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Trading In The Keys to the Cell for the Keys to Success: Rehabilitating Violent Youthful Offenders in New York State

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NOTE

TRADING IN THE KEYS TO THE CELL FOR THE KEYS TO SUCCESS: REHABILITATING VIOLENT YOUTHFUL OFFENDERS IN NEW YORK STATE

I. INTRODUCTION

New York, generally a progressive state, still subscribes to an outdated juvenile justice system that treats children as criminally responsible adults once they reach sixteen years of age.[1] New York Court of Appeals Chief Judge Lippman has proposed legislation that would largely reform the juvenile justice system by taking sixteen- and seventeen-year-old non-violent offenders out of adult criminal courts, and putting them in more rehabilitative "Adolescent Diversion Parts" ("ADP(s)").[2] While this is a laudable undertaking, this Note suggests that reforms to New York's juvenile justice system would arguably be more effective, and better benefit the people of New York, if the legislature adopted a broader rehabilitative approach that also included violent youthful offenders in the same age group.[3]

Nancy was only two-years-old the first time her father threw an oak log at her in a moment of rage, thus beginning an upbringing filled with violence and abuse.[4] At age seven, Nancy's anxiety from her hostile home-life manifested itself as she developed a bed-wetting problem, for

1. *See infra* Part II.A.

2. *See infra* Part III.A.

3. *See infra* Parts III.B.2, IV.

4. Anastasia Toufexis, *When Kids Kill Abusive Parents*, TIME, Nov. 23, 1992, at 60 (discussing the story of Donna Marie Wisener from Tyler, Texas). "Nancy" is a composite of several teenagers who had suffered abuse at the hands of their parents before eventually committing patricide. Her profile is adapted from various profiles, and "Nancy" has faced a wide variety of abuses based on these profiles. *See generally id.* For example, at age five, Nancy's father brought her down to the cellar and handcuffed her across a rafter, leaving her small body dangling from the ceiling for hours in an effort to combat her fear of the dark. *Id.* at 61 (discussing the story of Mark Martone from Haverhill, Massachusetts).

which her father punished her harshly.[5] As she developed into a young woman around thirteen years of age, Nancy began experiencing sexual abuse.[6]

At age sixteen, Nancy watched her father beat her mother brutally until she fell unconscious to the floor, before receiving a beating of her own.[7] Nancy felt that she had hit a wall, and she needed to do something to protect herself and her family.[8] The next day, Nancy sat on the front porch of her family home, in Suffolk County, New York, with the loaded revolver she had taken from her father's bureau.[9] As her father walked up to the house, returning home from work, Nancy fired two shots, killing him on their front lawn.[10]

The police arrived shortly thereafter and arrested Nancy. As a sixteen-year-old, Nancy was a criminally responsible adult in the eyes of the State of New York.[11] She was charged with murder in the second degree, and tried as an adult in criminal court.[12] Despite a viable "extreme emotional disturbance" defense, Nancy was convicted of the charge.[13] The judge, taking mercy on Nancy, sentenced her to fifteen

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5. Nancy's father sometimes addressed this issue by beating her with a two-inch wide leather strap, or would slap or punch her as punishment for her incontinence. *Id.* at 60 (discussing the story of seventeen-year-old Israel Marquez from Olympia, Washington).

6. Nancy's sexual abuse at the hands of her father manifested itself in various ways; for example, Nancy's father would send her lewd Valentines and insisted upon giving her massages. *Id.* at 60-61 (discussing the story of Donna Marie Wisener from Tyler, Texas).

7. *See id.* at 61.

8. *See id.* at 60. Anastasia Toufexis elaborated on this predicament:

> In fact, [an abused child] dispatching their tormentor can be seen as an act of sanity, a last-resort effort at self preservation. "They know what they're doing is wrong," says Dewey Cornell, a forensic psychologist at the University of Virginia. "But they are desparate and helpless, and they don't see alternatives."

Id.

9. *See id.* at 61 (discussing the stories of Roy Rowe from Vestal, New York, and Donna Marie Wisener from Tyler, Texas).

10. *See id.* (discussing the story of Roy Rowe from Vestal, New York).

11. *See* N.Y. PENAL LAW § 30.00(1) (McKinney 2009).

12. *See* N.Y. PENAL LAW § 125.25 (McKinney 2009) ("A person is guilty of murder in the second degree when . . . [w]ith intent to cause the death of another person, he causes the death of such person or of a third person."). Furthermore, second degree murder is a class A-I felony. *Id.*

13. PENAL § 125.25(1)(a). It is an affirmative defense to murder in the second degree that "[t]he defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be." *Id.* Nancy's attorney advanced the affirmative defense that at the time of the shooting, she was extremely emotionally disturbed as a result of the longstanding abuse, but the circumstances of the shooting left the jury unconvinced.

years in an adult prison, in accordance with the statutory minimum,[14] followed by five years of probation.[15]

Nancy's imprisonment exposed her to new dangers—she suffered sexual assault, began using drugs, and joined a gang in an effort to protect herself.[16] After serving her fifteen-year sentence, a thirty-one-year-old Nancy was released from prison to live with her mother.[17] Eighteen months after her release, while still under the supervision of the criminal justice system, Nancy entered the home of a neighbor she knew to be on vacation and unsuccessfully searched for petty cash. She was caught and arrested, and then charged and convicted of burglary in the second degree.[18] As a convicted murderer and a repeat felon, the court was uninterested in showing Nancy mercy, so she was sentenced to twelve years in prison.[19]

Nancy's story illustrates how a sixteen-year-old violent offender would be treated under New York law, as it currently stands,[20] and invokes thought about the juvenile justice system in New York and the reforms on the horizon.[21] Part II of this Note presents a more in-depth discussion of the history of the juvenile justice system in New York up to the present time, and reviews some juvenile justice reforms that have

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14. N.Y. PENAL LAW § 70.00(3)(a)(i) (McKinney 2009 & Supp. 2015). Felony sentences are indeterminate. *Id.* § 70.00(1). For Nancy's A-I felony, the minimum sentence "shall not be less than fifteen years nor more than twenty-five years." *Id.* § 70.00(3)(a)(i). The maximum term for a class A felony is life imprisonment. § 70.00(2)(a).

15. N.Y. PENAL LAW § 70.45(2) (McKinney Supp. 2015) ("The period of post-release supervision for a determinate sentence . . . shall be five years.").

16. Nancy was sexually assaulted by her cellmate for the first time within two days of her imprisonment. *See* T.J. Parsell, *In Prison, Teenagers Become Prey*, N.Y. TIMES (June 5, 2012), http://www.nytimes.com/roomfordebate/2012/06/05/when-to-punish-a-young-offender-and-when-to-rehabilitate/in-prison-teenagers-become-prey. Feeling vulnerable and unsure of how to protect herself from the harsh realities of incarceration, Nancy soon became involved with a gang. *See* Gary Scott, *Prison Is Too Violent for Young Offenders*, N.Y. TIMES (June 5, 2012), http://www.nytimes.com/roomfordebate/2012/06/05/when-to-punish-a-young-offender-and-when-to-rehabilitate/prison-is-too-violent-for-young-offenders. Nancy became extremely depressed and suicidal. *See id.* She began using drugs and engaging in violent behavior as was common with other members of her gang.

17. As a convicted felon with a drug problem and a gang affiliation, Nancy was unable to secure meaningful employment. To support her drug addiction, she shoplifted and pick-pocketed with increasing frequency.

18. *See* N.Y. PENAL LAW § 140.25 (McKinney 2010) ("A person is guilty of burglary in the second degree when he knowingly enters or remains unlawfully in a building with intent to commit a crime therein, and when . . . the building is a dwelling."). Furthermore, second degree burglary is a class C felony. *Id.*

19. *See* N.Y. PENAL LAW § 70.06(3)(c) (McKinney Supp. 2015) ("For a class C felony, the term must be at least six years and must not exceed fifteen years . . . .").

20. *See supra* notes 4-19 and accompanying text.

21. *See supra* text accompanying notes 1-2.

been put into effect throughout the United States.[22] Part III examines Chief Judge Lippman's proposal to create ADPs for sixteen- and seventeen-year-old non-violent offenders, and discusses limitations of such a proposal.[23] Part IV proposes a multifaceted approach to dealing with violent juvenile offenders that balances rehabilitation with public safety.[24] Part V of this Note concludes that ADPs, although a wonderful undertaking, could be even more beneficial by extending the parts to include provisions for violent youthful offenders.[25]

II. NEW YORK'S JUVENILE JUSTICE SYSTEM: FROM PAST TO PRESENT

In 1962, New York's Family Court Act ("FCA")[26] temporarily established the age of criminal responsibility as sixteen.[27] More than fifty years have elapsed, and while some states have started rehabilitating their youth that have gone astray,[28] New York and North Carolina are the only two states still prosecuting all sixteen- and seventeen-year-olds as adults.[29] Fortunately, and despite a shift in New York policy from rehabilitation toward retribution in the second half of

22. *See infra* Part II.

23. *See infra* Part III.

24. *See infra* Part IV.

25. *See infra* Part V.

26. N.Y. FAM. CT. ACT § 111 (McKinney 2008).

27. *See* N.Y. FAM. CT. ACT § 301.2(1) (McKinney 2008 & Supp. 2015) (defining "juvenile delinquent" as a "person over seven and less than sixteen" for the purposes of the FCA). A New York Times editorial discusses the introduction of the FCA to give context to the need to raise the age at which adolescents may be tried as adults in New York:

> The New York law came about in 1962, when the state created the juvenile justice system under the Family Court Act. At the time, lawmakers were unable to agree on the age at which offenders should be declared adults; they set it temporarily at sixteen, pending further hearings. But as often happens with public policy, inertia set in and "temporary" became permanent.

Editorial, *When Children Become Criminals*, N.Y. TIMES, Jan. 20, 2014, at A16 [hereinafter *When Children Become Criminals*].

28. *See* NAT'L JUVENILE JUSTICE NETWORK & TEX. PUB. POLICY FOUND., THE COMEBACK STATES: REDUCING JUVENILE INCARCERATION IN THE UNITED STATES 24-31, 34-40 (2013) [hereinafter NAT'L JUVENILE JUSTICE NETWORK], *available at* http://www.njjn.org/uploads/digital-library/Comeback-States-Report_FINAL.pdf. Although New York is one of the states cited for leadership in more rehabilitative policies in recent years, leading to reductions in incarcerated youth compared to prior decades, New York remains one of two states still prosecuting all youths age sixteen or older as adults. *See id.* at 32-33; Raise the Age NY, *Only New York and North Carolina Prosecute All 16- and 17-Year-Old Children as Adults*, CCC N.Y., http://www.cccnewyork.org/wp-content/uploads/2013/07/CCCRaisetheAgeFactSheets1.pdf (last visited Apr. 12, 2015). In New York, a person can be tried as an adult in criminal court as young as age thirteen. ASHLEY CANNON ET AL., CITIZENS CRIME COMM'N OF N.Y.C., GUIDE TO JUVENILE JUSTICE IN NEW YORK CITY 3 (2010), *available at* http://www.nycrimecommission.org/pdfs/GuideToJuvenileJusticeInNYC.pdf.

29. Raise the Age NY, *supra* note 28.

the twentieth century,[30] we are now at a point where lawmakers are working towards reforming New York's juvenile justice system so that New York's troubled adolescents will have improved outcomes.[31]

Chief Judge Lippman, of the New York Court of Appeals, has proposed a bill that would create an ADP, allowing some sixteen- and seventeen-year-olds to avoid formal prosecution.[32] The ADP would focus on providing rehabilitation opportunities and community-based programs for sixteen- and seventeen-year-olds.[33] However, Chief Judge Lippman's proposed ADP is currently only intended for non-violent offenders,[34] which greatly limits the potential of the program and the projected societal benefits.[35] This Note proposes that the program be extended to also reform the way that violent youthful offenders are dealt with in New York.[36] The proposed solution in this Note balances society's concern for public safety with giving misguided youth the chance to redeem themselves and become contributing members of society.[37]

This Part takes a more in-depth look at the history of the juvenile justice system in New York, including information about the FCA, the trend in recent decades towards treating children more punitively, and where New York policies stand today.[38] In particular, this Part highlights how New York's policy regarding age of criminal responsibility is isolated from all but one other state.[39] The discussion then shifts to juvenile justice reforms that have been put in place in other states,[40] as well as the effectiveness of those reforms.[41]

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30. *See infra* text accompanying note 42.

31. *See* Judith S. Kaye, *Juvenile Justice Reform: Now Is the Moment*, 56 N.Y.L. SCH. L. REV. 1299, 1301-03 (2011). Referring to voluminous research and data regarding adolescent brain development and the ineffectiveness of choosing punishment over reform, Judge Kaye declared, "*Now* is the moment for genuine reform. . . . . The winds of change need to blow all through the juvenile justice system, not just at the gates of our youth prisons." *Id.* at 1302 (emphasis added).

32. Alfred Siegel, *Introduction* to RICHARD ROSS, CTR. FOR COURT INNOVATION, THE ADOLESCENT DIVERSION PROGRAM IN NEW YORK: A REFORM IN PROGRESS 1-2 (2012), *available at* http://www.courtinnovation.org/sites/default/files/documents/ADP_FINAL.pdf.

33. *Id.* at 3, 5-7.

34. JONATHAN LIPPMAN, N.Y. STATE UNIFIED COURT SYS., THE STATE OF THE JUDICIARY 2013, at 9 (2013), *available at* https://www.nycourts.gov/ctapps/news/SOJ-2013.pdf.

35. *See infra* Part III.B.2.

36. *See infra* Part IV.

37. *See infra* Part IV.A.

38. *See infra* Part II.A; *see also* N.Y. FAM. CT. ACT § 301.2(1) (McKinney 2008 & Supp. 2015) (setting forth the age of criminal responsibility in New York).

39. *See infra* Part II.A.3.

40. *See infra* Part II.B.1–2.

41. *See infra* Part II.B.3.

A. History of the Juvenile Justice System in New York

The juvenile justice system in New York is governed primarily by the FCA, as it has been since 1962.[42] In the second half of the twentieth century, harsher punitive treatment of juvenile offenders became the norm.[43] Today, New York maintains the largely isolated, and comparatively harsh policy, that once offenders reach sixteen years of age, they are criminally responsible, and should, therefore, be tried as adults in criminal court.[44]

1. New York's Family Court Act

In 1962, the FCA temporarily established the age of criminal responsibility as sixteen, with the intention to revisit the age distinction pending further research.[45] Now, more than fifty years later, this temporary provision has never been remedied.[46] Functionally, this means that upon reaching age sixteen, a child is classified as a "youthful offender,"[47] allowing the youth to be eligible for Youthful Offender status after being convicted, but is otherwise viewed and treated as an

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42. *See infra* Part II.A.1.

43. *See infra* Part II.A.2.

44. *See infra* Part II.A.3.

45. *See* N.Y. FAM. CT. ACT § 301.2(1) (McKinney 2008 & Supp. 2015) (defining a juvenile delinquent as "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 by reason of infancy . . . ."); LIPPMAN, *supra* note 34, at 9 ("Over 50 years ago, New York established sixteen as the age of criminal responsibility. Even then, there was strong support for a higher age . . . ."); Mosi Secret, *Judge Seeks New System for Juveniles*, N.Y. TIMES, Sept. 21, 2011, at A22 ("When . . . the Family Court Act[] was enacted in 1962, the Legislature chose [sixteen] as the age of criminal responsibility as a temporary measure until public hearings and research could be conducted. The state did not carry out those steps, and the age was never changed."); Alysia Santo, *To Judge Kids as Kids*, TIMES UNION (Sept. 24, 2012, 10:48 AM), http://www.timesunion.com/default/article/To-judge-kids-as-kids-3888127.php ("New York's laws haven't significantly changed since the implementation of 1962's Family Court Act, which established our criminal age of responsibility, a distinction meant to be temporary, pending further research.").

46. Santo, *supra* note 45; *see also* FAM. CT. § 301.2(1) (defining a juvenile delinquent as "a person over seven and under sixteen years of age, who, having committed an act that would constitute a crime if committed by an adult . . . is not criminally responsible for such conduct by reason of infancy").

47. N.Y. CRIM. PROC. LAW § 720.10(1) (McKinney 2011) (defining "youth" as "a person charged with a crime alleged to have been committed when he was at least sixteen years old and less than nineteen years old"). Youthful Offender status, and therefore a Youthful Adjudication disposition in place of a conviction, may be denied to youths who have already been convicted of a crime or found to be a youthful offender in a separate prior incident if the youth is facing charges set forth in two or more separate accusatory instruments, or if the court does not find that it is in the "interest of justice" to classify the adolescent as a Youthful Offender. *Id.* § 720.20(1)–(2) (McKinney 2011).

adult.[48] Currently, teenagers falling into this category are automatically "prosecuted in criminal court by the county District Attorney's Office and serve their sentence under adult correctional authorities."[49] Younger teenagers, between thirteen and sixteen years of age, may also be classified as "juvenile offenders," and tried as adults in criminal court, depending on the severity of their crimes.[50] Children under thirteen are kept out of criminal court, but "juvenile delinquents" aged seven to twelve may have their crimes prosecuted in family court.[51]

2. Trend Toward More Punitive Treatment of Youthful Offenders

The juvenile justice system in the United States was initially built on the notion that young offenders were typically troubled children.[52] It was a vehicle to promote child welfare and individualized treatment for troubled children, with the ultimate goal of helping them become

48. CRIM. PROC. LAW § 720.20(1); *see* CANNON ET AL., *supra* note 28, at 4, 48 (explaining that Youthful Offender status allows a conviction to be vacated and replaced with a "youthful offender adjudication," which typically equates to a discounted sentence and no criminal record). An "eligible youth" is only guaranteed the protection of a youthful offender adjudication "[w]here the conviction is had in a local criminal court and the eligible youth had not prior to commencement of trial or entry of a plea of guilty been convicted of a crime or found a youthful offender;" or, in other words, adolescents are only guaranteed the leniency of a youthful offender adjudication if they have never been granted one or convicted before. CRIM. PROC. § 720.20(1)(b). However, a court may choose to grant a youthful offender adjudication if it believes, in its discretion, that doing so is in the interest of justice. *Id.* § 720.20(1)(a).

49. CANNON ET AL., *supra* note 28, at 4.

50. *See id.* at 8. New York Criminal Procedure Law defines a "Juvenile Offender" as:

> (1) a person, thirteen years old who is criminally responsible for acts constituting murder in the second degree . . . or such conduct as a sexually motivated felony . . . and (2) a person fourteen or fifteen years old who is criminally responsible for acts constituting the crimes [of murder in the second degree] provided that the underlying crime for the murder charge is one for which such person is criminally responsible; [kidnapping in the first degree]; [arson in the first or second degree]; [assault in the first degree]; [manslaughter in the first degree]; [rape in the first degree]; [criminal sexual act in the first degree]; [aggravated sexual abuse in the first degree]; [burglary in the first or second degree]; [robbery in the first or second degree]; [possessing a machine gun or such firearm on school grounds]; as defined in the penal law as an attempt to commit murder in the second degree or kidnapping in the first degree; or such conduct as a sexually motivated felony . . . .

N.Y. CRIM. PROC. LAW § 1.20(42) (McKinney Supp. 2015).

51. CANNON ET AL., *supra* note 28, at 3, 23-24 ("Following adjudication these youths may face a disposition of a term of placement for a maximum of 12 months for a misdemeanor; 18 months for a felony; or 5 years for a designated felony."). Designated felonies are: murder; kidnapping; arson; assault; manslaughter; rape; sodomy; aggravated sexual abuse; robbery; and burglary. *Id.*

52. James Herbie DiFonzo, *Parental Responsibility for Juvenile Crime*, 80 OR. L. REV. 1, 13-14 (2001).

productive members of society.[53] In fact, for many years, the justice system found it unnecessary to afford minors the same constitutional protections enjoyed by adults.[54] Prevailing policies at that time reflected the idea that troubled children could be salvaged if their best interests were kept in mind.[55]

From the late 1960s through the 1990s, the United States became increasingly more punitive towards youthful offenders.[56] Juvenile offenders began to take on a new image in the mind of the American people.[57] Young people who were once viewed as "our wayward sons and daughters in need of a guiding hand" from a "paternalistic" juvenile court system became "violent predators warranting retribution" in the eyes of the American public.[58] While there was an increase in violent juvenile crime between 1985 and 1994, many Americans falsely believed that the juvenile justice system was failing miserably because of heavy media coverage of high-profile crimes, combined with a skewed perception of the actual seriousness of most violent juvenile offenses.[59] In reality, the rate of violent juvenile crime typically

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53. C. Antoinette Clarke, *The Baby and the Bathwater: Adolescent Offending and Punitive Juvenile Justice Reform*, 53 U. KAN. L. REV. 659, 667 (2005) ("Since its inception, the juvenile justice system has been geared toward child welfare and individual assessment and treatment, with the primary goal being the reintegration of young offenders into society.").

54. *See In re* Gault, 387 U.S. 1, 27-31 (1967) (holding, for the first time, that the constitutional guarantee of due process applies to juveniles in delinquency proceedings).

55. DiFonzo, *supra* note 52, at 13-14. Only in recent decades has the criminal justice system begun punishing, rather than rehabilitating, troubled young people. *Id.* at 15. Regarding this shift in perspective, Professor J. Herbie DiFonzo wrote:

> Prior to the latter third of the twentieth century, deviant children were predominantly viewed as appropriate subjects for rehabilitation . . . . The juvenile court was viewed as the capable agent of that reformation at the nexus where psychology and philanthropy were to combine and place a rational and loving hand on wayward youth.

Id. at 13 (internal quotation marks omitted).

56. Stephen A. Newman, *Foreword, The Past, Present, and Future of Juvenile Justice Reform in New York State*, 56 N.Y.L. SCH. L. REV. 1263, 1271-73 (2012). Describing the trend toward more punitive treatment of youthful offenders, Stephen A. Newman commented:

> For New York, and most of the nation, the major changes that recast the legal rules governing juveniles in the 1970s, 1980s, and 1990s were aimed in a very different direction. Simply put, there was a determined effort to treat juveniles more severely. Most states expanded the grounds for steering juvenile cases to adult criminal court, with New York leading the way.

Id. at 1271.

57. DiFonzo, *supra* note 52, at 9-10.

58. *Id.*

59. Bree Langemo, *Serious Consequences for Serious Juvenile Offenders: Do Juveniles Belong in Adult Court?*, 30 OHIO N.U. L. REV. 141, 155-57 (2004); Brandi Miles Moore, *Blended Sentencing for Juveniles: The Creation of a Third Criminal Justice System?*, 22 J. JUV. L. 126, 128-29 (2001); Richard E. Redding, *Juveniles Transferred to Criminal Court: Legal Reform Proposals Based on Social Science Research*, 1997 UTAH L. REV. 709, 710-11; Enrico Pagnanelli, Note,

increases in proportion with the overall crime rate.[60] Legislatures began feeling pressure to punish juvenile offenders more harshly,[61] and updated juvenile codes throughout the United States began reflecting a demand for juvenile accountability for wrongdoing.[62] Many states, especially New York, sought ways to increase the number of juvenile offenses being handled in adult criminal court.[63] During this period, New York exemplified the American attitude that harsh punishment is the most appropriate response to juvenile offenders by passing legislation that put more youthful offenders behind bars for longer amounts of time in response to less severe offenses.[64]

In leading the movement toward more punitive treatment of juvenile offenders, New York deviated from the original plan to revisit the criminal age of responsibility prescribed by the FCA.[65] Rather than conducting research and adjusting the age of criminal responsibility accordingly, the New York State legislature enacted more punitive laws—most notably, the Juvenile Offender Act of 1978 ("JOA"),[66] which lowered the age of criminal responsibility to as young as thirteen for certain felonies.[67] The JOA was a hasty response to outrage among New Yorkers after a fifteen-year-old murdered two people in the subway and was only given a five-year sentence due to his age.[68] As a result, the legislature severely cracked down on juvenile crime, and the JOA "has been characterized as the most punitive delinquency law in the nation."[69] The overall effect of the law has been to increase the severity of the

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Children as Adults: The Transfer of Juveniles to Adult Courts and the Potential Impact of Roper v. Simmons, 44 AM. CRIM. L. REV. 175, 179-80 (2007).

60. *See supra* note 59.

61. Langemo, *supra* note 59, at 156; Redding, *supra* note 59, at 711-15; Pagnanelli, *supra* note 59, at 180.

62. DiFonzo, *supra* note 52, at 15.

63. Newman, *supra* note 56, at 1271.

64. *Cf. id.* at 1272. New York passed the notably harsh Rockefeller Drug Laws in 1973, which put lengthy mandatory sentences into place for even miniscule amounts of illegal substances. *Id.* Additionally, several changes to the FCA were formally accepted in 1982 that standardized the tendency towards harsher punishments that had developed since the initial passing of the FCA in 1962. *See id.* at 1271.

65. *See id.* at 1272; *supra* Part II.A.1.

66. 1978 N.Y. Laws ch. 481. Today, the ages of criminal responsibility for various offenses set forth in the Juvenile Offender Act of 1978 are codified in New York Penal Law. N.Y. PENAL LAW § 30.00 (McKinney 2009).

67. Newman, *supra* note 56, at 1272.

68. *Id.*

69. *Id.* at 1273 (quoting 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)).

punishments faced by juvenile offenders, and to ensure that more serious crimes are dealt with in the adult criminal system.[70]

3. New York's Current Isolated Policies

Today, New York remains one of only two states—North Carolina is the other—that funnels juvenile offenders through adult criminal courts, before they are even old enough to vote.[71] Out of the other forty-eight states, thirty-seven states will not prosecute an individual as an adult until they reach eighteen years of age, and the remaining eleven states do not impose adult prosecution under the age of seventeen.[72] While most states in the United States have been making strides away from treating adolescent offenders as adults, New York continues to treat sixteen as the age of "criminal adulthood."[73] As a result, some 45,000 to 50,000 sixteen- and seventeen-year-olds are prosecuted as adults in New York every year, most frequently for non-violent felony offenses, such as marijuana possession or shoplifting.[74]

Protections on account of youth beyond the age of fifteen are existent but scant,[75] since sixteen- and seventeen-year-olds are automatically prosecuted in adult criminal court.[76] After conviction and before sentencing, sixteen- and seventeen-year-olds may be eligible for Youthful Offender status, which would mean a discounted sentence and freedom from a criminal record.[77] More serious offenses preclude the offender from being eligible for such protections.[78] Additionally, if

70. *Id.* at 1273. Despite the efforts to reign in a perceived increase in violent juvenile crime, "[t]he effects of the law on crime rates were disappointing. A study reported that the evidence indicated no effect on homicides or assault, rape or arson, and a possible, but doubtful, effect on robbery." *Id.*

71. *See* Santo, *supra* note 45.

72. Editorial, *In New York, Juveniles Need a Court of Their Own*, N.Y. TIMES, Sept. 17, 2013, at A22 [hereinafter *In New York, Juveniles Need a Court of Their Own*].

73. Santo, *supra* note 45.

74. *In New York, Juveniles Need a Court of Their Own*, *supra* note 72; Santo, *supra* note 45.

75. *See* CANNON ET AL., *supra* note 28, at 4 (illustrating that the limited protections offered to younger juvenile delinquents and juvenile offenders become even more limited when youths are classified as youthful offenders upon reaching age sixteen).

76. *See id.*

77. N.Y. CRIM. PROC. LAW § 720.20(1), (3) (McKinney 2011); *see* CANNON ET AL., *supra* note 28, at 4. New York transfer mechanisms include: (1) "Statutory Exclusion Laws," where statutes "grant criminal courts exclusive jurisdiction over certain classes of cases involving juvenile-age offenders. If a case falls within a statutory exclusion category, it must be filed originally in criminal court;" and (2) "Reverse Waiver Laws," which "allow juveniles whose cases are in criminal court to petition to have them transferred to juvenile court." PATRICK GRIFFIN ET AL., U.S. DEP'T OF JUSTICE, TRYING JUVENILES AS ADULTS: AN ANALYSIS OF STATE TRANSFER LAWS AND REPORTING 2-3 (2011), *available at* https://www.ncjrs.gov/pdffiles1/ojjdp/232434.pdf.

78. CANNON ET AL., *supra* note 28, at 4.

children under sixteen are convicted of crimes and placed in juvenile detention facilities, they may be transferred to adult correctional facilities upon turning sixteen, unless they are given special permission to remain under the supervision of the juvenile system until they reach the age of twenty-one.[79]

In New York, child offenders as young as thirteen years of age may be prosecuted as adults for murder, and children as young as fourteen may be prosecuted as adults for an array of other felonies.[80] For example, a thirteen-year-old may be prosecuted as an adult if charged with murder in the second degree.[81] If convicted of murder, that thirteen-year-old may face a sentence of life imprisonment.[82] A fourteen-year-old may be prosecuted as an adult if charged with kidnapping, arson, assault, manslaughter, rape, burglary, or robbery.[83]

New York certainly enacted harsh punitive juvenile justice laws in the wake of serious crime waves in the second half of the twentieth century.[84] However, the state has begun reverting to traditional notions of rehabilitation and offering juveniles greater protections in the criminal justice system.[85] While New York has been trending toward more lenient, rehabilitative treatment of children over the last decade, obstacles to an overhaul of the entire system still exist in the form of budgetary concerns, political leadership, and fickle public opinion.[86]

B. Juvenile Justice Reform Throughout the United States

In the past decade, the United States, as a whole, has made a shift back toward rehabilitative treatment of juvenile and youthful offenders.[87] Different states have put various reforms into effect, and the overall results of the shift away from harsh punishment have been positive.[88] Young people are becoming less likely to face the dangers of incarceration in an adult facility, without any increase in the rate of

79. *Id.*

80. Newman, *supra* note 56, at 1272.

81. N.Y. PENAL LAW § 30.00(2) (McKinney 2009).

82. CANNON ET AL., *supra* note 28, at 3.

83. PENAL § 30.00(2); Newman, *supra* note 56, at 1272.

84. *See* Katherine Lazarow, Note, *The Continued Viability of New York's Juvenile Offender Act in Light of Recent National Developments*, 57 N.Y.L. SCH. L. REV. 595, 613-14 (2012).

85. *Id.*

86. Newman, *supra* note 56, at 1293-96. Although New York's policies are outdated in terms of the age at which a youth may be prosecuted as an adult, New York is actually a rehabilitative leader and has enacted multiple policy changes in an effort to reduce youth incarceration. NAT'L JUVENILE JUSTICE NETWORK, *supra* note 28, at 32-33.

87. *See infra* Part II.B.1.

88. *See infra* Part II.B.2–3.

recidivism.[89] Additionally, there has been no indication that a more rehabilitative approach to juvenile justice has had any negative impact on public safety.[90]

1. Juvenile Punishment Trends Throughout the United States

New York's JOA reflected a trend throughout the United States of punishing juvenile offenders harshly, rather than trying to rehabilitate them.[91] Traditionally, society sought to rehabilitate youth that had gone astray, but waves of serious juvenile crime in the 1980s and 1990s reinforced the shift in legislation that prosecuted more juveniles as adults and put more children in jail.[92] The number of incarcerated youth in the United States steadily increased until it peaked in 2000, when detention centers and juvenile detention facilities in the United States housed over 108,000 juvenile offenders.[93] However, since 2000, there has seen a trend back towards rehabilitation.[94] Levels of incarceration have dropped substantially, and various rehabilitative policy changes have been adopted throughout the United States.[95]

2. Reforms Throughout the United States

Over the last decade, the United States has begun to recognize that juveniles are not the same as adults, and therefore, their misdeeds should be treated differently.[96] Since 2005, the U.S. Supreme Court has held, through a number of decisions that it is unconstitutional to impose a sentence of capital punishment or life without the possibility of parole for a crime someone committed before the age of eighteen.[97] Individual

89. *See infra* Part III.B.2–3, 5.

90. *See infra* text accompanying notes 171-72.

91. *See* SARAH ALICE BROWN, NAT'L CONFERENCE OF STATE LEGISLATURES, TRENDS IN JUVENILE JUSTICE STATE LEGISLATION 2001–2011, at 3, 7 (2012), *available at* http://www.ncsl.org/documents/cj/TrendsInJuvenileJustice.pdf ("A rise in serious juvenile crime in the late 1980s and early 1990s led to state laws that moved away from the traditional emphasis on rehabilitation in the juvenile justice system toward tougher, more punitive treatment of youth, including adult handling.").

92. *Id.* at 3; *see* DiFonzo, *supra* note 52, at 16-17, 20.

93. NAT'L JUVENILE JUSTICE NETWORK, *supra* note 28, at 6, 10.

94. *Id.* at 6, 14-15.

95. *Id.* at 13-15 (noting that since 2000, policies have focused on reducing the reliance on incarceration).

96. MICHELLE DEITCH ET AL., UNIV. OF TEX. AT AUSTIN, FROM TIME OUT TO HARD TIME: YOUNG CHILDREN IN THE ADULT CRIMINAL JUSTICE SYSTEM 9-10, 15-18 (2009), *available at* http://www.utexas.edu/lbj/archive/news/images/file/From%20Time%20Out%20to%20Hard%20Time-revised%20final.pdf.

97. Miller v. Alabama, 132 S. Ct. 2455, 2460 (2012) (holding that mandatory life sentences without the possibility of parole for minors violates the Eighth Amendment); Graham v. Florida,

states throughout the country have also implemented various policy changes that offer juvenile offenders greater opportunities for rehabilitation, and greater protection from incarceration.[98] These changes have led to a number of beneficial reforms, such as: raising the age of criminal responsibility to seventeen or eighteen; making it more difficult for adolescent offenders to wind up in adult criminal court by expanding the jurisdiction of juvenile courts; increasing the availability of evidence-based alternatives to incarceration by evaluating the outcome of treatment provided to youth and their families; reducing the overreliance of schools on the criminal justice system as a form of discipline; and disallowing incarceration for minor offenses.[99] Some states have shortened the average duration of a stay in juvenile detention, and it is becoming more common for states to create programming to help detained youth reintegrate into society.[100] Courts across the country have begun to recognize the fact that juveniles cannot always be assumed to have the same competency as adults, and that many suffer from mental illness.[101]

3. Impact of Reform Throughout the United States

Since the trend towards rehabilitation has gained momentum in the last decade, results have been positive overall.[102] When juvenile offenders undergo community-based supervision, rather than incarceration, they are more likely to act responsibly and less likely to re-offend.[103] For example, drug addiction and substance abuse are both strongly correlated to serious juvenile offending, so drug treatment programs are, therefore, an effective way to reduce the rate of crime committed by minors.[104] Additionally, lengthy periods of incarceration do not reduce recidivism.[105] In fact, incarceration has the opposite effect:

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560 U.S. 48, 74 (2010) (holding that a minor may not be sentenced to life without possibility of parole for non-homicide crimes); Roper v. Simmons, 543 U.S. 551, 568 (2005) (holding that the Eighth Amendment against cruel and unusual punishment prohibits capital punishment for crimes committed before an offender reaches eighteen years of age).

98. *See* BROWN, *supra* note 91, at 4-8; NAT'L JUVENILE JUSTICE NETWORK, *supra* note 28, at 24-40.

99. *See* BROWN, *supra* note 91, at 4-8; NAT'L JUVENILE JUSTICE NETWORK, *supra* note 28, at 24-40 (profiling each "comeback state" and discussing their policy shifts).

100. BROWN, *supra* note 91, at 11-12.

101. *Id.* at 5-6, 8; *see infra* Part III.B.4.

102. EDWARD P. MULVEY, U.S. DEP'T OF JUSTICE, HIGHLIGHTS FROM PATHWAYS TO DESISTANCE: A LONGITUDINAL STUDY OF SERIOUS ADOLESCENT OFFENDERS 1-2 (2011), *available at* https://ncjrs.gov/pdffiles1/ojjdp/230971.pdf.

103. *See id.* at 2.

104. *Id.* at 2-3.

105. *Id.* at 2.

> Instead of rehabilitating youth and releasing productive members of society back into the community, the adult system produces youth that are more likely to re-offend and pose a threat to society. Research indicates that juveniles prosecuted as adults reoffend more quickly and at rates equal to or higher than comparable youths retained in the juvenile system.[106]

Incarcerating young offenders, particularly when they are placed in adult facilities, actually acts in contravention of public safety interests.[107]

Many states have also recognized, over the past few years, that rehabilitative community programming is typically far more cost-effective, as incarceration is massively expensive.[108] As of 2007, the United States was spending an average of $240.99 per day, or $88,000 annually, for *each* youth incarcerated in a juvenile detention facility.[109] Comparatively, different rehabilitative programs, such as Functional Family Therapy, Aggression Replacement Training, Multi-Systemic Therapy, and Multidimensional Treatment Foster Care, which were all shown to significantly reduce recidivism, yielded anywhere from ten to fourteen dollars worth of benefits for every dollar invested, depending on the program.[110]

III. NEW YORK REFORM ON THE HORIZON: PROPOSED ADOLESCENT DIVERSION PARTS

In Spring 2012, Chief Judge Lippman proposed long-overdue legislation that would create ADPs to handle sixteen- and seventeen-year-olds who commit non-violent criminal offenses,[111] marking a substantial reform to the juvenile justice system.[112] Notably, the reforms that would be put into place if the legislation passes are limited in reach

106. DEITCH ET AL., *supra* note 96, at 59 (internal quotation marks omitted).

107. *Id.*; *see also* PAUL BUTLER, LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE 29 (2009) (asserting that while people should not have any qualms about putting violent criminals behind bars, "every member of society pays the price" if punishment is unfair; that is, if too many people are incarcerated for non-violent offenses).

108. JUSTICE POLICY INST., THE COSTS OF CONFINEMENT: WHY GOOD JUVENILE JUSTICE POLICIES MAKE GOOD FISCAL SENSE 4-6 (2009), *available at* http://www.justicepolicy.org/images/upload/09_05_REP_CostsOfConfinement_JJ_PS.pdf (showing the average high costs of locking up youth per state, and how some states have realized real savings by adopting more community-based programs and committing less youths).

109. *Id.* at 4. Note that these costs refer to juvenile detention facilities, and do not contemplate the costs of incarcerating juveniles in prisons. *Id.*

110. *Id.* at 20.

111. LIPPMAN, *supra* note 34, at 9; Santo, *supra* note 45.

112. *See infra* Part III.A.

to non-violent juvenile offenders.[113] These special courts would be equipped to deal with the unique needs of the teenagers who are diverted to them from the adult criminal courts.[114] A pilot program has been put into place, creating nine ADP courts throughout New York to dispose of selected cases on a voluntary basis.[115] The results, thus far, have been promising.[116]

The key features of these ADPs are as follows: full procedural protections of the criminal courts; judges specially trained in dealing with troubled youth; insulation from criminal records, even where there is an adjudication of guilt; and, most importantly, a focus on "alternatives-to-incarceration," which includes rehabilitative community programming and social services.[117] Family involvement throughout the entire process is also thought to be of paramount importance to the success of the individuals going through ADPs.[118] Further protecting the youth, when cases are resolved in the ADP, the juvenile non-violent offender would not have any sort of criminal charges or record, his fingerprints would be destroyed, and his record would be sealed.[119]

A. Implementation of Adolescent Diversion Parts Thus Far

Before Chief Judge Lippman's proposal could be enacted, the 2012 legislative session came to an end.[120] Despite this setback, Chief Judge Lippman created a pilot program that put his proposed ADPs in nine jurisdictions throughout New York.[121] Juvenile offenders are screened and assessed, with resource coordinators paying particular attention to certain factors: alcohol or substance use and abuse; relationships at home between parent and child, including any history of abuse or neglect; educational issues, including truancy and discipline; gang affiliation; health issues, both mental and physical; and negative interactions with peers and the community.[122] The resource coordinators use these factors to determine appropriate rehabilitative programming, and those recommendations are made to the judge and counsel in conference the

113. *See infra* text accompanying notes 127-29.
114. *See infra* text accompanying notes 119-20.
115. *See infra* text accompanying note 118.
116. *See infra* text accompanying notes 125-26.
117. LIPPMAN, *supra* note 34, at 9-10; *In New York, Juveniles Need a Court of Their Own*, *supra* note 72.
118. ROSS, *supra* note 32, at 3.
119. *In New York, Juveniles Need a Court of Their Own*, *supra* note 72.
120. LIPPMAN, *supra* note 34, at 10.
121. *Id.*; Santo, *supra* note 45.
122. ROSS, *supra* note 32, at 4-6.

day prior to the calendar call.[123] Those who accepted the invitation to participate were often given sentences that involved no jail time, so long as the young person completed any rehabilitative program to which they were sentenced, typically to be completed within the thirty to sixty days between the first and second court appearances in the ADP.[124] Participants assessed to have a low risk of recidivism often have their cases dismissed outright.[125]

Notably, the program not only emphasized the involvement of parents or guardians at every part of the process, but also sought to encourage juvenile non-violent offenders to play an active role in their own rehabilitation.[126] In situations where ADP participants have had problems complying with the assigned programming, judges have met with the participant, counsel, and family members off the record in an effort to get the adolescent back on track.[127] Although the pilot program is limited in nature and deals mostly with less serious offenses, results thus far have been encouraging.[128] In the first six months, approximately 1300 non-violent juvenile offenders had their cases resolved through the pilot program, and data suggests that the program produced a lower re-arrest rate for new felonies, with no negative impact on public safety.[129]

B. The Reform Legislation Only Offers Rehabilitative Benefits to Non-Violent Offenders

Chief Judge Lippman's ADPs are exclusive to non-violent offenders.[130] Currently, all nine counties with ADP pilot programs accept non-violent misdemeanor cases, but only two counties accept a limited number of felonies, either violent or non-violent, into the program.[131] Excluding all violent juvenile offenders from being afforded

123. *Id.* at 5-6.

124. *Id.* at 3, 7.

125. *Id.* at 4-5. Risk of recidivism is determined using a Youth Assessment and Screening Instrument ("YASI"), which "gathers information on the adolescent's legal history, family, school attendance and other educational issues, community and peer relationships, drug and alcohol use, mental and physical health, and tendencies towards violence." *Id.* at 4. The YASI allows the court to determine whether the participating adolescent has a low, medium, or high risk of recidivism. *Id.*

126. *See id.* at 3.

127. *Id.* at 7.

128. MICHAEL REMPEL ET AL., CTR. FOR COURT INNOVATION, THE ADOLESCENT DIVERSION PROGRAM: A FIRST YEAR EVALUATION OF ALTERNATIVES TO CONVENTIONAL CASE PROCESSING FOR DEFENDANTS AGES 16 AND 17 IN NEW YORK 45-46 (2013), *available at* http://www.courtinnovation.org/sites/default/files/documents/ADP_Report_Final.pdf.

129. *Id.*

130. *See supra* text accompanying notes 108-10.

131. REMPEL ET AL., *supra* note 128, at 5.

the same opportunities for rehabilitation and valuable community programming does a disservice to both the individual offender and his community.[132]

1. What Constitutes a Violent Offender

In New York, a violent offender is one who commits a specified violent felony offense.[133] Under the New York Penal Code, violent felony offenses are categorized by severity as class B, C, D, or E violent felonies, with class B violent felonies being the most severe, and class E violent felonies being the least severe.[134] There are over sixty violent felonies enumerated, ranging from attempted murder in the second degree to falsely reporting a fire.[135] Although some misdemeanors could be considered violent in nature, there are no statutorily differentiated "violent misdemeanors."[136]

2. Why Violent Offenders Should Be Included

As a general rule, a juvenile justice system that revolves around retribution is entirely counterproductive, because excessive incarceration is a detriment to society.[137] Harsh punitive treatment of youthful offenders is not more effective than alternative methods of dealing with youthful offenders, and juvenile incarceration frequently causes more problems than it solves.[138] As more studies are conducted, it is becoming readily apparent that "public safety is not enhanced when we prosecute

132. *See infra* Part III.B.2. The same is true for non-violent felony offenders, but for the purposes of this Note, the discussion will focus on violent offenders, as non-violent felonies have been accepted into the program in some areas and, hopefully, will be regularly accepted once the program is fully legislated.

133. N.Y. PENAL LAW § 70.02(1) (McKinney Supp. 2015).

134. *Id.*

135. *Id.*; *see also* N.Y. PENAL LAW § 240.55 (McKinney 2008) (specifying what constitutes "falsely reporting an incident in the second degree," a class E violent felony pursuant to New York Penal Law section 70.02).

136. N.Y. PENAL LAW § 10.00(4) (McKinney Supp. 2015) (defining a misdemeanor as "an offense, other than a 'traffic infraction,' for which a sentence to a term of imprisonment in excess of fifteen days may be imposed, but for which a sentence to a term of imprisonment in excess of one year cannot be imposed"). Article 70 of the Penal Law clearly distinguishes between felonies and violent felonies in both definition and sentencing structure, however there is no equivalent distinction with regards to misdemeanors. *See* N.Y. PENAL LAW §§ 70.00(6), .02 (McKinney Supp. 2015).

137. *See* BUTLER, *supra* note 107, at 30-31.

138. *The Truth About Consequences: Studies Point Toward Sparing Use of Formal Juvenile Justice System Processing and Incarceration*, NAT'L JUV. JUSTICE NETWORK 2 (Jan. 23, 2012), http://www.njjn.org/uploads/digital-library/NJJN-Truth-about-Consequences_Fact-Sheet-FINAL_Jan23-2012.pdf [hereinafter *The Truth About Consequences*].

and punish [sixteen]- and [seventeen]-year-olds as adults."[139] Prisons are rarely places of reform; an offender is far more likely to commit a violent offense against someone after he is released from prison than if he had never been incarcerated.[140] This is especially true for non-violent offenders, but also logically applies to children who may have committed a statutorily violent act, but do not normally have a propensity for violence.[141] In deciding to extend protections to all juvenile offenders, including those who have committed violent offenses, New York State should consider: an adolescent's natural propensity for recidivism;[142] his lack of actual culpability;[143] the dangers and negative societal impacts of incarceration;[144] and the fact that concern for public safety from an adolescent offender is typically overstated.[145]

3. Natural Propensity for Reduced Recidivism with Age

Even the most serious offenders should not be dismissed as future career criminals.[146] The majority of juvenile offenders, even those who commit serious offenses, are not predetermined to become career criminals; rather, only a small fraction of juvenile offenders continue to offend at a high level.[147] Contrary to popular belief, most offenders under the age of eighteen "commit only one serious crime and then cease being criminally active," so lengthy incarceration is not only unnecessary, but actually harmful.[148]

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139. LIPPMAN, *supra* note 34, at 9.

140. BUTLER, *supra* note 107, at 30-31; *see also* LIPPMAN, *supra* note 34, at 9 (stating that when sixteen- and seventeen-year-olds are prosecuted as adults in criminal court, rather than going through the family court system, they "are not only more likely to re-offend and to re-offend sooner, but also go on to commit violent crimes and serious property crimes at a far higher rate"). In advocating for reform to the juvenile justice system, Chief Judge Lippman has argued:

> [S]tudies indicate that older adolescents, 16- and 17- year-olds whom we now prosecute and sentence in criminal courts, are not only more likely to re-offend and to re-offend sooner, but also go on to commit violent crimes and serious property crimes at a far higher rate than those young people who go through the family court system.

LIPPMAN, *supra* note 34, at 9.

141. *See* BUTLER, *supra* note 107, at 31 ("Prison becomes a finishing school in criminal activity for nonviolent offenders—it is where they have the time and eager teachers to learn how to be really good crooks. Good meaning bad.").

142. *See infra* Part III.B.3.

143. *See infra* Part III.B.4.

144. *See infra* Part III.B.5.

145. *See infra* Part III.B.6.

146. MULVEY, *supra* note 102, at 3.

147. *Id.*

148. Lisa S. Beresford, Comment, *Is Lowering the Age at Which Juveniles Can Be Transferred to Adult Criminal Court the Answer to Juvenile Crime? A State-by-State Assessment*, 37 SAN DIEGO

One multi-state, longitudinal, collaborative study followed 1354 serious juvenile offenders between the ages of fourteen and eighteen for seven years after conviction, and found that "91.5 percent of the youth in the study reported decreased illegal activity within three years following their court involvement."[149] Not only did the vast majority of young offenders reduce their illegal activities, but a large percentage of the most *serious* offenders also decreased their illegal activities significantly.[150] The young offenders who displayed the lowest levels of substance use and who had the greatest stability in terms of school and employment were the least likely to re-offend.[151]

4. Lack of Actual Culpability

In our retributive society, our criminal justice system functions by punishing people who commit bad acts "in proportion to the magnitude of their guilt."[152] Unfortunately, in the wake of the juvenile crime waves in the latter half of the twentieth century, many states, including New York, have prioritized punishment and juvenile accountability over the common-sense notion held by early juvenile courts that mental competency, along with culpability or responsibility, develops with age.[153] As a result, juveniles who committed serious felonies were viewed as having "emancipated themselves from the realm of juvenile justice," and were treated, tried, and sentenced in criminal courts more like adults than ever before.[154] Only in recent years have states started to once again recognize that because of their still-developing minds, young offenders are generally not as "guilty" as competent adults committing the same acts, and thus, punishment should be adjusted accordingly.[155]

Violent actions by children do not necessarily reflect violent tendencies, but are more likely due to immaturity, lack of impulse control, or reduced capacity to handle stressors.[156] In fact, because most

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L. REV. 783, 820 (2000).

149. *The Truth About Consequences*, *supra* note 138, at 2.

150. MULVEY, *supra* note 102, at 3.

151. *Id.* at 2-3.

152. David O. Brink, *Immaturity, Normative Competence, and Juvenile Transfer: How (Not) to Punish Minors for Major Crimes*, 82 TEX. L. REV. 1555, 1557, 1565 (2004).

153. *See id.* at 1562, 1569; *see also* DiFonzo, *supra* note 52, at 11 (describing the shift in public mindset regarding troublesome adolescents from one of protecting the "best interests of the child" to "an overarching concern with public safety").

154. DiFonzo, *supra* note 52, at 13, 16-17.

155. *See* NAT'L JUVENILE JUSTICE NETWORK, *supra* note 28, at 14-15; Brink, *supra* note 152, at 1576-77; *see also* Kaye, *supra* note 31, at 1301-02 (describing research and acknowledgement in recent years that the adolescent brain is akin to "a car with a powerful gas pedal and weak brakes").

156. *See* NEELUM AYRA, CAMPAIGN FOR YOUTH JUSTICE, STATE TRENDS: LEGISLATIVE

adolescents are unable to fully grasp the notion that "their actions have real consequences[, o]ver eighty percent of American adolescents admit to committing one or more delinquent acts; [but] relatively few are responsible for major delinquent behavior."[157] In addition to the incompetency inherent in youth, America has begun to recognize that youngsters in the criminal justice system often suffer from mental health issues.[158] It is estimated that sixty-five to seventy percent of the "youth arrested each year in the United States have some type of mental health disorder."[159] Accordingly, some states have begun to screen young people in the criminal justice system for mental health issues, assess their needs, and provide treatment services and opportunities that vary by state.[160]

5. Negative Effects of Incarceration

Lengthy incarceration does not reduce the rate of recidivism.[161] At best, there is little to no decrease in the rate of recidivism when youths are incarcerated for greater lengths of time;[162] at worst, the amount of time an adolescent spends incarcerated is linked to an increased likelihood that the youth will re-offend.[163] Some of the lowest level youthful offenders even reported committing more crimes after incarceration.[164] Adult prisons are dangerous places for children because

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VICTORIES FROM 2005 TO 2010 REMOVING YOUTH FROM THE ADULT CRIMINAL JUSTICE SYSTEM 9 (2011), *available at* http://www.campaignforyouthjustice.org/documents/CFYJ_State_Trends_Report.pdf; DEITCH ET AL., *supra* note 96, at 13 ("The teenage brain is like a car with a good accelerator but a weak brake. With powerful impulses under poor control, the likely result is a crash."); Redding, *supra* note 59, 729-30. Elaborating on how adolescent brains are simply not as developed as their adult counterparts, one law review article explains:

> [R]esearch on sensation seeking, impulsivity, moodiness, and pubertal hormones converges to suggest that adolescents are moodier and have poorer impulse control than adults. Adolescents may have difficulty controlling their impulses, especially in emptional or unexpected situations. . . . [A]dolescents cannot be expected to have as much self control as adults . . . .

Redding, *supra* note 59, 729-30.

157. Beresford, *supra* note 148, at 820.

158. BROWN, *supra* note 91, at 8.

159. *Id.*

160. *Id.* at 8-9.

161. MULVEY, *supra* note 102, at 2.

162. *Id.*; *The Truth About Consequences*, *supra* note 138, at 2.

163. DEITCH ET AL., *supra* note 96, at 59-60; Beresford, *supra* note 148, at 820; *see also* BUTLER, *supra* note 107, at 30-31 (arguing that incarceration, especially for less serious and non-violent offenses, often does more harm than good).

164. MULVEY, *supra* note 102, at 2 ("Longer stays in juvenile institutions do not reduce recidivism, and some youth who had the lowest offending levels reported committing more crimes after being incarcerated."); *The Truth About Consequences*, *supra* note 138, at 2.

juvenile offenders are often victims of physical and sexual assault, which results in a high likelihood of suicide.[165] Although adult prisons are inherently dangerous places, incarcerated children are at a disproportionate risk for abuse: "Juveniles in adult institutions are five times more likely to be sexually assaulted, twice as likely to be beaten by staff, and fifty percent more likely to be attacked with a weapon than minors in juvenile facilities."[166] Compared to adolescents in juvenile detention facilities, juveniles incarcerated in adult correctional facilities are 7.7 times more likely to attempt suicide.[167]

An otherwise treatable young person is far more likely to leave prison as a hardened criminal than a reformed adult.[168] When adolescents are sentenced to incarceration in adult correctional facilities, they are not afforded the same recreational and educational opportunities as they would be in a juvenile detention facility.[169] Instead, "they are schooled in crime by older inmates who instruct the juvenile offenders in advanced criminal skills and share criminal contacts."[170] The overall result is that young people sent to adult prisons are far more likely to emerge as skilled, bitter criminals who will re-offend, rather than reformed young adults ready to contribute to society.[171]

In addition to being ineffective and dangerous, adolescent incarceration is very expensive, presenting a sizeable burden on taxpayers.[172] Incarcerating adolescents is actually more expensive than providing them with community-based rehabilitative programs.[173] Furthermore, giving adolescents criminal records by processing them through the adult criminal system precludes them from certain rights; for

165. CAMPAIGN FOR YOUTH JUSTICE, JAILING JUVENILES: THE DANGERS OF INCARCERATING YOUTH IN ADULT JAILS IN AMERICA 13 (2007), *available at* http://www.campaignforyouthjustice.org/documents/CFYJNR_JailingJuveniles.pdf; DEITCH ET AL., *supra* note 96, at 55-56; Parsell, *supra* note 16.

166. Beresford, *supra* note 148, at 821-22.

167. Langemo, *supra* note 59, at 155.

168. DEITCH ET AL., *supra* note 96, at 60.

169. Langemo, *supra* note 59, at 155.

170. *Id.*

171. *Id.*; *see also* BUTLER, *supra* note 107, at 31 (highlighting a few states that have managed to reduce both crime rates and prison populations; while increased prison populations did not seem to have any correlation to lower crime rates, they did seem to correlate to an increased number of crimes committed by former inmates).

172. BUTLER, *supra* note 107, at 30; JUSTICE POLICY INST., *supra* note 108, at 4.

173. JUSTICE POLICY INST., *supra* note 108, at 2, 20 ("Some programs like multi-systemic therapy and functional family therapy have been shown to yield up to $13 in benefits to public safety for every dollar spent. These programs are more cost effective and produce more public safety benefits than detaining and incarcerating youth.").

example, they are unable to qualify for public employment.[174] Criminal convictions can also preclude young adults from being able to secure legitimate job opportunities, which then increases the likelihood of either re-offending out of desperation or relying on government support.[175] Thus, the societal costs of incarcerating adolescent offenders far outweigh any benefits.[176]

6. Concern for Public Safety Is Overly Exaggerated

Increasing the number of incarcerated youth does not in any way improve public safety.[177] In fact, states which made efforts towards reducing the population of incarcerated juveniles were more likely to enjoy lower crime rates than other states that chose to increase incarceration, suggesting that higher levels of incarceration correlate to increased crime rates.[178] Juvenile offenders who are truly *dangerous* are in the minority among violent juvenile offenders; thus, the need to protect society will not be compromised by affording violent offenders rehabilitative opportunities.[179] The vast majority of offending adolescents will turn away from criminality of their own accord as they age and mature, and will not commit more than one, if any, serious offense.[180] Also, as noted above, rates of violent juvenile crimes typically rise and fall in proportion with the crime rate as a whole, and public perception that juveniles are particularly dangerous or violent is a creation of media coverage and misunderstanding.[181] Adolescents are no more, and sometimes less, dangerous than their adult counterparts:

> The generation of adolescent super-predators was not discovered, it was invented. Since youth and adult criminalization rates run on

174. Beresford, *supra* note 148, at 821.

175. NAT'L JUVENILE JUSTICE NETWORK, *supra* note 28, at 7 ("Incarceration also severely reduces education and income-earning capacity and can often lead to youth who commit offenses becoming reliant on government social programs . . . even if they manage to steer clear of the criminal justice system.").

176. *See* BUTLER, *supra* note 107, at 30-31; Langemo, *supra* note 59, at 157.

177. *See* BUTLER, *supra* note 107, at 25-33; Langemo, *supra* note 59, at 157.

178. *See* NAT'L JUVENILE JUSTICE NETWORK, *supra* note 28, at 18, 23.

179. *See* Moore, *supra* note 59, at 128; *supra* Part III.B.3. Only a very small percentage of adolescents commit violent offenses. *See* Moore, *supra* note 59, at 128 (explaining that despite the surge in violent juvenile crime in the 1980s and 1990s, "juveniles accounted for only 19 percent of all violent crime arrests in 1994" and "less than one-half of one percent of juveniles in the United States were arrested for a violent offense – fewer than one in 200 juveniles"). Most juvenile offenders, even those who commit serious or violent offenses, are amenable to rehabilitation and unlikely to continue offending at a high level. *See supra* Part III.B.3.

180. *See supra* text accompanying note 148.

181. *See* Langemo, *supra* note 59, at 155-56; Moore, *supra* note 59, at 128-29; Pagnanelli, *supra* note 59, 179-80; Redding, *supra* note 59, at 710-11; *supra* Part II.A.2.

> roughly parallel tracks, it is hard to justify selecting the juvenile category as presenting a new genus of violent criminal. In fact, the age cohort consisting of persons between the ages of thirty and fifty exhibited the greatest increase in the rates of aggravated assault in the early 1990s . . . .[182]

Research has provided some "predictors" of violent individuals, and some of these predictors can be changed.[183] The risk that a young person will commit a violent act can often be predicted years before any such violent event transpires.[184] In one longitudinal study, researchers predicted the likelihood of subject children committing a violent act by age eighteen by tracking predictors of violence at ages ten, fourteen, and sixteen.[185] Of the children who actually committed violent acts by age eighteen, more than eighty percent were expected to do so based on predictive factors observed at age ten, and more than eighty-four percent were expected to do so based on predictive factors observed at age sixteen.[186] The study discussed "malleable predictors" of violence across five "domains:" (1) "individual factors," including aggressiveness, internalizing disorders, hyperactivity, and antisocial behaviors; (2) "family factors" contemplating issues such as parental criminality, low levels of parental involvement, and child abuse; (3) "school factors" including academic failure, truancy, and frequent transitions between schools; (4) "peer-related factors" including delinquent siblings or peers, and gang membership; and (5) "community and neighborhood factors" taking into consideration presence of poverty, availability of drugs and firearms, and exposure to violence and racial prejudice.[187]

Researchers have found that the factors most strongly predicting violence change by age group, and that individuals are more likely to exhibit violent behavior as the number of predictive factors attributable

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182. DiFonzo, *supra* note 52, at 24.

183. J. DAVID HAWKINS ET AL., U.S. DEP'T OF JUSTICE, PREDICTORS OF YOUTH VIOLENCE 6 (2000), *available at* https://www.ncjrs.gov/pdffiles1/ojjdp/179065.pdf.

184. *Id.* at 5-6. Some predictors of risk of later violence can be detected before a child reaches ten years of age; examples of early childhood predictors include "poor parenting from the parents (low involvement and monitoring of the child's behavior; inconsistent and harsh discipline), and difficulty making and keeping friendships or being accepted by other children." Interview with Patrick Tolan, Director of Research, Inst. of Juvenile Research, *available at* http://www.pbs.org/wgbh/pages/frontline/shows/little/experts/6.html.

185. HAWKINS ET AL., *supra* note 183, at 5-6.

186. *Id.* at 6.

187. *Id.* at 2. Another study similarly reflected that there are myriad factors which may be considered when assessing a child's risk to become violent in the future. Malcolm W. Watson et al., *Pathways to Aggression in Children and Adolescents*, 74 HARVARD EDUC. REV. 404, 412-15 (2004). However, gender, ethnicity, and intelligence were not significant predictors. *Id.* at 416-18.

to them increases.[188] However, "the strongest predictors of subsequent violence for both age groups [in the study] are relatively malleable factors," meaning they are "amenable to change."[189] Although there are, undeniably adolescents with a propensity for violent behavior, the likelihood of violence decreases as "risk factors [are] decreased and protective factors enhanced by preventative action."[190] If caught early enough, violent young people are highly receptive to intervention, and rehabilitation yields positive results.[191]

Conversely, incarcerating adolescents who already have predictive factors of violence will increase the likelihood that they will exhibit violent behavior upon re-entering society, because more predictive factors are likely to become attributable to them while they serve time.[192] For example, an incarcerated adolescent is more likely to become affiliated with a gang, find himself surrounded by delinquent peers, engage in antisocial behaviors, and have a more strained relationship with his family than an adolescent who is subjected to rehabilitative community programming.[193] Juvenile justice policies supporting mass incarceration of troubled adolescents in adult correctional facilities, therefore, may actually harm public welfare rather than make society safer.[194]

188. HAWKINS ET AL., *supra* note 183, at 6-7. Only a small percentage of people commit violent acts against others, and even fewer of that group commit violent acts repeatedly. Interview with Patrick Tolan, *supra* note 184.

189. HAWKINS ET AL., *supra* note 183, at 6. There are myriad types of factors in childhood that may predict later violence—"[t]here is growing consensus that it is a mix of inherited and other biological factors with environmental influences over time that leads to patterns of behavior that include criminal violence." Interview with Patrick Tolan, *supra* note 184.

190. *See* HAWKINS ET AL., *supra* note 183, at 1, 7.

191. *See id.* at 6 ("Because many of the strongest predictors of subsequent violence can be changed, they offer possible targets for successful intervention. This suggests that disrupting early patterns of antisocial behavior and negative peer support is a promising strategy for the prevention of violence and serious delinquency.").

192. *See supra* Part III.B.5.

193. *See* HAWKINS ET AL., *supra* note 183, at 2. These unsavory characteristics that may become attributable to an adolescent while incarcerated are due in part to the dangers a juvenile may face in an adult facility. *Health Services to Adolescents in Correctional Facilities*, NAT'L COMMISSION ON CORRECTIONAL HEALTH CARE (Mar. 21, 2008, 2:20 PM), http://www.campaignforyouthjustice.org/documents/natlres/NCCHC%20Position%20-%20Health%20Services%20to%20Adolescents%20in%20Adult%20Facilities.pdf.

194. *See supra* Part III.B.2.

The same does not hold true for juvenile detention facilities.[195] Although adult correctional facilities are often viewed as being more of a punishment than juvenile detention facilities, the latter still "holds youth accountable for their crimes by placing more requirements on youth and their families."[196] Involvement in the juvenile system typically requires family or parental involvement, continued education while under the supervision of the detention facility, and regular contact with court counselors.[197] While adolescents in juvenile detention facilities are protected from the dangers of being incarcerated alongside adults, they are also far more likely to emerge rehabilitated because of the requirements they must satisfy while under the supervision of the juvenile justice system.[198]

IV. EXPANDING THE ORIGINAL JURISDICTION OF THE ADOLESCENT DIVERSION PARTS TO INCLUDE VIOLENT YOUTHFUL OFFENDERS

New York should adopt a multifaceted approach in order to give violent juvenile offenders an opportunity for redemption, while still protecting public safety.[199] If adopted, this proposal will have an

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195. *See* AYRA, *supra* note 156, at 17. Although juvenile detention facilities are much less dangerous for adolescents than adult correctional facilities, adolescents in juvenile detention facilities often still suffer various abuses. Josh Voorhees, *The Dark Secret of Juvenile Detention Centers*, SLATE (Sept. 3, 2014, 9:31 PM), http://www.slate.com/articles/news_and_politics/politics/2014/09/woodland_hills_youth_development_center_the_dark_secret_of_juvenile_detention.html. A 2012 survey of adolescents in juvenile detention facilities showed that sexual victimization of the incarcerated juveniles was not uncommon, and was most often perpetrated by staff members. ALLEN J. BECK & DAVID CANTOR, U.S. DEP'T OF JUSTICE, SEXUAL VICTIMIZATION IN JUVENILE FACILITIES REPORTED BY YOUTH, 2012, at 9 (Morgan Young & Jill Thomas eds., 2013), *available at* http://www.bjs.gov/content/pub/pdf/svjfry12.pdf. The 2012 survey showed that "[a]bout 2.5% of adjudicated youth [] reported an incident [of sexual victimization] involving another youth, and 7.7% [] reported an incident involving facility staff." *Id.* However, this is still preferable to the risks an adolescent faces in an adult corrective facility, where "youth under the age of 18 represented 21 percent of all substantiated victims of inmate-on-inmate sexual violence in jails in 2005, and 13 percent in 2006—disproportionately high since only one percent of jail inmates are juveniles." Liz Ryan, *There's No Excuse for Keeping Children in Adult Prisons*, TAKEPART (Mar. 12, 2013), http://www.takepart.com/article/2013/03/12/op-ed-theres-no-excuse-keeping-children-adult-prisons.

196. AYRA, *supra* note 156, at 11.

197. *Id.*

198. *Id.* at 15-16.

199. *See infra* Part IV.A. One group that focuses on juvenile offenders and believes that they should be "held accountable for their crimes both as a matter of basic justice and as a way to prevent and deter delinquency," argues that juvenile offenders thrive when they are held accountable in a manner that allows them to understand the consequences of their actions, while also giving them an opportunity for personal growth:

> Holding juveniles accountable for acts that have harmed others must be approached in a developmental context because young people think differently than adults, are emotionally immature, and do not have fully formed moral values. Young offenders

enormous impact on the lives of misguided youth.[200] Adolescents would be given a fighting chance to change their course and resolve problematic behaviors instead of enhancing them, public safety would improve, and taxpayers in New York would save millions of dollars each year.[201]

A. New York Should Adopt a Multifaceted Approach to Overhaul the Juvenile Justice System

The multifaceted approach proposed herein gives violent juvenile offenders an opportunity to transition into contributing members of society, and protects them from the harsh adult criminal justice system without rewarding violence.[202] The proposed system would include three key components, so that all youthful offenders could potentially reap the benefits of a more rehabilitative system.[203] As a protective measure, judges would maintain the power of discretionary transfer to adult criminal court when faced with juveniles who have committed severe or multiple violent offenses.[204] Adolescents who are not transferred out will enjoy the benefits of blended sentencing, and all adolescents will be protected from the dangers of incarceration in an adult correctional facility until they reach at least eighteen years of age.[205]

> must be taught to view their victims as people and to view themselves as being more in control of their choices. They must also become successful at something other than crime. Neither treatment nor punishment repairs the damage done to victims and the community by delinquent acts. Juvenile accountability requires a combination of skills building, reparation to victims, and citizen protection in an approach that encourages the development of young people so they become contributors to the community.

MARTY BEYER, U.S. DEP'T OF JUSTICE, BEST PRACTICES IN JUVENILE ACCOUNTABILITY: OVERVIEW 1-2 (2003), *available at* https://www.ncjrs.gov/pdffiles1/ojjdp/184745.pdf.

200. *See infra* Part IV.B.

201. *See* NAT'L CONFERENCE OF STATE LEGISLATURES, COST-BENEFIT ANALYSIS OF JUVENILE JUSTICE PROGRAMS 4-6 (2003), *available at* http://www.ncsl.org/documents/cj/jjguidebook-costbenefit.pdf (discussing various rehabilitative programs utilized in states where they were found to be significantly more cost-effective than more punitive measures); *supra* Part III.B.2, 5-6.

202. *See infra* Part IV.A.1–3.

203. *See infra* Part IV.A.1–3.

204. *See infra* Part IV.A.3.

205. *See infra* Part IV.A.1–2. While there are some variations of blended sentencing, for the purposes of this Note, blended sentencing is when a adolescent offender is given both a juvenile disposition and an adult criminal sentence; if the adolescent re-offends or fails to meet the conditions of the juvenile disposition, he will face the adult criminal sentence. *See infra* Part IV.A.1.

1. Blended Sentencing for First Time Violent Offenders

Blended sentencing is not as harsh as the adult criminal system, yet it provides more incentive for juveniles to modify their behavior than the conventional juvenile system by combining the opportunity for rehabilitation with the threat of sanctions.[206] While there are a few different versions of blended sentencing, this Note proposes that first time violent offenders should be subjected to "juvenile inclusive blend," also commonly referred to as "Extended Jurisdiction Juvenile" prosecution.[207] Under this type of blended sentencing, a violent youthful offender is tried in juvenile court, but afforded all the protections and rights available in adult criminal court.[208] After the youthful offender either accepts a guilty plea or is convicted after a trial in juvenile court, violent juvenile offenders will receive a juvenile disposition,[209] as well as an adult sentence, determined by New York's Penal Law and Sentencing Guidelines, which will only be executed if the offender violates a condition of the juvenile disposition or commits another offense.[210] Under this schema, the threat of a full-fledged adult sentence and record acts as a powerful incentive for youthful offenders to embrace the opportunity to rehabilitate.[211] The unfortunate reality is that there may occasionally be a violent adolescent who is simply not amenable to rehabilitative treatment.[212] In these rare circumstances, the option to impose the designated adult sentence will effectively protect public safety without undue harsh treatment.[213]

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206. Fred Cheesman, *A Decade of NCSC Research on Blended Sentencing of Juvenile Offenders: What Have We Learned About "Who Gets a Second Chance?," in* FUTURE TRENDS IN STATE COURTS 2011, at 113 (2011), *available at* http://cdm16501.contentdm.oclc.org/cdm/ref/collection/criminal/id/198.

207. Moore, *supra* note 59, at 132.

208. Cheesman, *supra* note 206, at 114; Moore, *supra* note 59, at 132-33; Megan M. Sulok, Comment, *Extended Jurisdiction Juvenile Prosecutions: To Revoke or Not to Revoke*, 39 LOY. U. CHI. L.J. 215, 243, 245 (2007).

209. A juvenile disposition, explained in greater detail below, *infra* Part IV.A.2–3, varies depending on the offense and the offender, but may include, for example, community service, participation in a rehabilitative program, drug treatment, or a formal apology to any victim of the offense. Of course, incarceration in a juvenile detention facility may also be sentenced where warranted.

210. Moore, *supra* note 59, at 132-33.

211. *See id.*

212. *See id.* at 130, 132-33; Andrea Knox, Note, Blakely *and Blended Sentencing: A Constitutional Challenge to Sentencing Child "Criminals,"* 70 OHIO ST. L.J. 1261, 1288-89 (2009) (discussing New Mexico's approach to discretionary blended sentences); Shobha L. Mahadev, *Youth Matters:* Roper, Graham, J.D.B., Miller, *and the New Juvenile Jurisprudence*, CHAMPION, March 2014, at 14, 15-17 (listing amenability to rehabilitation as a factor to be considered when handling adolescents in the criminal justice system).

213. Pam Belluck, *Fighting Youth Crime, Some States Blend Adult and Juvenile Justice*, N.Y.

As is currently the case in the ADP pilot program, determining an appropriate juvenile disposition would be a "collaborative effort involving: judges; prosecution and defense counsel; the defendant's family; court-staffed community resource coordinators; rehabilitation service professionals; and county and municipal probation, social service, and educational officials."[214] After an assessment of the facts of the case and the needs of the defendant, an appropriate juvenile disposition would be crafted to both rehabilitate the youthful offender and to rectify matters with any victims of the crime, if found to be applicable and appropriate.[215] Juvenile dispositions can be creative, and may include sanctions such as performing community service or writing a letter of apology to a victim.[216] The majority of juvenile dispositions will be based on appropriate rehabilitative community programs, such as Conflict Resolution, Youth Anger Management, Youth Impact Panel, or individual counseling.[217] Programming assignments would be based upon the details of the offense and availability of local programs.[218]

2. Juvenile Detention Facilities for Everyone Under Age Eighteen

Under the proposed plan, at no time will a person under eighteen years of age be confined in an adult correctional facility.[219] This provision will apply in all situations that call for confining a person under the age of eighteen, most notably including the following four situations: (1) where an offender is given a juvenile disposition that includes incarceration; (2) where the adolescent re-offends or fails to comply with the terms of the juvenile disposition, thus triggering an

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TIMES, Feb. 11, 1998, at A1 ("The idea is to give a young offender some rope, enough to yank himself out of a life of crime – or to hang himself and wind up in prison."); *see also* Moore, *supra* note 59, at 129 (noting that "[t]he hybrid sentencing schemes are an attempt to deal with violent juvenile offenders in a way that balances the conflicting interests" of a harsh, punitive criminal justice system compared to the more rehabilitative family court system, which tends to insulate adolescents from harsh punishment).

214. ROSS, *supra* note 32, at 3.

215. *Id.* ("[Multiple community figures] commit to fashioning and supporting case dispositions that draw upon an assessment of an adolescent defendant's life situation and rehabilitative needs . . . ."); *see also* BEYER, *supra* note 199, at 3 (illustrating the rehabilitative effects of holding juvenile offenders accountable to their victims).

216. *See* Irina Ivanova & Amy Eley, *In One Brooklyn Courtroom, Teens Are Judge and Jury*, JUV. JUST. INFO. EXCHANGE (May 28, 2013), http://jjie.org/youth-alternatives-to-court-and-detention.

217. *See* REMPEL ET AL., *supra* note 128, at 31-32.

218. *See id.*; Ivanova & Eley, *supra* note 216 (noting that funding is often a barrier to certain community-based alternatives to incarceration).

219. *See supra* Part III.B.5 (explaining the dangers and negative effects of incarcerating an adolescent with adults).

adult sentence; (3) if the offender is found to present a high risk of flight after assessment, and the court finds it necessary to hold the offender during the pendency of the case; or (4) where the adolescent is transferred to adult criminal court at the discretion of the judge, and a sentence of incarceration is imposed upon conviction.[220] If someone under the age of eighteen is incarcerated—for example, if Nancy re-offended and was required to serve her adult sentence prescribed under the blended sentencing model above—she would be in a juvenile detention facility, where she would be less likely to face violence and have more opportunities to participate in rehabilitative programming until she reaches at least eighteen years of age.[221] Furthermore, courts should allow incarcerated offenders under the age of twenty-one to remain under the supervision of the juvenile detention system to the extent practical.[222]

As discussed above, adult correctional facilities are even more dangerous for adolescents than they are for adults, and society reaps no real benefits from incarcerating children.[223] Although juvenile detention facilities still present dangers to the adolescents confined within them, these facilities undoubtedly provide greater protections than adult correctional facilities:

> [In juvenile detention facilities] prison garb is rare, staff wear blazers or casual clothing instead of military or police uniforms; facilities often consist of small campuses with decentralized residential dormitories or "pods"; there is greater autonomy of movement and little physical security or barbed wire; and therapeutic services are omnipresent.[224]

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220. *See supra* Part IV.A.1 (describing blended sentencing as proposed in this solution, which may include incarceration as part of a juvenile disposition, or as part of an adult sentence to be carried out if the juvenile reoffends or otherwise fails to comply with his juvenile sentence); *infra* Part IV.A.3 (describing the transfer mechanism by which a judge may remove certain adolescents to adult criminal court); *cf.* CANNON ET AL., *supra* note 28, at 20-21 (noting that "high-risk scoring youths" on a risk assessment instrument used to measure the likelihood that a youth will fail to show up to court "are recommended for secure or non-secure detention").

221. *See supra* text accompanying notes 168-71.

222. *See* Donna M. Bishop, *Juvenile Offenders in the Adult Criminal Justice System*, 27 CRIME & JUST. 81, 138 (2000). Even in adult correctional facilities, some states keep youthful offenders up to age twenty-one (or, in fewer cases, twenty-five) separate from the general adult population. *Id.* Although the separation is a good protective measure, juvenile facilities are still superior for younger inmates due to the less dangerous population, greater opportunities for education, and smaller facility size. *Id.* at 139-40.

223. *See supra* Part III.B.5.

224. Jeffrey Fagan & Aaron Kupchik, *Juvenile Incarceration and the Pains of Imprisonment*, 3 DUKE F. FOR L. & SOC. CHANGE 29, 35 (2011).

All studies conducted on the impact of incarceration in an adult correctional facility compared to a juvenile detention facility unanimously agree: "[J]uvenile facilities [are] the far better option for youth."[225] It has been repeatedly determined that adolescents in adult facilities are more likely to be physically and sexually abused, and to exhibit symptoms of mental illness, including psychological trauma.[226] However, adolescents in juvenile detention facilities are less likely to experience abuse and manifestations of mental illness, and are given greater access to educational and counseling services.[227] The overall result is that "youths placed in juvenile facilities stand better chances of receiving help, finding their time beneficial, and avoiding the trauma of victimization, compared to youth in adult facilities."[228] Even if an offender is facing a longer sentence, which will include eventual transfer to an adult incarceration facility, utilizing a juvenile detention facility until age eighteen will help protect the adolescent from the danger of victimization, abuse, and suicide inherent to adolescents in adult incarceration facilities.[229]

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225. *Id.* at 37. In a statement of its position, the National Commission on Correctional Health Care ("NCCHC") "believes the incarceration of adolescents in adult correctional facilities is detrimental to the health and developmental well-being of youth." *Health Services to Adolescents in Correctional Facilities*, *supra* note 193. According to the NCCHC, if they must continue to be placed in adult correction facilities, "[a]dolescents should be separated and provided opportunities for appropriate peer interaction." *Id.*

226. ROSLYN M. SATCHEL, LOST OPPORTUNITIES: OUR CHILDREN ARE NOT REHABILITATED WHEN THEY ARE TREATED AND INCARCERATED AS ADULTS 2-3 (2002), *available at* http://www.prisonpolicy.org/scans/lost_opportunities.pdf; Fagan & Kupchick, *supra* note 224, at 37.

227. Fagan & Kupchik, *supra* note 224, at 37; Jennifer Smith, *The Purpose of a Juvenile Detention Center*, LIVESTRONG, http://www.livestrong.com/article/249313-the-purpose-of-a-juvenile-detention-center (last updated Jan. 28, 2015).

228. Fagan & Kupchik, *supra* note 224, at 37; *see also* Radek M. Gadek, *Juvenile vs. Adult Corrections: How Do They Stack Up?*, CHANGING LIVES, CHANGING MINDS (Apr. 18, 2009), https://cltlblog.wordpress.com/2009/04/18/juvenile-vs-adult-corrections-how-do-they-stack-up (commenting that while the primary purpose of adult correction facilities is punishment with limited rehabilitative programs, juvenile detention facilities are far better equipped to rehabilitate adolescents who are detained there).

229. JASMINE TYLER ET AL., JUSTICE POLICY INST., COST-EFFECTIVE YOUTH CORRECTIONS: RATIONALIZING THE FISCAL ARCHITECTURE OF JUVENILE JUSTICE SYSTEMS 2 (2006), *available at* http://www.justicepolicy.org/uploads/justicepolicy/documents/06-03_rep_costeffective_jj.pdf (arguing that confinement is unnecessary to manage most adolescents, that it is not cost-effective to incarcerate adolescents where such confinement is unnecessary, and that juvenile confinement makes it more difficult for troubled youth to successfully transition to adulthood); Fagan & Kupchik, *supra* note 224, at 37-38; Gadek, *supra* note 228. Although a juvenile detention facility is definitely preferable to an adult correction facility if an adolescent must be detained, the best option is to avoid detention altogether where possible. Fagan & Kupchik, *supra* note 224, at 38. Juvenile detention facilities, while preferable to adult prison, are imperfect in their own right—they "share with their adult counterparts the primary goals of control, discipline,

When the court deems it necessary to detain a youthful offender, use of juvenile detention facilities is not only safer than adult correctional facilities, but also offers vital rehabilitative opportunities.[230] Nevertheless, juvenile detention facilities are still appropriate to fulfill the retributive purposes of the court.[231] Detainees in juvenile facilities are deprived of privacy, personal freedoms, and autonomy.[232] Staff members maintain strict control of the adolescents under their supervision, and in many facilities, defiance may still be controlled or punished by solitary confinement, physical restraint, or other forms of deprivation.[233] Excluding the use of adult correctional facilities for all offenders under eighteen years of age will satisfy any judicial and societal needs for detention or retribution, while also protecting the adolescents and incorporating rehabilitation into their sentences.[234]

3. Judicial Discretionary Transfer in Cases of Severe or Multiple Violent Offenders

Understandably, there must be public safety protections in place to deal with violent juvenile offenders who simply do not respond to rehabilitative opportunities.[235] Currently, juvenile courts in New York only have original jurisdiction of offenders aged fifteen or younger.[236] Under the proposed model, all offenders under eighteen years of age would begin in an ADP.[237] However, judges would have discretion, not a mandate, to transfer a violent offender to adult criminal court if the

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order, security, and punishment, rather than treatment or education." *Id.*

230. *See* Gadek, *supra* note 228 ("It's widely known that each correction system uses incarceration to punish offenders. However, rehabilitation is often the key concept of juvenile corrections, and not adult corrections."); *supra* text accompanying notes 168-71.

231. Fagan & Kupchik, *supra* note 224, at 38. Advocates of rehabilitative alternatives for juveniles sometimes fail to reconcile the need to rehabilitate adolescents with the retributive purpose of the criminal justice system. *See* John Maki, *Why Juvenile Justice Advocates Shouldn't Ignore Retribution*, JUV. JUST. INFO. EXCHANGE (Feb. 12, 2014), http://jjie.org/why-juvenile-justice-advocates-shouldnt-ignore-retribution.

232. Fagan & Kupchik, *supra* note 224, at 38.

233. *Id.*

234. *See id.* at 57-60; Moore, *supra* note 59, at 129; Gadek, *supra* note 228; *supra* Part III.B.5.

235. Moore, *supra* note 59, at 129-30 (suggesting that some repeat offenders are "too far gone to benefit" from rehabilitative opportunities).

236. GRIFFIN ET AL., *supra* note 77, at 21.

237. LIPPMAN, *supra* note 34, at 9-10. In more than half of the states in our country, juvenile courts maintain original jurisdiction when the offender is seventeen or younger. GRIFFIN ET AL., *supra* note 77, at 21 ("[T]here are [only] 13 states that hold youth criminally responsible beginning with the 16th or 17th birthday."). On the other hand, only New York and North Carolina end original jurisdiction of juvenile courts after age fifteen. *Id.*

juvenile is either a severe violent offender or a multiple violent offender, both of which would be statutorily defined.[238]

For the purposes of this model, a "severe" violent offense would be defined as any felony that, if committed by someone under the age of sixteen, could get the offender tried as an adult under current New York law.[239] Under this definition, "severe" violent offenses would exclusively include: murder in the second degree, for which the adolescent is criminally responsible; sexually motivated felonies; kidnapping in the first degree; arson in the first or second degree; assault in the first degree; manslaughter in the first degree; rape in the first degree; burglary in the first or second degree; and bringing a machine gun or firearm onto school grounds.[240] If a sixteen- or seventeen-year-old is charged with one of these crimes, the offender may be sent to adult criminal court if the judge deems such transfer appropriate.[241]

A "multiple" violent offender would be defined as a juvenile who has committed more than one violent felony, as defined by New York Penal Code section 70.02.[242] This exception would apply if the adolescent being charged has previously been convicted, pleaded guilty, or received a youthful offender adjudication for a violent felony in an unrelated matter.[243] Similarly, if the adolescent is being charged with multiple violent felonies via multiple counts of the same accusatory instrument, or via multiple accusatory instruments consolidated for trial purposes, the judge would have the discretion to maintain both in the ADP or transfer both to criminal court.[244]

Before a decision is made to transfer an offender out of the ADP, the adolescent would have the opportunity to be heard by the judge regarding why the case should be handled in the juvenile court.[245] At this

238. *See infra* Part IV.B.1.

239. *See* N.Y. PENAL LAW § 30.00(2) (McKinney 2009).

240. *Id.*

241. *See* GRIFFIN ET AL., *supra* note 77, at 2. Such a decision is left in the sound discretion of the judge presiding over the ADP. *Id.* (explaining that current transfer methods are flexible and vary between states, but that the three basic categories of transfer mechanisms are judicial waiver laws, prosecutorial discretion or concurrent jurisdiction laws, and statutory exclusion laws).

242. N.Y. PENAL LAW § 70.02(1) (McKinney Supp. 2015); *see supra* Part III.B.1.

243. *See* N.Y. CRIM. PROC. LAW § 720.20(1) (McKinney 2011) (defining when a youth must be given a youthful offender adjudication); *see supra* notes 47-48 and accompanying text.

244. *See* CRIM. PROC. § 720.20(2). This provision is based upon the rules for vacating a conviction in favor of a youthful offender adjudication pursuant to New York Criminal Procedure Law section 720.20. *See id.*

245. *See* Sulok, *supra* note 208, at 231 ("[D]ue process demand[s] a hearing [prior to transferring an adolescent to adult criminal court] because [a] transfer could lead to criminal sanctions, which [are] more serious than juvenile sanctions."). Hearings to determine an adolescent's fitness to have a matter handled in juvenile court is not a novel concept. *See Guide to*

hearing, the adolescent may choose to explain the circumstances of the situation, divulge mitigating factors, or make any other points the offender deems important.[246] The judge would be given the opportunity to cross-examine the offender and ask both questions regarding the subject matter of the information provided by the adolescent, and questions intended to assess the offender's credibility.[247] Much like in plea negotiations, statements made by the offender at such a hearing would not be admissible against the offender at trial.[248] This would allow the judge to use information that may not be in the case file to determine the propriety of trying or transferring the case, while also protecting the adolescent offender from self-incrimination and encouraging honesty.[249]

As with the current ADP pilot program, sixteen- and seventeen-year-olds would be given the right to refuse to participate in the program.[250] Adolescents in this age group may, at any time through sentencing, reject the protections of the ADP and choose to face the adult sentence that would otherwise be a component of a blended sentence.[251] Even if a severe or multiple juvenile violent offender is

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Juvenile Court, CAL. CTS., http://www.courts.ca.gov/1216.htm (last visited Apr. 12, 2015). For example, in California juvenile courts, a judge may hold a "fitness or waiver hearing" to decide whether a child will stay in juvenile court or be transferred to adult criminal court, where transfer is possible, unless the child was under the age of fourteen when the crime was committed. *Id.* However, unlike the transfer mechanism proposed in this Note, in California, whether or not the adolescent is transferred to adult criminal court is left to the sound discretion of the presiding judge. *See id.*

246. *Cf.* Ivanova & Eley, *supra* note 216 (discussing a peer-led youth court designed for teens whose success is largely due to the high level of offender participation in determining the outcomes).

247. *See* FED. R. EVID. 611(b). The Federal Rules of Evidence would apply in these proceedings in line with the notion that adolescents should be afforded the rehabilitative opportunities of the juvenile justice system, while maintaining the protections of the adult criminal court system. *See infra* Part IV.A.1.

248. *See id.* 408(a)(2) (rendering comments made during plea and settlement negotiations inadmissible).

249. *But see* Chad M. Oldfather, *Judges as Humans: Interdisciplinary Research and the Problems of Institutional Design*, 36 HOFSTRA L. REV. 125, 127 (2007). Understandably, there may be a concern that while an adolescent's statements may not be admissible, a judge is still human and may be unable to make an impartial decision in a case where the judge has already heard the adolescent's story while determining whether that adolescent's case will stay in the juvenile court. *Id.* However, were this proposal to be adopted, a mechanism would be developed by which the adolescent would be able to be heard by a different judge once the decision is made to keep the case in juvenile court. *See id.*

250. ROSS, *supra* note 32, at 3 ("A defendant's participation in the Adolescent Diversion Program is voluntary; the adolescent can opt for the standard case process.").

251. *See* BEYER, *supra* note 199, at 3; ROSS, *supra* note 32, at 3. An important part of juvenile rehabilitation is for the adolescent to accept responsibility for his or her transgressions, which includes the recognition that the adolescent's actions may have negatively impacted other people. BEYER, *supra* note 199, at 3. If an adolescent is unwilling to accept responsibility or does not want

transferred to adult criminal court by judicial discretion or choice, he would still serve any sentence in a juvenile detention facility until he reaches the age of eighteen.[252]

B. Implementation

If adopted, the multifaceted approach proposed in this Note would be most effectively implemented via legislation.[253] Additionally, specific community programs would supplement any gaps based on the needs and resources of each jurisdiction.[254] Implementation of the proposed model has the potential for a marked positive impact on the lives of children that would otherwise be swept into the criminal justice system.[255]

1. Putting this Proposal into Place

The proposed model should be implemented legislatively. An effective statute would set clear guidelines for juvenile court judges to determine whether they must handle a particular case, or whether they may transfer the case to criminal court.[256] The success of the model will also depend on the availability of community programming and social services for use in juvenile dispositions.[257] If the plan proposed in this

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to accept rehabilitative options, he may exercise his autonomy and choose to proceed through the adult criminal system. *See* ROSS, *supra* note 32, at 3.

252. *See supra* Part IV.A.2. Many childhood predictors of violence are amenable to change. HAWKINS ET AL., *supra* note 183, at 6. Arguably, such change could work in either direction—putting an adolescent in an adult correctional facility may expose that adolescent to a greater availability of drugs, as well as greater exposure to violence and racial prejudice, all of which are predictors for later violence. *See id.* at 2.

253. *See infra* Part IV.B.1.

254. *See infra* Part IV.B.1.

255. *See infra* Part IV.B.2 (illustrating how Nancy, our hypothetical composite adolescent from Part I, would have had an entirely different outcome under the proposed system). Use of rehabilitative programs with troubled adolescents is far more likely to prevent re-offending than punishment. *See* Brittany Bostic, *Reducing Recidivism for Juvenile Criminal Offenders*, MICH. YOUTH VIOLENCE PREVENTION CENTER (Mar. 11, 2014), http://yvpc.sph.umich.edu/2014/03/11/exploring-rehabilitation-programs-juvenile-criminal-offenders ("Counseling interventions had the largest positive effects on recidivism decreasing it by 13%, followed by [m]ultiple coordinated services (12%), and [s]kill building programs (12%). . . . . Whereas, discipline interventions had the largest negative effects on recidivism with an increase of 8%, with deterrence interventions increasing recidivism by 2%.").

256. *See supra* Part IV.A.3.

257. *See* Interview with Kurt Kumli, Supervising Deputy Dist. Att'y, Santa Clara Cnty. Dist. Att'y, *available at* http://www.pbs.org/wgbh/pages/frontline/shows/juvenile/bench/whatittakes.html. One foreseeable obstacle to the implementation of this proposal is that more funding needs to be allocated to rehabilitative programs before any widespread ADP can work to its full potential. *See id.* However, funds currently spent on incarceration could appropriately be

Note were implemented, the experiences of sixteen- and seventeen-year-olds in the criminal justice system would undergo a drastic change.[258] As is currently the case, at the inception of the action, the adolescent would be given an ADP court date at the end of arraignment, and would be immediately sent for an assessment interview.[259] Lower-level, non-violent crimes would continue to be handled as they are now.[260] If the adolescent in question is a severe or multiple offender by statutory definition, as detailed above, the judge would order a hearing where the offender may make an argument why he should remain under the jurisdiction of the juvenile court.[261] If the judge determines that the adolescent is not amenable to rehabilitation, or that public welfare would not be served by trying the case in the ADP, the offender will be transferred to criminal court.[262]

For cases remaining in the ADP, the offenders maintain both the benefits of the juvenile justice system, and the protections of the criminal justice system.[263] As with the cases currently handled in the ADP and criminal court, a lawyer will be assigned if the adolescent does not have the resources to retain one.[264] The violent offender may choose

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reallocated to fund a variety of rehabilitation programs. *Id.* ("If we took half of the money that we spend on incarceration and put it in front-end programs to give these kids alternatives, then we wouldn't have as many back-end kids that we needed to incarcerate.").

258. *Compare supra* text accompanying notes 4-19 (introducing a hypothetical to portray the current state of the juvenile criminal justice system), *with infra* Part IV.B.2 (illustrating, when considered in conjunction with the previous section, that the proposed system change would have far-reaching, long term positive effects on participants and their communities).

259. *See supra* notes 122-25 and accompanying text. Nassau County, home to one of the nine pilot programs, sends the adolescent to the Probation Department immediately after arraignment, where a probation officer administers a YASI to assess likelihood of recidivism and areas where rehabilitation may be useful. LIPPMAN, *supra* note 34, at 10; ROSS, *supra* note 32, at 4.

260. *See* ROSS, *supra* note 32, at 3 (describing the current system for handling low-level non-violent adolescent offenders under Chief Judge Lippman's ADP plan).

261. *See supra* Part IV.A.3.

262. *See supra* Part IV.A.3. The number of adolescents transferred to criminal court should be relatively small, as adolescents tend to be highly amenable to rehabilitation. Mahadev, *supra* note 212, at 14. In fact, the *Roper*, *Graham*, and *Miller* cases, which created the framework for a separate juvenile justice system, are premised on the idea "that juveniles are less culpable and more amenable to rehabilitation than adults," and they should, therefore, not be viewed or treated as "miniature adults." *Id.*

263. *See supra* text accompanying notes 111-19. Although the juvenile justice system offers many benefits to youthful offenders, the U.S. Supreme Court recognized, in its decision of *In re Gault*, 387 U.S. 1 (1967), that adolescents in the juvenile justice system must also be afforded due process protections. *In re Gault*, 387 U.S. at 1; *see* Benjamin E. Friedman, *Protecting Truth: An Argument for Juvenile Rights and a Return to* In re Gault, 58 UCLA L. REV. DISCOURSE 165, 168-70 (2011), *available at* http://www.uclalawreview.org/pdf/discourse/58-9.pdf.

264. *Gault*, 387 U.S. at 36. Juveniles are entitled to the same due process rights as adults in criminal court, including right to counsel:

to take a plea deal or, alternatively, may choose to proceed to trial.[265] Either way, a blended sentence will be imposed with both a juvenile disposition and an adult sentence.[266] The juvenile disposition will be determined collaboratively by the judge, prosecution, defense counsel, social service providers, and community resource coordinators.[267] A juvenile disposition may require the offender to: complete rehabilitative community programming; spend a term in a juvenile detention facility; take steps to somehow make the victim whole, if applicable (for example, paying for damaged property or writing an apology letter); or fulfill any combination of those potential requirements.[268] The adult sentence would be determined pursuant to applicable sentencing guidelines, and would be stayed through the satisfaction of the conditions of the juvenile disposition, unless the adolescent fails to comply with the disposition or commits another crime.[269] Any incarceration, whether it is a part of a juvenile disposition or an adult sentence, would take place in a juvenile detention facility until the offender reaches at least eighteen years of age, or up to twenty-one years of age if local resources allow.[270]

At the conclusion of the period of time allotted for completion of the terms of the juvenile disposition, an adolescent will be required to return for another court date.[271] If the youth has successfully completed his juvenile disposition requirements, his case will be closed and the record sealed.[272] In the case of a plea deal, this may mean that the case is

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> The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child "requires the guiding hand of counsel at every step in the proceedings against him."

Id. (footnotes omitted) (citing Powell v. Alabama, 287 U.S. 45, 69 (1932)). The *Gault* court held "that juveniles were entitled to the basic due process protections of notice, right to counsel, right of confrontation, the right against self-incrimination, and the right of appellate review," and is considered a landmark case for juvenile justice. *Id.* at 1; Jay D. Blitzman, Gault*'s Promise*, 9 BARRY L. REV. 67, 69 (2007).

265. *See* Moore, *supra* note 59, at 133.

266. *Id.*; *see supra* Part IV.A.1.

267. *See* ROSS, *supra* note 32, at 3. The ADP program, as currently conducted, stresses a holistic community-centered approach involving all the listed parties. *Id.* Notably, the program also considers parental involvement to be of the utmost importance. *See id.*

268. *See supra* Part IV.A.1.

269. *See supra* notes 209-10 and accompanying text.

270. *See supra* Part IV.A.2.

271. *See* ROSS, *supra* note 32, at 8. Adolescent participants typically have a second court date thirty to sixty days after the first, during which time a resource coordinator will monitor participants to make sure they are complying with court orders. *Id.* at 7-8.

272. *See id.* at 3, 7. The ADPs, as they currently stand, allow adolescents significantly reduced dispositions in exchange for their compliance in social services:

dismissed, or a lesser conviction is entered into the sealed record.[273] If an adolescent is unable to successfully complete the requirements, he may be allotted more time for completion or he may face the adult sentence.[274] The courts may also want to consider, as a standardized requirement, that offenders write a letter to the court at the conclusion of their cases reflecting upon their experiences and what they have learned.[275] Such a requirement could help the courts identify what courses of rehabilitative treatment are most effective in a given situation.[276]

These young people would then be released back into society, ideally rehabilitated and ready to contribute meaningfully to their communities.[277] If asked about prior convictions for job or educational opportunities, ADP participants could answer in the negative.[278] Adolescents whose misdeeds were the result of poor choices or extenuating circumstances are given a fresh lease on life, while budding career criminals are given one last opportunity to accept help before facing the harsh realities of the adult criminal justice system.[279]

> Many, if not most, case resolutions involve pleas to violations instead of misdemeanors, or involve the grantive of 'adjournments in contemplation of dismissal,' pending the completion of social services. These case outcomes allow an adolescent to answer in the negative the question of whether an arrest resulted in conviction of a crime.

Id. at 3. The adolescent is required to come back for a second court date approximately thirty to sixty days after the first, and "an adolescent's compliance with the assigned program or service will almost always result in a final disposition according to the promise made previously." *Id.* at 7; *see also* N.Y. CRIM. PROC. LAW § 720.20(4) (McKinney 2011) (stating that an accusatory instrument must be unsealed upon a finding that an eligible youth is not a youthful offender).

273. *See* ROSS, *supra* note 32, at 8.

274. *See id.* at 7. Under the current program, "[i]f an adolescent is non-compliant, one or more additional Adolescent Diversion Program court dates will be set with adjustments made to compliance requirements as appropriate." *Id.*

275. *See* Kristin Henning, *What's Wrong with Victims' Rights in Juvenile Court?: Retributive Versus Rehabilitative Systems of Justice*, 97 CALIF. L. REV. 1107, 1148 (2009). Throughout the United States, apologies are often considered in matters of case disposition because "[t]he child's remorse and apology suggest that he has accepted social norms and recognizes that his conduct fell outside of societal expectations." *Id.*

276. *See* ROSS, *supra* note 32, at 5-7 (providing an example where an offender spoke directly to the judge about her feelings on a program); Patrick Clark, *Preventing Future Crime with Cognitive Behavioral Therapy*, NAT'L INST. JUST. J., Apr. 2010, at 22, 23 (finding that some rehabilitative programs worked better than others).

277. *See* Ivanova & Eley, *supra* note 216 (touting the benefits of alternatives to detention).

278. *See* CRIM. PROC. LAW § 720.20(3) ("Upon determining that an eligible youth is a youthful offender, the court must direct that the conviction be deemed vacated and replaced by a youthful offender finding . . . ."); *supra* text accompanying notes 117-19.

279. *See supra* Part III.B.2–5. This opportunity is particularly valuable in states which subscribe to the "once an adult, always an adult" practice in which adolescents are permanently excluded from the juvenile justice system for all future offenses once they enter the adult criminal justice system for any offense. GRIFFIN ET AL., *supra* note 77, at 2. As of 2011, there are thirty-four

2. Nancy, Revisited

Recall Nancy, the sixteen-year-old girl who was convicted of murder in the second degree for fatally shooting her habitually abusive father.[280] Nancy spent fifteen years, the statutory minimum, in an adult correctional facility, where she was sexually assaulted, became addicted to drugs, and joined a gang.[281] Nancy was never able to get her life on track after release.[282]

Consider how Nancy's situation differs if the proposed solution in this Note were put into place.[283] As a preliminary matter, the judge had the option to transfer Nancy to adult criminal court because children as young as thirteen are criminally responsible for murder in the second degree, which earned Nancy a classification as a "severe" violent offender.[284] For the purposes of this hypothetical, we assume that the judge obtained background information on Nancy's home life at the hearing and decided not to exercise her judicial discretion to transfer Nancy to adult criminal court.[285]

As a first-time violent offender, Nancy received the benefits of a blended sentence.[286] Nancy was assigned an attorney and afforded all of the same rights she would have received in adult criminal court, all while remaining in the juvenile court.[287] After conviction, the judge carefully considered Nancy's situation and issued both a juvenile disposition and an adult sentence.[288] Nancy was sentenced to three years in a juvenile detention facility, required to attend an anger management program, group therapy with other abused children, and a course of

states which subscribe to this practice. *Id.* at 3.

280. *See supra* text accompanying notes 4-19.

281. *See* Scott, *supra* note 16; *supra* text accompanying notes 4-19.

282. *See supra* text accompanying notes 4-19.

283. *See supra* Part IV.A–B.1 (discussing the proposed solution).

284. *See* N.Y. PENAL LAW § 30.00(2) (McKinney 2009) ("A person thirteen, fourteen or fifteen years of age is criminally responsible for acts constituting murder in the second degree . . . ."); *supra* Part IV.A.3 (referring to the proposed discretionary judicial transfer mechanism).

285. *See supra* Part IV.A.3. As mentioned earlier, abusive parents and exposure to violence are factors which predict risk for later violent behavior, both of which were consistently present in Nancy's upbringing. *See* HAWKINS ET AL., *supra* note 183, at 2. However, these factors are "malleable" and, with their removal, Nancy's risk of engaging in further violent behavior decreases before she is even exposed to any rehabilitative programming. *See id.*

286. *See* Cheesman, *supra* note 206, at 116 (arguing that the best candidates for blended sentencing would be young individuals presenting low risk to public safety and having "the greatest need for and potential to respond to treatment in the juvenile justice system," as determined by objective assessments); *supra* Part IV.A.1.

287. *See In re* Gault, 387 U.S. 1, 36 (1967); Friedman, *supra* note 263, at 168-69; *supra* Part IV.A.1.

288. *See supra* Part IV.A.1.

intensive counseling to be determined after a psychological examination.[289] Nancy was required to continue counseling for an additional three years after her release.[290] The judge also imposed an adult sentence: Nancy would be imprisoned for fifteen years and on probation for an additional five years if she did not satisfy the requirements of her juvenile disposition, or if she re-offended while under the supervision of the juvenile detention system.[291]

In the juvenile detention facility, Nancy cohabitated with other young offenders between the ages of thirteen and twenty under close adult supervision.[292] Of course, she would have preferred being home with her mother, but at least Nancy felt safe.[293] As mandated by the court, Nancy was evaluated by a psychologist, and met with her weekly to discuss her childhood and the events leading up to her incarceration.[294] She also went to group therapy sessions with some of the other juvenile detainees twice a week, where she realized that she

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289. Knox, *supra* note 212, at 1265. Giving a minor an opportunity to be classified as a juvenile delinquent rather than a criminal defendant "makes a profound difference on the minor's future." *Id.* Supporters of blended sentencing argue that

> serious offenders first have an opportunity to benefit from the services available in the juvenile system, while juveniles whom the system has failed by not rehabilitating them can be sent to adult prisons to serve a stricter punishment for their crimes, along with those juveniles who are simply not receptive to rehabilitation. The foremost benefit of a juvenile blended sentence is that the hybrid sentence protects society while simultaneously creating incentives for minors to be rehabilitated in the juvenile system.

Id. (footnotes omitted) (internal quotation marks omitted).

290. *See* Clark, *supra* note 276, at 22-23; *supra* Part III.A. One law review article explains the effectiveness of therapy, even on those who had committed serious offenses:

> Cognitive behavioral therapy has been found to be effective with juvenile and adult offenders . . . . It is effective in various criminal justice settings, both in institutions and in the community, and addresses a host of problems associated with criminal behavior.
>
> . . . .
>
> [In one study,] even high-risk behavior did not reduce the therapy's effectiveness. For example, some of the greatest effects were among more serious offenders.

Clark, *supra* note 276, at 22-23.

291. *See supra* Part IV.A.1; note 14 (stating that fifteen years is the statutory minimum for the crime with which Nancy was charged).

292. *See supra* Part IV.A.2. As of June 2012, "[s]eventy-three percent of U.S. states (37 of 51) allow individuals to remain in juvenile [correctional] custody until at least age 21." LINDSAY MILLER & DAVID SPAK, DEP'T OF YOUTH REHAB. SERVS., EFFECTIVE STRATEGIES FOR COURT-INVOLVED YOUTH: TRENDS IN MAXIMUM JUVENILE CUSTODY AGE LIMITATIONS 2 (2012), *available at* http://dcarts.dc.gov/sites/default/files/dc/sites/dyrs/publication/attachments/Effective%20Strategies%20-%20Maximum%20JJ%20Custodial%20Age.pdf.

293. *See supra* Part IV.A.2.

294. *See* ROSS, *supra* note 32, at 7, 8 (discussing a full clinical assessment where longer-term services are needed, and recommending weekly individual therapy as a possible longer-term service).

was not alone.[295] She connected with her peers and began to understand that, although her actions were bad and she regretted them, she was not a bad person; she realized she need not live her life in the shadows of her past actions or the abuse she suffered.[296]

Upon release, Nancy continued her therapy, as mandated by the court.[297] As a juvenile offender, her record was sealed and she was able to re-enter society with a clean slate.[298] Nancy struggled, but she was able to get a job to support herself.[299] She was required to continue and complete her high school education while in the juvenile correctional facility, enabling her to take some classes at her local community college after release.[300] Nancy also involved herself with a local support group for children of abusive parents and continued her own healing process, while helping others to do the same.[301] She did not wind up under the supervision of the justice system again.[302]

V. CONCLUSION

The people of New York are being failed by a juvenile justice system that deals with troubled children by giving them dangerous retributive sentences that are more likely to turn them into hardened criminals than deter them from committing additional crimes in the future.[303] New York's current juvenile justice system has fallen behind the rest of the United States in terms of the young age at which it is

295. *See id.* at 8. Judge Richard Ross, specifically addressing adolescents with substance abuse concerns, recommends group outpatient treatment two to seven days per week, in conjunction with weekly individual sessions. *Id.* I have extended the suggested service to include more general group therapy.

296. *See* Ivanova & Eley, *supra* note 216 (discussing a peer-driven youth court model, and the interest in the whole person rather than just the offense that person committed).

297. *See* ROSS, *supra* note 32, at 8.

298. *See* N.Y. CRIM. PROC. LAW § 720.20(3) (McKinney 2011); ROSS, *supra* note 32, at 3.

299. *See* Gadek, *supra* note 228 (stating that available programming in juvenile facilities "results in higher levels of academic achievement and provides more connections to employers").

300. *See id.* ("Services found to be effective in juvenile justice include . . . five hours of academic instruction per day (usually required by law) . . . result[ing] in higher levels of academic achievement . . . .").

301. *See* Ivanova & Eley, *supra* note 216 (detailing the story of Devin, a seventeen-year-old who entered an "alternative-to-detention" program after his freshman year of high school, who resisted the rehabilitative programming at first, but came to appreciate the services that were available to him, winding up as a peer leader helping other teens through the program).

302. *See* Bostic, *supra* note 255; *supra* Part III.B.2–3.

303. *See* BUTLER, *supra* note 107, at 31 (describing incarceration as a "finishing school" for criminals); *supra* Part III.B.5.

willing to prosecute and treat youth as adults.[304] Adolescents who would be amenable to reform are being treated as adults, facing dangerous incarceration in adult correctional facilities, and committing more serious offenses upon release.[305] Chief Judge Lippman's proposal for an ADP to handle charges against sixteen- and seventeen-year-olds is certainly a step in the right direction, but it is too narrow.[306] A truly effective reform to the juvenile justice system will balance public safety from dangerous individuals against the need to reduce long-term negative impacts on the community.[307] A multi-faceted system to deal with violent juvenile offenders, such as the one presented above, would allow violent juvenile offenders the opportunity to turn around their lives, while still enforcing the idea that bad actions have consequences.[308]

Sending children into adult criminal court rather than juvenile court "needlessly destroys lives and further endangers the public" by taking adolescent offenders—often misguided children amenable to rehabilitative efforts—and transforming them into "hardened criminals."[309] Expanding juvenile justice reform, as outlined in this Note, would benefit society as a whole.[310] Implementing the proposal set forth in this Note would protect our misguided youth from continuing down a path of destruction, and provide them with

304. *See* NAT'L JUVENILE JUSTICE NETWORK, *supra* note 28, at 20-23 (describing some effective reforms to the juvenile justice system which have been put into effect in various states); *supra* Part II.A.3. *But see* NAT'L JUVENILE JUSTICE NETWORK, *supra* note 28, at 32-33 (highlighting New York's reform attempts since the year 2000).

305. *See* BUTLER, *supra* note 107, at 30-31; *Health Services to Adolescents in Correctional Facilities*, *supra* note 193; *supra* text accompanying notes 69-72.

306. *See* ROSS, *supra* note 32, at 3 (giving an overview of the ADP program).

307. *See supra* Part III.B.5–6. Encouraging juvenile accountability, rather than a focus on punishment, can have profound results:

> [A]ccountability . . . results in young people who understand how their offenses affected others, recognize that the behaviors involved in the offenses were based on choices that could have been made differently, acknowledge to those affected that the behaviors were harmful, take action to repair the harm where possible, and make changes necessary to avoid such behaviors in the future.

BEYER, *supra* note 199, at 2.

308. *See* BEYER, *supra* note 199, at 3-4 ("[I]n the [Balanced and Restorative Justice] paradigm, 'the meaning of accountability shifts the focus from incurring a debt to society to that of incurring a responsibility for making amends to the victimized person and victimized community.'"); *supra* Part IV.

309. *When Children Become Criminals*, *supra* note 27.

310. *See supra* Part III.B.2.

opportunities to become contributing members of society, all while using New York tax dollars more effectively than putting those same adolescents behind bars.[311]

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311. *See supra* Part IV.B.2.

* J.D. candidate, 2015, Maurice A. Deane School of Law at Hofstra University; B.A., 2010, State University of New York at Geneseo. I dedicate this Note to my family, particularly my mother, Patty Ferrari, and my grandmother, Helen Halpin, for showing me what strong, independent women look like and always inspiring me to work harder and be my best. Heartfelt thanks are also in order to both of my dads, Arturo Fattizzo and Joe Guarino, and my sister, Addison Rose, whose positive energy and uplifting spirits have helped me get through stressful times over the last few years; and to Nick Vega, who has provided endless support, encouragement, and patience through the Note process and all my academic pursuits. I would like to thank my faculty advisor, Professor J. Herbie DiFonzo, for his insights and guidance in shaping this Note; Aaron Zucker, Courtney Klapper, and Addie Katz for all their passion, dedication, and long hours making *Hofstra Law Review* Volume 43 a smashing success; and to Andrew Lauria, James Meehan, Rachel Summer, Peter Guinnane, Michael Senders, and Leron Solomon for their help through the publication process. Finally, I extend my deepest gratitude to Professors Fred Klein and Elizabeth Nevins-Saunders for exemplifying the level of excellence in criminal practice to which I aspire; you have both shaped my views of the criminal justice system, influenced my ideals for what the criminal justice should be, and instilled in me the importance of keeping an open mind, a critical eye, and an unwavering moral and ethical compass even, and especially, in the face of adversity.