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Judging Children as Children: Reclaiming New York's Progressive Tradition

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I. INTRODUCTION

On a small island in New York Harbor, only a few miles from where I am writing, stands the Statue of Liberty. It is no accident that this symbol of freedom and opportunity stands at what was the nineteenth century gateway to America. New York has long been a place where strangers were welcomed, a place for the poor, the weak, and the vulnerable. The spirit of New York came to embody all that is meant by the American Dream: “a social order in which each man and each woman shall be able to attain to the fullest stature of which they are innately capable, and be recognized by others for what they are, regardless of the fortuitous circumstances of birth or position.”¹

In the past, the opportunity to reach beyond one's inherited social status and firmly grasp that promise of rebirth, realization, and renewal was readily extended to immigrants from all over the world. The possibility of a new life was not a mere metaphor. Today, that promise must be extended to a new class of weak and vulnerable, born not in some distant land but within the borders of our state—this article is dedicated to the many New York teenagers living in our poorest communities who are being denied an opportunity to participate in the American Dream because of poor choices made at a young age.

New York's system of adjudication for children under eighteen years of age accused of violating the law is unlike that of almost every other state in the nation. This article addresses the life-altering repercussions that can affect the future of children tried in New York's adult criminal justice system. Part II discusses New York's statutory age of criminal responsibility and also illustrates how the policy of treating children as adults results in missed opportunities to effectively intervene in the lives of troubled children. Part III addresses various collateral consequences of criminalization, including impediments surrounding educational opportunities, employability, housing, and immigration. Part IV discusses the impact of these policies on New York's teenagers. Part V, titled “Judging Children as Children,” presents a vision of a twenty-first century model of justice for minors that treats children as children, rationally and fairly acknowledging the intellectual, psychological, and sociological boundaries of adolescence.

II. NEW YORK'S AGE OF CRIMINAL RESPONSIBILITY

New York's system of adjudication of children under eighteen accused of violating the law is shaped by two statutes, that establish the minimum age of criminal responsibility and permit the prosecution of children as young as thirteen in the adult criminal justice system. Subdivision one of section 30.00 of the Penal Law embodies the statutory defense of infancy and establishes sixteen as the general age of criminal responsibility in New York.² Consequently, children as young as sixteen charged with any offense are prosecuted as adults in New York's courts, and face

1. JAMES TRUSLOW ADAMS, *THE EPIC OF AMERICA* 404 (1931).

2. N.Y. PENAL LAW § 30.00(1) (McKinney 2011).

sentencing according to sentencing parameters applied to adults. Subdivision two of Penal Law section 30.00³ also permits the automatic prosecution of children as young as thirteen as adults if they are charged with certain offenses defined as “juvenile offender” offenses.⁴ Juvenile offenders are subject to a different range of sentencing from those applicable to youth sixteen and over.⁵

New York is one of only two states—North Carolina is the other—that draws the line of adulthood for criminal justice purposes as low as sixteen years of age.⁶ As a result, juvenile offenders, and adolescents sixteen and over, fall outside the jurisdiction of the family/juvenile courts. They are statutorily deemed criminally responsible for their behavior as adults, their cases are adjudicated in adult criminal courts, and they are subject to the same procedures and potential criminalization as adults.⁷ Prosecution as an adult, for thirteen-, fourteen-, or fifteen-year-olds charged pursuant to the Juvenile Offender Law, as well as adolescents sixteen and seventeen years of age, is mandated irrespective of the youth’s background or potential and irrespective of the extent of the youth’s involvement in the crime charged. Moreover, they are unable to participate in an array of institutionalized social service programming available solely pursuant to New York’s Family Court Act.

3. *Id.* § 30.00(2).

4. *Id.* § 10.00(18). Under the Juvenile Offender law, a thirteen-year-old is criminally responsible for murder in the second degree, and a fourteen- or fifteen-year-old is criminally responsible for murder in the second degree, kidnapping in the first degree, arson in the first degree, assault in the first degree, manslaughter in the first degree, rape in the first degree, sodomy in the first degree, aggravated sexual abuse, burglary in the first degree, burglary in the second degree, arson in the second degree, robbery in the first degree, robbery in the second degree, criminal possession of a weapon in the second degree, where such weapon is possessed on school grounds (as defined by PENAL § 220.00(14)), attempted murder in the second degree, or attempted kidnapping in the second degree. *Id.*

5. *Id.* § 70.05.

6. Merrill Sobie, *Pity the Child: The Age of Delinquency in New York*, 30 PACE L. REV. 1061 (2010).

7. Juvenile offender cases may be removed to family court. Removal is a limited remedy that is not available in all cases. Upon motion by the defendant pursuant to N.Y. CRIM. PROC. § 180.75(5) (McKinney 2011), the criminal court may determine that transfer to the family court would serve the interests of justice. *Id.* § 210.43(1)(a). The court must look at various factors when making this determination, including the seriousness of the crime, the extent of the harm caused by the offense, evidence of guilt, the history, character, and condition of the defendant, the purpose of authorizing the sentence, the impact of removal on the community, the impact of removal on the public’s confidence with the criminal justice system, the attitude of the complainant or victim, and any other facts tending to show conviction in criminal court would serve no useful purpose. *Id.* § 210.43(2). Prosecutorial consent is required when the juvenile offender is charged with murder in the second degree, rape in the first degree, criminal sexual act in the first degree, or an armed felony. *Id.* § 210.43(1)(b). For such offenses, the court must also find at least one of three of the following factors:

- (i) mitigating circumstances that bear directly upon the manner in which the crime was committed; (ii) where the defendant was not the sole participant in the crime, the defendant’s participation was relatively minor although not so minor as to constitute a defense to the prosecution; or (iii) possible deficiencies in the proof of the crime, and, after consideration of the factors set forth in subdivision two of this section, the court determined that removal of the action to the family court would be in the interests of justice.

Id.

Although New York's youthful offender (YO) procedure⁸ provides an avenue for the court to exercise discretion upon conviction of youths fourteen through eighteen in order to avoid the lifetime stigma of a criminal conviction and the imposition of certain mandatory sentences of imprisonment,⁹ this device does not provide adequate protection from exposure to adult procedures and consequences. Adjudicating an eligible defendant as a youthful offender does not guarantee that such individual will receive the social services that so many of these children require in order to avoid further criminal behavior. Moreover, since youthful offender treatment is discretionary and a one-time opportunity when granted in the context of a felony conviction,¹⁰ these children may be at a high risk of future criminalization without proper intervention. As for the difficulty that a judge encounters in granting youthful offender treatment, one need only look at the literal wording of the statute to understand its restrictive nature.¹¹ The fact that some judges may grant YO in a somewhat "liberal" manner is not a panacea to the broader issue of the proper age of criminal responsibility. Additionally, even if an adult court judge adjudicates a defendant as a youthful offender, such a status, while avoiding a felony conviction, does not correct the systemic flaw—it fails to render such adolescents eligible for the developmentally sensitive educational, psychological, and social service intervention programs that so many of these children require, and which are available solely in the family court.

The Family Court Act, in contrast, authorizes social service interventions for youth accused as juvenile delinquents. The legislature recognized that family court judges require flexibility to address the multifaceted needs of court-involved youth. Unfortunately, the legislature did not tender these options to adult criminal or supreme court judges in either the juvenile offender sentencing scheme or the adult sentencing scheme as applicable to sixteen- and seventeen-year-olds.

Since the cases of sixteen- and seventeen-year-old children and juvenile offenders are processed in the adult criminal courts, the sentencing authority of criminal court judges is prescribed by the Penal Law and limited to sanctions which do not include access to therapeutic programmatic interventions available under the Family Court Act.¹² As a result, adult court judges are not statutorily authorized to sentence adolescent offenders ("juvenile offenders," and sixteen- and seventeen-year-olds) to placement in a private voluntary agency or residential treatment center, even though one of these might better serve the youth's needs and better protect society. Moreover, because of this lack of statutory authority, programs that offer these services and are

8. CRIM. PROC. § 720.10

9. For the sentencing options associated with youthful offender treatment, see PENAL § 60.02; for the sealment provisions, see CRIM. PROC. § 720.15.

10. CRIM. PROC. § 720.10(2)(c). After a youth receives youthful offender treatment for a felony conviction, he will not be eligible for this treatment after a subsequent conviction. *Id.* Youthful offender treatment is mandatory only for a first misdemeanor conviction. *Id.* § 720.20(1)(b).

11. *See Id.* § 720.1(2)–(3) (limiting who may qualify as an "eligible youth").

12. *See* PENAL § 60.10.

willing to accept these children have no mechanism of financial reimbursement from the court. Programs amenable to providing these services are required to secure their own funding in order to treat adolescent offenders. For example, criminal and supreme court judges cannot, under the present statutory scheme, sentence convicted adolescent offenders to placement in a program or residential setting that is specifically designed to provide developmentally sensitive services such as mentoring, socialization skills, family counseling, mental health intervention, and vocational and educational counseling. Judges who determine that such rehabilitative services are warranted in a given adolescent's case are left to their own devices and improvisational skills to craft a disposition that integrates participation in a program, pending a statutorily authorized sentence.

In sum, as a result of New York's low age of criminal responsibility and the Juvenile Offender Law, many young people who could benefit from the social service oriented family court are deprived of an opportunity to receive productive intervention only available through the Family Court Act. Alternative-to-incarceration programs relied on to provide developmentally sensitive interventions in the adult court are not an official part of the system. They are often supported financially by private donors and are subject to the fragility and inconsistency of that funding.

A. The Family Court Act Provides Judges with the Dispositional Flexibility Necessary to Respond to the Cases of Children

The Family Court Act recognizes that judges require flexibility when addressing the multifaceted needs of court-involved children. Family court judges have wide discretion. For example:

- 1) Under the Family Court Act, the court can place a child with a private residential or nonresidential program, and thus can create a statutory funding stream for reimbursement for the services rendered by the aforesaid program;¹³
- 2) With an exception for certain designated felonies, a family court judge is not bound by minimum sentences or durations of placement;¹⁴
- 3) "In contrast to Criminal Procedure Law § 170.55(1), which provides that a local criminal court may grant an ACD [adjournment in contemplation of dismissal] prior to the entry of a plea or a verdict, in a juvenile delinquency proceeding an ACD may be granted at any time, including at the conclusion of a dispositional hearing, so long as the court has not adjudicated

13. N.Y. FAM. CT. ACT § 353.3(1) (McKinney 2011).

14. Under the Family Court Act section 353.5(3), a respondent must be placed only "where the respondent is found to have committed a designated felony act in which the respondent inflicted serious physical injury . . . upon another person who is sixty-two years of age or more." *Id.*

the respondent to be a juvenile delinquent pursuant to Family Court Act § 352.1(1)";¹⁵

- 4) Under the Family Court Act, a disposition must reflect the needs and best interests of the individual respondents as well as the need for protection of the community.¹⁶ With the exception of designated felony acts, the family court must order the least restrictive alternative at disposition;¹⁷
- 5) The Family Court Act allows the court to remove the child from the home of a parent or guardian if the court concludes the home is not an appropriate environment for the child and places the child with an individual, such as a grandparent or aunt, in effect determining that custody should be changed;¹⁸
- 6) Under the Family Court Act, a juvenile delinquency petition or finding can be replaced with a person in need of supervision (PINS) petition,¹⁹ thus enabling the child to receive the probationary and social services attendant to such a finding.²⁰

Regrettably, the legislature did not afford this flexibility to criminal or supreme court judges in cases involving juvenile offenders and sixteen- and seventeen-year-olds. New York's approach sharply deviates from the flexible array of dispositional alternatives that have traditionally characterized juvenile adjudications. Additionally, uniformly and intractably subjecting sixteen- and seventeen-year-olds to the adult penal scheme dramatically compromises a judge's ability to respond to their developmental needs. It is paradoxical that, in many instances, those children who could most benefit from remedial social services are the very individuals who, by virtue of their age, fall outside the parameters of the statutes that establish, fund, and implement those programs.

B. Arrest, Detention, and Adjustment

New York's JO Law and its low age of criminal responsibility affect the lens under which we view the cases of children below eighteen at each point of contact with our justice system, including arrest, confinement, adjudication, and sentencing. The Family Court Act provides children with developmentally sensitive pretrial protections. For example, when a police officer takes a child subject to the jurisdiction

15. *See In re Sheenah C.*, 896 N.Y.S.2d 670, 672 (N.Y. Fam. Ct. 2010).

16. FAM. CT. ACT § 352.2(2)(a).

17. *Id.*

18. *Id.* § 353.3(1).

19. *Id.* § 311.4(1)–(2).

20. *See id.* § 735.

of the family court into custody, she must immediately notify the parent, the person legally responsible for the child, or a person with whom the child resides if the parent or person legally responsible is unavailable.²¹ Pretrial detention takes place in a facility certified by the Office of Children and Family Services as a “Juvenile Detention Facility.”²² Furthermore, under the Family Court Act, in determining the suitability of questioning a child, the child’s age and the presence or absence of his parents, or a person legally responsible for the child, are relevant considerations.²³

Finally, the Family Court Act allows the probation service to “adjust” certain cases before a petition is filed.²⁴ Under this process, the youth is released provided that he complies with conditions set by a probation officer. This process provides probation officers with an opportunity to expeditiously link the child to necessary services while holding the child accountable for his actions without extensive court intervention.

III. COLLATERAL CONSEQUENCES

A juvenile delinquency finding under the Family Court Act is not a criminal conviction. On the other hand, children prosecuted as adults due to New York’s low age of criminal responsibility and JO Law are exposed to the lifetime stigma of a criminal record. An adolescent’s conviction is more pernicious than an adult’s conviction because it can severely undermine a youth’s future before he has an opportunity to embark upon a productive adult life. As Professor Frank Zimring poignantly stated, “punishing a young offender in ways that significantly diminish later life chances compromises the essential core of a youth protection policy.”²⁵

The collateral consequences of a criminal conviction affect education, employment, and housing, perpetually punish children, prevent them from achieving their full potential, and may forever compromise their ability to become productive members of society. Such burdens may be carried for a lifetime. As Professor Andrew Schepard of Hofstra University Law School observed, a juvenile conviction will require an offender “to disclose information about his record when applying to college, [and] the conviction will show up on background checks when he is applying for jobs, a license to practice a profession, and public housing.”²⁶

Although adult criminal background information has always been open to public scrutiny, the facility with which such information can now be publicly accessed has increased significantly with the availability of internet-based criminal background

21. *Id.* § 305.2(3).

22. *Id.* § 305.2(4)(c).

23. *Id.* § 305.2(8); see also Justin Ashenfelter, Note, *Coming Clean: The Erosion of Juvenile Miranda Rights in New York State*, 56 N.Y.L. SCH. L. REV. 1503 (2011–12).

24. *Id.* § 308.1(2); *Id.* § 308.1(4) (enumerating crimes for which adjustment is available).

25. Franklin E. Zimring, *Youth Violence: Toward a Jurisprudence of Youth Violence*, in 24 CRIME & JUSTICE 477, 493 (Michael Tonry & Mark H. Moore eds., 1998).

26. Andrew Schepard, *Collateral Consequences for Young People Convicted as Adults*, 245 N.Y. L.J. 3 (2011).

checks. Today, a myriad of organizations remove the previously required legwork by checking all possible repositories of criminal background information for a nominal fee.²⁷ Online background checks gather and consolidate the criminal justice information contained in various databases based on nothing more than a name and social security number—information required on almost any application for employment, housing, credit, insurance, or service contract. However appropriate and relevant this information is to protecting society, knowledge of the convictions of those who were minors at the time of the offense significantly ignores and inhibits the possibility and potential for a young offender to grow out of criminal and delinquent behavior. Below is a brief discussion of some of the collateral consequences of a criminal conviction.

A. Education

There are many barriers for incarcerated youth who strive to obtain a quality education.²⁸ Even if a youth manages to complete high school while incarcerated, that individual will face a formidable challenge when seeking higher education. In a recent survey, sixty-six percent of responding colleges indicated that they collect criminal justice data from all applicants.²⁹ When two-year granting institutions are excluded, the number rises to seventy-four percent.³⁰ Juvenile/family court adjudications need not be disclosed to colleges. As a result of this disclosure, New York children who have been adjudicated and convicted as adults are at a considerable disadvantage in the application process, compared to similarly aged applicants seeking admission from states where the age of criminal responsibility is higher.

B. Employment and Influence on Employability

According to a recent survey in 2010, ninety-two percent of employers used criminal background checks regularly in their hiring decisions,³¹ seventy-three percent conducted checks on all job applicants, nineteen percent conducted checks

27. Erica Goode, *Internet Lets a Criminal Past Catch Up Quicker*, N.Y. TIMES, Apr. 28, 2011, at A17, available at <http://www.nytimes.com/2011/04/29/us/29records.html>.

28. A recent report by the Annie E. Casey Foundation notes that “[r]ecurrent problems include overcrowding, frequent movement of students, lack of qualified teachers, an inability to address gaps in students’ schooling, and a lack of collaboration with the public school system.” RICHARD A. MENDEL, THE ANNIE E. CASEY FOUND., NO PLACE FOR KIDS: THE CASE FOR REDUCING JUVENILE INCARCERATION 25 (2011) (internal quotation marks omitted), http://www.aecf.org/-/media/Pubs/Topics/Juvenile%20Justice/Detention%20Reform/NoPlaceForKids/JJ_NoPlaceForKids_Full.pdf.

29. CTR. FOR COMMUNITY ALTERNATIVES, THE USE OF CRIMINAL HISTORY RECORDS IN COLLEGE ADMISSIONS RECONSIDERED 8 (2010), <http://www.communityalternatives.org/pdf/Reconsidered-criminal-hist-recs-in-college-admissions.pdf>.

30. *Id.* at 10.

31. SOC’Y FOR HUMAN RES. MGMT., BACKGROUND CHECKING: CONDUCTING CRIMINAL BACKGROUND CHECKS 3 (2010), <http://www.shrm.org/Research/SurveyFindings/Articles/Pages/BackgroundCheckCriminalChecks.aspx>.

on selected candidates, and only seven percent did not regularly utilize background checks as part of the hiring process.³²

New York City's "Young Men's Initiative," announced by Mayor Michael Bloomberg on August 4, 2011, acknowledges the severity of this problem. The initiative attempts to ameliorate the impact of a criminal conviction on economic opportunity by "issu[ing] guidance to its [city] agencies for the consideration of criminal record[s] in hiring and licensing."³³ The Mayor instructed the city's agencies to not ask applicants about their criminal history before or during their first interview.³⁴ The Executive Order enacting the policy specifically recognizes that "obstacles to employment for people with prior criminal convictions and other barriers to reentry impair the economic and social vitality of this group, and is contrary to public policy."³⁵

C. Housing

In New York, securing affordable housing is a problem that increases exponentially for applicants with a criminal history. Property owners are not prohibited from discriminating against applicants with criminal convictions and, as such, many individuals are at a serious disadvantage in an already daunting endeavor.³⁶ This issue is compounded by the fact that a criminal conviction has a deleterious effect not solely on the convicted individual, but upon his or her family's eligibility for public housing. For example, the New York City Housing Authority conducts background checks on all members of an applicant's household above the age of sixteen.³⁷ The family is deemed ineligible for public housing for prescribed periods of time after the "convicted person has served his/her sentence (including the completion of probation and/or

32. *Id.* N.Y. CORRECT. LAW § 753(1) (McKinney 2011) (requiring private employers of ten or more people and public employers to consider a number of factors before rejecting a job or license application). These factors also include the time that elapsed since the offense, the job responsibilities, the age of the applicant at the time of the offense, and the time that has elapsed since the offense took place. CORRECT. § 753(1).

33. Press Release, Office of the Mayor, Mayor Bloomberg Launches Nation's Most Comprehensive Effort to Tackle Disparities Between Young Black and Latin Males and Their Peers (Aug. 4, 2011), *available at* http://www.nyc.gov/portal/site/nycgov/menuitem.c0935b9a57bb4ef3daf2f1c701c789a0/index.jsp?pageID=mayor_press_release&catID=1194&doc_name=http%3A%2F%2Fwww.nyc.gov%2Fhtml%2Fom%2Fhtml%2F2011b%2Fpr282-11.html&cc=unused1978&rc=1194&ndi=1.

34. Consideration of Criminal Convictions in Hiring, N.Y. Exec. Order No. 151 (Aug. 4, 2011), http://www.nyc.gov/html/om/pdf/eo/eo_151.pdf.

35. *Id.*

36. *See* LEGAL ACTION CTR., ARE YOU SOMEONE WITH HIV/AIDS? AN ALCOHOL OR DRUG HISTORY? A CRIMINAL RECORD? 13 (2007); N.Y.C. HOUSING AUTH., NEW YORK CITY HOUSING AUTHORITY'S TENANT SELECTION AND ASSIGNMENT PLAN, App. G at 5-7 (2011) [hereinafter TENANT SELECTION AND ASSIGNMENT PLAN], <http://www.nyc.gov/html/nycha/downloads/pdf/TSAPlan.pdf>.

37. N.Y.C. HOUSING AUTH., GUIDE TO APPLYING FOR PUBLIC HOUSING 7 (2011), http://www.nyc.gov/html/nycha/downloads/pdf/070008_pub_hsg_guide.pdf.

parole and the payment of any fine) with no further convictions or pending charges.”³⁸ The duration of the ineligibility period is contingent upon the severity of the underlying conviction. For example, families are ineligible for public housing for three years after the convicted person has completed his or her sentence, including probation and parole for “Class B or unclassified misdemeanors,” and families are ineligible for six years after “A, B or C felonies.”³⁹

D. Immigration

A criminal conviction can have devastating consequences on one’s immigration status and may result in deportation. In *Padilla v. Kentucky*, U.S. Supreme Court Justice John Paul Stevens recognized that

[t]he landscape of federal immigration law has changed dramatically over the last 90 years. While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation. The “drastic measure” of deportation or removal is now virtually inevitable for a vast number of noncitizens convicted of crimes.⁴⁰

IV. IMPACT ON NEW YORK’S TEENAGERS

New York is losing the opportunity to intervene constructively for far too many young people who come into contact with law enforcement and the criminal justice system. The idea of criminalizing or institutionalizing a fourteen- or fifteen-year-old without first making every effort to address the reasons behind the criminal behavior, demonstrates a fatal flaw in our effort to improve public safety. The number of youths below eighteen years of age who come into contact with our adult court system is staggering. In New York during 2010, approximately 44,000 arrests of youth below eighteen years of age were adjudicated pursuant to laws and sentences initially designed for adults (including 808 juvenile offenders below the age of sixteen).⁴¹

It has been suggested that New York’s system of adjudicating minors already takes into account the youth, immaturity, and diminished judgment of defendants under eighteen years of age. Those who adopt this argument point to the availability of youthful offender treatment and data that demonstrates that in 2010, for example, a significant number of sixteen- and seventeen-year-olds (ninety-four percent) who

38. N.Y.C. HOUSING AUTH., APPLICATIONS AND TENANCY ADMINISTRATION DEPARTMENT MANUAL (2009), http://www.nyc.gov/html/ceo/downloads/pdf/table-nycha_standards_of_admission.pdf.

39. See TENANT SELECTION AND ASSIGNMENT PLAN, *supra* note 36.

40. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1478 (2010) (citation omitted); see also 8 U.S.C. § 1182(a) (2006) (listing criminal offenses that render aliens ineligible for admission into the United States); 8 U.S.C. § 1227(a) (2006) (listing criminal offenses that subject aliens to deportation).

41. N.Y. DEP’T. OF CRIMINAL JUSTICE SERVS., NEW YORK STATE DISPOSITIONS OF ARRESTS IN 2010 INVOLVING YOUTH at App. A (2010).

were arrested and processed in New York's criminal courts received dispositions that did not result in a criminal record.

However, a review of the data also shows that when factoring out the number of cases that were dismissed or those that resulted in convictions for non-criminal offenses (violations), as well as the number of acquittals, a different picture presents itself. In 2010, a total of 9141 youth under eighteen were convicted of a crime.⁴² Of those convicted, 6596 (including 237 juvenile offenders under sixteen) received youthful offender treatment; the remaining 2545 (including 112 juvenile offenders under sixteen) incurred a criminal record.⁴³ Thus, twenty-eight percent of youth who were actually convicted of a crime in 2010 were criminalized and received a criminal record.

In terms of the suggested ameliorative impact of the Youthful Offender Law, as stated previously, the YO Law does not sufficiently address nor does it provide the developmentally sensitive remedies or interventions that so many of these children require—the majority of which are only available in family court through the Family Act. As a result, youthful offender treatment often results in ignoring the issues that bring young offenders to court in the first place. Troubled children who violate the law should receive appropriate therapeutic intervention at the earliest opportunity.

The practice of dismissing tens of thousands of cases of youth sixteen and seventeen years of age is not necessarily consistent with a system that takes into consideration the developmental differences of children.⁴⁴ In many of these cases, we may be missing an opportunity to effectively address the reasons that brought those children into contact with the system. Such intervention is available through the Family Court Act where the probation department has the authority to adjust cases and hold children accountable swiftly, without extensive court intervention.

In any event, there are a number of unanswered questions raised by the available data. For example, it is unclear whether, for cases dismissed, we are properly addressing issues presented by youth that could result in future crime and criminalization if unaddressed. It is unclear whether adjournments in contemplation of dismissal are considered adjournments at the time of dismissal, without a follow up to determine whether the conditions of dismissal were eventually met. Further, it would be helpful to obtain data on the recidivism rates of youth who receive youthful offender treatment and what services, if any, they were afforded. In sum, without this information, it is difficult to agree with the contention that our current system of adjudication of cases involving young offenders provides youth better treatment in New York's adult courts than what is available to them in family court.

It is also argued that the need to raise the age of criminal responsibility ignores the value of the alternative-to-incarceration programs that currently exist in criminal court. Although these programs are laudable, they are not an institutionalized part of the system, and depend upon the judge's individual policies and predispositions and on funding from private donors.

42. *Id.*

43. *Id.*

44. *See id.* (indicating that 23,888 cases of youth under the age of eighteen were dismissed in 2010).

The societal and economic ramifications of prosecuting tens of thousands of children as adults must be scrutinized as part of any comprehensive juvenile justice reform agenda. If we are to adeptly confront juvenile crime in New York, we must intervene productively in the lives of troubled children at the earliest possible opportunity. This will require a statewide shift in policy and legal practice from a system that judges children as adults to one that judges children as children.

V. JUDGING CHILDREN AS CHILDREN

A. *Theory of Reform*

A crucial element necessary to remedy the negative consequences of the policy of trying children as adults is legislation that will raise the age of criminal responsibility to eighteen. This would bring New York into conformity with the overwhelming national consensus that children under the age of eighteen, in the first instance, should have their cases referred to a family/juvenile court, and only those children whose crimes are so horrendous and backgrounds so disturbed that they would not be amenable to the services of these courts, should be tried in adult criminal courts where they could be exposed to greater periods of secure treatment.

In his treatise *American Youth Violence*, Professor Zimring stated, “The principal objective of policy in the adjudication and sentencing of minors is to avoid damaging the young person’s development into an adulthood of full potential and free choice; thus the label for this type of policy is ‘room to reform.’”⁴⁵

The crux of this approach is to afford children an opportunity to learn from their mistakes without posing an unjustifiable risk to public safety so that, as these children mature, they may become contributing members of our society. Our current sentencing structure does not adequately accommodate these interests because it all too often results in the unnecessary criminalization of a significant number of children who are then denied an opportunity to redeem themselves. Altering the way we prosecute minors is more than merely a matter of principle. Increasing the age of criminal responsibility to eighteen and opening the therapeutic services of the family court to all children will transform the way we prosecute minors from an intrinsically punitive approach to a rehabilitative-based model. This shift in culture, policy, and practice will reduce the unnecessary criminalization of many children currently subject to adult court jurisdiction and mitigate the impact of the collateral consequences of juvenile misconduct.

This approach is consistent with current U.S. Supreme Court juvenile justice jurisprudence and is reflected in a series of cases following *Roper v. Simmons*.⁴⁶ The

45. FRANKLIN E. ZIMRING, *AMERICAN YOUTH VIOLENCE* 142 (1998).

46. 543 U.S. 551 (2005); *see also* *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011) (holding that “a child’s age properly informs the Miranda custody analysis” and that “[a] child’s age is far ‘more than a chronological fact.’ It is a fact that ‘generates commonsense conclusions about behavior and perception.’ Such conclusions apply broadly to children as a class. And, they are self-evident to anyone who was a child once himself, including any police officer or judge.”) (citations omitted); *Graham v. Florida*, 130 S. Ct. 2011 (2010) (holding that “[t]he Constitution prohibits the imposition of a life without parole sentence

Supreme Court held in *Roper* that it is unconstitutional to execute anyone younger than eighteen years of age.⁴⁷ Justice Anthony Kennedy, speaking for a plurality of the Court, reasoned, “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.”⁴⁸

The Department of Justice, the Federal Center for Disease Control and Prevention, and The Brookings Institution have all issued reports confirming the position that prosecuting minors as adults in adult criminal courts is ineffective from both a rehabilitative and a public safety perspective.⁴⁹ In fact, these studies have found that young people tried in adult court are much more likely to reoffend. Equally revealing is a research project sponsored by the MacArthur Foundation that compared a sample of youth cases adjudicated in New York with a proportionate sample of youth cases (for similar offenses) in New Jersey, where the age of criminal responsibility is eighteen. The researchers found that youth prosecuted in the adult courts of New York were eighty-five percent more likely to be re-arrested for violent crimes than those prosecuted in the New Jersey juvenile courts, and that they were forty-four percent more likely to be re-arrested for felony property crimes.⁵⁰

B. Proposed New York Model for the Adjudication of Youth

A model of justice for minors in New York, in order to properly address the needs of children while protecting the safety of the community, must accomplish four objectives:

on a juvenile offender who did not commit homicide” and that the State must give “defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.”). The United States Supreme Court recently granted certiorari in *Miller v. Alabama*, 63 So. 3d 676 (Ala. Crim. App. 2010), *cert. granted*, 80 U.S.L.W. 3275 (U.S. Nov. 7, 2011) (No. 10–9646), and *Jackson v. Norris*, 2011 Ark. 49 (2011), *cert. granted sub nom. Jackson v. Hobbs*, 80 U.S.L.W. 3275 (U.S. Nov. 7, 2011) (No. 10–9647), two cases challenging the constitutionality under the Eighth Amendment of life sentences without parole imposed on two juvenile defendants convicted of first degree murder and felony murder. Both juveniles were fourteen-years-old at the time of the commission of the crimes. In both states, the life without parole sentences was mandatory upon conviction. *See Miller*, 63 So. 3d 676; *Jackson*, 2011 Ark. 49.

47. *Roper*, 543 U.S. at 568.

48. *Id.* at 570.

49. *See, e.g.*, Richard E. Redding, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?*, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION (June 2010), <http://www.ncjrs.gov/pdffiles1/ojjdp/220595.pdf>; Task Force on Community Preventive Services, *Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System*, 56 MORBIDITY & MORTALITY WEEKLY REPORT 1 (2007), <http://www.cdc.gov/mmwr/PDF/rr/rr5609.pdf>; LAURENCE STEINBERG & RON HASKINS, BROOKINGS, KEEPING ADOLESCENTS OUT OF PRISON (2008), http://www.brookings.edu/~media/Files/rc/papers/2008/fall_juvenile_justics_haskins/fall_juvenile_justice_haskins.pdf.

50. *See* MACARTHUR FOUND., RESEARCH NETWORK ON ADOLESCENT DEVELOPMENT AND JUVENILE JUSTICE, THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE ADULT CRIMINAL COURT (2006), http://www.adjj.org/downloads/3582issue_brief_5.pdf.

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- First, the development and implementation of a statutory strategy of prosecution that serves to identify, more precisely, dangerous, violent, and chronic juvenile offenders;
- Second, the development of sentences and dispositions that are primarily focused on education, rehabilitation, and reentry;
- Third, the development of a flexible system of prosecution and treatment, incorporating and institutionalizing participation in alternative-to-incarceration programs and developmentally sensitive programming for those juveniles most likely to benefit from that mode of intervention; and
- Fourth, the development of mechanisms to remove the stigma of a felony conviction from those juveniles who have demonstrated that they have conformed their behavior to society's standards following conviction and/or incarceration.

The model outlined below achieves these goals while embodying existing legal structures particular to New York:

- New York's age of criminal responsibility should be raised from sixteen to eighteen years of age.
- All youth under sixteen years of age regardless of the charges against them will be subject to the original jurisdiction of the family court. However, youth under sixteen years of age who are charged with designated offenses, currently defined by the Juvenile Offender Law, can be transferred to adult criminal court after a judicial amenability hearing. Further, no youth under fourteen years of age can be transferred to the adult court unless it can be established by clear and convincing evidence that such a youth is competent to stand and assist in the proceedings against him. In no event may a child under thirteen years of age be transferred to the adult criminal court.
- Youth transferred to the adult court will be subject to the current juvenile offender structure of indeterminate sentences or, in the discretion of the adult sentencing judge, adjudicated as if they were in the family court. (Judges will retain the option to grant YO treatment.)
- Sixteen- and seventeen-year-olds charged with crimes currently designated as juvenile offender offenses, can be prosecuted automatically in adult court in the same manner as the current Juvenile Offender Law provides. However, after a judicial hearing, an adult court judge shall have the discretion to: (a)

transfer the case to the family court; (b) upon conviction, sentence a sixteen- and seventeen-year-old as if he was adjudicated in the family court; (c) sentence such sixteen- and seventeen-year-old according to the indeterminate sentencing structure currently provided for juvenile offenders; or (d) sentence such sixteen- and seventeen-year-old under the law as currently applied to sixteen- and seventeen-year-olds.

- Sixteen- and seventeen-year-olds not charged with a designated juvenile offender offense shall be subject to the original and exclusive jurisdiction of the family court.
- Following a criminal conviction incurred before the age of eighteen, an offender may apply for expungement of his conviction at the expiration of five years from the date of his conviction, satisfactory completion of probation, parole, supervised release, and payment of any fines imposed or restitution ordered, whichever is later, provided that an offender can establish that he was crime-free for that period and can demonstrate his capacity to be a law abiding citizen.

The goal is to provide maximum sentencing flexibility and enhance judicial responsiveness to the cases of youth under the age of eighteen convicted in adult criminal courts.

VI. CONCLUSION

New York's juvenile and criminal justice systems are at a pivotal crossroads. Some refer to this as a watershed moment, others a crisis. I prefer to view our current posture as a rare and valuable opportunity. Efforts have already begun to improve the manner in which children are treated in juvenile and family courts and when they are placed in the custody of the Office of Children and Family Services. Before his election as governor of New York, Andrew Cuomo released an Urban Agenda, which contained a plan to "Reform New York's Broken Juvenile Justice System."⁵¹ The plan called for, among other reforms, the imprisonment of only those juveniles who pose a risk to public safety, improvement of the conditions of confinement, and greater reliance on community-based programming. Governor Cuomo's 2011–2012 state budget "included provisions specifically designed to discourage the unnecessary or inappropriate use of juvenile detention and expand funding for effective alternative to detention programming and services."⁵² His 2012–2013 Executive Budget provides

51. See Andrew Cuomo, *Reform New York's Broken Juvenile Justice System*, 6 URB. AGENDA: THE NEW NY AGENDA 161, 161–74 (2010), http://www.andrewcuomo.com/system/storage/6/5b/2/1183/andrew_cuomo_urban_agenda.pdf.

52. *Detention Reform in New York State*, OFFICE OF CHILDREN AND FAMILY SERVICES, http://ocfs.ny.gov/main/detention_reform/ (last visited Mar. 5, 2012).

for “closing costly State facilities and providing more appropriate placements and services to youth from New York City within New York City-based facilities.”⁵³

Mayor Bloomberg, in announcing his Young Men’s Initiative, reiterated New York City’s juvenile justice plan. According to the August 4, 2011 announcement:

The City will advocate for state juvenile justice reforms to allow young people to remain in community-based alternatives to detention in New York City, while also investing \$6 million to expand and strengthen the continuum of local programming for 100 youth who would otherwise be sent to OCFS-run or—contracted facilities. . . . New investment of \$9 million will enable the Department of Corrections to undertake comprehensive restructuring of in-jail services to inmates ages 16–18 to better prepare them for success upon release.⁵⁴

On September 21, 2011, Chief Judge Jonathan Lippman announced a juvenile justice proposal raising the age of criminal responsibility for young offenders accused of non-violent offenses.⁵⁵ The governor’s plan, the city’s plan, and the chief judge’s proposal are critical steps in the right direction and should be treated as integral components in an overarching strategy to transform juvenile justice in New York.⁵⁶

New York must capitalize on this progressive and propitious moment; the legislature must decisively act to replace the current, unyielding statutory structure for children under eighteen years of age and embrace a robust, evidence-based justice system that judges children as children. All New Yorkers would benefit from laws that make psychological, scientific, economic, and common sense in the context of adolescent offenses. Such laws must recognize the developmental differences of children, authorize judicial flexibility in response to their misconduct, incorporate meaningful educational and rehabilitative programming, and, above all, provide room to reform.

There cannot be true systemic reform of New York’s juvenile justice system unless New York sets a just and rational age of criminal responsibility. Extending family court jurisdiction to children up to eighteen years of age and expanding adjudicative alternatives, will result in fewer children criminalized for mistakes made while exceedingly young and developmentally immature. We have always had the responsibility, as a society, to ensure the promise of a productive future for our children. We now have the perfect opportunity to dismantle unwarranted obstacles

53. *Office of Children and Family Services, NEW YORK STATE: DIVISION OF BUDGET*, <http://publications.budget.ny.gov/eBudget1213/agencyPresentations/appropData/ChildrenandFamilyServicesOfficeof.html> (last visited Mar. 5, 2012).

54. *See* Press Release, *supra* note 33.

55. *See* Judge Jonathan Lippman, Chief Judge of the State of New York, Speech at Citizen’s Crime Commission (Sept. 21, 2011), *available at* <http://www.nycrimecommission.org/pdfs/Lippman110921.pdf>.

56. As part of his proposal, the chief judge announced the establishment of “adolescent intervention criminal court parts dedicated exclusively to handling the cases of young people ages 16 and 17.” *Id.* at 12. He explained that “[c]ases involving nonviolent offenses will be steered to specially-trained criminal court judges who both understand the legal and psychological issues involving troubled adolescents and are familiar with the broad range of age-appropriate services and interventions designed specifically to meet the needs and risks posed by these young adults.” *Id.*

to that future by fixing the flaws in our juvenile justice system. With responsibility and opportunity thus aligned, now is the time to act progressively, appreciate that children's perceptions and behaviors are not equivalent to those of an adult, and decisively judge all children of New York fairly, appropriately, and forthrightly—as children. The American Dream demands no less.

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Appendix

New York State Dispositions of Arrests in 2010 Involving Youth			
Arrest Group		2010	
		N	%
16-17 Year Olds	Total Dispositions	42,801	100.0%
	Total Not Sealed	2,433	5.7%
	Convicted-Felony	1,151	2.7%
	Convicted-Misdemeanor	1,282	3.0%
	Total Sealed	40,368	94.3%
	Convicted-Non Criminal Offense	9,388	21.9%
	Youthful Offender	6,359	14.9%
	Acquitted	31	.1%
	Dismissed	23,449	54.8%
	Other	1,141	2.7%
Juvenile Offenders	Total Dispositions	808	100.0%
	Total Not Sealed	112	13.9%
	Convicted-Felony	109	13.5%
	Convicted-Misdemeanor	3	.4%
	Total Sealed	696	86.1%
	Convicted-Non Criminal Offense	1	.1%
	Youthful Offender	237	29.3%
	Acquitted	6	.7%
	Dismissed	239	29.6%
	Removed to Family Court	192	23.8%
	Other	21	2.6%

DCJS, CCH as of 9-28-11.