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## New York's Raise the Age Law: Restoring the Juvenile Justice System Leaves Courts Legislating from the Bench

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**New York’s Raise the Age Law: Restoring the Juvenile  
Justice System Leaves Courts Legislating from the  
Bench**

**Sara V. Gomes\***

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## I. Introduction

With New York's enactment of the Raise the Age law, the State's Legislature codified the omnipresent notion that juveniles processed in the criminal justice system should be treated differently than adults given that they are inherently less culpable for a multitude of reasons, both measurable and incalculable. Flaws emanating from the minutiae of the Raise the Age law have surfaced since it became effective on October 1, 2018, as criminal matters involving sixteen-year-old offenders have been adjudicated in courts following the newly introduced procedures for removal of cases involving these youth to Family Court, or the newly-created Youth Part. Simultaneously, adjudications of matters in which applicants have turned to the courts to seal their criminal convictions pursuant to the Raise the Age legislation have also revealed gaps between the law's intent and its execution since implementation. Presiding judges have responded by bridging the gap between the legislation and its execution from the bench in accordance with the progressive, rehabilitative orientation of the Raise the Age law through developing case law. This Article will first provide background regarding New York's juvenile justice system, which provides context for the introduction and recent enactment of the Raise the Age law, before explaining the complexities of the legislation itself. Further, it will comment on periods of New York's extensive, dynamic history of juvenile justice which has reflected social mores through present day. Furthermore, this article will delve into several key provisions and consequent issues materializing in the courts under these provisions, which may endure into the second phase of implementation of the Law for seventeen-year-old offenders as of October 1, 2019. Finally, this article will suggest that the New York State Legislature should amend the Raise the Age legislation in order to better facilitate processing of sixteen- and seventeen-year-old offenders' matters, and sealing applications, respectively, under the law's new provisions. It is vital to the legislation's permanency to precisely mirror the ubiquitous concept embodied in the spirit of the Raise the Age legislation and the movement that preceded it: that adolescents are simply *different* than adult offenders, and their

status as such should be accorded deference by the courts of the State.

## II. A Brief History of New York's Juvenile Justice System

### A. Twentieth Century New York: A Progressive Juvenile Justice System

At common law and throughout the nineteenth century, criminal prosecution of a child less than fourteen years old could proceed only if the prosecution proved “[b]eyond all doubt and contradiction” that the youth could understand the distinction between right and wrong and could further understand the consequences of the illegal act.<sup>1</sup> This doctrine became known as the *infancy presumption* and was applied in New York throughout the nineteenth century, embodying the era's perception that juveniles required treatment and rehabilitation in response to wrongdoing, since those juveniles who did not know right from wrong, by extension, could not be deterred by virtue of the fact that they could not be assigned blame for their choices.<sup>2</sup> To that end, separate children's parts of the criminal courts of New York City were established in 1901.<sup>3</sup> The 1922 Children's Court Act codified the rehabilitative focus of the juvenile justice system that had predicated it<sup>4</sup> and “completed

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1. \* Sara Gomes is a third-year law student at the Elisabeth Haub School of Law at Pace University, J.D. expected May 2020, and is the Executive Acquisitions Editor for *Pace Law Review*. She intends to pursue a career in matrimonial and family law post-graduation. Sara would like to extend her wholehearted gratitude to her professors and colleagues on *Pace Law Review* for their invaluable time, effort, and advice in composing this Article. Merrill Sobie, *The Family Court: An Historical Survey*, 60 N.Y. ST. B.J. 53, 53 (1988). This burden of proof was very difficult to sustain, leading to few reported prosecutions. *Id.*

2. *Id.* at 54; BARRY C. FELD & PERRY L. MORIEARTY, *JUVENILE JUSTICE ADMINISTRATION IN A NUTSHELL* 40-41 (4th ed. 2018).

3. Sobie, *supra* note 1, at 55.

4. See Merrill Sobie, *Pity the Child: The Age of Delinquency in New York*, 30 PACE L. REV. 1061, 1066-71 (2014) (discussing how nineteenth century New York allowed convicted juveniles to be placed in privately-maintained Houses of Refuge instead of punitive, state-owned jails or prisons so juveniles could participate in rehabilitative programs until they reached majority) [hereinafter Sobie, *Pity the Child*]; Merrill Sobie, *The Juvenile Offender Act: Effectiveness and Impact on the New York Juvenile Justice System*, N.Y. L. SCH. L. REV. 677, 677-84 (1981) [hereinafter Sobie, *The Juvenile Offender Act*]. See

the divorce between juvenile and criminal courts” by removing all youth under the age of sixteen from the jurisdiction of the criminal court system and the procedural safeguards it afforded for juvenile defendants.<sup>5</sup> The Children’s Court Act provided for the separation of children from adult offenders, showcasing that, even in the early twentieth century, New York recognized that placing juveniles in adult prisons was inappropriate: “No child coming within the provisions of the act shall be placed . . . [in] any prison, jail, lockup, or other place where such child can come into contact at any time or in any manner with any adult who has been convicted of a crime, or who is under arrest.”<sup>6</sup> Notwithstanding the physical separation of juveniles from adults, a 1927 Court of Appeals decision held that criminal due process standards applied to delinquency actions, including a “definite charge, a hearing, competent proof, and a judgement. Anything less [would be] arbitrary power.”<sup>7</sup>

However, in the 1930s, New York Children’s Courts began to adopt the informality associated with the social work model of juvenile justice, as exemplified by the case of *People v. Lewis*, a New York Court of Appeals decision that stripped juvenile delinquents of the right against self-incrimination and replaced the due process standards the Court had instituted four years earlier with the less rigorous evidentiary standards of civil cases.<sup>8</sup> *People v. Lewis* also marked the beginning of the informal *parens patriae* system.<sup>9</sup> The legal doctrine of *parens patriae* demarcated the State’s right and responsibility to substitute its own control for that of the natural parent(s) and provided it the formal justification to intervene when parents appeared unable or unwilling to meet their responsibilities, or when a child was deemed to pose a problem for the community.<sup>10</sup>

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generally FELD & MORIEARTY, *supra* note 2, at 3-4.

5. See Sobie, *supra* note 1, at 54-55; N.Y. CODE CRIM. PROC. ANN. art. 1, § 2 (James C. Cahill 1928) (repealed 1962) (defining “juvenile delinquency” as pertaining to “any child under the age of sixteen years.”).

6. CRIM. PROC. art. 3, § 23.

7. Sobie, *supra* note 1, at 55 (citing *People v. Fitzgerald*, 155 N.E. 584, 586-88 (N.Y. 1927)).

8. John N. Kane, Jr., Note, *Dispositional Authority and Decision Making in New York’s Juvenile Justice System: Discretion at Risk*, 45 SYRACUSE L. REV. 925, 935 (1994) (citing *People v. Lewis*, 183 N.E. 353 (N.Y. 1932)); see Sobie, *supra* note 1.

9. Sobie, *The Juvenile Offender Act*, *supra* note 4, at 684.

10. FELD & MORIEARTY, *supra* note 2, at 7.

This informal system remained largely unchanged until 1962, when the Family Court Act (the “1962 Act”) was enacted, effectively reorganizing and renaming New York’s Children’s Courts as the Family Courts that exist today.<sup>11</sup>

The 1962 Act incorporated several unprecedented provisions, including transferring exclusive jurisdiction over crimes committed by children over the age of seven and under the age of sixteen to the newly created Family Courts, and providing that delinquent children under the age of sixteen could only be confined for a maximum of eighteen months initially, regardless of the crime.<sup>12</sup> Further, the 1962 Act incorporated procedural safeguards that the Children’s Court lacked: juvenile defendants were assigned counsel, permitted to conduct discovery, introduce evidence, and appeal adverse decisions.<sup>13</sup> Moreover, the 1962 Act afforded family court protections such as the potential for complete disposition of a case following probation, no mandatory sentencing requirements irrespective of the crime, and sealed juvenile records.<sup>14</sup> Although the 1962 Act provided for a criminal court judge to waive into family court a juvenile fifteen years or older if he had been charged with a capital or life-imprisonment offense, it rejected proposals to expand delinquency jurisdiction to eighteen-year-olds.<sup>15</sup> Despite the 1962 Act’s establishment of a rehabilitative foundation for New York’s juvenile justice system, growing public fear of rising juvenile crime, and the perception that the family courts’ dispositions were too lenient, ushered in New York’s “get tough” era of juvenile justice policies that permeated the 1970s, ‘80s, and ‘90s.<sup>16</sup>

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11. Kane, Jr., *supra* note 8, at 936 (citing 1962 N.Y. Laws, ch. 686 (current version at N.Y. FAM. CT. ACT § 111-1211 (McKinney through L.2019 ch. 652))).

12. *Id.*; Jonathan Lippman, *Criminal Justice Reform is Not for the Short-Winded: How the Judiciary’s Proactive Pursuit of Justice Helped Achieve “Raise the Age” Reform in New York*, 45 FORDHAM URB. L.J. 241, 264-65 (2017).

13. Julianne T. Scarpino, Note, *A Progressive State of Mind: New York’s Opportunity to Reclaim Justice for its Juveniles*, 23 J.L. & POL’Y 845, 854-55 (2015).

14. *Id.*; *see* Kane, Jr., *supra* note 8, at 936.

15. Scarpino, *supra* note 13, at 855; Sobie, *The Juvenile Offender Act*, *supra* note 4, at 685.

16. Kane, Jr., *supra* note 8, at 937; *see* FELD & MORIEARTY, *supra* note 2, at 16-18.

1. New York's Late-Twentieth Century Punitive Juvenile Justice System: The Juvenile Offender Acts of 1976 & 1978

During the “get tough” era, politicians and the media molded the perception of adolescents from vulnerable children to frightening “super-predators” by publicizing sound bites such as: “adult crime, adult time” or “old enough to do the crime, old enough to do the time,” in conjunction with high profile national cases that “fueled public outrage and spurred public debate on juvenile justice.”<sup>17</sup> The 1976 Juvenile Offender Act (the “1976 Act”) codified these sentiments and marked the most radical change in New York’s delinquency laws since the establishment of the Children’s Court in 1922.<sup>18</sup> The 1976 Act’s community interest provision, which weighed the unique needs of juveniles against the considerations relative to community safety, sharply pivoted from the previous legal notions of individualized justice based solely on the needs and interests of the subject child.<sup>19</sup> Among other provisions, it created a new category of designated felonies,<sup>20</sup> which carried stricter penalties for fourteen- and fifteen-year-olds adjudicated delinquent while maintaining adjudicatory and dispositional authority over these crimes in Family Court.<sup>21</sup>

Merely two years later, the crimes of one of New York’s juveniles became sensationalized in the media, precipitating sweeping “tough on crime” juvenile justice reform.<sup>22</sup> The “Baby-Faced Butcher” was a fifteen-year-old defendant who was found

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17. FELD & MORIEARTY, *supra* note 2, at 17; Kane, Jr., *supra* note 8, at 926 n.3 (citing Patricia Edmonds & Sam V. Meddis, *Crime and Punishment: Is the Juvenile Justice System “Creating Monsters”?*, USA TODAY, Sept. 28, 1994, at 1A) (“Robert ‘Yummy’ Sandifer, 11 years old, killed a 14-year-old neighbor in Chicago, before being murdered himself. . . . Craig Price murdered another at the age of 13 by stabbing his neighbor 58 times in Rhode Island. He murdered two more at the age of 15 . . .”).

18. Sobie, *The Juvenile Offender Act*, *supra* note 4, at 717.

19. Scarpino, *supra* note 13, at 856.

20. Designated felonies under the 1976 Act included violent crimes such as murder, manslaughter, kidnapping, robbery, assault, rape, sodomy, and arson. Kane Jr., *supra* note 8, at 938 n.102 (citing N.Y. FAM. CT. ACT § 301.2(8) (McKinney 1987) (current version at N.Y. FAM. CT. ACT § 301.2(8) (McKinney through L.2019 ch. 652)).

21. Kane Jr., *supra* note 8, at 937, 939.

22. Scarpino, *supra* note 13, at 856.

guilty of the murders of two subway passengers in the Bronx Family Court and sentenced to the maximum penalty for his crimes under the Juvenile Offender Act: five years of incarceration at a juvenile facility, with no permanent criminal record.<sup>23</sup> The ensuing public outcry for harsher reform culminated in the 1978 Juvenile Offender Law, which evidenced “the legislature’s outraged state of mind and thirst for retribution.”<sup>24</sup>

The 1978 Juvenile Offender Act (the “1978 Act”) lowered the age of criminal responsibility from sixteen to fourteen-years-old for a wide range of crimes, and to thirteen-years-old for murder, vesting adult criminal courts, instead of family courts, with original jurisdiction over these defendants.<sup>25</sup> Juveniles found to have committed one of the designated felonies defined by the preceding 1976 Act were deemed “Juvenile Offenders” and were subject to prosecution in adult court, including public hearings, public records, and harsher sentencing.<sup>26</sup> For the first time since the nineteenth century, the 1978 Act abolished the discretionary power of the court to waive a criminal penalty regardless of the circumstances, instead demanding mandatory incarceration for certain violent crimes.<sup>27</sup> Moreover, the 1978 Act expanded the discretion of the district attorney and judge under a “reverse wavier” process that provided for removal of a Juvenile Offender to family court if the prosecutor found that the attendant circumstances warranted removal, if it was more convenient to do so, or if there was insufficient proof to convict in adult court; or, as a catch-all, if the judge found removal to be “in the interests of justice.”<sup>28</sup> At later stages of the prosecution, the

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23. *Id.* at 857.

24. *Id.* at 858.

25. Kane, Jr., *supra* note 8, at 939; Scarpino, *supra* note 13, at 858; Sobie, *The Juvenile Offender Act*, *supra* note 4, at 686-87. With the Juvenile Offender Acts, “New York’s one-hundred-and-fifty-year history of maintaining an age threshold of sixteen for criminal prosecution (except for murder cases) ha[d] been terminated . . .” *Id.* (citing 1978 N.Y. Laws ch. 478, § 2 (repealed 2017)).

26. Kane, Jr., *supra* note 8, at 939.

27. *Id.*; *see also* Scarpino, *supra* note 13, at 858.

28. Kane, Jr., *supra* note 8, at 940. The court considered a number of factors when it determined whether removal was “in the interest of justice,” including “the seriousness and circumstances of the offense, the extent of the harm caused by the offense, the evidence of guilt, the history and character of the juvenile, and the impact the transfer [to Family Court] will have on the safety of the community and the victim involved.” *Id.* at 940 n.130.



district attorney possessed the power to preclude the removal of a Juvenile Offender case to family court, even if the court would otherwise be willing to grant a transfer.<sup>29</sup> The reverse waiver process was unique to New York, since other states operated conversely by vesting principal jurisdiction over juvenile offenders in family court and permitting waiver into adult court.<sup>30</sup> In the end, despite the call for harsher punishments echoed by the 1978 Act's wrath of retribution for juvenile defendants, it failed to deter juvenile crime, left all juveniles prosecuted as adults with stifling criminal records, and left those incarcerated with adults at risk for emotional and sexual abuse, and criminal socialization.<sup>31</sup> In the years following the enactment of the 1978 Act, New York's juvenile justice system became an emblem of the *tough on crime* era of the late twentieth century and simultaneously a "paradigm [that] entrench[ed] the state's youngest offenders in a correctional system designed to ensure that their first worst act [was] not their last."<sup>32</sup>

B. The Return of Sensible Juvenile Justice in New York:  
The Youth Court Act, the Public Outcry for Reform, and  
the Overdue Passage of the Raise the Age Law

In deciding several pivotal cases throughout the twenty-first century which buttressed expanding support for a criminal justice system that accounted for the innate differences between children and adults, the United States Supreme Court focused on three significant idiosyncrasies characteristic of juveniles which inherently reduces their level of culpability:

(1) [an] underdeveloped sense of responsibility, which leads to impulsive and reckless decisions, (2) inability to remove [themselves] from negative influences and vulnerability to such negative influences and pressures, and (3) underdeveloped moral character, which indicates [their] actions do not necessarily exemplify permanent depravity.<sup>33</sup>

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29. Sobie, *The Juvenile Offender Act*, *supra* note 4, at 698.

30. Kane, Jr., *supra* note 8, at 940.

31. Scarpino, *supra* note 13, at 864.

32. *Id.* at 857, 885.

33. *Id.* at 865. In each of these cases, the Supreme Court removed harsh punishments previously imposed on juvenile offenders for decades: *Roper v. Simmons*, 543 U.S. 551, 578 (2005), outlawed capital punishment for convicts

This change in perception of “adolescent criminality” was mirrored at the state level with a widespread break from the zero-sum game of the 1976 and 1978 Acts due to several contributing factors:

(a) a major decrease in the juvenile crime rate, and an even more pronounced diminution in the juvenile violent crime rate; (b) studies showing conclusively that treating youths as adults, and thereby incarcerating them in adult penal institutions—as opposed to juvenile facilities—dramatically increases recidivism; and (c) research proving that older adolescents are not as fully developed neurologically as adults and, as every parent knows innately, their ability to exercise sound judgment or control impulsive behavior is accordingly compromised.<sup>34</sup>

Recognition of the commonsense notion that adolescents are simply different than adults sparked the push toward New York’s liberalization of its juvenile criminal justice system, albeit over the course of many years, ultimately leading to the passage of the “Raise the Age” (“RTA”) law in 2017.<sup>35</sup> The State Legislature’s shift in focus from the charged offense to the alleged offender reversed the 1976 and 1978 Acts’ fixation on punishment in order to promote rehabilitation of New York’s youth.<sup>36</sup> Among the successful pilot programs reflecting the Legislature’s gradual transition toward the current rehabilitative-focused juvenile criminal justice system was Adolescent Diversion Program (“ADP”) implemented in January 2012, which temporarily installed Youth Parts in New York’s criminal courts that processed sixteen- and seventeen-year-

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under the age of eighteen; *Graham v. Florida*, 560 U.S. 48, 81 (2010), and *Miller v. Alabama*, 567 U.S. 460, 489 (2012), invalidated the imposition of a life sentence without parole for non-homicide convictions and mandatory life sentences for offenders convicted of homicide, respectively. *See also* *J.D.B. v. North Carolina*, 564 U.S. 261, 372 (2011) (holding that the objective inquiry of whether a defendant understands his or her *Miranda* rights must account for the child’s age as “a fact that ‘generates commonsense conclusions about behavior and perception’”).

34. Sobie, *Pity the Child*, *supra* note 4, at 1074-75; *see* Stephanie Tabashneck, *Feature*, “Raise the Age” Legislation: *Developmentally Tailored Justice*, 32 CRIM. JUST. 13, 16 (2018) (“Far from ‘mini-adults,’ adolescents in the throes of normative development are emotionally driven, short-sighted, exceedingly reactive, and highly emotionally aroused.”).

35. Dineen Ann Riviezzo, *Raise the Age New York*, RAISE THE AGE NY 2, <http://rta-ny.artiems.com/wp-content/uploads/2018/12/Raise-the-Age-Legislation-Summary-2017.pdf> (last visited Nov. 5, 2019).

36. Kane, Jr., *supra* note 8, at 944.

olds.<sup>37</sup> By April 13, 2013, more than 3000 cases had been adjudicated in these Parts, resolving most cases without jail time or criminal records while decreasing the rate of re-arrest among the youth who went through the program.<sup>38</sup> The ADP's 2013 study confirmed that New York's misguided juvenile criminal justice procedures had become a proxy for recidivism of low-risk juvenile offenders.<sup>39</sup> Further, the ADP recognized that the process of giving "intensive treatments to low-risk individuals," had the inadvertent effect of increasing the chances those juveniles would reoffend and successfully remedied these consequences by replacing incarceration with treatment, social service, or community service options geared toward sixteen- and seventeen-year-olds.<sup>40</sup> In the meantime, the Sentencing Commission had released a report finding that the Family Court was an unfeasible forum in which to process these youthful offenders at the time since, among other considerations, it lacked the ability to properly absorb a significant number of cases and procedural protections otherwise available in criminal court, such as a jury trial and access to bail.<sup>41</sup>

During the 2012 State of the Judiciary Address, the Honorable Jonathan Lippman, former Chief Judge of New York, announced a proposal for the Youth Court Act.<sup>42</sup> The Youth Court Act's incredibly progressive provisions included: (a) raising the age of criminal responsibility to eighteen; (b) obligatory notification of juveniles' parent or guardian immediately upon arrest; (c) either release to a parent or

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37. MICHAEL REMPEL ET. AL., THE ADOLESCENT DIVERSION PROGRAM: A FIRST YEAR EVALUATION OF ALTERNATIVES TO CONVENTIONAL CASE PROCESSING FOR DEFENDANTS AGES 16 AND 17 IN NEW YORK 3 (2013), [https://www.courtinnovation.org/sites/default/files/documents/ADP\\_Report\\_Final\\_0.pdf](https://www.courtinnovation.org/sites/default/files/documents/ADP_Report_Final_0.pdf).

38. Lippman, *supra* note 12, at 264-65.

39. See generally Ctr. for Court Innovation, *Adolescent Diversion Program in NY: Researchers Discuss First-Year Impacts* (May 13, 2013), <https://www.courtinnovation.org/publications/adolescent-diversion-program-ny-researchers-discuss-first-year-impacts>.

40. Lippman, *supra* note 12, at 264-65.

41. *Id.* at 265.

42. *Id.* at 266; see Jonathan Lippman, *The State of the Judiciary 2012: Balancing the Scales of Justice* (Feb. 14, 2012), <https://www.ils.ny.gov/files/SOJ-2012.pdf>.

guardian with a “special appearance ticket”<sup>43</sup> or processing in a new youth division of the superior court; (d) prohibiting the release of juveniles’ fingerprints; (e) adjustment<sup>44</sup> as the first option instead of incarceration; (f) sealing of criminal records; and (g) a process of removal to Family Court only after a youth is found guilty, to determine whether he or she required supervision, treatment, or confinement at that time.<sup>45</sup> Ultimately, the Youth Court Act lost traction after being referred to the Codes Committee of the New York State Senate both in 2012 and again as reintroduced in 2013.<sup>46</sup>

The renewed efforts toward raising the age of criminal responsibility to eighteen-years-old in New York finally came to fruition in 2014 when Governor Andrew Cuomo announced his support for reform, and established the Commission on Youth, Public Safety, and Justice.<sup>47</sup> The Commission’s report recommended that the Family Court, with judges primarily trained in the area of family law, be given jurisdiction over sixteen- and seventeen-year-olds charged with nonviolent felonies and misdemeanors, among other low-level offenses.<sup>48</sup> After gaining immense support from politicians, lawmakers, and the public,<sup>49</sup> and momentum in the State Assembly, the long-

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43. A “special appearance ticket” is a “written notice issued and subscribed by an officer . . . directing a designated person to appear at the probation service for the county in which the offense or offenses for which the special appearance ticket is issued were allegedly committed.” Lippman, *Criminal Justice Reform is Not for the Short-Winded*, *supra* note 12, at 267 n.145; see Jellisa Joseph, Note, *Catching Up: How the Youth Court Act Can Save New York State’s Outdated Juvenile Justice System with Regard to Sixteen and Seventeen-Year-Old Offenders*, 7 ALB. GOV’T L. REV. 219, 232 (2014).

44. “Adjustment” is a procedure under the Family Court Act that halts the prosecution of the juvenile on the condition that the youth person completes activities intended to promote positive youth development. See Susannah Karlsson, *Raise the Age*, 26 ATTICUS 11, 12 (2014).

45. Lippman, *supra* note 12, at 266-68.

46. See Joseph, *supra* note 43, at 230-39.

47. Lippman, *supra* note 12, at 273.

48. *Id.*

49. Eli Hager, *The Fine Print in New York’s Raise the Age Law*, THE MARSHALL PROJECT (Apr. 14, 2017 2:24 PM), <https://www.themarshallproject.org/2017/04/14/the-fine-print-in-new-york-s-raise-the-age-law> (“[F]or proponents of raising the age, the goal has always been to keep all juveniles, accused of all crimes, out of the adult system, and to that extent New York’s law is a compromise stitched together in Albany after many years of contentious debate and Republican opposition.”). See *generally* Time:

awaited Raise the Age legislation was enacted on April 10, 2017, adopting many of the provisions of the Youth Court Act and bringing New York's juvenile justice system up to speed with the rest of the nation.<sup>50</sup> Thus, "[a]fter more than a century of treating 16- and 17-year-olds as adults in the criminal justice system, the passage of [the] Raise the Age [law] created an entirely new [age-appropriate] system for older adolescents."<sup>51</sup>

### III. Intricacies of the Raise the Age Legislation

As the penultimate state to increase the age of criminal accountability, the Raise the Age law hoisted New York into a long-awaited era of age-appropriate juvenile justice.<sup>52</sup> Arguably, the most remarkable achievement of the Raise the Age legislation lies in its long-awaited provision that raises the presumptive age of juvenile accountability in New York from sixteen- to eighteen-years-old, effective for sixteen-year-olds as of October 1, 2018 and for seventeen-year-olds beginning October 1, 2019.<sup>53</sup> In so doing, the law vastly changes the landscape for juvenile offenders in the criminal justice system, including: prohibiting sixteen- and seventeen-year-olds from being held in adult jails and prisons, making substantive changes to the procedures and mechanisms in the criminal and

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*The Kalief Browder Story* parts I-V (Spike television broadcast Mar. 2017).

50. Riviezzo, *supra* note 35; see Act of Jan. 23, 2017, No. A.3009-C/S.2009-C, pmb. ("[T]o amend the criminal procedure law, the penal law, the executive law, the family court act, the social services law, the corrections law, the county law and state finance law, in relation to proceedings against juvenile and adolescent offenders and the age of juvenile and adolescent offenders and to repeal certain provisions of the criminal procedure law relating thereto.").

51. City of N.Y., *One Year after Raise the Age, Misdemeanor Arrests of 16-Year-Olds Decline 61%*, NYC (Oct. 1, 2019) (quoting Admin. of Children's Servs. Comm'r David A. Hansell), <https://www1.nyc.gov/office-of-the-mayor/news/452-19/one-year-after-raise-age-de-blasio-administration-sees-61-percent-decline-misdemeanor>.

52. Lawrence K. Marks, *Implementing 'Raise the Age' Legislation*, N.Y.L.J. (Jan. 11, 2019 11:29 AM), <https://www.law.com/newyorklawjournal/2019/01/11/implementing-raise-the-age-legislation/>. North Carolina was the sole state besides New York that had not raised the age of criminal responsibility to eighteen-years-old at the time of passing New York's Raise the Age law. *Id.* North Carolina's Raise the Age law took effect December 1, 2019. Tabashneck, *supra* note 34; see *Raise the Age – NC*, N.C. DEP'T PUB. SAFETY, <https://www.ncdps.gov/our-organization/juvenile-justice/key-initiatives/raise-age-nc> (last visited Dec. 30, 2019).

53. Riviezzo, *supra* note 35.

youth justice systems, and allowing for rehabilitative services for youth, including altering the type of placement and/or detention juveniles may be ordered to receive.<sup>54</sup> In addition, parental notification of arrest will now be required for sixteen- and seventeen-year-olds in police custody.<sup>55</sup>

A. The “Adolescent Offender” Designation, Youth Part Jurisdiction, and the Removal Procedure under the Raise the Age Legislation

The RTA law created a new class of juvenile offenders, the “Adolescent Offender” (“AO”) class, which is statutorily defined as “a person charged with a felony committed on or after October first, two thousand eighteen when he or she was sixteen years of age or on or after October first, two thousand nineteen, when he or she was seventeen years of age.”<sup>56</sup> The preexisting Juvenile Delinquent (“JD”) classification was also extended to include sixteen and seventeen-year-olds charged with misdemeanor offenses who will be processed in Family Court pursuant to existing JD laws, save a few exceptions for those charged with more heinous crimes.<sup>57</sup> If the State charges an AO as an adult, he or she will be subject to treatment as a Youthful Offender, meaning (s)he will be processed in the new “Youth Parts” of criminal courts like other AOs, but will be subject to adult sentencing laws, as was the law prior to the passage of the RTA legislation.<sup>58</sup> However, if the State does not deem the AO a Youthful Offender, the judge then presiding over AO cases in the Youth Part *must* take the youth’s age into account when

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54. See generally *Raise the Age: Overview and Implementation*, N.Y. STATE, <https://www.ny.gov/sites/ny.gov/files/atoms/files/RTAWebsitePresentation.pdf> (last visited Dec. 30, 2019) [hereinafter *Raise the Age Overview*].

55. *Id.*

56. N.Y. CPL § 1.20(44) (McKinney through L.2019 ch. 652); see *Raise the Age Implementation: Adolescent Offender*, N.Y. STATE, <https://www.ny.gov/raise-age/raise-age-implementation#adolescent-offender> (last visited Nov. 3, 2019).

57. *Raise the Age Overview*, *supra* note 54, at 6.

58. *Id.*; see Michael A. Corriero, *Judging Children as Children: Reclaiming New York’s Progressive Tradition*, 56 N.Y. L. SCH. L. REV. 1413, 1414-15 (2011/12).

sentencing.<sup>59,60</sup>

Further, under the RTA law, processing in the Youth Part allows for voluntary probation services tailored to AOs and other juvenile offenders and carries a presumption against detention.<sup>61</sup> This feature of the new law departs from prior *tough on crime* practices which failed to render social services, including educational, physiological, and social service programs, which were previously solely available to juveniles processed in Family Courts.<sup>62</sup> Should detention be ordered pre-trial, specialized secure juvenile detention facilities—created pursuant to the guidelines of the RTA law and reserved exclusively for AOs—will house the AOs in units separate from JDs and/or Juvenile Offenders,<sup>63</sup> a sharp departure from the housing requirements under previous state laws that landed teenagers on Rikers Island with adult offenders even prior to a determination of their guilt.<sup>64</sup> Judges will have the discretion to order that AOs sentenced to less than one year serve their

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59. Riviezzo, *supra* note 35, at 22. This notion coincides with Supreme Court cases such as *In re Gault* and its progeny, which recognized that age is a pertinent factor in a myriad of juvenile criminal matters. See sources cited *supra* note 34.

60. In other words, sentencing determinations for AOs who are not characterized as Youthful Offenders will be made cognizant of the RTA's recognition that their punishment should be commensurate with their blameworthiness, which it recognizes to be tied to their age, while Youthful Offenders will not be afforded such considerations by the court pursuant to statute though they too are younger than eighteen-years-old.

61. *Raise the Age Overview*, *supra* note 54, at 13. AO cases processed in Family Court may still be allowed to divert their case from a prosecutor's office to a probation through a process called "adjustment," which has been available prior to RTA for JDs. Scarpino, *supra* note 14, at 879-80.

62. Corriero, *supra* note 58, at 1416.

63. *Raise the Age Overview*, *supra* note 54, at 6; Riviezzo, *supra* note 35, at 27. Youth whose cases are heard in Family Court will be detained or placed in Office of Children and Family Services ("OCFS") operated, OCFS-licensed, or Administration for Children's Services facilities, as JDs currently are. *Raise the Age Overview*, *supra* note 54, at 6.

64. See Samantha A. Mumola, *The Concrete Jungle: Where Dreams Are Made of . . . and Now Where Children Are Protected*, 39.1 PACE L. REV. 539, 540-42 (2019); see also Jennifer Gonnerman, *Kalief Browder, 1993-2015*, NEW YORKER (June 7, 2015) <https://www.newyorker.com/news/news-desk/kalief-browder-1993-2015> (discussing the high-profile story of Kalief Browder). Browder faced years of violence and solitary confinement on Rikers Island in connection with his arrest for allegedly stealing a backpack, for which charges were eventually dropped; after his release and the publicization of his story, Browder committed suicide in 2015. *Id.*

sentences in these specialized juvenile detention facilities.<sup>65</sup> AOs who are sentenced to state imprisonment will be placed in AO facilities specially developed by the State in conjunction with government social service offices.<sup>66</sup>

The Youth Parts will have primary jurisdiction over AOs charged with felony offenses and will be presided over by specially-trained family court judges,<sup>67</sup> who will also hear cases of all thirteen- to fifteen-year-old Juvenile Offenders in these Parts.<sup>68</sup> Pursuant to a newly implemented process of removal, all non-violent felonies allegedly committed by AOs are automatically transferred from the Youth Part to Family Court unless the defendant waives removal; or, the District Attorney may file a motion within thirty calendar days of the AO's arraignment showing "extraordinary circumstances" that warrant retention of the matter in the Youth Part.<sup>69</sup> Violent

65. *Raise the Age Overview*, *supra* note 54, at 6.

66. *Id.* The facilities for AOs have been developed by the state with enhanced security managed by the Department of Corrections and Community Supervision with the assistance of the OCFS. *Id.*

67. Mumola, *supra* note 64, at 562 (citing Interview with Janet DiFiore, Chief Judge, N.Y. State (Mar. 16, 2018)) ("To make this transition smoother [for the Youth Parts], 'there [were] extensive [state-wide] trainings held throughout the summer [of 2018] . . . on the new law.' Additionally, judges and court staff engaged in a specialized training to better prepare them to address cases of adolescent and juvenile offenders."); Yvonne Borkowski et. al., Panel Discussion, Perspectives on the First Year of Implementation of Raise the Age, Westchester Women's Bar Association CLE (Oct. 3, 2019) [hereinafter WWBA CLE] ("The statute requires that the Youth Court Judges receive specialized training in juvenile justice, adolescent development, custody and care of youths and effective treatment methods for reducing unlawful conduct by youths."); see *Our Statement on the Final Phase of State-Wide Implementation, Our Agenda for Achieving Youth Justice*, RAISE THE AGE NY 1 (Oct. 1, 2019) [hereinafter *Agenda for Achieving Youth Justice*], <https://raisetheageny.org/wp-content/uploads/2019/10/RTANY-Statement-for-10.1.2019.pdf> (as of October 1, 2019, sixteen- and seventeen-year-olds falling under the purview of the RTA law have their cases heard before a judge trained in "adolescent development and family law").

68. Riviezzo, *supra* note 35, at 4; *Raise the Age Overview*, *supra* note 54, at 7.

69. N.Y. CPL § 722.23(1)(a) (McKinney through L.2019 ch. 652) ("Following the arraignment of [an AO] charged with a crime . . . other than any class A felony except for those defined in article two hundred twenty of the penal law, a violent felony defined in section 70.02 of the penal law or a felony listed in paragraph one or two of subdivision forty-two of section 1.20 of this chapter, or an offense set forth in the vehicle and traffic law, the court shall order the removal of the action to the family court . . . unless, within thirty calendar days of such arraignment, the district attorney makes a motion to



felonies may also be transferred from the Youth Part to Family Court if the District Attorney timely files the same motion showing “extraordinary circumstances.”<sup>70</sup> Although integral to the law and to the removal process it formed, the RTA legislation is wholly devoid of a definition of “extraordinary circumstances.”<sup>71</sup> Yet, the RTA law specifies a three-part test which retains a violent felony juvenile matter in the Youth Part automatically if one or more is proven by a preponderance of the evidence<sup>72</sup>: if the defendant is found to have (1) displayed a deadly weapon in furtherance of the offense; (2) caused significant physical injury; or, (3) engaged in certain criminal sexual conduct.<sup>73</sup> The term “significant physical injury” has not been defined by the Raise the Age legislation.<sup>74</sup> These three factors may not necessarily constitute *elements* of an offense, but the language “set forth in the accusatory instrument” may require the People to allege so nonetheless.<sup>75</sup> Upon the arraignment of an AO charged with a violent felony in the Youth Part, “the court shall schedule an appearance no later than six calendar days from such arraignment for the purpose of reviewing the accusatory instrument”<sup>76</sup> and other relevant facts

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prevent removal of the action . . . .”); see also *id.* § 722.23(1)(d) (“[T]he court [shall] make[] a determination upon such motion by the district attorney [to prevent removal of the case] that extraordinary circumstances exist that should prevent the transfer of the action to family court.”); Riviezzo, *supra* note 35, at 15.

70. Riviezzo, *supra* note 35, at 15.

71. Jesse McKinley, ‘Raise the Age,’ Now Law in New York, Is Still a Subject of Debate, N.Y. TIMES (Apr. 10, 2017), <https://www.nytimes.com/2017/04/10/nyregion/raise-the-age-new-york.html>; see CPL § 722.23.

72. *E.g.*, People v. D.G., No. FYC-70228-19, 2019 WL 2455461, at \*12 (N.Y. Sup. Ct. Kings Cty. Apr. 4, 2019) (“In Pattern Jury Instructions, to establish a fact by a preponderance of the evidence means to prove that something is more likely true than not true.”); People v. M.M. (*M.M. I*), 97 N.Y.S.3d 426, 428 (Cty. Ct. Nassau Cty. 2019) (quoting 58A N.Y. JUR. 2D EVIDENCE & WITNESSES § 978 (2019)) (“The well-established preponderance of the evidence standard requires evidence that is sufficient to ‘produce a reasonable belief in the truth of the facts asserted.’”).

73. *Raise the Age Overview*, *supra* note 54, at 15; Riviezzo, *supra* note 35, at 14. These matters will “likely [represent] the majority of cases.” Hager, *supra* note 49.

74. See CPL § 722.23(2)(b); *infra* Part II(a)(2).

75. CPL § 722.23 cmt. Vehicle and Traffic Law cases and Class A felonies other than Class A drug offenses cannot be transferred to family court. *Id.*; see RIVIEZZO, *supra* note 35, at 14.

76. CPL § 722.23 (2)(a).

to determine whether the People have proved by a preponderance of the evidence one or more of the foregoing three-part test.<sup>77</sup> The RTA law does not specify the nature of the scope of the parties' opportunity to be heard at the sixth-day appearance.<sup>78</sup> If a court determines the action shall not proceed under CPL § 722.23(2) because none of the three factors are present, it lapses into processing under CPL § 722.23(1), under which removal to Family Court is available.

The flow chart compiled by the Westchester Children's Association below provides an illustrative representation of the procedural channels of the RTA law in New York's criminal juvenile justice system:<sup>79</sup>

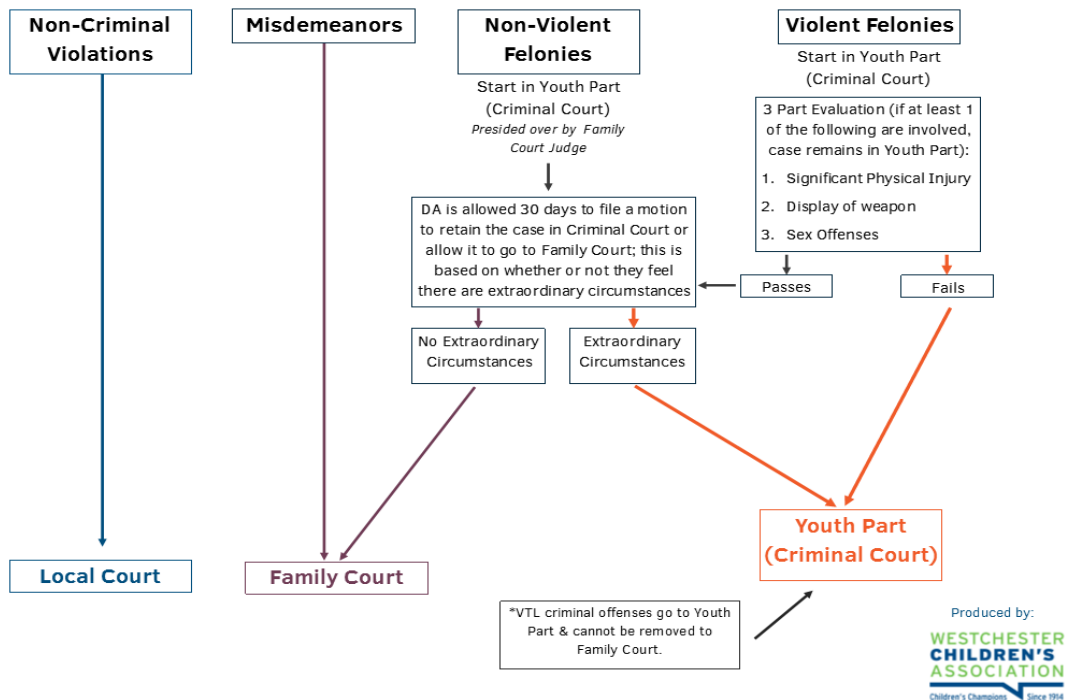
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77. *People v. E.B.M.*, 95 N.Y.S.3d 743, 745 (Cty. Ct. Nassau Cty. 2019). This appearance is referred to by Nassau County courts as the "sixth-day appearance" and "sixth-day hearing" interchangeably. *Id.* In Bronx County, however, this appearance is referred to as a "retention hearing." *People v. N.C.*, 110 N.Y.S.3d 833, 834 (Sup. Ct. Bronx Cty. 2019). Meanwhile, one Monroe County judge referred to it as "the six day review." *People v. Y.L.*, 104 N.Y.S.3d 839, 840 (Cty. Ct. Monroe Cty. 2019). In Westchester County it is called the "RAI hearing." WWBA CLE, *supra* note 68. See CPL § 722.23(2)(a). For the purposes of this Article, it will be referred to as "the sixth day hearing."

78. *E.B.M.*, 95 N.Y.S.3d at 747; *People v. B.H. (B.H. I)*, 89 N.Y.S.3d 855, 860 (Cty. Ct. Nassau Cty. 2018) ("[T]here is surprisingly little authority on what constitutes the opportunity to be heard."); see CPL § 722.23(2)(a); *infra* note 111.

79. *Raise the Age Flow Chart*, WESTCHESTER CHILD. ASS'N, <https://wca4kids.org/wp-content/uploads/2014/09/Updated-Flow-Chart-1.png> (last visited Dec. 30, 2019); see also *Raise the Age: 6 Months In*, WESTCHESTER CHILD. ASS'N (May 14, 2019), <https://wca4kids.org/issues/raise-the-age/>.

### Raise the Age Flow Chart



### B. The Raise the Age Law's Sealing Provision

The RTA legislation also provides that individuals previously convicted of up to two statutorily defined “eligible offenses” in an adult court, but not more than one felony offense, may apply to the court in which the defendant was convicted to have their criminal record sealed after ten years from the imposition of the sentence or discharge from incarceration,

whichever is later.<sup>80</sup> In considering any application, the court will consider a myriad of factors, including, but not limited to: the amount of time that has elapsed since the defendant's last conviction, the circumstances and seriousness of the offense, the circumstances and seriousness of any other offenses the defendant was convicted of, the character of the defendant, including measures (s)he has taken toward rehabilitation or participating in community service programs, statements made by the victim of the offense, the impact that sealing will have on the defendant's rehabilitation and reintegration into society, and the impact on public safety and the public's confidence in the law.<sup>81</sup> For offenses falling outside the "eligible offenses" designation, sealing is not available no matter how much time has passed since the defendant committed the crime, and regardless of how compelling a case the applicant can make for sealing his or her record.<sup>82</sup>

The Legislature's inclusion of the sealing provision in the RTA law speaks to the importance it places upon the impact criminal records can have on juvenile offenders who, upon reentering society, are likely to face seemingly insurmountable obligations of securing employment, housing, and education, to name a few, with the stain of a criminal record obtained before reaching adulthood.<sup>83</sup> Moreover, the sealing provision found in the RTA law seeks to make a reality that which is currently a common misconception about juvenile records: they should be

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80. See CPL § 160.59; 36A GEORGE L. BLUM & MARK GROMIS, CARMODY-WAIT NEW YORK PRACTICE WITH FORMS § 208:30 (2d ed. 2018); Riviezzo, *supra* note 35; see also N.Y. State Unified Court Sys., *Court Help: Sealed Criminal Records*, NYCOURTS.GOV, <https://www.nycourts.gov/courthelp/Criminal/sealedRecords.shtml> (last visited Nov. 5, 2019) ("Unlike some other states, New York has no laws to erase or 'expunge' criminal records. New York uses a process called sealing for some cases. Sealing means that the record still exists, but all related fingerprint and palmprint cards, booking photos, and DNA samples may be returned to you or destroyed (except digital fingerprints are not destroyed if you already have fingerprints on file from a different unsealed case).").

81. CPL § 160.59.

82. *People v. Jane Doe*, 89 N.Y.S.3d 594, 597 (Sup. Ct. Queens Cty. 2018).

83. Joy Radice, *The Juvenile Record Myth*, 106 GEO. L.J. 365, 368 (2018). Further, juvenile records can make it more difficult, if not impossible, for convicted adolescents to serve in the military, receive financial aid, or be granted a state occupational license. *Id.* They can also trigger immigration consequences, which in today's political climate, may result in deportation or a denial of citizenship. *Id.* at 388.

confidential (after some point in time), ultimately sealed or expunged “because the juvenile justice system aims to rehabilitate rather than merely punish youth.”<sup>84</sup> In today’s world of widespread access to information technology, the humanitarian goals of progressive juvenile justice fail to shield adolescents when they are completing applications for employment or school and are asked to reveal that they have a criminal record.<sup>85</sup> For example, one study of sixty campuses of the State University of New York showed that almost two-thirds of the students who started to fill out the online Common Application for college failed to complete and submit the application if they answered affirmatively to question(s) about juvenile records.<sup>86</sup> Furthermore, employment discrimination against ex-offenders, in general, is so pervasive that “any sentence is effectively a life sentence they must continue serving after their debt to society has been paid.”<sup>87</sup> This damaging effect is especially damning for juvenile offenders because adolescents will likely lack a high level of education and an established employment record, placing them at a severe disadvantage against other applicants as their qualifications will fail to outweigh potential employers’ fears of liability for hiring negligently.<sup>88</sup>

Due to the dramatic impact the RTA law will have on the courts, because cases that would have been adjudicated in criminal court (prior to the law’s passage) will now be removed to family court, this note will focus on the portions of the RTA law relative to the new class of “Adolescent Offenders” and the sealing provision. Recent decisions from the courts have progressively shed light on the fissures left by the legislation, resulting in challenges for those falling under the purview of the RTA’s provisions, as well as those charged with administering it.

#### IV. The First Phase of Implementation of the Raise the Age Legislation for New York’s Sixteen-Year-Old Adolescent

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84. *Id.* at 369.

85. *See generally id.*

86. *Id.* at 387.

87. Judith G. McMullen, *Invisible Stripes: The Problem of Youth Criminal Records*, 27 S. CAL. REV. L. & SOC. JUST. 1, 19 (2018).

88. *Id.* at 19-20.

### Offenders & Past Offenders Seeking to Seal Criminal Convictions

As courts across New York state contend with the recently implemented provisions of the RTA law, pitfalls of the legislation have become apparent, especially with regard to provisions for the removal and sealing of criminal records processes.<sup>89</sup> The obstacles arising from the vagueness of the legislation's sealing and removal provisions have at times obfuscated the progressive intentions behind the RTA legislation; however, this has been somewhat alleviated by growing case law defining the nuances of the statute and calling attention to areas of the law apt for improvement.

#### A. Sealing Provision: Adjudications Inconsistent with the Rehabilitative Spirit of Raise the Age Expose Legislation's Defects

The sealing provision, Criminal Procedure Law ("CPL") § 160.59, was enacted in October 2017 and provides a mechanism for defendants to move to seal up to two "eligible offenses," as explained above.<sup>90</sup> At the time of its enactment, Governor Cuomo declared the ameliorative purpose of the statute as an "eliminat[ion of] unnecessary barriers to opportunity and employment that former[ly] incarcerated individuals face and to improve the fairness of the state's criminal justice system."<sup>91</sup> Accordingly, New York's Executive Law was amended to make it an unlawful discriminatory

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89. This section of this Article is derived from reported decisions available on online legal research services, such as Westlaw and LexisNexis and is written cognizant of the fact that the reported cases reflect only a fraction of decisions on sealing applications and AO matters processed through criminal and family courts, respectively, pursuant to the RTA legislation. The judicial opinions discussed herein are intended to showcase unique issues in growing case law from courts administering the RTA law in its first year of implementation.

90. CPL section 160.59(1)(a) delineates offenses that are not considered "eligible offenses," including, but not limited to, certain sex offense[s], violent felony offense(s), including felonious homicide, a Class A felony, an attempt to commit an offense that is not an eligible offense if the attempt is a felony, or an offense for which registration as a sex offender is required, etc. N.Y. CPL § 160.59 (McKinney through L.2019 ch. 652).

91. *People v. John Doe*, 86 N.Y.S.3d 853, 855 (Sup. Ct. Queens Cty. 2018).

practice “to make inquiry about, whether in any form of application or otherwise, or to act upon adversely to the individual involved, any arrest or criminal accusation” that resulted in a conviction and was subsequently sealed.<sup>92</sup> However, in practice, CPL § 160.59 has produced adjudications inconsistent with the stated purpose and the language of the statute itself.

Motions under CPL § 160.59 by individuals who were criminally convicted decades ago, and who went on to lead law-abiding lives thereafter, were nonetheless barred from sealing their criminal records; giving courts the opportunity to remedy the inadequacies of the statute in its present form. While some courts have determined sealing motions with a focus on applying the laudable intent of the statute, others have focused on the convictions themselves, with neither approach giving enough substantial value to the argument that if the movant was subject to the current RTA legislation at the time of his/her conviction, (s)he may have been afforded sealing of his or her criminal records without obstacle.

In *Jaime S.*, the court granted the movant’s motion seeking to seal the record of his convictions of numerous computer crimes<sup>93</sup> despite the movant falling outside the class of offenders intended to benefit from the sealing statute, because it would make little sense to deny him relief “until such time as his life takes a turn for the worse” when he was applying for higher employment at the time of filing.<sup>94</sup> The *Jaime S.* court’s auspicious approach to this case indicates that courts applying similar logic may interpret the RTA’s sealing law based on the impact it will have on the individual’s ability to become a

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92. *Jane Doe*, 89 N.Y.S.3d at 596 (citing N.Y. EXEC. LAW § 296(16) (LexisNexis 2019)).

93. Jaime S. pled guilty to two Class E felonies in connection with his illicit actions while working in the IT department of a law firm between 1997 and 2002, for which he was sentenced to a five-year probationary term, which the Court terminated over a year early, and was ordered to pay a \$5,000 fine. *People v. Jaime S.*, 70 N.Y.S.3d 794, 797-98 (Sup. Ct. N.Y. Cty. 2018).

94. *Id.* at 795. Although Jaime S. is “skilled and experienced in his field,” when his employer’s company was bought out by a larger entity, the entity rescinded its offer of employment to Jaime S. after conducting a background check. Jaime alleged that in the fifteen years since his conviction, approximately fifteen other job interviews had unsuccessful results, leading him to exhaust unemployment insurance benefits and his life savings, and causing him to become depressed and anxious. *Id.* at 797.

successful member of, and contribute to, society instead of adhering to the exact letter of the law, which would have otherwise barred sealing in *Jamie S.*' particular case and future cases of others similarly situated.<sup>95</sup> Nonetheless, other courts determining sealing motions have felt constrained by the narrow parameters of the RTA law regarding the eligibility of convictions for sealing under the statute.

The case of *John Doe* showcased a movant's attempt to capitalize on the vagueness in the statute regarding when multiple felony convictions can be treated as a single conviction, which may allow for such convictions to be deemed eligible for sealing under the quantitative prong of the statute, which only allows for sealing of up to two offenses.<sup>96</sup> The movant argued that two of his criminal convictions should have been treated as one for sealing, since they were run concurrently. However, the Court rejected this contention since his criminal activities were not "so closely related and connected in point of time and circumstances as to constitute a single criminal incident."<sup>97</sup> Hence, under the current RTA legislation, individuals who were convicted of more than two crimes that are considered distinct criminal acts will not be able to consolidate the supernumerary convictions to seal their criminal record, even if the crimes were temporally proximate to each other.<sup>98</sup> Yet, New York's laws currently entitle defendants who were drug addicted, accepted

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95. See CPL § 160.59(7)(f). *But see* *People v. Timothy S.*, No. 1086-05, 2018 NYLJ LEXIS 2400 (Sup. Ct. Queens Cty. July 9, 2018) (granting sealing for a movant that fell squarely under the CPL § 160.59 sealing provision, since his conviction of the Class E felony of promoting gambling in the first degree is an eligible non-violent offense under the statute, occurred in 2005, and Timothy S. had no subsequent criminal arrests or convictions).

96. *John Doe*, 86 N.Y.S.3d at 853-54. John Doe was a defendant arrested twice in the span of a month and a half in 1985 for selling cocaine to undercover police officers when he was nineteen years old. *Id.* He resolved both cases by pleading guilty to two counts of criminal sale of a controlled substance in the third degree, a class B felony, and one count of criminal facilitation in the fourth degree. *Id.* Since his convictions, he worked in the New York City Department of Sanitation for over two decades, became an active member of his church and participated in community service, and had no contact with the criminal justice system for over thirty years. *Id.* at 853-56.

97. *John Doe*, 86 N.Y.S.3d at 854-56.

98. See *id.* (holding that two felonious criminal sales of cocaine within one and a half months did not occur sufficiently contemporaneously to deem the acts one criminal incident, and thus disqualified the movant's criminal record for sealing).



into, and completed judicial diversion programs to sealing of up to three misdemeanor drug offenses.<sup>99</sup> This disparity in the RTA law's allocation of eligibility under the sealing provision for non-violent drug-related offenses will likely have to be addressed by the Legislature in order to "further advance the statute's [explicit] laudable goals,"<sup>100</sup> especially since it can likely be addressed "without having a deleterious effect on public safety or society's respect for the law."<sup>101</sup>

The RTA legislation's sealing provision also fails to account for juvenile offenders who would have received AO treatment under the newly defined criterion for sixteen- and seventeen-year-old offenders had RTA been in place when they were convicted.<sup>102</sup> The Court in *People v. Jane Doe* was "constrain[ed] to deny [her sealing] motion" since her conviction for second degree robbery is considered a violent felony offense, and therefore not an offense eligible for sealing.<sup>103</sup> However, this ruling defies the logic that if Jane Doe, or other movants like her were granted the Youthful Offender status she was eligible for at the time of her conviction, she would be eligible for sealing today, much like a similarly situated sixteen-year-old AO under the RTA law would be treated.<sup>104</sup> The inequity apparent in the

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99. *Id.* at 856-58 (noting that defendants whose cases predate the widespread use of judicial diversion programs, but have nevertheless demonstrably extricated themselves from any involvement with drugs are entitled to significantly less relief). The court discussed the notion that drug dealers and drug addicts "are often the same people," who, as a result of their addiction, often accumulate multiple criminal convictions. *Id.* at 856 (citing Kathy Casteel, *A Crackdown on Drug Dealers Is Also a Crackdown on Drug Users*, FIVETHIRTYEIGHT (Apr. 5, 2018, 6:00 AM), <https://fivethirtyeight.com/features/a-crackdown-on-drug-dealers-is-also-a-crackdown-on-drug-users/>).

100. *John Doe*, 86 N.Y.S.3d at 857.

101. *Id.* at 858-59.

102. Zhandarka Kurti & William Martin, *Cuomo's "Carceral Humanism,"* JACOBIN (Nov. 16, 2018), <https://jacobinmag.com/2018/11/andrew-cuomo-juvenile-justice-carceral-humanism-kalief-browder> ("Most sixteen- and seventeen-year-[.]olds will still bear the scarlet letter of an adult criminal record. According to the Division of Criminal Justice Services, 3,063 sixteen- and seventeen-year-olds were charged in 2017 with violent felonies that the new law's passage would not affect."). See N.Y. CPL § 722.23 (McKinney through L.2019 ch. 652).

103. *People v. Jane Doe*, 89 N.Y.S.3d 594, 594 (Sup. Ct. Queens Cty. 2018).

104. See *id.* In 1984, Jane Doe was arrested and charged with one count of robbery in the second degree in connection with a robbery that allegedly had occurred at Queens County High School where the defendant twisted the

sealing statute will likely be addressed by future revisions to the RTA legislation, as discussed in Part IV(i) *infra*.

B. Unfolding Case Law Is Filling the Void Left by  
Lawmakers to Define Vague Terminology in Removal  
Provisions

As explained in Part II(i) *supra*, under the recently enacted RTA legislation, sixteen-year-old AOs charged with violent and/or non-violent felonies begin in the Youth Part of New York’s criminal courts<sup>105</sup>; however, there are distinct procedures employed in accordance with the degree of the crime(s) lodged against the defendant.<sup>106</sup> Since the District Attorney must cite “extraordinary circumstances” in a motion in order to retain nonviolent felonies in the Youth Part according to CPL § 722.23(1), courts have had to determine such motions of first-impression while simultaneously navigating the murky waters of the RTA law itself, which lacks any definition of extraordinary circumstances.<sup>107</sup> The interstices of the removal procedure in the RTA legislation has similarly challenged courts determining whether to remove AOs charged with violent felonies to family court under CPL § 722.23(2). Although the three-factor test<sup>108</sup> appears to be clear on its face, the RTA legislation is devoid of any definition of “significant physical injury”<sup>109</sup> or “display[ing] a [weapon],”<sup>110</sup> and does not delineate the scope of the mandatory hearing scheduled for six days after the AO’s

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complainant’s arm while the other perpetrators took her pocketbook and unicorn charm. *Id.* at 595. When defendant pleaded guilty to one charge of attempted robbery in the second degree, the sentencing court denied her youthful offender treatment and sentenced her to five years’ probation, which was terminated one year early at the request of the Department of Probation. *Id.* Jane Doe moved to seal her juvenile conviction record following her application for a job which required a criminal background check. *Id.*

105. As of this writing, the second phase of the RTA has been implemented and as such, New York’s seventeen-year-olds will be subject to the same procedure in place for sixteen-year-olds.

106. See CPL § 722.23.

107. See *id.* §§ 722.23(1)(a), (1)(c); *supra* Part II(i).

108. The three-factor test requires the state prove that the AO (i) caused significant physical injury; or (ii) displayed a deadly weapon in furtherance of the offense; or (iii) engaged in certain criminal sexual conduct. CPL § 722.23(2); see *supra* Part II(i).

109. See CPL § 722.23(2)(c)(i).

110. See *id.* § 722.23(2)(c)(ii).

arraignment on a violent felony charge(s), during which the court disposes of the matter based upon whether the State has proved any of the three factors by a preponderance of the evidence.<sup>111</sup> Where the action does not proceed under CPL § 722.23(2), it reverts to processing under CPL § 722.23(1) and the case becomes subject to the vague terminology there, i.e. “extraordinary circumstances.”<sup>112</sup>

Courts have faced complex determinations contending with the RTA’s resounding silence in defining “extraordinary circumstances,”<sup>113</sup> “significant physical injury,”<sup>114</sup> and/or “displayed.”<sup>115</sup> Via their broad discretion in deciding statutory interpretation methodology, courts have turned to the plain meaning of the words themselves; existing case law; legislative records (elucidating the Legislature’s intent and the overall goal

111. One court has found that “the closest analogy [to the sixth day hearing] is the opportunity to be heard on issuance of a temporary order of protection (‘TOP’). The key difference [being] that while a TOP hearing, whether evidentiary or otherwise, is purely in the Court’s discretion, [the sixth day hearing] is mandatory. In any event, the initial opportunity to be heard on the question of removal is similar to a TOP hearing in that ‘both accusatory instruments and supporting depositions may be considered’ and, as with most pretrial hearings, hearsay evidence may be admitted.” *B.H. I*, 89 N.Y.S.3d at 860. See CPL §§ 722.23(2)(a)-(c); *People v. L.M.*, No. IND-00000-00/000, 2019 WL 1187308, at \*4 (N.Y. Cty. Ct. Nassau Cty. Mar. 12, 2019) (“[B]ecause the statute states that the purpose of the sixth-day appearance is for the Court’s review of the ‘accusatory instrument,’ there is no basis to find that the nature of the proceeding differs pre- and post-indictment.”); see also *People v. Y.L.*, 104 N.Y.S.3d 839, 840 (Cty. Ct. Monroe Cty. 2019) (court considered People’s exhibits attached to its affirmation, including detective’s written narratives of separate interviews of AOs and “Facebook Live” video, to have sufficient evidentiary foundation and to be “relevant, material, and fairly considered.”).

112. See CPL §§ 722.23(2)(c)-(d); *supra* Part II(i).

113. CPL § 722.23(1)(d) (“The court shall deny the motion to prevent removal of the action in youth part unless the court makes a determination upon such motion by the district attorney that extraordinary circumstances exist that should prevent the transfer of the action to family court.”).

114. CPL § 722.23(2)(c)(i) (“The court shall order the action to proceed in accordance with subdivision one of this section unless . . . the court determines that the district attorney proved by a preponderance of the evidence . . . (i) the defendant caused significant physical injury to a person other than a participant in the offense . . .”).

115. In the context of whether the AO “displayed” a weapon in furtherance of the charged offense. See CPL § 722.23(2)(c)(ii) (“The court shall order the action to proceed in accordance with subdivision one of this section unless . . . the court determines that the district attorney proved by a preponderance of the evidence . . . (ii) the defendant displayed a firearm, shotgun, rifle or deadly weapon as defined in the penal law in furtherance of such offense . . .”).

of the legislation in interpreting the terms);<sup>116</sup> as well as other various sections of New York Penal Law (further illuminating the judicial search for definitional meaning of vague terminology used in the RTA law) on a case-by-case basis.<sup>117</sup>

a. What are Extraordinary Circumstances in Adolescent Offender Matters under N.Y. CPL § 722.23(1)?

The Legislature specifically contemplated that courts would “shape and determine” the meaning of extraordinary circumstances on a case-by-case basis while maintaining a “very high bar” for retention of cases in the Youth Part.<sup>118</sup> The New York Court of Appeals has provided courts with a foundational concept to define extraordinary circumstances: “Absent a statutory definition [the court] must give the term its ordinary

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116. *People v. J.P.*, 95 N.Y.S.3d 731, 739 (Sup. Ct. Bronx Cty. 2019) (“In pursuit of a determination of the ‘meaning intended by the lawmakers’ McKinney’s Statutes section 125 provides, in pertinent part, ‘If the interpretation to be attached to a statute is doubtful, the courts may utilize legislative proceedings to ascertain the legislative intent.’”).

117. *See People v. E.B.M.*, 95 N.Y.S.3d 743, 745 (Cty. Ct. Nassau Cty. 2019); *B.H. I*, 89 N.Y.S.3d 855, 860 (Cty. Ct. Nassau Cty. 2018).

118. *People v. B.H. (B.H. II)*, 92 N.Y.S.3d 856, 859-60 (Sup. Ct. Nassau Cty. 2019) (quoting N.Y. State Assemb. Rec. of Proceedings, Apr. 8, 2017, at 83-85 [hereinafter *Assemb. Proceedings*], <https://nyassembly.gov/raisetheage/transcripts/full-debate.pdf>); *see also E.B.M.*, 95 N.Y.S.3d at 745 (quoting *Assemb. Proceedings*, *supra*, at 21) (“[L]egislators intended that the requirement of finding one of three factors would ensure that ‘only those cases [of] the truly violent felons would stay in the criminal part, and those kids who were not violent would be able to find their way to family court, where they not only could get superior services, but would be able to get better outcomes for their lives not only with the services that were employed, but by not receiving a criminal record at the end of all this so that they could change their life around.’”); *People v. J.B.*, 94 N.Y.S. 3d 826, 829 (Cty. Ct. Westchester Cty. 2019) (citing CPL § 722.23(1)(d)) (“[T]he court must deny the motion unless it finds that ‘extraordinary circumstances exist that should prevent the transfer of the action to family court.’”); *People v. M.M. (M.M. II)*, 99 N.Y.S.3d 858, 866, 868 (Cty. Ct. Nassau Cty. 2019) (quoting *Assemb. Proceedings*, *supra*, at 37-38) (“[T]he question is whether the People have proved that the circumstances in th[e] AO’s case are so exceptional and beyond what is ‘usual’ to overcome the ‘presumption where only one out of 1,000 cases those extremely rare and exceptional cases’ would remain in the Youth Part and not be removed to the Family Court”); *People v. D.L.*, 90 N.Y.S.3d 866, 869 (Fam. Ct. Monroe Cty. 2018) (quoting *Assemb. Proceedings*, *supra*, at 39) (“Transfer to the family court should be denied only when highly unusual and heinous facts are proven and there is a strong proof that the young person is not amenable or would not benefit in any way from the heightened services in the family court.”).

and commonly understood meaning. . . . unless it is plain from the statute that a different meaning is intended”<sup>119</sup>; however, although “[d]ictionary definitions may be useful as guideposts in determining the sense with which a word was used in a statute . . . they are not controlling.”<sup>120</sup> Hence, the dictionary definition of extraordinary, “exceptional to a very marked extent,”<sup>121</sup> or “[a] highly unusual set of facts that are not commonly associated with a particular thing or event”<sup>122</sup> is merely one of many components defining “extraordinary circumstances” in the court system.<sup>123</sup> In addition, New York Assembly discussions concerning the vague definition of extraordinary circumstances contemplated several aggravating factors that a court may consider when determining whether extraordinary circumstances are present, including

- (1) whether the AO had committed a series of crimes over many days;
- (2) whether the AO had acted in an especially cruel and/or heinous manner; and
- (3) whether the AO was a leader of the criminal activity who had threatened or coerced other reluctant youths into committing the crimes before the court.<sup>124</sup>

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119. *J.P.*, 95 N.Y.S.3d at 738 (citations and internal quotation marks omitted).

120. *Id.*; *People v. T.R.*, No. FYC-70017-18/001, 2018 WL 7361428, at \*2 (N.Y. Fam. Ct. Erie Cty. Dec. 21, 2018) (“We can conclude from its ordinary meaning that it refers to that which is ‘very unusual’ or ‘remarkable.’ The Court, in its discretion, should look for circumstances that go beyond what is regular and foreseeable in the normal course of events.”).

121. *M.M. II*, 99 N.Y.S.3d at 864 (citing *Extraordinary*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/extraordinary> (last visited Nov. 3, 2019)).

122. *J.P.*, 95 N.Y.S.3d at 739 (citing *Extraordinary*, BLACK’S LAW DICTIONARY (10th ed. 2014)).

123. *Id.* (citing MERRIAM-WEBSTER COLLEGIATE DICTIONARY (11th ed. 2009)).

124. *B.H. II*, 92 N.Y.S.3d 856, 859-60 (Sup. Ct. Nassau Cty. 2019) (quoting Assemb. Proceedings, *supra* note 118, at 40); *see People v. A.G.*, No. FYC-XXXX-18-001, 2018 WL 7120259, at \*3 (N.Y. Sup. Ct. Queens Cty. Dec. 20, 2018) (holding that the AO’s several offenses involving robbery and grand larceny allegedly committed while on Family Court Probation, in addition to the AO’s numerous pending cases, constituted an extraordinary circumstance that would warrant retention of the matter in the Youth Part and “provide a

The Assembly also set forth a relatively comprehensive list of mitigating factors, which include

economic difficulties faced by the AO, substandard housing the AO may have lived in, educational challenges experienced by the AO; and emotional/psychological difficulties the AO may have, such as lack of insight, susceptibility to peer pressure due to immature [sic], the absence of positive role models or positive behavioral role models in the AO's life, and abuse of alcohol or drugs.<sup>125</sup>

The significance of both the aggravating and mitigating factors is their satisfaction of the “circumstances” portion of the extraordinary circumstances term, and, pragmatically, the “context they provide for evaluating the criminal conduct committed by the defendant . . . .”<sup>126</sup> In addition to the above mitigating factors, courts have explicitly considered adolescents’ inability to adequately foresee and take responsibility for the

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consistent outcome for defendant’s potential rehabilitation”). *But see* People v. D.P., No. FYC-70001-19, 2019 WL 1120491, at \*5 (N.Y. Fam. Ct. Erie Cty. Feb. 22, 2019) (distinguishing *A.G.* on the facts because the AO in *D.P.* did not have any pending matters before the Court, and granting removal to family court). As for the third prong, one court has opined that “conspiring with [two] other children is hardly extraordinary.” *T.R.*, 2018 WL 7361428, at \*2.

125. *B.H. II*, 92 N.Y.S.3d at 856; *see J.P.*, 95 N.Y.S.3d at 734-43 (discussing the AO’s extensive history with Child Protective Services and the failed efforts of various social workers over time to intervene with the defendant’s family dynamic in a constructive way, which were typically thwarted by defendant’s mother, from 2010 through 2018). *J.P.*’s mother was his most significant adult family member in his life, but she had neglected, rejected, and given up on him. *Id.* at 736. Despite this, the defendant presented two character witnesses to testify in his favor and class certificates he earned for class work and other activities while incarcerated since December 2018. *Id.* The Court ultimately held that the case should be transferred to family court since his “home life . . . constitute[d] a substantial contributing factor to this now sixteen-year-old defendant’s recidivism. As such, it must be viewed as a mitigating circumstance within the meaning of extraordinary circumstances . . . .” *Id.* at 743.

126. *Id.* at 735; *see B.H. II*, 921 N.Y.S.3d at 860 (“The Court is persuaded that a balancing of the factors set forth by the Legislature is the proper manner in which to determine if extraordinary circumstances exist in a given AO case.”).

legal consequences of their actions.<sup>127</sup> The inherent dichotomy between an AOs' inability to make choices with legal impact in their day-to-day lives and the prosecution of AOs in the Youth Part of adult criminal court has been highlighted by judicial recognition of AOs' statuses as "legal minor[s] for virtually all purposes under New York law [who cannot] vote, sign a binding contract, commence a lawsuit, select [their] own domicile or legally purchase alcohol or tobacco products" when determining whether extraordinary circumstances are present.<sup>128</sup> To that end, courts have also considered the punishment(s) associated with the allegation(s) lodged against an AO as a factor of extraordinary circumstances, in the interest of aligning an AO's sentence with his or her actual level of culpability and capacity to change, which is unquestionably tied to age.<sup>129</sup>

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127. See *People v. D.L.*, 90 N.Y.S.3d 866, 871 (Fam. Ct. Monroe Cty. 2018). In holding that the AO matter should be removed to family court, where it was alleged the AO was intentionally set a piece of furniture on fire on the complainant's porch, the court reasoned that the AO's "behavior is precisely the type of impulsive act done without thought of consequences, which is typical of young people. Had D.L. truly intended to burn the house and harm the inhabitants, a fire could have been set at night or in a manner where no one was aware of her actions. Instead, D.L. rang the complainant's door bell and announced her plan to set a fire because she was mad, thereby allowing the adult occupant to take action to curb her behavior." *Id.*; see also *T.R.*, 2018 WL 7361428, at \*1-3 (finding that an AO's failure to accept responsibility or "throw himself at the mercy of the investigating officers with an expansive and total mea culpa" for allegedly writing and delivering a note to school administrators that read, "I'm going to bomb this school today at 12 [dated] 11/13/2018," was "hardly irregular or unforeseeable" and that it was "very common that a sixteen-year-old child would fabricate a story or distance himself from involvement in a circumstance such as this").

128. *D.L.*, 90 N.Y.S.3d at 870-71.

129. *Id.* at 871 (discussing the matter of an AO charged with Attempted Arson in the Second Degree, whose matter was removed to family court because, among other factors, "[i]f the crime occurred just three weeks earlier, the case would have automatically gone to Family Court . . . [and] [s]ince the crime is not a juvenile offender offense . . . D.L. would not have been criminally responsible for her actions and there would have been no legal possibility of criminal prosecution"). The court there also reasoned that "[i]t [was] also relevant to consider that if D.L.'s case remain[ed] in the Youth Part it [would have been] adjudicated under the criminal law, which mandates incarceration in the NYS Department of Corrections." *Id.* The court in *J.P.* attributes this portion of the court's discussion in *D.L.* to the "growing acknowledgment in the judicial branch as well as in the legislature, over time, that 'children are less culpable in the criminal context than adults and more amenable to change,'" which is also comparable to the tenor of other judicial opinions discussing AO removal matters. *J.P.*, 95 N.Y.S.3d at n.5. See also *B.H. II*, 92 N.Y.S.3d at 857 ("In Family Court, young defendants would have better access to youth focused

As evidenced by emerging decisions disposing of motions seeking retention of AO matters in the Youth Part of adult criminal court, judges appear to have widened the guideposts laid by the Legislature to discern extraordinary circumstances by weighing all of the circumstances relevant to the offense(s), the offender, and the impact removal may have on the community on a case-by-case basis.<sup>130</sup> Furthermore, because the ostensibly accepted “totality of the circumstances” approach among New York’s courts disposing of removal motions comports with the purpose and focus of the RTA law itself, it is not unreasonable to expect that this approach will permeate the courts’ decisions into the second phase of the RTA’s implementation. However, considering the broad discretion afforded to presiding judges, unbridled by controlling authority outside of the RTA statute that is exactly on point as to Adolescent Offender matters thereunder, “invariably and necessarily, weight to be given relevant factors will vary in each individual case that comes before the Youth Part and individual determinations will result in conclusions upon which reasonable people may disagree.”<sup>131</sup>

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services and treatment and would be saved the onus of a criminal conviction, but would still be subject to appropriate sanctions to hold them accountable.”); *id.* at 861 (“[T]here is no evidence in the records showing that the AO is not amenable to services”); *D.P.*, 2019 WL 1120491, at \*3 (rejecting the People’s argument that removal to family court would “merely amount to allowing Defendant’s criminal behavior to go without consequences,” since a parole revocation hearing and removal to family court could lead to placement, in addition to a likely juvenile delinquency charge in family court).

130. *See B.H. II*, 92 N.Y.S.3d at 861 (“[A] balancing of the factors set forth by the Legislature is the proper manner in which to determine if extraordinary circumstances exist in a given AO case.”); *J.P.*, 95 N.Y.S.3d at 742 (“In applying that definition to the extraordinary circumstances standard . . . the scope of discretion vested in the trial court Youth Part by the legislature bears noting. . . . [T]he pertinent sections of Criminal Procedure Law Article [§] 722 do not limit an adolescent offender’s eligibility for removal based on prior juvenile delinquency adjudications, youthful offender adjudications, or even prior criminal convictions, including for that matter, prior felony convictions.”); *T.R.*, 2018 WL 7361428, at \*3 (“While it may be that Defendant’s conduct affected thousands of innocent lives by placing them in fear and causing them emotional harm which could perhaps be considered extraordinary circumstances, it would be mere speculation as the Court does not have fact to conclude that this is actually the case that rises to the level of extraordinary circumstances.”); *see also, e.g., D.L.*, 90 N.Y.S.3d 866; *D.P.*, 2019 WL 1120491; *A.G.*, 2018 WL 7120259.

131. *J.P.*, 95 N.Y.S.3d at 742; *see J.B.*, 94 N.Y.S.3d at 829 (holding that while the court “decidedly acknowledge[d] the violent nature of [the] crime and



The case of *R.M.* may represent such a controversial decision.<sup>132</sup> There, while the court acknowledged the emotional and violent nature of the AO's crime, which involved the suffocation and disembowelment of a cat, it opined that it was "constrained by the language of the statute and the philosophy behind it in determining the facts and circumstances . . . [did] not rise to the level of 'extraordinary circumstances'" to warrant retention in the Youth Part.<sup>133</sup> The court conceded that *R.M.*'s actions amounted to the "especially depraved or sadistic manner" contemplated by the aggravated cruelty statute under which she was charged, yet appeared to take a subjective approach in assessing whether extraordinary circumstances existed.<sup>134</sup> To that end, it explicitly considered two "major" factors: "the nature of the criminal behavior and the defendant's mental health status."<sup>135</sup> However, the court appeared to displace the significance of the former factor altogether by reasoning that "without the 'especially depraved or sadistic manner' of [the] crime, and the fact that the deceased cat was a companion animal, the underlying facts would establish the elements of . . . a class 'A' misdemeanor."<sup>136</sup> Thus, it effectively overlooked a clear aggravating factor prescribed to determine extraordinary circumstances, i.e. the heinous nature of the act, in favor of the mitigating factor of the defendant's mental health. Furthermore, although it reasonably concluded that

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the potential impact of the defendant's alleged conduct on the community as a whole," i.e. that the AO was in possession of and discarded a firearm into a garbage can while fleeing from police, it was bound to order the matter be removed to Family Court).

132. *People v. R.M.*, 94 N.Y.S.3d 764 (Cty. Ct. Westchester Cty. Dec. 14, 2018).

133. *R.M.*, 94 N.Y.S.3d at 769. The cat the AO suffocated belonged to a family friend with whom the defendant was sent to live. *Id.* at 765. After slicing the cat open and removing its small and large intestines, pancreas, and spleen, the AO kept them in a container in her room. *Id.*

134. *Id.* ("Agriculture and Markets Law § 353-a(1) defines 'aggravated cruelty' as conduct that '(i) is intended to cause extreme physical pain; or (ii) is done or carried out in an especially depraved or sadistic manner.'").

135. *Id.* *R.M.*'s mental illnesses resulted in several suicide attempts and hospitalizations. Despite this, she attended regular classes and maintained an average in the nineties. *R.M.* had also, at least once, "impulsively choked and attempted to strangulate [sic] her sister, which prompted her stay with the family friend in question." *Id.* at 766-67.

136. *Id.* at 769 ("The court is of the opinion that the mental health of the defendant weighs in favor of transferring the case to Family Court, not against it.").

“incarceration [was] not fitting for this defendant, but rather a therapeutic, albeit secure, setting [was]”<sup>137</sup> based on the AO’s mental health history, the court simultaneously admitted that both Family Court and the Youth Parts are capable of finding placement for the AO through probation services.<sup>138</sup> In light of the court’s acquiescence that the AO’s acts were sadistic and the AO could be placed in an appropriate facility by either court, the denial of the district attorney’s motion, and the subsequent removal of the matter to Family Court, appears to reflect the growing expectation that judges will heed their own discretion in discerning extraordinary circumstances concomitant with the overall spirit of the RTA law.<sup>139</sup>

Furthermore, as to the comprehensive factors courts are weighing in removal motions, there is a growing body of divergent opinions on the issue of whether an AO’s past and/or current involvement with the criminal justice system is pertinent to an *extraordinary circumstances* determination, even if such facts are outside of the accusatory instrument.<sup>140</sup> Generally, where the offense before the Youth Part marks the AO’s first brush with the criminal justice system, *i.e.* is his or her “first offense,” courts have deemed that fact a mitigating factor and used it to underscore the appropriateness of removal to Family Court in the spirit of the RTA.<sup>141</sup> To that end, that

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137. *Id.*

138. *Id.* (“[T]he adult setting is no more adept at finding the appropriate placement for the adolescent and monitoring [their] progress and treatment, two tasks that probation, available equally to Family Court as the Youth Part, will be vital in achieving.”).

139. *Cf. B.H. II*, 92 N.Y.S.3d at 860-61 (granting removal of an AO matter to family court since the Court’s balancing of factors concluded there was no evidence tending to show aggravating circumstances nor evidence that the AO was the one who actually stabbed the most seriously injured victim, and there were sufficient mitigating circumstances enumerated by the Legislature and no evidence that the AO is not amenable to services).

140. *See infra* notes 141-44.

141. *People v. A.T. (A.T. II)*, 98 N.Y.S.3d 377, 380 (Fam. Ct. Erie Cty. 2019) (“[T]he Court agrees with Counsel’s interpretation of the legislative intent to remove children and to rehabilitate those who are amenable to services . . . .”); *see People v. J.P.*, 95 N.Y.S.3d 731, 739 (Sup. Ct. Bronx Cty. 2019) (removed to family court); *People v. L.L.*, FYC-700\*\*-10-001, 2019 N.Y. Misc. LEXIS 4277, at \*13-14 (Sup. Ct. Queens Cty. July 19, 2019) (“The behavior alleged here demonstrates the kind of poor judgment and impetuous conduct that militates in favor of removal to the family court in order to redirect defendant’s errant path. Moreover, since this is defendant’s first contact with the criminal justice system, this Court does not believe that

factor has served as an indicator of the AO's amenability to the services available in Family Court and a lack of "extraordinary circumstances," leading to an order of removal.<sup>142</sup> Likewise, whether an AO has pending matters before the court, or has a criminal history has been weighed by courts determining removal actions. In line with the "first offense" approach, when an AO has no pending cases apart from the instant adjudication, courts have found no *extraordinary circumstances* to exist and have ordered removal of the case to family court.<sup>143</sup> The opposite has also proven true in that where an AO has multiple pending cases before the Youth Part or similar courts, and appears unamenable to services, the "extraordinary circumstances" requirement has been met and retention in the Youth Part ordered.<sup>144</sup>

However, at the time of this writing one court has declined

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defendant presents a danger to public safety such that removal should be denied. Rather, this matter can be effectively adjudicated in the family court where either rehabilitation and/or detention can be imposed.").

142. *People v. J.W.*, No. FYC-70022-19, 2019 WL 1576074, at \*2 (Fam. Ct. Erie Cty. Mar. 28, 2019) ("Since arraignment AO has been amenable to services. . . . [After] AO was released on own recognizance[,] AO has timely appeared in court for all further proceedings. AO has led a law-abiding life. AO has attended school as directed."). Notably, J.W. was A.T.'s co-defendant in *A.T. II*, and the key difference between the dispositions of their matters evidently lied in the court's judgment of each AO's amenability to services. *Cf. D.P.*, No. FYC-70001-19, 2019 WL 1120491. *But see A.T. II*, 98 N.Y.S.3d at 380-81 (holding "AO d[id] not appear amenable to services but rather appear[ed] to thwart any efforts at rehabilitation" where the AO failed to comply with the conditions of release and lead a law-abiding life, failed to report to the probation department, and failed to appear in court for subsequent proceedings).

143. *See D.P.*, 2019 WL 1120491, at \*7-8 (stating that, separate from the then-pending case, consequences for the then-current alleged parole violation could be disposed of at a parole revocation hearing, where Defendant would face placement in the event of revocation).

144. *A.G.*, 2018 WL 7120259, at \*6-7. Here, AO had five matters in Queens Supreme Court and Queens Criminal Court in addition to the case at hand. The court reasoned that "[t]his could lead to the likelihood of different and/or duplicative judicial processes and outcomes, which would not be in the interest of justice for the community or the defendant. Moreover, a global disposition of all matters in the Youth Part would provide a consistent outcome for defendant's potential rehabilitation." *Id.*; *accord A.T. II*, 98 N.Y.S.3d at 381 ("As set forth in the People's moving papers, committing a violent felony offense while at liberty on another pending charge, and the subsequent failure to appear although provided notice to do so is remarkable. Additionally, the Court must consider the third felony charge filed against AO, albeit after the filing of this motion, since that charge was filed prior to the hearing.").

to engage in such an analysis as outside of the judiciary's purview pursuant to a relevant statute.<sup>145</sup> In *People v. M.M.*, the Court “[wa]s not persuaded to rely on the AO’s juvenile delinquency records” although it was “mindful” of a sister court’s decision, *i.e.* the *J.P.* Court’s decision.<sup>146</sup> It outlined the following reasons for its departure from the *J.P.* court’s reasoning:

First, because the court in *J.P.* did not address [N.Y. Family Court Act (“FCA”) § 381.2[1] in its decision, it is possible that the Bronx court was not aware of FCA § 381.2[1]’s prohibition against the use of juvenile delinquency records.<sup>147</sup> Second, this Court, respectfully, is not bound by the decision of a justice of coordinate jurisdiction (citations omitted). Finally, this Court notes that even after taking into consideration the AO’s juvenile delinquency history, the court in *J.P.* nonetheless found that the People had failed to demonstrate “extraordinary circumstances” and ordered that the AO’s case be removed to the Family Court. If the fact that an individual was previously adjudicated a juvenile delinquent is to be considered in assessing factors against him with respect to the potential removal of a case from the Youth Part to the Family Court, then such consideration must be specifically authorized by the Legislature, not by this Court (citations omitted).<sup>148</sup>

Given that courts are looking to statutes and other

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145. See *M.M. II*, 99 N.Y.S.3d 858, 866 (Cty. Ct. Nassau Cty. 2019).

146. *Id.*; see *supra* notes 126-27, 130-32. See generally *People v. J.P.*, 95 N.Y.S.3d 731 (Sup. Ct. Bronx Cty. 2019).

147. *M.M. II*, 99 N.Y.S.3d at 865 (“[T]he Court of Appeals cited to FCA § 381.2[1] for the proposition that ‘[a]s a rule, a juvenile delinquency adjudication cannot be used against the juvenile in any other court for any other purpose.’ The rationale behind FCA § 381.2 is that ‘[d]elinquency proceedings are designed not just to punish the malefactor but also to extinguish the causes of juvenile delinquency through rehabilitation and treatment.’” (citations omitted)).

148. *Id.* at 866–67.

authority to clarify and cultivate the significance of the *extraordinary circumstances* term, it is not unexpected that courts, like that in *M.M.*, turned to the Family Court Act for guidance on this issue, even if such an approach diverges from those of other courts and judges. However, the *M.M.* court's unprecedented<sup>149</sup> approach in light of other reported AO cases discussed herein begs the question whether the discretion afforded judges to hone the RTA law's definition of *extraordinary circumstances* will effectuate inconsistencies in the administration of the RTA law from the outset, and therefore create another source of unpredictability for AOs in the juvenile justice system. As the state edges forward in the implementation of the RTA legislation for New York's seventeen-year-old AOs, it will be interesting to see whether tilting the scale towards removing ostensibly non-violent and/or violent felony cases into family court based upon an inclusive definition of extraordinary circumstances, like the approach taken in *R.M.*,<sup>150</sup> or an exclusive approach, similar to that taken in *M.M.*,<sup>151</sup> will better achieve the goals of the RTA legislation, which seeks to rehabilitate all juvenile offenders in a consistent manner while respecting the traditional underpinnings of the criminal justice system.

b. Defining Significant Physical Injury under N.Y. CPL  
§ 722.23(2)(c)(i)

Unlike the State Assembly's anticipatory commentary delineating how courts may interpret *extraordinary circumstances* on an ad hoc basis, its discussions surrounding the definition of *significant physical injury* have been less enlightening, perhaps due to the fact that "the Legislature specifically contemplated, at least with regard to the definition of significant physical injury, that the Courts would fill the void left by the Legislature."<sup>152</sup> Despite the lack of guidance from the

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149. At the time of this writing, and as to the reported cases only.

150. See *People v. R.M.*, 94 N.Y.S.3d 764 (Cty. Ct. Westchester Cty. Dec. 14, 2018).

151. See *M.M. I*, 97 N.Y.S.3d 426 (Cty. Ct. Nassau Cty. Mar. 21, 2019).

152. *B.H. I*, 89 N.Y.S.3d 855, 859 (Cty. Ct. Nassau Cty. 2018) (citing Assemb. Proceedings, *supra* note 118) ("Considering the absence of clear guidance from the Legislature, the Court has looked to existing case law to

Legislature, courts have gradually defined *significant physical injury* in the context of adolescent matters on a case-by-case basis using their broad discretion under the statute.

As expected, some physical injuries are easily recognized as significant by the courts, while others are more difficult to capture under the terminology. For instance, since “it would defy logic to argue that causing the death of a person was not the serious criminal conduct contemplated by the legislature to warrant retention of [a] criminal case by the Youth Part,” the injury of death is certainly a significant physical injury as required under CPL § 722.23(2)(i).<sup>153</sup> Exclusive of lethal injuries, a prevailing “working definition” of significant physical injuries has emerged.<sup>154</sup> In its debate prior to the passage of the RTA legislation, the State Assembly referenced that significant physical injury would involve “bone fractures, injuries requiring surgery, and injuries resulting in disfigurement.”<sup>155</sup> Some courts have opined that such injuries fall within the definition of significant physical injuries because they arise from the use of a weapon,<sup>156</sup> while others have used the allegation of the use of a weapon only to reinforce a conclusion that a significant

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define these terms.”); *see also* People v. A.S., No. FYC-70002-19/001, 2019 WL 722905, at \*2 (N.Y. Fam. Ct. Erie Cty. Jan. 15, 2019) (“RTA does not define significant physical injury. Thus, significant physical injury must be determined on a case by case basis.”).

153. People v. G.C., 94 N.Y.S.3d 795, 798 (Cty. Ct. Westchester Cty. Feb. 7, 2019).

154. *See B.H. I*, 89 N.Y.S.3d at 860; A.S., 2019 WL 722905; People v. E.B.M., 95 N.Y.S.3d 743 (Cty. Ct. Nassau Cty. 2019).

155. *B.H. I*, 89 N.Y.S.3d (quoting Assemb. Proceedings, *supra* note 118, at 26, 29); *accord* A.S., 2019 WL 722905, at \*2 (reasoning that legislative history also suggests that significant physical injury would be “more serious than a bruise”); *E.B.M.*, 2019 WL 1052201, at \*4. However, the Assembly Record of Proceedings makes clear such aggravating facts may exist alone, e.g., “a bone fracture need not require surgery to be considered an aggravating factor” in the determination of whether significant physical injury exists. People v. Y.L., 104 N.Y.S.3d 839, 842 (Cty. Ct. Monroe Cty. 2019) (citing Assemb. Proceedings, *supra* note 118).

156. *B.H. I*, 89 N.Y.S.3d at 860-61 (holding that significant physical injury existed where the complainant’s injury arose from the AO’s adult co-defendant’s use of weapons, including, a golf club carried by the AO, a long stick, a baseball bat, and a hammer). The Court also held the AO did not possess or display a deadly weapon, but found the victim suffered significant physical injury nonetheless. *Id.* at 861. The Court in *B.H. I* made mention of weapons that would cause significant physical injury to include: a firearm, samurai sword, or belt. *Id.*

physical injury is present from other alleged facts.<sup>157</sup> Yet, the use of a weapon is not necessary to support a finding that an AO caused significant physical injury as contemplated by the statute.<sup>158</sup>

Furthermore, although the Legislature suggested that a definition of significant physical injury could be ascertained by a comparison to the standard for injury in no-fault insurance law cases, which necessitates a permanent injury,<sup>159</sup> this standard has been rejected as “too stringent for the criminal law context.”<sup>160</sup> In other words, the fact that a victim may fully recover from an injury or not suffer any permanent effect therefrom does not preclude a finding of significant physical injury and assigning criminal liability accordingly.<sup>161</sup> The prevailing definition, inclusive of the aforementioned factors, has placed “significant physical injury” between “physical injury” as defined by New York Penal Law § 10.00(9), “impairment of a physical condition or substantial pain,” and

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157. *A.S.*, 2019 WL 722905, at \*2-3 (holding that the allegation of the use of a firearm in causing the complainant to suffer lacerations to his head which required staples to close the wound and suffer a broken wrist would clearly fall within the meaning of significant physical injury, even though a firearm was not uncovered during the investigation). *But see* *People v. L.L.*, FYC-700\*\*-10-001, 2019 N.Y. Misc. LEXIS 4277, at \*3, 12 (Sup. Ct. Queens Cty. July 19, 2019) (failing to discuss staples victim had put in to close head laceration incurred as a result of the AO’s alleged use of force and a B.B. gun, which AO admitted to possessing, after court found AO did not “display [a weapon] in furtherance of such offense”).

158. *E.B.M.*, 95 N.Y.S.3d at 745-46, 749 (holding that each AO co-defendant, while acting in concert with their adult co-defendants and others, to rob one victim caused significant physical injury when they punched, kicked, and stomped the victim in the face numerous times causing him to sustain a fractured nose, fractured orbital bone, a concussion, and swelling to the eyes and face); *Y.L.*, 104 N.Y.S.3d at 841-42 (finding significant physical injury where the victim sustained “a nasal bone fracture, associated soft tissues [sic] swelling, and frontal scalp swelling” and required several days’ hospitalization after the AO co-defendants taunted, punched, and kicked him repeatedly in the head).

159. *B.H. I.*, 89 N.Y.S.3d at 861 (“Serious physical injuries are found, in no-fault cases, in two circumstances. The first is where an individual suffers the ‘permanent consequential limitation of use of a body organ or member.’ The second is where an individual suffers the ‘significant limitation of use of a body function or system.’”).

160. *Id.*

161. *Id.* (holding that despite complainant’s recovery from being stabbed six times and hit in the head with a baseball bat, and the ensuing facial paralysis, the injuries constituted significant physical injuries).

New York Penal Law § 10.00(10), “physical injury which creates a substantial risk of death or which causes death or serious and protracted disfigurement, . . . impairment of health or protracted loss or impairment of the function of any bodily organ.”<sup>162</sup> It appears that positioning the meaning of the “significant physical injury” term between these provisions of the Penal Code, along with the other circumstances mentioned above, will afford courts a narrow breadth in which to exercise their discretion to interpret a clear, consistent rule to find “significant physical injury” in future AO cases, including those involving seventeen-year-old AOs as of October 1, 2019.

Moreover, it is unequivocal that, pursuant to the RTA statute, a determination that the AO *caused* the significant physical injury during the alleged commission of a violent felony is required under this prong of the three-part test, a consideration which has especially come to the fore in cases where the AO allegedly acted in concert with other offenders.<sup>163</sup> That is not to say, however, that courts agree that the AO must have been the “sole” actor in causing such injury<sup>164</sup>: at least one

162. A.S., 2019 WL 722905, at \*2; see N.Y. PENAL LAW § 10.00(9), (10) (McKinney through L.2019 ch. 652); see also *B.H. I*, 89 N.Y.S.3d at 861; *E.B.M.*, 95 N.Y.S.3d at 747-48.

163. N.Y. CPL § 722.23(2)(c)(i) (McKinney through L.2019 ch. 652).

164. Interestingly, the same portions of the New York Assembly Records memorializing the debate on the RTA legislation, specifically accomplice liability, have been cited by courts on opposite sides of the issue of causation of a victim’s alleged significant physical injury. Compare *Y.L.*, 104 N.Y.S.3d at 842-43, n.5 (citing Assemb. Proceedings, *supra* note 118, at 51-52, as basis for holding that AO need not be “sole actor”), with *B.H. II*, 92 N.Y.S.3d 856, 861 (Sup. Ct. Nassau Cty. 2019) (quoting Assemb. Proceedings, *supra* note 118, at 51) (“[T]he Assembly’s main sponsor of the Bill states that the three factor test required the defendant to be the sole actor who causes the conduct outlined. . . . The Legislative history states that this is consistent with the spirit of the law because ‘kids happen to get in trouble together all the time’ and the Assembly did not want to punish an entire group for ‘one bad apple.’”). The relevant portion of the Assembly Record of Proceedings reads as follows:

[Assemblyperson] Quart: . . . [“W]ould [the three-part] test also disqualify those [AO defendants from removal] who are just present or nearby during the alleged offense or occurrence?”

[Assemblyperson] Lentol: “No. This test requires that the defendant be the sole actor [sic] who causes the conduct outlined in the test. Again . . . you can understand why we want to do that, because kids happen to get in trouble together all the time and may – it may be just the one guy that really is the bad one – bad apple in the group, and we



court has held that “causation should not be so narrowly defined as requiring a ‘sole’ actor,”<sup>165</sup> while other courts have given ample weight to this factor in determining removal actions.<sup>166</sup>

Unlike the definition of *significant physical injury*, the incongruous levels of significance that courts have given to the *causation* portion of the *significant physical injury* prong suggests that there will, nonetheless, be inconsistent outcomes throughout the state on this issue as the state moves forward with implementing the RTA law for seventeen-year-olds. Additionally, these expected inconsistencies further clarify that the Legislature’s decision—to accord judges presiding over AO matters broad discretion to shape the terms of the statute—may certainly lead to uneven application of the RTA law throughout New York.

c. Interpreting *Displayed in Furtherance of an Offense* in  
Adolescent Offender Matters under N.Y. CPL  
§ 722.23(2)(c)(ii)

At the time of this writing, the meaning of the term *displayed* under the second prong of the three-factor test, which automatically retains an AO matter in the Youth Part, has been substantially fleshed out by the courts.<sup>167</sup> One opinion

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don’t want to punish all of them. It would also disqualify the [AO] defendant who directly caused the injury, who displayed the weapon in his or [her] [own] hand, and who personally engaged in the unlawful sexual conduct.”

Assemb. Proceedings, *supra* note 118, at 51-52. The disparity between these opinions highlights the inconsistency in reasoning and dispositions of AO matters due, at least partially, to the discretion imparted to judges presiding over RTA cases.

165. *Y.L.*, 104 N.Y.S.3d at 842-43 (distinguishing *Y.L.*’s facts from those in *J.M.*, where the court reasoned the Legislature intended that the defendant be the sole actor).

166. *B.H. II*, 92 N.Y.S.3d at 861 (ordering removal of the matter to family court because, *inter alia*, there was no evidence in the record that the AO was the sole actor); *cf. A.S.*, 2019 WL 722905, at \*2 (holding retention warranted where AO co-defendants “together struck the complainant in the head with a ‘black pistol’ causing complainant to suffer” significant physical injury (emphasis added)); *E.B.M.*, 95 N.Y.S.3d at 749 (holding retention in Youth Part was warranted because the State established by a preponderance of the evidence that “each AO co-defendant was personally responsible for directly causing Victim #1’s ‘significant physical injuries’” (emphasis added)).

167. See N.Y. CPL § 722.23(2)(c)(ii) (McKinney through L.2019 ch. 652) (“the defendant displayed a firearm, shotgun, rifle or deadly weapon as defined

encompassing the evidently accepted definition of “display” in the context of the RTA legislation derives from a decision after the AO’s sixth-day hearing in the case of *People v. M.M.*, where the Court ascertained the legislative intent and construed the pertinent statutes to effectuate that intent<sup>168</sup> by turning to the plain meaning of the word “display”<sup>169</sup> before determining that the statute requires that the People must prove, by a preponderance of the evidence, that the AO showed or “exhibited ostentatiously an *actual* firearm or deadly weapon as defined in the [P]enal [L]aw.”<sup>170</sup> Citing Legislative intent, the *M.M.* Court held it would be “illogical for [it] to construe CPL § 722.23(2)(c)(ii) in a way that *expands* the reach of the provision to cases that would otherwise proceed toward automatic removal to the Family Court under CPL § 722.23(1)(a).”<sup>171</sup> Moreover, generally, the argument proffered by prosecutors that “what the victim *perceives* to be a firearm, including situations where the AO’s words or actions suggest it is a firearm,”<sup>172</sup> should be included under “displayed” has been rejected by Youth Parts, since “[n]othing in the plain language of the statute indicates that CPL § 722.23(2)(c)(ii) is intended to extend cases where the

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in the penal law in furtherance of the offense.”).

168. *M.M. I*, 97 N.Y.S.3d 426 (Cty. Ct. Nassau Cty. Mar. 21, 2019). As of this decision, M.M. was charged by way of three felony complaints, two of which respectively charged M.M. with one count of Robbery in the First Degree, a class B felony, and the remaining complaint charging M.M. with Robbery in the Third Degree for a total of two class B felonies and one class D felony lodged against the AO. *Id.* at 427. M.M. was later charged by way of a fourth felony complaint with one count of Robbery in the First Degree. *M.M. II*, 99 N.Y.S.3d 858, 860 (Cty. Ct. Nassau Cty. 2019).

169. *M.M. I*, 97 N.Y.S.3d at 432; *People v. D.G.*, No. FYC-70228-19, 2019 WL 2455461, at \*11 (N.Y. Sup. Ct. Kings Cty. Apr. 4, 2019) (“[A]s a noun, the word ‘display’ means a setting or presentation of something in open view . . . . As a verb, it means[] to disport, exhibit, expose, flash, flaunt, lay out, parade, produce, show, show off, sport, strut, and unveil.”).

170. *M.M. I*, 97 N.Y.S.3d at 432 (emphasis added).

171. *Id.*; *accord D.G.*, 2019 WL 2455461, at \*12.

172. *M.M. I*, 97 N.Y.S.3d at 429; *People v. W.H.*, 2019 NYLJ LEXIS 2981, at \*8-9 (Sup. Ct. Queens Cty. Aug. 19, 2019) (“[U]nlike the Penal Law inclusive language allowing prosecution for Robbery in the first degree for ‘what appears to be a firearm . . . or deadly weapon,’ the legislature under CPL § 722.23(2)(c)(ii) uses unequivocal language requiring an actual ‘display of a firearm or deadly weapon’ to avoid removal.”). The Court in *D.G.* similarly stated that the Legislature intended that this definition required “something more than to merely ‘display what *appears* to be a firearm or deadly weapon.” 2019 WL 2455461, at \*11.

AO has not displayed an *actual* firearm . . . <sup>173</sup>

Thus, growing case law reveals that satisfaction of the prong that the AO “display” a firearm in furtherance of the alleged violent offense requires the accusatory instrument to sufficiently plead that the AO displayed an *actual* firearm, shotgun, rifle, or other deadly weapon,<sup>174</sup> which would be bolstered by the recovery of such a weapon,<sup>175</sup> evidence the complainant sustained injuries *that match that* which would be caused by a weapon,<sup>176</sup> and/or other evidence or circumstances pertinent to the determination, including, but not limited to: eyewitness(es), clothing which tests positive for gunshot primer residue,<sup>177</sup> et cetera. It is not untenable that the prevailing interpretation of the term *displayed* will be sustained in future decisions throughout the state as it preserves the courts’ common trend

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173. *M.M. I*, 97 N.Y.S.3d at 430; *See also D.G.*, 2019 WL 2455461, at \*4 (holding People did not meet their burden to prove that the object displayed was in fact, an actual firearm and ordering removal of the matter to family court); *W.H.*, 2019 NYLJ LEXIS 2981, at \*11-12 (holding retention in Youth Part appropriate where the People met burden and AO did not challenge or provide proof to contradict the alleged display of a loaded silver twenty-five caliber semi-automatic pistol).

174. For example, a B.B. gun is a “deadly weapon” as defined by N.Y. Penal Law section 10.00(12). *People v. A.T. (A.T. D)*, 94 N.Y.S.3d 431, 432 (Fam. Ct. Erie Cty. 2019). *But see A.T. II*, 98 N.Y.S.3d 377, 378-79 (Fam. Ct. Erie Cty. 2019) (court previously held People failed to meet the requirements of CPL § 722.23(2)(c) where the same AO, along with co-defendants, in the course of the commission of the alleged crime did place a screwdriver at the back of the complainant’s head and threaten immediate use thereof).

175. *See A.T. I*, 94 N.Y.S.3d at 432 (holding that retention of the matter in the Youth Part was warranted since the AO used or threatened the use of physical force and actually displayed a black and silver BB gun while allegedly committing a robbery, which was recovered); *W.H.*, 2019 NYLJ LEXIS 2981, at \*11-12 (twenty-five caliber semi-automatic pistol was recovered); *see also People v. L.L.*, FYC-700\*-10-001, 2019 N.Y. Misc. LEXIS 4277, at \*12-13 (Sup. Ct. Queens Cty. July 19, 2019) (removed to family court because, *inter alia*, no gun recovered). *But see D.G.*, 2019 WL 2455461, at \*13 (“And although this Court is not holding that a firearm must be recovered and or discharged in order for the People to meet their burden . . . the People’s mere recitation of the facts as outlined in the complaint, and bald assertions that the Complainant perceived what she believed to be a black colored firearm, at night, standing alone, falls woefully short of the Legislative intent.”).

176. *L.M.*, 2019 WL 1187308, at \*4 (holding that case should remain in the Youth Part the AO possessed and fired five shots from a loaded pistol, of which one shot struck the complaining witness and became lodged in their abdomen); *People v. G.C.*, 94 N.Y.S.3d 795, 798 (Cty. Ct. Westchester Cty. Feb. 7, 2019) (autopsy report stated death was caused by a bullet wound).

177. *See id.*

toward effectuating the progressive legislative intent of the RTA legislation and its presumption of removal to family court.

However, it is worth noting that proof that the AO did, in fact, display an actual weapon may not sustain the burden of proof to retain the AO matter in the Youth Part automatically, according to growing case law. There remains the issue relative to the second half of the CPL § 722.23(2)(c)(ii)—whether the AO displayed said weapon “in furtherance of the offense” alleged. At the time of this writing, there is only one reported decision explicitly discussing the “in furtherance of the offense” piece of this prong of the three-part test, *People v. N.C.* (No. 70335-2019, 2019 WL 5199478 (N.Y. Sup. Ct., Bronx Cty. Oct. 4, 2019)).<sup>178</sup> There, despite finding that the prosecution did establish that the AO brandished an actual, operable firearm during the incident in question and that a firearm was recovered which matched the shell casings of bullets fired, the Court nevertheless found that the People failed to prove that the AO displayed the firearm *in furtherance* of either of the violent felonies the AO was charged with and ordered the case be removed to family court.<sup>179</sup> It reasoned that “[r]equiring that the People prove that an adolescent’s display of a firearm was done in order to ‘advance or promote’ the underlying felony with which the adolescent is charged ensures that all but the most serious cases are in fact subject to the automatic removal provisions of the ‘Raise the Age’ statute,”<sup>180</sup> in line with the intent of the RTA law.

Yet, the *N.C.* Court’s reasoning effectuated a result that does not exactly comport with prior decisions of sister courts disposing of AO matters in the context of CPL § 722.23(2)(c)(ii). Specifically, as to the charge of Attempted Criminal Possession

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178. In *People v. N.C.*, No. 70335-2019, 2019 WL 5199478 (N.Y. Sup. Ct. Bronx Cty. Oct. 4, 2019), the AO was charged with Attempted Murder in the Second Degree (and related charges) and with Attempted Criminal Possession of a Weapon in the Second Degree (and related charges) in connection with an incident where the AO allegedly (a) made a hand-to-hand exchange with an unapprehended individual who had just displayed a .380 caliber, semi-automatic pistol, and fired approximately seven shots in the direction of an individual who was shot twice; (b) removed a .380 caliber pistol from his shorts pocket and pointed it in the direction of an unknown individual before cocking the pistol’s hammer; and (c) held the pistol, ran behind a marked police car, and abandoned the pistol there, where it would be recovered by police. *Id.* at \*2-5.

179. *Id.* at \*10-12.

180. *Id.* at \*10-11.

of a Weapon, the *N.C.* Court expressed doubt regarding “how pointing the firearm furthered the defendant’s attempted possession of a loaded and operable firearm,” and rejected the implication of the People’s argument, that “whenever an adolescent displays a firearm, he or she [must be] ‘furthering’ the commission of the crime of Criminal Possession of a Weapon or Attempted Criminal Possession of a Weapon.”<sup>181</sup> It reasoned that accepting such a position “would deprive the words, ‘in furtherance of,’ of any meaning or effect, as all cases in which an adolescent displayed a firearm would fall within [CPL § 722.23(2)(c)(ii)].”<sup>182</sup> Conversely, the Court in *W.H.* previously held that the defendant there indeed displayed a firearm in furtherance of essentially the same offense *N.C.* was charged with—criminal possession of a weapon in the second degree.<sup>183</sup> Moreover, according to the published decision, *W.H.* did not even point the gun at someone, it was recovered from inside his jacket by a police officer upon his arrest after the officer observed *W.H.* to have “possessed a shiny silver object, which defendant tried to conceal in his jacket as he ran from the [officer].”<sup>184</sup> These disparate cases offer a thought-provoking comparison, since after all, if examining an unlawful possession of a firearm charge, *actual* possession of such a firearm does not fall under the “in furtherance of” term, then what does?

Although it is expected that courts will differ in their decisions under the RTA law, given the vast discretion afforded Youth Part judges who must give meaning to vague, undefined terms like *displayed* and *in furtherance of*, inconsistent interpretations of all of the ambiguous terms in the legislation may lead to unequal, uncertain results in a juvenile justice system that is in the process of being overhauled in and outside of court.

## V. Remediating the Defects in the Sealing & Removal

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181. *Id.* at \*11-12.

182. *Id.* at \*12.

183. *People v. W.H.*, 2019 NYLJ LEXIS 2981, at \*11 (Sup. Ct. Queens Cty. Aug. 19, 2019). As discussed *supra*, see note 178, *N.C.* was charged with Attempted Criminal Possession of a Weapon in the Second Degree. *N.C.*, 2019 WL 5199478 at \*1-2; see also *W.H.*, 2019 NYLJ LEXIS 2981, at \*2, \*11 (defendant was charged with two counts of Criminal Possession of a Weapon in the Second Degree).

184. *Id.* at \*11.

## Provisions of the Raise the Age Law Going Forward

Although the Raise the Age legislation's progressive orientation has been viewed as a triumph of the juvenile criminal justice system by some, critics have suggested that the law is incomplete, or "half a loaf," resulting in the challenges for courts, as discussed above, and other facets of New York's criminal justice system.<sup>185</sup> In light of the emerging defects of the law and judicial opinions reaching out to the Legislature for remedies to the RTA provisions since their enactment, future changes in the landscape of the juvenile justice system under the RTA legislation is vital. In the following subsections, this article will highlight a few proposals that may remedy the defects in the law and assuage the concerns of critics and courts alike.

A. The Judiciary's Call for Amendments to the Raise the Age Law's Sealing Provision & the Legislature's Forthcoming Response

Because the RTA legislation is currently being administered by the courts, opinions discussing the sealing provision have shed light upon grey areas of the law that can be tailored to better suit the goals of the progressive law. Judge Joseph A. Zayas of the Supreme Court of Queens County has opined that there are "several reasons to question the wisdom of [the] categorial approach to sealing eligibility," including, producing seemingly inequitable outcomes, and failing to explicitly address criminal records of younger offenders, even though the sealing statute that was enacted as part of the RTA legislation is overtly geared toward those offenders.<sup>186</sup> He illustrated this inequity through the description of a case where because a defendant pleaded to a lesser charge he was able to seal his robbery conviction "which was violent by any reasonable definition of the word," in stark contrast with the results of *Jane Doe* and *John Doe*, discussed in Part II(ii), *supra*.<sup>187</sup> Judge Zayas called upon

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185. Hager, *supra* note 49 (quoting State Sen. Kevin Parker of Brooklyn).

186. *People v. Jane Doe*, 89 N.Y.S.3d 594, 597-98 (Sup. Ct. Queens Cty. 2018).

187. *Id.* See Andrew Denny, *Queens Judge to Lawmakers: "Raise the Age" Sealing Law Needs More Work*, N.Y.L.J. (Dec. 12, 2018), <http://raisetheageny.com/newitem/queens-judge-lawmakers-raise-age-sealing->

the Legislature to revise the sealing statute to ameliorate troublesome outcomes like that in *Jane Doe*, since the disparities it produces can be the product of factors beyond the defendant's control, such as the prosecution's discretion in offering plea bargains and the trial judge's discretion to resolve a case by deeming the defendant a Youthful Offender.<sup>188</sup> His suggestions to amend the RTA law include

[e]xpand[ing] sealing eligibility to convictions of violent felony offenses that were committed when the defendant was younger than nineteen, provided that, at the time of conviction, the defendant was eligible to be adjudicated as a youthful offender. Because sealing eligibility in New York is relatively strict, there would [be] little risk that a truly violent, antisocial person would be eligible for relief.<sup>189</sup>

Assemblywoman Aravella Simotas has answered the Queens Supreme Court's calls to amend the RTA legislation, at least in part, by announcing her plan to propose a bill that would expand the sealing provision by allowing individuals to apply for their records to be sealed if they were eligible to be treated as a Youthful Offender in the past, but were denied that status, clearly alluding to the compelling case of *Jane Doe*.<sup>190</sup> Because of the discretionary nature of the designation of Youthful Offender status, which is determined at sentencing and would allow for automatic sealing of the Youthful Offender's records,

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law-needs-work ("The judge said he recently granted a sealing application in another case in which the defendant was [nineteen] when he and an accomplice allegedly committed a robbery in which they assaulted the victim, but who later pleaded guilty to third-degree robbery, an eligible offense under the sealing statute.").

188. *Jane Doe*, 89 N.Y.S.3d at 597.

189. *Id.* at 599.

190. Dan M. Clark, *Lawmaker Proposes Bill to Expand Protections in 'Raise the Age' Law*, N.Y.L.J. (Jan. 31, 2019, 6:00 AM), <https://www.law.com/newyorklawjournal/2019/01/31/lawmaker-proposes-bill-to-expand-protections-in-nys-raise-the-age-law/> ("Youthful offender status has been available to defendants as young as 16 years old but younger than 19 years old in New York since 1971, when the Legislature passed a bill creating the classification. Certain violent or serious crimes may prevent that person from being classified as a youthful offender.").

state lawmaker Simotas' proposal would address the disparity identified by the court in *Jane Doe* to effectuate sealing of criminal records not only for future AOs, but also retroactively for movants with convictions that are more likely to have met the ten-year conviction-free requirement to be eligible for sealing. Simotas' anticipated bill obliges defendants to meet the same requirements as AOs to be eligible for sealing, affording all juvenile offenders eligibility proportionate to that of offenders falling under the newly enacted law and giving "people who committed crimes in their youth the chance to become full members of society in adulthood [by] grant[ing them] the chance to move beyond the burden of a criminal record."<sup>191</sup> Moreover, lawmakers in Albany have discussed shortening the ten-year period defendants seeking to seal their record must wait before applying in order to afford younger defendants more opportunities in the job market at an earlier age.<sup>192,193</sup>

#### B. Proposal for Clarification of the Ambiguous Terminology in the Raise the Age Legislation

In order to avoid contravening the rehabilitative and forward-looking goals of the RTA law, the Legislature should set forth explicit explanations to confirm the definitions created by the courts on a case-by-case basis, perhaps in the form of Legislative commentary to the RTA legislation itself or outright amendments to the law. Not only will this clear up the amorphous definitions of the terminology which is intrinsic to the administration of the RTA's provision with regard to AOs, but it will aid in providing an objective rule to a wide range of circumstances that begin in the already unfamiliar setting of the

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191. *Id.* (quoting Assemb. Aravella Simotas).

192. *Id.* At the time of writing, these discussions appear to be ongoing.

193. Additionally, New York's Youthful Offender law provides the opportunity for youth under the age of nineteen to have a criminal conviction set aside and replaced with a confidential, non-criminal outcome, and to have reduced prison sentences; however, these protections are no longer available once a youth reaches the age of nineteen. *See Agenda for Achieving Youth Justice, supra* note 67, at 2. Organizations and leaders throughout the state are working toward strengthening existing protections under the Youthful Offender law to create a new "Young Adult Status," which would cover young adults up to the age of twenty-five, shielding them from incurring lifelong criminal records that create barriers to education, jobs, and housing for youthful mistakes. *Id.*



Youth Parts of adult criminal courts.<sup>194</sup> Furthermore, issuing commentary to the RTA law would be feasible in light of the resources and mechanisms available to the Legislature including criminal and family court advisory committees which provide a forum that possesses the necessary acumen for effective discussions to discover and implement resolutions of pertinent issues.<sup>195</sup>

## VI. After-Thoughts

It is incontrovertible that in its first year, the RTA legislation has been regarded as a resounding success for New York's juvenile justice system.<sup>196</sup> As of October 1, 2019, New York no longer treats juveniles under the age of eighteen-years-old as adults in the state criminal system automatically, completing the state's timeline for the complete transition under the RTA legislation.<sup>197</sup> Although it has been noted that New

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194. One court's approach to remedying inconsistent outcomes combined the dictionary definition of extraordinary in conjunction with all other factors "in the interest of applying an objective defined standard to a fluid set of circumstances," *People v. J.P.*, 95 N.Y.S.3d 731, 742 (Sup. Ct. Bronx Cty. 2019); however, it is not guaranteed that all courts will employ the same logic.

195. See generally N.Y. State Unified Court Sys., *Judiciary's Legislative Reform: Advisory Committee Reports Archive*, N.Y. COURTS, <http://ww2.nycourts.gov/ip/judiciaryslegislative/archive.shtml> (last visited Nov. 1, 2019). The most recent Report of the Advisory Committee on Criminal Law and Procedure reveals the Committee has already called for clarification of a portion of the sealing law under CPL sections 160.58, 160.59. See generally N.Y. ADVISORY COMM. ON CRIM. LAW AND PROC., REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL LAW AND PROCEDURE TO THE CHIEF ADMINISTRATIVE JUDGE OF THE COURTS OF THE STATE OF NEW YORK (2019), <https://www.nycourts.gov/LegacyPDFS/IP/judiciaryslegislative/pdfs/2019-CriminalLaw.pdf>.

196. See, e.g., Devon Magliozzi, *Early Progress of Cuomo's Youth Justice Overhaul Looks Positive*, ITHACA VOICE (Sept. 27, 2019), <https://ithacavoice.com/2019/09/raise-the-age-early-progress-of-cuomos-youth-justice-overhaul-looks-positive/>; Devon Magliozzi, *New York's Raise The Age Overhaul Wins Early Praise*, CRIME REP., <https://thecrimereport.org/2019/09/24/youth-justice-overhaul-in-new-york-state-wins-early-praise/> (Sept. 24, 2019); see generally *Updates: News*, RAISE THE AGE NY, <https://raisetheageny.org/category/news/> (last visited Dec. 30, 2019).

197. *Governor Cuomo Announces Second Phase of Raise the Age Law Now in Effect*, N.Y. STATE: GOVERNOR ANDREW M. CUOMO (Oct. 1, 2019) <https://www.governor.ny.gov/news/governor-cuomo-announces-second-phase-raise-age-law-now-effect>; see *Agenda for Achieving Youth Justice*, *supra* note 67, at 2.

York's RTA "comes amid an already rapidly shrinking justice system,"<sup>198</sup> the statistics gathered since its implementation for sixteen-year-old offenders underscore the overall success of the legislation thus far. The Mayor's Office of Criminal Justice has reported that: "[b]uilding on this success [of the shrinking justice system], the first nine months under the new law saw misdemeanor arrests of sixteen-year-olds decline sixty-one percent compared to the same time period from October 2017 to June 2018."<sup>199</sup> Furthermore, during the first year since RTA law's enactment, nearly eighty percent of sixteen-year-old AOs have been arraigned in the Youth Part and removed to Family Court, in line with the general intent of the Legislation.<sup>200</sup> Specifically, as to the period from October 2019 to March 2019, eighty-two percent of such cases were removed to Family Court or Probation according to a report issued in August 2019 by the State's RTA Task Force, which oversees the law's implementation.<sup>201</sup> Furthermore, over the past two years, it has been reported that more than 1,000 individuals have taken advantage of the sealing provisions of the RTA law, according to the State, proving that the law's rehabilitative focus is taking effect.<sup>202</sup>

Nevertheless, as the implementation and execution of the RTA legislation forges onward, there remain issues to be cognizant of in order to ensure the intent behind the law is effectively realized.<sup>203</sup> One issue which has been recognized by

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198. City of N.Y., *supra* note 51.

199. *Id.*

200. *See id.*

201. Dan M. Clark, *NY Courts Ready as Second Phase of 'Raise the Age' Law Takes Effect, Officials Say*, N.Y.L.J. (Oct. 1, 2019 12:27 PM), <https://www.law.com/newyorklawjournal/2019/10/01/ny-courts-ready-as-second-phase-of-raise-the-age-law-takes-effect-officials-say/>.

202. *Id.*

203. As mentioned previously, *supra* note 1, this Article would not do justice to discussing other issues surrounding the implementation of the Raise the Age legislation that would be more fully disposed of in another law review article. However, as to the housing and facilities issues under the RTA, it is praiseworthy that with the decline in arrests of those under the age of eighteen-years-old, "New York's approach to youth justice and its simultaneous sharp drops in both youth incarceration and youth crime, call into question the need for youth prisons that dominate so much of youth justice landscape throughout the rest of the country." City of N.Y., *supra* note 51 (quoting Vincent Schiraldi, former Commissioner of N.Y.C. Probation and co-Director of the Columbia University Justice Lab). As such, it is not untenable

those overseeing the execution of the RTA, for instance, is whether there will be accessible magistrates to hear AO matters in a timely manner as is required under the statute. Deputy Administrative Judge Edwina Mendelson, who leads the Office for Justice Initiatives in the Office of Court Administration, has made assurances that the state's family courts are ready for the processing of seventeen-year-old AOs as the second phase of the RTA is implemented, and that she does not foresee that courts will be unable to successfully absorb AO cases accordingly with currently available resources, including jurists.<sup>204</sup> However, to the extent such issues will come to fruition in connection with the anticipated influx of seventeen-year-old AOs,<sup>205</sup> they are preemptively being curtailed by changes in court operations which undercut the need for additional accessible magistrates, such as the creation of more opportunities for cases to go to family youth justice system diversion as an alternative to court filing.<sup>206,207</sup>

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to suggest that, perhaps, the RTA law will remedy some of these issues in due course over time.

204. Clark, *supra* note 202. Moreover, Judge Mendleson has been reported as saying that the courts are prepared to “watch very carefully as those [seventeen-year-old AO] cases come in and change resources as needed.” *Id.* Some “change[s] in resources” she referred to included the option to train State Supreme Court Justices to preside over the AO cases and designate them as Family Court Justices. *Id.*

205. Eileen Grench, *Big Influx of 17-year-olds Poses Next ‘Raise the Age’ Test*, CITY (Sept. 23, 2019) <https://thecity.nyc/2019/09/influx-of-17-year-olds-poses-raise-the-age-test-for-juvenile-justice-system.html>.

206. Clark, *supra* note 202. Moreover, there is a procedure already in effect whereby AOs who previously had to wait for cases to be transferred to family court, because the Youth Part was not in session, can now skip that step. *Id.* As long as there is an accessible magistrate, and the prosecutor consents, a proceeding can avoid the criminal court altogether and instead proceed through the family justice system. *Id.*

207. Other fundamental, perhaps constitutional, issues have surfaced as the Raise the Age legislation has been implemented throughout the state, including, but not limited to: AOs' rights to access to counsel while in custody of the police and/or state facilities, and/or prior to their arraignment and other court appearances; housing adolescents in solitary confinement; and the disparate treatment of New York's thirteen-, fourteen-, and fifteen-year-old offenders who, although younger than their AO counterparts, are not afforded the same treatment under RTA legislation. WWBA CLE, *supra* note 67; see N.Y. State Unified Court Sys., *Crimes Committed by Children Between 7-19*, NYCOURTS.GOV, <https://www.nycourts.gov/courthelp/Criminal/crimesByChildren.shtml> (last visited Nov. 5, 2019) (describing Juvenile Delinquent(s) and Juvenile Offender(s) designations that apply to seven to sixteen-year-olds and thirteen- to fifteen-year-olds, respectively, and stating that Juvenile

As such, it is abundantly clear that there remain substantial pitfalls under the RTA Legislation which will have to be addressed, likely sooner rather than later due to their important, perhaps constitutional implications. Nonetheless, there appears to be a strong foundation of case law, resources, and people readily able and willing to safeguard the intention behind the RTA law while dealing with the formulating issues aforementioned, some of which are already recognized today.<sup>208</sup>

## VII. Conclusion

New York's enactment and implementation of the RTA law reflects the basic standard of decency to treat kids as kids, as has been understood across the nation and by this nation's highest court for decades. Moreover, the RTA legislation marks a monumental step forward in New York's efforts to create a more fair, commonsense juvenile justice system that will endure well into the future. However, although the RTA legislation is an emblem for New York's historic shift in juvenile justice, it is not without flaws that are ripe for redress by the courts, the Legislature, and those overseeing the statute's implementation. With the second phase of the RTA law being applied for

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Offenders may be punished like adults). Paradoxically, these offenders would invariably be younger than sixteen- and/or seventeen-year-old Adolescent Offenders and receive harsher treatment. *Id.* Though compelling and relevant to the RTA legislation, given this Article's focus largely on the implementation and effect the RTA's provisions are currently having in the State's courts and attendant procedures, the far-reaching implications these issues contend with are a topic for another law review note, or several, where they can be discussed more fully. For Federal Cases arising from the Raise the Age legislation, see *J.B. v. Onondaga Cty.*, No. 5:19-CV-137 (LEK/TWD), 2019 WL 3776377 (N.D.N.Y. Aug. 12, 2019) (granting AOs' motion for class certification and a preliminary injunction against defendants to permit Adolescent Offenders and Juvenile Offenders to consult with their lawyers privately in the courthouse before their court appearances); *Paykina v. Lewin*, No. 9:19-cv-00061 (BKS/DJS), 2019 WL 2329688 (N.D.N.Y. May 31, 2019) (awarding preliminary injunction against confinement in Adolescent Offender Separation Unit of AO with mental illness on grounds of cruel and unusual punishment).

208. For example, in New York City, the "Working Group" is present in all five boroughs, continues to meet regularly to monitor RTA's progress, discuss ideas, and analyze trends. *City of N.Y.*, *supra* note 51. The Working Group is comprised of the Administration for Children's Services, Department of Correction, Department of Education, Department of Probation, NYPD, New York City Law Department, Office of Court Administration, Legal Aid Society, Bronx Defenders, Brooklyn Defenders, and the District Attorney's Offices. *Id.*

seventeen-year-old offenders as of October 1, 2019, the onus falls on the Legislature to provide the courts with the workable mechanisms delineating sealing AO criminal records for movants who have, by all accounts, outgrown their adolescent behavior; in the absence of such mechanisms, courts will have to apply ambiguous statutory language in removal proceedings moving forward. The State would be remiss if it failed to address emerging challenges and concerns identified and evaluated by the courts, which, if unremedied, may permit the juvenile justice system to revert to its past illogical execution. Because of the varied outcomes that are expected to result from judges' discretion and authority to remedy the deficiencies of RTA legislation case by case, and the influx of AO cases which is certain to occur with the implementation of the second phase, an effective response is essential. Not only is clarification vital to future processing of sealing and AO removal matters in the courts, it is also essential to the longevity and success of the RTA law altogether. In the alternative, the State's courts will continue to effectively displace the Legislature as to matters falling under the purview of RTA and legislate as they see fit from the proverbial bench.