income families. National Center for Education Statistics, *Immediate College Enrollment Rate*, NAT’L CTR. FOR EDUC. STATS. (Jan. 2018), https://nces.ed.gov/programs/coe/indicator_cpa.asp.

63. Young adults today are more keen on matching their interests and abilities with the ‘right’ job and have a greater desire for their job to have meaning, leading young people today to try out more fields. Jeffrey Jensen Arnett, *Oh, Grow Up! Generational Grumbling and the New Life Stage of Emerging Adulthood—Commentary on Trzesniewski & Donnellan (2010)*, 5 PERSPECTIVES ON PSYCH. SCI. 89, 90 (2010).

64. Ryan Bhandari and David Brown, *The Opportunity Index: Ranking Opportunity in Metropolitan America* (2018) (finding that only thirty-eight percent of jobs pay enough today to afford a middle- or upper-class life for a dual income-earning family with children), <https://www.thirdway.org/report/the-opportunity-index-ranking-opportunity-in-metropolitan-america>; see generally JENNIFER M. SILVA, *COMING UP SHORT: WORKING-CLASS ADULTHOOD IN AN AGE OF UNCERTAINTY* 66 (2013).

during their twenties than in the last half-century.⁶⁶ Those who do not live with their parents often rely on financial support from parents to pay rent while they complete schooling. Simply put, for a variety of reasons, it takes longer to achieve financial independence than ever before.

4. *Marriage and Child Rearing*

Longer schooling, increased work and wage instability, and delayed financial independence have ripple effects on family formation. Whereas the post-World War II generation moved quickly out of the parental home and into marriage and child rearing, today, most young people experience a prolonged period of independent living before (if ever) committing to marriage and child rearing.

According to the U.S. Census Bureau, the average age of first marriages has risen to its highest point ever.⁶⁷ For men, it is twenty-nine (up from twenty-three from the 1950s to mid-1970s). For women, it is twenty-six (up from twenty). Pew estimates that one in four of today's young adults will never marry.⁶⁸

The mean age of first-time parents in the United States has likewise risen. In 2014, it was 26.3 for mothers, up by 1.5 years since 2000 and almost five years from 1970.⁶⁹ For fathers, it is 27.4, which represents a similar rise compared to the past.⁷⁰

65. Robert F. Shoeni & Karen E. Ross, *Material Assistance from Families During the Transition to Adulthood*, in *ON THE FRONTIER OF ADULTHOOD* 396–415 (Richard A. Settersten, Jr. et al. eds., 2005).

66. Richard Fry, *For First Time in Modern Era, Living With Parents Edges Out Other Living Arrangements for 18- to 34-Year-Olds: Share Living with Spouse or Partner Continues to Fall*, PEW RES. CTR. (May 24, 2016), <http://www.pewsocialtrends.org/2016/05/24/for-first-time-in-modern-era-living-with-parents-edges-out-other-living-arrangements-for-18-to-34-year-olds/>. This is not a historical high. That occurred in 1940, when thirty-five percent of the nation's eighteen- to twenty-four-year-olds lived with their parent(s). *Id.*

67. Jonathan Vespa, *Marrying Older, But Sooner?*, U.S. CENSUS BUREAU (Feb. 10, 2014), <https://www.census.gov/newsroom/blogs/random-samplings/2014/02/marrying-older-but-sooner.html>.

68. Wendy Wang & Kim Parker, *Record Share of Americans Have Never Married*, PEW RES. CTR. (Sept. 24, 2014), <http://www.pewsocialtrends.org/2014/09/24/record-share-of-americans-have-never-married/>. Poor young people and African-Americans are less likely to get married than middle and upper-class individuals, and white Americans. According to Jennifer Silva, working-class young adults find that commitment is more of a financial risk than a bulwark. SILVA, *supra* note 64 (“working-class young adults learn early on that commitment, rather than a hedge against external risks of the market, is simply one demand too many”). The high percentage of incarcerated young black men may also explain the lower marriage rates for African-Americans.

69. T.J. Mathews, M.S. & Brady E. Hamilton, Ph.D., *Mean Age of Mothers is on the Rise: United States, 2000–2014*, NAT'L CTR. FOR HEALTH STATS., 1 (Jan. 2016), <http://www.cdc.gov/nchs/data/databriefs/db232.pdf>; T.J. Mathews & Brady E. Hamilton, *Mean Age of Mother, 1970–2000*, 51 NAT'L VITAL STATS. REP. 1 (2002), https://www.cdc.gov/nchs/data/nvsr/nvsr51/nvsr51_01.pdf (reporting a mean age for first mothers in 1970 of 21.4 years).

70. *See Fatherhood in the U.S.: Men's Age at First Birth, 1987–2010*, NCFMR FAM. PROFILES, <https://www.bgsu.edu/content/dam/BGSU/college-of-arts-and-sciences/NCFMR/documents/FP/FP-11-04.pdf>; *The State of Young America: The Databook*, DEMOS (2011), <http://www.demos.org/publication/state-young-america-databook>.

5. *Self-Perception*

As the above changes have happened, young people have also come to define adulthood differently. Today's young people are more likely to define adulthood by a subjective feeling of self-sufficiency and autonomy than they are by the accomplishment of life events. According to sociologist Jeffrey Jensen Arnett, a leading expert on what he calls "emerging adulthood," the most important criteria for adulthood of the young people he has surveyed were not the tradition markers described above, but "were more intangible and psychological: accepting responsibility for one's actions, making independent decisions, and becoming financially independent."⁷¹ As one individual put it, "[a] boy doesn't necessarily take responsibility for his own actions But a man is responsible for whatever he does I finally realized that I am responsible for everything so I am an adult."⁷² Young people today do not understand adulthood to be defined by their cognitive capacity to make decisions, or reaching an age where the law imposed on them full responsibility, but about feeling like an adult, making independent decisions, and taking responsibility for them.⁷³ As a result, a sense of adulthood does not come to many young people until much later than eighteen.⁷⁴

Moreover, whereas young people decades ago were more eager to settle down into adulthood, young people today are in no hurry to be or feel like an adult. To many, adulthood "represents a closing of doors—the end of independence, the end of spontaneity, the end of a sense of wide-open possibilities."⁷⁵ As one young person put it, "[i]f adulthood means being saddled with a mortgage, a life-sucking nine to five job, two expensive kids, an equally disgruntled spouse, and lifelong educational debt[,] I hope I never reach adulthood."⁷⁶

The lengthening of adolescence matters a great deal to public policy and the law, not the least because an extended adolescence appears to be a developmental advantage. According to adolescence expert Laurence Steinberg, "[p]eople who can delay the transition into adulthood . . . reap the benefits of a longer period of plasticity during which higher-order brain systems continue to mature."⁷⁷ Steinberg concluded that an extended adolescence "portends advantage" and "is an asset, not a liability."⁷⁸

71. JEFFREY JENSEN ARNETT, *EMERGING ADULTHOOD: THE WINDING ROAD FROM LATE TEENS THROUGH THE TWENTIES* vi (2004).

72. *Id.* at 209.

73. *See also* MINTZ, *supra* note, 18 at 19 ("adulthood has come to be defined less by clear rites of passage . . . than by subjective feeling of self-sufficiency and autonomy").

74. *See* ARNETT, *supra* note 71, at 15 (showing survey results that almost sixty percent of those age eighteen to twenty-five say "yes and no" in response to "Do you feel you have reached adulthood?").

75. *Id.* at 6.

76. MINTZ, *supra* note 18, at 69 (quoting an online comment to Robin Marantz Henig, *What Is it About 20-Somethings?*, N.Y. TIMES MAG. (Aug. 22, 2010)).

77. STEINBERG, *supra* note 6, at 164.

78. *Id.* at 164.

The benefits of an extended adolescence are not, however, distributed equally. Differences along class lines and by ethnicity are apparent. Economically poor youth and youth of color start adolescence sooner than other youth, and leave adolescence sooner. At the front end, poor youth and African-Americans start puberty earlier than other youth.⁷⁹ At the back end, poor youth and youth of color leave adolescence and enter adulthood sooner than other youth. With regard to education, work, marriage and child rearing, middle and upper class youth are more likely to stay in school longer, delay entrance to full-time labor force, delay getting married, and put off becoming parents. College tuition, room and board, unpaid internships, “gap years” traveling the world all require subsidizing, or taking on debt.⁸⁰ Young adults from middle- and upper-class families have greater access to financial support than poor youth. According to one study, young adults whose parents are in the top quartile of income receive approximately three times as much material support as those whose parents were in the bottom half of income.⁸¹ Lacking the ability to take on tuition costs or room and board during an unpaid internship (much less a “gap year”), poor youth are more likely to forego an extended adolescence and transition more quickly into the workforce, self-sufficiency, and adulthood.⁸²

The financial impediment to an extended adolescence may explain the different class-based attitudes about the transition to adulthood uncovered by researchers. Less affluent Americans, when asked, give earlier deadlines for leaving home, completing school, obtaining full-time employment, marrying, and parenting.⁸³ In her study of modern childhood, Annette Lareau found striking differences in the way that young people were treated by their parents along class lines. Lareau found that “in middle-class families, [the young people in their late teens and early twenties] frequently were treated as if they were still children, while in working-class and poor families they were treated as if they were grown.”⁸⁴ The attitude difference was not just a generational one. According to Lareau, both parents *and* children in working-class and poor families considered post-adolescent children “grown.” By contrast, in middle-class families, “the young adults seemed to still

79. See *Id.* at 177; Euling, *supra* note 38, at S176 (“Analyses . . . revealed racial differences in the timing of female puberty; black girls were younger than white girls at the same stage of breast development, pubic hair development, and menarche,” and “[f]or boys, the onset of genital and pubic hair development occurs earlier in black than white boys.”).

80. According to the College Board, the average annual budget for undergraduates in 2018–2019 ranged from 17,930 for two-year colleges to 52,500 for four-year private colleges. *Average Estimated Undergraduate Budgets, 2018-2019*, COLLEGEBOARD, <https://trends.collegeboard.org/college-pricing/figures-tables/average-estimated-undergraduate-budgets-2018-19> (last visited Nov. 20, 2018).

81. NAT'L POVERTY CTR., POLICY BRIEF: FAMILY SUPPORT DURING THE TRANSITION TO ADULTHOOD 2 (2004); see also Chuck Collins, *The Wealthy Kids are Alright*, AM. PROSPECT (May 28, 2013).

82. See Arnett, *supra* note 63, at 22 (noting poor and minority youth “may be less likely to experience their late teens and early twenties as a period of emerging adulthood”).

83. Richard A. Settersten, Jr. & Barbara Ray, *What's Going on with Young People Today? The Long and Twisting Path to Adulthood*, 20 FUTURE OF CHILD. 19, 22 (Spring 2010).

84. ANNETTE LAREAU, *UNEQUAL CHILDHOODS: CLASS, RACE AND FAMILY LIFE* 266 (2d ed. 2011).

rely heavily on their parents and, in crucial ways, the parents often continued to treat them as children [who would benefit from continuous monitoring and assistance].”⁸⁵

There is also evidence that race correlates with an earlier (at least perceived) transition to adulthood. This phenomenon is not a new one. During the slavery era, white owners considered slaves to be adults when they became full hands, at sixteen or younger.⁸⁶ Today, youth of color are more likely to leave adolescence and enter adulthood sooner than white youth for a couple of reasons. Youth of color are less likely to have access to the economic and social resources that enable an extended adolescence.⁸⁷ Cross-race perceptions further skew the distribution of extended adolescence. Modern research has shown that whites view youth of color as older than their chronological age. In one study, researchers found that study participants (mostly white male police officers and female undergraduate students) were more likely to mistake black youth as older than their actual age, by an average of 4.5 years.⁸⁸ That is, they perceive a fourteen-year-old black youth as an eighteen-year-old and a sixteen-year-old as twenty.

The same effect has been documented in school settings as well. Ann Arnett Ferguson spent over three years observing a racially-mixed public intermediate school (grades four to six).⁸⁹ She concluded that African American students are not seen as childlike but “adultified,” as “naturally naughty” and “willfully bad.”⁹⁰ Their misbehavior was not seen as typical childishness, but was “likely to be interpreted as symptomatic of ominous criminal proclivities.”⁹¹ In one example, a white teacher described as “looters” the African-American children who borrowed books from a classroom without returning them. As Ferguson put it, “what might be interpreted as the careless behavior of children is displaced by images of adult acts of theft that conjure up violence and mayhem.”⁹²

85. *Id.* at 287.

86. See GEOFF K. WARD, *THE BLACK CHILD-SAVERS: RACIAL DEMOCRACY AND JUVENILE JUSTICE* 36 (2012) (noting black youth were not included in the conception of childhood because the “antebellum black child was never expected to become an economically independent or politically equal participant in American civil society”).

87. According to the Kids Count Data Center, as of 2016, over one-third of American Indian and African-American youth (under eighteen) live in families with incomes below the federal poverty line, compared to nineteen percent of youth overall, twenty-eight percent of Hispanic/Latino youth, and twelve percent of non-Hispanic White youth. *Children in Poverty (100%) by Age Group and Race and Ethnicity*, KIDS COUNT DATA CTR., <https://datacenter.kidscount.org/> (last updated September 2018).

88. Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PSYCHOL. 526, 532 (2014).

89. ANN ARNETT FERGUSON, *BAD BOYS: PUBLIC SCHOOLS IN THE MAKING OF BLACK MASCULINITY* (2000).

90. *Id.* at 80.

91. *Id.* at 89; see also Anne Gregory & Rhona S. Weinstein, *The Discipline Gap and African Americans: Defiance or Cooperation in the High School Classroom*, 46 J. SCH. PSYCHOL. 455–75 (2008) (finding teachers perceived African-American students as more defiant, disrespectful, and rule-breaking than other groups).

92. FERGUSON, *supra* note 89, at 83.

The differential patterns make poor youth and youth of color at a higher risk of contact with the criminal justice system. As shown above, poor youth and youth of color enter adolescence sooner, and move into adulthood (or perceived adulthood) more quickly. “[T]he impact of early puberty on the development of self-control is negative,” and “is associated with delinquency, substance abuse, and other risky behaviors.”⁹³ The impact of a delayed adulthood on self-control is, conversely, positive.⁹⁴ As a result, “the general trend toward a longer adolescence has been far more advantageous to the privileged than to the underprivileged.”⁹⁵

II. REGULATING YOUNG ADULTHOOD: CURRENT LEGAL LANDSCAPE

As Jonathan Todres has observed, “maturity determinations are pivotal to outcomes” across numerous areas of law.⁹⁶ Among other things, they govern access to rights and the extent of one’s legal accountability. Laws have traditionally and continue to predominantly take an age-based approach to separating childhood (and adolescence) from adulthood. The lengthening of adolescence, by itself, demands that we rethink how law and social institutions serve those eighteen and up.⁹⁷ This section briefly explains the law’s withering commitment to age eighteen as the legal line separating adolescents from adults. This groundwork sets up the criminal justice policy analysis that follows in Part III.

The predominant age at which individuals have been considered adults in American society has typically been eighteen.⁹⁸ Why eighteen? As explained above, until recently, eighteen roughly corresponded with the end of compulsory education and the switch from a life of dependency to an independent life of work and a family of one’s own.⁹⁹ Eighteen is also the age at which individuals acquire the right to vote, and thus full membership in the political community.¹⁰⁰

93. STEINBERG, *supra* note 6, at 177; Christopher Uggen & Sara Wakefield, *Young Adults Reentering the Community from the Criminal Justice System: The Challenge of Becoming an Adult*, in *TRANSITION TO ADULTHOOD FOR VULNERABLE POPULATIONS* 114, 130–31 (D. Wayne Osgood et al. eds., 2005) (citing Deborah J. Safron et al., *Part-time Work and Hurried Adolescence: The Links Among Work Intensity, Social Activities, Health Behaviors, and Substance Use*, 42 *J. HEALTH & SOC. BEHAV.* 425 (2001)).

94. STEINBERG, *supra* note 6, at 177.

95. *Id.*

96. Jonathan Todres, *Maturity*, 48 *HOUS. L. REV.* 1107, 1109–1110 (2012).

97. See Gordon Berlin et al., *Introducing the Issue*, 20 *FUTURE OF CHILD.* 3, 3 (2010) (“Now that researchers have shown how and why the timetable for becoming an adult has altered, policy makers must rethink” how social institutions provide those becoming adults with services.); Setttersen & Ray, *supra* note 83, at 34 (“As the transition to adulthood evolves, so too must society’s institutions.”).

98. Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 *HOFSTRA L. REV.* 547, 559 (2000) (the dominant assumption is that “legal adulthood begins at age eighteen”).

99. See Part (I)(B)(2), *supra*.

100. U.S. CONST. amend. XXVI (prohibiting the denial of the right to vote on the basis of age to those eighteen and over).

That is not to say that the line is always drawn there. In fact, legal thresholds for maturity vary widely.¹⁰¹ As early as seven, individuals can be held criminally responsible for their actions in criminal court.¹⁰² At fourteen, individuals can work lawfully in non-agricultural labor.¹⁰³ Individuals can legally drive a vehicle and, in most states, lawfully consent to sex, at sixteen.¹⁰⁴ Voting, the right to marry, the right to enter into a non-voidable contract, and military service become available at age eighteen.¹⁰⁵ The right to purchase alcohol (and in most states gamble at casinos) is restricted until age twenty-one.¹⁰⁶ It is much more difficult, and costly, to rent a car before age twenty-five.¹⁰⁷ And you cannot be President until you turn thirty-five.¹⁰⁸

These different maturity lines reflect the reality that individuals develop competencies at different times, and that the law should align responsibility with capacity. Indeed, the cultural and biological lengthening of adolescence, and the centering of cognitive development to rulemaking, has reduced the importance of eighteen as a line that matters throughout the law. Some changes have been driven by a recognition that many eighteen-year-olds were unprepared or unable to independently support themselves.¹⁰⁹ The Foster Care Independence Act of 1999, for

101. See Todres, *supra* note 96, at 1107 (“[m]arkers of maturity in the law frequently occur at different points in time”).

102. See OKLA. STAT. ANN. tit. 21 § 152 (West 1998) (Children over the age of seven but under the age fourteen, are deemed not to be capable of committing crimes without “proof that at the time of committing the act . . . they knew its wrongfulness.”).

103. U.S. Dep’t of Labor, *Fair Labor Standards Act Advisor*, <https://webapps.dol.gov/elaws/faq/esa/flsa/029.htm> (adding, “at any age, youth may deliver newspapers; perform in radio, television, movie, or theatrical productions; work in businesses owned by their parents (except in mining, manufacturing or on hazardous jobs); perform babysitting or perform minor chores around a private home. Also, at any age, youth may be employed as homeworkers to gather evergreens and make evergreen wreaths.”).

104. See ASAPH GLOSSER et al., DEP’T OF HEALTH & HUM. SERVS., STATUTORY RAPE: A GUIDE TO STATE LAWS AND REPORTING REQUIREMENTS ES-1, ES-2 (2004) (discussing state age-of-consent laws); Kate Sutherland, *From Jailbird to Jailbait: Age of Consent Laws and the Construction of Teenage Sexualities*, 9 WM. & MARY J. WOMEN & L. 313, 314–19 (2003) (same).

105. U.S. CONST. amend. XVI (voting); 10 U.S.C. § 505(a) (2012) (“no person under eighteen years of age may be originally enlisted without the written consent of his parent or guardian, if he has a parent or guardian entitled to his custody and control”); Cheryl B. Preston et al., *Infancy Doctrine Inquiries*, 52 SANTA CLARA L. REV. 47, 50 (2012) (minor’s contracts are generally voidable); *U.S. Marriage Laws*, MARRIAGE LICENSE LAWS, <https://www.usmarriagelaws.com/marriage-license/application/requirements/procedures/documents-needed.shtml> (last visited Nov. 20, 2018) (in Nebraska, the age of majority is nineteen; NEB. REV. STAT. § 43-2101 (effective July 19, 2018); and twenty-one in Mississippi, unless all parents or guardians consent; MISS. CODE ANN. § 93-1-5(a) (West 2012)).

106. National Minimum Drinking Act of 1984, 23 U.S.C. § 158 (2012); (withholding revenue from states that allow the purchase of alcohol by anyone under the age of twenty-one); *Complete Guide to USA Casino Gambling*, CASINO.ORG, <https://www.casino.org/us/guide/> (last visited Nov. 20, 2018) (twenty-eight states prohibit all gambling until age twenty-one).

107. Brittany Leigh Anas, *How to Rent a Car When You are Under 25*, USA TODAY: TRAVEL TIPS (Mar. 18, 2018), <https://traveltips.usatoday.com/rent-car-under-25-61224.html>.

108. U.S. CONST. art. II, § I.

109. 20 U.S.C. § 1412(a)(1)(A) (2012); D. Wayne Osgood et al., *Vulnerable Populations and the Transition to Adulthood*, 20 FUTURE OF CHILD. 209 (2010) (explaining that these reforms “mark[] a philosophical shift

example, permitted states to extend Medicaid eligibility and access to other benefits to former foster youth up to age twenty-one.¹¹⁰ A decade later, Congress made federal reimbursements available for foster care services provided to individuals beyond the age of eighteen.¹¹¹ The Individuals with Disabilities Education Act (IDEA) extended the availability of free services to individuals age twenty-two to better “prepare [them] for employment and independent living.”¹¹² The Internal Revenue Service allows full-time college students to be claimed as dependents until twenty-four.¹¹³ And Obamacare allows individuals to remain as dependents on their parents’ health insurance until they are twenty-six.¹¹⁴

Other laws reflect the growing recognition that individuals are not mature or responsible enough at eighteen for full privileges or accountability. The federal Gun Control Act, for example, does not allow individuals to purchase handguns from federal firearms licensees until they are twenty-one years old.¹¹⁵ Some states do not permit individuals to serve on juries until they are twenty-one.¹¹⁶ Likewise, every state restricts alcohol purchases to those twenty-one and up.¹¹⁷ Recently, California raised the age to lawfully purchase tobacco from eighteen to twenty-one.¹¹⁸ And several jurisdictions are considering or have already implemented reforms that raise the age of juvenile court jurisdiction (and therefore reduce the number of young people charged as adults and punished in adult criminal court).¹¹⁹

Together, these legal reforms reflect the reality that people do not magically become fully responsible, self-sufficient adults when they turn eighteen.¹²⁰ This is

toward acknowledging continuing state responsibility to act *in loco parentis* for foster youth into early adulthood.”).

110. John H. Chafee Foster Care Program for Successful Transition to Adulthood, 42 U.S.C. § 677 (2012).

111. Fostering Connections to Success and Increasing Adoptions Act of 2008, 42 U.S.C. § 1305 note (2012).

112. Individuals with Disabilities Education Act Amendments of 1997 § 601(d)(1)(A), 20 U.S.C. § 1400 (2012); Phyllis Levine & Mary Wagner, *Transition for Young Adults Who Receive Special Education Services as Adolescents: A Time of Challenge and Change*, in ON YOUR OWN WITHOUT A NET: THE TRANSITION TO ADULTHOOD FOR VULNERABLE POPULATIONS 204 (D. Wayne Osgood et al. eds., 2005) (planning for the transition to adulthood has become a focus of federal policy for students with disabilities).

113. I.R.C. § 152(c)(3)(A)(ii).

114. 42 U.S.C. § 300gg-14(a) (2012) (“A group health plan and a health insurance issuer offering group or individual health insurance coverage that provides dependent coverage of children shall continue to make such coverage available for an adult child until the child turns 26 years of age.”).

115. 18 U.S.C. §§ 922(b)(1), (c)(1) (2012). See also *Minimum Age to Purchase & Possess*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, <https://lawcenter.giffords.org/gun-laws/policy-areas/who-can-have-a-gun/minimum-age/> (last visited Dec. 20, 2018).

116. MISS. CODE ANN. § 13-5-1 (West 1970) (twenty-one to serve on jury); MO. ANN. STAT. § 494.425(1) (2016) (twenty-one to serve on jury); ALA. CODE § 12-16-60(a)(1) (1978) (nineteen to serve on jury); NEB. REV. STAT. § 25-1601(1) (2003) (nineteen to serve on jury).

117. The National Minimum Drinking Age Act, 23 U.S.C. § 158 (West 2012). The Act does not mandate a twenty-one-year-old rule, but has provided states with financial incentives to enact one since 1984.

118. CAL. BUS. & PROF. CODE § 22963 (West 2016).

119. See *infra*, notes 171–74.

120. See *Roper v. Simmons*, 543 U.S. 551, 574 (2005) (choosing to draw the line regarding the constitutionality of the death penalty at eighteen, and acknowledging that “the qualities that distinguish juveniles from adults do not disappear when an individual turns eighteen”). As professor of criminal justice Jeffrey Butts

especially true for those from vulnerable populations, like poor and minority youth, who may not have been raised with the resources of more economically advantaged youth and who may require more supportive services during the transition to adulthood.

In the last decade, criminal justice policy has also begun to exhibit more protective impulses for young offenders.¹²¹ Developmental science has led courts to restrict the punishments that can be imposed on young offenders.¹²² In a trio of cases, the Supreme Court has mandated a sentencing discount for youth under eighteen convicted in criminal court, prohibiting the death penalty and mandatory life without parole sentences for adolescent offenders.¹²³ It did so based on empirical research regarding the distinguishing characteristics of youth.¹²⁴ What the Court did not explore, however, was whether the developmental research justified fixing the bright line at age eighteen. Instead, it observed that eighteen “is the point where society draws the line for many purposes between childhood and adulthood” and left it at that.¹²⁵

This principle is beginning to extend to those beyond age eighteen. In 2015, an Illinois appellate court held that the mandatory life without parole sentence imposed on nineteen-year-old Antonio House was unconstitutional as applied because, “while defendant was not a juvenile at the time of the offense, his young age of nineteen is relevant.”¹²⁶ The court discussed at length the Supreme Court’s consideration of continuing brain development in *Roper*, *Graham*, and *Miller*, and recent research explaining the difference between “young adults, like defendant, and a fully mature adult.”¹²⁷ The court held that it was relevant to sentencing that the defendant was “barely a legal adult and still a teenager.”¹²⁸

The same research has prompted many jurisdictions to extend special protections to young adults. Some minimize the consequences for youth processed in criminal

put it, development does not end, and adulthood begin, at some “magic birthday.” NAT’L INST. OF JUST., Justice-Involved Young Adults Research Planning Meeting, Minutes 19 (December 12, 2016), <https://www.ncjrs.gov/pdffiles1/nij/250735.pdf>.

121. See Elizabeth S. Scott, “*Children Are Different*”: *Constitutional Values and Justice Policy*, 11 OHIO ST. J. CRIM. L. 71, 72 (2013) (“[T]he Court has announced a broad principle grounded in developmental knowledge that ‘children are different’ from adult offenders and that these differences are important to the law’s response to youthful criminal conduct.”); Stamm, *supra* note 16, at 105.

122. Scott, *supra* note 121, at 72.

123. See *Roper*, 543 U.S. at 551 (2005) (prohibiting the death penalty for juvenile offenders); *Graham v. Florida*, 560 U.S. 48 (2010) (prohibiting life in prison without parole for non-homicide offenses committed by juveniles); *Miller v. Alabama*, 567 U.S. 460 (2012) (prohibiting mandatory life without parole for juvenile offenders).

124. *Roper*, 543 U.S. at 568 (discussing three general differences between juveniles and adults: (1) they are more likely to lack maturity and have an underdeveloped sense of responsibility; (2) they are more vulnerable and susceptible to negative influences and outside pressures; and (3) their characters are not yet fully formed).

125. *Id.* at 574.

126. *People v. House*, 72 N.E.3d 357, 384 (Ill. App. 1st Dist. 2015), *appeal denied, judgment vacated*, 111 N. E.3d 940 (Ill. 2018).

127. *Id.* at 387.

128. *Id.* at 388.

court. In New York, “Youthful Offender” status is available to a limited number of young people charged in criminal court: those at least sixteen but not yet nineteen, facing certain charges and without certain criminal history.¹²⁹ Those who qualify benefit from a sealed accusatory instrument, may have their arraignment and all proceedings conducted in private, can receive reduced sentences that do not carry the same consequences as a conviction, and their court records are confidential.¹³⁰ Several other states have similar youthful offender provisions for those eighteen and up.¹³¹ Others have set up dedicated probation units and detention facilities that provide services tailored to the distinct developmental needs of those ages eighteen to twenty-five.¹³²

States have also extended the reach of their juvenile justice system beyond the age of eighteen. In many states, adolescent offenders can and do remain under juvenile court jurisdiction into their adult years.¹³³ At least thirty-six states and the District of Columbia allow juvenile courts to retain jurisdiction over individuals adjudicated delinquent until they reach twenty.¹³⁴ In California, Oregon, Montana, and Wisconsin, the juvenile court can retain jurisdiction until they reach twenty-five.¹³⁵ In Colorado, Hawaii, and New Mexico it can be even longer.¹³⁶

129. N.Y. CRIM. PROC. § 720.10 (McKinney 2006).

130. N.Y. CRIM. PROC. §§ 720.15, 720.20, 720.35 (McKinney 2014).

131. Stamm, *supra* note 16, at 82–88.

132. San Francisco has a Transitional Age Youth Unit that serves probationers ages eighteen to twenty-five. The Pine Grove Correctional Facility in Pennsylvania focuses on fifteen- to twenty-year-olds and “is run as a therapeutic community providing this unique population the opportunity to mature in a nurturing environment.” PINE GROVE CORRECTIONAL FACILITY, <http://www.cor.pa.gov/Facilities/StatePrisons/Pages/Pine-Grove.aspx> (last visited Nov. 21, 2018). Maine expanded a juvenile facility to include offenders under 26, where it provides “educational, therapeutic, and substance abuse [services] designed to meet individual risks and needs.” MOUNTAIN VIEW CORRECTIONAL FACILITY, <http://maine.gov/corrections/juvenile/Facilities/MVYDC/index.htm> (last visited Nov. 21, 2018).

133. He Len Chung et al., *The Transition to Adulthood for Adolescents in the Juvenile Justice System: A Developmental Perspective*, in ON YOUR OWN WITHOUT A NET: THE TRANSITION TO ADULTHOOD FOR VULNERABLE POPULATIONS 71 (D. Wayne Osgood et al. eds., 2005).

134. *Jurisdictional Boundaries*, JUVENILE JUST. GEOGRAPHY, POL’Y, PRACTICE & STATS., <http://www.jjgps.org/jurisdictional-boundaries>.

135. See CAL. WELF. & INST. CODE § 607.1 (West 2011) (“The court shall retain jurisdiction as described in paragraph (1) until one of the following applies: (A) the person attains the age of 25 years.”); MONT. CODE ANN. § 41-5-205 (West 2017) (“The jurisdiction of the court over an extended jurisdiction juvenile, with respect to the offense for which the youth was convicted as an extended jurisdiction juvenile, extends until the offender becomes 25 years of age unless the court terminates jurisdiction before that date.”); OR. REV. STAT. ANN. § 419C.005 (West 2007) (“The court’s jurisdiction over a person under this section or ORS 419C.067 continues until one of the following occurs: (d) the person becomes 25 years of age.”); WIS. STAT. ANN. § 938.355 (West 2017) (“an order under . . . before the juvenile attains 18 years of age shall apply for 5 years after the date on which the order is granted, if the juvenile is adjudicated delinquent for committing a violation . . . or for committing an act that would be punishable as a Class B or C felony if committed by an adult, or until the juvenile reaches 25 years of age, if the juvenile is adjudicated delinquent for committing an act that would be punishable as a Class A felony if committed by an adult.”).

136. See *e.g.*, Chung, *supra* note 133, at 72 (noting in 1997, almost 15,000 of residents in juvenile facilities were between the ages of eighteen and twenty years old.); COLO. REV. STAT. ANN. § 19-2-104(6) (West 2018) (“The juvenile court may retain jurisdiction over a juvenile until all orders have been fully complied with by such person, or any pending cases have been completed, or the statute of limitations applicable to any offense that may be charged has run, regardless of whether such person has attained the age of eighteen years, and regardless of

These reform efforts should not, however, be understood to reflect the typical approach. For most offenders eighteen to twenty-four, the criminal justice system currently offers little accommodation. All are mandatorily processed in adult criminal courts, where they are processed en masse for low-level offenses,¹³⁷ and incarcerated or intensely surveilled in ways that not only fail to rehabilitate them but may increase recidivism rates¹³⁸ and shackle them with debilitating criminal records.¹³⁹

III. ACCOMMODATING YOUNG ADULTHOOD

The previous sections have shown that the transition to adulthood now takes years longer than it used to, that the brain is still developing and especially sensitive to experience during this extended adolescence, and that, in response, legal reforms have moved away from eighteen as the line distinguishing youth from adults. This Part focuses on how the criminal justice system might intervene with regards to this critical age group of offenders in a way that reduces the risk of future offending and enhances the legitimacy of the criminal justice system.

A. Criminal Court Accommodations

Young adults engage in risky behaviors like binge drinking, substance abuse, and unprotected sex, much more than their older adult counterparts.¹⁴⁰ Similarly, criminal offending and violent offending peak amongst those aged eighteen to twenty-four.¹⁴¹ Nevertheless, every person age eighteen or older accused of

the age of such person.”); HAW. REV. STAT. ANN. § 571-13 (West 1998) (“Except as otherwise provided in this chapter, jurisdiction obtained by the court in the case of a minor may be retained by it, for the purposes of this chapter, after the minor becomes eighteen years of age until the full term for which any order entered shall have expired.”); N.J. STAT. ANN. § 2A:4A-45 (West 1995) (“The court shall retain jurisdiction over any case in which it has entered a disposition . . . for the duration of that disposition of commitment or incarceration and may substitute any disposition otherwise available to it.”).

137. See Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 101 (2012).

138. See ANDREW GUTHRIE FERGUSON, *THE RISE OF BIG DATA POLICING: SURVEILLANCE, RACE, AND THE FUTURE OF LAW ENFORCEMENT* (2017); Martin H. Pritikin, *Is Prison Increasing Crime?*, 2008 WIS. L. REV. 1049, 1089–90 (2008) (identifying the criminogenic effects of pervasive incarceration). *But see* JOHN PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM* 67–68 (2017).

139. See generally JAMES B. JACOBS, *THE ETERNAL CRIMINAL RECORD* (2015).

140. See Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 DEVELOPMENTAL REV. 78, 79 (2008); Frank F. Furstenberg, *Growing Up Healthy: Are Adolescents the Right Target Group?*, 39 J. ADOLESCENT HEALTH 303, 303 (2006) (“Young adults face higher risks of mortality from suicide, homicide, and accidents, health-compromising behaviors such as smoking and substance abuse, reproductive health problems, and a range of mental disorders than do youth in their early teens.”).

141. Eighteen to twenty-four year-olds are approximately ten percent of the U.S. population but account for 26.8% of criminal arrests. U.S. CENSUS BUREAU, *AGE AND SEX COMPOSITION: 2010*, <https://www.census.gov/prod/cen2010/briefs/c2010br-03.pdf> (last visited Nov. 22, 2018); FED. BUREAU OF INVESTIGATION, CRIM. JUST. INFO. SERVS. DIV., *2014 CRIME IN THE UNITED STATES*, <https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/tables/table-38> (last visited Nov. 22, 2018). This group is disproportionately likely to be arrested for violent crime and disproportionately likely to recidivate. See U.S. SENTENCING COMM’N., *The Effects of Aging on Recidivism Among Federal Offenders* 22–23 (2017) <https://www.ussc.gov/sites/default/files/>

violating the criminal law in the United States has always been charged, if they are charged, as an adult in criminal court. Long-held assumptions about the developmental maturity and the dominant cultural view that adulthood begins at eighteen explain why this group has traditionally been subject only to criminal court jurisdiction.

The cultural and scientific evidence discussed in Part I shows that adolescence now extends through the teens and into the twenties.¹⁴² This is true even when adolescents offend, and irrespective of the crime charged. As leading adolescence expert Laurence Steinberg put it, “[n]o matter how ‘adult-like’ the crime is, it doesn’t change the fact that brain systems that govern abilities like thinking ahead and impulse control are still developing.”¹⁴³ To proceed as if a crime, by itself, turns an adolescent into an adult is to adhere to what Frank Zimring dubbed the “forfeiture theory” where young people lose the protections of youth as a consequence of their unlawful act.¹⁴⁴ As Zimring observed, “[t]here is certainly no logically necessary reason that protective features of youth policy are only for nice kids.”¹⁴⁵ As leading scholars of adolescence recently observed, “the possibility that much risky behavior, including involvement in criminal activity, is a product of psychological and social immaturity raises the question of whether the presumption of reduced culpability and greater potential for reform should be applied to young adult offenders as well as juveniles.”¹⁴⁶

One potential response to the extension of adolescence is to keep those offenders aged eighteen to twenty-five years in criminal court, and import more protective, developmentally informed policies to criminal justice. Accommodating extended adolescence in criminal court is precisely what major figures in juvenile law and adolescent developmental psychology advocated in a *New York Times* editorial entitled “Don’t Treat Young Adults as Teenagers.”¹⁴⁷ Numerous scholars have argued in greater length and detail for such an approach. Some have urged

pdf/research-and-publications/research-publications/2017/20171207_Recidivism-Age.pdf. (“The Commission found that younger offenders were more likely to be rearrested than older offenders, were rearrested faster than older offenders, and committed more serious offenses after they were released than older offenders.”).

142. See *supra* Part I.

143. STEINBERG, *supra* note 6, at 192.

144. Franklin E. Zimring, *Toward a Jurisprudence of Youth Violence*, 24 CRIME & JUST. 477, 483 (1998).

145. *Id.*

146. Elizabeth S. Scott et al., *Young Adulthood as a Transitional Legal Category: Science, Social Change, and Justice Policy*, 85 FORDHAM L. REV. 641, 642 (2016) (arguing for reduced sanctions for young adults for less serious crimes and special parole and correctional programs and settings).

147. See Laurence Steinberg et al., Editorial, *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> (arguing to keep young adult offenders in the adult justice system and accommodating their developmental needs there); (arguing for reduced sanctions for young adults for less serious crimes and special parole and correctional programs and settings). The authors pioneered and published leading texts on developmental-informed reforms to juvenile justice. See, e.g., THOMAS GRISSO, JUVENILES’ WAIVER OF RIGHTS: LEGAL AND PSYCHOLOGICAL COMPETENCE (1981); NAT’L RES. COUNCIL, REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH (Richard J. Bonnie et al. eds., 2013); ELIZABETH S. SCOTT & LAURENCE STEINBERG, RETHINKING JUVENILE JUSTICE 13 (2009) (arguing that juvenile justice policy should reflect what we know about youth: that

sentencing discounts to better reflect young adults' incomplete maturity and diminished responsibility.¹⁴⁸ In fact, at least twelve states have special sentencing options for young adults convicted in criminal court.¹⁴⁹ Others have argued for additional special protections for young adults in criminal court, like increased confidentiality and greater opportunities for sealing and expunging criminal records for young adults.¹⁵⁰ Specialized programming for incarcerated young adult offenders has also been proposed and adopted.¹⁵¹

Accommodating extended adolescence in criminal court offers several advantages. It has the benefit of applying to young adult offenders universally, avoiding any potential discrimination in the allocation or withholding of benefits based on factors such as race.¹⁵² In addition, as compared to expanding juvenile court jurisdiction or creating Young Adult Court, accommodating extended adolescence in criminal court requires little new infrastructure. Perhaps more importantly, it zeroes in on the crucial issue: the punitiveness of criminal court for those who arguably have a reduced culpability because of the developmental research discussed above.¹⁵³ Moreover, it does so without disrupting the traditional, legislatively-enacted jurisdictional dividing lines. This avoids the bureaucratic and legislative challenge of determining which aged offenders, facing which charges, would or would not properly belong in criminal court as opposed to juvenile or young adult court. In fact, it would likely eliminate the need for a system of

adolescence is a distinct stage of cognitive and emotional development and that adolescents should be treated neither like adults nor like children).

148. See Feld, *supra* note 12, at 108; see also Andrew Michaels, *A Decent Proposal: Exempting Eighteen- to Twenty-Year-Olds from the Death Penalty*, 40 N.Y.U. L. REV. & SOC. CHANGE 139, 144 (2016).

149. See Stamm, *supra* note 16, at 80–87 (identifying at least twelve states that have special sentencing options for young adults).

150. See Schiraldi, *supra* note 61, at 1, 8–9, 15 (recommending gradually diminishing protections for young adults up to age twenty-four or twenty-five, such as enhanced confidentiality, more access to sealing, and greater use of certificates of relief from disabilities); Gass, *supra* note 13 (proposing that young adults have their criminal cases heard confidentially, their records sealed, and the opportunity to have those records expunged); MODEL PENAL CODE § 6.05 (AM. LAW INST., Tentative Draft No. 2, 2011) (recommending a sentencing provision for sixteen to twenty-two-year-olds that reduces sentences, served in facility that houses similar-aged offenders, and additional provisions permitting the vacating of convictions after release or discharge). At least eight states already have special provisions governing the expungement of criminal records for young adults. See Stamm, *supra* note 16, at 97–100 (identifying eight such states).

151. Melissa S. Caulum, *Postadolescent Brain Development: A Disconnect Between Neuroscience, Emerging Adults, and the Corrections System*, 2007 WIS. L. REV. 729, 756 (2007) (recommending special programming for incarcerated young adult offenders).

152. Alternatively, criminal courts could do a better job of taking relevant developmental characteristics into account on a case-by-case basis. An analysis of this option is beyond the scope of this paper. In short, this would avoid any over-inclusiveness problems with an age-based sentencing discount but would come with its own efficiency drawbacks. It would also make space for unequal recognition of extended adolescence along impermissible or unjustifiable lines such as class or race. See, e.g., Kathleen Tierney, *The "Leniency Epidemic": A Study of Leniency Granted to Convicted Rapists in America and Australia*, 6 PENN ST. J.L. & INT'L AFF. 342, 344 (2018).

153. See *supra* Part I.

transfer or waiver altogether. And it would avoid overwhelming juvenile courts with tens of thousands of new cases and the systemic shock that it could cause.

Keeping all extended adolescent offenders in criminal court is open to several objections. First, it will continue to subject hundreds of thousands of young people to a punitive, dysfunctional, racist, and classist system of state coercion. Countless qualitative and quantitative studies have demonstrated that criminal court is, in a word, awful.¹⁵⁴ It is focused on punishment and incarceration, with few meaningful rehabilitative options available.¹⁵⁵ This is not just limited to the incarcerated: nationwide, probation and parole departments have also restricted their rehabilitative offerings.¹⁵⁶

This is not to say that deterrence and punishment have no place in sanctioning policy. They certainly do. But “so too does providing young people with the tools and skills they need to transition to adulthood in ways that promote prosocial, legitimate, and constructive behavior.”¹⁵⁷ And “young adult offenders . . . are more likely to become productive members of society if they are given the tools to do so during a critical developmental period.”¹⁵⁸

Currently, however, criminal court and criminal justice institutions like correctional facilities and parole offices are neither well-positioned nor staffed to do so. By and large, criminal courts are not designed for the kind of service-heavy, community-based dispositions that would best reflect the rehabilitative needs and capacities of young adult offenders. Furthermore, many judges are not yet aware of the research discussed above about young adults and its relevance to culpability and sentencing. Similarly, most probation officers are not trained, or equipped to address the distinct developmental needs of young adults in a productive way.¹⁵⁹

154. See, e.g., MALCOLM FEELEY, *THE PROCESS IS THE PUNISHMENT* (1979); NICOLE GONZALEZ VAN CLEVE, *CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA’S LARGEST CRIMINAL COURT* (2016).

155. See Michelle S. Phelps, *Rehabilitation in the Punitive Era: The Gap Between Rhetoric and Reality in U.S. Prison Programs*, 45 *LAW & SOC’Y REV.* 33, 34 (2011); RYAN S. KING & MARC MAUER, *THE SENTENCING PROJECT, STATE SENTENCING AND CORRECTIONS POLICY IN AN ERA OF FISCAL RESTRAINT* 11–16 (2002) <https://www.sentencingproject.org/wp-content/uploads/2016/01/State-Sentencing-and-Corrections-Policy-in-an-Era-of-Fiscal-Restraint.pdf> (identifying state cuts to treatment programs as a way to reduce corrections budgets).

156. See Michael P. Jacobson et al., *Less Is More: How Reducing Probation Populations Can Improve Outcomes*, EXEC. SESSION ON CMTY. CORRS., Aug. 2017, at 6 (noting “probation’s slow move away from a ‘helping’ or rehabilitation-focused profession to one that is far more oriented to monitoring, supervision, and the detection of violations”), https://www.hks.harvard.edu/sites/default/files/centers/wiener/programs/pcj/files/less_is_more_final.pdf.

157. See David Altschuler, *Policy and Program Perspectives on the Transition to Adulthood for Adolescents in the Juvenile Justice System*, in *ON YOUR OWN WITHOUT A NET: THE TRANSITION TO ADULTHOOD FOR VULNERABLE POPULATIONS* 108 (D. Wayne Osgood et al. eds., 2005).

158. Scott, *supra* note 146, at 644.

159. Some jurisdictions are implementing specialized parole units focusing on young adults. See *Transition Age Youth Housing*, CITY & CTY. OF S.F., <https://sfmohcd.org/transition-age-youth-housing> (last visited Nov. 15, 2018) (describing San Francisco’s Transitional Age Youth Unit serving probationers ages eighteen to twenty-four).

Specialized programming for young adults within jails and prisons is almost non-existent.¹⁶⁰

Keeping young adults in criminal court also does not solve the stigma and collateral consequences problem. Via what is known as labeling theory, criminal convictions can reinforce a criminal identity, perpetuating a life as an offender.¹⁶¹ As Devah Pager showed in her book *Marked*, “the ‘credential’ of a criminal record . . . constitutes a formal and enduring classification of social status, which can be used to regulate access and opportunity across numerous social, economic, and political domains.”¹⁶² And no country on Earth has taken to using criminal records to foreclose opportunities other than the United States.¹⁶³ Criminal convictions restrict an individual’s access to work, housing, public benefits, college admission and financial aid, access to the right to vote and to serve on juries, and much, much more.¹⁶⁴ Anti-social and deviant social behavior patterns become more entrenched as a result of these cumulative consequences and barriers.

Like juveniles, young adults are vulnerable and susceptible to the negative impact that criminal labeling brings. “During the emerging adulthood period, the criminal identities of [life-course persistent] offenders may be reinforced by convictions in the adult criminal justice system, and the resulting label of ‘felon’ is applied.”¹⁶⁵ Young adults also suffer from collateral consequences at a crucial time—as they attempt to pursue higher education, start a career, start a family, and make the transition to adulthood. Collateral consequences of criminal court convictions hinder all of that. With a restricted ability to find work, housing, pursue higher education, vote, attract a partner, etc., young adults processed in criminal court become more likely to return to crime.¹⁶⁶

Finally, keeping young adults in criminal court, and responding to their offending by sentencing young adults differently, essentially reduces the difference between adolescents and adults to one of culpability. But there is more to it than

160. See Caulum, *supra* note 151, at 754 (recommending special programming for incarcerated young adult offenders).

161. See EDWIN LEMERT, *SOCIAL PATHOLOGY: A SYSTEMIC APPROACH TO THE THEORY OF SOCIOPATHIC BEHAVIOR* 76–77 (1951); IRVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* 3 (2d ed. 1963); Bruce G. Link et al., *Conceptualizing Stigma*, 27 *ANN. REV. SOC.* 363, 380 (2001).

162. DEVAH PAGER, *MARKED: RACE, CRIME AND FINDING WORK IN AN ERA OF MASS INCARCERATION* 4 (2007); see also John C. Coffee, *Privacy Versus Parens Patriae: The Role of Police Records in the Sentencing and Surveillance of Juveniles*, 57 *CORNELL L. REV.* 571, 617 (1972) (“Particularly in the case of the juvenile, . . . yesterday’s record does not accurately describe today’s individual.”).

163. See generally Kevin Lapp, *American Criminal Record Exceptionalism*, 14 *OHIO ST. J. CRIM. L.* 303, 305–06 (2016).

164. See MARGARET COLGATE-LOVE ET AL., *COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY AND PRACTICE* (2013); Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 16 (Marc Mauer & Meda Chesney-Lind eds., 2002).

165. Jessica M. Craig & Alex R. Piquero, *Crime and Punishment in Emerging Adulthood*, in *OXFORD HANDBOOK OF EMERGING ADULTHOOD* 552 (2015).

166. *Id.*

that. There are reasons to treat young adults differently at the front end of the criminal justice system as well. Instead of processing young adult offenders in criminal court, where the focus is on punishment for past acts, more young offenders should (like juveniles) be diverted from criminal court because their offending is rooted in other factors, like poverty, homelessness, and mental-health issues, that are poorly served by criminal courts.¹⁶⁷ Unlike juvenile justice systems, however, criminal justice systems are less likely to consider and use front-end diversionary programs.¹⁶⁸

In short, while accommodations can be made within the criminal courts to reflect the distinct developmental characteristics and rehabilitative needs of young adults (and such accommodations should not be discouraged), it does not appear that criminal courts are well-positioned to implement such reforms meaningfully. Moreover, a less punitive sentencing regime would still leave young adult offenders with the devastating effects of criminal records.

B. Expand Juvenile Court Jurisdiction

In the late nineteenth century, when adolescence came to be recognized as a separate developmental life stage marked by distinguishing characteristics that included cognitive immaturity, impulsivity, and vulnerability, the criminal justice system responded. Separate juvenile courts were created that had initial jurisdiction over cases involving young offenders.¹⁶⁹ The juvenile justice movement was an intentional effort to make the criminal justice system more attuned to the developmental characteristics of young offenders and spare them from the punitive and stigmatizing consequences imposed by criminal courts.¹⁷⁰ It ensured distinct treatment by diverting the vast bulk of juvenile offenders away from criminal court to the specialized forum of the juvenile court. There, the juvenile court would provide less punishment and more rehabilitative services that would, it was hoped, nip a life of crime in the bud and promote a successful transition to adulthood.¹⁷¹

167. See Chung, *supra* note 133, at 71 (citing Hawkins et al., *A Review of Predictors of Youth Violence, in SERIOUS AND VIOLENT JUVENILE OFFENDERS: RISK FACTORS AND SUCCESSFUL INTERVENTIONS* 106 (Loeber & Farrington eds., 1998)) (“It is well-established . . . that most juvenile offenders evince some combination of problems that are likely to compromise positive youth development: poor school performance (e.g., truancy, low grades), mental health problems (e.g., substance abuse, depression), unstable and unsupportive family relationships, poverty- and crime-ridden communities, delinquent peer influences, and the absence of positive role models.”).

168. See Charles Lindner, *Probation Intake: Gatekeeper to the Family Court*, 72 *FED. PROB.* 48, 48 (2008) (describing the probation intake process, which screens inappropriate cases out of the formal court process, as “generally unused in criminal court”).

169. DAVID S. TANENHAUS, *JUVENILE JUSTICE IN THE MAKING* (2004).

170. See FRANKLIN E. ZIMRING, *AMERICAN JUVENILE JUSTICE* 18–19 (2005) (“Above almost all else, we seek a legal policy that preserves the life chances for those who make serious mistakes Similarly, we want to give young law violators the chance to survive our legal system with their life opportunities still intact”); WARD, *supra* note 86, at 78 (2012) (“The court was envisioned as a cornerstone of a more diagnostic, individualized, and formalized solution to juvenile crime and dependency, an institutional network in which officials, ‘through modern science, would discover the root causes of delinquency, and through active intervention, prevent it.’”).

171. Julian W. Mack, *The Juvenile Court*, 23 *HARV. L. REV.* 104, 107 (1910).

According to one of the nation's earliest juvenile court judges, the purpose of the juvenile court was "not so much to punish as to reform, not to degrade but to uplift, not to crush but to develop, not to make him a criminal but a worthy citizen."¹⁷² Today, all states have separate juvenile court systems that handle the majority of cases involving those under eighteen.¹⁷³

The same impulses and science behind the maintenance of separate juvenile courts have led to calls to expand juvenile court jurisdiction for young adults.¹⁷⁴ In 2015, Connecticut Governor Dan Malloy proposed to raise the age of juvenile court jurisdiction to twenty-one.¹⁷⁵ That same year, the Vermont legislature commissioned a committee to examine increasing the age of its juvenile court jurisdiction to twenty.¹⁷⁶ Vincent Schiraldi, senior research fellow at the Harvard Kennedy School's Program in Criminal Justice Policy and Management, has called for all states to raise the age of juvenile court jurisdiction to twenty-one.¹⁷⁷ Even the research arm of the Department of Justice has recommended that policymakers consider raising the minimum age of criminal court jurisdiction to twenty-one or twenty-four.¹⁷⁸

172. *Id.*

173. Forty-two states and the District of Columbia currently permit juvenile court jurisdiction until an alleged offender reaches age eighteen; five states restrict juvenile court jurisdiction to those under seventeen. *Jurisdictional Boundaries: Delinquency Age Boundaries*, JUVENILE JUST.: GEOGRAPHY, POL'Y, PRACTICE & STATS., <http://www.jjgps.org/jurisdictional-boundaries> (last visited Nov. 15, 2018). The two states that had restricted juvenile court jurisdiction to those under sixteen (New York and North Carolina) each adopted reforms set to go into effect in 2019 that raise the age of juvenile court jurisdiction through seventeen. See Marcy Mistrett, *New York and North Carolina Are The Last States To Raise The Age of which Children can be Funneled Through their Adult Jails and Prisons*, CAMPAIGN FOR YOUTH JUST. (July 21, 2017), <http://www.campaignforyouthjustice.org/campaigns/item/new-york-and-north-carolina-are-the-last-states-to-raise-the-age-of-which-children-can-be-funneled-through-their-adult-jails-and-prisons>. Louisiana raised its juvenile court jurisdiction from sixteen to seventeen in July 2016. 2016 Reg. Sess. L.A. Acts S.B. 324. Illinois raised its cut-off age from seventeen to eighteen in 2014. 2013 Ill. Laws Pub. Act 98-61, § 5 (effective Jan. 1, 2014) (amending 705 Ill. Comp. Stat. 405/5-105(3) (2015)). While most cases within the juvenile court's jurisdiction are filed and handled in juvenile court, a variety of mechanisms exist to permit or require the processing of a criminal case against a young person in criminal court, even if her age makes her eligible for juvenile court processing. See Christopher Slobogin, *Treating Juveniles Like Juveniles: Getting Rid of Transfer and Expanded Adult Court Jurisdiction*, 46 TEX. TECH L. REV. 103, 103-04 (2013).

174. D. Wayne Osgood et al., *Vulnerable Populations and the Transition to Adulthood*, 20 FUTURE OF CHILD. 209, 221 (2010) ("[T]he need for public investment in the vulnerable populations does not end at age eighteen. Extending the age eligibility of youth-serving systems well into young adulthood would be consistent with normative transitions to adulthood nowadays.").

175. Press Release, Office of Governor Daniel P. Malloy (Nov. 6, 2015) <https://portal.ct.gov/Office-of-the-Governor/Press-Room/Press-Releases/2015/11-2015/Gov-Malloy-Launches-Conversation-on-Expanding-Second-Chance-Society-Initiatives-in-Connecticut>. Governor Malloy's proposal includes protections akin to those offered in juvenile court for low-risk young adults aged twenty-one through twenty-five, such as having their cases heard confidentially, their records sealed, and the opportunity to have those records expunged. *Id.*

176. 2016 Vt. Acts & Resolves No. 153, Sec. 33 (directing the Joint Legislative Justice Oversight Committee to examine increasing the top-end age of juvenile jurisdiction to twenty and the age of youthful offender jurisdiction to twenty-five).

177. See Schiraldi, *supra* note 61, at 3.

178. U.S. DEP'T OF JUST., OFF. OF JUVENILE JUST. & DELINQUENCY PREVENTION, *Young Offenders: What Happens and What Should Happen 2* (Feb. 2014), <https://www.ncjrs.gov/pdffiles1/nij/242653.pdf>.

Expanding juvenile court jurisdiction to include those eighteen and over would continue the twenty-first century trend to remove young people from the adult criminal justice system.¹⁷⁹ At the same time, it would be a significant additional step. While “[o]ur jurisprudence fully accepts that adolescents are entitled to a separate system of justice, with separate facilities, confidentiality protections, and more individualized treatment in a more robust network of rehabilitative programming,”¹⁸⁰ according to the protections, procedures, and approach of juvenile court to young adults is another thing entirely.

Expanding juvenile court jurisdiction is now a part of the policy conversation because of doubts about eighteen as the dividing line between adults and adolescents and, therefore, between criminal and juvenile court.¹⁸¹ As explained above, the characteristics that distinguish juveniles from adults also distinguish extended adolescents from adults.¹⁸² Diverting young adult offenders to juvenile court “recognizes the diminished capacity for responsible decision-making in youth while harnessing the opportunities presented by their ability to grow, adapt and change.”¹⁸³

It is not just cognitive development, diminished culpability, and amenability to interventions that support expanded juvenile court jurisdiction. Juvenile courts, with their greater likelihood to attempt to rehabilitate, to dispense procedural justice, and to individualize sentencing decisions than adult courts, may better serve the pro-development mission of shepherding young people to a productive adulthood than the punitive criminal court can. One major way the juvenile court achieves this goal is by reducing the stigma of offending. Juvenile court processing reduces the chances of the individual accumulating a debilitating criminal record. Because juvenile court proceedings are not criminal proceedings, juvenile court adjudications do not necessarily become part of a young person’s permanent criminal record.¹⁸⁴ This, together with stricter confidentiality provisions, protects young people from widespread disclosure of their offending history. Additionally,

179. Since 2006, two dozen states have enacted legislation designed to reduce the prosecution of youth in adult criminal court and to end the placement of youth in adult jails and prisons. See Carmen E. Daugherty, *State Trends Legislative Victories from 2011-2013: Removing Youth from the Adult Criminal Justice System*, CAMPAIGN FOR YOUTH JUST. 1 (2013) (noting that several states have raised the aged of juvenile court jurisdiction and reformed transfer/waiver laws to keep more youth out of criminal courts).

180. See Schiraldi, *supra* note 61, at 8.

181. STEINBERG, *supra* note 6, at 202 (“[R]esearch on adolescent brain development does not point to an obvious chronological age at which a sharp legal distinction between adolescents and adults should be drawn for all purposes.”).

182. See *supra* I(B).

183. See Schiraldi, *supra* note 61, at 3.

184. *But see* Riya Saha Shah et al., JUVENILE L. CTR., *Future Interrupted: The Collateral Damage Caused by Proliferation of Juvenile Records* 3–4 (Feb. 2016) https://jlc.org/sites/default/files/publication_pdfs/Future%20Interrupted%20-%20final%20for%20web_0.pdf (observing that there are many exceptions to juvenile record confidentiality that permit access to juvenile records).

juvenile court records, as compared to criminal convictions, can be more easily sealed or expunged when the young person reaches a particular age.¹⁸⁵

Juvenile court jurisdiction, therefore protects young offenders in several ways. Perhaps most importantly, it shields young offenders from the devastating formal and informal collateral consequences of criminal convictions.¹⁸⁶ In addition, juvenile court jurisdiction limits the chances that a criminal label will entrench young adults in deviant social groups or lead them to withdraw from pro-social activities and support systems that help prevent recidivism.¹⁸⁷

Another advantage of juvenile court jurisdiction is that juvenile courts are already staffed by judges, probation staff, prosecutors, and defense attorneys who are trained in the special characteristics and developmental needs of youth. While each would require additional training regarding the particulars of young adults, it is a workforce already primed to pay attention to these issues. Through a legitimating process known as procedural justice, this alone could have beneficial impacts.¹⁸⁸ As Vincent Schiraldi observed:

Courts with specially trained judges, prosecutors, defense attorneys and probation staff, and which have access to adequate resources geared toward the special needs of this population (particularly education, workforce development, and cognitive-behavioral training) would go a long way toward legitimizing the adjudicatory process for young adults, which has been shown to improve outcomes.¹⁸⁹

The United States would not stand alone if it extended juvenile court jurisdiction to those eighteen and up. In Germany, offenders aged eighteen to twenty-one have been adjudicated in juvenile court since 1953.¹⁹⁰ In Switzerland, young adults can be treated as juveniles up to age twenty-five.¹⁹¹

185. JUVENILE L. CTR., *Failed Policies, Forfeited Futures: A Nationwide Scoreboard on Juvenile Records* (2014). But as I have documented previously, after nearly a century of limited record-making and enhanced confidentiality regarding juveniles, the expansion of the modern culture of “dataveillance” to youth has vastly expanded the criminal justice system’s data collection and dissemination practices regarding young people. See generally Kevin Lapp, *Databasing Delinquency*, 67 HASTINGS L.J. 195 (2015).

186. See Lapp, *supra* note 163, at 304.

187. Note, *Shame, Stigma, and Crime: Evaluating the Efficacy of Shaming Sanctions in Criminal Law*, 116 HARV. L. REV. 2186, 2192–93 (2003); Craig & Piquero, *supra* note 165, *Crime and Punishment in Emerging Adulthood*, in OXFORD HANDBOOK OF EMERGING ADULTHOOD at 552 (2015).

188. See generally TOM TYLER, *WHY PEOPLE OBEY THE LAW* (1990).

189. See Schiraldi, *supra* note 61, at 10.

190. Transition to Adulthood, *Young Adults and Criminal Justice: International Norms and Practices* 3 (2011), <https://www.t2a.org.uk/wp-content/uploads/2011/09/T2A-International-Norms-and-Practices.pdf> (observing that the juvenile court may impose adult sentences).

191. See *id.* at 3. These jurisdictions also have separate facilities for young adults. Craig & Piquero, *supra* note 165, at 553–554 (noting that Switzerland, Sweden, and Germany have treatment facilities geared specifically towards young adults, and in England, those between eighteen and twenty attend a young offender institution instead of prison).

Expanding juvenile court jurisdiction would, however, have several drawbacks. The potential objections can be organized into three broad categories: purpose concerns, process concerns, and proportionality concerns.¹⁹²

The first drawback to expanding juvenile court jurisdiction is a potential mismatch between juvenile court's purpose and young adults. Simply put, the cultural extension of adolescence may be irrelevant to assigning criminal jurisdiction. The purpose of juvenile courts, this argument asserts, is to serve juveniles. Just because young people are delaying getting married, or are going to college for six years, or do not feel like adults, does not mean that they should not be processed as adults in criminal court. They are adults. Like it or not, when you turn eighteen, you are a legal adult. Under this view, eighteen- to twenty-four-year-old offenders should not enjoy the special protections and processes of the juvenile court.¹⁹³

Similarly, the link between developmental science and juvenile court's rehabilitative purpose may not justify juvenile court jurisdiction for those eighteen and up. It arguably proves too much to say that young adults should be in juvenile court because they can benefit from evidence-based, rehabilitative interventions. Other than the irredeemable, every offender, whatever his age, would benefit from such an approach. Moreover, while the brain may not be fully developed until the early or mid-twenties, it is not clear that the lack of complete brain development means diminished culpability for wrongdoing.¹⁹⁴ It is definitely not clear that it means eighteen- to twenty-five year-old offenders have so diminished culpability that criminal court jurisdiction is improper.¹⁹⁵ Criminal court can, and does, adjust its sentencing to individual circumstances.

Another concern related to purpose is that juvenile court judges, prosecutors, defense attorneys, and probation staff, may not be easily trained to deal with this age group. Offenders who are eighteen to twenty-four are more violent, and more entrenched in their offending, than younger offenders, and they have particular developmental needs. This concern was expressed by the juvenile justice experts who recently wrote a *New York Times* editorial arguing against juvenile court

192. See Lisa Schreibersdorf, *Bringing the Best of Both Worlds: Recommendations for Criminal Justice Reform for Older Adolescents*, 35 CARDOZO L. REV. 1143, 1145 (2014) (indicating that juvenile court procedures "present serious due process, governmental intrusion, and proportionality concerns when applied to older adolescents").

193. Adherents to this view of juvenile court might distinguish the fact that we help foster youth transition to independent living or provide special education services or health care through the youth's parents beyond eighteen from the purpose of criminal jurisdiction. Foster care and special education are support systems. The criminal justice system is not a support system. It is a system for imposing accountability and protecting public safety.

194. See Terry A. Maroney, *The False Promise of Adolescent Brain Science in Juvenile Justice*, 85 NOTRE DAME L. REV. 89, 146, 148 (2009).

195. See Scott, *supra* note 146, at Elizabeth S. Scott, et al., *Young Adulthood as a Transitional Legal Category: Science, Social Change, and Justice Policy*, 85 FORDHAM L. REV. 641, 643 (2016) ("The available research does not indicate that individuals between the ages of eighteen and twenty are indistinguishable from younger adolescents in attributes relevant to criminal offending and punishment.").

jurisdiction for young adults.¹⁹⁶ This is, however, a solvable problem. It would simply require training and commitment, which most juvenile court personnel are interested in and possess, respectively. Moreover, someone in the criminal justice system somewhere is going to have to learn how to better respond to young adult offenders, so this concern is not unique to expanding juvenile court jurisdiction.

Finally, the history of American juvenile justice betrays a resistance to extending the rehabilitative, citizen-building mission of juvenile court to minority youth. As Geoffrey Ward recounts in his book on African-Americans and juvenile justice, black youth were denied access to juvenile court for decades after its founding.¹⁹⁷ When juvenile court's doors were finally opened to black youth in more than minimal numbers after the middle of the twentieth century, the juvenile court began to turn away from rehabilitation and toward punishment as its focus. In fact, the increase in disproportionate minority contact with juvenile court overlaps with the decline of the rehabilitative ideal and the rise of a more punitive juvenile court.¹⁹⁸ In short, the blacker the respondents before juvenile court got, the less rehabilitative and more punitive it became.¹⁹⁹ This history should not be ignored by Young Adult Court reformers. It suggests that efforts to provide more rehabilitative services to black young adults are likely to confront resistance.

The second set of concerns about moving young adult offenders to juvenile court involves due process rights of the accused. Juvenile courts do not use grand juries to screen filings, and do not provide the right to a jury trial.²⁰⁰ The accused in juvenile court has no chance at bail to prevent pre-trial detention.²⁰¹ In juvenile court, the same judge typically hears suppression motions and presides over the trial as the fact-finder. While this happens in criminal court, it is strongly discouraged.²⁰² In juvenile court, it is almost guaranteed.²⁰³ According to Randy Hertz and Martin Guggenheim, this may compromise the juvenile respondent's basic right to a fair trial by an impartial tribunal.²⁰⁴ Other

196. See Steinberg, *supra* note 147.

197. WARD, *supra* note 86, at 3 ("The white-dominated parental state engaged for generations in racially selective citizen- and state-building initiatives through juvenile justice policy and practice.").

198. See *id.* at 4.

199. See *id.*

200. *McKeiver v. Pennsylvania*, 403 U.S. 528, 551 (1971) (holding no right to jury trial in juvenile court proceedings).

201. There is no right to pre-trial bail, but the Constitution protects against excessive bail. *Schall v. Martin*, 467 U.S. 253, 281 (1984) (holding pre-trial detention by juvenile court constitutional).

202. *Commonwealth v. Baxter*, 422 A.2d 1388, 1390 (Pa. Super. Ct. 1980) ("[T]he practice of holding a non-jury trial before the same judge who presided at a pre-trial suppression hearing has been sharply criticized.").

203. See Martin Guggenheim & Randy Hertz, *Reflections on Judges, Juries and Justice: Ensuring the Fairness of Juvenile Delinquency Trials*, 33 WAKE FOREST L. REV. 553, 571-73 (1998); Barry C. Feld, *Criminalizing Juvenile Justice: Rules of Procedure for Juvenile Court*, 69 MINN. L. REV. 141, 246 (1984).

204. See Guggenheim, *supra* note 203, at 73; Feld, *supra* note 203.

commentators have identified it as a process that may contribute to wrongful convictions.²⁰⁵

These process concerns are legitimate, and by themselves may make juvenile court jurisdiction inappropriate for young adults. However, their real-world impact may be minimal. Grand juries do not serve as a meaningful filter for prosecutions.²⁰⁶ Almost no one goes to trial in criminal court.²⁰⁷ Most defendants in criminal court are poor, and few can meet bail even when it is set low.²⁰⁸ Also, judges deny most suppression motions.²⁰⁹ Still, due process concerns caution against replacing criminal court jurisdiction with juvenile court jurisdiction for older defendants.

The third set of concerns with expanded juvenile court jurisdiction relate to the proportionality of its interventions. The juvenile court is philosophically interventionist. As one of the first juvenile court judges put it, it is the duty of the state:

[T]o find out what he is, physically, mentally, morally, and then if it learns that he is treading the path that leads to criminality, to take him in charge, not so much to punish as to reform, not to degrade but to uplift, not to crush but to develop, not to make him a criminal but a worthy citizen.²¹⁰

205. Steven A. Drizin & Greg Luloff, *Are Juvenile Courts A Breeding Ground for Wrongful Convictions?*, 34 N. KY. L. REV. 257, 305 (2007) (stating that empirical evidence demonstrates that exposure to prejudicial information affects a judge's impartiality).

206. In 2010, for example, grand juries declined to indict in only eleven of 193,021 federal cases. See Mark Motivans, *Federal Justice Statistics 2010—Statistical Tables*, U.S. DEP'T OF JUST., BUREAU OF JUST. STATS. 11-2 (2013), <https://bjs.gov/content/pub/pdf/fjs10st.pdf>; see also Niki Kuckes, *The Useful, Dangerous Fiction of Grand Jury Independence*, 41 AM. CRIM. L. REV. 1, 2 (2004) ("Most knowledgeable observers would describe the federal grand jury more as a handmaiden of the prosecutor than a bulwark of constitutional liberty; to quote the classic vignette, the grand jury is little more than a rubber stamp that would 'indict a ham sandwich' if the prosecutor asked.").

207. Lindsey Devers, *Plea and Charge Bargaining: Research Summary*, U.S. DEP'T OF JUST., BUREAU OF JUST. ASSISTANCE 3 (2011), <https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf> (90-95% of criminal cases result in plea bargaining); *Criminal Cases*, U.S. DEP'T OF JUST., BUREAU OF JUST. STATS. (July 13, 2017) <https://www.bjs.gov/index.cfm?ty=tp&tid=23> (over ninety-five percent of felony convictions are obtained through pleas); U.S. SENT'G. COMM'N, *2016 Sourcebook of Federal Sentencing Statistics S-23 fig. C* (2016), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2016/FigureC.pdf>.

208. See Caroline Wolf Harlow, *Defense Counsel in Criminal Cases*, U.S. DEP'T OF JUST., BUREAU OF JUST. STATS. 1 (2000) <http://bjs.ojp.usdoj.gov/content/pub/pdf/dccc.pdf> (finding that over eighty percent of state defendants facing felony charges and two-thirds of federal felony defendants were represented by publicly-financed attorneys); Kenechukwu Okocha, *Nationwide Trend: Rethinking the Money Bail System*, WIS. LAWYER 30, 34 (June 2017) ("Many jurisdictions across the country are adjusting their bail systems to reduce the role of money.").

209. Russell M. Gold, *Beyond the Judicial Fourth Amendment: The Prosecutor's Role*, 47 U.C. DAVIS L. REV. 1591, 1646 (2014) ("Few suppression motions are filed, and fewer still are granted."); see also Albert W. Alschuler, *Studying the Exclusionary Rule: An Empirical Classic*, 75 U. CHI. L. REV. 1365, 1375 (2008) (citing studies showing that federal courts excluded unlawfully-seized evidence in only 1.3% of all federal criminal cases and 0.7% of the state court cases).

210. Mack, *supra* note 172, at 107.

The court often learns a lot about the juvenile respondent, and the court's eventual disposition²¹¹ frequently depends more on the juvenile's alleged service needs than the gravity of his offense.²¹² As a result, juvenile courts can be intrusive and paternalistic.

This interventionist bent also stems from the notion that juveniles have a less substantial interest in freedom from government intrusion than adults. According to the Supreme Court, juveniles have a qualified interest in freedom from institutional restraints because they, unlike adults, "are always in some form of custody."²¹³ In short, the state interest is greater, and the liberty interest reduced, for juveniles. But this imbalance disappears for those eighteen and up. It would undoubtedly complicate juvenile court proceedings to bring within the court's jurisdiction individuals who do not have similarly diminished liberty interests.

Because of its paternalistic purpose, juvenile court processing can lead to longer sentences and longer periods of court supervision than criminal court, especially for minor offenses. For example, a seventeen year-old in juvenile court for a first time simple drug possession offense will have his disposition depend more on life circumstances and perceived service needs than the gravity of the offense. He is likely to end up with a period of probation supervision as his disposition.²¹⁴ Probation supervision is frequently violated and frequently extended.²¹⁵ By contrast, an eighteen year-old in criminal court for a first time simple drug possession offense is more likely to avoid significant restraints on liberty and severe consequences.²¹⁶ It may be better,

211. "Disposition" is the juvenile court term for sentencing.

212. See Guggenheim & Hertz, *supra* note 203, at 572–73.

213. Schall, 467 U.S. at 265.

214. According to the Office of Juvenile Justice and Delinquency Prevention, sixty-two percent of juveniles adjudicated delinquent are placed on some form of probation. U.S. DEP'T OF JUST. OFF. OF JUVENILE JUST. & DELINQUENCY PREVENTION, JUVENILES IN COURT (Aug. 2018), https://www.ojjdp.gov/ojstatbb/court/JCSCF_Display.asp. Indeed, over fifteen percent of juveniles whose arrest did not result in a petition in juvenile court, or whose delinquency petition was dismissed, are nevertheless placed on some form of probation supervision. *Id.*

215. See Soraya Shockley, *Meant To Keep Youths Out Of Detention, Probation Often Leads Them There*, NAT'L PUB. RADIO (July 29, 2015) <https://www.npr.org/2015/07/29/427263478/some-youths-find-probation-more-challenging-than-juvenile-detention>. Approximately eighteen percent of youth detained in juvenile correctional centers are there because of technical probation violations. OFF. OF JUVENILE JUST. & DELINQUENCY PREVENTION, *supra* note 214. Technical violations typically follow a disobeyed court-mandated condition, such as failing to attend school, staying out past curfew, or failing to meet with a probation officer as scheduled. Andrea J. Sedlak & Carol Bruce, *Youth's Characteristics and Backgrounds: Findings from the Survey of Youth in Residential Placement*, U.S. DEP'T OF JUST., OFF. OF JUVENILE JUST. & DELINQUENCY PREVENTION, Dec. 2010, at 4.

216. Many states have recently lowered penalties for possession of small amounts of drugs, reducing those charges to misdemeanors and eliminating prison sentences. See Don Stemen, *Beyond the War: The Evolving Nature of the U.S. Approach to Drugs*, 11 HARV. L. & POL'Y REV. 375, 376–77 (2017) ("Since 2000, states have begun to dismantle much of the apparatus of the war on drugs—reclassifying and reducing sentences for drug offenses, repealing mandatory sentencing policies, creating mandatory probation programs, increasing eligibility and opportunities for drug courts and deferred prosecution programs, and legalizing medical and recreational use of marijuana."); see also 18 U.S.C. § 3607(c) (2012) (requiring a court to expunge certain first-time misdemeanor drug offenses for persons under twenty-one at the time of offense upon application).

from a sentencing perspective, to be the youngest defendant in criminal court than the oldest respondent in juvenile court.²¹⁷

Not only is juvenile court potentially more intrusive than criminal courts, and likely to impose longer periods of court supervision, especially for minor offenses, processing those eighteen and older in juvenile court may increase political pressure to make juvenile court more punitive. In part, this is because eighteen to twenty-four year-olds commit the lion's share of violent crime and are generally committing more serious crimes than those under eighteen.²¹⁸ With more serious offenders in juvenile court, legislatures may increase the court's ability to mete out punishment.²¹⁹ Any increased punitiveness will likely trickle down to younger respondents and those who commit less serious offenses. That is what happened when 1990s reforms increased the punitiveness of the juvenile court and facilitated the transfer of juveniles to criminal court following notorious outlier cases.²²⁰ For similar reasons, expanded juvenile court jurisdiction might reignite interest in transfer to adult court, which has waned.²²¹ If juvenile court's distinctive, rehabilitative focus is further replaced by criminal court's punitiveness, then its whole reason for being vanishes.

A further critique—one that has been applied to problem-solving courts generally—is that their focus on individual offenders distracts from the socio-cultural conditions that drive offending in the first place.²²² Court-based approaches are generally incapable of managing either the structural problems the specialized criminal courts aim to address (high caseloads) or the difficult social issues that attend

217. There is evidence, however, that this outcome is less likely for serious offenses. Juvenile convicted of violent offenses in criminal court typically receive longer sentences than young people adjudicated in juvenile court for similar crimes. See generally Donna M. Bishop, *Juvenile Offenders in the Adult Criminal Justice System*, 27 CRIME & JUST. 81 (2000).

218. Offending, and violent offending, peaks during the young adult years. Craig & Piquero, *supra* note 165, at 543 (“[I]n the aggregate, everywhere and at all times, the prevalence of offending tends to increase in early adolescence, rise to a peak in late adolescence, and diminish in early adulthood.”). See also David P. Farrington, *Age and Crime*, 7 CRIME & JUST. 189 (1986).

219. As Jeffrey Fagan and Frank Zimring explained, the ability to transfer juveniles from juvenile court and charge them in adult criminal court has acted as a safety valve that has protected the juvenile court. If the juvenile court keeps too many serious offenders within its jurisdiction, pressures to increase its punitiveness will increase, which would threaten to erode its distinctiveness. JEFFREY FAGAN & FRANKLIN E. ZIMRING, *THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT* (2000) (“[T]he system recognized that some crimes and some youth required a stronger response than the juvenile system, with its limited options for punishment, could offer. For the sake of public protection—and perhaps retribution as well—a safety valve was needed. The solution was *transfer* . . .”) (emphasis in original).

220. See BARRY C. FELD, *THE EVOLUTION OF THE JUVENILE COURT* 106-08, 117 (2017) (describing how “[p]olicy makers [in the 1990s] portrayed adolescents as young criminals and sharply shifted juvenile justice policy from rehabilitation to punishment” and explaining how juvenile court judges applied new sanctions “to those whom they previously treated more leniently”).

221. Slobogin, *supra* note 173, at 104 (2013) (“While in the past several years some states have reduced the scope of transfer or have raised the age for criminal court jurisdiction, the . . . number [of juveniles prosecuted as adults] has stayed fairly constant since 2000.”).

222. C.S. Lewis, *The Humanitarian Theory of Punishment*, 13 ASS'N OF MORMON COUNS. & PSYCHOTHERAPISTS J. 147, 151 (1987) (“Of all tyrannies a tyranny sincerely exercised for the good of its victims may be the most oppressive . . . [T]hose who torment us for our own good will torment us without end for they do so with approval of their own conscience.”).

criminal offending (economic poverty, resource poverty, addiction, social dislocation, etc.).²²³ These problems are multifaceted and socially entrenched, and courts have little control over the way those problems are produced. This was Edwin Schur's critique of the juvenile court in the 1970s, which he characterized as prioritizing the "treatment response"²²⁴ as opposed to the reform response.²²⁵ Allegra McLeod offered a similar take in her recent work on problem-solving courts, observing that:

[S]imply improving the employment and life prospects of particular individuals and shifting resources that may support those individuals to become more socially integrated, is unlikely to do a great deal to shift the structures of opportunity in blighted urban and rural neighborhoods when, fundamentally, the problems the courts aim to address are deep-seated, systemic problems.²²⁶

By carving out yet another class of offenders from general jurisdiction criminal courts, expanding juvenile court jurisdiction moves us closer to leaving criminal courts with what might be thought of as an irredeemable remainder—those whose offending is not rooted in a treatable condition like drug dependency or mental health issues, whose individual characteristics do not suggest a reason for mitigated punishment, and who are not thought amenable to therapeutic or rehabilitative intervention. This could advance the problematic notion that mercy and rehabilitation have no place in criminal court.

C. *Young Adult Court*

A third criminal justice option for responding to extended adolescence would be to create a distinct system designed especially for young adults. Several jurisdictions have already taken this step. As explained below, each has a different model. Some take only a small subset of cases, while the court in Brooklyn is designed to handle every case not resolved at arraignment. In San Francisco, the court prefers defendants charged with felonies, while others will only consider those charged with a misdemeanor. What they all share, however, is that each targets offenders over eighteen and endeavors to provide a more therapeutic, and less punitive, response to offending.

Douglas County, Nebraska, created what may have been the first Young Adult Court in 2004. The court was originally open to individuals aged sixteen to twenty-two charged with a non-violent felony such as theft or non-trafficking drug

223. See Jane M. Spinak, *Romancing the Court*, 46 FAMILY CT. REV. 258, 258–62 (2008).

224. EDWIN M. SCHUR, RADICAL NONINTERVENTION: RETHINKING THE DELINQUENCY PROBLEM 29, 70 (1973) (noting the treatment response, which emphasized early identification of issues and individual-specific intensive efforts to treat or fix the person, lies at the heart of the philosophy and practice of the traditional juvenile court).

225. *Id.* at 155 (1973) (“[I]f the choice is between changing youth and changing the society (including some of its laws) the radical noninterventionist opts for changing society.”).

226. McLeod, *supra* note 5, at 1655.

offenses.²²⁷ It has since expanded its jurisdiction up to age twenty-five and has the discretion to take cases that involve violence.²²⁸ A dedicated judge handles all Young Adult Court cases.²²⁹ The court is staffed by a dedicated probation officer, county attorney, and corrections reentry program staff.²³⁰ Potential participants are screened by the Young Adult Court team, interviewed to determine their potential service needs, and a suitability report is submitted to the county attorney for approval.²³¹ Participants must first enter a plea to their felony charge and then proceed through a three-phase, community-based program that can last anywhere from eighteen to thirty-six months.²³² A suite of multidisciplinary services is available. Successful completion of the program results in the felony conviction being dismissed.²³³ The caseload has expanded from an initial capacity of ten per year to approximately fifty per year in 2018.²³⁴ Between August 2004 and June 2018, 192 individuals were accepted into the program. Of those 192, seventy have successfully graduated, forty-four were terminated, thirty-six voluntarily withdrew, and thirteen chose not to participate.²³⁵

In 2009, both Lockport, New York, and Buffalo, New York, initiated a problem-oriented court program focused on young adults.²³⁶ Buffalo's program, known as Crossroads, aimed to provide a therapeutic environment, structured case management, education assistance, and community supervision.²³⁷ It targeted young adults "ages 16-19 appearing for allegations of crimes such as stealing, vagrancy, minor drug offenses, non-violent felonies, and misdemeanors that have contributed significantly to their current criminal case (excluding crimes of violence, sexual abuse and drug sales)."²³⁸ By 2015, it had served over

227. See *Problem-Solving Courts*, SUP. CT. OF NEB., <http://court.nol.org/problem-solving/youngadult.html> (last visited Nov. 21); *Nebraska Alternative Courts: Young Adults Courts*, CREIGHTON UNIV. L. LIBR., <http://culibraries.creighton.edu/c.php?g=163566&p=1074176> (last visited Nov. 21) (identifying Young Adult Court as an alternative for "offenders between the ages of 16-22").

228. See generally *Young Adult Court*, NEB. DOUGLAS CTY. DIST. CT., <http://court.nol.org/problem-solving/youngadult.html> (last visited Nov. 21) (indicating Young Adult Court is an alternative for "youthful offenders age 18-24" charged with a felony); Telephone Interview with Nicholas Lurz, Problem Solving Court Coordinator, Nebraska Probation, (June 6, 2018).

229. *Nebraska Alternative Courts: Young Adults Courts*, *supra* note 227.

230. *Young Adult Court*, *supra* note 228.

231. *Id.*

232. *Nebraska Alternative Courts: Young Adults Courts*, *supra* note 227 (describing the phases as stabilization, sixty to 180 days; transition, 120-240 days; and probation, twelve to twenty-four months).

233. Nicholas Lurz, *supra* note 228.

234. *Id.*

235. Email from Nicholas Lurz, Problem Solving Court Coordinator, Nebraska Probation (June 11, 2018). The remaining individuals are currently participating in the program.

236. At the time, juvenile court jurisdiction ended in New York at age sixteen, so anyone alleged to have committed an offense at age sixteen or older was charged in adult court. N.Y. FAM. CT. ACT 301.2 (2016) (defining "juvenile delinquent" as a person over seven but under sixteen).

237. *Court Diversion Programs*, HEARTFOUND, <http://www.heartfound.org/court-diversion-programs>.

238. *Buffalo City Courts Crossroads Program, Enhancement, Expansion, Evaluation*, RECOVERY SOLUTIONS, at 1, 5 (April 2013), <http://www.recovery-solutions.org/Data/Sites/1/userfiles/crossroads-youth-court-evaluation-%282013%29.pdf>.

1500 youth.²³⁹ According to a 2013 report, approximately thirty-six percent of participants successfully completed the court's program, and approximately sixteen percent failed.²⁴⁰ Lockport's Young Adult Court serves those aged sixteen to twenty-one.²⁴¹ According to the Lockport court's handbook, the program includes court supervised curfews, education/vocational training, evaluations for substance abuse and mental health issues, drug testing, group/individual/family counseling, first offender type programs, as well as sanctions and incentives."²⁴² The handbook also notes that that "Judge has much more involvement in supervising Young Adult Court offenders as compared to a traditional probationary or diversionary court setting."²⁴³

Bonneville County, Idaho, started a Young Adult Court in 2012.²⁴⁴ Designed for high-risk and high-need eighteen- to twenty-four-year-olds, the Young Adult Court essentially functions as an alternative to an incarceration program. Like the Nebraska model, a guilty plea is required prior to entrance into the program. Idaho's court has a broader jurisdiction; those with misdemeanor and felony convictions are eligible.²⁴⁵ Participants are placed on probation and offered a series of services via a four-phase program that lasts twelve to eighteen months.²⁴⁶ The Idaho Young Adult Court program can accommodate up to fifty participants.²⁴⁷

San Francisco created a Young Adult Court in August 2015, and it arguably functions more like a distinct justice system than the Nebraska and Idaho models.²⁴⁸ The San Francisco Young Adult Court is open to cases where the defendant is eighteen to twenty-five, and it prioritizes felonies.²⁴⁹ The court's mission is to "enhance long term public safety and reduce recidivism by working in partnership with young adults ages 18-25, supporting them to make a successful transition into

239. *Court Diversion Programs*, *supra* note 237.

240. *Buffalo City Courts Crossroads Program, Enhancement, Expansion, Evaluation*, *supra* note 238, at 20.

241. *Lockport Young Adult Court (Ages 16–21)*, AM. U. JUST. PROGRAMS OFF., (August, 26, 2009) <https://jpo.wrlc.org/bitstream/handle/11204/2571/2829.pdf?sequence=1&isAllowed=y>

242. *Id.*

243. *Id.*

244. Ruth Brown, *Young Adult Court Helps Offenders Change Habits*, DAILY HERALD, Feb. 9, 2014, https://www.heraldextra.com/news/state-and-regional/young-adult-court-helps-offenders-change-habits/article_cd38c947-79f2-5248-9c89-7da063baa30c.html.

245. *Id.*

246. *Id.*

247. *Id.*

248. *Young Adult Court*, SUP. CT. OF CAL., CTY. OF S.F., <http://www.sfsuperiorcourt.org/divisions/collaborative/yac> (last visited Nov. 9, 2018). Since 2009, the San Francisco Adult Probation Department has similarly maintained a special unit for eighteen- to twenty-five-year-old young adult probationers, called a transitional age youth (TAY) unit.

249. *Memorandum of Understanding*, SUP. CT. OF CAL., CTY. OF S.F., *Young Adult Court Eligibility Guidelines Pilot Period: August 2015–March 2016* (Sept. 15–22, 2015), <http://www.sfsuperiorcourt.org/sites/default/files/images/EligibilitysignedYAC.PDF>

adulthood.”²⁵⁰ It does so by providing a therapeutic, clinical-focused case management approach that “strives to align opportunities for accountability and transformation with the unique needs and developmental stage of this age group.”²⁵¹ All of the staff involved in the Young Adult Court—the judge, the prosecutors, defense attorneys, probation staff, and case managers—are specially trained in the developmental characteristics and needs of the young adult population. The court screens applicants via a list of eligibility criteria and the ultimate decision rests with the judge.²⁵² The court is open to those facing misdemeanor or felony charges, including felony charges for drug possession or sale, theft, assault, and robbery with no weapon or injury.²⁵³ Disqualifying characteristics for misdemeanors include drunk driving, gang allegations, hate crimes, domestic violence, and potential sex offender registration offenses.²⁵⁴ For felony drug cases, certain amount thresholds may disqualify an individual, and felony theft, auto offenses, and vandalism are excluded if the restitution exceeds a certain dollar amount.²⁵⁵ Other disqualifying conditions include use of a firearm, allegations of great or serious bodily injury, two or more open felonies, a prior conviction or sustained juvenile petition for a “strike” offense in the last eight years, or active membership in an organized street gang.²⁵⁶ Prosecutors can argue against an eligible individual being allowed to participate (and they may also waive objections to participants), but they do not make the final decision.

Unlike the Nebraska and Idaho Young Adult Courts, individuals can participate in the San Francisco Young Adult Court pre-plea. Participants in the Young Adult Court proceed through four phases which are estimated to last between ten and fifteen months.²⁵⁷ Those who successfully complete the program can have their case dismissed and arrest record sealed, withdraw a plea, have a felony plea reduced to a misdemeanor, or reduce the length of their probation, depending on the particulars of their case and the agreement of the court.²⁵⁸

250. *Fact Sheet*, SUP. CT. OF CAL., CTY. OF S.F., San Francisco Collaborative Courts: Young Adult Court (March 2016), <http://www.sfsuperiorcourt.org/sites/default/files/images/YACFactSheetFINALMarch2016.pdf>

251. *Young Adult Court*, *supra* note 248. The court aims to provide “a comprehensive program of strength-based, trauma-informed, and evidence-supported educational, vocational, and counseling opportunities in conjunction with court supervision.” *Fact Sheet*, *supra* note 250.

252. *Memorandum of Understanding*, *supra* note 249.

253. *Id.*

254. *Id.*

255. *Id.* (noting pre-plea felony drug cases involving sale or possession of two or more ounces of marijuana or five or more grams of any other controlled substance, and pre-plea theft, auto and vandalism offenses involving more than \$2000 in restitution are excluded; deferred entry of judgment felony drug cases involves more than five ounces of marijuana or more than twenty grams of another controlled substances are excluded, as are deferred entry of judgment theft, auto, and vandalism offenses involving more than \$4000 in restitution).

256. *Id.* (noting that simple assault does not disqualify an individual).

257. CITY & CTY. OF S.F., YOUNG ADULT COURT PARTICIPANT HANDBOOK (June 2016), <http://www.sfsuperiorcourt.org/sites/default/files/images/YACParticipantHandbookJune2016FINAL.pdf>. The four phases are: (1) assessment and engagement, (2) stability and accountability, (3) wellness and community connection, and (4) program transition. *Id.* at 5–7.

258. *Memorandum of Understanding*, *supra* note 249.

Table 1: Young Adult Court Jurisdiction

	Non-Violent, Low Level	Felonies
Small Caseload	Nebraska Buffalo, NY Lockport, NY	Nebraska Idaho San Francisco
Large Caseload	Brooklyn	None

Like many collaborative courts, the San Francisco Young Adult Court's work revolves around case conferencing.²⁵⁹ Each Tuesday, before cases are called, the entire Young Adult Court team meets to discuss the progress of participants.²⁶⁰ The judge, the prosecutor and a prosecution investigator, defense counsel, probation staff, service assessors and providers, and case managers are all present, and all participate.²⁶¹ A progress report on each participant is distributed.²⁶²

In the court's first six months, sixty-three individuals participated in the program²⁶³ with six terminated before the end of 2015.²⁶⁴ By March 2017, 123 individuals had their cases diverted to the Young Adult Court.²⁶⁵ Approximately twenty percent of the participants had completed the program, and forty-five percent were still actively participating in the program.²⁶⁶ The remaining third were terminated from the program as a result of new arrests or failure to comply with the rules or expectations of participants.²⁶⁷

In May 2016, the Brooklyn district attorney and the Center for Court Innovation announced that they had teamed up to create a separate court for sixteen- to twenty-four-year-olds in the borough.²⁶⁸ The court, presided over by a dedicated

259. The following is based on the author's observation of a case conference session on Tuesday, July 12, 2016. Because the author signed a confidentiality agreement with respect to that case conference session, no specific details about any participants will be described.

260. At the beginning, participants have court appearances weekly. As they progress into the program, the frequency of their court appearances is reduced.

261. Author's Observation of a Case Conference Session, July 16, 2016.

262. *Id.*

263. *Fact Sheet*, *supra* note 250.

264. *Id.*

265. JENNIFER HENDERSON-FRAKES ET. AL., SOC. POL'Y RES. ASSOCS., AN EVALUATION OF SAN FRANCISCO'S YOUNG ADULT COURT: FINDINGS ON PLANNING AND EARLY IMPLEMENTATION 16 (May 2017).

266. *Id.* at 25.

267. *Id.* at 25 (adding that two participants self-terminated).

268. Press Release, DIST. ATT'Y, KINGS CTY., Brooklyn District Attorney's Office Announces Creation of New Young Adult Bureau (May 6, 2016), <http://www.brooklynda.org/2016/05/06/brooklyn-district-attorneys-office-announces-creation-of-new-young-adult-bureau/>. Manhattan is poised to begin its own Young Adult Court for misdemeanor defendants between the ages of eighteen and twenty. Avni Majithia-Sejpal, *Youth Justice Takes Two Steps Forward in New York City*, HARV. KENNEDY SCH. MALCOM WIENER CTR. FOR SOC. POL'Y, <https://www.hks.harvard.edu/centers/wiener/programs/criminaljustice/research-publications/young-adult-justice/developments->

judge and staffed with individuals trained in the unique developmental characteristics and needs of young adults, will handle all misdemeanor cases of defendants between the ages sixteen and twenty-four that are not resolved at arraignment.²⁶⁹ It will offer risk-needs assessments, counseling, and services tailored to the specific requirements of the particular age group, including substance abuse, mental health, anger management, GED, vocational and internship programs.²⁷⁰ The aim of the court is to replace the use of criminal disposition and incarceration with court-supervised services that do not result in a criminal record. In the first twelve months of the program, more than 1500 eighteen- to twenty-four-year-olds reportedly participated.²⁷¹

In addition to the above-mentioned courts, several jurisdictions have set up special programs for young adults within already existing drug courts.²⁷² Similar-minded reform efforts have begun in federal criminal courts. According to research by Christine Scott-Hayward, four districts operate specialized courts for younger defendants, generally ages eighteen to twenty-five, which result in dismissed charges or sentences substantially below the federal guidelines.²⁷³ The Eastern District of New York's Special Options Service (SOS) program, established in 2000, is one example.¹⁵⁰ The SOS program is "an intensive supervision program with education, job training, and counseling for youthful defendants" that "is primarily designed for non-violent defendants, although exceptions can be made."²⁷⁴ The program does not require participants to plea before entering, and aims to keep youthful defendants out of pretrial detention and, after successful completion of the program, either dismisses the charges or imposes a non-incarceration sentence.²⁷⁵ Between March 2013 and August 2015, the program served thirty-three participants, all but one charged with a drug offense.²⁷⁶ By August 2015, ten individuals had left the program, six after completing the program successfully. Of the six, only one received a prison sentence.²⁷⁷

in-young-adult-justice/youth-justice-takes-two-steps-forward-in-new-york-city#new_adult (last visited Nov. 9, 2018).

269. Telephone Interview with Adam Mansky, Director of Operations, Center for Court Innovation (June 22, 2016). Domestic violence and sex offense cases are excluded. *Id.*

270. Press Release, *supra* note 213.

271. Nicole C. Brambila, *Why Special Courts for Young Adults are Gaining Attention*, READING EAGLE (June 12, 2017), <http://www.readingeagle.com/news/article/why-special-courts-for-young-adults-are-gaining-attention>.

272. See Stamm, *supra* note 16, at 89–93 (2017) (identifying thirteen examples in eleven states, including in Denver, Colorado; Pasco and Pinellas County, Florida; St. Mary's, Louisiana; St. Louis, Missouri; and King County, Washington).

273. Scott-Hayward, *supra* note 16, at 75.

274. *Id.*

275. *Id.* (citing UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK, SECOND REPORT TO THE BOARD OF JUDGES, ALTERNATIVES TO INCARCERATION IN THE EASTERN DISTRICT OF NEW YORK: THE PRETRIAL OPPORTUNITY PROGRAM AND THE SPECIAL OPTIONS SERVICES PROGRAM 13 (2015)).

276. SECOND REPORT TO THE BOARD OF JUDGES, *supra* note 275, at 19.

277. *Id.* at 20.

In 2015, the Southern District of New York began a similar program, the Young Adult Opportunity Program.²⁷⁸ The program generally requires that candidates “have a limited criminal history” and seeks to either dismiss charges or provide non-incarcerative sentences.²⁷⁹ The Southern District of Ohio has operated its similar Special Options Addressing Rehabilitation program since 2012.²⁸⁰ And the Southern District of California’s alternative to the Prison Sentence Program has long focused on youthful defendants charged with drug trafficking or immigration offenses.²⁸¹

While these Young Adult Courts differ in a number of ways, they offer a number of advantages. They provide a developmentally informed response to a particular group of offenders via a specialized court that is procedurally oriented and professionally staffed. By offering life skills, counseling, and educational and vocational training, the court not only reduces recidivism and does so while saving compared to the tremendous short-term and long-term costs of incarceration, it does so while communicating to these offenders that they are worthy of something other than treatment as criminals. Moreover, as Vincent Schiraldi has observed, the benefits of a new, distinct institution include that it offers a system approach, that can be staffed with specialists and funded and studied as a system.²⁸²

The most progressive model, the San Francisco Young Adult Court, treats cases at the front end and back end more like juvenile court, with individualized, community-based, rehabilitative-focused services designed to keep the public safe and shepherd the young person to a more independent and productive adulthood. At the same time, because it remains a criminal court, participants can still receive criminal court procedural protections like bail, grand juries, trial by jury, speedy trial requirements, and more.

Young Adult Courts can serve several different reformist goals. A reduced emphasis on incarceration and a commitment to avoiding the creation of a criminal record enable Young Adult Courts to serve the goal of penal moderation, both in the short and long-term. By focusing on the needs of the individual offender, and prioritizing interventions that address conditions that contribute to offending, Young Adult Courts can advance therapeutic justice and a successful transition to adulthood. Because they do so while minimizing the substantial costs of incarceration,

278. Scott-Hayward, *supra* note 16, at 76 (citing Press Release, United States District Court for the Southern District of New York, SDNY Young Adult Opportunity Program, (Aug. 17, 2015), <http://www.nysd.uscourts.gov/docs/SDNY%20Young%C20Adult%C20Opportunity%20Program.pdf>).

279. Press Release, United States District Court for the Southern District of New York, SDNY Young Adult Opportunity Program, (Aug. 17, 2015), <http://www.nysd.uscourts.gov/docs/SDNY%20Young%C20Adult%C20Opportunity%20Program.pdf>.

280. Scott-Hayward, *supra* note 16, at 76.

281. *Id.*

282. Vincent Schiraldi, Senior Research Fellow, Program in Crim. Just. Pol’y at Harvard University., Remarks at the Community Justice International Summit, Young Adult Justice Panel (Apr. 15, 2016), <https://www.youtube.com/watch?v=O4M7BywQWwU>.

they simultaneously promote the smart on crime movement.²⁸³ Young Adult Courts also enable a more intense and often longer period of state supervision of offenders, promoting the goals of increased responsabilization and surveillance of wrongdoers.

Young Adult Courts are not without their drawbacks. Problem-solving courts in general face a scale/resource problem.²⁸⁴ While the community-based rehabilitative services prioritized by Young Adult Courts may be more cost-effective than incarceration, it is costly to create, staff, regulate, and maintain a new criminal justice institution. Even for courts like San Francisco's Young Adult Court, which has a limited caseload and hears cases only one afternoon a week, these bureaucratic costs are real. Moreover, since the Young Adult Courts are not doing anything that a general jurisdiction criminal court could not do, it might be said that there is no need for a separate system.

Young Adult Courts may, as they serve laudable goals, negatively impact the criminal justice system as a whole, and individual defendants as a consequence. Critics have shown that problem-oriented courts tend to "subordinate all of the issues involved in a defendant's contact with the criminal justice system to treatment."²⁸⁵ Legal issues regarding arrest, detention, interrogation, or the proportionality of the punishment to the offense, are commonly swept over. Since criminal proceedings are often the only place where law enforcement is policed, and constitutional rights vindicated,²⁸⁶ Young Adult Courts may further reduce court review of unlawful police practices and undermine a major legitimizing function of the judicial system.

Young Adult Courts could, like expanded juvenile court jurisdiction, end up increasing the punitiveness of the criminal justice system as they attempt to reduce it. By carving out yet another class of offenders from general jurisdiction criminal courts, Young Adult Courts also move us closer to leaving criminal courts with what might be thought of as an irredeemable remainder—those whose offending is not rooted in a treatable condition like drug dependency or mental health issues, whose individual characteristics do not suggest a reason for mitigated punishment, and who are not thought amenable to therapeutic or rehabilitative intervention.

283. See U.S. DEP'T OF JUST., SMART ON CRIME: REFORMING THE CRIMINAL JUSTICE SYSTEM FOR THE 21ST CENTURY 4 (2013), <https://www.justice.gov/sites/default/files/ag/legacy/2013/08/12/smart-on-crime.pdf> (former Attorney General Eric Holder expressed support for front-end specialized courts).

284. McLeod, *supra* note 5, at 1618

285. Anthony C. Thompson, *Courting Disorder: Some Thoughts on Community Courts*, 10 WASH. U. J. L. & POL'Y 63, 81 (2002).

286. *Id.* (observing that problem-solving courts like drug courts can leave an individual "with the impression that being stopped illegally because of her race, ethnicity, or place of residence is unimportant to the criminal justice system").

CONCLUSION

Specialized Young Adult Courts dedicated to eighteen to twenty-five-year-olds offer a developmentally-informed response at the front and back end of cases without unduly complicating the work of the juvenile court, avoid potential due process and rights problems, and communicate to these offenders that they are worthy of something other than punitive, assembly-line treatment as criminals. Despite the challenges and the potential drawbacks, Young Adult Courts can demonstrate that a more developmentally-informed, and less incapacitation-focused intervention can successfully protect public safety and impose accountability on this age group.