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Cover Page Footnote

Linda Nelson, Esq., Iris Coleman

NEW YORK'S JUVENILE OFFENDER LAW: AN OVERVIEW AND ANALYSIS

John P. Woods*

I. Introduction

In March of 1978, two men were shot to death on the New York City subway system. In another instance, two men were seriously wounded by gun shots. The gunman in each of these instances was a fifteen year old boy named Willie Bosket, Jr. Although Bosket had committed a number of violent crimes in the past, the maximum possible sentence for these murders was a five-year "placement"¹ which was in fact ordered on June 29, 1978.² The outrage which arose when Bosket's crimes were made public was heightened when another vicious murder was committed by a thirteen year-old.³

In response to the public furor which arose as a result of these incidents, Governor Hugh Carey called the New York legislature into Extra-Ordinary Session seeking to revise the laws governing juvenile crime. The state legislature, pursuant to the Governor's request, enacted the Crime Package Bill⁴ which made major revisions in the entire criminal justice system. The Bill, which pro-

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1. In New York State until 1978, juveniles convicted of any crime were subject not to incarceration in adult prisons but rather to "placements" in juvenile facilities run by the Division For Youth ("DFY"). For a detailed explanation of court placements, see text accompanying notes 77-93, 105-14, 132-34 & 192-208 *infra*.

2. N.Y. Times, June 30, 1978, at 1, cols. 3, 5. Bosket was subsequently sent to the DFY facility at Goshen from which he escaped after his sixteenth birthday. N.Y. Times, December 27, 1978, § 2, at 2, col. 1. For that escape he was given a four-year sentence as an adult—only one year less than his sentence for two homicides. If Bosket had been treated as an adult, he could have received anywhere from fifteen years to life imprisonment. See N.Y. PENAL LAW §§ 125.25, 70.00(2), (3) (McKinney 1975 and Supp. 1979).

3. See *Matter of Felipe O.* N.Y.L.J. Feb. 6, 1979 at 12, cols. 2-3.

4. 1978 N.Y. Laws ch. 481. The bill was introduced on July 14, 1978, passed the state assembly by a vote of 125-10 and was signed into law six days later. It has no legislative history. See Thorpe, *Juvenile Justice Reform*, 15 TRIAL 22 (1979).

vided New York with one of the harshest juvenile justice systems in the country,⁵ introduced mandatory sentencing for adults, made fourteen and fifteen year-olds criminally responsible for fourteen different crimes and made thirteen year olds responsible for murder. The Crime Package Bill created a complex judicial system with two sets of prosecutors, three classes of offenses, three separate courts, at least six stages at which a juvenile can be removed from the adult to the juvenile justice system and four types of sentencing. This system has proven to be both inefficient and ineffective.

This Article will first examine the historical development of the present juvenile justice system. Second, New York's juvenile court system as well as recent reforms in this system will be analyzed. Finally, this Article will explore the problems created by the Crime Package Bill and further determine whether the reforms enacted by the state legislature have resulted in a more effective juvenile justice system.

II. Historical Development of Juvenile Justice

Anglo-American jurisprudence, concerned with the theory of *mens rea*, has never satisfactorily developed a system to handle crimes committed by those felt to be incapable of possessing criminal intent.⁶ Courts, in an attempt to resolve this dilemma, often resorted to arbitrary distinctions.

At early common law, it was believed that a child under seven lacked the requisite state of mind necessary to commit a criminal act, whereas a child over seven was responsible for his acts.⁷ According to Blackstone, by the fourteenth century, the law had developed that a child under fourteen and over seven was presumed *doli incapax*, that is, unable to discern right from wrong. However, if the presumption were rebutted, the child could suffer capital

5. Peyser, *The New Juvenile Offender Law in New York: A Comparison with Other Jurisdictions*, N.Y.L.J. September 27, 1978, at 1, col. 1. New York is only one of four states to end juvenile court jurisdiction at age 15. Nine states end it at 16, thirty seven states at 17 and one state at 18.

6. See generally Prevezer, *A Historical Summary of the English Juvenile Court System and an Assessment of Its Features in the Light of American Practice*, 4 WAYNE L. REV. 1 (1957).

7. *Id.* at 3; Note, *The Young Offender: Jurisdiction*, 17 BROOKLYN L. REV. 216, 217 (1951).

punishment.⁸ Juveniles were in fact executed with some frequency for a variety of offenses.⁹ Children convicted of felonies were often sentenced to corporal punishment such as mutilation and whipping.¹⁰ When prisons became common, juveniles were sent to adult penitentiaries where conditions were frequently atrocious.¹¹

Further compounding the inability of the legal system to deal effectively with juvenile criminals was the idea, basic to Anglo-American criminal jurisprudence, that criminal laws were intended to punish criminals, not rehabilitate them.¹² As nineteenth century reformers became increasingly aware that the criminal system instead of training "its bad boys so as to make them decent citizens . . . permitted them to become outlaws and outcasts of society,"¹³ they sought to make fundamental changes in the juvenile system. Reformers first developed the theory that the state, acting as *parens patriae*, should provide for the treatment and rehabilitation of the juvenile. To effectuate this goal, the New York House of Refuge was founded in 1824. The founders of the House argued that by taking the juvenile out of his home and separating him from bad influences, he could be rehabilitated.¹⁴ Children were placed in the Refuges on an informal basis without a hearing or actual proof of criminal offenses. The Refuges only housed a small percentage of all juvenile offenders, leaving the remainder to the streets or to the adult penitentiary system. Those that were sent to the Refuges were not necessarily in a better position.¹⁵

8. 4 Blackstone, COMMENTARIES *23.

9. See Prevezer, *supra* note 6, at 3. "Felony" was a very expansive term at English law. Capital crimes included destroying the heads of fishponds and being in the company of gypsies. *Id.* Fine distinctions were also made as to the mode of punishment. In one reported case, a thirteen year old girl murdered her mistress, a treasonable offense. Because the law did not permit anyone under 14 to be hanged, the girl was burned to death. 1 Hale P.C. p. 26, 1. Y.B. 12 Ed.W. III, under Pleas of the Crown.

10. 2 ABBOTT, THE CHILD AND THE STATE 324 (1938).

11. Due to these harsh alternatives, juries would frequently acquit. Mennel, *Origins of the Juvenile Court: Changing Perspectives on the Legal Rights of Juvenile Delinquents*, 11 CRIM. L. Q. 68 (1972).

12. See generally Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909).

13. *Id.* at 107. See also Lindsey, *Historical Sketch of the Indeterminate Sentence and Parole System*, 16 J. CRIM. L. & CRIMINOLOGY 9 (1925); W. CAMPBELL, LAW OF SENTENCING 21-23 (1978).

14. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1188-93 (1970).

15. Many of the Refuges deteriorated into sweat shops. They also used an updated ver-

Late nineteenth century reformers sought alternatives to the Refuges and the abominable prison conditions in which children were placed.¹⁶ In 1899, reformers in Cook County, Illinois enacted a statute creating the first juvenile court.¹⁷ New York, following the lead of the Illinois reformers, granted criminal courts the discretion to try children under fourteen accused of felonies that were not capital crimes for a misdemeanor. Subsequently, the age at which this could be done was raised to sixteen and this procedure became mandatory.¹⁸

The New York Penal Law of 1909 provided that a child of more than seven and less than sixteen years who committed any act or omission which if committed by an adult would be a crime, would not be guilty of a crime but would be guilty of juvenile delinquency.¹⁹ Such a delinquent could be committed to "any incorpo-

sion of the old English punishment of transportation by sending their charges to farms in the West. *Id.* at 1189-91, 1200-01, 1209-12, 1225-29.

16. While these reforms were originally hailed as great progressive social changes, *THEORY AND PRACTICE OF JUVENILE COURTS*, NATIONAL CONFERENCE OF CHARITIES AND CORRECTION, 358-59 (1904); H. LOU, *JUVENILE COURTS IN THE UNITED STATES*, (1927), more recent research has expressed strong reservations about this assumption. See generally Mennel, *supra* note 11, at 69; A. PLATT, *THE CHILD SAVERS: THE INVENTION OF DELINQUENCY* (1969); C. SILBERMAN, *CRIMINAL VIOLENCE, CRIMINAL JUSTICE* 310-13 (1978); Note, *Rights and Rehabilitation in the Juvenile Courts*, 67 *COLUM. L. REV.* 281 (1967).

17. 1899 Ill. Laws at 131, §§ 1, 21. One of the early judges of that court discussed its goals and procedures in a much-quoted article:

Why is it not just and proper to treat these juvenile offenders, as we deal with neglected children, as a wise and merciful father handles his own children whose errors are not discovered by the authorities? Why is it not the duty of the state, instead of asking merely whether a boy or girl has committed a specific offense, to find out what he is, physically, mentally, morally, and then if it learns that he is treading the path that leads to criminality, to take him in charge, not so much to punish him as to reform, not to degrade but to uplift, not to crush but to develop, not to make him a criminal but a worthy citizen.

.....

The child who must be brought into court should, of course, be made to know that he is face to face with the power of the state, but he should at the same time, and more emphatically, be made to feel that he is the object of its care and solicitude. The ordinary trappings of the courtroom are out of place in such hearings. The judge on a bench, looking down upon the boy standing at the bar, can never evoke a proper sympathetic spirit. Seated at a desk, with the child at his side, where he can on occasion put his arm around his shoulder and draw the lad to him, the judge, while losing none of his judicial dignity, will gain immensely in the effectiveness of his work. Mack, *The Juvenile Court*, 23 *HARV. L. REV.* 104, 107, 120 (1909).

18. 1905 N.Y. Laws ch. 655.

19. N.Y. PENAL LAW § 2186 (McKinney 1909) (amended 1949, 1950, 1956, 1962).

rated charitable reformatory, or other institution" for a period up to three years. These children were not to be sent to adult prisons or otherwise to be associated with adult criminals.²⁰ However, a child over seven and under sixteen charged with a crime punishable by death or life imprisonment²¹ could be indicted, tried and convicted in the same manner as an adult.²² A sixteen year-old, regardless of the charge involved, was an adult, and was treated accordingly.

By the turn of the twentieth century, the first children's court was established in Manhattan as part of the Court of Special Sessions.²³ In 1922, Children's Court became a division of the Domestic Relations Court of the City of New York.²⁴ Analogous courts were established in the rest of the state but with no consistent statewide law as to jurisdiction, procedure or venue.²⁵ The Children's Court had jurisdiction over, *inter alia*, delinquent²⁶ or neglected children and mental defectives.²⁷ Hearings were held before a judge in a closed courtroom with relaxed rules of evidence.²⁸ If

20. *Id.* §§ 486, 2194. The Children's Court Act had a similar provision. See text accompanying notes 23-29 *infra*. N.Y. CHILDREN'S CT. ACT § 21 (McKinney 1922) (repealed 1962).

21. These crimes included first and second degree murder, kidnapping, treason and lynching. Note, *Criminal Law—Capacity of Minor of Fifteen*, 23 BROOKLYN L. REV. 300, 300 n.2 (1957).

22. N.Y. PENAL LAW § 2186(c) (McKinney 1909) (amended 1949, 1950, 1956, 1962). There was a rebuttable presumption that a child under 12 was incapable of committing a crime. *Id.* § 817.

23. Note, *Criminal and Delinquent Minors in the Courts of New York City*, 14 BROOKLYN L. REV. 102, 105 (1947) [hereinafter cited as *Delinquent Minors*].

24. N.Y. CHILDREN'S CT. ACT § 5(1) (McKinney 1922) (repealed 1962).

25. Oughterson, *Family Court Jurisdiction*, 12 BUFFALO L. REV. 467 (1963).

26. The definition of delinquency included the commission of a large number of non-criminal acts. See N.Y. DOM. REL. CT. ACT § 2(12) (McKinney 1945) (repealed 1962); N.Y. CHILDREN'S CT. ACT § 2 (McKinney 1922) (repealed 1962):

The words "delinquent child" shall mean a child under sixteen years of age (a) who violates any law or municipal ordinance or who commits any act which, if committed by an adult would be a crime not punishable by death or life imprisonment; (b) who is incorrigible, ungovernable or habitually disobedient and beyond the control of its parents, custodians or other lawful authority; (c) who is habitually truant; (d) who, without just cause and without the consent of his parent, parents, guardians or other custodian, deserts his home or place of abode; (e) who knowingly engages in any occupation which is in violation of law; (f) who frequents any place the existence of which is in violation of law; (g) who habitually uses obscene or profane language; or (h) who so deports himself as to wilfully injure the morals or health of himself or others.

27. N.Y. CHILDREN'S CT. ACT § 5 (McKinney 1922) (repealed 1962).

28. *Delinquent Minors*, *supra* note 23, at 106.

the juvenile was found to be a delinquent, the court could either suspend judgment, place him on probation or commit him to an institution for an indefinite period.²⁹

Unfortunately, the juvenile courts in New York and elsewhere rarely fulfilled their goal of reforming the wayward youth. The courts tended to be chronically understaffed and underfunded and failed to attract and retain the best level of judicial talent.³⁰ In practice, the juvenile frequently received "the worst of both worlds . . . neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."³¹

Despite the many procedural defects of the juvenile court system, it was more than sixty years before the United States Supreme Court scrutinized such proceedings. In *Kent v. United States*,³² a sixteen year-old charged with rape, robbery and house-breaking challenged a ruling by a juvenile court waiving jurisdiction over his person even though he was subject to the "exclusive" jurisdiction of the juvenile court under District of Columbia law.³³ The juvenile court judge had remitted the juvenile to trial in a district court without holding a hearing or conferring with the defendant, his parents or his counsel. Kent was subsequently indicted and convicted as an adult, for housebreaking and robbery, and sentenced to thirty to ninety years in prison. The Supreme Court, in overturning the conviction, held that the determination whether to transfer a juvenile from juvenile court to district court is "critically important"³⁴ to the juvenile. Therefore, the Court held that as a condition to a valid waiver order, a juvenile is entitled to a hearing that "must measure up to the essentials of due process and fair treatment"³⁵ but need not "conform with all of the requirements of a criminal trial. . . ."³⁶ A juvenile's counsel in such a proceeding, according to the Court, is entitled to access to the juvenile's

29. N.Y. DOM. REL. CT. ACT § 83 (McKinney 1945) (repealed 1962); N.Y. CHILDREN'S CT. ACT § 22 (McKinney 1922) (repealed 1962).

30. See *In re Gault*, 387 U.S. 1, 14 n.14 (1967) (a quarter of the juvenile court judges nationally had no law school training and that half had no undergraduate degree).

31. *Kent v. United States*, 383 U.S. 541, 556 (1966) (footnote omitted).

32. 383 U.S. 541 (1966).

33. *Id.* at 543.

34. *Id.* at 560.

35. *Id.* at 562.

36. *Id.*

records as well as to a statement of reasons for the court's decision concerning the juvenile.³⁷

A year later, the Supreme Court in *In re Gault*³⁸ held that the fundamental right to due process guaranteed that a juvenile be given adequate notice of the charges, the right to counsel, confrontation and cross-examination and the privilege against self-incrimination. Gerald Gault, a fifteen year-old charged with juvenile delinquency for making obscene telephone calls, was convicted at a trial at which no one was sworn, no complainant appeared, and no record of the proceedings was prepared.³⁹ He was sentenced to six years in the State Industrial School for an offense for which an adult could have received not more than two months imprisonment. The Supreme Court in overturning Gault's conviction recognized that a "juvenile is not entitled to bail, to indictment by grand jury, to a public trial or to trial by jury."⁴⁰ However, the court made clear that "[u]nder our Constitution, the condition of being a boy does not justify a kangaroo court."⁴¹

The Supreme Court in *In re Winship*,⁴² expanding upon the due process rights enunciated in *Kent* and *Gault*, held that a juvenile is constitutionally entitled to proof beyond a reasonable doubt during the adjudicatory stage of a delinquency proceeding. However, in *McKeiver v. Pennsylvania*,⁴³ the Supreme Court ruled that the Constitution does not require a jury trial in the adjudicative phase of a state juvenile court delinquency proceeding.⁴⁴

In view of the fact that many states considered juvenile proceedings civil and not criminal,⁴⁵ the juveniles were not accorded all the

37. *Id.* at 557.

38. 387 U.S. 1 (1967).

39. *Id.* at 5.

40. *Id.* at 14. See also *Kent v. United States*, 383 U.S. 541, 555 n.22.

41. 387 U.S. at 28.

42. 397 U.S. 358 (1970).

43. 403 U.S. 528 (1971).

44. In *Matter of D.*, 27 N.Y.2d 90, 261 N.E.2d 627, 313 N.Y.S.2d 704 (1970), *cert. denied*, 403 U.S. 926 (1971), the New York Court of Appeals held that a juvenile defendant is not entitled to a jury trial as a matter of state law. The New York court also ruled that the procedural requirement of notice under the Code of Criminal Procedure (the predecessor statute to the New York Criminal Procedure Law) does not apply to family court procedure.

45. See, e.g., the District of Columbia statute involved in *Kent v. United States*, 383 U.S. 541, 554 (1966), which designated juvenile proceedings as civil rather than criminal.

rights of an adult in a criminal trial.⁴⁶ However, the Supreme Court's rulings on the constitutional rights guaranteed to a juvenile have required major changes in the handling of juvenile cases in courts throughout the country.

III. New York's Juvenile Justice System

A. The Family Court Act

The New York Family Court Act⁴⁷ which in 1962 superseded the old Children's Court system, embodied most of the due process protections that were to be required by the Supreme Court in *Gault*.⁴⁸ The Family Court Act was enacted as part of a general revision of the New York court system. It placed in one court cases encompassing different aspects of the same problem, namely, the breakdown of family life. Family courts were given jurisdiction over juvenile delinquents, persons in need of supervision, neglected children, as well as paternity, support, custody, adoption and visitation proceedings.⁴⁹ It was believed at the outset that the family court would be able to apply a unified approach to these related problems. It was also felt at the time of the bill's enactment that the best interests of the child could still be considered in the context of due process.⁵⁰ Unfortunately, the Family Court Act has been as unsuccessful as its predecessors in dealing with the prob-

46. *Id.* at 555.

47. 1962 N.Y. Laws ch. 686. See generally, Paulsen, *The New York Family Court Act*, 12 BUFFALO L. REV. 420 (1963).

The Act has its own vocabulary. The juvenile is a "respondent" rather than a defendant. A "petition" rather than an indictment or a criminal information, is filed against him. Following a "fact-finding hearing" as opposed to a trial, the juvenile may be found to have committed an "act, which if done by an adult, would constitute a crime." At the "dispositional hearing," which is analogous to sentencing in the adult system, the delinquent may be "placed" rather than incarcerated.

In this Article, the terms juvenile, youth and child will be used interchangeably to describe a person under the age of 16. The terms conviction and crime will sometimes be used to describe, respectively, "fact-finding" and "an act, which if done by an adult, would constitute a crime," in order to avoid circumlocution.

48. The New York Family Court Act was praised in *Gault* several times. 387 U.S. at 40, 48, 55-57. See Note, *The Gault Decision and the New York Family Court Act*, 19 SYRACUSE L. REV. 753 (1968).

49. 1962 N.Y. Laws ch. 686, § 115.

50. Oughterson, *Family Court Jurisdiction*, 12 BUFFALO L. REV. 467 (1963); N.Y. FAM. CT. ACT, Art. I (McKinney 1975) D. Bersharov, Practice Commentaries [hereinafter cited as Commentaries].

lem of juvenile crime.

1. Procedural Framework

The general scheme of the Family Court Act has not changed substantially since 1962.⁵¹ A juvenile arrested for a crime⁵² is either released by the police to his parents or other person legally responsible for his care or brought directly to family court or to a court-designated juvenile detention facility.⁵³ In court, he is referred to the Intake Bureau of the Family Court Probation Department. Probation Intake screens out neighborhood disputes and trivial incidents of non-criminal conduct. These cases can either be "adjusted at intake" or "terminated without adjustment."⁵⁴ If the case is not resolved in Intake, it is referred to a prosecuting attorney. The attorney at this juncture reviews the case for legal sufficiency and may either decline to prosecute or draft a petition.⁵⁵ If a petition is filed,⁵⁶ the juvenile is brought before a family court judge for arraignment. At arraignment, he can either be paroled to an appropriate person or remanded for detention.⁵⁷ The juvenile can be remanded if the court finds that there is a substantial probability that he will not return to court or that he will engage

51. However, changes have been made with respect to the dispositions available for certain crimes. See text accompanying notes 105-14, 132-34, 192-208, *infra*.

52. Family court jurisdiction extends only to crimes. N.Y. FAM. CT. ACT § 712(a) (McKinney 1975). "Crimes" under New York law are defined as either felonies or misdemeanors. N.Y. PENAL LAW § 10.00(6) (McKinney 1975).

53. N.Y. FAM. CT. ACT § 724 (McKinney 1975).

54. *Id.* § 734. Adjustment at intake involves a determination by the probation officer not to refer the charges to the prosecutor. This type of action is taken where the charges are felt not to merit court intervention or where the victim and the juvenile reach some form of agreement. A case will be terminated without adjustment where the complainant does not come forward. The juvenile is not entitled to counsel at this stage of the proceedings. *Matter of Anthony S.*, 73 Misc. 2d 187, 191, 341 N.Y.S.2d 11, 15 (Fam. Ct. 1973).

55. No petition may be filed without the approval of the prosecuting attorney. N.Y. FAM. CT. ACT § 734-a(a) (McKinney Supp. 1979).

56. *Id.* § 731. The petition must allege not only a crime but that the juvenile is in need of supervision, treatment, or confinement. See also *Matter of Jaime T.*, 96 Misc. 2d 173, 181, 408 N.Y.S.2d 901, 907 (Fam. Ct. 1978). Section 733 of the New York Family Court Act sets forth who may originate the proceedings.

57. N.Y. FAM. CT. ACT § 739(a) (McKinney Supp. 1979). Out of 17,880 juveniles arrested in New York State in 1979, only 17% were detained but a full 83% were not. Office of Court Administration, Second Annual Report of the Chief Administrator of Courts [hereinafter cited as *1979 Annual Report*].

in other criminal acts.⁵⁸ Such a remand⁵⁹ can initially only be for a three-day period. The remand cannot be extended past the initial three days unless "special circumstances" exist or the court finds that probable cause exists to believe that the juvenile is a juvenile delinquent. The remand then can be extended another three court days or for fourteen days if the juvenile is charged with a class A, B or C felony.⁶⁰

Family court delinquency fact-finding hearings are actually fully litigated "criminal" trials differing from adult trials only by the absence of a jury.⁶¹ At trial, a juvenile is represented at all stages

DETAINED			LENGTH OF DETENTION IN DAYS							
BEFORE PETITION	PETITION	TOTAL	DAYS 1-7	8-14	15-21	22-30	31-90	91-180	181-365	365 or more
212	2818	3030	957	406	309	296	669	147	31	3
6.9%	93.1	100	32	13	10	10	22	5	1	.1

Id. at Tables 3-63, 3-64.

A third alternative at arraignment is remand to a "shelter." This alternative would apply where it is found that a juvenile is neither dangerous nor likely to flee and where no relative has appeared to take custody of him.

There is no provision for bail in the statute.

58. *Id.* § 739 (a). The preventive detention provision has been found to be constitutional on the curious ground that it protects the child. *People ex rel. Wayburn v. Schupf*, 39 N.Y.2d 682, 350 N.E.2d 906, 385 N.Y.S.2d 518 (1976).

Another challenge to the preventive detention provision is currently awaiting decision in the United States District Court for the Southern District of New York. *United States ex rel. Martin v. Strasberg*, Civ. No. 77-6176 (S.D.N.Y. filed Dec. 21, 1977).

59. In New York City remands to detention are made to the Spofford Juvenile Detention facility.

60. N.Y. FAM. CT. ACT §§ 739(b), 747 (McKinney 1975). The first section was added to the Family Court Act in 1975 in response to *People ex rel. Guggenheim v. Mucci*, 32 N.Y.2d 307, 312, 298 N.E.2d 109, 112, 344 N.Y.S.2d 944, 948 (1973) which read the Act as requiring a probable cause hearing within three days. This section has created numerous practical problems. One problem is whether the juvenile is entitled to a probable cause hearing in a situation where he is not prepared for a full trial but the prosecutor is prepared. The Appellate Division, Second Department, has held that a probable cause hearing is required. *People ex rel. Kaufmann v. Davis*, 57 A.D.2d 597, 598, 393 N.Y.S.2d, 746, 748 (2d Dep't 1977).

61. For example, N.Y. FAM. CT. ACT § 744(a), (b) (McKinney Supp. 1979) sets forth

by a "law guardian"⁶³ who must be an attorney admitted to practice in New York.⁶³

The majority of petitions filed in family court are disposed of without the juvenile being convicted.⁶⁴ A substantial number of petitions are dismissed before trial for failure to prosecute.⁶⁵ Others are withdrawn by the prosecutor⁶⁶ or dismissed for failure of proof at a hearing.⁶⁷ By far the largest number of dismissals occur when the juvenile is granted an adjournment in contemplation of dismissal ("ACD").⁶⁸ Where the juvenile is convicted, either upon a guilty plea or after trial, a dispositional hearing is scheduled to determine whether the juvenile is in need of supervision, treatment or con-

"beyond a reasonable doubt" as the standard of proof and limits the admissibility of evidence to that which is "competent, material and relevant."

62. *Id.* §§ 241-249 (McKinney 1975 and Supp. 1979).

63. *Id.* § 242 (McKinney 1975). In New York City, an indigent juvenile is usually represented by the Juvenile Rights Division of the Legal Aid Society or by an attorney appointed by the Family Court Indigent Panel. *See id.* § 249 (McKinney Supp. 1979). Juveniles whose parents have resources may, of course, engage their own attorney.

Originally, there was little or no provision for prosecutors in the Family Court Act. The evidence would be presented by police officers, social workers and other untrained individuals. They were frequently no match for trained defense attorneys. *See Commentaries, supra* note 50, § 254. For the last ten years, petitions have been presented in New York City by the corporation counsel's office and in other counties by the county attorney. N.Y. FAM. CT. ACT § 254 (McKinney 1975). *See also Commentaries, supra* note 50, § 254. In New York City, the Family Court Division of the corporation counsel presently has more than 40 attorneys assigned to present family court cases with the overwhelming bulk of these cases being delinquencies.

64. In 1979, 17,655 delinquency petitions were filed in New York State: 15,554 against boys and 2,101 against girls. Sixty-five percent of those cases were dismissed without a conviction. 1979 *Annual Report, supra* note 57, at Tables 3-65, 3-66. The conviction rate for adults charged with felonies is somewhat higher; 56% were convicted of some crime but only 15% of a felony. *Felony Arrests: Their Prosecution and Disposition in New York City's Courts*, VERA INSTITUTE OF JUSTICE 1-9 (1977).

65. This is usually attributable to witnesses' failure to come forward. Four percent of the total cases filed were dismissed for this reasons. 1979 *Annual Report, supra* note 57, at Tables 3-65, 3-66.

66. Twelve percent of the juvenile petitions filed in New York in 1979 were withdrawn by the prosecutor. *Id.*

67. Five percent of the petitions filed (933 petitions) were dismissed for failure of proof at a hearing. *Id.*

68. This is a procedure under which the petition can be adjourned for up to six months with the imposition of terms and conditions of conduct upon the juvenile. If the juvenile does not violate these terms, the petition will be dismissed. N.Y. FAM. CT. ACT § 749(a) (McKinney 1975).

Twenty-seven percent of all petitions filed were disposed of by means of an ACD. 1979 *Annual Report, supra* note 57, at Tables 3-65, 3-66.

trol.⁶⁹ The usual procedure is for the court to order a probation "Investigation and Report" ("I and R") to determine, *inter alia*, the child's family background, school record and court history. The court can also order a Bureau of Mental Health study ("BMHS") of the juvenile by a court psychiatrist and direct that placement be explored. At this stage in the proceeding, the juvenile is usually paroled or remanded. Remand to detention can be for an initial period of ten days followed by another ten days. Following this period, the juvenile can be continued on remand only on a showing of "special circumstances."⁷⁰ The juvenile's only remedy for an improper detention is a writ of habeas corpus in New York supreme court.⁷¹

At a dispositional hearing, the juvenile, again represented by counsel, can call witnesses in his behalf and cross-examine witnesses testifying against him.⁷² At disposition, the court has numerous alternatives. It can dismiss the petition finding that, despite the fact that the juvenile committed an act which would be a crime if he were an adult, the juvenile is not in need of supervision, control or treatment.⁷³ The court can suspend judgment for up to a year⁷⁴ or grant the juvenile an adjournment in contemplation of dismissal.⁷⁵ It can also place the juvenile on probation for a period of up to two years.⁷⁶ The vast majority of juveniles are routinely

69. N.Y. FAM. CT. ACT § 746(a) (McKinney Supp. 1979).

70. *Id.* § 749(b) (McKinney 1975). These so-called "special circumstances" are left undefined in the statute and case law.

71. N.Y. CIV. PRAC. LAW §§ 7002, 7010 (McKinney Supp. 1980). The likelihood of success is poor. Frequently, judges sitting in these cases reserve decision until the return date in family court, thereby causing the writ to become moot.

72. N.Y. FAM. CT. ACT. § 743 (McKinney Supp. 1979).

73. *See id.* § 751 (McKinney 1975). *See also id.* § 731(c). In 1979, this occurred in five percent of the cases in New York State in which juveniles were found to have committed a crime. 1979 *Annual Report*, *supra* note 57, at Tables 3-65, 3-66.

74. N.Y. FAM. CT. ACT § 755 (McKinney Supp. 1979). If "the court finds at the conclusion of that period that exceptional circumstances require an additional period of one year," the court may so extend the duration of the suspended judgment. *Id.* Conditions for suspended judgment can include restitution or services for the public good. *Id.*

Suspended judgment was applied in 12% of the cases in which findings were made. 1979 *Annual Report*, *supra* note 57, at Tables 3-65, 3-66.

75. N.Y. FAM. CT. ACT § 749(a) (McKinney 1975).

76. *Id.* § 757. Exceptional circumstances can extend probation another year. *Id.*

Probation is the most common disposition, used in 55% of all cases where a fact-finding was made. 1979 *Annual Report*, *supra* note 57, at Tables 3-65, 3-66.

disposed of under these provisions. The balance of the juveniles that require placement are those that require particular scrutiny.

2. Placement

Placement can be in the child's home, with another suitable person, or in an institution.⁷⁷ Institutional placements are either to a private agency affiliated with the Commissioner of Social Service ("CSS")⁷⁸ or to the Division For Youth ("DFY") which maintains its own facilities.

CSS facilities are generally residential schools contracted by the state to take delinquents. They retain the option of rejecting youths they deem unsuitable for their programs. Juveniles with records of extensive mental illness or convictions for arson or sexual offenses are often rejected by the private agencies. The only alternative for these youths is placement with DFY which cannot reject juveniles.⁷⁹

77. N.Y. FAM. CT. ACT § 756(a) (McKinney Supp. 1979). Placements in the home of a relative or other suitable person are rare. Only 17 such placements were made in 1979. 1979 Annual Report, *supra* note 57, at Tables 3-65, 3-66.

If the court orders placement, it may first order that the juvenile continue on remand until he is actually transported to the facility. At times where DFY or the private facilities are short of beds, this may result in long stays in detention awaiting transportation. In *People ex rel. Dale v. Davis*, N.Y.L.J., April 17, 1978, at 14, col. 6 (Sup. Ct. April 5, 1978), *aff'd*, 63 A.D.2d 866, 404 N.Y.S.2d 933 (1st Dep't 1978), a juvenile's challenge to the constitutionality of such proceedings was rejected.

However, DFY agreed on July 9, 1980 to a stipulation and order in the case of *Ronald W. v. Hall*, Civ. No. 80-1795 (S.D.N.Y. filed March 31, 1980). This stipulation binds DFY to designate a particular facility and transfer each juvenile in detention to that facility or one in its class, unless there are no vacancies in that category within 15 days. If at the end of the 15 day period no vacancy is available the juvenile must be transferred to the particular facility or one within its class. If at the end of the 30th day there is no vacancy, then DFY must go to court for an order to show why the transfer should not be effected.

78. N.Y. FAM. CT. ACT § 756(a)(ii) (McKinney Supp. 1979). CSS placements constituted more than one-third of all placements made in New York State in 1979. 1979 Annual Report, *supra* note 57, at Tables 3-65, 3-66.

79. See Cohen, *Juvenile Justice: New York's Act is Hard to Follow*, 13 TRIAL 28, 34 (1977). See, e.g., *Matter of David R.*, N.Y.L.J. March 18, 1980, at 11, col. 4 (Fam. Ct. Feb. 21, 1980). David had a history of psychiatric disturbances and repeated non-violent delinquent behavior. Although placed in a CSS facility, David absconded many times and was subsequently arrested for other crimes. The probation officer explored 18 different private facilities for David. David was either rejected by the facility or the facility was deemed inappropriate by the court. In addition, he was unwilling to go to the only facility appropriate for him, i.e., a psychiatric hospital. He was eventually placed with DFY Title III, see note 82 *infra* and accompanying text, because no other alternatives were open to him.

DFY placements are either to "Title II" or "Title III" facilities.⁸⁰ Title II facilities are generally urban residences, that is, group homes or camps. Those juveniles who are placed in urban residences usually remain in the community and attend community schools. However, they retain limited personal freedom. Juveniles who require removal from the community but not necessarily to a secure setting are placed in camps.⁸¹ Title III placements are for juveniles who require structured settings.⁸²

Until 1976, all placements were made for an initial period of eighteen months regardless of the crime for which the juvenile had been convicted.⁸³ Since 1976, the initial period of placement for a misdemeanor has been reduced to one year.⁸⁴ However, the placement may be extended with court approval in increments of one year up to the juvenile's eighteenth birthday. If the juvenile consents, the extension may be made up to his twenty-first birthday.⁸⁵

A placement with DFY does not mean that a juvenile will necessarily spend the entire period specified in the placement order in such a facility. DFY retains the power to put a delinquent originally placed with Title III, in a Title II facility.⁸⁶ Moreover, DFY can release⁸⁷ or discharge⁸⁸ the delinquent when it believes that suitable care and supervision can be provided and the juvenile's return to the community would not endanger public safety. The

80. Title II and Title III refer respectively to N.Y. EXEC. LAW §§ 502-09 and §§ 510-27 (McKinney Supp. 1979). These are the statutes granting DFY the power to take custody of these youths and describing the types of facilities in which they may be placed.

81. Interview with Iris Coleman, Court Liaison Officer of DFY, Bronx County, in New York City (Aug. 1, 1980). Title II placements were made in seven percent of the cases where a juvenile was found to have committed a crime. 1979 Annual Report, *supra* note 57, at Tables 3-92, 3-93.

82. These programs have a high staff-juvenile ratio. Some settings severely restrict the juveniles' access and movement. Education, psychological treatment and other services are offered on an internal basis. Training is usually given in vocational subjects such as wood-working, welding and auto mechanics. *Id.* Title III placements were made in ten percent of the cases where the juvenile was found to have committed a crime. 1979 Annual Report, *supra* note 57 at Table 3-92, 3-93.

83. The only exception to this was the situation of a fifteen year-old convicted of a class A or B felony. See text accompanying notes 90-93 *infra*.

84. N.Y. FAM. CT. ACT § 756(b) (McKinney Supp. 1979).

85. *Id.* § 756(b), (c) (McKinney 1975 and Supp. 1979).

86. Interview with Iris Coleman, Court Liaison Officer of DFY, Bronx County, in New York City (Aug. 1, 1980).

87. N.Y. EXEC. LAW § 523 (McKinney Supp. 1979).

88. *Id.* § 525.

argument ostensibly can be made that according DFY broad discretion over the placement of a juvenile where there is no statutory provision giving a juvenile who is not transferred or released a hearing, violates the non-transferred juvenile's right to due process and equal protection. However, the procedures currently employed by DFY militate against such a claim.⁸⁹

Until 1976, fifteen year olds charged with class A or B felonies were placed in a separate and distinct category. These juveniles could be committed to the Elmira Reception Center ("Elmira") for a period up to three years.⁹⁰ Elmira was a medium security, adult prison run by the Department of Correctional Services for offenders ranging in age from sixteen to twenty-one.⁹¹ Placing a child in an adult prison for three years without a jury trial raised constitutional questions of due process and equal protection.⁹² Neverthe-

89. The decision whether to place a juvenile placed in a Title III facility by a court, to a Title II facility, is made after a meeting with the juvenile and his parents (if they are available), and the juvenile's record is reviewed to determine how his needs can best be met. The determination whether to release the juvenile earlier than required, is based on his or her adaptation to the facility. Most Title III facilities award juveniles points for positive behavior. After the juvenile has amassed a sufficient number of points, he is allowed to make home visits and after a number of successful home visits, the juvenile might become eligible for early release. Progress reports are filed out which the juvenile usually signs. Some facilities even use charts to show a juvenile how well he or she is doing. Interview with Iris Coleman, Court Liaison Officer of DFY, Bronx County, in New York City (Oct. 10, 1980). The Supreme Court has held that a parole release hearing involves a liberty interest too tenuous to require invocation of all the requirements of due process. *Greenholtz v. Inmates of the Neb. Penal and Corrections Complex*, 442 U.S. 1, 9 (1979). The New York statute governing the early release of adult prisoners, N.Y. EXEC. LAW § 259-i (McKinney Supp. 1979), has been held, like the Nebraska statutory scheme, not to entitle a prisoner to all due process protections. *Boothe v. Hammock*, 605 F.2d 661 (2d Cir. 1979). See also *Bowles v. Tennant*, 613 F.2d 776, 778 (9th Cir. 1980); *Wagner v. Gilligan*, 609 F.2d 866, 867 (6th Cir. 1979). For a discussion of what was required for a parole release hearing in New York prior to *Greenholtz*, see *Coralluzzo v. New York State Parole Bd.*, 566 F.2d 375 (2d Cir. 1977), cert. dismissed as improvidently granted, 435 U.S. 912 (1978); *United States ex rel. Johnson v. Chairman of N.Y. State Bd. of Parole*, 500 F.2d 925 (2d Cir.), vacated as moot sub nom. *Regan v. Johnson*, 419 U.S. 1015 (1974).

90. N.Y. FAM. CT. ACT § 758(b)(c) (McKinney 1975) (repealed 1976). Girls were sent to a "suitable institution" such as Westfield state farm. Fifteen year-olds had been criminally responsible as adults for crimes punishable by death or life imprisonment until 1967 when the penal law extended to them the defense of infancy. N.Y. PENAL LAW § 30.00 (McKinney 1967).

91. See Note, *The Unique Status of the Fifteen Year Old under the Criminal Law in New York*, 39 ALB. L. REV. 297, 299 (1975). Statistics show that there were only about ten commitments to Elmira per year.

92. *United States ex rel. Murray v. Owens*, 465 F.2d 289 (2d Cir. 1972); *R. v. Cory*, 44

less, both federal and state courts sustained the statute, relying upon *McKeiver* and the fact that the singling out of fifteen year olds for separate treatment was not without reasonable relation to permissible statutory goals.⁹³

B. The Juvenile Justice Reform Act of 1976

The Juvenile Justice Reform Act of 1976 ("JJRA")⁹⁴ marked a significant departure from the rehabilitative ideals first enunciated by the Illinois reformers.⁹⁵ The JJRA explicitly requires a family court to consider the need for protecting the community as well as the needs and best interests of the juvenile.⁹⁶ The most significant change⁹⁷ made by the JJRA was the creation of a new class of crime, the Designated Felony Act ("DFA")⁹⁸ for which a "restrictive placement" could be made.⁹⁹ A second change allowed district attorneys to prosecute juvenile cases in family court.

1. The Designated Felony Act

The JJRA defined DFA's as acts done by a fourteen or fifteen year-old which, if done by an adult, would constitute the crimes of murder and attempted murder, manslaughter, robbery, kidnap-

A.D.2d 599, 353 N.Y.S.2d 783 (2d Dep't 1974); *In re Garrett*, 74 Misc. 2d 961, 346 N.Y.S.2d 651 (Fam. Ct. 1973).

93. See *United States ex rel. Murray v. Owens*, 465 F.2d 289 (2d Cir. 1972).

94. 1976 N.Y. Laws ch. 878. For an interesting discussion of the JJRA see Comment, *The Juvenile Justice Reform Act of 1976: Operation Constitutional Vulnerability, and Effect*, 6 N.Y.U. REV. L. AND SOC. CHANGE 217 (1977); Comment, *The New York Juvenile Justice Reform Act of 1976: An Answer to the Problem of the Seriously Violent Youth?*, 45 FORDHAM L. REV. 408 (1976). Two legislative studies were conducted prior to enactment of the new law. GOTFRIED, BARSKY & BARON, *Juvenile Crime: Report of Recommendations and Summary of Findings*: New York State Assembly Committee on Child Care, 1976; *Report of the Governor's Panel on Juvenile Violence*, 1976.

95. The JJRA was enacted in response to reports of particularly vicious juvenile crimes which had not been deterred by the juvenile laws. See N.Y. Times, Jan. 19, 1975 (Magazine), at 11, col. 1; N.Y. Times, Oct. 26, 1971, at 36, col. 4. See generally Comment, *The Juvenile Offender — Where Can We Send Him?* 2 FORDHAM URB. L.J. 245 (1974).

96. N.Y. FAM. CT. ACT § 711 (McKinney Supp. 1979).

97. The JJRA also enacted a number of procedural changes: requiring the judge to state the reasons for a remand, *id.* § 739(a); for a fact-finding, *id.* § 752; or for a particular disposition, *id.* §§ 753-a(2), 754(2). Some provisions are ignored in practice, such as the one requiring the same judge to preside at the fact-finding hearing and all subsequent hearings. *Id.* § 742.

98. *Id.* § 712(h).

99. *Id.* § 753-a.

ping, arson, burglary, assault, rape and sodomy.¹⁰⁰ The legislature felt it was essential that the courts and other agencies concentrate on juveniles charged with the most serious crimes. Consequently, a number of provisions differentiated DFA's from ordinary delinquency cases. First, if a juvenile is charged with a DFA, this fact must be noted conspicuously on the petition.¹⁰¹ Second, in adjusting a DFA petition at intake,¹⁰² the petition cannot be adjourned in contemplation of dismissal,¹⁰³ and the written permission of a judge is required. Third, a separate part in each family court was established specifically to hear DFA petitions.¹⁰⁴

2. Restrictive Placements

With regard to the dispositional alternatives available for DFA offenders, the three-year commitment to Elmira was replaced by a "restrictive placement." Inasmuch as a juvenile is afforded intensive rehabilitative treatment in a setting removed from his previous environment, the ideals of the nineteenth century reformers were not completely abrogated under the JJRA.¹⁰⁵

Under the JJRA, a family court is required to determine within twenty days of the fact-finding whether the juvenile requires a restrictive placement.¹⁰⁶ This determination is to be based upon an extensive probation report¹⁰⁷ in addition to criteria set forth in the

100. *Id.* § 712(h). The various degrees of these crimes are set forth in the statute.

DFA's constitute a small percentage of total juvenile crime. In 1979, in Bronx County, 1,621 total petitions were filed. *1979 Annual Report, supra* note 57, at 3-91, 3-92. Only 47 (9%) were filed as DFA's for an average of 12 per month. These figures were obtained from an examination of the Bronx Family Court Docket Book.

DFA's do not encompass some of the most serious crimes. See text accompanying notes 210-11, *infra*.

101. N.Y. FAM. CT. ACT § 731(2) (McKinney Supp. 1979); *Commentaries, supra* note 50, § 731(2).

102. N.Y. FAM. CT. ACT § 734 (McKinney Supp. 1979). The former statute had prohibited adjustment of class A or B felonies without the approval of the local probation director. The difference appears to be insignificant.

103. *Id.* § 749(d)(i). It is doubtful whether very many viable cases with available witnesses were adjourned in contemplation of dismissal under the old law because prosecutors typically offer an ACD only when they have a weak case.

104. *Id.* § 117(b)(i), (ii). For criticism of this reform, see text accompanying notes 239-41, *infra*. Outside New York City, DFA's are to be given hearing preferences.

105. See *People v. Young*, 99 Misc. 2d 328, 330, 416 N.Y.2d 171, 172 (Fam. Ct. 1979).

106. N.Y. FAM. CT. ACT § 753-a (McKinney Supp. 1979).

107. *Id.* § 750(3) (McKinney Supp. 1979).

JJRA.¹⁰⁸ If the court elects not to make a restrictive placement,¹⁰⁹ the juvenile becomes subject to the normal range of dispositions including an eighteen month placement in a Title III facility. If a restrictive placement is ordered, and the juvenile has been convicted of a designated class A felony,¹¹⁰ placement with DFY must be for an initial period of five years. The first twelve to eighteen months are to be spent in a "secure facility"¹¹¹ as designated by DFY. After that period the juvenile must be placed in a residential facility for twelve months. Tight restrictions are placed on DFY to prevent release of a juvenile during these first two years of the placement absent a court order or written approval from the Director or Deputy Director of DFY.¹¹²

108. The court considers the following criteria:

(a) the needs and best interests of the respondent; (b) the record and background of the respondent, including but not limited to the information disclosed in the probation investigation and diagnostic assessment; (c) the nature and circumstances of the offense, including whether any injury involved was inflicted by the respondent or another participant; (d) the need for protection of the community; and (e) the age and physical condition of the victim.

Id. § 753-a(2).

109. *Id.* As a general rule, the court is not required to order a restrictive placement. However, a 1977 amendment to the Family Court Act mandates a restrictive placement where the juvenile has inflicted serious physical injury upon persons 62 years old or older. *Id.* § 753-a(2-a).

The constitutionality of this provision was sustained by the New York Court of Appeals in *Matter of Quinton A.*, 49 N.Y.2d 328, 402 N.E.2d 126, 425 N.Y.S.2d 788 (1980).

110. These are second degree murder, first degree arson and first degree kidnapping.

111. A "secure facility" is defined in the act as "a residential facility in which a juvenile delinquent may be placed . . . which is characterized by physically restricting construction, hardware and procedures, and is designated as a secure facility by the division for youth." N.Y. FAM. CT. ACT § 712(j) (McKinney Supp. 1979).

112. *Id.* § 753-a(3)(a)(i-iv). DFY has promulgated administrative rules to deal with juveniles convicted of DFA's. These rules create two classes: (1) classified cases, *i.e.*, juveniles convicted of DFA's upon whom the court elected not to impose a restrictive placement and (2) restrictive cases, *i.e.*, juveniles given a restrictive placement. NEW YORK STATE DIVISION FOR YOUTH, *Policy and Procedures Manual 2* (1978). Supervision of classified and restrictive cases is to be more intensive, especially when the juveniles are not in a secure or residential facility. *Id.* at 10-11.

Juveniles on restrictive placements may not be transferred from a secure facility before the expiration of the secure term or from a Title III facility during the first 12 months after admission. *Id.* at 13. Classified cases may not be transferred from a Title III facility for at least 12 months after admission. Juveniles on restrictive placement may not be released prior to the expiration of the residential and secure terms set by the court. They must successfully complete at least two unaccompanied home visits. *Id.* at 14-15. They cannot be discharged prior to the expiration of their placement. *Id.* at 15. Classified cases cannot be released from a Title III facility for at least 12 months, *id.*, or discharged prior to the expira-

Where a juvenile is found to have committed a DFA other than a class A DFA, the initial period of placement is for three years with the first six to twelve months to be spent in a secure facility and the next six to twelve months in a residential facility.¹¹³ Both types of placements can be extended by court order upon request by DFY for one year intervals up to and until the juvenile's twenty-first birthday.¹¹⁴

3. Prosecution of Juvenile Criminals

Until 1976, the Family Court Act specifically provided that all juvenile prosecutions were to be initiated and handled by either a county attorney or the corporation counsel of the City of New York. District attorneys were excluded from family court in order to preserve the noncriminal, rehabilitative nature of the proceedings.¹¹⁵ Amendments to the JJRA in 1976 and 1978 for the first time permitted district attorneys to prosecute juveniles charged with having committed DFA's once an agreement had been reached with either the corporation counsel or the county attorney.¹¹⁶ This change marked a significant departure from the rehabilitative ideals of the nineteenth century reformers, no doubt reflecting society's increasing concern with the problem of juvenile crime and its desire to insure punishment of the worst juvenile criminals. The corporation counsel and the county attorney's office continue to prosecute all the non-DFA cases, the vast majority of delinquency cases. As a consequence of these amendments, the family court system has two sets of prosecutors—a system certain to cause confusion.

The very definition of DFA's further confused the dual system. DFA's are mainly crimes of violence in which "serious physical in-

tion of 18 months. *Id.*

113. N.Y. FAM. CT. ACT § 753-a(4) (McKinney Supp. 1979). See note 110 *supra*. See also *Matter of Quinton A.*, 49 N.Y.2d 328, 334, 402 N.E.2d 142, 145, 425 N.Y.S.2d 788, 791 (1980).

114. *Id.* §§ 753-a(3)(d), 4(d).

115. See N.Y. FAM. CT. ACT § 254, Commentary (McKinney 1975).

116. N.Y. FAM. CT. ACT § 254-a (McKinney Supp. 1979). Agreements were entered into and district attorneys began to present DFA petitions in the fall of 1977. New York State Division of Criminal Justice Services, Designated Felony Program Progress Report 1-17 (1978) [hereinafter cited as DF Progress Report]. See *Matter of Samuel P.*, 424 N.Y.S.2d 837, 839-40 (Fam. Ct. 1980), *rev'd*, N.Y.L.J., Aug. 8, 1980, at 15, col. 5 (2d Dep't July 26, 1980).

jury" was inflicted or in which a "deadly weapon" or "dangerous instrument" was used. "Serious physical injury" is not clearly defined in the penal law.¹¹⁷ The differences between "serious physical injury" and "physical injury,"¹¹⁸ and thus between a DFA and a non-DFA, is frequently a difference of opinion. The practical result in borderline or difficult cases, is that complainants and police are shuttled between the corporation counsel and the district attorney while the respective attorneys debate whether the injury is "serious." This determination will in turn dictate whether the district attorney or the corporation counsel will prosecute the case. The district attorney retains the final word on whether to file a DFA. Ironically, the district attorneys often reject cases that because of their seriousness the corporation counsel wishes to file as DFA's.¹¹⁹

The JJRA was the first major revisions of the juvenile justice system since the Family Court Act of 1962. The question still remains as to how effective these reforms are in dealing with the violent juvenile criminal. In many instances, these revisions have had contradictory effects. Although the new provisions were intended to treat fourteen and fifteen year-olds more harshly than they had been previously, statistics reveal that less than half of the petitions filed as DFA's have resulted in DFA convictions and less than half of the DFA convictions have resulted in restrictive placements.¹²⁰

117. N.Y. PENAL LAW § 10.00(10) (McKinney Supp. 1979) provides that "serious physical injury" is physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ.

118. *Id.* § 10.00(9). See *People v. Almonte*, 424 N.Y.S.2d 818, 819-20 (Sup. Ct. 1980) for discussion of what constitutes a "physical injury."

119. There are some indications that the conviction rate of delinquents charged with DFA's rose from 72% to 85% after the district attorneys assumed the role of prosecutor. Similarly, the percentage of restrictive placements increased from 15% to 25%. The reliability of the comparative figures is somewhat questionable. Indeed, the statistics from the earlier period are described as "fragmentary and difficult to reconcile." *DF Progress Report*, *supra* note 116, at 18-20, 26. These increases, if actual, are no doubt due to the amount of staff assigned to these cases. In Brooklyn, for example, four assistant district attorneys were assigned to handle a total of 98 DFA's filed between September 6, 1977 and April 30, 1978, for an average of less than four cases per month per attorney. Even more remarkable is the fact that only 32 cases, *i.e.*, about one per month per attorney, went to trial. *Id.* at 6, 23, 26, 46. Figures in the other boroughs are similar. *Id.* at 42-45.

120. During an eight month period in New York City from September 6, 1977 through April 30, 1978, 456 DFA arrests were made but 170 were rejected as DFA's by the district attorney's offices and referred to corporation counsel. Thus, 286 DFA petitions were filed in New York City (excluding Richmond County). *Id.* at 7-8, 27. Of those, 198 had completed

Moreover, the DFA and restrictive placement provisions are in fact less harsh than the former Elmira commitment which had provided for three years in an adult prison rather than in a juvenile facility and which had covered all class A and B felonies rather than just certain designated crimes. However, restrictive placements have been ordered more frequently than Elmira commitments.¹²¹

4. *The Juvenile Reform Amendment of 1978*

In 1978 the state legislature, in an attempt to expand the effect of the DFA and restrictive placement provisions previously enacted in 1976¹²² enacted a number of amendments to the Family Court Act.¹²³ These amendments expanded the type of criminal activity which constitutes a DFA.¹²⁴ In addition, the dispositional alternatives available to a family court judge were increased.¹²⁵ Third, the instances when the fingerprints of a juvenile could be retained were broadened.¹²⁶ Fourth, the cases which could be adjusted without court approval were enlarged to include many non-violent acts.¹²⁷

the fact-finding progress at the conclusion of the survey. 161 (85%) resulted in convictions, but only 76 (47% of the convictions) led to convictions of DFA's. *Id.* at 9-11, 34-35. At the end of the sample period, 55 of the juveniles convicted of DFA's had been placed. Twenty-two received restrictive secure placements and twenty-nine received either Title II or III placements. *Id.* at 14-15, 40.

121. Compare note 12 *supra* with note 91 *supra*.

122. See note 95 *supra*. See generally Note, *Juvenile Justice: Alternative Answers*, 40 ALB. L. REV. 179 (1975).

123. 1978 N.Y. Laws ch. 478.

124. See text accompanying notes 128-31 *infra*.

125. See text accompanying notes 132-34 *infra*.

126. N.Y. FAM. CT. ACT § 724(a) (McKinney Supp. 1979) allows the police to take fingerprints and photographs of any juvenile eleven years of age or older who is charged with a class A or B felony and any juvenile thirteen years old or older who is charged with a class C or greater felony. Section 753-b provides for the retention of the fingerprints and photographs if the juvenile is convicted of an act which if done by an adult would constitute a felony. An exception exists with regard to eleven and twelve year olds. Their prints can be retained only if they are convicted of class A or B felonies. Where the juvenile is subsequently convicted as an adult of a crime either before reaching the age of 21 or within three years after his discharge from placement, whichever occurs later, the prints and photos become a permanent part of his adult criminal record. If, on the other hand, the juvenile does not have any adult convictions or pending charges which result in convictions by this time, the records are destroyed. Formerly, the law had permitted retention of the prints only if the juvenile had been convicted of a class C or greater felony. *Id.* § 753-b.

127. N.Y. FAM. CT. ACT § 734(a)(ii) (McKinney Supp. 1979).

The amendments expanded the scope of the DFA provisions¹²⁸ in two ways. First, some provisions now extend to acts committed by thirteen year-olds. Second, the amendments added two predicate felony clauses to the statute. The law now includes as a DFA an act committed by a fourteen or fifteen year-old which, if committed by an adult, would constitute second degree assault or second degree robbery where the juvenile has a prior conviction for such crimes or a prior conviction for a DFA or for what would have been a DFA had the juvenile not been underage at the time he committed the act.¹²⁹

The other predicate felony clause makes a DFA any offense "other than a misdemeanor, committed by a person at least seven but less than sixteen years of age, but only where there have been two prior findings by the court that such person has committed a prior act which, if committed by an adult would be a felony."¹³⁰ This provision treats a non-violent recidivist as harshly as a violent one.¹³¹

The predicate felony sections have created serious problems. On a practical level there is often a considerable lag in determining the juvenile's prior record in other jurisdictions because such records are not computerized statewide. Consequently, this information oftentimes does not become available until after the petition has been filed or after the case has been adjudicated. In addition, the juvenile's family court findings are usually not available to the police when the juvenile is being processed. This prevents the police from ascertaining whether a DFA or non-DFA offender is involved.

On the dispositional level, the amendments allow a court to impose a maximum five-year restrictive placement on a juvenile found to have committed his second DFA.¹³² This is true even if the predicate felony was not a DFA at the time the juvenile committed it. One amendment curiously shortened the period of placement for misdemeanor offenses from eighteen months to a maxi-

128. *Id.* § 712(h).

129. *Id.* § 712(h)(iv).

130. *Id.* § 712(h)(v).

131. For example, a twelve year old with a predilection for stealing credit cards would become a DFA offender upon his third conviction and upon a fourth conviction would become a second DFA offender subject to the same five-year restrictive placement as would a juvenile convicted of a class A DFA such as murder.

132. *Id.* § 753-a(5).

mum initial period of one year.¹³³ Another amendment allowed the dispositional judge to "authorize" DFY to place a juvenile convicted of a non-DFA into a secure setting.¹³⁴

In family court, the judge is the trier of the facts.¹³⁵ The Family Court Act amendments requires that probation information not be made available to the judge prior to disposition¹³⁶ to insure that the juvenile is accorded an impartial hearing. However, when a judge is confronted with a petition prominently marked "Designated Felony,"¹³⁷ presented in the DFA part by a district attorney charging a twelve year old with grand larceny, the judge must certainly realize that the juvenile has at least two prior felony findings.

This point has been raised routinely by law guardians. However, courts have held that judges as trained triers of fact can disregard their knowledge of a juvenile's record in reaching a conclusion as to whether the juvenile has committed the alleged act. Therefore, a contention that the juvenile is denied due process of law under these circumstances will fail.¹³⁸ The Second Department has recently held that the designation of a petition as a "Designated Felony Act Petition"¹³⁹ is proper at the fact-finding stage of a proceeding or only at the dispositional stage. In *Matter of Luis R.*,¹⁴⁰ it was felt that no legitimate state interest is served by revealing a juvenile's record to the court prior to a fact-finding hearing and "can only cause mischief by needlessly calling into question the impartiality and integrity of the court."¹⁴¹ The court in *Luis R.* directed that such designation be made on the petition only after a

133. *Id.* § 756(b). This change is odd in light of one of the purposes of the amendment, i.e., "[t]o toughen the Juvenile Justice Reform Act of 1976. . . ." News Memorandum of State Executive Department, 1978 N.Y. Laws 1724.

134. N.Y. FAM. CT. ACT § 756(a)(iv) (McKinney Supp. 1979). See *Matter of John Edward B.*, 70 A.D.2d 1004, 1006, 418 N.Y.S.2d 186, 188 (3d Dep't 1979).

135. See *Matter of Luis R.*, 98 Misc. 2d 994, 414 N.Y.S.2d 997 (Fam. Ct. 1979).

136. N.Y. FAM. CT. ACT § 750(1) (McKinney Supp. 1979).

137. See text accompanying note 101 *supra*.

138. See, e.g., *Matter of Robert D.*, 97 Misc. 2d 315, 411 N.Y.S.2d 482 (Fam. Ct. 1978); *Matter of James H.*, No. D3167/78 (Fam. Ct. Sept. 29, 1978); *Matter of Juan R.*, No. D2891/78 (Fam. Ct., Dec. 8, 1978).

139. *Matter of Samuel P.*, 424 N.Y.S.2d 837 (Fam. Ct. 1980), *rev'd*, N.Y.L.J. Aug. 8, 1980, at 15, col. 5 (2d Dep't July 26, 1980). See also N.Y. FAM. CT. ACT § 712(h)(v) (McKinney Supp. 1979).

140. 98 Misc. 2d 994, 414 N.Y.S.2d 997 (Fam. Ct. 1979).

141. *Id.* at 999, 414 N.Y.S.2d at 1000.

fact-finding established that the juvenile committed a DFA.¹⁴² In *Matter of Frederick B.*,¹⁴³ a DFA designation on a petition was permitted prior to completion of the fact-finding hearing. The court in *Frederick B.* construed the intent of the Family Court Act rule against a judge examining probation material¹⁴⁴ to exclude incompetent, hearsay evidence of a juvenile's history in general rather than evidence of past findings *per se*. In addition, the court considered a failure to make the designation to be a denial of equal protection by "affording an unfair advantage to respondents who choose not to testify over those respondents who exercise their constitutional right to testify and are subject to impeachment by reason of prior felony findings."¹⁴⁵ The marking of petitions as DFA petitions at the fact-finding stage of a juvenile proceeding continues to be done routinely in New York despite the possibility of bias towards the juvenile. The continued use of this procedure reflects in part the desire of the state legislature and the judiciary to protect the community from further crimes by recidivist juvenile offenders.

C. The Crime Package Bill

The JJRA amendments of 1978 had not even gone into effect, when the N.Y. legislature responding to the vicious murders committed by Bosket and other juveniles enacted the Crime Package Bill¹⁴⁶ in an effort to make the system more effective in dealing with juvenile crime. The legislature sought to effectuate this goal by making juveniles criminally responsible as adults for a large number of violent crimes and by providing longer sentences for juveniles convicted of such crimes. Three specific revisions enacted as part of the Crime Package Bill will be discussed. First, the newly-created juvenile offender ("JO") category will be analyzed. Second, the Bill's removal procedure will be discussed. Third, the penalties that can be imposed upon juveniles convicted of crimes as adults will be covered.

142. See also *Matter of Samuel P.*, 424 N.Y.S.2d 837 (Fam. Ct. 1980), *rev'd*, N.Y.L.J., Aug. 8, 1980, at 15 col. 5 (2d Dep't July 26, 1980).

143. 425 N.Y.S.2d 44 (Fam. Ct. 1978).

144. See text accompanying note 136 *supra*.

145. 425 N.Y.S.2d at 45. See also *Matter of Robert D.*, 411 N.Y.S.2d 482 (Fam. Ct. 1978); *Matter of Francis L. and Juan B.*, Nos. D-2701/78, D-2891/78 (Fam. Ct. Dec. 8, 1978).

146. 1978 N.Y. Laws ch. 481.

1. *The Juvenile Offender Category*

A juvenile offender is a fourteen or fifteen year-old who is held criminally responsible for any of fourteen different crimes¹⁴⁷ or a thirteen year old who is criminally responsible for acts constituting second degree murder.¹⁴⁸ The defense of infancy is no longer available for these crimes.¹⁴⁹

A JO is treated as an adult when arrested. Once arrested, the juvenile is taken by the police to the central booking facility where he is photographed and fingerprinted. The case is then screened by an assistant district attorney.¹⁵⁰ If the attorney decides that the act allegedly committed by the juvenile does not fall within the statute, he can decline to prosecute the juvenile as a JO and refer the case to family court. Sixteen percent of juveniles charged as JO's are disposed of at this point.¹⁵¹ The district attorney can also dis-

147. These crimes are: second degree murder (including felony murder where the juvenile is criminally responsible for the underlying crime), first degree kidnapping, first degree manslaughter, first and second degree arson, first degree burglary, first degree sodomy (where force is used or the victim is incapable of consent but not where the victim is less than eleven), second degree burglary (where the defendant is armed, causes physical injury, uses or threatens use of a dangerous instrument or displays what appears to be a firearm), first degree rape (or by forcible compulsion or where the victim is incapable of consent), first degree robbery and second degree robbery (where the defendant causes physical injury or displays what appears to be a firearm), first degree assault (where a serious physical injury is caused by a deadly weapon or dangerous instrument or where the victim is intentionally maimed) and attempted murder and kidnapping. N.Y. PENAL LAW § 10.00(18) (McKinney Supp. 1979).

As originally enacted, juveniles could be charged only with crimes for which they were criminally responsible. Thus, if an incident involved sexual abuse as well as robbery, the indictment could not charge sexual abuse because the latter is not a juvenile offense. Recent legislation has lessened this inconsistency by allowing inclusion of non-JO charges where the non-JO charges are based upon "the same act or the same criminal transaction" or where proof of one charge would be material and admissible as evidence in chief, "upon a trial of the other." N.Y. CRIM. PROC. LAW § 220.20(6). If the court subsequently dismisses the JO charge, the other charges will be removed. *Id.* §§ 210.20(5), .30(7).

148. *Id.* A 13 year old is not criminally responsible for felony murder inasmuch as he is not criminally responsible for any of its underlying felonies.

149. N.Y. PENAL LAW § 30.00(2) (McKinney 1978). See *People v. Ryal*, 420 N.Y.S.2d 257 (Sup. Ct. 1979).

150. STATE OF NEW YORK, DIVISION OF CRIMINAL JUSTICE SERVICES, *Juvenile Offenders in New York City: Their Characteristics and the Course of Case Processing*, 4, 5 (1979) [hereinafter cited as *DCJS—NYC*]. This study was done in conjunction with the New York City Criminal Justice Agency. Although quite detailed, the study covers only the first nine months of the law, *i.e.*, until May 31, 1979.

151. State of New York, Division of Criminal Justice Services, *Juvenile Offenders in New York State*, September 1, 1978-February 29, 1980 Table 3 (1980) [hereinafter cited as

miss the charges if it is believed that the charges cannot be proven. This occurs in thirteen percent of the total cases.¹⁵² If the district attorney elects to prosecute, the juvenile is arraigned in a criminal court as an adult. The criminal court judge can release the juvenile on his own recognizance, fix bail,¹⁵³ or deny bail and remand the juvenile to the Department of Correctional Services ("DOCS") to be held at a place designated by DFY for the reception of children.¹⁵⁴

After the juvenile has been arraigned, a preliminary hearing is held to determine whether there is reasonable cause to believe the juvenile committed a juvenile offense.¹⁵⁵ If no such finding is made at the preliminary hearing, the court must dismiss the felony complaint. If the court finds that there is reasonable cause to believe the juvenile has committed a delinquent act but not a juvenile offense, it must remove the proceeding to family court.¹⁵⁶

2. Removal

A juvenile proceeding may be removed in criminal court, in supreme court, by a grand jury, by a guilty plea, and at sentencing. Following amendments enacted in 1979, a criminal court judge must order removal to the family court at the request of the district attorney, if upon consideration of specified criteria, it is deter-

DCJS—NYS].

152. *Id.*

153. See N.Y. CIV. PRAC. LAW § 500.10(2), (3), (9) (McKinney 1971) for definitions of these terms. Criteria for granting bail are set forth in N.Y. CRIM. PROC. LAW § 510.30(2) (McKinney 1971 and Supp. 1979). The concept of bail for juveniles is perplexing because many of the criteria for determining whether to grant bail really do not apply to juveniles. For example, in determining bail a court should consider, *inter alia*, the defendant's employment and financial resources as well as any ties in the community. *Id.* § 510.30(2)(a)(ii),(iii).

154. Approximately 45% of juveniles arraigned are released on their own recognizance. Bail is set for another 50% and denied for 5%. The average bail set is \$2,375 with the median being \$1,000. Only 12% of those for whom bail is set are able to post it at arraignment. DCJS—NYC, *supra* note 150, at 14-17. Most juvenile offenders are detained only a few days. However, 20% are held longer than six days. In fact 12 juveniles have been held in excess of 270 days and two in excess of 450 days. DCJS—NYS, *supra* note 151, at Table 9.

155. N.Y. CRIM. PROC. LAW § 180.75(3)(c) (McKinney Supp. 1979). If the juvenile waives a hearing, the court must order that the juvenile be held for grand jury action. *Id.* § 180.75(2).

156. *Id.* § 180.75(3)(b). The court must specify the act or acts it found reasonable cause to believe the juvenile committed.

mined that removal is in the interests of justice.¹⁵⁷ However, if the juvenile is charged with murder, rape, sodomy or an "armed felony,"¹⁵⁸ a court to order removal, in addition, must also find at least one of the following factors:

- (i) mitigating circumstances that bear directly upon the manner in which the crime was committed; or (ii) where the defendant was not the sole participant in the crime, the defendant's participation was relatively minor although not so minor as to constitute a defense to the prosecution; or (iii) possible deficiencies in proof of the crime.¹⁵⁹

A juvenile can move for removal either in criminal court or in supreme court, provided he has not waived his right to a preliminary hearing or such a hearing has not yet been held.¹⁶⁰ If the juvenile properly makes such a motion in supreme court, that court is authorized to sit as a criminal court and conduct a preliminary hearing. The supreme court can, on its own or another party's motion and over the objection of the district attorney, remove any proceeding except those involving murder, rape, sodomy or an armed felony¹⁶¹ if the court finds it appropriate, based upon an

157. *Id.* § 180.75(4). The original juvenile offender statute had left the term "interests of justice" undefined. This resulted in some challenges to the constitutionality of the law. See *People v. Williams*, 97 Misc. 2d 24, 410 N.Y.S.2d 973 (County Ct. 1978). Legislation enacted in 1979 specifically sets forth the criteria:

- (a) the seriousness and circumstances of the offense; (b) the extent of harm caused by the offense; (c) the evidence of guilt whether admissible or inadmissible at trial; (d) the history, character and condition of the defendant; (e) the purpose and effect of imposing upon the defendant a sentence authorized for the offense; (f) the impact of a removal of the case to the family court on the safety or welfare of the community; (g) the impact of a removal of the case to the family court upon the confidence of the public in the criminal justice system; (h) where the court deems it appropriate, the attitude of the complainant or victim with respect to the motion; and (i) any other relevant fact indicating that a judgment of conviction in the criminal court would serve no useful purpose.

N.Y. CRIM. PROC. LAW § 210.43(2) (McKinney Supp. 1979).

158. An "armed felony" is a "violent felony offense," which includes as an element either "(a) possession, being armed with or causing serious physical injury by reason of a deadly weapon if the weapon is a loaded weapon for which a shot readily capable of causing death or serious injury may be discharged or (b) display of what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm." N.Y. CRIM. PROC. LAW § 1.20(41) (McKinney 1972). For a definition of what constitutes a violent felony offense see N.Y. PENAL LAW § 70.02(1) (McKinney Supp. 1979).

159. N.Y. CRIM. PROC. LAW § 180.75(4) (McKinney Supp. 1979); See *People v. Williams*, 97 Misc. 2d 24, 410 N.Y.S.2d 978 (Sup. Ct. 1978).

160. N.Y. CRIM. PROC. LAW § 180.75(5) (McKinney Supp. 1979).

161. This refers to an armed felony involving possession of a loaded firearm rather than

“interests of justice” analysis.¹⁶² This is the only instance where removal is possible in supreme court over the district attorney’s objection.¹⁶³ If the supreme court finds that murder, rape, sodomy or an armed felony¹⁶⁴ is involved, it can remove only with the consent of the district attorney and after undertaking the three-factor analysis.¹⁶⁵ Removal over the district attorney’s objection is never possible in criminal court.¹⁶⁶ Of those juveniles who are arrested for juvenile offenses, thirty-five percent are removed to family court with another thirteen percent being dismissed by the criminal court.¹⁶⁷

Approximately one-third of the juveniles whose cases are not disposed of in criminal court are referred to the grand jury.¹⁶⁸ A grand jury has three alternatives as to the disposition of the juvenile. First, a grand jury can indict the juvenile for the crimes for which he is charged. Second, the grand jury can dismiss the charges if there is insufficient proof of the commission of a crime. Third, a grand jury could find that a crime has been committed but not one for which a juvenile is criminally responsible. If the latter conclusion is reached, the grand jury can file a request to remove the proceeding to a family court.¹⁶⁹ If a grand jury does not indict within thirty days of the juvenile’s initial confinement, the juvenile must be released on his own recognizance.¹⁷⁰ Grand jury removal is surprisingly common. In the first nine months following the enactment of the Crime Package Bill, grand juries dismissed five percent of the cases referred to them and removed another

involving mere display of what appears to be a firearm. See note 158 *supra*.

162. N.Y. CRIM. PROC. LAW § 180.75(4) (McKinney Supp. 1979).

163. *Id.* § 210.43(1). See *People v. Putland*, 423 N.Y.S.2d 999, 1005-06 (County Ct. 1979).

164. See note 161 *supra*.

165. See text accompanying note 159 *supra*.

166. N.Y. CRIM. PROC. LAW § 180.75(4) (McKinney Supp. 1979).

167. *DCJS—NYS*, *supra* note 151, at Table 3.

168. *Id.* See N.Y. CRIM. PROC. LAW § 190.71 (McKinney Supp. 1979); *People v. Mason*, 99 Misc. 2d 583, 416 N.Y.S.2d 981 (Sup. Ct. 1979); *People v. Williams*, 100 Misc. 2d 183, 418 N.Y.S.2d 737 (County Ct. 1979).

169. N.Y. CRIM. PROC. LAW § 190.71 (McKinney Supp. 1979). When the case is removed by the criminal court, the grand jury loses its power to indict, even if the charges are pending before the grand jury at the time of removal. *Rodriguez v. Myerson*, 69 A.D.2d 162, 170, 418 N.Y.S.2d 936, 941 (2d Dep’t 1979).

170. N.Y. CRIM. PROC. LAW § 190.80 (McKinney Supp. 1979). Adults can be held for 45 days.

sixteen percent.¹⁷¹

In *Vega v. Bell*,¹⁷² the New York Court of Appeals, in its first ruling on the juvenile offender law, held that a juvenile has neither a statutory nor a constitutional right to a hearing before indictment by a grand jury as to whether the interests of justice require removal of the proceeding.¹⁷³

After *Vega*, the legislature amended the juvenile offender law to specifically provide for removal hearings in supreme court.¹⁷⁴ These hearings can either be held while the case is pending in criminal court¹⁷⁵ or after indictment, provided that the juvenile has not previously been denied a motion for removal.¹⁷⁶ The procedure and criteria for post-indictment removal are the same as the procedure and criteria for pre-indictment removal. In either instance the court can hold a hearing to determine whether the evidence indicates that a crime has been committed for which consent of the district attorney is necessary in order to grant removal.¹⁷⁷

Removal can also occur in the supreme court after a plea has been entered. When a fourteen or fifteen year-old charged with a crime other than murder¹⁷⁸ enters a guilty plea, the district attorney may recommend removal of the proceeding to family court. If a district attorney chooses to make such a recommendation, a memorandum must be submitted outlining how the "interests of justice" would best be served by removal to family court. In addition, if the juvenile is charged with first degree rape or sodomy, or an armed felony not involving mere display of a firearm, or, in the

171. *DCJS—NYC*, *supra* note 150, at 26.

172. 47 N.Y.2d 543, 393 N.E.2d 450, 419 N.Y.S.2d 454 (1979).

173. *Id.* at 552-53, 393 N.E.2d at 455-56, 419 N.Y.S.2d at 460. The court distinguished *Kent* on the ground that the statutory scheme in *Kent* involved a waiver of juvenile court jurisdiction and transfer to criminal court, whereas the New York statute imposed the adult system on all youngsters over a certain age who were accused of specified criminal activities unless special circumstances warranted transfer to family court. *Id.* at 550-51, 393 N.E.2d at 454-55, 419 N.Y.S.2d at 459. *See also* *People v. Ryals*, 420 N.Y.S.2d 257, 261 (Sup. Ct. 1979).

174. N.Y. CRIM. PROC. LAW § 180.75(5) (McKinney Supp. 1979).

175. *See* text accompanying note 160 *supra*.

176. N.Y. CRIM. PROC. LAW §§ 180.75(5),(6)(d), 210.43 (McKinney Supp. 1979).

177. *Id.* *See* text accompanying notes 160-67 *supra*.

178. The statute provides that a fourteen or fifteen year-old charged with second degree murder can enter a guilty plea only to a crime for which he is criminally responsible. Removal is not possible in this circumstance. N.Y. CRIM. PROC. LAW § 220.10(g)(i) (McKinney Supp. 1979).

alternative, if a thirteen year-old is charged with second degree murder, the district attorney must establish: that mitigating circumstances exist; or that the juvenile was a minor participant in the criminal acts; or that there are deficiencies in the proof against the juvenile;¹⁷⁹ or "where the juvenile offender has no previous adjudications of having committed a designated felony act, . . . regardless of the age of the offender at the time of the commission of the act, that the criminal act was not part of a pattern of criminal behavior and, in view of the history of the offender, is not likely to be repeated."¹⁸⁰ If the court determines, based upon the district attorney's memorandum, that the interests of justice would best be served by removal, a plea of guilty for a crime or act for which the juvenile is not criminally responsible may be entered,¹⁸¹ except that a thirteen year-old charged with second degree murder may only plead to a DFA.¹⁸² The court must then remove the action to family court upon acceptance of such a plea.¹⁸³

If a juvenile's case progresses through the system without being removed from criminal court, from supreme court, by a grand jury, or at sentencing, it will proceed to a jury trial in the same manner as any adult case. Nevertheless, the juvenile has two additional opportunities for removal to family court. If a jury convicts a juvenile of a crime for which he is not criminally responsible,¹⁸⁴ the criminal court must order the verdict vacated and replaced by a juvenile delinquency fact determination.¹⁸⁵ If a jury verdict is vacated, the court must remove the proceeding to family court.¹⁸⁶

179. See text accompanying note 159 *supra*.

180. N.Y. CRIM. PROC. LAW § 220.10(g)(iii) (McKinney Supp. 1979).

181. If the indictment does not charge a juvenile with second degree murder, and a plea of guilty is not accepted, then any plea of guilty must be for a crime for which the juvenile is criminally responsible. *Id.* § 220.10(5)(g)(ii).

182. This situation arose because thirteen year-olds are only criminally responsible for murder and under the old statute could plead guilty only to murder. *Id.* § 220.10(5)(h) (McKinney Supp. 1978) (amended 1979). The former provision gave defense counsel little incentive to plea bargain.

183. *Id.* § 220.10(5)(g)(iii) (McKinney Supp. 1979).

184. N.Y. CRIM. PROC. LAW § 330.50 (McKinney 1971) requires the court to instruct the jury with respect to such lesser included charges.

185. *Id.* § 310.85(3) (McKinney Supp. 1979).

186. *Id.* § 310.85(2). If a verdict of guilty is also rendered with respect to a crime for which the juvenile is criminally responsible, or if the juvenile is awaiting sentence or is under a sentence of imprisonment on another criminal conviction, the verdict for the crime for which he is not criminally responsible must be set aside and deemed a nullity.

In addition, if the juvenile is convicted of a crime for which he is found to be criminally responsible, other than second degree murder, the action may be removed upon motion by the juvenile, and with the consent of the district attorney.¹⁸⁷ A memorandum must be submitted in support of such a motion, outlining the circumstances which justify removal.¹⁸⁸

Regardless of the stage at which a case is removed to family court, an order of removal must direct that all of the pleadings and proceedings in an action be transferred to the family court.¹⁸⁹ The minutes of any hearings in supreme or criminal court or before a grand jury are incorporated into the pleadings before the family court.¹⁹⁰ After removal, a juvenile is arraigned in family court and a trial date is determined. If the juvenile did not receive a probable cause hearing in criminal court, one can be held in family court.¹⁹¹

3. Sentencing

The foremost concern of a convicted juvenile offender is the sentence he will receive for the crimes he has committed. The juvenile offender law theoretically provides for harsher penalties than those imposed in family court but not as harsh as those imposed on

187. *Id.* § 330.25(1).

188. These factors include: (1) mitigating circumstances that bear directly upon the manner in which the crime was committed; or (2) where the defendant was not the sole participant in the crime, the defendant's participation was relatively minor although not so minor as to constitute a defense to the prosecution; or (3) where the juvenile offender has no previous adjudications of having committed a designated felony act, . . . regardless of the age of the offender at the time of the commission of the act, that the criminal act was not part of a pattern of criminal behavior and, in view of the history of the offender, is not likely to be repeated. *Id.*

189. *Id.* § 725.05(8).

190. *Id.*

191. N.Y. FAM. CT. ACT § 739(c) (McKinney Supp. 1979).

adults.¹⁹² The New York Penal Law mandates that the sentencing court shall impose an indeterminate sentence¹⁹³ for a felony committed by a juvenile offender.¹⁹⁴ In addition, restrictions are placed upon the imposition of consecutive sentences for juvenile offenders with more than one conviction.¹⁹⁵

A convicted juvenile offender, after sentencing, is initially placed in a secure DFY facility¹⁹⁶ where he remains until he is twenty-one years old,¹⁹⁷ unless his sentence expires earlier. A convicted JO is

192.

CRIME	ADULT PENALTY*	JO PENALTY	DFA PENALTY
Murder 2	A-1 Felony 15-25 to life	5-9 to life	5 yr. restrictive placement
Arson 1, Kidnapping	A-1 Felony 15-25 to life	4-6 to 12-15 yrs.	5 yr. restrictive placement
Rape 1, Robbery 1, Sodomy 1, Manslaughter 1, Burglary 1	Class B Felony up to 1/3 of max. to 25 yrs.	1/3 of max. to 10 yrs.	3 yr. restrictive placement
Burglary 2, Robbery 2, Assault 1	Class C Felony up to 1/3 of max. to 15 yrs.	1/3 of max. to 7 yrs.	3 yr. restrictive placement

* Adult penalties may vary somewhat because certain conditions may mandate longer sentences.

See N.Y. PENAL LAW §§ 70.00, 70.05 (McKinney 1975 and Supp. 1979); N.Y. FAM. CT. ACT. § 753-a(2-a),(3),(4) (McKinney Supp. 1979).

193. An indeterminate sentence is a sentence with both a maximum and minimum term.

194. N.Y. PENAL LAW § 70.05(1) (McKinney Supp. 1979). The class A felony of second degree murder carries a minimum of five to nine years with a maximum of life. The class A felonies of first degree arson and first degree kidnapping carry minimum sentences of four to six years and maximums of 12-15 years. For a class B felony, the minimum is one-third of the maximum term imposed; the maximum is ten years. Class C felonies also carry a minimum of one-third of the maximum term imposed; the maximum is seven years. *Id.* § 70.05(2),(3).

195. If the juvenile is not convicted of a class A felony, two consecutive sentences may not exceed a total of ten years. If the juvenile is convicted of a class A felony kidnapping or arson, the total aggregate may not exceed 15 years. *Id.* at § 70.30(1)(d).

196. N.Y. PENAL LAW § 70.05(4) (McKinney Supp. 1979). Prior to 1976, a juvenile convicted of a class A or B felony could have been sent to an adult prison. See text accompanying notes 90-93 *supra*.

197. N.Y. EXEC. LAW § 515-b(2) (McKinney Supp. 1979). It should be noted that a juvenile will receive credit against his minimum sentence for any time spent in custody prior to sentencing. N.Y. PENAL LAW § 70.30(3) (McKinney Supp. 1979). As well as good behavior time up to one third of his maximum sentence. *Id.* § 70.30(4).

placed in the same type of facility as he would have been if the juvenile had been convicted of a DFA. After the juvenile's twenty-first birthday, he is placed with the Department of Correctional Services ("DOCS") to complete his term in an adult facility.¹⁹⁸

A juvenile can also be transferred by DFY to DOCS before he reaches his twenty-first birthday. The procedure for transfer depends upon the age of the juvenile. If the juvenile is between the ages of sixteen and eighteen, DFY may apply to the sentencing court for transfer to DOCS if the juvenile is not likely to benefit from the progress offered by the DFY facilities. A possible due process violation is averted by the provision that "[s]uch application shall be made upon notice to the youth, who shall be entitled to be heard upon the application and to be represented by counsel or law guardian."¹⁹⁹ If the juvenile is between eighteen and twenty-one years of age, DFY may effect a transfer simply by certifying to DOCS that the juvenile is not likely to benefit from DFY.²⁰⁰ The only difference between juvenile offenders confined in DFY's secure facilities and juveniles confined there because of convictions for DFA's is that the former serve their entire sentence at the secure facility rather than being transferred to a residential facility at the end of a year or eighteen months. It is also apparent that, given the range of sentences presently imposed upon JO's, most JO's will complete their sentences in a DFY facility without ever being transferred to an adult prison.²⁰¹

The juvenile offender law, as enacted in 1978, specifically precluded a court from utilizing non-jail sentencing alternatives such as probation, fines, and conditional and unconditional discharges. It also prohibited giving youthful offender treatment to a juvenile.²⁰² Youthful offender ("YO") treatment is ordinarily available

198. *Id.* § 515-b(6).

199. *Id.* § 515-b(4).

200. *Id.* § 515-b(5). This section of the Executive Law has yet to be challenged on due process or equal protection grounds, most likely because the distinction between those juveniles who are older than eighteen and those who are younger bears reasonable relation to the varying objectives of the juvenile justice system.

201. The disparity in treatment of JO's and juveniles convicted of DFA's does not necessarily raise a viable constitutional question of equal protection so long as the disparity is reasonable in relation to permissible statutory goals. As of June 1980, only one juvenile in the entire state has been transferred to DOCS.

202. N.Y. PENAL LAW § 60.10 (McKinney 1971) (amended 1979). The denial of YO treatment was attacked in several cases as unconstitutional, with mixed results. See *People v.*

to any person over sixteen and under nineteen years of age, unless the youth is convicted of a class A-I or A-II felony, has previously been convicted and sentenced either for a felony or adjudicated a youthful offender following conviction for a felony, and has not been found to have previously committed a DFA.²⁰³ A YO adjudication is not a record of conviction of a crime.²⁰⁴ Most significantly, the maximum sentence upon a YO adjudication is an indeterminate term of four years.²⁰⁵

The denial of YO treatment for a juvenile offender led to the anomalous situation where a convicted eighteen year-old was being treated less harshly than his equally culpable fourteen year-old accomplice.²⁰⁶ The New York legislature remedied this in 1979 by authorizing a court to grant YO treatment if it finds that the interests of justice would be served.²⁰⁷ In addition, the non-jail sentencing alternatives mentioned above are currently available.²⁰⁸ Therefore, it appears that, by allowing courts to utilize probation, fines and discharges, the legislature has returned, albeit in a limited fashion, to some of the rehabilitative ideals espoused by the nineteenth century reformers.

IV. Analysis of New York's Juvenile Offender Law

Serious constitutional and statutory problems were created by the Juvenile Offender Law of 1978 with which courts are still struggling. These include whether JO proceedings in criminal and

Michael D., 99 Misc. 2d 816, 417 N.Y.S.2d 604 (Sup. Ct. 1979) (statute held unconstitutional); *People v. Mason*, 99 Misc. 2d 583, 416 N.Y.S.2d 981 (Sup. Ct. 1979) (statute upheld); *People v. Bates*, N.Y.L.J. June 1, 1979 at 13, col. 1 (statute upheld).

203. N.Y. CRIM. PROC. LAW § 720.10(2) (McKinney Supp. 1979).

204. *Id.* § 720.35(1) (McKinney 1971). Records and papers relating to YO proceedings are confidential. *Id.* § 720.35(2) (McKinney Supp. 1979).

205. N.Y. PENAL LAW §§ 60.02, 70.00(2)(e) (McKinney 1975 and Supp. 1979).

206. This situation has been held to violate the equal protection clause of the fourteenth amendment. *See People v. Michael D.*, 99 Misc. 2d 816, 417 N.Y.S.2d 604, 606-08 (Sup. Ct. 1979).

207. N.Y. CRIM. PROC. LAW § 720.20(1) (McKinney Supp. 1979).

208. N.Y. PENAL LAW §§ 60.02(2), 60.10(2) (McKinney Supp. 1979). Allowing juvenile offenders to receive YO treatment alleviates a great inequity, *see* text accompanying note 206 *supra*, but also undermines the purpose of trying the juvenile in supreme court. The sentence imposed in supreme court is likely to be less severe than that which would have been imposed in family court. Moreover, the juvenile's record is not marred by a predicate conviction.

supreme court should be open to the press and public²⁰⁹ and whether the major delegation of authority to the district attorney regarding the issue of removal is an encroachment on the separation of powers.²¹⁰ Two problems will be briefly discussed here. First, the DFA and JO concepts will be analyzed. Second, the juvenile removal process will be examined. This section will conclude with a statistical analysis of the juvenile offender law.

Perhaps the most serious problem plaguing New York's present juvenile justice system is the very foundation upon which it is built, namely, the DFA and JO concepts. The system attempts to differentiate criminal behavior according to the definitional categories set forth in the Penal Law. Unfortunately, there are many heinous acts which depending upon the factual circumstances fail to fall within the ambit of either the DFA or the JO categories, such as attempted rape and attempted robbery and ironically, many less serious acts which do. Only when the system reclassifies the various degrees of criminal acts will it be capable of effectively punishing the worst juvenile criminals.

The current removal procedures in New York must be character-

209. Members of the press and the public may be barred from family court proceedings in New York. N.Y. FAM. CT. ACT § 741(b) (McKinney 1975). In contrast, proceedings in criminal and supreme court are open to both the press and the public. In *People v. Green*, N.Y.L.J. October 16, 1978, at 16, cols. 2-4, a juvenile whose case was pending in criminal court sought to have all hearings closed to the press and public because the proceeding might ultimately be removed to family court. The court, in denying the juvenile's application, held that the public's right to know and to assess the utility of the Crime Package Bill outweighed the juvenile's right to a closed proceeding.

In *Merola v. Bell*, 68 A.D.2d 24, 415 N.Y.S.2d 992 (1st Dep't 1979), a thirteen year-old charged with murder was successful in barring press and public from a suppression hearing. The First Department, in sustaining the trial court's closure order, stated that the adverse publicity which would be generated by the press would seriously impair the juvenile's constitutional right to a trial by impartial jurors. 68 A.D.2d at 24, 415 N.Y.S.2d at 994-95. The New York Court of Appeals upheld the closure order. *Merola v. Bell*, 47 N.Y.2d 965, 393 N.E.2d 1038, 419 N.Y.S.2d 965 (1979), *appeal pending*. See *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368 (1979) (closure order in pretrial proceeding upheld on Sixth Amendment grounds).

The Supreme Court cut back on *Gannett* in *Richmond Newspapers, Inc., v. Virginia*, 444 U.S. 896 (1980). There, the Court stated that while there is not a sixth amendment right of access to a trial, there is a first amendment right of access to criminal trials in the absence of extraordinary circumstances. After *Richmond Newspapers*, a motion to close a juvenile's trial will probably fail for the trial itself as opposed to pre and post-trial proceedings.

210. One court has held that vesting the district attorney with power to withhold consent to removal does not violate this constitutional doctrine. *People v. Putland*, 423 N.Y.S.2d 999 (County Ct. 1979).

ized as inadequate and inefficient. The present procedures require police, prosecutors, defense attorneys and complainants to expend time and resources unnecessarily. It is common for a juvenile to go through three or four court appearances in the adult system before his case is removed to family court. Witnesses may be required to appear in court several times. When the case is removed to family court, the juvenile is usually assigned a new attorney who is in most instances unfamiliar with the prior proceedings.

Another problem with the removal procedure is the method in which it is effected. Assistant district attorneys and criminal court judges are frequently unfamiliar with the range of dispositions and types of placement available in family court and thus make their decisions regarding removal in a vacuum. Moreover, the removal decision is often based on a case's relative strengths rather than on its merits. The statute lists "possible deficiencies in proof of the crime" as one of the grounds for removal.²¹¹ Thus, removal is frequently used as a device to transfer potentially "weak" cases to family court. The family court judge, however, must apply the same rules of evidence and standards of proof as are applied in supreme court.²¹² A "weak case" is rarely strengthened by being declared "possibly deficient in proof" and removed to family court. When the allegations are serious and the juvenile's record merits adult treatment, the case should remain in the adult system regardless of any possible deficiencies in proof.

In view of the fact that the minutes of a removal hearing are incorporated into the pleadings in family court,²¹³ a juvenile's case cannot proceed without them. Unfortunately, it frequently takes as long as two months to procure these minutes, during which time a serious case stands untried. When the minutes do arrive, additional problems are created in that the judge, serving as the finder of fact, has before him all the prior testimony taken at the removal hearing, regardless of whether either counsel wishes to elicit that testimony at the fact-finding hearing. This problem is particularly evident where the minutes not only include the testimony of witnesses who failed to testify at the fact-finding hearing despite their

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

212. N.Y. FAM. CT. ACT § 744 (McKinney 1975).

213. N.Y. CRIM. PROC. LAW § 725.05(8) (McKinney Supp. 1979); N.Y. FAM. CT. ACT § 731(3) (McKinney Supp. 1979).

availability to do so, but also include references to the juvenile's past record which the fact-finding court would ordinarily not be privy to at that point.²¹⁴ As part of the pleadings the removal hearing is not in evidence as such, what weight this testimony should be accorded at the fact-finding is unclear.

While not a clear violation of a juvenile's constitutional rights, this provision violates the spirit of the requirement that the wide range of hearsay material contained in the juvenile's probation file not be considered at a fact-finding hearing.²¹⁵ This provision places an unnecessary burden on a trial judge, forcing him to separate prior testimony he had read from testimony he has heard.²¹⁶

V. Statistical Analysis of the Juvenile Offender Law

The ultimate question in assessing New York's juvenile offender law is whether it operates to distill from those who pass through the system the worst juvenile criminals and whether it effectively punishes them. Unfortunately, statistics reveal that the juvenile offender system is not only awkward and inefficient but in many ways counterproductive. A study of the first eighteen months since the enactment of the juvenile offender law reveals that, during this

214. See N.Y. FAM. CT. ACT § 750 (McKinney Supp. 1979).

215. See note 136 *supra* and accompanying text.

216. See generally *Dutton v. Evans*, 400 U.S. 74, 86 (1970); *United States v. King*, 613 F.2d 670, 673 (7th Cir. 1980); and unavailability, *United States v. Garner*, 574 F.2d 1141 (4th Cir.), *cert. denied*, 439 U.S. 936, 939 (1978) (Stewart, J., dissenting); *United States v. Gonzalez*, 559 F.2d 1271 (5th Cir. 1977) (grand jury testimony held inadmissible); *United States v. Fiore*, 443 F.2d 112 (2d Cir. 1977); *People ex rel. Lauring v. Mucci*, 44 A.D.2d 479, 480, 355 N.Y.S.2d 786, 787 (1st Dep't 1974). See also FED. R. EVID. 804(b)(5); *United States v. Martin*, 615 F.2d 318, 326 (5th Cir. 1980); *Furtado v. Bishop*, 604 F.2d 80, 91 (1st Cir. 1979).

period, there were 2,432 JO arrests statewide,²¹⁷ 86% of which were made in New York City. Of the 2,089 JO arrests made in New York City, the various district attorneys declined to prosecute 16% as JO's, referring them instead to family court,²¹⁸ dismissed 13% and removed 35% to family court. 23% of the total arrests re-

217.

JUVENILE OFFENDERS
STATEWIDE ARRESTS BY CHARGE
September 1, 1978—February 29, 1980

SUBURBAN UPSTATE NEW YORK CITY STATEWIDE

Robbery 1	57(36)	70(38)	974(46)	1101(45)
Robbery 2	37(23)	42(23)	629(30)	708(29)
Assault 1	5(3)	11(6)	88(4)	104(4)
Burglary 1	7(4)	3(2)	27(1)	37(2)
Burglary 2	17(11)	13(7)	29(1)	59(2)
Arson 1 & 2	7(4)	12(6)	44(2)	63(3)
Rape 1	14(9)	12(6)	131(6)	157(6)
Sodomy 1	6(4)	11(6)	43(2)	60(2)
Kidnapping 1 & 2		1(1)	4(0)	5(0)
Att. Murder 2	2(1)	1(1)	57(3)	60(2)
Murder 2*	4(3)	9(5)	44(2)	57(2)
Other	2(1)		4(0)	6(0)
Unknown			25(1)	25(1)
	158(100)	185(100)	2089(100)	2432(100)

* Includes Manslaughter.

Note: Numbers in parentheses are percentages.

DCJS—NYS, *supra* note 151, at Table 2, 11.

218. This occurs when it is believed that the alleged crime is not one for which a juvenile is criminally responsible.

sulted in indictment. The remaining 10% were still pending in either the grand jury or criminal court when the study was concluded.²¹⁹ Of the 493 cases which resulted in indictments, 278 had been resolved in supreme court by the end of the eighteen months; 63% resulted in convictions, usually by guilty pleas; 25% were removed from supreme court because of non-JO findings or for other reasons; and in 12% of the cases, the juvenile was acquitted or the

219.

**JUVENILE OFFENDERS
COURT ACTION BY COUNTY
ALL CASES**

September 1, 1978—February 29, 1980

	KINGS	BRONX	NEW YORK	QUEENS	RICHMOND	CITYWIDE
Declined to Prosecute	134 (17)	81 (20)	85 (18)	26 (7)	1 (2)	327 (16)
Removed to Family Ct.	342 (43)	171 (42)	108 (21)	104 (27)	19 (46)	744 (35)
Dismissed	78 (10)	34 (8)	83 (18)	74 (19)	3 (7)	272 (13)
Subtotal	554 (69)	286 (70)	276 (60)	204 (53)	23 (56)	1343 (64)
Pend. in Crim. Ct.	62 (8)	15 (4)	42 (9)	22 (6)	2 (5)	143 (7)
Pend. in Grand Jury	31 (4)	2 (0)	3 (1)	20 (5)	1 (2)	57 (3)
Indicted	154 (19)	98 (24)	93 (20)	132 (34)	15 (37)	492 (23)
Subtotal	247 (31)	115 (28)	138 (30)	174 (45)	18 (44)	692 (33)
Unconfirmed arrest reports	1 (0)	9 (2)	47 (10)	6 (2)		63 (3)
Total	802 (100)	410 (100)	461 (100)	384 (100)	41 (100)	2098 (100)

Note: Numbers in parentheses are percentages.
DCJS—NYS, *supra* note 151, at Table 3.

proceeding was dismissed.²²⁰

The sentencing figures for this period emphasize the impact that the juvenile offender law has had upon the justice system. In New York City, only 108 juveniles were sentenced as JO's. 31% of the JO's did not receive a jail sentence but rather received a five-year probation term. Eight percent received four-year youthful offender sentences, while 26% received a three-year maximum sentence. In essence, at least 57% of those juveniles sentenced during this pe-

220.

**JUVENILE OFFENDERS
DISPOSITIONS OF INDICTED CASES
September 1, 1978—February 29, 1980**

	KINGS	BRONX	NEW YORK	QUEENS	RICHMOND	CITYWIDE
Guilty By Trial	3 (2)	2 (2)	4 (4)	4 (3)	2 (13)	15 (3)
Guilty By Admission	41 (27)	54 (55)	32 (34)	29 (22)	5 (33)	161 (33)
Total Convictions	44 (29)	56 (57)	36 (39)	33 (25)	7 (47)	176 (36)
Removed With Non-J.O. Finding	1 (1)	14 (14)	8 (9)	40 (30)	—	63 (13)
Removed By Supreme Ct.	2 (1)	—	2 (2)	3 (2)	—	7 (1)
Total Removals	3 (2)	14 (14)	10 (11)	43 (33)	—	70 (14)
Acquitted	2 (1)	3 (3)	—	2 (2)	2 (13)	9 (2)
Dismissed	9 (6)	2 (2)	5 (5)	7 (5)	—	23 (5)
Subtotal	11 (7)	5 (5)	5 (5)	9 (7)	2 (13)	32 (7)
Pending In Supreme Ct.	96 (62)	23 (23)	42 (45)	47 (36)	6 (40)	214 (43)
Total Indictments	154 (100)	98 (100)	93 (100)	132 (100)	15 (100)	492 (100)

Note: Numbers in parentheses are percentages.

Id. at Table 7. Percentages in text are percentages of the cases which as of February 29, 1980 had been resolved.

riod received the same treatment that would have been afforded them in family court. Only 43% received sentences which, if fully served, would be longer than the three-year restrictive placement for a DFA.²²¹ These sentences were served for the most part in DFY facilities and not in adult correctional facilities.

221.

**JUVENILE OFFENDERS
SENTENCES BY COUNTY**

September 1, 1978—February 29, 1980

	KINGS	BRONX	NEW YORK	QUEENS	RICHMOND	CITYWIDE
5 Yrs. Probation	11(25)	7(13)	8(22)	8(24)	—	34(19)
4 Yrs.	—	7(13)	—	2(6)	—	9(5)
Y.O. Subtotal	11(25)	14(26)	8(22)	10(30)	—	43(24)
3 Yrs.	13(30)	6(11)	2(6)	7(21)	—	28(16)
4 Yrs.	—	2(4)	—	—	—	2(4)
5 Yrs.	1(2)	7(13)	2(6)	1(3)	—	11(6)
6 Yrs.	—	2(4)	2(6)	4(12)	—	8(5)
7 Yrs.	1(2)	4(7)	—	—	—	5(9)
8 Yrs.	—	—	—	—	—	—
9 Yrs.	—	5(9)	1(3)	—	—	6(12)
10 Yrs.	1(2)	1(2)	1(3)	—	—	3(7)
Life	1(2)	—	1(3)	—	—	2(5)
J.O. Subtotal	17(38)	27(48)	9(25)	12(36)	—	65(37)
Pending Sentencing	16(36)	15(27)	19(53)	11(33)	7(100)	68(39)
Total Convictions	44(100)	56(100)	36(100)	33(100)	7(100)	176(100)

Note: All sentences indicated are maximums. For juvenile offenders, the minimum sentence is 1/3 the maximum, except when the conviction is for murder; then, the minimum sentence can range from five to nine years.

Note: Numbers in parentheses are percentages.

Id. at Table 8. Percentages in text represent percentage of those cases which as of February 29, 1980 had been resolved.

Sentencing data on juvenile offenders sentenced to DFY from September 1, 1978 until June 13, 1980²²² reveals that 36% of those in DFY custody were sentenced to a maximum term of three years or less. Another 26% were sentenced to a four-year maximum. 62 percent are serving sentences from which they can expect to be conditionally released within 36 months. Only 17% of those sentenced received minimum sentences of three years or more. Sentences imposed for the same crime appear to vary significantly.²²³

222. The Statistics and Survey Unit of DFY prepared a roster of all the juveniles sentenced to DFY as JO's during this 21-month period. Before being made available, the roster was edited to exclude the name and other identifying data of the juvenile involved. However, it does include the juvenile's date of sentence, the maximum and minimum sentence received, the facility to which he was sent, the amount of jail time he had served prior to sentence, and the crimes for which he was sentenced. The roster also includes the date of eligibility for parole as well as the conditional release date, which is the date upon which the juvenile would ordinarily be released.

223.

Sentence (Yrs.)	Average Period Before Parole Eligibility (Months)	Average Period Before Conditional Release Date (Months)	Number of Juveniles Sentenced	Percentage of Juveniles in DFY Custody (%)
0-1	—	8	1	.07
0-3	17	21	11	8
0-4	15	28	21	16
1-3	13	21	36	27
1-4	17	30	14	10
1-5	20	37	4	3
1-6	18	30	2	1
2-5	n.a.	n.a.	2	1
2-6	19	43	11	8
2-7	21	47	9	7
3-8	n.a.	n.a.	1	.7
3-9	29	65	8	6
3-10	36	74	11	8
5 to life	53	n.a.	2	1
7 to life	n.a.	n.a.	1	.7
9 to life	99	n.a.	1	.7
Totals	—	—	135	100

DCJS—NYS, *supra* note 151, at Table 2-5. See also EXECUTIVE ADVISORY COMMITTEE ON SENTENCING, CRIME AND PUNISHMENT IN NEW YORK: AN INQUIRY INTO SENTENCING AND THE

Those juveniles whose cases were removed to family court²²⁴ do not appear to have been treated in a particularly harsh manner. In

CRIMINAL JUSTICE SYSTEM x-xxi (Report to Governor Hugh L. Carey, March 1979) [hereinafter cited as EXECUTIVE COMMISSION ON SENTENCING]. Fractional sentences have been averaged out.

224. The majority of removals are robbery cases, with assault and rape charges also being frequently removed.

Distribution of Arrest Charges for Family Court Cases

Removed From or By:	Criminal Court	Grand Jury	Fact Finding	Supreme Court		Total
				For:	Disposition (Sentence)	
Robbery 1	141 39%	7 23%	4 66%	9 30%	161 37%	
Robbery 2	153 42	10 32	1 17	13 43	177 41	
Rape 1	27 7	2 6	1 17	— —	30 7	
Assault 1	11 3	5 16	— —	2 7	18 4	
Arson 2	11 3	1 3	— —	2 7	14 3	
Sodomy 1	11 3	2 6	— —	— —	13 3	
Burglary 1	6 2	— —	— —	1 3	7 2	
Murder	2 1	1 3	— —	2 7	5 1	
Att. Murder	1 *	3 10	— —	1 3	5 1	
Burglary 2	1 *	— —	— —	— —	1 *	
Kidnapping	1 *	— —	— —	— —	1 *	
Totals	365 100%	31 100%	6 100%	30 100%	432 100%	

28% of the removals,²²⁵ the charges were reduced, sometimes all the way to the misdemeanor level and, in other cases, to non-DFA felonies.²²⁶

The inefficiencies of the removal process,²²⁷ which requires numerous appearances by complainants and other witnesses, are reflected in the conviction rate. Only 47%²²⁸ of the removed cases result in convictions. 63% of those cases where a juvenile had been indicted resulted in conviction,²²⁹ while 56% of all felony charges against adults resulted in convictions.²³⁰ Considering the gravity of the charges and the fact that the removed cases have already been screened at least once to eliminate the cases which cannot be successfully prosecuted, one would expect the conviction rate to be higher. Those proceedings which do result in convictions do not necessarily result in DFA convictions. A substantial number result in convictions for misdemeanors or non-DFA felonies.²³¹ Of the re-

225. Proportion of Arrest Charges Reduced Before Removal to Family by Most Severe Arrest Charge

Most Severe Arrest Charge	Removal Charge Same as Arrest Charge	Removal Charge Lower Than Arrest Charge	Total	Proportion of Charges Reduced
Robbery 1	116	45	161	28%
Robbery 2	134	43	177	24
Rape	17	12	29	41
Att. Murder	1	4	5	80
Murder	0	5	5	100
Sodomy	11	0	11	0
Assault 1	12	6	18	33
Arson 2	10	4	14	29
Burglary 1	3	3	6	50
Burglary 2	1	0	1	0
Kidnapping	1	0	1	0
Subtotal	306	122	428	29%
Removal Charge N. A.			4	—
Total	—	—	432	—

Id. at 36.

226. *Id.* at 35-37.

227. See text accompanying notes 210-11 *supra*.

228. DCJS—NYC, *supra* note 150, at 41-42.

229. See note 220 *supra* and accompanying text.

230. See note 64 *supra*.

231. DCJS—NYC, *supra* note 150, at 43-44. The study merely specifies the crimes for which the juvenile was convicted. Absent more information, it is difficult to ascertain whether the convictions were for felonies, misdemeanors or DFA's. Nevertheless, out of 309 convictions, at least 32 were clearly misdemeanors. Another 77 were clearly non-DFA felonies.

maining cases, one quarter are dismissed, 16% are granted ACD's and 10% are withdrawn, apparently because of a determination subsequent to removal that the juvenile was at least sixteen at the time of the alleged act.²³²

The dispositions made in the cases of convicted juveniles did not reflect the severity of the original charges. 48% of the juveniles were sentenced to probation for either one or two years, and 12% received either a suspended sentence or an ACD. Only 40% of the convictions resulted in placements, with 22% of those being in se-

232. Family Court Fact Findings By Type of Removal

	Criminal Court	Grand Jury	Supreme Court	Total
Admitted	133 46%	12 57%	3 60%	148 47
Dismissed	79 27	2 9	— —	81 25
ACD	45 15	5 24	1 20	51 16
Withdrawn	31 11	1 5	— —	32 10
Transferred	4 1	1 5	1 20	6 2
Subtotal	292 100%	21 100%	5 100%	318 100%
Pending Fact Finding	67	10	1	78
Removed After Plea in Supreme Court	—	—	30	30
Case Status Not Available	6	—	—	6
TOTAL FAMILY COURT	365	31	36	432

DCJS—NYC, *supra* note 150, at 41-43.

cure settings.²³³ Almost 90% of the placements were made for an initial period of 18 months or less.²³⁴

One glaring fact emerges from these statistics: twenty-one months following the law's passage, only 60 juvenile offenders in the entire state received sentences imposed in the adult system which, if fully served, would be longer than those sentences which could have been imposed in family court. Moreover, only 48 juvenile offenders are likely to serve sentences longer than the family court three-year restrictive placement. Less than 10 juveniles will not be eligible for parole within three years.

VI. Conclusion

Although it is possible that the current system will eventually function more smoothly once bench and bar become more familiar

233. Family Court Disposition (Sentence) Types by Type of Removal

	Criminal Court	Grand Jury	Fact Finding	Supreme Court Removal For Family Court Disposition (Sentence)	Total
Placement					
Non-Secure	15 15%	2 20%	—	2 10%	19 15%
Secure	18 18	3 30	—	7 35	28 22
Not Available	<u>4 4</u>	<u>— —</u>	<u>—</u>	<u>— —</u>	<u>4 3</u>
Subtotal	37 37	5 50	—	9 45	51 40
Probation	50 51	5 50	—	7 35	62 48
Dismissed/ACD	6 6	— —	—	4 20	10 8
Suspended Judgment	<u>6 6</u>	<u>— —</u>	<u>—</u>	<u>— —</u>	<u>6 4</u>
Total	99 100%	10 100%	—	20 100%	129 100%
Type Not Available	<u>6</u>	<u>2</u>	<u>—</u>	<u>—</u>	<u>8</u>
Total Disposed (Sentenced)	105	12	—	20	137

Id. at 44-46.

234. *Id.* at 47-48. The data is somewhat sparse because the length of placement is known for only 39 juveniles. However, 31 of those juveniles were placed for 18 months or less. This percentage is so overwhelming as to make it unlikely that a larger sample would result in radically different figures. This conclusion is buttressed by the fact that only 19 restrictive placements were made in New York in 1979. See A Roster edited to exclude the names of

with the various procedures, the juvenile justice system will never operate at peak efficiency unless it is flexible enough to handle both a Willie Bosket and a graffiti artist. The choice is between reviving the present, cumbersome system by periodic reforms and creating a new, more efficient juvenile justice system. Although the latter method is obviously preferred, the former must nonetheless be considered.

A major problem troubling the juvenile justice system is inadequate state and local financial assistance. As a result, the entire juvenile system is understaffed. Probation officers routinely struggle with case loads too great to enable them to provide individual attention to juveniles. Congested court calendars often force two-month adjournments of fact-finding hearings.

Inadequate funding has had its strongest impact upon DFY. DFY has only 174 beds in secure facilities in the state.²³⁵ As of June 13, 1980, there were 103 juvenile offenders in secure facilities²³⁶ and 143 juveniles with restrictive placements.²³⁷ As a result, 40 to 50 juveniles at any given time are in detention centers awaiting transfer to secure facilities. Some juveniles remain in detention so long that the minimum period of the juvenile's sentence expires before he or she is sent to a DFY facility.²³⁸

One means to insure that the system will become more efficient is to consolidate the prosecutorial function. Retaining both the district attorney and the corporation counsel as prosecutor in the same court inevitably creates disputes, duplication of effort and

the individual juveniles compiled by the Statistics and Survey Unit of DFY [hereinafter cited as *DFY Roster*]. This roster provides information on juveniles with DFY on restrictive placements as well as the crimes for which they have been convicted.

235. Interview with Iris Coleman, Court Liaison Officer of DFY, Bronx County, in New York City (Aug. 1, 1980). The secure facilities are: Goshen (75 beds), Brookwood (50 beds), Mastar Park (15 beds), Tryon (20 beds for girls) and the Long Term Treatment Unit (14 beds). The 14 beds in the Long Term Treatment Unit are the only secure beds available in the entire state for juveniles who need intensive psychiatric help.

236. See note 223 *supra*.

237. See *DFY Roster*, *supra* note 234. As of June 23, 1980, 133 juveniles were serving three-year restrictive placements and 10 were serving five-year restrictive placements. 8 of the 10 serving the five year placement were convicted of murder. Two juveniles were convicted of rape and robbery respectively presumably their third DFA offense. Interview with Iris Coleman, Court Liaison Officer of DFY, Bronx County, in New York City (Oct. 10, 1980).

238. Interview with Iris Coleman, Court Liaison Officer of DFY, Bronx County, in New York City (Aug. 1, 1980).

confusion. Another relatively inexpensive reform would be to photograph and fingerprint every child who is arrested. This would eliminate the current problem of erroneous identification of the juvenile offender, one which often plagues the court. Juveniles frequently give false names, addresses, and ages, causing needless time spent on ascertaining correct information. Understanding that such photographic and fingerprint data could very well haunt a juvenile in later life, these records should be destroyed when the juvenile reaches the age of twenty-one unless he has been convicted of a serious crime, in which case the state's interest in protecting its citizens would counterbalance any prejudice to the juvenile.

Establishing a separate part of the family court to hear DFA petitions²³⁹ has caused congestion within the rest of the juvenile court system. DFA cases are relatively few in number²⁴⁰ and, as a rule, do not necessarily require lengthy trials. As a result, the DFA parts usually have only two or three petitions on their calendars whereas other trial parts carry fifteen to twenty. A wiser alternative would be to establish a separate trial part for cases expected to involve lengthy trials, regardless of whether the cases are DFA or non-DFA.

Legislative enactment of a new juvenile system is preferable to the periodic reform of the present system. A first step could entail a return to the pre-1967 law which made fifteen year-olds criminally responsible for murder and other capital crimes, thereby treating them as adults. Under present law, murder is the crime least likely to be removed and most likely to result in a full range of punishment. A juvenile should additionally be charged with any other lesser crimes related to the murder charge. A jury in such a proceeding should be instructed that it can return a verdict on any or all of the charges. A verdict on a charge other than murder or manslaughter would result in removal to family court. Having all but homicide cases originate in the juvenile system is practical in view of the fact that the vast majority of the nonhomicides are ultimately resolved in family court under current practice.

The family court should also be given more latitude in dealing

239. See text accompanying note 104 *supra*.

240. For example, in Bronx County in 1979, only 147 DFA's were filed—an average of less than one per court day. See note 100 *supra*.

with the worst juvenile offenders. This could be achieved by permitting waiver *upward* of those juveniles not likely to benefit from family court services,²⁴¹ upon a motion by the prosecuting attorney and after a hearing. This hearing would include, *inter alia*, a probable cause inquiry into whether a crime had been committed, an inquiry into the juvenile's record, the nature of the act, and the juvenile's relative involvement. The logical cut-off point for waiver upward is class C felonies. This would include all instances which are presently considered DFA's and JO's in addition to attempts at the most serious crimes. If the court were to order waiver, the minutes of the waiver hearing could then be read to the grand jury in order to provide a basis for an indictment.

Waiver upward could also be ordered when a juvenile has been absent from the jurisdiction for more than six months on a warrant and it is unlikely that he will appear voluntarily. A "probable cause" hearing could be conducted after a warrant officer has filed a report detailing the efforts made to secure the juvenile's presence before the court. This practice would close a gaping loophole in the present law. DFY by law cannot accept a juvenile after his eighteenth birthday. Therefore, a juvenile approaching eighteen need only evade arrest on a warrant until his eighteenth birthday in order to evade prosecution.

With regard to those cases not waived up to supreme court, it is logical to discontinue the artificial distinction between the classes of offenses that now constitute the DFA system. All cases involving class C or greater felonies, and cases where the juvenile has three or more prior felony convictions, should have available as a dispositional option a three-year restrictive placement.²⁴²

Any reforms that are instituted should also remedy the various procedural problems that presently permeate the juvenile justice system.²⁴³ Any discretion that is granted to juvenile agencies must not deprive the juvenile of notice and an opportunity to be heard. Similarly, although "equal protection does not demand that classifications be ideal,"²⁴⁴ the distinctions that are drawn, whether on

241. Waiver upward into the adult system is used in most states. The minimum age for this type of waiver is generally 13. See Peyser, *supra* note 5, at 1, col. 1.

242. A five-year restrictive placement should be available for class A felonies.

243. See notes 145-46, 213-17 *supra* and accompanying text.

244. Matter of Quinton A., 49 N.Y.2d 328, 337, 402 N.E.2d 142, 148, 425 N.Y.S.2d 788,

the basis of age or type of crime, must bear rational relation to legitimate state interests.²⁴⁵

New York has a valid state interest in protecting its citizens from future Willie Boskets. However, a great injustice would result if the legislature, in its zeal to criminalize the juvenile justice system,²⁴⁶ loses sight of the fact that the system deals with children and not adults. The majority of these delinquents are the products of an impoverished and troubled environment. Despite its shortcomings, the family court system frequently offers these youths the last opportunity for positive rehabilitation. Thus, an effective juvenile justice system should emphasize flexibility in its treatment in order to protect society from violent juvenile criminals, while remaining a humane and rational institution.

793 (1980).

245. See *Matter of James A.*, 424 N.Y.S.2d 334, 336 (Fam. Ct. 1980).

246. C. SILBERMAN, *CRIMINAL VIOLENCE, CRIMINAL JUSTICE* 335 (1978) ("After seventy-five years of talk about substituting rehabilitation for punishment, it is difficult to find the rehabilitation, and all too easy to find the punishment."). Similarly, with regard to adult criminals, there is currently pending before the New York legislature a bill, which if enacted, would bring determinate sentencing to New York. N.Y.A. 8308, 202nd Sess. (1979). Determinate sentencing, limits and structures the actions of sentencing so as to increase the certainty of punishment. EXECUTIVE COMMISSION ON SENTENCING, *supra* note 223, at 212-13. See generally Note, *Proposal for Determinate Sentencing in New York: The Effect on an Offender's Due Process Rights*, 8 FORDHAM URB. L.J. 629 (1980).