

# The Advocate



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## SHARED RESPONSIBILITY: THE YOUNG ADULT OFFENDER

by Rebecca Ballard DiLoreto\*

I would there were no age between ten and three-and-twenty, or that youth would sleep out the rest; for there is nothing in the between but getting wenches with child, wronging the ancientry, stealing, fighting.

Shakespeare: A Winter's Tale, Act 3, Scene 3

Those who truly know Kentucky often recall our Thoroughbred, Cardinal and Goldenrod, the Commonwealth's treasured horse, bird, and flower.<sup>1</sup> The cardinal comes to maturity after a year of life;<sup>2</sup> the Goldenrod's maturity is measured at six to eight feet tall;<sup>3</sup> on the other hand, there is debate about our state horse.<sup>4</sup> Some believe that the thoroughbred is mature enough to race by its third birthday.<sup>5</sup> Others assert that the horse's bone structure is not fully formed until the sixth year of life.<sup>6</sup> Maturity—it is something we think about in regards to all life—we study the question and we re-evaluate based on the knowledge available to us. Are we at a new place in terms of our understanding of the process of human maturation? Do we see behavior differently today than it was understood by Shakespeare? This article engages us in some thoughts about this issue with respect to the young adults who grow up in our homes, live in our communities, and break the law. Are we at a new day in terms of how our Kentucky Criminal Justice System should address these young/emerging adult offenders?



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**“Research has shown that 18 to 25 year-olds are still developing their capacities for judgment and impulse control. While they, like all offenders, must be held accountable for their actions, criminal justice policy should recognize that the malleability of these young people also means there is an even greater opportunity to, with the right intervention, put them on a track to a productive, law-abiding life. The stakes couldn't be higher as, even when those in this age group are incarcerated, they will typically be discharged with many decades left to either be a contributor or menace to society.**

**Kentucky can be a national leader in making sure that, rather than a cookie-cutter approach to corrections, the sentences and rehabilitation programs for 18 to 25 year-olds incorporate the best research as to what works to reduce recidivism without being too tough on taxpayers.”\*\***

Marc Levin, Director, Center for Effective Justice,  
Texas Public Policy Foundation Policy Director, Right on Crime  
<http://rightoncrime.com/about/>

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\*\* Quote by Marc Levin not included in the original publication of "Shared Responsibility: The Young Adult Offender," 2014, Northern Law Review, 41:2, pp.254-78

## I. INTRODUCTION

The United States Supreme Court has recognized that youth are a cognizable class to be treated differently under the law.<sup>7</sup> The Court has recognized that “youth” as a class are less culpable for their actions because their development as human beings is not yet complete.<sup>8</sup> Youth lack the social, physical and psychological maturity deemed appropriate to hold them equally responsible as adults for their actions.<sup>9</sup> The brain science relied upon by the Court, established that the human brain does not complete its development until a person reaches their mid-twenties.<sup>10</sup> This research indicates that lawmakers should consider amendments to appropriately address the “young adult,” or what is sometimes called the “emerging adult” population<sup>11</sup>, when such persons break the law.

**“America’s incarceration costs continue to skyrocket. It is not surprising that the recent financial crisis has attracted an increased level of attention to the nation’s allocation of fiscal resources and its costly incarceration practices called into question.” - Professor Lawson**

Public safety is served by a criminal justice system that balances the objectives of prevention, punishment and rehabilitation.<sup>12</sup> Given what we know about the developmental reality of young/emerging adults, should we alter how we address this population for acts of criminal wrongdoing? Said otherwise, what do the Roper, Graham, Miller, and JDB cohort of cases suggest about how to effectively and justly deter, punish, and rehabilitate newly adult offenders?<sup>13</sup> The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (also referred to

as the “Beijing Rules”) require that efforts “be made to extend the principles embodied in the Rules to young adult offenders” and to extend the protection afforded by the Rules to cover proceedings dealing with young adult offenders.<sup>14</sup>

Several states and other countries have created young adult offender categories.<sup>15</sup> Options include easier access to diversion than that allowed for older adult offenders; the option of keeping convictions confidential; greater leniency at sentencing with a preference for probation; confinement in facilities structured to meet the young adults need for education and vocational training with mentors and counselors; a reduction in years of confinement with earlier consideration for parole.<sup>16</sup>

Kentucky has not employed any of these options. The only area of the Kentucky penal code where youthfulness is recognized in mitigation of punishment for adults is with capital cases.<sup>17</sup> Thus, the law of the Commonwealth mandates that a jury or judge in sentencing a young woman convicted of capital homicide, one of the most serious crimes, must consider her young adult status in mitigation for punishment.<sup>18</sup> Yet, the car thief, facing a sentence of one to five years in prison for a Class D felony, has no statutorily defined right to leniency based on lack of complete adult development.<sup>19</sup> This article argues that models of reform adopted by other states and nations should be sensibly considered and, where appropriate, incorporated into Kentucky’s penal code. Our area of concern herein is with those convicted of felony offenses. Kentucky’s misdemeanor provisions place discretion for sentencing and supervision of probation squarely upon the sentencing court and incarceration is at the local jail level.<sup>20</sup> The youthfulness of adult offenders can more easily be taken into account by district court judges. However, those young adults convicted of felony offenses are more likely to be placed indiscriminately on the assembly line of a justice system attempting to be fair and expedient by applying standards that make little to no exception for youthfulness.

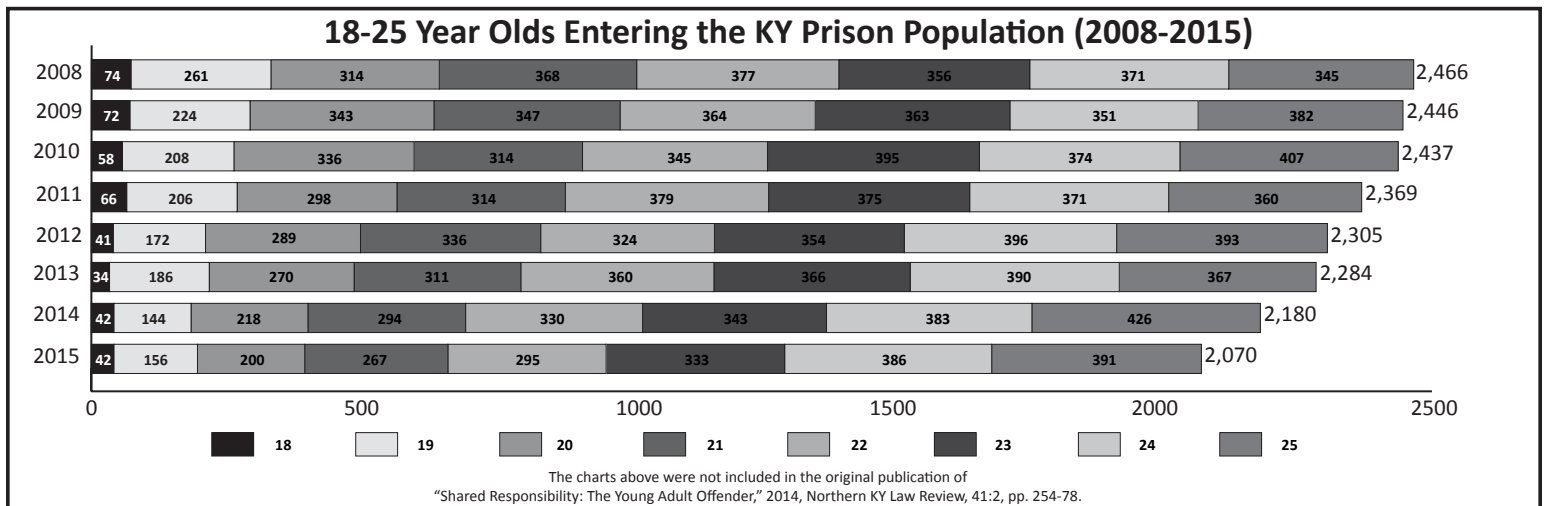
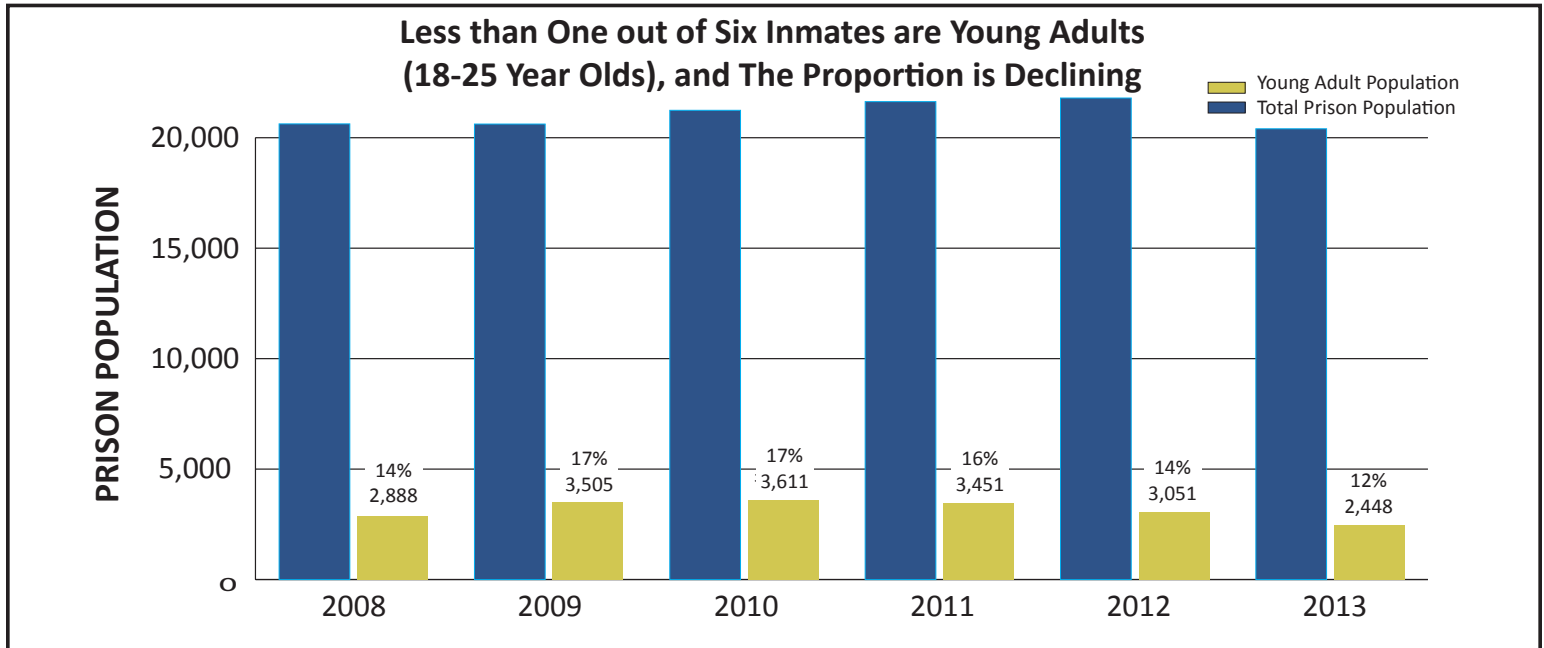
1. See Kentucky State Symbols, KY. LEGIS. RES. COMMISSION, <http://www.lrc.ky.gov/kidspages/symbols.htm> (last visited Mar. 15, 2014).
2. See Tanya Dewey et. al., Cardinalis Cardinalis Northern Cardinal, ANIMAL DIVERSITY WEB, [http://animaldiversity.ummz.umich.edu/accounts/Cardinalis\\_cardinalis/](http://animaldiversity.ummz.umich.edu/accounts/Cardinalis_cardinalis/) (last visited Mar. 15, 2014) (noting that the cardinal reaches sexual maturity at one year of age).
3. Kentucky State Flower – Goldenrod, ABOUT.COM, <http://homeschooling.about.com/library/blkyflower.htm> (last visited Mar. 15, 2014) (noting that the Goldenrod may range between one and eight feet in height).
4. Deb Bennett, Horse Timing and Rate of Skeletal Maturation in Horses, With Comments on Starting Young Horses and the State of the Industry, EQUINE STUDIES INST. (2008), [http://www.equinestudies.org/ranger\\_2008/ranger\\_piece\\_2008\\_pdf1.pdf](http://www.equinestudies.org/ranger_2008/ranger_piece_2008_pdf1.pdf).
5. Id.
6. See id. at 8 (noting that horses’ vertebrae do not finally fuse until five and one-half years for females and an additional six months for males).
7. See Roper v. Simmons, 543 U.S. 551, 569 (2005) (“[D]ifferences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders.”).
8. See id. at 569–71.
9. See generally id.
10. See id. at 569 (citing Laurence Steinberg & Elizabeth S. Scott, Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 AM. PSYCHOLOGIST 1009, 1014 (2003). See also, Laurence Steinberg, What the Brain Says About Maturity, N.Y. TIMES (May 29, 2012), [www.nytimes.com/roomfordebate/2012/05/28/do-we-need-to-redefine-adulthood/adulthood-what-the-brain-says-about-maturity](http://www.nytimes.com/roomfordebate/2012/05/28/do-we-need-to-redefine-adulthood/adulthood-what-the-brain-says-about-maturity) (“Significant changes in brain anatomy and activity are still taking place during young adulthood, especially in prefrontal regions that are important for planning ahead, anticipating the future consequences of one’s decisions, controlling impulses, and comparing risk and reward. Indeed, some brain regions and systems do not reach full maturity until the early or mid-20s.”).
11. See Barbar Hofer, A Parent’s Role in the Path to Adulthood, N.Y. TIMES (May 28, 2012), [www.nytimes.com/roomfordebate/2012/05/28/do-we-need-to-redefine-adulthood/a-parents-role-in-the-path-to-adulthood](http://www.nytimes.com/roomfordebate/2012/05/28/do-we-need-to-redefine-adulthood/a-parents-role-in-the-path-to-adulthood) (“‘Emerging adults’ – whom Jeffrey Arnett defines as individuals between 18 and 25 – need opportunities to make their own choices, whether that’s about their major, what courses to take, their social lives or summer plans, and they need practice in making mistakes and recovering, and in owning the outcomes of their choices.”); see also, JEFFREY J. ARNETT EMERGING ADULTHOOD: THE WINDING ROAD FROM LATE TEENS THROUGH THE TWENTIES (2004).

## II. COSTS OF RELYING ONLY UPON INCARCERATION OR STANDARD TERMS OF PROBATION FOR THE YOUNG ADULT POPULATION

### A. Incarceration

For a person to be counted as a prisoner by the United States government, they must be physically held in a facility under the jurisdiction of a state or the Federal Bureau of Prisons.<sup>21</sup> A locality, state, or the Federal Bureau of Prisons may hold inmates over whom a different government maintains jurisdiction.<sup>22</sup> Hence, in Kentucky, state and federal prisoners can be held in local jails.<sup>23</sup>

To calculate the costs of incarceration requires an accounting of the number of people incarcerated. The main source for annual prisoner counts is the National Prisoner Statistics Program (NPS) data collection, which began in 1926 under a mandate from Congress to collect statistics on prisoners.<sup>24</sup> Imprisonment rates refer to the number of persons under the jurisdiction, or legal authority, of state or federal correctional officers per 100,000 U.S. residents.<sup>25</sup> When prison populations are combined with local jail counts, they are referred to as the incarcerated



12. See Jeremy Travis, *International Strategies for Crime Prevention in Transitional Societies: Problems & Prospects*, URBAN INST., 3-4 (2000), [http://www.urban.org/pdfs/south\\_africa.pdf](http://www.urban.org/pdfs/south_africa.pdf) (noting that societies' crime prevention policies should meet the three goals of reducing crime, developing community structures to increase levels of safety, and building a justice infrastructure that efficiently and fairly responds to crime).
13. See generally *Roper v. Simmons*, 543 U.S. 551 (2005) (execution of individuals who were under eighteen years of age at time of their capital crimes is prohibited by the Eighth and Fourteenth Amendments); *Graham v. Florida*, 560 U.S. 48 (2010) (holding unconstitutional sentences of life without parole for juvenile, non-homicide offenders); *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (holding that mandatory life imprisonment without parole for those under the age of eighteen at the time of their crimes violates the Eighth Amendment's prohibition on cruel and unusual punishments); *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011) (child's age properly informs Miranda analysis).
14. United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), G.A. Res. 40/33, U.N. GAOR, 40th Sess., Supp. No. 53, U.N. Doc. A/RES/40/33 (Nov. 29, 1985), available at <http://www.un.org/documents/ga/res/40/a40r033.htm>.
15. See, e.g., Colo. Rev. Stat. Ann. § 18-1.3-407(2)(a)(III)(B) (2013) ("Young adult offender means a person who is at least 18 years of age but under 20 years of age when the crime is committed and under 21 years of age at the time of sentencing pursuant to this section."); GA. CODE ANN. § 42-7-2(7) (2013) (defining "youthful offender" to include male offenders aged at least 17, but less than 25 years of age).

population, and the incarceration rate is the number of persons in prison or jail per 100,000 U.S. residents.<sup>26</sup> The United States government reported spending an average of \$28,893.40 per prisoner during fiscal year 2011.<sup>27</sup>

Kentucky operates 12 prisons, including one women's prison, and provides grants to community corrections programs and facilities.<sup>28</sup> In 2009, Kentucky reported spending \$384,336,582 on the approximately 22,553 inmates housed in its facilities.<sup>29</sup> Persons convicted for offenses committed from age eighteen upward can be housed in these prisons in Kentucky.<sup>30</sup> The reported figure does not include monies allotted to local jails for general maintenance.<sup>31</sup> Inmates are incarcerated pretrial in local jails on misdemeanor offenses and often serve out their sentences on Class D and C felonies.<sup>32</sup> The \$384,336,582 includes the monies paid to local jails for the convicted C and D felons.<sup>33</sup>

An inmate's placement is determined based on a classification instrument used by the Department of Corrections and developed with assistance from the National Institute of Corrections.<sup>34</sup> Kentucky has one male and one female intake facility where the classification occurs.<sup>35</sup> Elderly, middle aged, and young inmates may be housed together.<sup>36</sup> Women are kept in separate institutions from men, except when prisoners are Class C and D felons retained in the county jails.<sup>37</sup> In the jails, men and women are locked up in separate areas.<sup>38</sup>

KRS 532.100(4) requires the Department of Corrections to house qualifying Class D and Class C felons in county jails.<sup>39</sup> Administrative regulation establishes the procedures to implement the required housing program.<sup>40</sup> Qualifying Class D or C felons can also be placed in home incarceration or on conditional release.<sup>41</sup> None of these provisions or accompanying procedures differentiates treatment of adult offenders based on age.

16. See, e.g., Colo. Rev. Stat. Ann. § 18-1.3-407(2)(a)(I) ("The court shall have a presentence investigation conducted before sentencing a juvenile or young adult offender pursuant to this section. Upon the request of either the prosecution or the defense, the presentence report shall include a determination by the warden of the youthful offender system whether the offender is acceptable for sentencing to the youthful offender system. When making a determination, the warden shall consider the nature and circumstances of the crime; the age, circumstances, and criminal history of the offender; the available bed space in the youthful offender system; and any other appropriate considerations."); DEL. CODE ANN. tit. 11, § 6701 (2013) (includes short military style program for young adult offenders); HAW. REV. STAT. § 706-667(1)-(2) (2013) (providing for special and individualized correctional and rehabilitative treatment as may be appropriate to the young adult defendant's needs if under twenty-two years of age); ME. REV. STAT. ANN. tit. 34-A, § 3816 (2013) (authorizing placement of young adult offenders below the age of twenty-six in separate facilities more suited for juvenile offenders); TRANSITION TO ADULTHOOD ALLIANCE, TRANSITION TO ADULTHOOD: A NEW START: YOUNG ADULTS IN THE CRIMINAL JUSTICE SYSTEM, available at <http://www.barrowcadbury.org.uk/wp-content/uploads/2011/01/T2A-A-New-Start-Young-Adults-in-the-Criminal-Justice-System-2009.pdf> (describing the need for a "distinct and radically different approach to young adults in the criminal justice system; an approach that is proportionate to their maturity and responsive to their specific needs").
17. See KY. REV. STAT. ANN. § 532.025(2)(b) (West 2013) (noting that age can be considered as a mitigating factor in sentencing for capital cases).
18. *Id.*
19. Compare *id.* (noting age as mitigating factor in sentencing for capital crimes), with § 514.030(2)(d) (noting that theft of property with a value between \$500 and \$10,000 is a Class D felony) and § 532.060(d)(2) (providing for a sentence of not less than one year or more than five years for a Class D felony).
20. See *id.* § 439.177 (noting that the sentencing court has discretion with regard to sentencing, parole, and parole conditions); see also § 439.179 (noting that the sentencing court has discretion to grant work release, and that local probation and work release agencies are responsible for obligations under this section).
21. See Terms and Definitions: Corrections, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, <http://www.bjs.gov/index.cfm?ty=tdpt&tid=1> (last visited Mar. 16, 2014) (defining "custody count").
22. *Id.*
23. See KY. REV. STAT. ANN. § 532.100(4) (West 2013) (stating that inmates can be held in local or state facilities depending on the class of crime, length of sentence, etc.); 501 KY. ADMIN. REGS. 2:060 (2013) (detailing procedures for housing of Class D and Class C felons).
24. See Prison Population Counts, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, <http://www.bjs.gov/index.cfm?ty=tp&tid=131> (last visited Mar. 16, 2014).
25. *Id.*
26. *Id.*
27. Annual Determination of Average Cost of Incarceration, 78 Fed. Reg. 16711-02 (Mar. 18, 2013), at <http://www.gpo.gov/fdsys/pkg/FR-2013-03-18/pdf/2013-06139.pdf>.
28. Institutions & Facilities, KY. DEP'T OF CORR., <http://corrections.ky.gov/depts/AI/Pages/default.aspx> (last visited Mar. 16, 2014) (listing the twelve correctional facilities operated by the Kentucky Department of Corrections); see KY. DEP'T OF CORR., 2011 ANNUAL REPORT 96-97 (2011), available at <http://corrections.ky.gov/about/Documents/Research%20and%20Statistics/Annual%20Reports/2011%20Annual%20Report.pdf> (listing sixteen community corrections programs funded through grants during 2010-11 from the Kentucky Department of Correction's Division of Local Facilities).
29. PROGRAM REVIEW & INVESTIGATIONS COMM., KY. LEGISLATIVE RESEARCH COMM'N, REPORT ON COST OF INCARCERATING ADULT FELONS, RESEARCH REPORT NO. 373 at viii (2009), available at <http://www.lrc.ky.gov/lrcpubs/rr373.pdf>.
30. See Institutions & Facilities, *supra* note 28 (stating that Kentucky's twelve correctional facilities house Kentucky's adult inmate population); see also 505 KY. ADMIN. REGS. 2:010(26) (West 2013) (defining "juvenile" as a person under the age of eighteen).
31. COST OF INCARCERATING ADULT FELONS, *supra* note 30, at viii.
32. See KY. REV. STAT. ANN. § 532.100(4)(a) (West 2013) (requiring persons convicted of a Class D felony with a term of five years or less to serve that term in a local jail); § 532.100(4)(b) (stating that persons convicted of a Class D or C felony with a sentence of more than five years may under certain conditions serve the term in a local jail).
33. COST OF INCARCERATING ADULT FELONS, *supra* note 30, at viii-ix.
34. See Institutions & Facilities, *supra* note 28.
35. See PATRICIA L. HARDIMAN ET. AL., NAT'L INST. OF CORR., U.S. DEP'T OF JUSTICE, PRISONER INTAKE SYSTEMS: ASSESSING NEEDS AND CLASSIFYING PRISONERS 6 (2004), available at <https://s3.amazonaws.com/static.nicic.gov/Library/019033.pdf>.
36. See *id.* (indicating by inference that if Kentucky has one male and one female intake facility, then adult inmates of all ages may thus be housed together).
37. See *id.* (noting that Kentucky has separate intake facilities for males and females); KY. REV. STAT. ANN. § 532.100(4)(a) (West 2013) (requiring persons convicted of a Class D felony with a term of five years or less to serve that term in a local jail); § 532.100(4)(b) (stating that persons convicted of a Class D or C felony with a sentence of more than five years may under certain conditions serve the term in a local jail).
38. See 501 KY. ADMIN. REGS. 7:110(2)(b) (West 2013) (requiring separation of male and female prisoners).
39. KY. REV. STAT. ANN. § 532.100(4) (West 2013).
40. See 501 KY. ADMIN. REGS. 2:060 (West 2013) (noting procedures for housing of Class D and Class C felons).
41. See KY. REV. STAT. ANN. § 532.060 (West 2013) (the Editor's Notes include the 1974 Kentucky Crime Commission, Legislative Research Committee comments: "[T]he trial judge has at his disposal the power of modification granted by KRS 532.070 and the power granted by KRS Ch 533 to substitute probation or conditional discharge in place of imprisonment.").
42. Community Corrections (Probation and Parole), BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, [http://www.bjs.gov/index.cfm?ty=tp&tid=15#terms\\_def](http://www.bjs.gov/index.cfm?ty=tp&tid=15#terms_def) (last visited



## B. Probation and Parole

Probation refers to adult offenders whom courts place on supervision in the community through a probation agency, generally in lieu of incarceration.<sup>42</sup> Some jurisdictions sentence probationers to a combined short-term incarceration sentence immediately followed by probation, which is referred to as a “split sentence.”<sup>43</sup> Kentucky uses “shock probation,” a process wherein the felon serves a period of time in the county jail, which theoretically “shocks” her into good behavior, and then, is granted probation under terms determined by a trial judge.<sup>44</sup>

Probationers can be subject to different levels of supervision.<sup>45</sup> Some may have to report on a weekly or monthly basis to a probation officer, others may be permitted to communicate with their probation officers by mail or phone.<sup>46</sup> Some states include the status of inactive supervision, removing the obligation of regular reporting.<sup>47</sup> In most states, as in Kentucky, the law permits that terms of probation be constructed to meet the particular facts of the case and the identified needs of the convicted felon placed on probation.<sup>48</sup> The Kentucky Office of Probation and Parole completes a presentence investigation to gather the facts needed by the trial judge to impose an appropriate sentence.<sup>49</sup> This report includes inquiry about an offender’s educational status, but makes no reference to or consideration of youthfulness.<sup>50</sup> Uniformly, probationary terms include fulfillment of certain conditions such as the payment of fines, fees or court costs, participation in treatment program and

adherence to specific rules of conduct while in the community.<sup>51</sup> Probation officers can seek court orders to incarcerate for the failure to comply with any condition.<sup>52</sup>

In Kentucky, the sentencing judge determines whether a convicted felon is placed on probation and the terms of that probation.<sup>53</sup> The Parole Board, whose members are appointed by the Governor, grants and establishes and the terms of parole.<sup>54</sup> An inmate generally faces the Parole Board only after being denied probation or violating the terms of probation, going to jail or prison, and then qualifying for review by the Parole Board based on the amount of time served.<sup>55</sup>

The presentence investigation report continues as a point of reference for the state in assessing a convicted felon while he remains under the jurisdiction of the Department of Corrections.<sup>56</sup> It affects how the inmate is classified by the Department of Corrections.<sup>57</sup> In Kentucky, the same community based office that supervises probation of Kentucky felons also supervises those placed on parole.<sup>58</sup> The same presentence investigation report gives guidance to the parole officer for determining the conditions of supervision for parole.<sup>59</sup>

## C. Financial Cost of Reliance Upon Incarceration

Recognizing that the financial costs alone of incarcerating both violent and non-violent offender alike has burdened the state and federal economy, officials sought alternatives to incarceration.<sup>60</sup> In 2012, the number of admissions to state and

Mar. 22, 2014) (defining probation).

43. J. Richard Couzens & Tricia A. Bigelow, *Felony Sentencing After Realignment*, JUDICIAL BRANCH OF CAL., 11 (Mar. 4, 2014), [http://www.courts.ca.gov/partners/documents/felony\\_sentencing.pdf](http://www.courts.ca.gov/partners/documents/felony_sentencing.pdf) (describing split sentencing in California).
44. KY. REV. STAT. ANN. § 439.265 (West 2013).
45. Id. § 533.030(1) (“The conditions of probation and conditional discharge shall be such as the court, in its discretion, deems reasonably necessary to insure that the defendant will lead a law-abiding life or to assist him to do so.”).
46. Id. § 533.030(2).
47. See, e.g., *Community Corrections (Probation and Parole)*, supra note 43 (defining inactive status for federal parolees as “excluded from regularly reporting”); Ky. Dep’t of Corr., Policy No. 27-24-01, *Releasing Offender From Active Supervision 1* (Dec. 16, 2011), available at <http://corrections.ky.gov/communityinfo/Policies%20and%20Procedures/Documents/CH27/27-24-01%20-%20Releasing%20Offenders%20from%20Active%20Supervision.pdf> (defining inactive supervision in Kentucky as “a level of supervision that does not require personal or collateral contact”).
48. KY. REV. STAT. ANN. § 532.050 (West 2013) (requiring a presentence investigation report identifying counseling treatment, education, and rehabilitation needs of the defendant).
49. Id. § 532.050(2).
50. Id. § 532.050(3) (requiring the presentencing report to include “an analysis of the defendant’s history of delinquency or criminality, physical and mental condition, family situation and background, economic status, education, occupation, and personal habits”).
51. See, e.g., id. § 533.030 (stating probationary terms and conditions that the court may impose on defendant); *Community Corrections (Probation and Parole)*, supra note 43 (providing examples of probationary conditions such as payment of fines, fees or court costs, participation in treatment programs, and adherence to specific rules of conduct while in the community).
52. See KY. REV. STAT. ANN. § 532.060(4) (West 2013) (stating that an offender violating the terms of his or her probation may be incarcerated); § 532.020(1) (“[T]he court may modify or enlarge the conditions or, if the defendant commits an additional offense or violates a condition, revoke the sentence at any time prior to the expiration or termination of the period of probation.”).
53. Id. § 533.030.
54. See id. § 439.330 (describing the duties of the Parole Board); § 439.320 (requiring the Governor to appoint members of the Parole Board).
55. See generally id. 533.030 (describing the general requirements for an inmate to receive consideration for parole).
56. See id. § 439.330 (requiring the Parole Board to “study the case histories of persons eligible for parole, and deliberate on that record”); *Aaron v. Com.*, 810 S.W.2d 60 (Ky. Ct. App. 1991) (holding that presentencing reports are court records and reviewable by the Parole Board without the need to redact dropped criminal charges or any other information included in the report).
57. See Ky. Dep’t of Corr., Policy No. 28-01-03, *Presentence, Postsentence, and Other Investigation Reports 10* (Mar. 12, 2012), available at <http://corrections.ky.gov/communityinfo/Policies%20and%20Procedures/Documents/CH28/28-01-03%20-%20PSI.pdf> (noting that the presentencing report is available to the Classification and Records Department via the Kentucky Department of Correction’s case management).
58. See Division of Probation and Parole, KY. DEP’T OF CORR., <http://corrections.ky.gov/depts/Probation%20and%20Parole/Pages/default.aspx> (last visited Mar. 22, 2014) (noting that the division also provides services for Community Centers, Halfway House pre-release programs, and jail-based Class D programs).
59. See Ky. Dep’t of Corr., Policy No. 27-02-02, *Duties of Probation and Parole Officers and Investigators 1* (Jan. 1, 2012), available at <http://corrections.ky.gov/communityinfo/Policies%20and%20Procedures/Documents/CH27/27-02-02%20Duties.pdf> (noting that probation and parole investigators prepare pre-sentence investigation reports and provide recommendations on supervision of offenders to the courts and probation and parole officers).
60. See CHRISTINE S. SCOTT-HAYWARD, *VERA INST. OF JUSTICE, THE FISCAL CRISIS IN CORRECTIONS: RETHINKING POLICIES AND PRACTICES 3* (2009), available at [KENTUCKY DEPARTMENT OF PUBLIC ADVOCACY](http://www.</a></li>
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federal prison in the United States had dropped to 609,800, the lowest number of offenders admitted since 1999.<sup>61</sup>

In 2011, the U.S. government reported 4,814,200 adults under state and federal community supervision.<sup>62</sup> This number likewise represented a drop in population from the previous year.<sup>63</sup> Based on data from 2012, Kentucky identified 14,419 adults on parole, 54,511 on probation, and 17,814 in prison.<sup>64</sup>

A long look back allows us to see the trend towards reliance on incarceration in Kentucky, as noted by the original architect of Kentucky's penal code, Professor Robert G. Lawson:

In the early 1970s, Kentucky held about 3,000 convicted felons in its prisons. It had two major prisons for men, a small prison for women, and a separate facility for juveniles. It had no inmates in private prisons, had none housed permanently in county jails, and had not engaged in major prison construction for more than three decades. By late 2005, the state held more than 19,850 felons in custody, an increase of more than 650 percent since the early 1970s. It operated thirteen state prison facilities (ten major prisons for men, a major prison for women, and two smaller facilities); it had more than 1,500 inmates housed in private prisons; and with all its prisons full, the state held more than 5,600 inmates in county jails across the state. Kentucky opened a new prison for men (almost 1,000 beds) in July 2005, and not long thereafter, the state contracted for an additional 400-bed private prison for women. Near this time, the state looked ahead and concluded that it would have 26,527 inmates by 2010 and 31,057 by 2014. This means that the state will need a new 1000-inmate prison every

year for the next decade and will incur truly staggering increases in prison operating costs.<sup>65</sup>

Professor Lawson's trend analysis was echoed in another, more recent, article: "In the midst of immense budget shortfalls, America's incarceration costs continue to skyrocket. It is not surprising that the recent financial crisis has attracted an increased level of attention to the nation's allocation of fiscal resources and its costly incarceration practices called into question."<sup>66</sup>

To cut such costs, states have been urged by the right, the left, and the middle to reevaluate statutory mandates and regulatory policies that route those on probation or parole back to prison every year, often times not for new crimes, but for technical violations.<sup>67</sup> The length of prison terms and their relationship to recidivism "is one of the central points of debate in sentencing and corrections policy."<sup>68</sup>

Many people assert that longer prison terms are more effective at deterring future crimes because they set a higher price for criminal behavior and because they hold offenders until they are more likely to "age out" of a criminal lifestyle. Others argue the opposite—that more time behind bars increases the chances that inmates will reoffend later because it breaks their supportive bonds in the community and hardens their associations with other criminals.<sup>69</sup>

Research indicates that the two theories, however, "may cancel each other out."<sup>70</sup> Studies examining this relationship "have failed to find a consistent impact, either positive or negative."<sup>71</sup>

vera.org/files/The-fiscal-crisis-in-corrections\_July-2009.pdf (noting that states are pursuing innovative strategies to reduce levels of incarceration and thereby reduce overall corrections expenditures).

61. E. ANN CARSON & DANIELA GOLINELLI, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 2012, at 3 (2013), available at <http://www.bjs.gov/content/pub/pdf/p12tar9112.pdf>.
62. LAURA M. MARUSCHAK & ERIKA PARK, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PROBATION AND PAROLE IN THE U.S. 2011, at 1 (2012), available at <http://www.bjs.gov/content/pub/pdf/ppus11.1.pdf>.
63. *Id.*
64. LAURA M. MARUSCHAK AND THOMAS P. BONCZAR, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PROBATION AND PAROLE IN THE U.S. 2012, at 16-20 (2013), available at <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=1997>.
65. Robert G. Lawson, Turning Jails into Prisons—Collateral Damage from Kentucky's "War on Crime," 95 KY. L.J. 1, 2 (2006-2007) (internal citations omitted).
66. Emily M. Grant, Cost Conscious Justice: The Case for Wholly-Informed Discretionary Sentencing in Kentucky 100 KY. L.J. 391, 392 (2011-2012).
67. See generally RIGHT ON CRIME, <http://www.rightoncrime.com> (last visited Mar. 23, 2014) (advocating criminal justice reform from a conservative standpoint); Overview, PUBLIC SAFETY PERFORMANCE PROJECT, PEW CHARITABLE TRUSTS, <http://www.pewstates.org/projects/public-safety-performance-project-328068> (last visited Mar. 23, 2014) (explaining that Pew's Public Safety Performance Project "works with states to advance data-driven, fiscally sound policies and practices in the criminal and juvenile justice systems that protect public safety, hold offenders accountable, and control corrections costs"); The Sentencing Project - About Us, THE SENTENCING PROJECT, <http://www.sentencingproject.org/template/page.cfm?id=2> (last visited Mar. 23, 2014) (describing the organization's mission as "work[ing] for a fair and effective U.S. criminal justice system by promoting reforms in sentencing policy, addressing unjust racial disparities and practices, and advocating for alternatives to incarceration").
68. Fact Sheet: Prison Time Served and Recidivism, PUBLIC SAFETY PERFORMANCE PROJECT, PEW CHARITABLE TRUSTS (Oct. 8, 2013), <http://www.pewstates.org/research/fact-sheets/prison-time-served-and-recidivism-85899510643>.
69. *Id.*
70. *Id.*
71. *Id.* (citing PAUL GENDREAU ET AL., THE EFFECTS OF PRISON SENTENCES ON RECIDIVISM (1999); Thomas Orsagh & Jong-Rong Chen, The Effect of Time Served on Recidivism: An Interdisciplinary Theory, 4 J. Quantitative Criminology 155, 157 (1988); ROBERT BARNOSKI, WASH. STATE INST. FOR PUB. POL'Y, SENTENCES FOR ADULT FELONS IN WASHINGTON: OPTIONS TO ADDRESS PRISON OVERCROWDING (2004); ILYANA KUZIEMKO, GOING OFF PAROLE: HOW THE ELIMINATION OF DISCRETIONARY PRISON RELEASE AFFECTS THE SOCIAL COST OF CRIME 2 (Nat'l Bureau of Econ. Research, Working Paper No. 13380, 2007); CAROLINA GUZMAN ET AL., NAT'L COUNCIL ON CRIME & DELINQUENCY, ACCELERATED RELEASE: A LITERATURE REVIEW (Jan. 2008); G. Matthew Snodgrass et al., Does the Time Cause the Crime? An Examination of the Relationship Between Time Served and Reoffending in the Netherlands, 49 CRIMINOLOGY 1149 (2011); Thomas A. Loughran et al., Estimating A Dose-Response Relationship Between Length of Stay and Future Recidivism in Serious Juvenile Offenders, 47 CRIMINOLOGY 699 (2009)). In the author's own experience across the Commonwealth from Fulton County to Jenkins, Kentucky, she has heard the span of perspectives and many more not so appropriate for a distinguished law journal review.
72. Creasie Finney Hairston, Prisoners and Their Families: Parenting Issues during Incarceration, in PRISONERS ONCE REMOVED: THE IMPACT OF INCARCERATION AND REENTRY ON CHILDREN, FAMILIES, AND COMMUNITIES 259, 270-71 (Jeremy Travis & Michelle Waul eds., 2003).

### III. PERSONAL COST OF RELIANCE UPON INCARCERATION AS PRIMARY STRATEGY FOR KEEPING PUBLIC SAFE

The personal costs of relying upon incarceration for the violent and nonviolent offender alike is obvious to most observers. Offenders and families suffer from long-term separation and the inability to sustain positive relationships.<sup>72</sup> Removal from society generally creates greater alienation once an individual is released and must try to find a place for herself, living within a community.<sup>73</sup> Many felons are challenged by years of institutionalization, not able to make basic decisions for themselves upon their release.<sup>74</sup> These costs are only magnified for the young adult offender.<sup>75</sup> While incarcerated, these young adults, who would only begin to be establishing their own way in the world, are removed from positive peer relationships; too easily assume an identification with the status of being a felon; are overtaken by the stigma of a conviction; lose the opportunity for education or job training; are disassociated from their family of origin; and are unable to begin to build a family of their own.<sup>76</sup>

**“[t]he brain isn’t fully mature at 16, when we are allowed to drive, or at 18, when we are allowed to vote, or at 21, when we are allowed to drink, but closer to 25, when we are allowed to rent a car.”**

- Massachusetts Institute of Technology

#### A. Critical Nature of Ages 18 to 24

Upon graduation from high school, many young people begin college, pursue vocational training, or seek employment often

at the bottom of the pay scale.<sup>77</sup> Everyone recognizes these years as foundational for building a solid future.<sup>78</sup> Young people may engage in their first serious romantic relationships.<sup>79</sup> They remain heavily influenced by their peers, for good or ill.<sup>80</sup> Young adults are primarily concerned with image, and thus any stigmatization can have long lasting effects on self-perception.<sup>81</sup>

Communities recognize the need to reach out to this population as it is seen as a time of both great promise and great risk.<sup>82</sup> At eighteen, young people are invited to join and often play leadership roles with youth groups at their places of religious worship.<sup>83</sup> Young people may be more highly sexualized than at any other time in their lives.<sup>84</sup> Thus, they have a great risk of bearing children without the means to care for their offspring.<sup>85</sup>

A 2002 study by the Bureau of Justice Statistics indicated that of the adults who had been released from state prison in 1994, “those in the 18-24 year old age bracket had the highest rates of re-arrest (75.4%), reconviction (52%) and return to prison with a new sentence (30.2%) within three years of release.”<sup>86</sup> What has been happening with these young adult offenders when we treat them in the same manner as older offenders has compelled other states and countries to try something different.<sup>87</sup>

#### B. Defining the Class of Young/Emerging Adults

For purposes of this discussion and in consideration of making room for the realities of young adulthood in Kentucky’s sentencing scheme, “young adulthood” is defined as the years between eighteen and twenty-four. From the twin perspectives of culture and biology, the age band is not clear-cut.<sup>88</sup> Statistics indicate that most adults desist from crime by the end of young

73. Craig Haney, *The Psychological Impact of Incarceration: Implications for Postprison Adjustment*, in *PRISONERS ONCE REMOVED*, supra note 73, at 33, 42.
74. *Id.* at 40-41. Additionally, twenty-eight plus years that the author has spent representing those who move in and out of our prison system confirms the statements made.
75. Griffiths et al., *The Int’l Ctr. for Criminal Law Reform and Criminal Justice Policy, The Social Reintegration of Offenders and Crime Prevention 4* (Apr. 2007), available at <http://curtgriffiths.com/pdfs/Social%20reintegration.pdf>.
76. *Id.*
77. See U.S. CENSUS BUREAU, *STATISTICAL ABSTRACT OF THE UNITED STATES* §§ 4, 12, 13. (2012), available at <https://www.census.gov/compendia/statab/2012edition.html>.
78. SUSAN JEKIELEK & BRETT BROWN, *CHILD TRENDS, THE TRANSITION TO ADULTHOOD: CHARACTERISTICS OF YOUNG ADULTS AGES 18 TO 24 IN AMERICA 1* (2005), available at <http://www.prb.org/pdf05/transitiontoadulthood.pdf>.
79. *Id.* at 13-17.
80. COMM. ON THE SCIENCE OF ADOLESCENCE, INST. OF MEDICINE & NAT’L RESEARCH COUNCIL, *THE SCIENCE OF ADOLESCENT RISK-TAKING: WORKSHOP REPORT 64-70* (2011), available at <http://www.ncbi.nlm.nih.gov/books/NBK53418/pdf/TOC.pdf>.
81. See Jön Gunnar Bernburg & Marvin D. Krohn, *Labeling, Life Chances, and Crime: The Direct and Indirect Effects of Official Intervention in Adolescence on Crime in Early Adulthood*, 41 *CRIMINOLOGY* 1287, 1288-89 (2003); S.E. Szivos-Bach, *Social Comparison Stigma And Mainstreaming: The Self-Esteem of Young Adults with a Mild Mental Handicap*, 6 *MENTAL HANDICAP RESEARCH*, 217-236 (1993).
82. See Elizabeth Fernandez, *Don’t push foster children out in the cold when they turn 18*, *THE CONVERSATION* (Aug. 26, 2013, 9:19 PM), <http://theconversation.com/dont-push-foster-children-out-in-the-cold-when-they-turn-18-16762>.
83. See, e.g., *Handbook 2: Administering the Church*, *THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS*, <https://www.lds.org/handbook/handbook-2-administering-the-church/meetings-in-the-church/18.3#183> (last visited Mar. 25, 2014) (allowing church members over the age of eighteen to attend church leadership conferences).
84. Justin R. Garcia, et al., *Sexual Hookup Culture: A Review*, 16 *REV. OF GEN. PSYCHOL.* 161, 163 (2012), available at <http://www.apa.org/monitor/2013/02/sexual-hookup-culture.pdf>.
85. *TRANSITION TO ADULTHOOD ALLIANCE*, supra note 16, at 12.
86. Tracy Velazquez, *Young Adult Justice: A New Frontier Worth Exploring*, *THE CHRON. OF SOC. CHANGE* 2 (May 1, 2013), <https://chronicleofsocialchange.org/xpanel/wp-content/uploads/2013/05/Young-Adult-Justice-FINAL1.pdf>. (citing PATRICK A. LANGAN AND DAVID J. LEVIN, *BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 1994*, 3 (2002), available at <http://bjs.gov/content/pub/pdf/rpr94.pdf>).
87. *Id.* at 3.
88. See generally, Sara B. Johnson, Robert W. Blum, and Jay N. Giedd, *Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy*, *J. ADOLESCENT HEALTH* 216 (2009), available at <http://download.journals.elsevierhealth.com/pdfs/journals/1054-139X/PIIS1054139X09002511.pdf>.



adulthood (the peak crime age being between the late teens and early twenties).<sup>89</sup> This age group has been described as “the invisible early twenties” by Great Britain’s Social Exclusion Unit 6, and the “lost generation” by Britain’s former Chief Inspector of Prisons.<sup>90</sup> It could be argued that the upper boundary should be when a young adult turns twenty-six years of age. Thus, limiting leniency to the eighteen to twenty-four age range should satisfy the concerns of hardliners and yet make some allowance for those transitioning to adulthood years.

**Creating a more uniform, well publicized, and clearly understood diversion program for young adult offenders would strengthen public safety in Kentucky.**

Eighteen is recognized by most states as the upper limit for emancipation.<sup>91</sup> The federal government and subsequently all states recognize twenty-one years of age as the permissible age for possession and consumption of alcohol.<sup>92</sup> The federal government has changed the law to permit young adults to be covered on their parents’ health care insurance until the individual reaches twenty-six years of age.<sup>93</sup> The business world relies upon actuarial tables to inform decisions concerning age and financial risk.<sup>94</sup> Full adulthood status is often deferred until the age of 25. Examples include car rental agencies, hotels that require greater proof of ability to pay for younger guests and banks that demand more proof of financial backing for the younger adult lender.<sup>95</sup>

The hard sciences are on par with the actuarial tables relied upon by business interests. MRIs and CAT scans allow us to see concrete evidence that brain development is not completed

until a person reaches the mid-twenties.<sup>96</sup> The particular impact of this growth in the brain indicates that a person between the ages of 14 and 24 is more likely to be governed by their emotions than rational judgment and even take greater risks impairing their safety and that of others than the same individual may have chosen to do at age 12, before physical changes occur in the prefrontal cortex.<sup>97</sup> This area of the brain is associated with planning, problem-solving, and related tasks.<sup>98</sup>

Young adult brains continue to experience growth of myelin over the nerve fibers in the brain.<sup>99</sup> Myelin insulates the fibers so that signals can be transmitted more efficiently.<sup>100</sup> The brain in young adults is also undergoing what is called “synaptic pruning” or the cutting back of connections resulting from nerve growth.<sup>101</sup> The end result is that signals are transmitted more efficiently.<sup>102</sup> However, during the transition years, more often than not emotion rules over judgment and there is a natural attraction to risk taking behavior.<sup>103</sup> These tendencies are magnified given the preference for peer relations over intergenerational connections.<sup>104</sup> Thus, young adults “hanging together” can influence one another toward more risk taking, adventuresome, and less guarded or thoughtful actions.<sup>105</sup>

In referring to the “Executive Suite” that guides our judgment, a prominent MIT study notes that:

The cluster of functions that center in the prefrontal cortex is sometimes called the “executive suite,” including calibration of risk and reward, problem-solving, prioritizing, thinking ahead, self-evaluation, long-term planning, and regulation of emotion. . . . It is not that these tasks cannot be done before young adulthood, but rather that it takes less effort, and hence is more likely to happen.<sup>106</sup>

89. Gary Sweeten, et al., *Age and the Explanation of Crime, Revised*, 42 J. YOUTH ADOLESCENCE 921, 923 (2013).

90. TRANSITION TO ADULTHOOD ALLIANCE, *supra* note 16, at 12.

91. See *Laws of the Fifty States, District of Columbia and Puerto Rico Governing the Emancipation of Minors*, CORNELL UNIV. LAW SCHOOL LEGAL INFO. INST., [http://www.law.cornell.edu/wex/table\\_emancipation](http://www.law.cornell.edu/wex/table_emancipation) (last visited Mar. 11, 2014) (hosting links to the emancipation laws of all fifty states).

92. Mary Pat Treuthart, *Lowering the Bar: Rethinking Underage Drinking*, 9 N.Y.U. J. LEGIS. & PUB. POL’Y 303, 304 (2006) (citing the National Minimum Drinking Age Act, Pub. L. No. 98-363, § 6(a), 98 Stat. 435, 437 (1984) (codified as amended at 23 U.S.C. § 158 (2012)).

93. 45 C.F.R. § 147.120 (2013).

94. See, e.g., *Actuarial Tables*, INTERNAL REVENUE SERV., <http://www.irs.gov/Retirement-Plans/Actuarial-Tables> (last visited Mar. 6, 2014).

95. Compare, *Just the FAQs*, BUDGET, [http://www.budget.com/budgetWeb/html/en/customer/commonquestions/#What are the minimum age requirements for renting?](http://www.budget.com/budgetWeb/html/en/customer/commonquestions/#What%20are%20the%20minimum%20age%20requirements%20for%20renting%20?) (last visited Mar. 6, 2014) (mandating additional requirements for renters under the age of twenty-five), with Lisa Fritscher, *Minimum Age Requirement for Renting Rooms*, USA TODAY, <http://traveltips.usatoday.com/minimum-age-requirement-renting-hotel-rooms-61923.html> (last visited Mar. 6, 2014) (noting that many hotels do not rent to individuals under the age of twenty-five), and Bill Hardekopf, *This Week in Credit Card News: Young Adults Ditch Cards, Effects of Bad Credit Report*, FORBES (June 24, 2013, 9:22 AM), <http://www.forbes.com/sites/moneybuilder/2013/06/24/this-week-in-credit-card-news-young-adults-ditch-cards-effects-of-bad-credit-report/> (showing young adult’s debt habits which justify additional borrowing requirements).

96. *Delayed Development: 20-Somethings Blame the Brain*, WALL ST. J. (Aug. 23, 2012 12:01 A.M.), <http://online.wsj.com/news/articles/SB10000872396390443713704577601532208760746?mg=reno64-wsj&url=http%3A%2F%2Fonline.wsj.com%2Farticle%2F5B10000872396390443713704577601532208760746.html>.

97. Young Adult Development Project, MASS INST. OF TECH. 4, <http://hrweb.mit.edu/worklife/youngadult/youngadult.pdf> (last visited Mar. 7, 2014).

98. *Id.* at 10.

99. *Id.* at 11.

100. *Id.* at 10.

101. *Id.*

102. *Id.*

103. MASSACHUSETTS INSTITUTE OF TECHNOLOGY, *supra* note 98, at 10.

104. *Id.* at 6.

105. *Id.* at 15.

106. *Id.* at 10 (internal references omitted).



The human brain does not fully mature “until at least the mid-20s.”<sup>107</sup> The specific neurological changes of young adulthood have not yet been thoroughly studied, “but it is known that they involve increased myelination and continued adding and pruning of neurons.”<sup>108</sup> However, the research shows that “the rental car companies have it right.”<sup>109</sup> This is because “[t]he brain isn’t fully mature at 16, when we are allowed to drive, or at 18, when we are allowed to vote, or at 21, when we are allowed to drink, but closer to 25, when we are allowed to rent a car.”<sup>110</sup>

In accord with this brain science evidence, international norms also recognize the value of greater protections in the law until a person moves through young adulthood. Penal codes in several countries create distinct sanctions for young adults.<sup>111</sup> These sanctions address developmental concerns including education, living environments, relationship building, career and job training, mental health, and substance abuse.<sup>112</sup>

### C. Models to Consider

Several states and nations have instituted models that Kentucky could evaluate. They include establishing guidelines for the allowance of diversion, which would include appropriate terms for this age range.<sup>113</sup> Diversion is used across Kentucky at the discretion of county and commonwealth attorneys for misdemeanor convictions, class D felonies and deferred prosecution,<sup>114</sup> but such programs are neither encouraged nor mandated in the law.<sup>115</sup> Some states permit the prosecution of young adults to take place under the cloak of confidentiality.<sup>116</sup> Courts have found that this approach cannot be practically implemented when the accused seeks a jury trial, thus a young adult often has to choose a path that reduces her due

process rights in order to avail herself of the protections of confidentiality.<sup>117</sup> Several states and the laws of other nations mandate consideration of leniency at sentencing and establish presumptions in favor of probation for the young offender.<sup>118</sup>

Some systems go so far as to sentence youth offenders to incarceration in young adult facilities tailored to the criminogenic needs of the young adult population.<sup>119</sup> London, England opened a training prison for eighteen to twenty four year-olds in 2010.<sup>120</sup> The prison curriculum includes academics, vocational training, substance abuse and mental health interventions, physical training.<sup>121</sup> All offenders are given access to full time occupation designed to support their reintegration and employment upon release.<sup>122</sup>

**All of us share a responsibility to care for the next generation.**

Other approaches require or permit a reduction in the years of confinement with earlier parole consideration.<sup>123</sup> Finally, some legislative schemes have created accountability courts, which operate with more intensive terms of probationary supervision.<sup>124</sup> Such programs are akin to the well-known drug courts that Kentucky has had for over a decade.<sup>125</sup> Accountability courts for young adults can provide boundaries to a young adult’s decision-making and open opportunities that may not be readily available or apparent to a young adult offender, affecting where the probationer lives, receives education or job training, works, and receives substance abuse intervention or mental health counseling.<sup>126</sup> Likewise, courts can mandate parenting courses where necessary and participation in mentoring programs.<sup>127</sup>

107. Id at 11 (citing J.N. Giedd, Structural Magnetic Resonance Imaging of the Adolescent Brain, 1021 ANNALS N.Y. ACAD. SCI. 77 (2004)).

108. Id.

109. MASSACHUSETTS INSTITUTE OF TECHNOLOGY, supra note 98, at 11.

110. Id.

111. TRANSITION TO ADULTHOOD ALLIANCE, supra note 16, at 21.

112. See generally id.

113. See, e.g., IND. CODE ANN. § 31-37-9 (2009); VT. STAT. ANN. tit. 3, § 163 (2013).

114. KRS 218A.14151

115. Pretrial Diversion Program, KY. COURT OF JUSTICE, <http://courts.ky.gov/courtprograms/pretrialservices/pages/pretrialdiversion.aspx> (last visited Mar. 20, 2014).

116. See, e.g., ALA. CODE § 15-19-7 (2013).

117. See, e.g., Raines v. State, 317 So.2d 559, 564 (Ala. 1975).

118. See, e.g., HAW. REV. STAT. § 706-667(1)-(2) (2013); TRANSITION TO ADULTHOOD ALLIANCE, TAKING ACCOUNT OF MATURITY: A GUIDE FOR PROBATION PRACTITIONERS, 2 (2013), available at [http://www.t2a.org.uk/wp-content/uploads/2013/07/T2A-Maturity-Guide\\_online1.pdf](http://www.t2a.org.uk/wp-content/uploads/2013/07/T2A-Maturity-Guide_online1.pdf).

119. RAM SUBRAMANIAN & ALISON SHAMES, VERA INST. OF JUSTICE, SENTENCING AND PRISON PRACTICES IN GERMANY AND THE NETHERLANDS: IMPLICATIONS FOR THE UNITED STATES 1, 18 (Oct. 2013), available at <http://www.vera.org/sites/default/files/resources/downloads/european-american-prison-report-v3.pdf>; see also W. Va. Code, § 25-4-6 (assigning youth felony offenders to a young adult offenders center).

120. TRANSITION TO ADULTHOOD ALLIANCE, YOUNG ADULTS AND CRIMINAL JUSTICE: INTERNATIONAL NORMS AND PRACTICES 8 (2010), available at <http://www.t2a.org.uk/wp-content/uploads/2011/09/T2A-International-Norms-and-Practices.pdf>.

121. Id.

122. Id.

123. JAMES AUSTIN ET AL., OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEP’T OFFICE OF JUSTICE, ALTERNATIVES TO THE SECURE DETENTION AND CONFINEMENT OF JUVENILE OFFENDERS, JUVENILE JUSTICE BULLETIN 11 (2005), available at <https://www.ncjrs.gov/pdffiles1/ojjdp/208804.pdf>.

124. MELISSA M. LABRIOLA, CTR. FOR COURT INNOVATION, PROCESS EVALUATION OF THE BRONX JUVENILE ACCOUNTABILITY COURT 4 (2007), available at [http://www.courtinnovation.org/sites/default/files/JAC\\_process\\_evaluation.pdf](http://www.courtinnovation.org/sites/default/files/JAC_process_evaluation.pdf).

125. Kentucky Drug Court: Saving Costs, Saving Lives, KY. COURT OF JUSTICE, <http://courts.ky.gov/courtprograms/drugcourt/Pages/default.aspx> (last visited Mar. 24, 2014).

126. See, e.g., LABRIOLA, supra note 124, at 4.

127. Id. at 7-8.

128. Angela Davis, Racial Fairness in the Criminal Justice System: The Role of the Prosecutor, 39 COLUM. HUM. RTS. L. REV. 202, 202-05 (2007).

129. See, e.g., ALA. CODE § 15-19-7 (2013).

130. See Jason Riley, Jefferson attorney seeks to open juvenile courts, COURIER-J. (Feb. 12, 2013), <http://www.courier-journal.com/article/20130107/NEWS01/102120002/Jefferson-attorney-seeks-open-juvenile-courts>.

## IV. WHAT MAKES SENSE FOR KENTUCKY?

## A. Diversion

Creating a more uniform, well publicized, and clearly understood diversion program for young adult offenders would strengthen public safety in Kentucky. When diversion programs rest in the absolute discretion of the prosecuting authority, there is a greater likelihood of disparate results that too often place those programs out of reach of the disenfranchised.<sup>128</sup> Hence, one sees diversion programs more readily available to the college athlete than the high school dropout who works at a fast food restaurant. Clearly defining the standards for admission to such programs for young offenders would help Kentucky move beyond current charges of bias that plague our criminal justice system. Diversion makes sense for first time misdemeanants and Class D felons, and may be appropriate for Class C felons. It is not reasonable for those who would otherwise be convicted of Class B or A felonies.

## B. Restoration of Civil Rights &amp; Expungement Rather than Confidentiality

As previously indicated, some states permit a confidential court process for young adult offenders in certain classifications.<sup>129</sup> As the public availability of case law reflects, this process is not practical given the open nature of district and circuit court. Already, juvenile court confidentiality is largely illusory given Internet access to information and the ever-broadening amount of information shared between the court system and schools in Kentucky.<sup>130</sup> Rather than trying to create a new cloak of confidentiality, Kentucky could instead open the door to an easier path for restoration of civil rights and expungement of records for the young offender who maintains a clean record for a given number of years. Young adults generally lack the resources to hire lawyers to navigate these two processes.<sup>131</sup> It serves the public interest to keep our young people engaged in democratic processes and employed. Permitting clearly defined and automatic restoration of civil rights and expungement of identified types of offenses would enhance the futures of the young reformed offenders and strengthen our larger body politic.

## C. Mandated Leniency

Changes in our laws can be left to the discretion of the judge or the prosecutor. However, Kentucky has seen challenges to the implementation of policy changes when the implementation relies upon individual discretion.<sup>132</sup> Additionally, when the law clearly mandates changes, the costs for the alternative approach intended can be more carefully set forth; monies redirected to meet the need; and appropriate limits placed on the policy shift, to temper those forces whose enthusiasm for reform may exceed the capacities of the system. Yet, given the United States Supreme Court's rulings in *Roper* and its progeny,<sup>133</sup> it only makes sense to mandate a measure of leniency in sentencing the young adult offender. The Court's proscriptive language requiring that the judge or jury must be able to identify youthfulness as a mitigating factor of punishment in the most serious of offenses logically should influence how we judge young adult offenders because of their immaturity. The question is not whether we punish the young adult offender or not. Rather, the question that must be posed is—should relative youthfulness be taken into account at sentencing? Currently, it is only taken into account for a young adult facing the death penalty.<sup>134</sup> Youthfulness or immaturity merits no consideration for any other lesser offense in Kentucky.<sup>135</sup> It would be an easy matter to include a presumption of leniency for the offender who is between the age band of eighteen to twenty-four in the statutory guidelines for sentencing, probation, and conditional discharge.<sup>136</sup>

## D. Confinement of Young Adult Offenders in Designated Facilities

Criminal justice systems that are more intentional about where young adult offenders are held in confinement make sense. Though a large restructuring of Kentucky's prison classification system may be impractical, some monies could be set aside to create a pilot program at one of Kentucky's current penal institutions. Such a program could be explicitly designed to meet the criminogenic needs of the young adult offender. In some regards, to create prototypes consistent with our current

131. See Linda Paul, *Why is it so hard to expunge juvenile records in Cook County?*, WBEZ (Feb. 4, 2013), <http://www.wbez.org/news/why-it-so-hard-expunge-juvenile-records-cook-county-105257> (highlighting both the financial and societal costs of the expungement process).

132. See, e.g., Lana Kunz, *Officials: House Bill 463 impedes drug crime investigation and prosecution*, KY. NEW ERA (Jan. 26, 2012, 11:00 AM), [http://www.kentuckynewera.com/web/news/article\\_66970bda-47c9-11e1-a269-001871e3ce6c.html](http://www.kentuckynewera.com/web/news/article_66970bda-47c9-11e1-a269-001871e3ce6c.html).

133. See *supra* note 13.

134. KY. REV. STAT. ANN. § 532.025(2)(b) (West 2013) (noting that age can be considered as a mitigating factor in capital case sentencing).

135. See *supra* notes 15-17 and accompanying text.

136. See KY. REV. STAT. ANN. § 532.007 (containing the Commonwealth's sentencing policy); § 532.040 (containing the provisions for probation and conditional discharge).

137. *Inmate Programs*, KY. DEP'T OF CORRECTIONS, <http://corrections.ky.gov/depts/AI/LLCC/Pages/InmatePrograms.aspx> (last visited Feb. 25, 2014).

138. See, e.g., Carla Cesaroni and Nicholas Bala, *Deterrence as a Principle of Youth Sentencing: No Effect on Youth, but a Significant Effect on Judges*, 34 QUEEN'S L.J. 447, 448 (2008) (Can.) (highlighting the restricting of custodial sentences in favor of community-based approaches to youth offenses).

139. *Mission*, KY. PAROLE BOARD, <http://justice.ky.gov/parolebd/> (last visited Feb. 25, 2014).

140. *Id.*

141. Compare NAT'L INST. OF CORRECTIONS INFORMATION CTR., U.S. DEP'T OF JUSTICE, *OFFENDERS UNDER AGE 18 IN STATE ADULT CORRECTIONAL SYSTEMS: A NATIONAL PICTURE 1* (1995), available at <https://s3.amazonaws.com/static.nicic.gov/Library/012096.pdf> (documenting Mississippi's requirement that a juvenile fifteen year or over, who is charged with committing any felony with the use of a firearm, be tried in circuit court), with Accountability Court, GA. CRIM. JUSTICE COORDINATING COUNCIL, <https://cjcc.georgia.gov/accountability-court> (last visited Mar. 25, 2014) (stating Georgia's creation of accountability courts as a sentencing alternative to reduce the state's prison population).

penal structure, we can look to units Kentucky has set up for geriatric offenders, the mentally ill, substance abusers, and sex offenders.<sup>137</sup> Such programs make sense for incarcerated young adult offenders who have sentences of ten years or less before they see the Parole Board.

### **E. Mandated Reduction in Years of Confinement or Opportunity for Earlier Parole**

Sentencing structures in other countries mandate that young adult offenders must receive a reduction in years of confinement.<sup>138</sup> Such an approach is unlikely to win favor in Kentucky. Rather, given the range of years available for every felony class, the obligation to exercise leniency within the already established range of years can permit the system to appropriately account for the impact of immaturity for the young adult offender. If the Kentucky Department of Corrections is able to more intentionally meet the deficits of the young adult offender, successfully rehabilitate and prepare that individual for success on the outside, back in the community; then the possibility of earlier parole for that offender would rationally serve public safety. Amending the parole process to give greater consideration to the young adult offender and to provide the Parole Board with guidance would be consistent with the purpose of the Kentucky Parole Board. The board's stated mission is to "make decisions that maintain a delicate balance between public safety, victim's rights, reintegration of the offender and recidivism."<sup>139</sup> The board notes that it will achieve this balance by application of its "Core Values: Knowledge; Experience and Integrity."<sup>140</sup>

### **F. Accountability Courts With Appropriate Resources to Function As Intended**

Accountability courts that can ensure speedy and age appropriate responses to young adult offenders may meet Kentucky's public safety concerns more effectively than any other model of reform. Treating our young adults appropriately is a criminal justice system concern because it is first a community concern. Hence, effective solutions will require greater partnering between the courts and those who control

community resources. Such accountability courts could also be operated through the county attorney's office, where potential felony offenses could be reduced to misdemeanors by agreement upon successful completion of accountability court terms. Alternatively, the programs could be run through the Commonwealth Attorney's office using a speedier process of resolution through securing indictments by information or establishing agreements that would permit expungement of charges upon successful conclusion of court supervision.

These benefits that would inure to the offender after completion of process in the accountability court do not need to include amendments down to misdemeanors or expungement. Instead, the accountability court could be the mandatory process for young offenders to receive more lenient sentencing. However, Due Process protections would prohibit young offenders from being required to proceed through such courts if the sentencing options in these courts were equal in punishment to those available in regular circuit court prosecution.<sup>141</sup> The young adult offender, who may not understand her long term interests, may perceive that more will be required to satisfy accountability court terms than the current probation required on the average Class D or C felony offense. Thus, to withstand constitutional scrutiny and secure necessary buy-in from prosecutors and defense counsel alike, the sentencing scheme in these accountability courts would need to offer opportunity for a reduction in sentence upon compliance with court orders or leniency with regard to alternative sentencing terms or probation.

There is a value to structuring this accountability court so that it is mandatory for young offenders. It may take time for the young offender to appreciate the benefit of a more prolonged and intrusive court process. Thus, if the process is only optional, young adults facing prosecution may throw caution to the wind and want to proceed along the same path as their elders. Creating a required, separate path, structured to meet the well-identified needs of the young adult offender, so that rehabilitation and healthy maturation can be secured, is in accord with public safety.

## **CONCLUSION**

All of us share a responsibility to care for the next generation. Many adults may feel that they raised themselves by their own bootstraps and the young among us do not deserve a break. Yet, when we look at our own adult children, we are hesitant to cut off all assistance, guidance, or support. Other states and countries have innovatively worked to tackle this problem of what to do with the young adult offender. Kentucky can benefit from their efforts. As noted, Robert G. Lawson, one of the architects of our Kentucky penal code has pleaded with Kentucky's lawmakers and prosecutors to end an addictive reliance upon incarceration as the premier method to address criminal wrongdoing. Perhaps nowhere in the adult arena should his plea be taken more seriously than as regards our young adult offenders.

Applying the science we know regarding maturation, risks, and needs of young adults to our criminal justice system will serve public safety and help us all care more intelligently for future generations of Kentuckians. To avoid all harm, Shakespeare would put us on the shelf while we age to mature adults. Yet, experience tells us that this approach yields more harm than good. Kentucky would do well to consider the possibilities so that we might improve how we ensure that young adult offenders make reparation for their offenses, are appropriately punished, and are rehabilitated in a manner that will strengthen the likelihood that they can become participative members of a thriving democracy.

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## SHARED RESPONSIBILITY: THE YOUNG ADULT OFFENDER

INCLUDING SECTIONS ON:

- **Costs of Relying Upon Incarceration or Standard Term of Probation for the Young Adult Population**
- **Personal Cost of Reliance Upon Incarceration as Primary Strategy for Keeping the Public Safe**
  - **What Makes Sense for Kentucky?**