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The Continued Viability of New York's Juvenile Offender Act in Light of Recent National Developments

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"*What's done to children, they will do to society.*"[1]

I. INTRODUCTION

Starting in the early 1960s through the 1970s, New York City and a number of other large cities experienced a wave of violent juvenile crime.[2] Consequently, many states began to question the effectiveness of their juvenile courts and took steps to hold juveniles accountable for their crimes as adults.[3] In doing so, many states enacted "transfer laws,"[4] which provide a mechanism for transferring serious juvenile offenders from juvenile to adult criminal court for prosecution and punishment.[5] Unlike juvenile courts, where the primary purpose is to treat the juvenile and integrate him

1. The Harper Book of Quotations 94 (Robert I. Fitzhenry ed., 3d ed. 1993) (quoting Karl Menninger).

2. Nationally, from 1960 to 1975, the arrests of young offenders age thirteen to twenty for homicide increased 92%, from 7.6 to 14.6 per 100,000. Franklin E. Zimring, *American Youth Violence: Issues and Trends*, 1 Crime & Just. 67, 75 tbl.1 (1979). During the same period, the arrests for forcible rape grew 17%, from 24.0 to 28.3 per 100,000. *Id.* The arrests of young people for robbery increased 115%, starting at 118 arrests per 100,000 in 1960 and ending with 254 in 1975. *Id.* at 78 tbl.2. In addition, the arrests for aggravated assault grew 129% during that time period, from 96 to 220 arrests per 100,000. *Id.* at 80 tbl.3. Furthermore, "offenses of violence" were mostly concentrated in big cities. *Id.* at 84. For example, the youth homicide arrest rate was three times higher in cities with a population over 250,000 than in other areas, and the robbery rate was six times greater in large cities. *Id.*; *see also The Youth Crime Plague*, Time, July 11, 1977, at 18, *available at* http://www.time.com/time/magazine/article/0,9171,919043,00.html (discussing the incidents and costs of juvenile crime in large cities, including San Francisco, Chicago, Detroit, New York City, and Miami).

3. *See* discussion *infra* Part II.C.

4. The term "transfer law," used throughout this note, refers to a law that requires or permits the transfer of certain young offenders from juvenile to criminal court for prosecution and punishment. New York's Juvenile Offender Law is a transfer law that requires thirteen- to fifteen-year-olds charged with a specified offense to proceed through the adult, rather than the juvenile, justice system. Since 1997, every state has had a transfer law on the books. Patrick Griffin, Patricia Torbet & Linda Szymanski, U.S. Dep't of Justice, Office of Juvenile Justice and Delinquency Prevention, Trying Juveniles as Adults in Criminal Court: An Analysis of State Transfer Provisions 1 (1998), *available at* https://www.ncjrs.gov/pdffiles/172836.pdf. For example, Ohio's transfer law allows juvenile court judges to transfer juveniles age fourteen and over who are charged with a felony or certain misdemeanors to criminal court. *See* Ohio Rev. Code Ann. § 2152.12 (LexisNexis 2011). Texas's transfer law authorizes juvenile court judges to transfer any child age fourteen or older charged with a first-degree felony, or fifteen or older charged with a second- or third-degree felony, to criminal court to be tried as an adult if the judge determines that "because of the seriousness of the offense alleged or the background of the child the welfare of the community requires criminal proceedings." Tex. Fam. Code Ann. § 54.02 (West Supp. 2011). Florida's transfer law requires that certain children—those who have already been convicted and sentenced as an adult for a previous crime, who are sixteen or older and charged with a violent crime, or who have been adjudicated in juvenile court for felonies on three separate occasions—be automatically transferred from juvenile to adult criminal court for prosecution. *See* Fla. Stat. § 39.052 (current version at § 985.556/7) (1997). In addition, Florida law gives a prosecutor the discretion to decide whether to try juveniles age sixteen and above charged with serious offenses in adult criminal court or juvenile court "when in his judgment and discretion the public interest requires that adult sanctions be considered or imposed." *Id.* § 39.047 (current version § 985.21); *see also id.* § 39.022 (current version at § 985.201). Florida's transfer law also allows juvenile court judges to transfer juveniles age fourteen and older to criminal court for trial. *See id.* § 985.556.

5. *See* discussion *infra* Part II.D.

back into the community, criminal courts focus on punishment and incapacitation.[6] New York was one of the first states to "get tough" on juvenile "superpredators" when it enacted the Juvenile Offender Law, a type of transfer law, in 1978.[7] This broad statutory scheme excludes juveniles as young as thirteen who are charged with a serious offense from juvenile court, requiring their prosecution in criminal court and thus subjecting them to increased punishment.[8] By the late 1990s, every state and the District of Columbia had created a mechanism to transfer youth from the jurisdiction of juvenile court to criminal court in certain circumstances.[9]

Approximately thirty years after New York's transfer statute set the standard for harsher punishment,[10] new developments in U.S. Supreme Court jurisprudence indicate a growing rejection of severe punitive measures for juvenile offenders. In the 2005 case of *Roper v. Simmons*, the Court, after considering the small number of states that continued to authorize juvenile death sentences, held that it is cruel and unusual punishment to sentence juveniles under the age of eighteen to death.[11] Five years later, the Court held in *Graham v. Florida* that imposing a sentence of life imprisonment without the possibility of parole on juveniles convicted of crimes other than homicide also violates the U.S. Constitution.[12] And in June 2012, in *Miller v. Alabama*, the Court abolished mandatory sentences of life without parole for juveniles convicted of all crimes, including homicides.[13] In these three cases, the Supreme Court considered the psychological differences between juveniles and adults, such as their immaturity and susceptibility to peer pressure,[14] and reasoned that these innate character traits should result in lessened punishment for juvenile offenders.[15]

Following the latest changes, some states began adjudicating more children through the juvenile court system.[16] The rates of juveniles tried in criminal court under certain

6. *See* discussion *infra* Part II.A.

7. *See* discussion *infra* Part II.C.

8. *See* discussion *infra* Part II.E.

9. Griffin et al., *supra* note 4.

10. *See* Barry C. Feld, *Legislative Exclusion of Offenses from Juvenile Court Jurisdiction: A History and Critique*, *in* The Changing Borders of Juvenile Justice: Transfer of Adolescents to the Criminal Court 83, 115–16 (Jeffrey Fagan & Franklin E. Zimring eds., 2000) ("The 1978 New York excluded-offense law provided a model that other states subsequently followed to simplify the process of trying juveniles as adults.").

11. 543 U.S. 551, 568 (2005).

12. 130 S. Ct. 2011, 2030 (2010).

13. 132 S. Ct. 2455, 2460 (2012).

14. *See Roper*, 543 U.S. at 569 (noting that juveniles lack maturity and a developed sense of responsibility, are more susceptible to peer pressure, and that their "personality traits are more transitory, less fixed"); *Graham*, 130 S. Ct. at 2026; *Miller*, 132 S. Ct. at 2464.

15. *See Roper*, 543 U.S. at 567; *Graham*, 130 S. Ct. at 2026; *Miller*, 132 S. Ct. at 2464.

16. *See* Mosi Secret, *States Prosecute Fewer Teenagers in Adult Courts*, N.Y. Times, Mar. 6, 2011, at A1 (explaining that, in the past few years, five states have passed laws or introduced bills to increase the number of youth adjudicated in juvenile court).

types of transfer mechanisms started to fall, and a few states recently increased the maximum age of juvenile court jurisdiction.[17] Although many states are moving away from trying minors as adults and instead focusing on rehabilitation through the juvenile justice system, some states, including New York, have not adopted this therapeutic approach and instead continue to enforce their transfer statutes.[18]

This note will argue that the New York Juvenile Offender Law—specifically the provisions regarding automatic transfer to criminal court for juveniles charged with certain crimes—is out of date. New York legislators, attorneys, and judges, in continuing to implement the law, have disregarded recent behavioral science research documenting fundamental differences between juvenile and adult offenders. In doing so, they have ignored the growing national movement that both rejects severe punishments for juveniles and embraces a rehabilitative framework, and they have discounted statistics showing the law has no effect on juvenile crime rates and recidivism. In order to comport with the recent U.S. Supreme Court holdings in *Roper*, *Graham*, and *Miller*, New York courts must begin to interpret the law's transfer provisions with a focus on rehabilitation and treatment. In the alternative, the entire statutory scheme should be thoroughly amended, which would include abolishing automatic transfer of juvenile offenders to criminal court and instead requiring that individualized transfer decisions be made in juvenile court.

Part II of this note will discuss the historical development of juvenile courts in the United States, starting with the creation of the first juvenile court in 1899 and proceeding through the major trends in the area of juvenile justice over the past century. These trends include the latest developments in juvenile justice reform—the Supreme Court's holdings in *Roper v. Simmons*,[19] *Graham v. Florida*,[20] and *Miller v. Alabama*,[21] and the movement away from punishment for juveniles and back toward rehabilitation. Part II also introduces common types of transfer laws implemented in

17. *See* discussion *infra* Part II.F.1.

18. Comparisons are difficult as only thirteen states report the number of cases in which juveniles are prosecuted in criminal court. Patrick Griffin, Sean Addie, Benjamin Adams & Kathy Firestine, U.S. Dep't of Justice, Office of Juvenile Justice and Delinquency Prevention, Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting 17 (2011), *available at* https://www.ncjrs.gov/pdffiles1/ojjdp/232434.pdf. Of those states reporting data, Florida, Oregon, Arizona, Tennessee, and Montana have the highest juvenile transfer rate. *Id.* at 18. New York and many other states do not report this information, so rough estimates regarding the number of juveniles tried in criminal court must be made based on the scope of each state's current laws. *See id.* at 20. Since New York prosecutes all youth age sixteen and above in criminal court, and also requires that certain juveniles be automatically transferred to criminal court based only on their age and offense charged, one may assume that New York has a high rate of prosecuting juveniles as adults. *See id.* at 20–21. One report found that out of 2449 criminal court dispositions of juvenile offenders in New York City from 2005 through 2008, 23.8% were dismissed and 14.7% removed to family court, with the remaining 61.5% continuing through the adult system. *See* Ashley Cannon et al., Citizens Crime Commission of New York City 87 (2010), *available at* http://www.nycrimecommission.org/pdfs/GuideToJuvenileJusticeInNYC.pdf.

19. 543 U.S. at 551.

20. 130 S. Ct. at 2011.

21. 132 S. Ct. at 2455.

other states and describes the basic provisions of New York's transfer law, called the Juvenile Offender Law.

Part III examines the central principles revisited by the Supreme Court in *Roper*, *Graham*, and *Miller*: (1) juveniles are not as culpable as adult offenders due to fundamental developmental differences, (2) juveniles are more amenable to reform, and (3) there is a growing national consensus against harsh punishments for juveniles. Part III also argues that the transfer and sentencing provisions of the Juvenile Offender Law, which require certain children to be automatically tried as adults and subject to lengthy prison terms without first considering their lack of maturity and rehabilitative potential, are inconsistent with the Supreme Court's recent jurisprudence.

Part IV provides a number of recommendations to bring the Juvenile Offender Law into compliance with these recent changes, including (1) statutory amendments that would require all charges against juveniles to begin in juvenile court and allow a child's transfer to criminal court only after an amenability hearing, (2) increasing the upper age of juvenile court jurisdiction to seventeen, and (3) introducing methods with which courts and juvenile advocates can interpret the juvenile offender provisions to result in less punitive treatment. Part IV concludes with a summary of the main arguments and solutions presented in this note.

II. THE HISTORICAL DEVELOPMENT OF JUVENILE COURTS IN THE UNITED STATES: FROM REHABILITATION TO PUNISHMENT . . . AND BACK AGAIN?

The following discussion addresses the developments behind the modern juvenile court, starting with the creation of the first juvenile court in 1899 and the introduction of due process protections in juvenile proceedings in the mid-1960s. This section will also explore New York's punitive response to increasing juvenile crime rates in the 1970s and introduce the reader to the various types of laws that states have implemented to transfer children from juvenile to criminal court to be tried as adults.

A. The Establishment of a Separate Juvenile Court System

Illinois enacted the first juvenile court in 1899.[22] At the time, the leaders of the juvenile justice reform movement[23] were appalled that the procedures and punishment initially created for hardened adult criminals were forced upon children as well.[24] The reformers "believed that society's role was not to ascertain whether the child was 'guilty' or 'innocent,' but 'What is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career.'"[25] The courts assumed that children were inherently good, and

22. *See* Juvenile Court Act of 1899, 1899 Ill. Laws 131; *In re* Gault, 387 U.S. 1, 14 (1967).

23. These reformers included the Chicago Bar Association, Superintendent Turner of the Chicago Reform School, and women's groups who lobbied the Illinois Legislature to get children out of institutions that also housed adults and provide them with a separate juvenile court. *See* Sanford A. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 Stan. L. Rev. 1187, 1222–24 (1970).

24. *Gault*, 387 U.S. at 15.

25. *Id.* (quoting Julian W. Mack, *The Juvenile Court*, 23 Harv. L. Rev. 104, 119–20 (1909)).

that the state's duty was to care for juveniles by providing treatment.[26] Therefore, rehabilitation was the foremost concern of the juvenile court, and punishment was abandoned.[27]

New York's first juvenile court—the New York State Children's Court—was officially established in 1922.[28] By 1925, every state save two had adopted legislation creating a separate court to adjudicate juveniles.[29] Juvenile courts initially exercised jurisdiction over matters of child neglect and abuse, status offenses, and juvenile delinquency for children below the age of sixteen.[30] In the following decades, most states increased the maximum age of juvenile court jurisdiction for delinquency cases to sixteen or seventeen.[31] Although the procedures differed among states, in general the juvenile court system evolved into an informal process where juveniles were adjudicated "delinquent" rather than "criminals."[32]

The first juvenile courts did not strictly adhere to the rules of criminal procedure; because the courts were created to promote the best interests of the child, proceedings were less formal and less adversarial than those in criminal court.[33] However, after a series of Supreme Court cases starting in the mid-1960s, a more formalized juvenile procedure, complete with due process protections, began to emerge. In the span of four years, three groundbreaking Supreme Court cases firmly established the principle that juveniles, like adults, are entitled to many of the rights provided under the Due Process Clause of the Fourteenth Amendment.

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26. *See id.*; David S. Tanenhaus, *The Evolution of Transfer out of the Juvenile Court*, *in* The Changing Borders of Juvenile Justice: Transfer of Adolescents to the Criminal Court 13, 17–18 (Jeffrey Fagan & Franklin E. Zimring eds., 2000).

27. *Gault*, 387 U.S. at 15–16.

28. Merril Sobie, *Pity the Child: The Age of Delinquency in New York*, 30 Pace L. Rev. 1061, 1069 (2010). Before that time, New York had a long history of treating children separately from adults. In 1824, the New York Society for the Prevention of Pauperism convinced the legislature to establish the New York House of Refuge for the sole purpose of rehabilitating juveniles. *Id.* at 1066. In 1846, the legislature made their commitment to the House of Refuge mandatory; children could no longer be sentenced to a term of imprisonment with adult criminals. *Id.* at 1067. It was not until 1903, however, when the New York State Legislature created separate children's court parts, that "[a]ll cases involving the commitment or trial of children . . . under the age of sixteen years, for any violation of law" were adjudicated in separate courts. *Id.* at 1068 (quoting Act of May 6, 1903, 1903 N.Y. Laws 676, 677).

29. *Id.* at 1061. "The two 1925 'holdout' states were Maine and Wyoming—both of which had joined the 'juvenile court' bandwagon by the mid-1940s." *Id.* at 1061 n.2.

30. *Id.* at 1064. During the early years of the juvenile courts, children age sixteen and above were considered adults and were prosecuted through the criminal court system. *Id.* at 1061.

31. *Id.* By 2012, thirty-eight states established an upper age of juvenile court jurisdiction of seventeen. Griffin et al., *supra* note 18, at 21. Ten states set the maximum age at sixteen, and the two remaining states (New York and North Carolina) have an upper age of fifteen, therefore prosecuting all juveniles age sixteen and above in criminal court. *See id.*

32. *See* Simon I. Singer & David McDowall, *Criminalizing Delinquency: The Deterrent Effects of the New York Juvenile Offender Law*, 22 Law & Soc'y Rev. 521, 522 (1988).

33. *See In re* Gault, 387 U.S. 1, 15–16 (1967). Juvenile court proceedings were often described as civil, as opposed to criminal, and thus the procedural protections afforded to criminal defendants did not apply. *See id.* at 17.

First, the U.S. Supreme Court held in *Kent v. United States* that when a juvenile is transferred from the jurisdiction of juvenile court to be tried as an adult in criminal court, certain procedures are required in order to "satisfy the basic requirements of due process and fairness."[34] Juveniles are entitled to a hearing and explanation of the reasons behind the judge's decision to waive jurisdiction before they can be transferred to criminal court.[35] One year later, in *In re Gault*,[36] the Court concluded that although juvenile courts have historically been deemed separate from criminal courts, with different procedures and purposes,[37] in situations where a juvenile's liberty might be "curtailed," certain procedural protections are required in order to comport with the Due Process Clause.[38] In particular, youth in juvenile court are entitled to notice[39] and appointed counsel,[40] and they enjoy the Fifth Amendment privilege against self-incrimination and the right to cross-examine witnesses.[41] The third due process reform arrived in 1970 with *In re Winship*.[42] The Supreme Court held that—regardless of whether the defendant is a child proceeding in juvenile court or an adult standing trial in criminal court—"the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[43]

B. New York and the 1962 Family Court Act

Consistent with the national trend, New York also began reforming its juvenile justice system in the 1960s. The first New York Family Court was established under

34. 383 U.S. 541, 553 (1966). Kent was arrested at the age of sixteen, and the juvenile court judge ordered him to stand trial in criminal court, which was authorized under Washington, D.C.'s Juvenile Court Act. *Id*. at 543–44. The judge, however, made the decision to waive jurisdiction without first holding a hearing to determine whether Kent would be better served by remaining in juvenile court. *Id*. at 546. Although the text of the Juvenile Court Act required an investigation prior to the waiver of a juvenile into adult court, the statute did not provide any standards to guide juvenile court judges in determining when to waive a juvenile into adult proceedings. *See id*. at 547.

35. *Id*. at 557. *See infra* note 88 for a list of the Supreme Court's recommended factors and a discussion of how these factors have been incorporated into various states' statutes.

36. 387 U.S. at 1.

37. *See id*. at 14 ("From the inception of the juvenile court system, wide differences have been tolerated—indeed insisted upon—between the procedural rights accorded to adults and those of juveniles.").

38. *Id*. at 41.

39. *Id*. at 33.

40. *Id*. at 41.

41. *See id*. at 55–57. After *In re Gault*, youth adjudicated in juvenile court were entitled to almost the same due process protections as criminal defendants, although the U.S. Supreme Court has not recognized a juvenile's right to bail, indictment by grand jury, or a jury trial. *See* Kent v. United States, 383 U.S. 541, 555 (1966); McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971).

42. *In re* Winship, 397 U.S. 358 (1970).

43. *Id*. at 364–65.

the 1962 Family Court Act.[44] Under that statute, the family court possesses "exclusive original jurisdiction" over abuse and neglect proceedings, child support proceedings, paternity disputes, termination of parental rights, and juvenile delinquency proceedings.[45] Pursuant to the Supreme Court's mandate, the Family Court Act provides that in juvenile delinquency hearings, youth are entitled to notice of the charges in the petition,[46] appointment of counsel,[47] and notice of their right to remain silent and right to be represented by counsel.[48]

Under the Family Court Act, a juvenile delinquent was defined as a "person over seven and less than sixteen years of age who does any act which, if done by an adult, would constitute a crime."[49] Children below the age of seven are not legally responsible for their actions, and thus not subject to juvenile delinquency proceedings, while youth ages sixteen and above are considered adults and prosecuted in criminal court.[50] Less than two decades later, however, the boundary between juveniles and adults began to blur with the enactment of the 1978 Juvenile Offender Act.

C. New York as a Leader in the National Punitive Trend

By the 1970s, New York City and many other urban cities experienced a surge of violent crime committed by young people.[51] Some attributed the crime wave to the crack epidemic and the breakdown of the traditional family,[52] whereas others blamed gang violence and the pervasiveness of guns.[53] Both the media and politicians warned of a new generation of "superpredators."[54] In 1977, *TIME Magazine* ran a cover story entitled *The Youth Crime Plague*, cautioning that "[a] new, remorseless, mutant juvenile

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44. *See* N.Y. Fam. Ct. Act § 113 (McKinney 2012); Sobie, *supra* note 28, at 1071.

45. Fam. Ct. Act § 115. For the remainder of this note, the terms family court and juvenile court will be used interchangeably when referring to the New York juvenile justice system.

46. *Id.* § 320.4.

47. *Id.* §§ 249, 320.2.

48. *Id.* § 320.3.

49. *Id.* § 712 (formerly (a)).

50. Alison Marie Grinnell, Note, *Searching for a Solution: The Future of New York's Juvenile Offender Law*, 16 N.Y.L. Sch. J. Hum. Rts. 635, 641 (2000).

51. *See* Zimring, *supra* note 2, at 86 ("Given generally higher crime rates as well as large increases in the population at risk, a substantial increase in violent youth crime was predictable. The increases that occurred between 1960 and 1970 were, however, much greater than the most sophisticated demographic projections would have predicted, because rates per 100,000 of major crimes of violence increased dramatically."); *The Youth Crime Plague*, *supra* note 2.

52. *The Youth Crime Plague*, *supra* note 2.

53. *See* Feld, *supra* note 10, at 109 ("The prevalence of guns in the hands of children, the apparent randomness of gang violence and drive-by shootings, the disproportionate racial minority involvement in homicides, and media depictions of callous youths' gratuitous violence have inflamed public fear.").

54. *Id.*

seems to have been born, and there is no more terrifying figure in America today . . . . Especially in ghettos of big cities, the violent youth is the king of the streets."[55]

This concern about increased juvenile crime rates resulted in a growing rejection of dual systems for adults and juveniles.[56] Some studies found that rehabilitation was ineffective because the majority of serious offenses were committed at the hands of repeat offenders.[57] Many critics believed that the dispositions for juvenile delinquents were too lenient, and they proposed increasing punishment in an effort to deter juveniles from committing crimes.[58] The "public frustration with crime, fear of recent rise in youth violence, and the racial characteristics of violent young offenders . . . fueled the desire to 'get tough' and provided political impetus to prosecute larger numbers of youths as adults."[59]

In New York, the critical moment occurred in 1978, when fifteen-year-old Willie Bosket shot and killed two strangers in the New York City subway.[60] Bosket was placed in juvenile detention for five years, which, at the time, was the maximum punishment available under the Family Court Act.[61] The public was irate.[62] Two weeks after Bosket was sentenced, the governor called a special legislative session.[63] The New York State Legislature passed the Juvenile Justice Reform Amendment (the

55. *The Youth Crime Plague*, *supra* note 2.

56. *See* Donna M. Bishop, *Juvenile Offenders in the Adult Criminal Justice System*, 27 Crime & Just. 81, 83 (2000); Jeffrey Fagan, *The Comparative Advantage of Juvenile Versus Criminal Court Sanctions on Recidivism Among Adolescent Felony Offenders*, 18 Law & Pol'y 77, 82–83 (1996); *The Youth Crime Plague*, *supra* note 2.

57. *See, e.g.*, Steven P. Lab & John T. Whitehead, *An Analysis of Juvenile Correctional Treatment*, 34 Crime & Delinq. 60 (1988) (concluding that there is no evidence that juvenile treatment and rehabilitation reduces recidivism); James O. Robison & Gerald W. Smith, *The Effectiveness of Correctional Programs*, 17 Crime & Delinq. 67 (1971) (contending that any decrease in recidivism rates is not due to treatment but rather due to individual differences among offenders); William E. Wright & Michael C. Dixon, *Community Prevention and Treatment of Juvenile Delinquency: A Review of Evaluation Studies*, 19 J. Res. Crime & Delinq. 35 (1975) (discrediting reports concerning possible success of juvenile delinquency prevention programs).

58. *See* Fagan, *supra* note 56, at 82 ("Proponents of deterrence and incapacitation policies criticized the juvenile court as ineffective at controlling juvenile crime, particularly violent behavior."); Singer & McDowall, *supra* note 32, at 521–22.

59. Feld, *supra* note 10, at 85.

60. *See* Simon I. Singer, Jeffrey Fagan & Akiva Liberman, *The Reproduction of Juvenile Justice in Criminal Court: A Case Study of New York's Juvenile Offender Law*, *in* The Changing Borders of Juvenile Justice: Transfer of Adolescents to the Criminal Court 353, 353 (Jeffrey Fagan & Franklin E. Zimring eds., 2000); Michelle Haddad, Note, *Catching Up: The Need for New York State to Amend Its Juvenile Offender Law to Reflect Psychiatric, Constitutional and Normative National Trends over the Last Three Decades*, 7 Cardozo Pub. L. Pol'y & Ethics J. 455, 456 (2009); Secret, *supra* note 16.

61. *See* Haddad, *supra* note 60; Fox Butterfield, All God's Children: The Bosket Family and the American Tradition of Violence 226 (Alfred A. Knoft ed., 1st ed. 1995).

62. *See* Secret, *supra* note 16; Haddad, *supra* note 60.

63. Feld, *supra* note 10, at 115; Butterfield, *supra* note 61, at 227.

"Juvenile Offender Law") just a few months later.[64] The law created a new category of juveniles called "juvenile offenders," which are defined as thirteen- to fifteen-year-olds charged with a crime the legislature considered to be sufficiently serious to require the child's prosecution in criminal court.[65] In effect, the new law "criminalized" certain serious offenses committed by juveniles ages thirteen to fifteen.[66] In addition, the potential penalties for these offenses increased dramatically.[67]

New York was one of the first states to "crack down" on juvenile crime, but almost every state followed New York's lead within the next twenty years.[68] In the 1990s, many states increased the number of crimes for which juveniles could be prosecuted as adults in criminal court.[69] "To make transfer more expedient, they established offense-based, categorical, and absolute alternatives to individualized, offender-oriented waiver proceedings in the juvenile court."[70] In addition, a number of states adopted a broader approach by lowering the maximum age of original jurisdiction in juvenile court,[71] which resulted in removing an entire category of juveniles to criminal court regardless of the offense charged.[72] By 1997, all states and the District of Columbia provided for criminal prosecution of juveniles under certain circumstances.[73]

New York's Juvenile Offender Act was the model transfer statute that many states imitated in an effort to stem the tide of juvenile crime.[74] Following is a brief introduction

64. *See* Singer, Fagan & Liberman, *supra* note 60, at 353–54; Haddad, *supra* note 60, at 456–57.

65. *See* Cannon et al., *supra* note 18, at 8.

66. *See* Singer & McDowall, *supra* note 32, at 523–24.

67. *See id.* ("[A] juvenile convicted of Murder 2 under the JO Law faces a minimum sentence of five to nine years and a maximum of life. Prior to the law the same youth could have been committed to state custody for a maximum of five years.").

68. Bishop, *supra* note 56, at 84 ("Between 1992 and 1997, legislatures in forty-four states and the District of Columbia enacted provisions to facilitate the [transfer] of young offenders to criminal court."); Fagan, *supra* note 56, at 79; Feld, *supra* note 10, at 116.

69. Fagan, *supra* note 56, at 79; Griffin et al., *supra* note 4, at iii. For example, California lowered the age at which juvenile court judges can "waive," or transfer, youth to criminal court from sixteen to fourteen. U.S. General Accounting Office, Juvenile Justice: Juveniles Processed in Criminal Court and Case Dispositions 1, 2 (1995) [hereinafter GAO Report], *available at* http://www.gao.gov/assets/230/221507.pdf. New Jersey added additional crimes to the list of offenses that, if committed by a juvenile, may be waived to criminal court. *Id.* at 3.

70. Bishop, *supra* note 56, at 84.

71. The maximum age of juvenile court jurisdiction is the oldest age that a youth can still be adjudicated in juvenile court. GAO Report, *supra* note 69, at 4. Any juvenile above that age is deemed an adult and subject to criminal court jurisdiction. *Id.*

72. *See* Bishop, *supra* note 56, at 93; Robert O. Dawson, *Waiver in Theory and Practice*, *in* The Changing Borders of Juvenile Justice: Transfer of Adolescents to the Criminal Court 45, 47–48 (Jeffrey Fagan & Franklin E. Zimring eds., 2000).

73. Griffin et al., *supra* note 4, at 1.

74. Feld, *supra* note 10, at 115–16 ("The 1978 New York excluded-offense law provided a model that other states subsequently followed to simplify the process of trying juveniles as adults.").

to the various types of transfer laws implemented across the country from the late 1970s through the 1990s that authorize juveniles to be tried in criminal court.

D. Common Types of Transfer Laws

In this note, the term "transfer law" refers to any law that authorizes a juvenile to be prosecuted and punished in the adult criminal justice system. These laws include "legislative exclusion" provisions, which automatically transfer juveniles charged with serious crimes to criminal court;[75] "direct file" laws, which grant prosecutors the discretion to file charges against juveniles either in criminal or juvenile court;[76] and "judicial waiver" laws, which can be mandatory, discretionary, or presumptive and authorize juvenile court judges to waive their jurisdiction and transfer children to criminal court.[77]

Depending on the type of transfer law a state has implemented, different procedures apply. Under legislative exclusion and direct file statutes, if a juvenile is a certain age and charged with a specific crime (usually one of a handful of serious crimes enumerated in the statute), the prosecutor files the charges against the juvenile offender in criminal court and the case proceeds from there; the child never appears in juvenile court.[78] However, if a juvenile lives in a state that has implemented a judicial waiver statute, the child first appears in juvenile court[79] where the state attorney may then file a motion to transfer the juvenile to criminal court.[80] The judge holds an amenability hearing, at which both the state and the juvenile have an opportunity to present evidence regarding the juvenile's amenability to treatment through the juvenile justice system.[81] The judge considers a number of factors in ruling on the motion, including the juvenile's criminal history, the seriousness of the offense charged, and the child's rehabilitative potential.[82] If the judge decides to waive jurisdiction and transfer the child, the case then proceeds in criminal court.

Before 1970, most transfers from juvenile to criminal court were ordered on a case-by-case basis at the discretion of the juvenile court judge under a judicial waiver type of transfer law.[83] Now, a majority of states have implemented multiple mechanisms by

75. *See* Griffin et al., *supra* note 18, at 2.

76. *See id.* at 2. Direct file laws are not the focus of this note, and thus will be mentioned only briefly.

77. *Id.*

78. *See id.* at 4–6.

79. *See id.* at 2–4.

80. *See id.*

81. *See id.*

82. *See id.*

83. *See id.* at 8. Although judicial waivers—the type of transfer provision at issue in *Kent*—have existed in almost all states since the creation of the juvenile court system, the method was rarely used and juvenile courts still possessed original jurisdiction over all juvenile offenses. *See* Bishop, *supra* note 56, at 82. It was not until statutory exclusion and direct file laws were implemented that juvenile courts have been divested of this original jurisdiction. *See id.* at 124.

which to transfer juveniles to criminal court and do not rely on just one.[84] The transfer laws relevant to this note are discussed in more detail below.

1. Judicial Waiver

Judicial waivers are the oldest and most common transfer mechanism.[85] As of 2009, forty-five states authorized juvenile court judges to waive their jurisdiction and transfer juveniles to adult court for criminal prosecution.[86] These judicial waiver statutes can be discretionary, presumptive, or mandatory.[87] Prior to transferring a child to criminal court under a discretionary judicial waiver law, the juvenile court is required to hold an amenability hearing and consider certain factors, such as the circumstances surrounding each juvenile and the alleged crime.[88]

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84. Griffin et al., *supra* note 18, at 3. New York, New Mexico, and Massachusetts are the only states that have implemented statutory exclusion as the sole procedure to remove juveniles to criminal court. *Id.* Judicial waiver is authorized in forty-five states, and thirty states employ judicial waiver plus at least one other mechanism. *Id.* See *infra* appendix, for a complete list of each states' transfer laws.

85. Griffin et al., *supra* note 18, at 2.

86. *Id.* Massachusetts, Montana, Nebraska, New Mexico, and New York are the only states that do not allow some form of judicial waiver to transfer certain youth from juvenile to criminal court. *Id.* at 3.

87. *Id.* at 2.

88. Kent v. United States, 383 U.S. 541, 557 (1966). A policy memo appended to the Supreme Court's opinion provided eight factors to be considered when the juvenile court judge is asked to transfer a juvenile into the adult system:

> (1) The seriousness of the alleged offense to the community and whether the protection of the community requires waiver.
>
> (2) Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner.
>
> (3) Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted.
>
> (4) The prosecutive merit of the complaint, i.e., whether there is evidence upon which a Grand Jury may be expected to return an indictment . . . .
>
> (5) The desirability of trial and disposition of the entire offense in one court when the juvenile's associates in the alleged offense are adults who will be charged with a crime in the [criminal court].
>
> (6) The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living.
>
> (7) The record and previous history of the juvenile, including previous contacts with the Youth Aid Division, other law enforcement agencies, juvenile courts and other jurisdictions, prior periods of probation to this Court, or prior commitments to juvenile institutions.
>
> (8) The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available to the Juvenile Court.

Id. at 566–67 app. After the *Kent* decision, numerous states adopted some or all of the Supreme Court's recommended eight factors by incorporating them into their own juvenile court statutes. *See* GAO Report, *supra* note 69, at 14; Griffin et al., *supra* note 4, at 3–4. The factors vary between states, but they generally cover the nature of the offense and the individual juvenile's age, maturity, criminal

Presumptive waivers are a subset of judicial waivers. Under a presumptive waiver process, certain juveniles—usually those of a particular age charged with a specific offense—face a rebuttable presumption that they are not amenable to rehabilitation.[89] Therefore, the juvenile bears the burden of proving amenability to treatment in order to remain in juvenile court.[90] Of the forty-five states that authorize judicial waivers, fourteen permit a rebuttable presumption that transfer to criminal court is appropriate for certain offenders.[91]

Finally, mandatory judicial waivers require a juvenile court judge to transfer the child to criminal court if certain criteria are met (e.g., the child is of a certain age and charged with a specific offense, or has a criminal record).[92] Like discretionary and presumptive judicial waivers, the case begins in juvenile court.[93] The judge's only task, however, is to determine whether the criteria for transferring the child to criminal court are met (that is, whether the juvenile is of the required age and whether there is probable cause that the juvenile committed the offense charged).[94] Once this decision is made, the juvenile is automatically transferred to criminal court.[95] In this way, mandatory judicial waiver laws function more as statutory exclusion laws than as traditional, discretionary waivers.[96]

history, and amenability to treatment. GRIFFIN ET AL., *supra* note 18, at 2. In addition, most states do not dictate how the factors should be considered, e.g., the weight to be accorded each factor, and whether all factors must be present to justify ordering a transfer or whether only a couple will suffice. GRIFFIN ET AL., *supra* note 4, at 3–4. There are a few exceptions to this general practice, however. In Michigan and Minnesota, judges must give the most weight to two factors: the seriousness of the offense and the juvenile's prior record. *Id.* In Kentucky, at least two of the seven listed factors must be present to warrant a transfer to criminal court. *Id.* In addition, the most important factors, according to a survey of judges and prosecutors, are the gravity of the offense, the juvenile's criminal record, and the juvenile's amenability to treatment. GAO REPORT, *supra* note 69, at 14.

89. GRIFFIN ET AL., *supra* note 18, at 4.

90. Normally, under the more common judicial waiver, the state bears the burden of proving that the juvenile is not amenable to treatment as a prerequisite to transferring the juvenile to adult court. Dawson, *supra* note 72, at 57.

91. GRIFFIN ET AL., *supra* note 18, at 3. See *infra* appendix for a full list of these states.

92. *See* GRIFFIN ET AL., *supra* note 18, at 4.

93. *Id.*

94. *Id.*

95. *Id.*

96. *See id.* Similar to statutory exclusion laws, under a mandatory judicial waiver the child is automatically transferred to criminal court based only on the existence of statutory factors. *See id.* The juvenile court judge does not have the discretion to permit the child to remain in juvenile court once the judge finds these factors have been met. *See id.*

2. Statutory Exclusion[97]

New York's Juvenile Offender Law is a type of exclusion statute. Under these statutes, a juvenile is automatically arraigned in criminal court when specific statutory criteria are met.[98] For example, under New York's Juvenile Offender Act, if a child is thirteen years old and charged with second-degree murder, he is prosecuted in criminal court.[99] Unlike the judicial waiver system, in which the prosecutor must request that the juvenile court judge waive jurisdiction and transfer the child to adult criminal court, under a statutory exclusion regime the prosecutor merely files the charging document with the criminal court.[100]

Under statutory exclusion, there is no transfer hearing because the criminal court possesses original jurisdiction and the youth never appears before a juvenile court judge.[101] Thus, legislative exclusion effectively circumvents the due process requirements the Supreme Court established in *Kent*—a pre-transfer hearing, weighing of factors, and individualized consideration of the particular circumstances surrounding each case—and automatically places juvenile offenders in criminal court based solely on certain facts (usually their age and offense). As of 2009, twenty-nine states have enacted some form of exclusion statute.[102]

3. Reverse Waiver

Some states, including New York, also allow reverse waivers (often called removals), which authorize criminal court judges to remove a child's case to juvenile court under some circumstances.[103] Usually, reverse waivers are available only in situations where the juvenile court did not already have an opportunity to determine the suitability of the transfer to criminal court.[104] States that authorize reverse waivers require the criminal court judge to consider the *Kent* factors, or some combination of similar factors, to determine whether removal to juvenile court is appropriate.[105] Of

97. This transfer mechanism is also referred to as legislative waiver. For the sake of clarity, this note will use the term "waiver" only when referring to judicial waivers or "reverse" waivers, which are discussed *infra* Part II.D.3.

98. *See* Griffin et al., *supra* note 18, at 2.

99. *See* discussion *infra* Part II.E.1.

100. *See* Griffin et al., *supra* note 18, at 4–6.

101. *See* Griffin et al., *supra* note 4, at 8.

102. Griffin et al., *supra* note 18, at 3. See *infra* appendix, for a full list of the states that have enacted statutory exclusion statutes.

103. Griffin et al., *supra* note 18, at 3, 7. See *infra* appendix for a list of states with a reverse waiver statute.

104. *See* Bishop, *supra* note 56, at 94. For example, reverse waivers are usually available when the juvenile was automatically indicted in criminal court under a legislative exclusion statute or when the prosecutor directly filed in criminal court. However, in three states—Connecticut, Kentucky, and Tennessee—reverse waivers are authorized even though the state has not implemented statutory exclusion or direct file laws. *See* Griffin et al., *supra* note 18, at 3.

105. *See* Bishop, *supra* note 56, at 94.

the forty-three states that authorize automatic transfers to criminal court, either through direct file, statutory exclusion, or mandatory judicial waiver laws, twenty-four also provide some form of reverse waiver back to juvenile court.[106] The remaining nineteen states implement at least one transfer mechanism that circumvents an amenability hearing in the juvenile courts but fails to provide any later hearing to determine the juvenile's suitability to proceed in criminal court.[107] In those states, "transfer decisions . . . are not subject to any sort of judicial review: they are absolute."[108]

4. "Wholesale" Transfer

During the time when fear of juvenile "superpredators" was sweeping the nation, some states, in addition to implementing specific transfer laws, also lowered the maximum age of original jurisdiction in juvenile court.[109] Although a state's decision to change the upper age of juvenile court jurisdiction is not technically a transfer law, it is another method of effectively transferring a whole group of juveniles to adult court based entirely on their age.[110] If a juvenile commits an offense after reaching the boundary age for his jurisdiction, he will automatically be processed in criminal court without any juvenile court involvement; he is deemed an adult under the laws of his state.[111] Typically, once a juvenile reaches eighteen, he or she will no longer be adjudicated in juvenile court.[112] However, in ten states the line between juvenile and criminal court jurisdiction is a child's seventeenth birthday and in two states—New York and North Carolina—criminal court jurisdiction begins at age sixteen.[113]

E. New York's Juvenile Offender Law in Detail

1. Automatic Transfer of All "Juvenile Offenders" to Criminal Court

By the late 1970s, the New York State Legislature decided to implement a transfer law for its own juveniles. The 1978 Juvenile Offender Act (the "Act") drastically changed the juvenile justice system in New York, amending the New York Family Court Act, Penal Law, and Criminal Procedure Law.[114] The Act modified the definition of juvenile delinquent to remove juveniles between the ages of thirteen and

106. *See infra* appendix.

107. These states include Alabama, Alaska, Florida, Idaho, Illinois, Indiana, Louisiana, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, North Carolina, North Dakota, Rhode Island, South Carolina, Utah, Washington, and West Virginia. *See infra* appendix.

108. Bishop, *supra* note 56, at 94.

109. *Id.* at 93; Dawson, *supra* note 72, at 47–48.

110. *See* Bishop, *supra* note 56, at 93.

111. Dawson, *supra* note 72, at 47.

112. *See id.*

113. *See* Griffin et al., *supra* note 18, at 21. For a list of the maximum age of juvenile court jurisdiction for each state, see *infra* appendix.

114. Haddad, *supra* note 60, at 460.

fifteen, charged with certain serious offenses, to adult criminal court where they will be subject to criminal sanctions.[115] The Act effectively deprives the juvenile court of original jurisdiction over these juveniles, requiring that they be automatically prosecuted in criminal court.[116] This new category of juvenile, called a "juvenile offender," includes thirteen-year-olds charged with second degree murder or a sexually motivated felony, and fourteen- and fifteen-year-olds charged with murder, kidnapping, arson, assault, manslaughter, rape, criminal sexual act, aggravated sexual abuse, burglary, arson, robbery, possession of a machine gun or firearm on school grounds, an attempt to commit murder or kidnapping, or a sexually motivated felony.[117]

2. Provisions for Removal to Family Court

Because juveniles between thirteen and fifteen who are charged with a "juvenile offense" will automatically be placed in criminal court, the Act also provides opportunities during various stages of the criminal proceeding for a juvenile offender to be removed to family court "if it becomes apparent in a particular case that such treatment would be more appropriate than continuation of criminal prosecution."[118] Prior to trial, upon the motion of any party,[119] the criminal court judge may order the child's removal to family court if he or she concludes that removal would be "in the interests of justice."[120] If the district attorney does not consent to the juvenile's

115. The revised definition provides that a juvenile delinquent is

> a person over seven and less than sixteen years of age, who, having committed an act that would constitute a crime if committed by an adult, (a) *is not criminally responsible for such conduct* by reason of infancy, or (b) is the defendant in an action ordered removed from a criminal court to the family court.

N.Y. Fam. Ct. Act § 301.2(1) (McKinney 2006) (emphasis added).

116. *See In re* Raymond G., 93 N.Y.2d 531, 535 (1999) ("[T]he Legislature divested the Family Court of original jurisdiction over such acts in favor of original jurisdiction in the adult criminal justice system."); *see also In re* Elizabeth R., 646 N.Y.S.2d 240 (1st Dep't 1997) (holding that family court does not possess concurrent jurisdiction with criminal court).

117. N.Y. Penal Law § 10.00(18) (McKinney 2003); N.Y. Crim. Proc. Law § 1.20(42) (McKinney 2006). As an important side note, the label "juvenile offender" should not be confused with the term "juvenile delinquent," which refers to any juvenile under the age of sixteen who has been adjudicated delinquent in juvenile court. *See* Fam. Ct. Act § 301.2(1). In addition, the law also recognizes a "youthful offender": an adult between the ages of sixteen and nineteen, or a juvenile offender (a juvenile between the age of thirteen and fifteen charged with a serious offense) who is eligible for a lighter sentence due to his age and crime. *See* Crim. Proc. § 720.10.

118. Vega v. Bell, 47 N.Y.2d 543, 548 (1979); Crim. Proc. §§ 180.75(4)–(5), 210.43(1). This procedure is often referred to as "reverse waiver." *See supra* Part II.D.3.

119. If the defense attorney requests removal to family court, he or she would likely argue that removal is appropriate because the victim was not harmed, the defendant's participation in the offense was minor, this is the defendant's first offense, the defendant is not a danger to the community, and/or the defendant is amenable to treatment in juvenile court. *See, e.g.*, People v. Gregory C., 602 N.Y.S.2d 492, 494–97 (Sup. Ct. Erie Cnty. 1993); People v. Martinez, 412 N.Y.S.2d 276, 279–81 (Crim. Ct. N.Y. Cnty. 1978).

120. Crim. Proc. §§ 180.75(4), 210.43(1)(a)–(b). To determine whether a removal to family court is in the interests of justice, the judge must consider specific criteria:

removal to family court, the judge has the discretion to order the removal sua sponte[121] unless the juvenile is charged with murder, rape, criminal sexual act, or an armed felony.[122]

The statutory scheme also provides additional opportunities for removal to family court. For example, the grand jury can decide to remove the case instead of indicting the juvenile,[123] and the district attorney may recommend removal to family court prior to the juvenile pleading guilty.[124] Finally, upon a motion by the district attorney, a juvenile may be removed to family court following conviction of a juvenile offense in criminal court.[125] The verdict will be set aside and replaced with a juvenile

(a) the seriousness and circumstances of the offense;

(b) the extent of harm caused by the offense;

(c) the evidence of guilt, whether admissible or inadmissible at trial;

(d) the history, character and condition of the defendant;

(e) the purpose and effect of imposing upon the defendant a sentence authorized for the offense;

(f) the impact of a removal of the case to the family court on the safety or welfare of the community;

(g) the impact of a removal of the case to the family court upon the confidence of the public in the criminal justice system;

(h) where the court deems it appropriate, the attitude of the complainant or victim with respect to the motion; and

(i) any other relevant fact indicating that a judgment of conviction in the criminal court would serve no useful purpose.

Id. §§ 180.75(4), 210.43(1)–(2). Note the similarity between the statutory factors provided for removal to juvenile court and the eight *Kent* factors that juvenile court judges must consider before transferring a juvenile to adult court. *See* Kent v. United States, 383 U.S. 541, 557 (1966).

121. Crim. Proc. § 210.43(1)–(2); *Vega*, 47 N.Y.2d at 552 (interpreting the statutory scheme to allow both criminal court and superior court judges to remove the juvenile to family court without the district attorney's consent if removal would be in the interests of justice).

122. *See* Crim. Proc. § 210.43 (1)(a)–(b). In that case, the district attorney must consent to removal to family court and the judge must find: "(i) mitigating circumstances that bear directly upon the manner in which the crime was committed; or (ii) . . . [that] the defendant's participation was relatively minor . . . ; or (iii) possible deficiencies in proof of the crime" before the juvenile's removal to family court is proper. *Id*. §§ 180.75(4), 210.43(1). This finding is in addition to the determination that the removal is in the best interests of justice. *Id*. § 210.43(1)(b). If the judge decides to remove the case from criminal to family court, he or she must state the factors that led to this determination. *Id.* § 180.75(6)(a). In addition, if the district attorney's consent is required to remove the action to family court (i.e., where certain serious crimes are charged), he must also state the reasons for his decision on the record. *Id*. § 180.75(6)(b).

123. *See id*. § 190.71.

124. *See id.* § 220.10(g)(iii).

125. *See id*. § 330.25. This provision applies only if the juvenile has not been convicted of murder, and requires the judge to find that the removal is in the "interests of justice." *Id*. § 330.25(1). The same nine factors used to determine whether removal to family court prior to trial is in the "interests of justice" apply here as well. *Id*.

delinquency fact determination.[126] The juvenile will then be removed to family court for sentencing.[127]

Although multiple opportunities for removal to family court are available under the statute, only the first option—removal prior to trial—authorizes the juvenile defendant, rather than a third party, to request removal.[128] In addition, when a defendant moves for removal, the criminal court is not obligated to hold a removal hearing.[129] The New York Court of Appeals stated that "under the present scheme it will only be in the unusual or exceptional case that removal will be proper, and thus a hearing will be necessary only if it appears for some special reason that removal would be appropriate in the particular case."[130]

3. Types and Length of Sentences

The New York Juvenile Offender Law also modified the types and length of sentences a juvenile can receive. Before the law went into effect, the maximum punishment for a juvenile under the age of sixteen for any offense was five years in a secure facility.[131] Upon the enactment of the Juvenile Offender Law, the sentence for one of the more serious juvenile offenses is a minimum of five to nine years and a maximum of life imprisonment.[132] Lighter sentences may be available if the juvenile is eligible for youthful offender treatment, which is "an ameliorative mechanism that can avoid some of the harsh results [that] follow a finding of guilt of a criminal offense . . . . It seals the records of the offender and limits the term of incarceration."[133]

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126. *Id.* § 330.25(3).

127. *See id.*

128. *Compare* Crim. Proc. §§ 180.75(4)–(5), 210.43(1) (allowing the defendant to file a removal motion prior to trial), *with id.* § 220.10(g)(iii) (allowing the district attorney to request removal to family court prior to the juvenile pleading guilty), *and id.* § 330.25 (allowing removal following a conviction of a juvenile offense upon motion by the district attorney and with the consent of the judge).

129. *See* Vega v. Bell, 47 N.Y.2d 543, 553 (1979). 541, 557 (1966). The court concluded that because the legislature decided that juveniles who commit these offenses are criminally responsible for their actions, courts should not question this legislative judgment. *Id.* at 555; *see also* People v. Charles M., 731 N.Y.S.2d 307, 308 (4th Dep't 2001).

130. *Vega*, 47 N.Y.2d at 553.

131. *See* Singer & McDowall, *supra* note 32, at 524.

132. *Id.* at 523 tbl.1. For a complete list of all juvenile offenses and the corresponding sentencing range, see Cannon et al., *supra* note 18, at 31 tbl.3. If sentenced to a term of incarceration past his twenty-first birthday, the juvenile will spend the first part of the sentence in a secure juvenile facility, and then transfer to an adult prison for the remainder of his sentence. *See* N.Y. Penal Law § 70.20(4) (McKinney 2003) ("[A] juvenile offender, or a juvenile offender who is adjudicated a youthful offender and given an indeterminate or a definite sentence, shall be committed to the custody of the commissioner of the office of children and family services who shall arrange for the confinement of such offender in secure facilities of the office."); Singer & McDowall, *supra* note 32, at 524.

133. People v. Williams, 418 N.Y.S.2d 737, 740 (Cnty. Ct. Dutchess Cnty. 1979). A juvenile offender will be eligible for youthful offender sentencing under two circumstances. First, if the judge finds that "the interest of justice would be served by relieving the eligible youth from the onus of a criminal record and by not imposing an indeterminate term of imprisonment of more than four years," the judge may, at his

Youthful offender sentences range from a term of imprisonment—usually much less than the term available under the juvenile offender sentencing statute[134]—to conditional or unconditional discharge.[135]

F. A Step Back: The Growing Rejection of Punitive Measures

1. An Emerging Consensus against Severe Punishments for Juveniles

Within the past five years, states have started to turn away from the punitive measures that have been the hallmark of transfer statutes over the last thirty years. According to a recent *New York Times* article, "[a] generation after record levels of youth crime spurred a nationwide movement to prosecute more teenagers as adults, a consensus is emerging that many young delinquents have been mishandled by the adult court system."[136] One indication of this growing consensus is that many states have initiated a campaign to increase the maximum age of juvenile court jurisdiction.[137] In 2007, the Connecticut legislature passed a bill to increase the age of adulthood from sixteen to eighteen by 2012.[138] In addition, legislators in Massachusetts, Wisconsin, and North Carolina have introduced bills to increase the age of adulthood.[139] New York may soon be the only state that still requires all juveniles age sixteen and above to be prosecuted in criminal court, regardless of the offense charged or any mitigating circumstances.

Another possible sign of this movement toward rehabilitation and away from punishment is the lack of any major expansion in transfer laws since 2000.[140] Between 1986 and 1997, legislatures in almost every state amended their juvenile codes to increase the number of juveniles that could be tried in criminal court.[141] Over the past decade, however, no new laws have been enacted to increase the number of

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discretion, deem the juvenile a youthful offender. CRIM. PROC. § 720.20(1)(a). Second, if the youth has not previously been convicted of a crime, the judge must find he is a youthful offender. *Id.* § 720.20(1)(b). If the judge believes that the above criteria apply, the juvenile's conviction is vacated and replaced with a youthful offender finding. *Id.* § 720.20(3).

134. The sentence varies depending on the underlying conviction and may range from a minimum term of one-year imprisonment to a maximum term of four years. *See* PENAL §§ 60.02(2), 70.00(2)(e). In the alternative, if the court believes that "a sentence of imprisonment is necessary but that it would be unduly harsh to impose an indeterminate or determinate sentence, the court may impose a definite sentence of imprisonment and fix a term of one year or less." *Id.* § 70.00(4).

135. *See id.* §§ 60.02(2), 65.05(1)(a), 65.20(1).

136. Secret, *supra* note 16.

137. *See id.*

138. *See* 2007 Conn. Acts 4 (Reg. Sess.); 2009 Conn. Acts 7 (Reg. Sess.); GRIFFIN ET AL., *supra* note 18, at 21.

139. *See* Secret, *supra* note 16.

140. *See* GRIFFIN ET AL., *supra* note 18, at 9.

141. *Id.* During this period, the number of states authorizing statutory exclusion increased from twenty to thirty-eight. *Id.* In addition, the number of states that permit prosecutorial direct filing jumped from seven to fifteen. *Id.*

juveniles that can be transferred to criminal court.[142] In addition, the number of cases that have been judicially waived to criminal court peaked in 1994 and has since fallen by thirty-five percent.[143] In 2007, a national report estimated that juvenile courts waived their original jurisdiction in less than one percent of all delinquency petitions.[144] Of course, it is difficult to determine from the scarce data if the decrease in judicial waivers is due to juvenile court judges' unwillingness to transfer juveniles to criminal court or rather results from an increase in the use of more efficient types of transfer mechanisms.[145] There are "striking variations in individual states' propensity to try juveniles as adults," and therefore drawing conclusions from the existing data is difficult.[146] It should also be noted that although states are not creating new transfer mechanisms, they are also not amending their current procedures to funnel more youth back into the juvenile justice system.[147]

2. *The Supreme Court Weighs In:* Roper v. Simmons, Graham v. Florida, *and* Miller v. Alabama

In addition to individual states' reconsideration of their punitive approach to juvenile justice, three recent Supreme Court cases—*Roper v. Simmons*,[148] *Graham v. Florida*,[149] and *Miller v. Alabama*[150]—have declared certain extreme punishments for juveniles unconstitutional.

In 2005, the Court held in *Roper v. Simmons* that sentencing juveniles to death for crimes they committed while under the age of eighteen violates the Eighth Amendment's ban on cruel and unusual punishment.[151] The Court recognized a growing national consensus against such punishment, noting that thirty states prohibit the death penalty for juveniles and the additional twenty states rarely sentence juveniles to death.[152] In addition, the Court identified three differences between juveniles and adults that led to its conclusion that juveniles are not "among the worst offenders" and

142. *Id.* at 9.

143. *Id.* at 10.

144. *Id.*

145. *Id.* National data regarding the frequency of statutory exclusion and direct file transfers is severely lacking. *Id.* at 14. Only thirteen states report all of their juvenile transfers to criminal court, and fourteen states do not report transfers at all. *Id.* at 14–15.

146. *Id.* at 17.

147. *Id.* at 9.

148. 543 U.S. 551 (2005).

149. 130 S. Ct. 2011 (2010).

150. 132 S. Ct. 2455 (2012).

151. 543 U.S. at 568.

152. *Id.* at 564. The majority also thought it was significant that since *Stanford v. Kentucky*, 492 U.S. 361 (1989), a Supreme Court case holding that execution of juveniles between ages sixteen and eighteen does not violate the Eighth Amendment, no state had reinstated the death penalty for juveniles. *Roper*, 543 U.S. at 566.

thus should not be subject to the death penalty.[153] First, juveniles lack maturity and a developed sense of responsibility, which often leads to rash decisionmaking.[154] Second, juveniles are more susceptible to outside influences and peer pressure.[155] Third, juveniles' characters are more malleable than adults as their "personality traits are more transitory, less fixed."[156] The Court concluded that these characteristics prohibit the imposition of the death penalty on juveniles under eighteen.[157]

The invalidation of especially harsh punishments for juveniles was recently expanded in 2010 when the Supreme Court held in *Graham v. Florida* that sentencing juveniles to life imprisonment without parole for nonhomicide crimes also violates the Eighth Amendment's ban on cruel and unusual punishment.[158] The Court first considered various states' statutes and practices and determined that a national consensus had emerged disapproving of the sentence for this specific class of offenders.[159] The Court next cited *Roper*'s assertion that juveniles are less culpable than adults due to their immaturity, underdeveloped sense of responsibility, and vulnerability to peer pressure.[160] Because of juveniles' decreased culpability, the Court concluded that they are less deserving of the most severe punishments.[161]

Most recently, in June 2012, the U.S. Supreme Court held in *Miller v. Alabama* that automatic life without parole for juveniles convicted of homicides also violates the Eighth Amendment,[162] effectively expanding *Graham* to include juvenile homicide offenders subject to mandatory sentences. Justice Kagan, writing for the majority, noted that *Roper* and *Graham* both established three fundamental differences between juveniles and adults that are important for the purpose of sentencing: (1) juveniles are less mature, which leads to impulsive actions and reckless decisionmaking;[163] (2) children are more vulnerable to pressure from their peers and family, and "have limited 'control over their environment' and lack the ability to extricate themselves from horrific, crime-producing settings;"[164] and (3) juveniles' characters are not well

153. *Roper*, 543 U.S. at 569.

154. *Id.* (citing Johnson v. Texas, 509 U.S. 350, 367 (1993)).

155. *Id.*

156. *Id.* at 569–70.

157. *Id.* at 570–71.

158. Graham v. Florida, 130 S. Ct. 2011, 2030 (2010).

159. *See id.* at 2024. The Court noted that six states prohibit the sentence of life without the possibility of parole for juveniles, and that seven states allow the sentence, but only for homicides. *Id.* at 2023. Of the thirty-seven states that do permit the sentence for juveniles convicted of nonhomicide crimes, the sentence is rarely imposed. *Id.*

160. *Id.* at 2026 (citing *Roper*, 543 U.S. at 569–70).

161. *Id.* In addition, life without parole is even harsher for juveniles than for adults, as they will likely spend many more years behind bars than their adult counterparts. *Id.* at 2028.

162. Miller v. Alabama, 132 S. Ct. 2455, 2460 (2012).

163. *Id.* at 2464.

164. *Id.* (quoting Roper v. Simmons, 543 U.S. 551, 569 (2005)).

formed, and therefore their traits may be temporary and are "less likely to be 'evidence of irretrievable depravity.'"[165] Further, because life without parole for juveniles is comparable to the death sentence for adults, these life sentences require the same individualized sentencing that the death penalty requires.[166] This includes taking into account an offender's age and character, his or her criminal record, the circumstances surrounding the offense, and other potential mitigating factors.[167]

It appears that the juvenile justice system has come full circle. The first juvenile court was established in 1899 to provide treatment and protect juveniles from harsh criminal court sentences. Due process protections for juveniles were recognized in the 1960s, followed by increased punitive measures starting in the 1970s and continuing through the end of the twentieth century. In the past decade, however, the Supreme Court and some state legislatures have started to reject severe punishments for juveniles and are moving back toward the original values of juvenile justice system: protecting and rehabilitating children. The next section examines how, in this environment, New York's Juvenile Offender Law is quickly becoming outdated and unjustifiable.

III. NEW YORK HAS FALLEN BEHIND THE RECENT NATIONAL MOVEMENT AGAINST PUNISHMENT FOR JUVENILES

The New York Juvenile Offender Law does not reflect recent trends in juvenile justice. The law's automatic transfer provisions do not allow for the consideration of a juvenile's decreased culpability or amenability to treatment through the juvenile justice system. By imposing criminal sanctions on juveniles, the law disregards both the Supreme Court and numerous states' recent rejection of harsh punishments for juveniles. Additionally, studies show that the Juvenile Offender Law does not reduce juvenile crime rates and punishes minority males more harshly than other groups. For these reasons, the Juvenile Offender Law is no longer a viable solution to address juvenile delinquency in New York.

A. The Viability of the New York Juvenile Offender Law after Roper, Graham, *and* Miller

The Court in *Roper*, *Graham*, and *Miller* revisited the same key concepts: the developmental differences between juveniles and adults, including their lack of maturity and susceptibility to outside influences;[168] juveniles' decreased culpability as a result of these fundamental differences;[169] juveniles' greater ability to reform than

165. *Id.* (quoting Roper v. Simmons, 543 U.S. 551, 570 (2005)).

166. *See id.* at 2467–69.

167. *See id.*

168. *See* Roper v. Simmons, 543 U.S. 551, 569–70 (2005) (noting that juveniles lack maturity and a developed sense of responsibility, are more susceptible to peer pressure, and that their "personality traits are more transitory, less fixed"); Graham v. Florida, 130 S. Ct. 2011, 2026 (2010); *Miller*, 132 S. Ct. at 2464.

169. *See Roper*, 543 U.S. at 567; *Graham*, 130 S. Ct. at 2026; *Miller*, 132 S. Ct. at 2464.

adults;[170] and the country's changing beliefs about the purpose of the juvenile justice system and the appropriate punishment for children (often called our "evolving standards of decency").[171]

This note argues that the New York Juvenile Offender Law, drafted in 1978 and unchanged since, does not reflect these concepts. The Juvenile Offender Law requires juveniles of a certain age charged with a specific offense to be automatically transferred to criminal court, without considering their maturity, their environment, the circumstances surrounding their offense, and ultimately their amenability to treatment through the juvenile justice system. The law ignores the fundamental differences between juvenile and adult offenders, such as their impulsive nature and lack of maturity, as well as their capacity to change. These differences have been repeatedly recognized by the Supreme Court and support the position that children should not be subject to the same procedures and punishment created for adult offenders.[172] Furthermore, the Juvenile Offender Law disregards the nation's evolving standards of decency and moral disapproval of harsh punishments for juveniles.

1. The Juvenile Offender Law Ignores the Fundamental Differences between Juveniles and Adults and the Resulting Decreased Culpability of Juvenile Offenders

Numerous behavioral science studies have concluded that adolescents share certain developmental and psychological characteristics that would traditionally make them less criminally responsible than adults. "Unlike competence, which concerns an individual's ability to serve as a defendant during trial or adjudication, culpability turns on the offender's state of mind at the time of the offense, including factors that would mitigate . . . the degree of responsibility."[173] Recent studies indicate that adolescents are less mature than their adult counterparts.[174] Juveniles are also more likely to succumb to peer pressure and other external influences when compared

170. *See Roper*, 543 U.S. at 569–70 ("From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed."); *Graham*, 130 S. Ct. at 2026–27; *Miller*, 132 S. Ct. at 2464.

171. *See Roper*, 543 U.S. at 567 (examining "the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice"); *Graham*, 130 S. Ct. at 2024 (concluding that a national consensus against juvenile life without parole for nonhomicide crimes has emerged); *Miller*, 132 S. Ct. at 2463 (noting that the concept of proportionality should be viewed "according to the 'evolving standards of decency that mark the progress of a maturing society'" (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958))).

172. *See supra* text accompanying notes 168–71.

173. MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice, Issue Brief 3: Less Guilty by Reason of Adolescence 1 [hereinafter MacArthur Foundation Research Network], *available at* http://www.adjj.org/downloads/6093issue_brief_3.pdf.

174. *See* Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. Crim. L. & Criminology 137, 139 (1997).

to adults.[175] In addition to following a crowd, this "malleability" also means that juveniles are better suited to rehabilitative programs than adults.[176] Juveniles are also more likely to act impulsively to attain an immediate reward rather than fully considering the long-term consequences of their conduct.[177] Furthermore, research shows that adolescents take more risks than adults because, due to their inexperience, they are less aware of the risks associated with a certain activity.[178]

The Supreme Court has concluded that juveniles are not as culpable as adults due to these characteristics[179] and that therefore they should not be subject to comparable procedures and punishment. In *Roper*, Justice Kennedy explained that "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption."[180] And in *Miller*, Justice Kagan stated that "transient rashness, proclivity for risk, and inability to assess consequences—both lessen[] a child's 'moral culpability' and enhance[] the prospect that, as the years go by and neurological development occurs, his 'deficiencies will be reformed.'"[181]

2. *The Juvenile Offender Law Disregards the Nation's Evolving Standards of Decency and Moral Disapproval of Strict Punishments for Juveniles*

In *Roper*, *Graham*, and *Miller*, the Court explored the nation's "evolving standards of decency" to determine whether the specific punishment at issue violated the Eighth Amendment's ban on cruel and unusual punishment.[182] The Court often looks to various states' statutes and practices—the "objective indicia of society's standards," as the Court calls them—to determine whether a national consensus has

175. *See id.* at 162; MacArthur Foundation Research Network, *supra* note 173, at 3 (noting that not only may peers coerce juveniles into taking certain actions, but the indirect desire to be accepted by peers may lead juveniles to take risks they would otherwise avoid).

176. Bishop, *supra* note 56, at 83.

177. *See* Scott & Grisso, *supra* note 174, at 164. The prefrontal cortex, which affects the ability to "delay impulsive or emotional reactions sufficiently to allow for rational consideration of appropriate responses," continues to develop throughout adolescence. Elizabeth S. Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice Policy*, 83 N.C. L. Rev. 793, 812 (2005); MacArthur Foundation Research Network, *supra* note 173, at 2; *see generally* Valerie F. Reyna & Frank Farley, *Risk and Rationality in Adolescent Decision Making: Implications for Theory, Practice, and Public Policy*, 7 Psychol. Sci. Pub. Int. 1 (2006).

178. *See* Scott & Grisso, *supra* note 174, at 163 (noting that juveniles are more likely than adults to engage in many risky behaviors, such as unprotected sex and driving under the influence); MacArthur Foundation Research Network, *supra* note 173, at 3; *see generally* Reyna & Farley, *supra* note 177.

179. *See* Roper v. Simmons, 543 U.S. 551, 569–70 (2005); Graham v. Florida, 130 S. Ct. 2011, 2026 (2010); Miller v. Alabama, 132 S. Ct. 2455, 2464 (2012).

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

181. *Miller*, 132 S. Ct. at 2465 (citing *Graham*, 130 S. Ct. at 2027 (quoting *Roper*, 543 U.S. 551 at 570)).

182. *See Roper*, 543 U.S. at 567; *Graham*, 130 S. Ct. at 2024; *Miller*, 132 S. Ct. at 2463.

formed against the sentence.[183] In *Roper*, the Court found it significant that thirty states abolished the death sentence for juveniles.[184] The *Graham* Court noted that although only eleven states banned the sentence of life imprisonment without parole for juveniles convicted of nonhomicide crimes, the fact that the majority of the remaining states rarely if ever imposed the punishment was also noteworthy.[185] And in *Miller*, Justice Kagan noted that although twenty-nine states allowed for the mandatory sentence of life without parole for juvenile offenders, the fact that the majority of states do not have separate penalty provisions for juveniles, and thus merely apply the same sentences to juveniles proceeding in adult court as they do to adults, makes it impossible to determine whether a legislature has endorsed this specific punishment for juveniles.[186] Therefore, the fact that twenty-nine states require the sentence in some circumstances does not indicate that a consensus has formed in favor of the punishment.

Applying this analysis to the Juvenile Offender Law, it is apparent that the law's punishments for juveniles—including life imprisonment for thirteen- and fourteen-year-olds convicted of murder—are also inconsistent with a growing national consensus against severe penalties for juvenile offenders. Similar to New York, transfer statutes in forty-nine states allow juveniles who are thirteen and fourteen years old to be prosecuted in criminal court for murder.[187] Of those, forty-three states' statutes authorize the judge to sentence the thirteen- or fourteen-year-old to life imprisonment following a murder conviction.[188] However, only eighteen states are currently incarcerating thirteen- and fourteen-year-olds sentenced to life.[189] In addition, out of 2594 juveniles across the country who are currently incarcerated for life, only seventy-one were between the ages of thirteen and fourteen when they committed homicide.[190] Following *Graham*'s reasoning, the fact that forty-three states authorize the sentence

183. *See Roper*, 543 U.S. at 567; *Graham*, 130 S. Ct. at 2023 (concluding that a national consensus against juvenile life without parole for nonhomicide crimes has emerged); *Miller*, 132 S. Ct. at 2463 (noting that the concept of proportionality should be viewed "according to the 'evolving standards of decency that mark the progress of a maturing society'").

184. *See Roper*, 543 U.S. at 564.

185. *See supra* note 159 and accompanying text.

186. *Miller*, 132 S. Ct. at 2473.

187. This data was compiled from statistics found in *Graham*, 130 S. Ct. at 2034 apps. I–III; Miller v. State, 63 So.3d 676, 687–88 & nn.3–4 (Ala. Crim. App. 2010); GRIFFIN ET AL., *supra* note 18; and *State-by-State Legal Resource Guide*, UNIV. OF S.F. SCH. OF LAW, http://www.usfca.edu/law/jlwop/resource_guide (last visited Nov. 12, 2011); Adam Liptak & Lisa Faye Petak, *Juvenile Killers in Jail for Life Seek a Reprieve*, N.Y. TIMES, Apr. 21, 2011, at A13, *available at* http://www.nytimes.com/2011/04/21/us/21juvenile.html?scp=1&sq=graham%20juvenile%20life%20imprisonment&st=cse.

188. *See* GRIFFIN ET AL., *supra* note 18.

189. *See id.*

190. *See* Liptak & Petak, *supra* note 187. One issue with these figures is that there is very little data regarding the number of juveniles transferred to criminal courts and subsequently convicted of homicide. *See* GRIFFIN ET AL., *supra* note 18, at 12–17. It is possible that the low number of life sentences for thirteen- and fourteen-year-olds is a result of their low rate of conviction for homicide.

of life imprisonment for thirteen- and fourteen-year-olds convicted of homicide, yet only eighteen states actually implement that punishment, objectively indicates that society is starting to reject this harsh punishment.

Another sign of a national consensus against these severe sentences for young adolescents is the fact that states are now starting to increase the age of criminal responsibility for juveniles. In *Roper*, Justice Kennedy found it significant that a number of states abolished the death penalty for juveniles, thereby indicating a consistent trend against the practice.[191] By increasing the maximum age of the juvenile court's jurisdiction, states are removing entire categories of juveniles from the criminal system and placing them back in juvenile courts, where dispositions tend to be more lenient and allow for a wider range of alternatives to incarceration.[192] Although these recent changes do not necessarily indicate that states are rejecting harsh sentences for young offenders, since all states allow the transfer of juveniles to criminal court for particularly serious crimes,[193] there is at least a growing presumption that children should remain in juvenile court and that severe punitive measures should be a last resort, rather than the first choice.

B. Additional Reasons to Revise the Juvenile Offender Law

In addition to the Supreme Court's rationales for abolishing certain severe penalties for juveniles, there are several other reasons for concluding that the Juvenile Offender Law is no longer practicable. At least three additional factors demonstrate the need to amend the Juvenile Offender Law and abolish its harsh punitive measures for juveniles. First, the prediction that juvenile "superpredators" would take over the country has not come to pass. On the contrary, the violent juvenile crime rate has decreased.[194] Second, studies have demonstrated that, rather than having the intended deterrent effect, punitive measures actually lead to an increase in juvenile recidivism.[195] Third, various studies indicate that transfer laws may disproportionately target and punish minority males.[196] These factors, when applied to the Juvenile Offender Law, demonstrate that New York's approach to juvenile justice is outdated and must be revisited.[197]

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191. *See supra* note 152 and accompanying text.

192. *See* Task Force on Transforming Juvenile Justice, Charting a New Course: A Blueprint for Transforming Juvenile Justice in New York State 22–23 (2009), *available at* http://www.vera.org/download?file=2944/Charting-a-new-course-A-blueprint-for-transforming-juvenile-justice-in-New-York-State.pdf.

193. *See infra* appendix.

194. *See* Fox Butterfield, *After a Decade, Juvenile Crime Begins to Drop*, N.Y. Times, Aug. 9, 1996, at A1; *see generally* Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six that Do Not*, 18 J. Econ. Perspectives 163 (2004).

195. *See* discussion *infra* Part III.B.1.

196. *See* discussion *infra* Part III.B.2.

197. Although beyond the scope of this note, it should be briefly mentioned that the New York statutory scheme also disregards prevailing international standards. For example, Article 37(b) of the United

1. The Juvenile Offender Law Does Not Reduce Juvenile Crime Rates and Recidivism

One factor leading to the popularity of transfer laws was the belief that juvenile court was ineffective and, that to truly deter juveniles from committing crimes, states must treat them like adults by transferring them to criminal court and increasing punishments.[198] However, studies focusing on the Juvenile Offender Law indicate that trying juveniles in criminal court not only fails to reduce crime and recidivism rates, but that the rates may actually be increasing after implementation of the law. One study, conducted by Jeffrey Fagan and published in 1996, found that recidivism rates were "significantly lower" for juveniles sentenced in juvenile court than those sentenced in criminal court.[199] Fagan found that juveniles charged with robbery and tried in criminal court had re-arrest rates "over 50% higher than robbery offenders in juvenile court."[200] Fagan concluded that, "[r]ather than affording greater community protection, the higher recidivism rates for the criminal cohort suggest that public safety was in fact compromised by adjudication in criminal court. Moreover, the data hints that increasing the severity of criminal court sanctions may actually enhance the likelihood of recidivism."[201] The study calls into question one of the principles on

Nations Convention on the Rights of the Child provides that "The arrest, detention or imprisonment of a child . . . shall be used only as a measure of last resort and for the shortest appropriate period of time." United Nations Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3, art. 37(b), *available at* http://treaties.un.org/doc/publication/UNTS/Volume%201577/v1577.pdf. Under the Juvenile Offender Law, however, a convicted juvenile offender would most likely be imprisoned unless the court finds the juvenile eligible for youthful offender status. *See* N.Y. Penal Law § 60.10 (McKinney 2003). A 2010 report found that of the 926 juvenile offenders in New York City sentenced in criminal court from 2005 to 2008, 54% received a term of imprisonment. Cannon et al., *supra* note 18, at 8. In addition, a national study, which included data from six New York counties, shows that of the approximately 4700 juveniles convicted of felonies in criminal courts in 1998, 64% were sentenced to jail or prison. Gerard A. Rainville & Steven K. Smith, U.S. Department of Justice, Bureau of Justice Statistics, Juvenile Felony Defendants in Criminal Courts 1 (2003), *available at* http://www.bjs.gov/content/pub/pdf/jfdcc98.pdf. The average prison sentence was approximately ninety months. *Id.*

198. *See* discussion *supra* Part II.C.

199. Fagan, *supra* note 56, at 77. The study compared the "severity, certainty and celerity of sanctions for fifteen- and sixteen-year-old adolescents charged with robbery and burglary in juvenile court in New Jersey with identical offenders in matched communities in New York State whose cases are adjudicated in criminal court." *Id.* at 79. The author studied 800 juveniles in four matched counties in New York and New Jersey. *Id.* at 84. The counties were matched for crime rates and other socio-economic factors, including housing characteristics, transportation, social institutions, media, culture, and employment, in order to minimize differences and increase the validity of the study. *Id.* at 86.

200. *Id.* at 93. In addition, the failure rate—the time elapsed between the juvenile's release from incarceration and arrest for a new offense—for robbery offenders was 392 days for juveniles sentenced in criminal court versus 631 days for those adjudicated in juvenile court. *Id.* at 94.

201. *Id.* at 100. The Fagan study also found that the difference in the severity of sanctions in juvenile and criminal courts was statistically significant. Almost half of the juveniles convicted in criminal court of either robbery or burglary were sentenced to a term of incarceration, whereas only 18.3% and 23.8% of juveniles adjudicated in juvenile court for robbery and burglary, respectively, were sentenced to a juvenile facility. *Id.* at 90 & tbl.2.

which transfer laws were based: Adolescents will respond to the intended deterrent effects of increased severity and certainty of punishment by committing fewer crimes.

In addition, a study published in 1988 found that the increased punitive measures implemented under the Juvenile Offender Law had no effect on juvenile homicide or assault rates.[202] The authors studied monthly juvenile arrests from 1974 through 1984, both before and after the Juvenile Offender Law went into effect in 1978.[203] The authors expected that if the law deterred serious juvenile offenders, the arrest rate would decrease after it went into effect.[204] That was not the case, however. In addition to the lack of any change in homicide or assault rates, there was also no significant decrease in the arrests of juveniles age thirteen to fifteen for rape and arson.[205] The authors believed that a likely explanation for this surprising finding is that juveniles are not deterred by the increased severity of the new sentences.[206] They concluded that "by far the simplest interpretation of the results is that the [Juvenile Offender] Law was ineffective in reducing crime."[207]

2. Transfer Laws Disproportionately Affect Minority Males

Although New York courts have held that the Juvenile Offender Law does not violate the Equal Protection Clause because it is "not directed at any class of individuals on account of race, national origin, religion, or sex,"[208] there is at least some evidence that legislative exclusion statutes "operate[] to the disadvantage of some suspect class,"[209] specifically minority males. For example, a Special Report published by the Bureau of Justice Statistics indicates that in 1998 62.2% of juveniles prosecuted in adult criminal courts were black and 19.9% were white (non-Hispanic).[210] However, overall population data for the forty counties in the sample

202. Singer & McDowall, *supra* note 32, at 529.

203. *Id.* at 526. The arrest rates for juveniles age thirteen to fifteen who were affected by the Juvenile Offender Law were compared against two control groups: sixteen- to nineteen-year-olds in New York (who were not affected by the law because youth age sixteen and above are defined as adults in New York) and thirteen- and fourteen-year-olds in Philadelphia, which did not have a similar legislative exclusion statute. *Id.* at 526–31.

204. *Id.* at 526.

205. *Id.* at 530. Although the arrest rate for rape and arson among thirteen- to fifteen-year-olds decreased in New York City, the authors also noted a similar decline in their control groups (juveniles age sixteen to nineteen who were not affected by the law, and juveniles in Philadelphia). *Id.*

206. *Id.* at 532–33.

207. *Id.* at 532.

208. People v. Ryals, 420 N.Y.S.2d 257, 259–260 (Sup. Ct. Kings Cnty. 1979); *see also* People v. Killeen, 603 N.Y.S.2d 510, 510 (2d Dep't 1993).

209. *Ryals*, 420 N.Y.S.2d at 259–60 (quoting San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1, 17 (1973)).

210. Rainville & Smith, *supra* note 197, at 2 tbl.3. The researchers used a sample size of 7135 juveniles (ranging in age from fifteen to seventeen) charged with felonies in criminal courts around the country in 1998. *Id.* at 1. The data was drawn from forty of the country's largest urban counties in nineteen states. *Id.* Among those included in the sample were six counties in New York: Bronx, Kings, New York, Queens, Suffolk, and Westchester. *Id.* at 11 app. 2.

shows that in the general population, black juveniles made up only 23.2% of the population, whereas white juveniles constituted 67.1%.[211] In addition, 95.8% of juveniles charged in criminal court were male,[212] whereas in the general population the ratio of males and females is almost equal.[213]

The increased rate of young black males in the criminal justice system is probably not the result of prosecutors or judges consciously deciding to treat one class of juveniles differently than another due to their race and sex. Rather, it is likely a result of the legislative decision to impose greater punishments on specific offenses.[214] As one commentator noted, "police have arrested black juveniles under the age of eighteen years for all violent offenses . . . at a rate about five times as great as that of white youths . . . . Thus, any sentencing policy that targets violent offenders inevitably will have a racially disparate impact on minority youths."[215]

One would expect that under judicial waiver statutes, under which juvenile court judges have broad discretion to transfer children to criminal court and enjoy a deferential standard for appellate review,[216] racial disparities in transfers to criminal court would be more pronounced than under statutes that transfer juveniles based on objective criteria, such as age and alleged offense. Although the statutory reforms may have reduced the most blatant racial discrimination, racial bias is now "simply manifested in less obvious ways . . . making disparate treatment more intricate and harder to detect."[217]

In New York specifically, of the 10,000 juveniles between the ages of thirteen and fifteen who were arrested and charged under the Juvenile Offender Law from 1978 to 1985, 85% were minorities.[218] In addition, minorities were significantly less likely to be granted youthful offender status, which provides a more lenient sentencing scheme, than their white counterparts.[219] In addition, nonwhite males who were

211. *Id.* at 11 app. 2.

212. *Id.* at 2 tbl.3.

213. *See id.* at 11 app. 2. However, "[t]he very small percentage of females in the waived population is due in large measure to the comparatively low incidence of female offending," rather than any blatant attempt to punish males more than females. Bishop, *supra* note 56, at 104.

214. *Id.* at 111.

215. Feld, *supra* note 10, at 109. Not everyone agrees with this theory. Two explanations for racial disparities in the transfer of juveniles to criminal court have emerged recently: some commentators contend that minorities are transferred more often because they are the worst offenders, while others argue that the juvenile justice system is racially biased. *See* M.A. Bortner et al., *Race and Transfer: Empirical Research and Social Context*, *in* The Changing Borders of Juvenile Justice: Transfer of Adolescents to the Criminal Court 277, 278 (Jeffrey Fagan & Franklin E. Zimring eds., 2000).

216. *See* Lynda E. Frost Clausel & Richard J. Bonnie, *Juvenile Justice on Appeal*, *in* The Changing Borders of Juvenile Justice: Transfer of Adolescents to the Criminal Court 181, 184 (Jeffrey Fagan & Franklin E. Zimring eds., 2000).

217. Bortner et al., *supra* note 215, at 281.

218. Bishop, *supra* note 56, at 110–11.

219. *Id.* at 116–17.

sentenced as juvenile offenders were 1.7 times more likely to be sentenced to a term of imprisonment than white males.[220]

IV. SUGGESTIONS TO BRING THE NEW YORK JUVENILE OFFENDER LAW INTO COMPLIANCE WITH NATIONAL DEVELOPMENTS

This part will explore three options that New York courts and the legislature can undertake to bring the present statutory scheme into conformity with recent national trends. First, the New York State Legislature can amend the law to require that all juveniles be brought before the juvenile court prior to being transferred to criminal court, thus ensuring that the practice of trying juveniles in criminal courts becomes the exception rather than the rule. Second, the legislature could increase the maximum age of juvenile court jurisdiction to seventeen, thereby placing an entire group of juveniles under the jurisdiction of the family court for adjudication and sentencing. Third, judges and attorneys could interpret the Juvenile Offender Law with a focus on rehabilitation, taking advantage of the reverse waiver and youthful offender provisions to remove more juveniles to family court while simultaneously incarcerating fewer juveniles.

A. Place Original Jurisdiction Back in Family Court for All Juveniles

One option to bring the Juvenile Offender Law into compliance with recent developments is to amend the statutes to place original jurisdiction back in the family court for all juveniles, regardless of the offense charged. Thus, juveniles of a certain age charged with one of the enumerated "juvenile offenses" would no longer be excluded from juvenile court and automatically tried in criminal court. Instead, all proceedings against juveniles would commence in juvenile court. If the legislature still wishes to transfer some habitual offenders to criminal court, it can implement a judicial waiver system to allow juvenile court judges to transfer certain youth after an individualized assessment of their amenability to treatment.

New Jersey's judicial waiver statute, which does not provide a mechanism for juveniles to be prosecuted in criminal court without first appearing in juvenile court, is an example of this approach.[221] Under the New Jersey statute, a child between the age of fourteen and seventeen,[222] charged with one of the offenses listed in the waiver statute, may be transferred to criminal court under certain circumstances.[223] Depending on the offense, the waiver may be mandatory, discretionary, or presumptive.[224] For example, if a juvenile is charged with certain serious offenses, such as homicide,

220. *Id.* at 117. It should be noted that white juveniles were sentenced, on average, to a term of imprisonment five months longer than non-white individuals. *Id.* However, the researchers believed that this result was due to the fact that whites were less likely to be sentenced as juvenile offenders unless their crimes were especially violent. *Id.*

221. GAO Report, *supra* note 69, at 79 app. IV.

222. Unlike New York, which prosecutes all youth ages sixteen and above in criminal court, the maximum age of juvenile court jurisdiction in New Jersey is seventeen. Griffin et al., *supra* note 18, at 21.

223. N.J. Stat. Ann. § 2A:4A-26(a) (West Supp. 2009).

224. *See* Griffin et al., *supra* note 18, at 3.

robbery, sexual assault, aggravated assault, kidnapping, and aggravated arson, the juvenile court judge must transfer the case to criminal court after finding probable cause to believe that the juvenile committed the act.[225] However, if a juvenile is charged with other less serious offenses, the judge may transfer the case to criminal court only after the State demonstrates "that the nature and circumstances of the charge or the prior record of the juvenile are sufficiently serious that the interests of the public require waiver."[226]

Furthermore, the New Jersey statute provides, for all juveniles except those age sixteen or older charged with a serious offense, that when "the juvenile can show that the probability of his rehabilitation by the use of the procedures, services and facilities available to the court prior to the juvenile reaching the age of 19 substantially outweighs the reasons for waiver, waiver shall not be granted."[227] Although the mandatory waiver provisions of the New Jersey statute are similar to New York's legislative exclusion statute—requiring transfer to criminal court based solely on age and offense charged—its other provisions are a helpful starting point.

If New York implemented a statute similar to New Jersey's discretionary judicial waiver law, the juvenile court would possess original jurisdiction for all juveniles under the age of sixteen, and transfer to criminal court would only be available after a *Kent* hearing.[228] In *Kent*, the Supreme Court recommended eight factors to be considered in determining whether a juvenile's case should be transferred to criminal court, including the gravity of the offense, the juvenile's danger to the community, the juvenile's personal characteristics, and the rehabilitative options available in juvenile court.[229] If New York requires that all proceedings against juveniles begin in juvenile court, the legislature must consider which *Kent* factors juvenile court judges should consider prior to transferring a juvenile to criminal court. The chosen factors should focus more on the juvenile's amenability to treatment than on society's desire to feel that justice has been done.

Furthermore, in contrast to New Jersey, New York should adopt judicial waiver procedures that do not apply a presumption that certain juveniles are not amenable to treatment and should not be tried in family court. Rather, the law should be written to require prosecutors who wish to transfer juveniles to criminal court to prove by a preponderance of the evidence that the juvenile is not amenable to treatment. In doing so, the prosecutors could offer evidence that the juvenile demonstrates a pattern of increasingly violent behavior and that prior opportunities for rehabilitation, such as community-based alternatives to incarceration, have failed to redirect the juvenile's conduct.

By placing the original jurisdiction for all juveniles back in juvenile court, regardless of the offense charged, the procedure will be more consistent with the

225. N.J.S.A. § 2A:4A-26(a).

226. *Id.* § 2A:4A-26(a)(3).

227. *Id.* § 2A:4A-26(e).

228. *See supra* notes 34–35, 88 and accompanying text.

229. *See supra* note 88.

growing national movement toward rehabilitation of juvenile offenders. Imprisonment for juveniles will again become a last resort, as those that are adjudicated delinquent in family court may be sentenced to a number of dispositions other than a prison term.[230] In addition, the procedures will require a juvenile court judge to consider the juvenile's amenability to treatment prior to transfer.

This approach would also take into account juveniles' diminished responsibility for their actions in light of the developmental and psychological differences between adolescents and adults.[231] Juveniles will still be responsible for their actions; however they will not be criminally responsible and punished through the adult system without an individualized hearing and a finding that they are habitual offenders who are not amenable to rehabilitation through the juvenile justice system.

Although there is some criticism that juvenile waiver statutes provide the juvenile court judge with "broad, standardless discretion," which results in arbitrary transfers and racial bias in waiver decisions,[232] it is preferable to legislative exclusion statutes. Broad discretion is still a key component of legislative exclusion and direct file statutes, but this discretion is hidden because it is exercised by the arresting officers and prosecutors when they decide what charges, if any, to bring against the juvenile. In New York, because juveniles are only subject to prosecution in criminal court if they are charged with a designated "juvenile offense," the charging decisions currently replace the judge's decision to waive juvenile court jurisdiction. But unlike a juvenile court judge's transfer decision, charging decisions are not guided by any set of factors and are not reviewable by appellate courts.[233] "An adversarial hearing at which both the state and defense can present relevant evidence more likely will produce accurate, correct, and fair decisions than prosecutors will make in their offices without access to critical information and subject to extraneous political considerations."[234]

B. Increase the Maximum Age of Juvenile Court Jurisdiction to Seventeen

New York legislators should seriously consider increasing the presumptive age of criminal responsibility from sixteen to eighteen. New York will soon be the only state in the country that still prosecutes all sixteen-year-olds in criminal court regardless of the offense charged or their level of maturity and culpability.[235] As previously discussed, juvenile courts offer more treatment programs than criminal courts.[236] In addition, there are fewer stigmas associated with a juvenile court disposition, as records are sealed and juveniles will avoid a criminal conviction that

230. *See* Task Force on Transforming Juvenile Justice, *supra* note 192, at 21.

231. *See* discussion *supra* Part III.A.1.

232. *See* Feld, *supra* note 10, at 90; Clausel & Bonnie, *supra* note 216, at 188.

233. Griffin et al., *supra* note 18, at 2.

234. Feld, *supra* note 10, at 128 (advocating for mandatory waiver hearings to be conducted in criminal court prior to a juvenile's prosecution).

235. *See* discussion *supra* Part II.F.1.

236. *See* Task Force on Transforming Juvenile Justice, *supra* note 192.

may limit future employment prospects.[237] Finally, although sixteen- and seventeen-year-olds are more mature than thirteen- to fifteen-year-olds, and are thus less likely to act impulsively, succumb to peer pressure, and engage in risky behavior, their capacities for rational decisionmaking and comprehension of the criminal justice system are still less developed than adults.[238] Therefore, it would be more appropriate to place all juveniles below the age of eighteen in family court and permit judicial transfers to criminal court for repeat offenders and others not amenable to treatment.

One possible criticism of this proposal is that it will substantially increase juvenile court costs if all sixteen- and seventeen-year-olds are adjudicated in family court. However, if the juvenile court system will suddenly face a large increase in its docket, it would follow that the criminal court system will lose a large number of cases to the family court. And it is likely more costly to adjudicate juveniles in criminal court as opposed to juvenile court because "[c]riminal prosecutions demand more resources than juvenile ones. They require more hearings, involve more attorney preparation, call on investigative resources, are more likely to result in jury trials, and take at least twice as long to process as comparable cases in juvenile court."[239]

C. Apply the Juvenile Offender Law with a Focus on Rehabilitation Rather Than Punishment

If a complete overhaul of the Juvenile Offender Law is not feasible, either due to cost or the protracted nature of amending a statute, courts can still interpret its provisions with a goal toward rehabilitation. Almost all the actors in the criminal justice system, from the judges and defense attorneys to the police officers and prosecutors, have an opportunity under the current statutory scheme to make the system less punitive by simply applying the Juvenile Offender Law in a rehabilitative manner.[240]

As discussed previously, once a juvenile has been arraigned in criminal court, he may file a motion to request removal to family court,[241] and the criminal court judge will consider whether the "interests of justice" would be served in removing the juvenile

237. Fagan, *supra* note 56.

238. *See* discussion *supra* Part III.A.1.

239. Bishop, *supra* note 56, at 123.

240. Therapeutic jurisprudence provides another option to treat and rehabilitate these juvenile offenders. A movement co-founded by Bruce Winick and David Wexler, therapeutic jurisprudence "assess[es] the therapeutic and counter-therapeutic consequences of law and how it is applied . . . to effect legal change." Bruce J. Winick, *Applying the Law Therapeutically in Domestic Violence* Cases, 69 UMKC L. Rev. 33 (2000). The values of therapeutic jurisprudence are put into play throughout various specialized problem-solving courts across the country. A thorough discussion of therapeutic jurisprudence is beyond the scope of this note. For more information, see Kelly O'Keefe, Ctr. for Court Innovation, The Brooklyn Mental Health Court Evaluation: Planning, Implementation, Courtroom Dynamics, and Participant Outcomes 3-4 (2006), *available at* http://www.courtinnovation.org/sites/default/files/BMHCevaluation.pdf; John E. Cummings, *The Cost of Crazy: How Therapeutic Jurisprudence and Mental Health Courts Lower Incarceration Rates, Reduce Recidivism, and Improve Public Safety*, 56 Loy. L. Rev. 279, 280 (2010).

241. *See* discussion *supra* Part II.E.2.

to family court.[242] The judge may consider a number of factors, including "the history, character, and condition of the defendant" and "*any other relevant fact* indicating that a judgment of conviction in the criminal court would serve no useful purpose."[243] As there is no statutory requirement regarding which factors a judge must examine or the weight that the judge should attribute to each factor, judges have substantial discretion when considering whether to remove a juvenile to family court. Therefore, the reverse waiver provisions in the Juvenile Offender Law afford judges and defense attorneys a valuable opportunity to interpret the removal provisions in a rehabilitative light, erring on the side of caution and removing the juvenile to family court when it appears it would be in the juvenile's interest to do so.[244]

Under these factors, a zealous defense attorney may introduce evidence of the juvenile's immaturity, mental illness, developmental disability, family support, employment, and educational achievements to convince the judge that the juvenile would be better served by treatment through the family court than prosecution in criminal court. The judge, in turn, can weigh these factors as he or she sees fit. For example, one criminal court judge considered the defendants' "age, intelligence, maturity, character, reputation, habits, physical and mental condition, emotional attitude and pattern of living" as well as their "prior contacts with the law, family court history, school attendance record, work history, family ties, home and social environment, and length of residence within the community,"[245] to determine whether removal from criminal to family court was appropriate.

Furthermore, if a juvenile is charged with the most serious offenses, including murder, rape, criminal sexual acts, and armed felony, the judge must also find mitigating circumstances to warrant the juvenile's removal to family court.[246] This provides yet another opportunity for defense attorneys to submit documentation of the juvenile's immaturity, developmental disability, mental illness, impulsivity, and susceptibility to peer pressure when arguing that these mitigating circumstances, which "bear directly upon the manner in which the crime was committed,"[247] require the juvenile's removal to family court.

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242. N.Y. Crim. Proc. Law § 210.43(1)(a) (McKinney 2003).

243. *Id.* § 210.43(2)(d), (i) (emphasis added). See *supra* note 120 for the complete list of removal factors.

244. For an excellent example of a judge fully considering each factor involved in the removal decision, see People v. Gregory C., 602 N.Y.S.2d 492, 494–97 (Sup. Ct. Erie Cnty. 1993).

245. *See* People v. Martinez, 412 N.Y.S.2d 276, 279 (Crim. Ct. N.Y. Cnty. 1978). The criminal court judge ordered the male defendant to be removed to family court following testimony that the victim of the robbery was not harmed, the defendant had no prior records in family court, the defendant's behavior had been "unstable and erratic" after a recent car accident, the defendant was not on his medication at the time the offense was committed, and he was under the domineering influence of his female co-defendant. *Id.* at 280–81. However, the judge refused to remove the female defendant after it was revealed that she had been recently arrested for another robbery and her school records indicated she was violent and disruptive. *Id.* at 281.

246. Crim. Proc. § 210.43(1)(b). The district attorney must also consent to the juvenile's removal to family court in these circumstances. *Id.*

247. *Id.*

Police officers, probation officers, and prosecutors also have an opportunity to apply the Juvenile Offender Law in a less punitive manner. For example, police officers may exercise their informal discretion and choose to release a child with a warning or refer him to services instead of arresting him.[248] Probation officers have the authority to collect information about a juvenile offender case and then dismiss the case, divert the case from court, or file a complaint in criminal court.[249] The District Attorney's Office also has discretion to divert the case, refuse to prosecute the case, or file a complaint in criminal court.[250] In addition, prosecutors may choose to charge relatively minor offenders with less serious crimes (that is, crimes that are not listed as "juvenile offenses" under the statute) to avoid subjecting these juveniles to criminal court.[251] Although it is unreasonable to suggest that prosecutors should decide not to charge a child with a juvenile offense when there is probable cause to believe he has committed murder, kidnapping, or rape, it is possible that a prosecutor may decide to charge a juvenile with second-degree robbery (not a juvenile offense unless committed with a weapon or resulting in injury) instead of first-degree robbery (a juvenile offense) in order to circumvent the Juvenile Offender Law's harsh consequences.[252]

New York courts have recognized this method of evading the Juvenile Offender Law and have attempted to stop prosecutors from taking advantage of this loophole. Courts have held that even when a juvenile is charged with both juvenile and non-juvenile offenses, the criminal court possesses original jurisdiction, and the juvenile is not subject to juvenile delinquency proceedings in family court absent removal from criminal court to family court.[253] In addition, prosecutors cannot circumvent the statutory scheme by charging the juvenile with only non-juvenile offenses when the evidence shows that the child also committed a juvenile offense.[254] Although these precedents may make it more difficult for prosecutors to exercise their discretion in choosing which charges to bring against a potential juvenile offender, the circumstances are usually not so black and white.[255] In cases where the prosecutor

248. *See* Cannon et al., *supra* note 18, at 19.

249. *See id.* at 20.

250. *See id.* There is evidence that New York City prosecutors are already considering methods to avoid trying juvenile offenders in criminal court. In 2008, 2223 arrests were made for "juvenile offenses," yet only thirty percent of these cases were docketed for arraignment. *Id.* at 19 tbl.1. The remaining seventy percent were dismissed or removed to family court. *Id.*

251. *See* Singer & McDowall, *supra* note 32, at 528.

252. *See* N.Y. Penal Law §§ 10.00(18), 160.10 (McKinney 2003).

253. *In re* Kaminski G., 908 N.Y.S.2d 328, 330 (Fam. Ct. Queens Cnty. 2010).

254. *In re* Travis Y., 896 N.Y.S.2d 638, 643 (Fam. Ct. Queens Cnty. 2010). If the nonhearsay allegations indicate that the juvenile committed one or more juvenile offenses, the case must be first brought in criminal court or not at all. *Id.*

255. For example, burglary in the first degree and burglary in the second degree are "juvenile offenses" that, if charged, subject all fourteen- and fifteen-year-olds to prosecution in criminal court. *See* Penal § 10.00(18)(2). However, burglary in the third degree is not a juvenile offense, and thus a youth of the same age charged with third-degree burglary will not be prosecuted in criminal court. *Id.* The main difference between second- and third-degree burglary in New York is that, in second-degree burglary,

could reasonably choose between one charge and another, and where one of those charges would result in the juvenile escaping prosecution in criminal court, the prosecutor could interpret the statute with a focus on rehabilitation and choose to charge the non-juvenile offense.

To determine whether simply applying the Juvenile Offender Law in a rehabilitative manner could actually affect the outcome, consider the case of fifteen-year-old Anthony.[256] Anthony and a sixteen-year-old friend assaulted an elderly man and robbed him of seven cents.[257] Anthony was arrested and charged with robbery in the first degree, a juvenile offense.[258] Consequently, he was prosecuted in criminal court, convicted, and ultimately sentenced to an indeterminate term of two to six years' imprisonment (to be served in a juvenile detention facility).[259]

Now consider what may have occurred if everyone involved in Anthony's case had interpreted the Juvenile Offender Statute with a focus on rehabilitation. First, perhaps Anthony could have been charged with a non-juvenile offense, thus avoiding criminal court altogether. According to prosecutors, Anthony and his friend knocked the victim to the ground, Anthony punched him, and the boys took his money.[260] They were carrying BB guns at the time.[261] It is possible that Anthony could have been charged with robbery in the second degree[262] instead of robbery in the first degree, and thus avoided prosecution in criminal court.[263] The extent of the victim's

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the offender must display a dangerous weapon or cause physical injury to another person during an unlawful entry into a building, whereas third-degree burglary merely requires unlawful entry into the building. *See id.* §§ 140.20, 140.25. Exactly what constitutes a dangerous weapon or a physical injury may be ambiguous, and thus prosecutors may have the option of choosing which charge to bring against the juvenile.

256. Dean Praetorius, *Anthony Stewart, 15-Year-Old from Syracuse, N.Y., Jailed for Assault and 7-Cent Robbery*, HuffingtonPost.com (Aug. 30, 2011, 4:02 PM), http://www.huffingtonpost.com/2011/08/30/anthony-stewart-7-cent-robbery_n_942036.html.

257. *Id.*

258. *Id.*; *see also* Penal § 10.00(18).

259. Tim Knauss, *Syracuse 15-Year-Old Gets Two to Six Years for 7-Cent Robbery*, The Post-Standard (Aug. 29, 2011, 12:28 PM), http://www.syracuse.com/news/index.ssf/2011/08/syracuse_15-year-old_gets_two.html.

260. *Id.*

261. *Id.*

262. Robbery in the second degree, subsection one, is not a juvenile offense. *See* Penal § 10.00(18). "A person is guilty of robbery in the second degree when he forcibly steals property and when: 1. He is aided by another person actually present . . . ." *Id.* § 160.10.

263. Robbery in the first degree is a juvenile offense, which would subject Anthony to prosecution in criminal court. *See id.* § 10.00(18).

> A person is guilty of robbery in the first degree when he forcibly steals property and when, in the course of the commission of the crime or of immediate flight therefrom, he or another participant in the crime: 1. Causes serious physical injury to any person who is not a participant in the crime; or 2. Is armed with a deadly weapon; or 3. Uses or threatens the immediate use of a dangerous instrument; or 4. Displays what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm; except that in any

injuries was not reported, so it is difficult to draw a conclusion. The example is merely to illustrate the options that are available to prosecutors to avoid placing juveniles in the criminal justice system whenever possible.

Once Anthony was arraigned in criminal court, his attorney could have filed a motion to remove his case to family court based on his limited involvement in the crime, the minimal harm caused by the crime, and perhaps Anthony's susceptibility to peer pressure or other unexplored factors.[264] If the judge had applied the factors with a focus on rehabilitation, he could have decided to remove Anthony to family court, where a variety of dispositions in place of incarceration would be available to treat and rehabilitate Anthony.[265]

Finally, if the judge in Anthony's case had interpreted the sentencing provisions of the Juvenile Offender Law in a rehabilitative manner, he could have found Anthony eligible for "youthful offender" sentencing.[266] Judges may sentence juvenile offenders under the more lenient youthful offender statute if the judge finds that "the interest of justice would be served."[267] The judge could have considered the small amount of money taken from the victim, Anthony's criminal history, and any other factors to determine that the interest of justice would be served by finding Anthony eligible for a youthful offender sentence. The judge, however, took the opposite approach and stressed Anthony's refusal to plead guilty as a justification for not applying the youthful offender sentencing provisions.[268]

> prosecution under this subdivision, it is an affirmative defense that such pistol, revolver, rifle, shotgun, machine gun or other firearm was not a loaded weapon from which a shot, readily capable of producing death or other serious physical injury, could be discharged. Nothing contained in this subdivision shall constitute a defense to a prosecution for, or preclude a conviction of, robbery in the second degree, robbery in the third degree or any other crime.

Id. § 160.15.

264. *See* N.Y. Crim Proc. Law §§ 180.75, 210.43 (McKinney 2006). It is possible Anthony's attorney did file a motion to remove his case to family court, but that information is not available.

265. In New York, the possible dispositions available in family court include placement in a secure facility for a maximum of twelve months for a misdemeanor, eighteen months for a felony, and five years for a designated felony; referral to an alternative-to-incarceration program; conditional discharge; adjournment in contemplation of dismissal; or probation supervision. Cannon et al., *supra* note 18, at 29. The sentences available in criminal court include placement in a secure facility for a minimum of one year and a maximum of life (depending on the offense committed), conditional discharge, unconditional discharge, probation, restitution, or fines. *Id.* at 30–31.

266. In 2008, forty percent of juvenile offenders in New York found to be eligible for youthful offender sentencing were sentenced to placement in a secure facility, whereas eighty-six percent of juvenile offenders sentenced as juvenile offenders were placed in a secure facility. *Id.* at 32. The average length of stay in New York State Department of Correctional Services for youthful offenders was 14.7 months, where the average for juvenile offenders was 60.4 months. *Id.* at 33.

267. *See supra* notes 133–35 and accompanying text.

268. *See* Knauss, *supra* note 259. Anthony's accomplice, sixteen-year-old Skyler, pleaded guilty and was sentenced as a "youthful offender." *Id.* He was sentenced to one and one-third to four years in state prison. *Id.*

V. CONCLUSION

Over thirty years have passed since the Juvenile Offender Law was enacted in 1978 as a response to increased juvenile crime. Since then, crime has decreased, studies have been published indicating that juveniles, due to their immaturity and developmental delay, are less criminally culpable than adults, and statistics regarding the law's ineffectiveness have been widely disseminated. In addition, three U.S. Supreme Court cases—*Roper v. Simmons*, *Graham v. Florida*, and *Miller v. Alabama*—have concluded that certain severe punishments for juveniles are unconstitutional. In response to these changes, many states have increased the number of youth adjudicated through their juvenile courts by modifying the boundary age separating juveniles from adults or by transferring less youth to criminal court.

New York, on the other hand, has not revisited its Juvenile Offender Law to take into account these recent developments. Various provisions of the law, including its harsh sentencing structure and failure to consider individualized needs prior to a juvenile's prosecution in criminal court, are no longer in compliance with national standards. Through this introduction to New York's statutory exclusion provisions and the prevailing trends in juvenile justice, this note aims to motivate others to advocate for changes to the way New York treats one of its most vulnerable populations.

Appendix

States	Type of Transfer Law(s)[269]	Maximum Age of Juvenile Court Jurisdiction[270]	Minimum Age to Transfer a Juvenile to Criminal Court[271]	Amenability Hearing Required Prior to Transfer[272]	Reverse Waiver Available to Remove Juveniles From Criminal Court Back to Juvenile Court[273]
Alabama	Judicial Waiver (D), Statutory Exclusion	17	14	Depends[274]	No
Alaska	Judicial Waiver (D, P), Statutory Exclusion	17	No age restriction	Depends	No
Arizona	Judicial Waiver (D), Direct File, Statutory Exclusion	17	No age restriction	Depends	Yes
Arkansas	Judicial Waiver (D), Direct File	17	14	Depends	Yes
California	Judicial Waiver (D, P), Direct File, Statutory Exclusion	17	14	Depends	Yes
Colorado	Judicial Waiver (D, P), Direct File	17	12	Depends	Yes
Connecticut	Judicial Waiver (M)	17	14	No	Yes
Delaware	Judicial Waiver (D, M), Statutory Exclusion	17	No age restriction	Depends	Yes
District of Columbia	Judicial Waiver (D, P), Direct File	17	15	Depends	No
Florida	Judicial Waiver (D), Direct File, Statutory Exclusion	17	No age restriction	Depends	No

269. *See* Griffin et al., *supra* note 18, at 3. Data is current as of 2009. *Id.* "D" stands for discretionary judicial waiver, "P" denotes presumptive judicial waiver, and "M" is mandatory judicial waiver.

270. *See id.* at 21.

271. *See id.* at 4–6. When a state employs multiple mechanisms to transfer a juvenile to criminal court, the age listed is the minimum age a child can be transferred in that state. In some states, the legislature designates a minimum age to transfer the child via judicial waiver and a separate minimum age to transfer a child through direct file or legislative exclusion. For those states, the lowest age is shown. If, under one or more transfer mechanisms, the state does not specify a minimum age to transfer the child, "No age restriction" is listed.

272. *See id.* at 3.

273. *See id.*

274. Whether an amenability hearing is required depends on whether the child is transferred pursuant to the juvenile court judge's authority under a discretionary or presumptive judicial waiver statute or rather under a direct file, statutory exclusion, or mandatory judicial waiver law, all of which circumvent *Kent*'s requirement for an individualized amenability hearing prior to transferring a juvenile to adult criminal court. Thus, whether the child receives an amenability hearing will depend on which mechanism the state decides to employ when transferring the juvenile.

States	Type of Transfer Law(s)	Maximum Age of Juvenile Court Jurisdiction	Minimum Age to Transfer a Juvenile to Criminal Court	Amenability Hearing Required Prior to Transfer	Reverse Waiver Available to Remove Juveniles From Criminal Court Back to Juvenile Court
Georgia	Judicial Waiver (D, M), Direct File, Statutory Exclusion	16	No age restriction	Depends	Yes
Hawaii	Judicial Waiver (D)	17	14	Yes	No
Idaho	Judicial Waiver (D), Statutory Exclusion	17	14	Depends	No
Illinois	Judicial Waiver (D, P, M), Statutory Exclusion	16[275]	13	Depends	No
Indiana	Judicial Waiver (D, M), Statutory Exclusion	17	16	Depends	No
Iowa	Judicial Waiver (D), Statutory Exclusion	17	14	Depends	Yes
Kansas	Judicial Waiver (D, P)	17	10	Yes	No
Kentucky	Judicial Waiver (D, M)	17	14	Depends	Yes
Louisiana	Judicial Waiver (D, M), Direct File, Statutory Exclusion	16	14	Depends	No
Maine	Judicial Waiver (D, P)	17	No age restriction	Yes	No
Maryland	Judicial Waiver (D), Statutory Exclusion	17	14	Depends	Yes
Massachusetts	Statutory Exclusion	16	14	No	No
Michigan	Judicial Waiver (D), Direct File	16	14	Depends	No
Minnesota	Judicial Waiver (D, P), Statutory Exclusion	17	14	Depends	No
Mississippi	Judicial Waiver (D), Statutory Exclusion	17	13	Depends	Yes
Missouri	Judicial Waiver (D)	16	12	Yes	No
Montana	Direct File, Statutory Exclusion	17	12	No	Yes
Nebraska	Direct File	17	No age restriction	No	Yes
Nevada	Judicial Waiver (D, P), Statutory Exclusion	17	No age restriction	Depends	Yes
New Hampshire	Judicial Waiver (D, P)	16	13	Yes	No

275. In Illinois, the upper age of juvenile court jurisdiction is sixteen for juveniles charged with felonies and seventeen for those charged with misdemeanors. *See* GRIFFIN ET AL., *supra* note 18, at 21.

States	Type of Transfer Law(s)	Maximum Age of Juvenile Court Jurisdiction	Minimum Age to Transfer a Juvenile to Criminal Court	Amenability Hearing Required Prior to Transfer	Reverse Waiver Available to Remove Juveniles From Criminal Court Back to Juvenile Court
New Jersey	Judicial Waiver (D, P, M)	17	14	Depends	No
New Mexico	Statutory Exclusion	17	15	No	No
New York	Statutory Exclusion	15	13	No	Yes
North Carolina	Judicial Waiver (D, M)	15	13	Depends	No
North Dakota	Judicial Waiver (D, P, M)	17	14	Depends	No
Ohio	Judicial Waiver (D, M)	17	14	Depends	Yes[276]
Oklahoma	Judicial Waiver (D), Direct File, Statutory Exclusion	17	No age restriction	Depends	Yes
Oregon	Judicial Waiver (D), Statutory Exclusion	17	15	Depends	Yes
Pennsylvania	Judicial Waiver (D, P), Statutory Exclusion	17	No age restriction	Depends	Yes
Rhode Island	Judicial Waiver (D, P, M)	17	16	Depends	No
South Carolina	Judicial Waiver (D, M), Statutory Exclusion	16	14	Depends	No
South Dakota	Judicial Waiver (D), Statutory Exclusion	17	No age restriction	Depends	Yes
Tennessee	Judicial Waiver (D)	17	16	Yes	Yes
Texas	Judicial Waiver (D)	16	15	Yes	No
Utah	Judicial Waiver (D, P), Statutory Exclusion	17	14	Depends	No
Vermont	Judicial Waiver (D), Direct File, Statutory Exclusion	17	10	Depends	Yes
Virginia	Judicial Waiver (D, M), Direct File	17	14	Depends	Yes
Washington	Judicial Waiver (D), Statutory Exclusion	17	No age restriction	Depends	No
West Virginia	Judicial Waiver (D, M)	17	No age restriction	Depends	No
Wisconsin	Judicial Waiver (D), Statutory Exclusion	16	10	Depends	Yes
Wyoming	Judicial Waiver (D), Direct File	17	13	Depends	Yes

276. Ohio recently amended a number of its transfer provisions. This included, among other changes, adding a "reverse bindover" process to remove juveniles back to juvenile court under certain circumstances. *See* Ohio Rev. Code Ann. §§ 2152.151, 2152.122 (LexisNexis 2012).