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CHILD SOLDIERS IN AMERICA: CRIMINAL MANIPULATION OF MINORS

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INTRODUCTION

Robert Sandifer, known as Yummy for his love of sweets, was the third child born to a teenage mother.¹ Yummy's mother was a drug addict and a prostitute, and his father was in prison for a felony gun charge.² By the time he was twenty-two months old, Yummy was admitted to the hospital for abuse.³ At three years old, Yummy went into his grandmother's custody. However, this environment was no better than his mother's care. In addition to "nearly all her ten children and thirty grandchildren [who] lived with her at one time or another," local prostitutes also worked out of Yummy's grandmother's home.⁴ By eight years old, Yummy had joined the Black Disciples gang and was arrested for the first time.⁵ Over the next year and a half, Yummy was arrested five additional times for crimes ranging from robbery to auto theft and arson.⁶

At eleven years old, Yummy walked up to sixteen-year-old Kianta Britten and shot him severing his spinal cord and partially paralyzing him.⁷ Later that day, Yummy again pulled out his gun and fired into a crowd of boys playing football, injuring one and killing a bystander.⁸ After the shootings, police hypothesized, "he might be getting orders from someone higher up in the gang. The word on the street is this may be a gang

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¹ John Muller, *True Crime: The Forgotten Story of Robert "Yummy" Sandifer*, WASHINGTON SYNDICATE (Jan. 21, 2011), <http://thewashingtonsyndicate.wordpress.com/2011/01/21/true-crime-the-forgotten-story-of-robert-%E2%80%9Cyummy%E2%80%9D-sandifer/>.

² PAUL H. ROBINSON, *Yummy Sandifer*, in CRIMINAL LAW CASE STUDIES 169, 169 (2006).

³ Julie Grace, *There are No Children Here*, TIME (Sept. 12, 1994), <http://www.time.com/time/magazine/article/0,9171,981434-2,00.html>.

⁴ *Id.*

⁵ See Muller, *supra* note 1.

⁶ See *id.*

⁷ Grace, *supra* note 3.

⁸ *Id.*

initiation.”⁹ Less than a week later, eleven-year-old Yummy Sandifer was found dead.¹⁰ Yummy’s gang, the Black Disciples, sent two of its members to kill him. His killers were children themselves: Cragg Hardaway was sixteen years old, and Derrick Hardaway was fourteen years old.¹¹ Derrick Hardaway is now serving a forty-five year sentence and Cragg Hardaway is serving a sixty year sentence for their participation in Yummy’s death.¹² Three young lives were ruined by the manipulation of older, wiser gang leaders.¹³

In addition to abuse in gangs, juveniles are also vulnerable to manipulation by adults outside of gangs. This is evident in the case of the D.C. Sniper. Similar to many young gang members, Lee Malvo lived a difficult life. His mother would leave him with strangers for prolonged periods of time, and his father was absent.¹⁴ When Lee was fifteen years old, he met forty-one-year-old John Muhammad.¹⁵ Muhammad gave Lee the structure and attention that he never received from his parents. Muhammad trained Lee in military techniques and tactics, provided him with a strict diet and vitamins, and indoctrinated him with radical beliefs and religious dogma.¹⁶ Muhammad then told Lee that he would be his partner in terrorizing Washington D.C.¹⁷ After hearing about the plan, Lee claims he tried to kill himself, but could not go through with it.¹⁸ At Muhammad’s command, the pair killed ten people, and wounded three others.¹⁹

After living with Muhammad for two years, Lee was a systematic killer. Although only seventeen years old at the time of the killings, Malvo was charged with, and found guilty of, capital murder, terrorism, and weapons

⁹ Muller, *supra* note 1.

¹⁰ *Id.*

¹¹ Grace, *supra* note 3.

¹² See Sharon Cohen, *Locked Up At 14 For An Infamous Murder*, USA TODAY (Dec. 17, 2007), http://www.usatoday.com/news/nation/2007-12-17-645637555_x.htm; see also *60 Year Sentence in Gang Killing of Boy*, 11, N.Y. TIMES, Apr. 23, 1997, <http://www.nytimes.com/1997/04/23/us/60-year-sentence-in-gang-killing-of-boy-11.html>.

¹³ Grace, *supra* note 3.

¹⁴ *Lee Boyd Malvo: biography*, BIOGRAPHY, <http://www.biography.com/people/lee-boyd-malvo-236005> (last visited Mar. 22, 2014).

¹⁵ *Id.*

¹⁶ *Malvo: Muhammad 'made me a monster'*, CNN (May 23, 2006), http://articles.cnn.com/2006-05-23/justice/sniper.trial_1_lee-boyd-malvo-muhammad-shot-muhammad-and-malvo?_s=PM:LAW.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ See *id.*; see also Russell Goldman, *DC Sniper Lee Boyd Malvo Tells William Shatner Other Shooters Involved in Plot*, ABC News (July 29, 2010), <http://abcnews.go.com/US/dc-sniper-lee-boyd-malvo-tells-william-shatner/story?id=11280777#.UBcsBqM2SF8>; *Muhammad v. Maryland*, 934 A.2d 1059, 1079 (Md. Ct. Spec. App. 2007).

charges, and was sentenced to life in prison without the possibility of parole.²⁰

Another child who was indoctrinated by his manipulator was Alex Cabarga. Alex was five years old when his parents moved from New Jersey to an experimental community²¹ in San Francisco.²² It was here that Alex met thirty-three-year-old Luis Johnson, known as ‘Tree Frog.’²³ Johnson immediately began a friendship with Alex and his two older brothers.²⁴ By the time Alex was seven years old, Johnson began openly “courting” him and Alex’s parents suspected that they were having sex.²⁵ Instead of protecting him, Alex’s mother decided she no longer wanted to be a parent and gave Alex to Johnson.²⁶ Johnson continued to sexually abuse Alex and made pornographic films of him in order to make money.²⁷ If Alex tried to refuse, he was beaten and starved. This continued until Alex was seventeen years old.²⁸

When Alex was seventeen, Johnson decided that he wanted to kidnap a girl who would eventually be able to carry his child and continue his lifestyle.²⁹ Alex and Johnson kidnapped two and one-half-year-old Tara Burke.³⁰ Johnson took pornographic pictures of Tara and taped Alex having sex with her.³¹ When the police eventually caught them, both Johnson and Alex were arrested.³² At the age of seventeen, Alex was charged with rape, kidnapping, and sodomy and sentenced to two hundred and eight years in prison.³³ For nearly ten years Alex was Johnson’s sex slave. Although Johnson controlled every aspect of Alex’s life, Alex was not treated as a victim; instead, he was considered a criminal. Although the

²⁰ *Sniper Malvo Sentenced to Life without Parole*, CNN (July 24, 2004), http://articles.cnn.com/2004-03-10/justice/sniper.malvo_1_sniper-malvo-malvo-trial-lee-boyd-malvo?_s=PM:LAW [hereinafter *Sniper Malvo*].

²¹ This experimental community, called Project 2, consisted of twenty-five individuals, united by their rejection of traditional social values. Members of the community, including children, lived in an old warehouse and participated in drug usage and open sexuality. PAUL H. ROBINSON, *WOULD YOU CONVICT: SEVENTEEN CASES THAT CHALLENGED THE LAW* 191, 191 (New York University Press, 1999).

²² PAUL H. ROBINSON, *Alex Cabarga*, in *CRIMINAL LAW CASE STUDIES* 143, 143 (2006).

²³ *See id.*

²⁴ *See id.*

²⁵ *See id.*

²⁶ *See id.*

²⁷ *See id.*

²⁸ *See id.*

²⁹ *See id.*

³⁰ *See id.*

³¹ *See id.*

³² *See Philip Hager, 208-year Term in 1982 Child Molestation Case Rejected*, LOS ANGELES TIMES (Sept. 3, 1988), http://articles.latimes.com/1988-09-03/news/mn-3141_1_child-molestation-case.

³³ *See id.*

California Court of Appeals later reduced Alex's sentence to twenty-five years, Alex still spent the majority of his adult life in prison because he was exploited by an adult. Even now, Alex continues to be labeled a sex offender because of the manipulation of Luis Johnson.³⁴

Yummy, Lee, and Alex were all victims of adult manipulation; however, many criminal statutes, including New York's legislation, which this Note focuses on, do not recognize their victimization. While New York does punish adults with greater sentences because they use juveniles to commit criminal acts, New York still sees the boys themselves as criminals.³⁵ This position conflicts with recent advances in neuroscience, which illustrate that juveniles' brains are structured and function differently than adult brains.³⁶ Furthermore, the United States Supreme Court has held that these differences often lessen a minor's criminal culpability.³⁷ Therefore, this Note addresses the need for change in New York State legislation and proposes a comprehensive statute, which would hold adults criminally liable for crimes committed by juveniles when that adult, through any type of manipulation or exploitation, caused the juvenile to commit the crime. Additionally, this proposal recommends that juveniles who are misled into committing these crimes should be punished in juvenile court, should be punished less severely, and should be entitled to specific rehabilitative programs as victims of manipulation and control.

Part I of this Note describes the effect of recent developments in neuroscience on the study of juvenile behavior. This research has been used by the United States Supreme Court in sentencing minors, and should also inspire changes in the penal law. Part II discusses how adults manipulate juveniles by exploring gang dynamics. Part III examines the federal sentencing guidelines and New York State legislation that are currently used in punishing adults who manipulate minors. Part IV proposes to the New York State legislature a comprehensive statute that would better punish adults who manipulate minors and rehabilitate minors who were manipulated.

I. CHILD PSYCHOLOGY IN JUVENILE JUSTICE

In recent years neuroscientists have made great advances in the

³⁴ *See id.*

³⁵ *See generally* N.Y. PENAL LAW Art. 105 (Consol. 2012); N.Y. PENAL LAW Art. 115 (Consol. 2012); *see also* N.Y. PENAL LAW § 20.00 (Consol. 2013).

³⁶ *Graham v. Florida*, 560 U.S. 48, 68 (2010).

³⁷ *Id.*

understanding of brain development and how brain structure affects its functioning.³⁸ These developments have been especially helpful in the study of juvenile behavior, and specifically juvenile criminality. While teenage unpredictability was once considered to be a result of teenage hormones, recent neuroscience studies reveal that adolescents and children actually have a different brain structure than adults.³⁹ As minors age, their gray matter thins, and thus their cognitive abilities increase.⁴⁰ Gray matter is brain material made up of the neurons, nerve fibers, and support cells.⁴¹ This material also contains a large number of synapses, which are the connections between brain cells.⁴² As the brain matures, the amount of synapses are reduced, and the brain can more efficiently process information and make better judgments.⁴³ Adolescent brains are also distinct from adult brains because the pre-frontal cortex, which controls reasoning, does not finish developing until the early twenties.⁴⁴

These physical differences in brain development affect how juveniles process material and behave. While there is agreement within the scientific community that adolescents' intelligence and ability to reason are equal to that of adults in ideal conditions, when juveniles are under stress, their ability to reason diminishes.⁴⁵ Therefore, in situations like those of Yummy, Lee, and Alex, their actual cognitive ability is significantly less than the ability of their adult counterparts.

Studies also reveal that juveniles are developmentally immature, short-sighted in decision making, have poor impulse control, and are especially vulnerable to outside suggestions.⁴⁶ For instance, in a study where juveniles were offered \$100 today or \$1,000 in one year, juveniles were more likely to take less money now than wait for a substantially greater sum.⁴⁷ Furthermore, in another study, juveniles who participated in a computer car-driving simulation increased their risk-taking behavior when

³⁸ Paul M. Thompson, *Bioinformatics and Brain Imaging: Recent Advances and Neuroscience Applications*, BIOINFORMATICS 69, 69 (2002), available at http://www.nervenet.org/papers/bioinformatics_02/pdfs/Thompson.pdf.

³⁹ Sharon Begley, *Getting Inside a Teen Brain*, NEWSWEEK (Feb. 27, 2000), <http://mag.newsweek.com/2000/02/27/getting-inside-a-teen-brain.html>.

⁴⁰ See Begley, *supra* note 39.

⁴¹ See *id.*

⁴² See *id.*

⁴³ See *id.*

⁴⁴ See *id.*

⁴⁵ *Less Guilty by Reason of Adolescence*, MACARTHUR FOUND. RES. NETWORK ON ADOLESCENT DEV. & JUV. JUST. 2, http://www.adjj.org/downloads/6093issue_brief_3.pdf [hereinafter *Less Guilty by Reason of Adolescence*].

⁴⁶ *Id.* at 1-2.

⁴⁷ *Id.* at 2.

their friends were present, while the presence of peers had little effect on adults.⁴⁸ Also, unlike adults who generally consider the long-term consequences of their actions before making a decision, juveniles are more likely to only consider positive outcomes and focus on immediate gratification.⁴⁹ For example, when juveniles and adults were asked to solve a puzzle in as few moves as possible, with a wrong move requiring extra moves, adolescents took less time to consider a plan of action.⁵⁰ Juveniles tried to finish the puzzle as quickly as possible, rather than considering the longer-term consequences of getting a move wrong and having to use more moves to correct their mistake.

Because adolescents are more vulnerable to peer pressure, coercive situations have a more substantial effect on their decision-making. This vulnerability is especially relevant in situations where an adult manipulates a juvenile into committing a crime, because the minor's brain development, combined with the adult's coercion, makes it very difficult, for a minor to make a rational and well thought out decision.⁵¹

Using these findings about juveniles and neuroscience, the Supreme Court has, in recent decisions, opined that these characteristics mitigate a juvenile's criminal culpability. In *Roper v. Simmons*,⁵² seventeen-year-old Christopher Roper concocted a plan to rob and murder Shirley Cook.⁵³ He and a friend broke into Cook's home, bound her hands together with electrical wire, covered her head with a towel, and drove her to a park where they threw her over a bridge.⁵⁴ Cook drowned, and Roper was charged with burglary, kidnapping, stealing, and murder in the first degree.⁵⁵ Roper was convicted and sentenced to death.⁵⁶ On review, the Supreme Court held that, as a minor, Roper could not be considered "among the worst offenders," and therefore, should not be given the death penalty, no matter how egregious his crime.⁵⁷

The court stated three reasons for this decision.⁵⁸ First, the Court cited scientific and sociological studies that show a "lack of maturity and an

⁴⁸ *Id.* at 3.

⁴⁹ *Id.* at 2.

⁵⁰ *Id.* at 2-3.

⁵¹ See generally *id.*

⁵² 543 U.S. 551, 556 (2005).

⁵³ See *id.* at 556.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ See generally *id.*

⁵⁷ *Id.* at 568-69.

⁵⁸ *Id.* at 568.

underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.”⁵⁹ Second, the Court found that juveniles are more vulnerable to outside pressures and negative influences.⁶⁰ Last, the Court asserted that minors’ personalities are still being formed, giving them a greater ability to change.⁶¹ Since juveniles innately have a greater ability to change, by placing them in rehabilitative programs with other children, rather than violent, adult prisons that often, “compound preexisting problems,” society can prevent juveniles from committing future crimes.⁶² Although Roper’s crime was methodically planned and viciously executed, the Supreme Court, relied on evidence of juvenile brain development, and found that merely because Roper was a minor, he could not be fully culpable for his actions and should not be subject to the death penalty.⁶³

Only five years after *Roper v. Simmons* was decided, the Supreme Court expanded its use of developmental neuroscience in *Graham v. Florida*.⁶⁴ At sixteen years old, Terrance Graham and two accomplices attempted to rob a restaurant.⁶⁵ Graham pled guilty to armed burglary, assault and battery, and attempted armed robbery.⁶⁶ Only six months later, Graham was arrested again for robbery and was sentenced to life in prison without the possibility of parole.⁶⁷ Although Graham was a repeat offender and these were serious and dangerous crimes, the Supreme Court held that the Eighth Amendment prohibited a sentence of life in prison without the possibility of parole because he was a minor and his crime was non-homicidal.⁶⁸

One of the main rationales for this decision was, again, the recent advancements in neuroscience.⁶⁹ Justice Kennedy’s opinion cited

⁵⁹ *Id.* at 569 (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)).

⁶⁰ *See id.*

⁶¹ *See id.* at 570.

⁶² *See* Ellis Cose, *Children Are Not Too Old to Change*, NEWSWEEK (Jan. 14, 2010), <http://www.newsweek.com/rehabilitation-beats-punishment-juveniles-71201>; *see also* Michael Tonry, *Treating Juveniles as Adult Criminals: An Iatrogenic Violence Prevention Strategy if Ever There Was One*, 32 AM. J. PREVENTIVE MEDICINE S3 (2007), available at www.thecommunityguide.org/violence/tonryarticle2.pdf (“Overall, transferred juveniles were 33.7% more likely to be re-arrested for a violent or other crime.”).

⁶³ *See Roper*, 543 U.S. at 570.

⁶⁴ *See generally* 560 U.S. 48 (2010).

⁶⁵ *Id.* at 53.

⁶⁶ *See id.* at 53-54.

⁶⁷ *See id.* at 54, 57.

⁶⁸ *Id.* at 74.

⁶⁹ *See id.* at 68.

American Psychological Association's and American Medical Association's amicus briefs, stating "developments in psychology and brain science continue to show fundamental differences between juveniles and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence."⁷⁰ In analyzing juveniles' reduced culpability, reduced inclination to be deterred by life in prison, and greater capacity for change, the Court determined that life in prison without the possibility of parole is an unjust punishment for minors who have not committed homicidal offenses.⁷¹

Although the Supreme Court has just recently begun to recognize the fundamental differences between juveniles and adults, gang leaders have known and preyed on juveniles' vulnerability for decades. Part II of this Note gives a detailed look at the manipulation of minors in gangs.

II. ADULT MANIPULATION OF MINORS

A. History of Gangs in America

Gangs have been an integral part of American culture since the country's inception.⁷² Just years after the American Revolution, youth gangs began emerging in large cities.⁷³ New York was one of the first cities to experience this phenomenon.⁷⁴ Similar to many modern youth gangs, young men would assemble in gangs for protection, and to create a sense of community.⁷⁵

Since the eighteenth century, youth gangs have continued to play a large role in New York's political, economic, and social structure. In fact, until 1992, New York City was the nation's gang capital.⁷⁶ As waves of immigrants entered New York City in the early nineteenth century, new

⁷⁰ *Id.*

⁷¹ *Id.* at 71-72.

⁷² See James C. Howell & John P. Moore, *History of Street Gangs in the United States*, NAT'L GANG CENTER BULL. (Bureau of Justice Assistance & U.S. Dep't of Justice), May 2010, at 1, available at <http://www.nationalgangcenter.gov/Content/Documents/History-of-Street-Gangs.pdf>.

⁷³ See LUC SANTE, *LOW LIFE: LURES AND SNARES OF OLD NEW YORK* 198 (2003) (discussing the five major gangs of the late eighteenth century).

⁷⁴ See CELINDA FRANCO, CONG. RESEARCH SERV., RL 33400, *YOUTH GANGS: BACKGROUND, LEGISLATION, AND ISSUES* 2 (2008) ("It has been estimated that in 1855, New York City alone has more than 30,000 gang members.").

⁷⁵ See FREDERIC M. THRASHER, *THE GANG: A STUDY OF 1, 313 GANGS IN CHICAGO* 26-32 (1927); see also Howell & Moore, *supra* note 72, at 2 ("The earliest gangs of New York were not criminal groups.").

⁷⁶ Louis Holland, *Can Gang Recruitment Be Stopped? An Analysis of the Social and Legal Factors Affecting Anti-Gang Legislation*, 21 J. CONTEMP. L. 259, 276 (1995).

gangs arose.⁷⁷ The influx of immigrants created increased diversity, which furthered the tension in New York City neighborhoods and increased the threat of conflict. Although these gangs were highly territorial and committed a number of criminal and delinquent offenses, they were generally non-violent.⁷⁸

B. Modern Gangs

In the 1970s and 1980s this changed; gangs became more criminal, more organized and more violent.⁷⁹ Crack cocaine, drug trafficking, and easy access to weapons created a path to wealth and social advancement for many impoverished youths that they would not have otherwise had.⁸⁰ This path provided incentives for gangs, particularly those in New York, to become organized.⁸¹ Organized gangs are characterized by hierarchical memberships, rules, leaders, and activities that profit the gang itself and not just its members.⁸² Although even organized gangs vary in their practices and participation in various criminal trades, the majority of modern gangs do have an economic objective.⁸³ Therefore, members in organized gangs have the responsibility of protecting the gang's economic interest through violence and intimidation.⁸⁴

In well-organized gangs it is often the leaders who decide what violence is committed and by whom. Leaders give orders, make decisions, and discipline those who violate the gang's laws and policies.⁸⁵ These leaders are generally adult gang members who have worked their way up the hierarchy of the gang.⁸⁶ For instance, in Yummy's gang, the Black Disciplines, the average age of membership is twelve years old, and

⁷⁷ See James C. Howell, *Youth Gangs: An Overview*, JUV. JUST. BULL. (U.S. Dep't of Justice), Aug. 1998, at 2, available at <https://www.ncjrs.gov/pdffiles/167249.pdf>.

⁷⁸ See *id.*

⁷⁹ See Placido C. Gomez, *It is not so simply because an expert says it is so: The Reliability of Gang Expert Testimony Regarding Membership in Criminal Street Gangs: Pushing the Limits of Texas Rule of Evidence 702*, 34 ST. MARY'S L.J. 581, 585 (2003).

⁸⁰ See *id.*; see also Stephen Johnson & David Muhlhausen, *North American Transnational Youth Gangs: Breaking the Chain of Violence*, HERITAGE FOUND. (Mar. 21, 2005), <http://www.heritage.org/research/reports/2005/03/north-american-transnational-youth-gangs-breaking-the-chain-of-violence>.

⁸¹ See Scott Decker et al., *A Tale of Two Cities: Gangs as Organized Crime Groups*, JUST. Q. 13, 395, 423 (1998) (finding differentiation among gang members to be an indicator of high developed organization).

⁸² See *id.*

⁸³ See *id.*

⁸⁴ Gomez, *supra* note 79, at 585.

⁸⁵ Decker et al., *supra* note 81, at 405.

⁸⁶ George Knox, *Gang Threat Analysis: The Black Disciples*, NAT'L GANG CRIM. RES. CENTER (2004), <http://www.ngcrc.com/bdprofile.html>.

children must sell drugs for the gang for at least six years before they are eligible for an official position within the gang.⁸⁷ Furthermore, many of the rules of the Black Disciplines are used to shield leaders and adult gang members from criminal prosecution.⁸⁸ For instance, one of the rules in Almighty Black Disciple Nation Universal Code of Laws is “[a]t no time shall a soldier point out, refer, or introduce any outsider to the “King,” or any of the places the “King” might be without permission from the proper chain of Command.”⁸⁹ These rules illustrate the requirement that lower members of the gang protect their leader from any danger, including danger from law enforcement. The use of children to protect adults is evident in other gangs as well. Police all over the country have found that juveniles are ““carrying the guns and the drugs for the gang leaders so (the leaders) can avoid prosecution.””⁹⁰

Juveniles join gangs for a number of reasons. Similar to immigrant gangs of the eighteenth century, these adolescents join modern street gangs for protection and for a sense of family.⁹¹ The majority of juveniles who join street gangs do not have close familial ties or a strong support system. For instance, juveniles who live with an adult who is not a parent, or who live in a single parent home, are three times more likely to join a gang.⁹² Gangs are also inviting to young people who are looking to increase their status or wealth.⁹³ Children and adolescents grow up watching and respecting gang members.⁹⁴ Additionally, as illustrated by recent brain imaging technologies, adolescents do not have the maturity to fully anticipate the negative consequences of their actions; therefore, they are more likely to join a gang without understanding what their responsibilities will be.⁹⁵

Although gang membership has decreased in the last twenty years, gangs still have a significant role in large cities, such as New York.⁹⁶ Moreover,

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Kevin Johnson, *Cities Grapple with Crimes by Kids*, USA TODAY (July 12, 2006), http://www.usatoday.com/news/nation/2006-07-12-juveniles-inside_x.htm.

⁹¹ David S. Rutkowski, *A Coercion Defense for the Street Gang Criminal*, 10 NOTRE DAME J.L. ETHICS & PUB. POL’Y 137, 152 (1996).

⁹² Johnson & Muhlhausen, *supra* note 80.

⁹³ Howell, *supra* note 77, at 5.

⁹⁴ See Anthony Pinizzotto et al., *Street Gang Mentality: A Mosaic of Remorseless Violence and Relentless Loyalty*, FBI L. ENFORCEMENT BULL. (Fed. Bureau of Investigation) Sept. 2007, 5 <http://leb.fbi.gov/2007-pdfs/leb-september-2007>.

⁹⁵ Kim Taylor-Thomas, *Children, Crime, and Consequences: Juvenile Justice in America: State of Mind/States of Development*, 14 STAN. L. & POL’Y REV. 143, 144 (2003).

⁹⁶ See *National Youth Gang Survey Analysis: Demographics*, NAT’L GANG CENTER (2008), <http://www.nationalgangcenter.gov/Survey-Analysis/Demographics>.

as of 2008, 41.4% of gang members were under eighteen.⁹⁷ This means more than 300,000⁹⁸ children are still in gangs, and are still vulnerable to an increased risk of victimization from adult members and leaders. This statistic does not include the innumerable juveniles who are manipulated by non-gang affiliated adults, like Muhammad and Johnson. In order to protect juveniles from this kind of victimization, clear and comprehensive legislation is needed. Part III analyzes how current federal and New York State laws deal with adult manipulation of a minor.

III. FEDERAL SENTENCING GUIDELINES AND NEW YORK STATE LEGISLATION THAT CURRENTLY ADDRESS THE RESPONSIBILITY OF ADULTS WHO USE CHILDREN TO COMMIT CRIMES

Both the New York State Legislature and the United States Congress have recognized the victimization of juveniles by adults, and have taken steps to remedy the problem. However, both attempts to address the vulnerability of minors are incomplete because they only modify adults' punishments and fail to adjust juveniles' sentences.

A. Federal Sentencing Guidelines

The two statutes that are most often used in the federal prosecution of criminal groups are conspiracy and racketeering (RICO).⁹⁹ These statutes are often used in tandem to stop gangs from committing crimes, such as drug trafficking across state lines. While neither of these statutes specifically addresses adult liability and the use of juveniles, through an analysis of the penalties for these crimes, and the case law surrounding the use of these statutes, the struggle to hold adults and children properly liable is evident.

a. Adult Liability under Sentencing Guidelines

Federal sentencing guidelines provide increased sentences for adults who conspire with children.¹⁰⁰ Under U.S.S.G. § 3B1.4, if a defendant used, or attempted to use, a minor to commit an offense or to avoid detection for a crime, the sentence should be increased two levels.¹⁰¹ "Used or attempted

⁹⁷ *See id.*

⁹⁸ There were 731,000 gang members in United States as of 2009, and 41.4% of those in gangs were minors; therefore, 302,634 minors were in gangs in the United States. *See id.*

⁹⁹ Julia N. Sarnoff, *Federal Criminal Conspiracy*, 48 AM. CRIM. L. REV. 663, 665 (2011).

¹⁰⁰ *See* U.S. SENTENCING GUIDELINES MANUAL § 3B1.4 (2010).

¹⁰¹ *Id.*

to use” includes a number of actions, such as: “directing, commanding, encouraging, intimidating, counseling, training, procuring, recruiting, or soliciting.”¹⁰² These sentencing differences illustrate an attempt to protect children from adult manipulation, and deter adults from using juveniles.¹⁰³

Although not mandatory, many courts do follow these sentencing guidelines.¹⁰⁴ For instance, in *United States v. Cummings*,¹⁰⁵ three adult defendants were found guilty of conspiracy to manufacture counterfeit currency.¹⁰⁶ One of the adult defendants encouraged his sixteen-year-old girlfriend to participate in the manufacturing, and his co-defendant used her own children to make and distribute the counterfeit currency.¹⁰⁷ These adults were subjected to enhanced sentencing, under U.S.S.G. § 3B1.4, for using minors.¹⁰⁸

These sentencing guidelines illuminate the legislature’s intent to protect non-culpable youthful defendants from manipulative adults, and punish the adults that do use children. However, federal court decisions do not always consider this intent.¹⁰⁹ For instance, in *United States v. Butler*,¹¹⁰ Harden, seventeen, and Retic, twenty, robbed a bank at gunpoint. Both individuals had firearms and both directed bank employees to give them money. Although Harden was a minor, the court held that because he actively participated in the robbery with an adult he was not “used” under U.S.S.G. § 3B1.4.¹¹¹ The court held, “the term ‘use’ requires a showing of more than a mere criminal partnership . . .”¹¹² Therefore, if an adult works in partnership with a minor to commit a crime, as Muhammad did with Lee, this is not necessarily ‘using’ a minor under the sentencing guidelines.¹¹³

¹⁰² *Id.* cmt. n.1.

¹⁰³ See generally *United States v. Booker*, 543 U.S. 220 (2005) (holding that sentencing guidelines are merely discretionary; therefore, giving federal courts significant freedom in how to penalize adults who manipulate children).

¹⁰⁴ See generally *id.*

¹⁰⁵ 18 Fed. Appx. 135 (4th Cir. 2001).

¹⁰⁶ See *id.* at 136.

¹⁰⁷ See *id.* at 137.

¹⁰⁸ See generally *id.*

¹⁰⁹ *United States v. Murphy*, 254 F.3d 511 (4th Cir. 2004) (holding federal courts are not following legislative intent, because they are enhancing an eighteen-year-old’s sentence while the congressional record intends enhancement to be used only for individuals over twenty-one years old).

¹¹⁰ 207 F.3d 839 (6th Cir. 2000).

¹¹¹ See *id.* at 849.

¹¹² *Id.*

¹¹³ See *id.* It is likely that Lee would not have been considered ‘used’ under the sentencing guidelines, because in a number of the shootings he chose the victim and committed the murder without explicit direction from Muhammad. Therefore, the court could find Lee possessed equal authority in the commission of the shootings. See *Muhammad v. Maryland*, 934 A.2d 1059, 1078-79 (Md. Ct. Spec. App. 2007).

b. Juvenile Liability under Sentencing Guidelines

Although federal sentencing guidelines provide increased sentences for adults who conspire with children, the guidelines fail to address juvenile liability.¹¹⁴ Therefore, prosecutors and judges have considerable discretion of how to deal with minors who are ‘used’ under U.S.S.G. 3B1.4. For instance, juveniles can be sentenced as a mitigating participant, and entitled to decreased sentences.¹¹⁵ A mitigating participant is an adult or a juvenile who is “substantially less culpable than the average participant.”¹¹⁶ While this sentencing guideline does provide decreased punishment for decreased criminal culpability, it is not specifically intended for juveniles. Furthermore, the courts have held that a defendant is not entitled to reduced sentencing just because “he may be less culpable than his codefendants.”¹¹⁷ Rather, the courts have held that a defendant “would not [be] entitled to a downward adjustment simply because someone else in the gang supervised his activities.”¹¹⁸ Also, courts often do not often utilize U.S.S.G. 3B1.2.¹¹⁹ According to the application notes of U.S.S.G 3B1.2, a downward adjustment based on status as a minor or minimal participant should be used infrequently.¹²⁰ Therefore, juveniles are still vulnerable to criminal liability for crimes committed under the direction of an adult.

Juveniles can also be charged with lesser crimes than their adult counterparts.¹²¹ In *United States v. Delpit*,¹²² seven gang leaders and supervisors were convicted of drug conspiracy and gang rivalry.¹²³ These gang leaders used juveniles to sell drugs for them, and therefore, were subjected to enhanced sentencing.¹²⁴ Rather than also being charged with conspiracy, the juveniles who sold drugs were charged with drug related offenses, and sentenced to detention in juvenile facilities.¹²⁵

Although many juveniles are not criminally charged with RICO or conspiracy, this is likely because the majority of those cases are non-violent crimes, such as drug trafficking and manufacturing counterfeit

¹¹⁴ See U.S. SENTENCING GUIDELINES MANUAL § 3B1.4 (2010).

¹¹⁵ See U.S. SENTENCING GUIDELINES MANUAL § 3B1.2 (2011).

¹¹⁶ *Id.* cmt. n.3(A).

¹¹⁷ *United States v. Hoac*, 990 F.2d 1099, 1106 (9th Cir. 1993).

¹¹⁸ *United States v. Rotolo*, 950 F.2d 70, 71 (1st Cir. 1991).

¹¹⁹ See *Hoac*, 990 F.2d at 1105-06.

¹²⁰ U.S. SENTENCING GUIDELINES MANUAL § 3B1.2 cmt. n.3-5 (2011).

¹²¹ See generally *United States v. DAM*, 69 F.3d 542 (8th Cir.1995).

¹²² 94 F.3d 1134 (8th Cir. 1996).

¹²³ See generally *id.*

¹²⁴ See *id.* at 1155.

¹²⁵ See *id.* at 1141 n.1 (illustrating that juveniles were charged with lesser crimes than their adult counterparts).

currency.¹²⁶ In *United States v. Juvenile Male*,¹²⁷ three juvenile members of the “Rollin’ 30” CRIPS were charged with violating Federal Criminal RICO. ¹²⁸ In an attempt to acquire funds to purchase firearms, the gang “implemented a plan to commit armed robberies.”¹²⁹ Juvenile R.B. and several of his fellow gang members robbed a Subway sandwich shop, stealing \$100, seven sandwiches, and five bags of chips, and murdering one employee.¹³⁰ While the “Rollin’ 30” CRIPS did have adult members during this time, no adults were charged, even though “the gang” implemented the plan to commit the robberies.¹³¹ Therefore, prosecutors are less likely to see juveniles who commit violent crime as victims, whether or not they were manipulated, and because the federal sentencing guidelines do not address what happens to the minors, violent minors are often penalized with substantial punishment, despite their own victimization.¹³²

B. New York Legislation

Unlike federal legislation, which addresses adult manipulation in its sentencing guidelines, New York addresses adult manipulation in its substantive penal law. One New York law that speaks to this issue is New York’s conspiracy statute.¹³³ Conspiracy is divided into six degrees based on the nature of the crime and whether the adult conspired with a minor under the age of sixteen.¹³⁴ Conspiracy in the first degree, a class A-I felony, states, “with [the] intent that conduct constituting a Class A felony be performed, he, being over eighteen years of age, agrees with one or more persons under sixteen years of age to engage in or cause the performance of such conduct.”¹³⁵ An adult is guilty of conspiracy in the second degree, a class B felony, if he or she, with intent that a Class A felony be performed, engages in or causes an individual of any age to commit a Class A felony.¹³⁶ A Class A-I felony carries with it a sentence of

¹²⁶ See PANEL ON JUVENILE CRIME: PREVENTION, TREATMENT, & CONTROL ET AL., JUVENILE CRIME, JUVENILE JUSTICE 207-08 (2001) (finding juveniles are more likely to be waived to adult court for violent crimes).

¹²⁷ 118 F.3d 1344 (9th Cir. 1997).

¹²⁸ See generally *id.*

¹²⁹ *Id.* at 1346.

¹³⁰ See *id.*

¹³¹ Burt Hubbard & Felisa Cardona, *Denver’s Original Gangsters: 1986 Rolling 30 Crips*, DENVER POST (June 14, 2009), http://www.denverpost.com/recommended/ci_12586254.

¹³² See *Juvenile Male*, 118 F.3d at 1344.

¹³³ See generally N.Y. PENAL LAW Art. 105 (McKinney 2014).

¹³⁴ See generally *id.*

¹³⁵ N.Y. PENAL LAW § 105.17 (McKinney 2014).

¹³⁶ N.Y. PENAL LAW § 105.15 (McKinney 2014).

at minimum fifteen to twenty-five years in prison, while a Class B felony only requires six to twenty-five years, depending on the crime.¹³⁷ This distinction in sentencing illustrates the legislature's intent to deter adults' use of children in committing crimes through the use of increased penalties. In addition, the legislative history of the conspiracy statute reveals the intent to enact "extremely serious penalties . . . to those who endeavored to mask their own participation . . . by employing children in the 'front lines.'"¹³⁸

However, like the federal sentencing guidelines, New York's conspiracy statute does not address the minor's culpability in committing the criminal act.¹³⁹ In *People v. Canales*,¹⁴⁰ the defendants were arrested and charged with conspiracy in the first degree for a drug ring where customers could order cocaine over the phone and the drugs would be delivered to them.¹⁴¹ The defendants were charged with conspiracy in the first degree because they were over eighteen and they employed two juveniles under the age of sixteen.¹⁴² This drug ring lasted more than two years and, thus, the latter individuals were no longer juveniles at the time of arrest.¹⁴³ The court still held that those adults who engaged in or caused the behavior of the juveniles while they were minors would still be subject to the enhanced degrees of conspiracy.¹⁴⁴ However, the juveniles who were used in the drug ring were considered conspirators,¹⁴⁵ and it is unclear if they too were charged with conspiracy.¹⁴⁶

Furthermore, it is difficult to determine the true effect of New York's conspiracy statutes because there is little case law interpreting or citing it.¹⁴⁷ In *Canales*, the court found that both the legislative history and the case law interpreting conspiracy in the first degree were sparse.¹⁴⁸ Moreover, the statute merely states that a defendant over eighteen is guilty if he or she "engag[es] in or cause[s] the performance of such [criminal] conduct. . . ."¹⁴⁹ This provides little guidance to prosecutors about how to

137 See N.Y. PENAL LAW § 70.00 (McKinney 2014).

138 *People v. Canales*, 32 Misc. 3d 1211(A), 2 (N.Y. Sup. Ct. 2011).

139 See generally N.Y. PENAL LAW Art. 105 (McKinney 2014).

140 32 Misc. 3d 1211(A) (N.Y. Sup. Ct. 2011).

141 See *id.* at 1.

142 *Id.* at 2.

143 See *id.* at 1-2.

144 *Id.* at 2.

145 See *id.* at 4 (referring to the juveniles as fellow conspirators).

146 *Id.* at 2.

147 *Id.*

148 *Id.*

149 N.Y. PENAL LAW Art. 105 (McKinney 2011).

interpret “engages” or “causes,” and makes conspiracy statutes difficult to use.

Similar to conspiracy, in New York’s criminal facilitation statute, the legislature increased punishment for adults who provide means or opportunities to minors to commit crimes, especially serious crimes.¹⁵⁰ For example, under Section 115.08, an adult who knows that it is probable he is providing aid to a person under sixteen to commit a Class A felony, and that minor does commit a Class A felony, is guilty of criminal facilitation in the first degree.¹⁵¹ Criminal facilitation in the first degree is a Class B felony, punishable by no less than one-year, and not more than nine years, in prison.¹⁵² The legislature’s intent to deter adults from using children is clear.

Like conspiracy laws, New York’s criminal facilitation statute imperfectly defines the conduct of manipulation to accomplish the legislature’s intent. New York’s criminal facilitation statute only punishes adults who provide means or opportunity to commit a crime.¹⁵³ Juveniles can still be manipulated in other ways.¹⁵⁴ For instance, gang initiations often require juveniles to commit random acts of violence against strangers.¹⁵⁵ Although the gang leader is commanding the killing, he neither provides the means nor the opportunity for the crime. Thus, he would not be found guilty under this statute. According to the commission staff notes, “‘Criminal facilitation’ . . . address[es] . . . a kind of accessorial conduct in which the actor aids [in] the commission of a crime with knowledge that he is doing so but without . . . participat[ing] therein or benefit[ing] therefrom.”¹⁵⁶ Therefore, this statute is not applicable in a number of the scenarios of adult manipulation, where juveniles are used in committing a crime for the adult’s benefit.

Moreover, the criminal facilitation statute also is not clear about the fate of the minor who actually commits the crime. Generally, under criminal facilitation, as in conspiracy cases, both the principal participant and the accessory are liable for the crime.¹⁵⁷ Under this statutory scheme, although manipulated, minors who committed the criminal act could still be

¹⁵⁰ See generally N.Y. PENAL LAW Art. 115 (McKinney 2014).

¹⁵¹ N.Y. PENAL LAW § 115.08 (McKinney 2014).

¹⁵² See *id.*

¹⁵³ See generally N.Y. PENAL LAW Art. 115 (McKinney 2014).

¹⁵⁴ See RICHARD MINTZER, COPING WITH RANDOM ACTS OF VIOLENCE 50 (2004).

¹⁵⁵ See *id.*

¹⁵⁶ N.Y. PENAL LAW Art. 115 n. (McKinney 2014).

¹⁵⁷ See MATTHEW ROSS LIPPMANN, CONTEMPORARY CRIMINAL LAW: CONCEPTS, CASES, AND CONTROVERSIES 154 (2d ed. 2009).

considered culpable and punished accordingly.

A third set of statutes that is relevant is accessorial liability. Unlike criminal facilitation and conspiracy, criminal liability for the conduct of another is not its own crime. Rather, New York Penal Law Section 20.00 assigns criminal liability to an individual who, “acting with the mental culpability required for the commission thereof, . . . solicits, requests, commands, importunes, or intentionally aids” another person in the commission of a crime.¹⁵⁸ By defining the many ways one individual may manipulate another, the language of this statute provides prosecutors and judiciaries with a more complete understanding of the purpose of the statute, which allows them to interpret and apply it in appropriate circumstances.

However, criminal liability for conduct of another is not geared towards punishing adults who use children in the commission of criminal activity.¹⁵⁹ For instance, in the *Matter of Aida S.*,¹⁶⁰ there was a robbery. While Aida, a juvenile, did not physically accost the victim or say anything during the attack, because she remained physically close to her companions during the robbery, fled with the robbers, and had a knife on her person, she was arrested. She was found guilty of robbery in the first and second degree under New York Penal Law § 20.00.¹⁶¹ The court found that under criminal liability for conduct of another, she had the predicate mens rea, and intentionally aided in the robbery by standing there and blocking the victim’s escape.¹⁶² This decision did not take into consideration Aida’s vulnerability as a minor.¹⁶³

In analyzing the above statutes, it is unmistakable that the New York State Legislature, like the United States Supreme Court, has recognized that minors are different, and has tried to protect them by increasing punishments for adults who use children in criminal activity. However, New York statutes have failed to accomplish these goals. They are unclear, imprecise, incomplete and difficult to apply. Rather than three statutes that only address part of the problem, this Note proposes one comprehensive statute that will address both the adult and minor’s culpability. This proposal will first address adult’s culpability and will then address the minor’s liability.

¹⁵⁸ N.Y. PENAL LAW § 20.00 (McKinney 2014).

¹⁵⁹ *See id.*

¹⁶⁰ 592 N.Y.S.2d 442 (1993).

¹⁶¹ *See id.* at 442.

¹⁶² *See id.*

¹⁶³ *See id.*

IV. PROPOSAL

This Note proposes a solution by combining New York's conspiracy statutes, criminal facilitation statutes, and accessorial liability statutes to create a comprehensive rule that will protect juveniles who are manipulated by adults in any situation. This solution will build on New York's already existing statutory scheme, thus preserving the legislature's intent to punish adults who manipulate juveniles while clarifying the statute. Additionally, this proposed statute will fill the gap in New York's current legislation by addressing how courts should punish minors who were used or manipulated to commit a criminal act.

A. Language of Proposal

A) 1. A person is guilty of the offense of criminal manipulation of a minor if, being eighteen years of age or older, the person intentionally aids, induces, solicits, requests, commands, causes, or encourages a minor to commit any crime. 2. An adult who commits the offense of criminal manipulation shall be criminally liable for whatever crime the minor commits, and any sentence that is the result of this statute shall run consecutively with any other sentence.

B) 1. A minor, being an individual under the age of eighteen, who was found in a hearing by a juvenile court judge to be intentionally aided, induced, solicited, requested, commanded, caused, or encouraged to commit any crime by an adult, shall be found to be a criminally manipulated minor. 2. A criminally manipulated minor is entitled to a hearing to determine the child's level of culpability and shall be sentenced relative to such culpability, with the maximum sentence being one-third of the current maximum sentence under New York Penal Law § 70.05, and the minimum sentence being one-half of the maximum sentence under this statute.

B. Criminal Manipulation of a Minor-Adult Liability

a. Defining Criminal Manipulation of a Minor-Adult Liability

The proposed statute states that "a person is guilty of the offense of criminal manipulation of a minor if, being eighteen years of age or older the person intentionally aids, induces, solicits, requests, commands, causes, or encourages a minor to commit any crime." This statute mirrors much of

the language of § 20.00, but slightly broadens it by adding “encourages.”¹⁶⁴ The proposed statute also moves the phrase “intentionally aids” from the end of the statute to the beginning, thus applying “intentionally” to every act covered by the statute, not just those in which an adult aids a minor.¹⁶⁵ As a result, an adult who manipulates a juvenile in one of these ways must intend to do so under the proposed statute. This change prevents the statute from expanding beyond its intended purpose. If the statute did not include “intentionally,” an adult who unknowingly states in front of a minor that they used to drink when they were underage could be accused of encouraging a minor to commit a crime under the proposed statute. This would be an injustice, as the adult lacked the requisite intent for liability and should not be responsible for the juvenile’s decision.¹⁶⁶

Moreover, this proposed statute increases the age of the manipulated party from sixteen to eighteen. Although both New York’s conspiracy statute and criminal facilitation statute only increase punishments for adults who manipulate children under the age of sixteen, recent developments in brain imaging technology have emerged that support increasing the age of the manipulated party.¹⁶⁷ These advances in neuroscience reveal that sixteen and seventeen year olds have a vastly different ability to see long-term consequences and continue to be manipulated more easily by adults.¹⁶⁸ As these principles have been adopted by the legal community, including the United States Supreme Court,¹⁶⁹ New York State’s statutes should also reflect this change in dealing with juvenile criminals.

b. Sentencing Criminal Manipulation of a Minor-Adult Liability

Under the proposed statute, “an adult who commits the offense of criminal manipulation shall be criminally liable for whatever crime the minor commits.” For instance, if an adult gang leader orders that all members commit armed robbery to bring money into the gang, and one of

¹⁶⁴ N.Y. PENAL LAW § 20.00 (McKinney 2014) (“When one person engages in conduct which constitutes an offense, another person is criminally liable for such conduct when, acting with the mental culpability required for the commission thereof, he solicits, requests, commands, importunes, or intentionally aids such person to engage in such conduct.”).

¹⁶⁵ See generally YULE KIM, CONG. RESEARCH SERV. STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND TRENDS, 97-589 (2008).

¹⁶⁶ This is distinct from social host laws because this kind of liability would further increase the legal obligation of an individual from only those who furnish alcohol and therefore provide opportunity for underage drinking to those who merely mention alcohol and do not provide such an opportunity.

¹⁶⁷ See generally *Less Guilty by Reason of Adolescence*, *supra* note 45.

¹⁶⁸ While these advances in neuroscience have found that brain development does not end until the early twenties, because America has long held eighteen as the age of adulthood I believe that it would be unwise to increase the age of majority beyond eighteen.

¹⁶⁹ See *Roper v. Simmons*, 543 U.S. 551, 561 (2005).

the gang's juvenile members follows this order, the gang leader should be liable for the armed robbery. Furthermore, if in the process of completing the robbery the juvenile kills someone, the gang leader would also be liable for the murder. As these adults are preying on juveniles' immaturity and diminished cognitive ability, they should also be subject to the negative consequences of the minor's immaturity and impulsive nature.

The proposed statute also provides that, "any sentence that is the result of this proposed statute shall run consecutively to any other term or sentence." If an adult participates in a crime with the minor, like Muhammad or Johnson, they will likely already be criminally liable for whatever crime the minor committed. Therefore, if the statute allowed sentences to run concurrently, the proposal would not inflict greater punishment for the responsible adult and would not deter them from using juveniles.

Although the penalties for adults who use juveniles under New York's conspiracy and criminal facilitation statutes are strict, this proposal inflicts more severe punishments.¹⁷⁰ For instance, under New York's conspiracy statute, an adult who causes the performance of a Class B felony commits a Class D felony, and can be sentenced to, at most, seven years. Under the proposed statute, an adult who causes the performance of a Class B felony commits a Class B felony, and can be sentenced to up to twenty-five years in prison. This increase in sentence will further deter adults from using minors to commit crimes.

C. Criminal Manipulation of a Minor Proposal-Juvenile Liability

a. Defining Criminal Manipulation of a Minor-Juvenile Liability

Unlike current New York State statutes, this proposal also addresses the minor's responsibility and culpability in the committed crime. The proposal features two changes to the current law: First, it defines when a minor has been manipulated, and therefore, has decreased criminal culpability, and second, the proposal recommends decreased sentences and rehabilitative programs to victims of manipulation and control.

According to the proposal, a criminally manipulated minor is "an individual under the age of eighteen, who was found in a hearing by a juvenile court judge to be intentionally aided, induced, solicited, requested, commanded, caused, or encouraged to commit any crime by an adult." At the hearing in juvenile court, the judge plays two distinct roles. The judge

¹⁷⁰ See N.Y. PENAL LAW § 105.13 (McKinney 2014).

must first determine, based on legally sufficient evidence, that the child was intentionally aided, induced, solicited, requested, commanded, caused, or encouraged to commit a crime by an adult. Next, the judge must determine the child's level of culpability. At the hearing, the court should examine the child's level of maturity, psychiatric and mental capacities, past history, role in the offense, amenability to treatment, and willingness to participate with the police¹⁷¹ and prosecution to convict the manipulative adult.¹⁷² When examining the category of past history, the court should explore not only the child's past criminal activity, but how long the adult and child had a relationship and the child's home life. Although this creates a discretionary standard, judges in family and juveniles court are qualified to make these decisions because of their experience working with children and families.¹⁷³ By dealing with juveniles full-time, they have a better understanding of the child's mind and how and why juveniles commit criminal acts.¹⁷⁴ For these reasons, as well as a juvenile's lessened criminal culpability, it is pertinent to note that under no situation should the hearing be conducted in adult court.

This proposed criminal manipulation statute would create an exception to New York's transfer laws. Currently, New York automatically waives all sixteen and seventeen year old offenders into adult court; however, this proposal provides that in situations where their actions were caused by an adult, they should be entitled to have their case in juvenile court.¹⁷⁵ Furthermore, under current New York law, all children who are thirteen, fourteen, or fifteen years of age are automatically transferred to adult court for a number of crimes, including murder in the first or second degree or a sexually motivated felony.¹⁷⁶ This law does not take into account the Supreme Court's assertion that children are categorically different than adults.¹⁷⁷ This proposal asserts that, in the case of adult manipulation, children ages thirteen through eighteen should be automatically be tried

¹⁷¹ Even if the adult is not found guilty of criminal manipulation of a minor, if the minor participates fully with the prosecution then the minor *shall* be provided with a decreased sentence under the statute. However, if the minor does not fully work with prosecutors, makes misrepresentations or lies to prosecutors they shall not be entitled to a reduced sentence under this statute.

¹⁷² See LAURENCE STEINBERG, SHOULD JUVENILE OFFENDERS BE TRIED AS ADULTS: A DEVELOPMENTAL PERSPECTIVE ON CHANGING LEGAL POLICIES (2000), available at http://www.willamette.edu/cla/debate/pdf/youth_forum/kpdc%20research/motion%202%20affirm/bong_o_DATA%20ON%20JUVENILES.pdf (proposing similar guidelines for deciding whether juveniles should be transferred to adult courts).

¹⁷³ See *id.*

¹⁷⁴ See *id.*

¹⁷⁵ See *id.*

¹⁷⁶ See N.Y. PENAL LAW Art. 30 (McKinney 2014).

¹⁷⁷ See *Roper v. Simmons*, 543 U.S. 551, 551 (2005).

and sentenced in juvenile court, even for heinous crimes.¹⁷⁸

b. Sentencing Criminal Manipulation of a Minor-Juvenile Liability

Although minors covered the proposed statute were manipulated and used by adults, this merely diminishes their amount of responsibility; it does not remove all culpability. Therefore, under the proposal, a minor's sentencing should reflect the level of crime they committed. This Note recommends "the maximum sentence be one-third of the current maximum for juveniles under New York Penal Law § 70.05¹⁷⁹ and at minimum one-half of the maximum sentence under the proposed criminal manipulation statute." For example, if a minor commits Class C felony arson in the third degree at the behest of an adult, that juvenile would be subject to at maximum five years and at minimum two and one-half years in a juvenile detention center. Under current New York law, if a minor commits Class C felony arson in the third degree, that juvenile will be subject to at maximum fifteen years and at minimum of three years in prison.

Furthermore, these minors have often undergone years of manipulation, and in some cases indoctrination, so they must be provided with rehabilitative services that specifically address these issues. According to the majority in *Roper*, "[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed."¹⁸⁰ Therefore, this criminal manipulation statute proposes that at least one year of the minor's sentence be completed in a rehabilitative center that focuses on cognitive behavioral treatment, mental health and transitional counseling, educational opportunities, and job training and placement. Without this rehabilitation, it is likely that the manipulated juvenile will return to crime.

These reduced penalties are consistent with other New York State statutes involving adult manipulation of minors. For instance, New York Penal Law § 230.35 states "a person less than seventeen years of age from whose prostitution activity another person is alleged to have advanced or attempted to advance or profited or attempted to profit shall not be deemed

¹⁷⁸ If a minor, during his or her sentence, ages out of the juvenile facility he or she has been placed in, he or she can, at that point, be transferred to adult prison to finish out the sentence.

¹⁷⁹ N.Y. PENAL LAW § 70.05 (McKinney 2014). For the crime of murder in the 2nd degree where the punishment is life in prison, the maximum penalty under criminal manipulation is 1/3 of 25 years and is therefore 8.33 years.

¹⁸⁰ *Roper*, 543 U.S. at 570.

to be an accomplice.”¹⁸¹ Although prostitution is not considered to be a violent offense, Penal Law

§ 230.35 sets the precedent for absolving minors of liability in specific situations, and illustrates the legislature’s intent to punish juveniles only for the percentage of the crime for which they are culpable. Because juveniles have a diminished responsibility for their criminal acts, this statute’s distribution of sentences based on the level of culpability of the parties is appropriate.¹⁸²

In order to avoid potential abuse by juveniles in blaming adults for their actions, at the hearing to determine juvenile culpability, the court will hear not only from the juvenile, but also from the allegedly criminally responsible adult and from the prosecution. This process will allow the judge to develop a complete understanding of the case and allow him to determine by legally sufficient evidence, what, if any, influence the adult had on the juvenile.¹⁸³ If the court determines that the juvenile was not manipulated, as defined under this statute, the juvenile will not be entitled to reduced sentencing or specialized rehabilitative services. Therefore, this process will mitigate any motivation minors might have to exploit this statute.

CONCLUSION

Yummy Sandifer was buried, with his stuffed animals, on the day he was supposed to enter sixth grade.¹⁸⁴ His killers, Derrick and Cragg Hardaway, now thirty-two and thirty-four years old, respectively, remain in prison.¹⁸⁵ Neither boy had the opportunity to go to high school or college, as their mother wished.¹⁸⁶ Rather, the boys have spent the last eighteen years in prison because they were directed to kill Yummy Sandifer.¹⁸⁷ Similarly,

¹⁸¹ N.Y. PENAL LAW § 230.35 (McKinney 2014).

¹⁸² *Less Guilty by Reason of Adolescence*, *supra* note 45.

¹⁸³ This hearing articulated in the proposal will resemble a grand jury proceeding. The hearing will be used to hear evidence and determine if the individual should be charged with the crime. Furthermore, the standard of proof for the hearing should be ‘legally sufficient’ as the two proceedings share a number of similarities and the standard for grand jury hearings is legally sufficient evidence. *See* N.Y. CRIM. PRO. LAW § 190.05 (McKinney 2014); *see also* N.Y. CRIM. PRO. LAW § 190.65 (McKinney 2014).

¹⁸⁴ *Kids Killing Kids Rekindles Plea for Action to Stop Black and Black Crime*, JET, Sept. 26, 1994, at 18.

¹⁸⁵ Sharon Cohen, *Locked up at 14 for an Infamous Murder, Living with Regrets and Dreaming of a Future*, STARNEWS ONLINE (Dec. 18, 2007), <http://www.stamewsonline.com/article/20071218/YOUTH/71214002?p=6&tc=pg&tc=ar>.

¹⁸⁶ *See id.*

¹⁸⁷ *Id.*

Alex Cabarga spent twenty-five years in prison and, for the rest of his life, will be labeled a sex offender because he followed the direction of his captor and serial rapist.¹⁸⁸ Lastly, Lee Malvo, now twenty-six years old, will spend the rest of his life in prison because of John Muhammad's manipulation and indoctrination.¹⁸⁹ Although all of these boys were subjected to adult manipulation, the law failed to recognize their victimization. By adopting the proposed statute to punish adults who manipulate minors into committing crimes and to rehabilitate those minors who are also victimized in the commission of the crime, New York law would more accurately reflect current understanding of criminal culpability. Additionally, because this statute covers multiple types of adult manipulation, it would be more comprehensive and easier for prosecutors to apply than current laws. Lastly, and most importantly, this statute must be adopted to better protect minors like Yummy, Lee, and Alex from adult predators by deterring adults and by providing rehabilitation for minors.

¹⁸⁸ See Hager, *supra* note 32.

¹⁸⁹ *Sniper Malvo Sentenced to Life without Parole*, *supra* note 20.