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THE BITTER SIDE OF SWEET SIXTEEN: WHY NEW YORK SHOULD AMEND ITS JUVENILE TRANSFER LAWS

JORDAN K. HUMMEL*

INTRODUCTION

There is something illustrious about the age sixteen. Immortalized by Hollywood in films like *Sixteen Candles*, television shows such as MTV's "My Super Sweet 16," and ample other pop culture references, turning sixteen is a milestone in a young person's life. Perhaps the fascination with this birthday stems from the amusing combination of youth and budding maturity as teenagers begin their ascent into adulthood while still struggling with parental and societal restrictions. Turning sixteen is often associated with newfound freedoms and exciting privileges, such as driving or a later curfew. Of course, there remain a lot of things a sixteen-year-old cannot do, but this first step into adulthood is exhilarating nonetheless. In New York, however, this milestone birthday means a lot more than sweet sixteen celebrations and car keys; it also means criminal liability for one's actions.

Consider the following hypothetical. John and Derek are both star athletes at their local high school with promising futures playing college soccer at the school of their choice. John is a sixteen-year-old junior and Derek is a thirteen-year-old freshman. The varsity soccer program recently recruited both boys to play on its team because of their extreme talent. They get along well at first, but as the season progresses their relationship becomes hostile. John thinks freshmen should not be allowed to play on varsity teams and Derek thinks John refuses to pass him the ball because Derek's talent is intimidating. After a particularly crushing loss to their rival high school, John and Derek begin arguing on the field about why their team lost the game. The verbal altercation turns physical as the boys punch one another repeatedly. Eventually, a police officer pulls John and

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Derek apart and each boy is bloody and swollen. The police officer files an incident report and the boys wait to hear what will happen to them, unaware their respective ages will play a key factor in the outcome.

John, being sixteen, is prosecuted as an adult in criminal court for assault. He appears in criminal court and meets with the Assistant District Attorney. John's parents are not present for this meeting because John is legally considered an adult for the criminal proceeding. He decides to plead guilty to the charges in order to receive the Assistant District Attorney's offer of one-year probation. John listens as the Assistant District Attorney and the judge ask questions, but the courtroom is loud and crowded, he is scared and just wants to go home. Before he knows it, the judge bangs his gavel and the next case is called. John now has a criminal record with a conviction for assault, a fact he will need to report on every college application next fall. He also learns many of the colleges that were previously scouting him to play on their team are no longer interested and his dream of playing professional soccer may be thwarted.

Derek, being thirteen, is prosecuted as a juvenile in Family Court. His parents are permitted, and even encouraged, to be a part of his proceeding. The judge explains each step of the proceeding to Derek and invites him to ask questions if he is confused. Derek is ordered to complete one hundred hours of community service, but walks out of court without a criminal record and his future intact.

In New York, a sixteen-year-old is automatically prosecuted as an adult for all criminal conduct, but in other proceedings, like those involving neglect¹ or status offenses,² the law treats sixteen-year-olds as children.³ Sixteen-year-olds cannot consume alcohol, purchase tobacco or a lottery ticket, enlist in the army, or even vote, but under New York law they are held criminally responsible for their actions. The New York legislature enacted many of these laws to protect children who lack the maturity to make these important decisions, but this raises the question: if the State has such a strong interest in protecting sixteen-year-olds from making potentially dangerous choices, why does it fail to protect them in the aftermath of these choices when teenagers need protection the most?

This Note addresses the need for New York to increase its jurisdictional

¹ Neglect proceedings refer to actions against a child's parent for neglect; however, a child is defined as anyone under the age of eighteen.

² Status offenses are behaviors that are legal for the general population, but illegal for a certain class of people. For example, it is illegal for a sixteen-year-old to consume alcohol, but it is perfectly legal for a twenty-one-old to do so.

³ Merrill Sobie, *Pity the Child: The Age of Delinquency in New York*, 30 PACE L. REV. 1061, 1074 (2010).

age limit to prosecute juveniles as adults in criminal court from sixteen to eighteen. It proposes a compromise that recognizes emerging psychological findings but retains retributivist values and political practicality essential to the criminal justice system. Specifically, to ensure that children receive adequate protection under the law, New York should prosecute all individuals under the age of eighteen in Family Court, remove only extreme cases at the Family Court's discretion, and expand the sentencing power of the Family Court while increasing its jurisdiction from age twenty-one to twenty-five.

Part II discusses recent psychological findings on juvenile cognitive development that make New York's jurisdictional age limit unfair to teenagers. Part III outlines the creation and development of the juvenile justice system on a national and statewide level. This part discusses both societal factors that contributed to the formation of the juvenile courts and the current New York transfer law itself. Part IV will address the need to change the transfer law, and why prior justifications for the New York juvenile transfer laws no longer apply today. Notably, juvenile crime rates have decreased over the past decade and advances in psychology demonstrate that juveniles have an inherently different level of culpability than adults. This part will also address why the current proposed amendments to New York's juvenile transfer laws are inadequate to protect teenagers. Part V proposes New York amend its juvenile transfer laws by increasing the age of criminal liability from sixteen to eighteen. All juveniles should be prosecuted in Family Court, removing only extreme cases upon petition by the District Attorney and subject to the Family Court's approval. Additionally, New York should expand the Family Court's sentencing power by removing sentencing maximums and increasing its jurisdiction from age twenty-one to twenty-five.

I. THE REALITY OF JUVENILE TRANSFERS: NEW FINDINGS ABOUT THE TEENAGE BRAIN

It is well established that teenagers are different from adults. As compared to adults, young people have trouble making decisions, take more risks, and seem to rarely consider the consequences of their actions. While any parent or teacher could have told you this from experience alone, recent developments in psychology provide an explanation for this difference in behavior.

This section discusses recent psychological findings that demonstrate juveniles differ from adults in their ability to use logic, reason, make

decisions, and analyze risks for a variety of reasons. Part A will explain the recent psychological findings with respect to juvenile brain development including structural changes, hormonal changes, and external influences. Part B will highlight the impact of these findings on the law's treatment of juveniles.

A. A Closer Look at the Teenage Brain

Advances in scientific research, largely attributable to new methods, including the functional MRI,⁴ have revealed juveniles differ from adults in two distinct ways that have a profound impact on their behavior: first, a juvenile's brain is structurally underdeveloped, even at age sixteen or seventeen, as compared to an adult's brain, and second, the processes of a juvenile brain's functioning are distinguishable from that of an adult.

a. Structural Changes

The juvenile brain boasts a number of structural differences from an adult brain. Recent estimates state the human brain finishes developing close to age twenty-five.⁵ Previously, scientists believed the human brain was fully mature by age twelve,⁶ but new research indicates the brain undergoes a second wave of growth in the teen years.⁷ During this time the amount of gray matter⁸ peaks and thins to create connections within the brain.⁹ Over the years the connections used most frequently become permanent, while others disappear.¹⁰ These connections create an intricate communication system using messengers called neurons to transmit signals from the brain to the body.¹¹ These processes speed up as white matter¹²

⁴ See Brief for the American Medical Association et. al. as Amici Curiae in Support of Respondent at 10–11, *Roper v. Simmons*, 543 U.S. 551 (2007) (No. 03-633).

⁵ Michelle Haddad, *Catching Up: The Need for New York State to Amend its Juvenile Offender Law to Reflect Psychiatric, Constitutional and Normative National Trends Over the Last Three Decades*, 7 CARDOZO PUB. L. POL'Y & ETHICS J. 455, 481 (2009).

⁶ Claudia Wallis, *What Makes Teens Tick*, TIME (Sept. 26, 2008), <http://www.time.com/time/magazine/article/0,9171,994126,00.html>.

⁷ See *id.*

⁸ See Brief for the American Medical Association et. al. as Amici Curiae in Support of Neither Party at 19, *Graham v. Florida*, 130 S.Ct. 2011 (2010) (No. 08-7412) ("Gray matter, which comprises the outer surfaces of the brain, is composed of cells called neurons that perform the brain's tasks, such as the higher functions that are carried out in the prefrontal cortex.").

⁹ See Wallis, *supra* note 6.

¹⁰ See *id.*

¹¹ See *id.*

¹² See Brief for the American Psychological Association et. al. as Amici Curiae Supporting Petitioners at 26–27, *Graham v. Florida*, 130 S.Ct. 2011 (2010) (No. 08-7412) ("[White matter is] the tissue that forms pathways among different parts of the brain . . .").

thickens with myelin sheaths that accelerate communication.¹³ As teens establish these neurological connections and develop the ability to utilize them faster and more efficiently, their cognitive abilities improve.

During this time, juveniles experience the most growth in areas that impact decision-making and risk-taking behavior. The brain is organized into different parts and each part controls certain actions. Teenage brains develop the most in the pre-frontal cortex, parietal lobes, and temporal lobes.¹⁴ The pre-frontal cortex controls our executive-functions such as planning, judgment, controlling impulses, and foreseeing the consequences of our actions.¹⁵ This part of the brain finishes developing around age twenty-one.¹⁶ The parietal lobes integrate information from different parts of the brain such as auditory, tactile, and visual stimuli to make sense of this information and create one larger picture.¹⁷ This part of the brain finishes developing in the mid-teen years.¹⁸ The temporal lobes control language and emotions¹⁹ and finish developing around age sixteen.²⁰ As these parts of the brain develop, juveniles enhance their capacity to use logic and reason in their decision-making and increase their ability to control their actions.

b. Hormonal Changes

In addition to rapid brain development, teenagers also undergo drastic hormonal changes that influence their behavior. Particularly, increases in dopamine and sex hormones, like estrogen and testosterone, encourage teens to engage in risky pleasure-seeking behaviors.²¹ These behaviors can range from simple decisions, like choosing to watch television instead of doing homework, to more dangerous behavior like experimenting with drugs or engaging in unprotected sex. Dopamine is strongly linked to reward seeking and motivation²² while sex hormones mainly influence

¹³ Wallis, *supra* note 6.

¹⁴ See *id.*; Sharon Begley, *Getting Inside a Teen Brain*, NEWSWEEK (Feb. 27, 2000), <http://www.thedailybeast.com/newsweek/2000/02/27/getting-inside-a-teen-brain.html>.

¹⁵ Wallis, *supra* note 6.

¹⁶ Haddad, *supra* note 5, at 478.

¹⁷ See Begley, *supra* note 14.

¹⁸ See Haddad, *supra* note 5, at 480.

¹⁹ Begley, *supra* note 14.

²⁰ Haddad, *supra* note 5, at 480.

²¹ See Wallis, *supra* note 6.

²² Samantha Schad, *Adolescent Decision Making: Reduced Culpability in the Criminal Justice System and Recognition of Capacity in Other Legal Contexts*, 14 J. HEALTH CARE L. & POL'Y 375, 378 (2011).

mood and excitability.²³ This influx of new hormones combined with the underdeveloped pre-frontal cortex (which controls judgment and impulse-control) makes juveniles more likely to choose risky reward seeking activities where adults would choose more rational behaviors.²⁴ As young people develop into mature adults, they become accustomed to processing these hormones and the pre-frontal cortex establishes the necessary connections to resist such impulses and choose safer behaviors, but until then teens face a difficult challenge in controlling their behavior.

c. External Influences

Juvenile behavior is also largely influenced by external sources. One major influence is peer pressure.²⁵ Teens engage in a variety of behaviors to conform to peer groups or gain societal acceptance. Often attributed to an underdeveloped sense of self, this factor, combined with hormonal and brain developments, further increases the likelihood that teens will engage in risky behavior without properly evaluating its impact.²⁶

B. *The Impact of Psychology on the Law*

Due to this powerful combination of brain development, hormonal changes, and external pressure, juveniles require different treatment under the law. Standard capacity defenses like insanity and diminished capacity are ill suited. For instance, the typical legal inquiry for insanity is whether one knows the difference between right and wrong. Young people know the difference between right and wrong, but are at times incapable of deciding to do what they know is right. Hormonal influences create an emotionally driven brain that, without properly developed reasoning skills, causes teens to focus on seeking immediate gratification instead of evaluating consequences or controlling impulses.²⁷

This reward or pleasure-seeking behavior is exemplified by the prevalence of non-violent juvenile crime, such as property crimes²⁸ and teenage pregnancy. In 2008, the Department of Justice reported that, while violent crime rates for juveniles decreased, juvenile property crime rates increased, resulting in 493,600 arrests that year.²⁹ As for teen pregnancy,

²³ Wallis, *supra* note 6.

²⁴ See Schad, *supra* note 22, at 377–79.

²⁵ See *id.* at 380–81.

²⁶ See *id.*

²⁷ See *id.* at 377–78.

²⁸ Property crimes include burglary, larceny-theft, motor vehicle theft, and arson.

²⁹ Charles Puzzanchera, *Juvenile Arrests 2008*, OFF. OF JUV. JUST. & DELINQ. PREVENTION 3 (Dec.

approximately 750,000 teenagers in the United States become pregnant each year and 82% of these pregnancies were unintended.³⁰ Ultimately, these examples demonstrate that, while a juvenile may know a certain behavior like stealing someone's property or engaging in unprotected sex is wrong or dangerous, they may be incapable of resisting their impulses and properly evaluating the consequences of their actions.

II. DEVELOPMENT OF THE JUVENILE JUSTICE SYSTEM

Though findings about juvenile psychological developments are recent, today any parent or teacher could tell you teenagers are different from adults. Historically, however, society did not view young people differently, but believed they were simply smaller versions of adults. Changes in the societal perceptions of the youth forced the law to adapt and eventually gave rise to an independent juvenile justice system.

This section discusses the development of the juvenile justice system, including the creation of juvenile courts and, eventually, juvenile transfer laws. Part A will address how the juvenile justice system developed on a national level. Part B will address how the juvenile justice system developed in New York.

A. Nationwide Development of the Juvenile Justice System

a. Creating Juvenile Courts

Legislators created the juvenile justice system during the late nineteenth century in response to a dramatic shift in the societal understanding of children.³¹ Previously considered miniature adults, society began to view children as a special category of societal member.³² New legislation reflected this change in opinion as legislators passed laws designed to protect children, such as child labor laws, mandatory education requirements, and the creation of the juvenile justice system.³³

The first Juvenile Court was created in Illinois in 1899.³⁴ The Juvenile

2009), <https://www.ncjrs.gov/pdffiles1/ojjdp/228479.pdf>.

³⁰ *Facts on American Teens' Sources of Information About Sex*, GUTTMACHER INSTITUTE 1 (Feb. 2012), <http://www.guttmacher.org/pubs/FB-Teen-Sex-Ed.pdf>.

³¹ See Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. Rev. 1083, 1097 (1991).

³² See *id.* at 1093–94; Office of Juvenile Justice & Delinquency Prevention, *Juvenile Offenders and Victims: 1999 National Report*, NAT'L CRIM. JUST. REFERENCE SERVICE 2 (Dec. 1999), <https://www.ncjrs.gov/pdffiles1/ojjdp/178995.pdf>.

³³ See Ainsworth, *supra* note 31, at 1093.

³⁴ See Monya M. Bunch, *Juvenile Transfer Proceedings: A Place for Restorative Justice Values*,

Court Act of 1899 created a separate court system in Illinois with original jurisdiction over juveniles to address children's issues in a non-criminal proceeding.³⁵ Other states quickly followed this model and developed their own similar juvenile courts.³⁶

Legislators created the juvenile justice system to account for two generally held beliefs. First, the belief that juveniles are less blameworthy for their actions than adults, and, second, the belief that the State has an interest in developing a child rather than simply punishing him.³⁷ Juvenile courts purported to achieve these goals through three main differences from criminal courts: (1) the proceedings were separate from those for adult offenders; (2) parents were involved in the proceedings; and (3) children were not imprisoned in adult jails.³⁸

b. Creating Juvenile Transfer Laws

By 1925, only two states lacked a separate juvenile court.³⁹ Though the original jurisdictional age limit began at sixteen, the success of juvenile courts encouraged many states to increase this age to eighteen.⁴⁰ By 2000, almost every state followed course, and today only New York maintains the jurisdictional age limit of sixteen.⁴¹

As the age limit increased, many legislators believed some juveniles, particularly those who committed violent offenses, did not deserve such benevolent and protective care from the State. To address these violent offenders, the juvenile courts developed a "transfer" system to remove extreme cases to criminal court.⁴² For example, today, in any state, a seventeen-year-old charged with murder would be prosecuted as an adult in criminal court, rather than prosecuted as a juvenile offender in juvenile court.⁴³

There are three ways a juvenile can be transferred from juvenile court to criminal court: prosecutorial waiver, judicial waiver, or statutory waiver. With prosecutorial waiver, the prosecutor is given discretion to file in

47 How. L.J. 909, 914 (2004).

³⁵ *See id.*

³⁶ *See id.*; Sobie, *supra* note 3, at 1063 (stating that in 1903 alone, 6 states created their first juvenile courts).

³⁷ *See* Bunch, *supra* note 34, at 914–15; *see also* Shay Bilchik, *Youth Courts: A Chance to Build Hope*, 83 N.Y. ST. B.J. 12, 14 (2011).

³⁸ *See* Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 115–16 (1909).

³⁹ *See* Sobie, *supra* note 3, at 1061.

⁴⁰ *See id.* at 1064.

⁴¹ *See id.*

⁴² *See id.* at 1065.

⁴³ *Id.*

either criminal or juvenile court, as both courts have concurrent jurisdiction over the case.⁴⁴ With mandatory judicial waiver, only the juvenile court has jurisdiction over the case, so it must waive its jurisdiction in order to proceed in criminal court.⁴⁵ With statutory waiver, state law determines the maximum age of the juvenile court's original jurisdiction and all offenders above that age are prosecuted in criminal court.⁴⁶ Additionally, some states provide for a reverse waiver where the criminal court may transfer cases back to the juvenile court.⁴⁷

Today most states use a combination of these three types of waiver to govern juvenile offenders.⁴⁸ Regardless of the type of waiver, however, these tools expose juveniles to the risk of prosecution in adult criminal court.

B. The Creation of the Juvenile Justice System in New York

New York's juvenile justice system developed slowly and was largely influenced by the public and media perceptions of juvenile criminals.⁴⁹ Today, it remains one of the harshest states for treatment of juvenile offenders.⁵⁰

a. New York's Evolution of the Juvenile Court

New York law generally reflects the belief that children are different from adults and need to be treated as such under the law. Originally, to decide eligibility for imprisonment, New York defined juveniles as those under the age of eighteen.⁵¹ In 1824, the New York legislature created the New York House of Refuge to rehabilitate juveniles instead of sending them to traditional prisons to be incarcerated with adults.⁵² Though juveniles did not have their own court until 1922, previously they were prosecuted in their own separate part, Children's Court, to promote

⁴⁴ See Donna M. Bishop, *Juvenile Offenders in the Adult Criminal Justice System*, 27 CRIM. & JUST. 81, 92 (2000).

⁴⁵ See *id.*

⁴⁶ See *id.* at 93.

⁴⁷ See *id.*

⁴⁸ See *id.* at 89–92 tbl.1.

⁴⁹ See Kelly M. Angell, *The Regressive Movement: When Juvenile Offenders are Treated as Adults, Nobody Wins*, 14 S. CAL. INTERDISC. L.J. 125, 135 (2004); see also Tracy Rightmer, *Arrested Development: Juveniles' Brains Make Them Less Culpable Than Adults*, 9 QUINNIPIAC L.J. 1, 8-9 (2005).

⁵⁰ Haddad, *supra* note 5, at 484.

⁵¹ See Sobie, *supra* note 3, at 1067.

⁵² *Id.* at 1066.

separating young offenders from the general prison population.⁵³ Eventually, in 1922, New York followed the national trend and created a separate juvenile court, the New York State Children's Court, though the legislature lowered the jurisdictional age limit to sixteen.⁵⁴

Criticism of the low jurisdictional age limit began shortly after it was passed, and has remained consistent ever since. In 1931, a New York State Crime Commission report stated that the stark difference between the criminal and juvenile courts was unfair to young offenders prosecuted as adults, considering the arbitrary cut off age prescribed by the legislature.⁵⁵ Similar criticism continued and the legislature constantly revisits the issue, but has never reached a majority consensus to increase the age. Specifically, the issue has been addressed by the Joint Legislative Committee on Children's Court Jurisdiction and Juvenile Delinquency in 1942,⁵⁶ the New York Constitutional Convention in 1961,⁵⁷ and the Juvenile Offender Law in 1978.⁵⁸ Under each treatment legislators failed to reach a majority consensus to increase the age limit, but always tabled the issue for further review, often shifting the debate to another committee.⁵⁹

b. New York's Juvenile Transfer law

As the jurisdictional age limit issue shuffled back and forth between committees, legislators, and interest groups, a violent juvenile crime wave in the 1970s provided the legislature with a solid justification to not only defend the harsh treatment of juveniles, but to increase punishment and expand its reach.

1. The Juvenile Justice Reform Act of 1976

New York responded to a general increase in juvenile violence with the Juvenile Justice Reform Act of 1976.⁶⁰ One juvenile crime that prompted

⁵³ See *id.* at 1069.

⁵⁴ See *id.*

⁵⁵ See *id.* at 1070.

⁵⁶ See *id.* at 1071.

⁵⁷ See *id.*

⁵⁸ See *id.* at 1084.

⁵⁹ See *id.* at 1071-72. For example, the Family Court Act of 1962 included the following language: "This section follows existing law in limiting juvenile delinquency to persons under sixteen years of age. This decision is tentative and subject to change upon completion of a study of the Youthful Offender Act and the Wayward Minor Law." *Id.* at 1072 (emphasis added). That report in turn concluded with the following statement: "[g]iven [the] . . . constitutional mandate to examine again the question of whether the juvenile delinquency age should be changed or other arrangements made for dealing with young offenders." *Id.* at 1072-73.

⁶⁰ Haddad, *supra* note 5, at 459.

the response was the case of two juveniles, ages fourteen and fifteen, who kidnapped, robbed, assaulted, terrorized, and sodomized two ten-year-old boys.⁶¹ The act passed in a political fury and public outrage after incidents of juvenile violence received vast media coverage that encouraged the public to seek harsher punishments for young offenders who committed heinous crimes.⁶² This piece of legislation served as the starting point for New York's transfer of juveniles from juvenile court to criminal court.⁶³

The Juvenile Justice Reform Act responded to the people's cry for harsher punishments for juvenile criminals by creating a list of designated felonies and prescribing appropriate punishment.⁶⁴ For example, a fourteen or fifteen-year-old convicted of murder, rape, or arson would be held in restrictive placement for three to five years.⁶⁵ Despite these mandatory penalties, violent juvenile offenses continued and the process proved to be insufficient to address the public's concern.

2. The Juvenile Offender Law of 1978

Two years later the New York Legislature imposed even harsher conditions on juveniles in response to the continued increase in violent juvenile crimes.⁶⁶ Not only did the rate of juvenile violent crime and homicides double between 1965 and 1980, but individual incidents posed an alarming disregard for human life. One case in particular raised cause for concern. In March 1978, a juvenile named Willie Bosket shot three men, killing two.⁶⁷ Bosket shot and killed the first man while he was sleeping on the subway and proceeded to steal the victim's gold watch, ring, and the money in his pocket.⁶⁸ Bosket shot and killed the second man about a week later also while riding the subway; on this occasion, Bosket also shot a train yard dispatcher, who survived.⁶⁹ Because Willie was fifteen years old, he was prosecuted in the Bronx Family Court System where his maximum sentence for the two murders was only five years.⁷⁰ Additionally, the conviction did not go on Bosket's criminal record.⁷¹

⁶¹ *See id.* at 459 n.22.

⁶² *See id.* at 456-57.

⁶³ *See id.* at 457.

⁶⁴ *See id.* at 459.

⁶⁵ *See id.*

⁶⁶ *See Sobie, supra* note 3, at 1075.

⁶⁷ Haddad, *supra* note 5, at 456.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

Naturally, an outraged public demanded the young offender receive harsher punishment, and soon after the legislature responded.⁷²

Given the horrific nature of Bosket's crimes and his young age, the media followed the incident closely to the verdict.⁷³ To be sure, the horrible nature of the crimes became distorted in the public perception as representative of the violent nature of all juvenile crimes and how lightly the justice system treated juveniles. The excessive media attention, paired with the general spike in juvenile crime rates, placed tremendous pressure on the legislature to act. This public outcry shaped the penal nature of the Juvenile Offender Law of 1978 and removed the treatment of juveniles far from its rehabilitative beginnings to a retributivist emphasis on punishment.

The Juvenile Offender Law of 1978 created even harsher punishments for juveniles.⁷⁴ The law addressed violent crimes by decreasing the age of criminal liability and imposing harsher mandatory minimum sentences. For example, a fourteen or fifteen-year-old convicted of arson would receive a minimum sentence of four to six years and a maximum sentence of twelve to fifteen years in a secure facility.⁷⁵ Additionally, the law restricted plea-bargaining for all violent offenders, including juveniles.⁷⁶

Most importantly, the Juvenile Offender Law mandated that juveniles charged with crimes would begin their proceedings in criminal court.⁷⁷ These offenders could only be removed to Family Court at the District Attorney's discretion in a reverse waiver.⁷⁸ In limited circumstances, a juvenile in criminal court could receive "Youthful Offender Treatment" that would seal his or her criminal record and prevent the future stigma of a criminal conviction, but this was rare.⁷⁹ The law left many juveniles exposed to the harsh realities of being prosecuted as an adult in criminal court before the prosecution even established the merits of its case.

New York's transfer law was highly influenced by the political climate, public outcry, and disproportionate media attention placed on juvenile

⁷² *Id.* at 456-57.

⁷³ *Id.*

⁷⁴ See 1978 N.Y. Laws ch. 481.

⁷⁵ See *id.* § 32 (defining "juvenile offender"); Simon I. Singer & David McDowall, *Criminalizing Delinquency: The Deterrent Effects of the New York Juvenile Offender Law*, 22 LAW & SOC'Y REV. 521, 523-24 (1988), available at <http://www.jstor.org/stable/pdfplus/3053628.pdf?acceptTC=true>. Compare this sentence to the Juvenile Justice Reform Act of 1976 that mandated three to five years of restrictive placement for a fourteen or fifteen-year-old convicted of arson.

⁷⁶ 1978 N.Y. Laws ch. 481.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Haddad, *supra* note 5, at 462 (stating that the court considers the circumstances of the crime, the nature of the offense, the harm to the victim, prior criminal history and recommendation of the prosecutor and defense counsel).

violence in the 1970s. The media is generally drawn to cases of juvenile violence for the same reasons that support more lenient punishment of juvenile offenders. Violent juvenile crime shocks society because it challenges the common notion that children are not violent criminals, but simply do not understand the consequences of their actions.⁸⁰

Stories of juvenile violence instill a societal fear that anyone could become a criminal, or worse, a victim.⁸¹ One study found newspapers were 27.49%⁸² more likely to report crimes as the age of the offender decreased by one year. This age dichotomy becomes important because the public desire to punish extreme young offenders is misplaced, and, in reality, legislation is more likely to punish older offenders, such as sixteen and seventeen-year-olds who are subject to prosecution as adults.

Media reports foster a public perception that overestimates the prevalence of juvenile crime, even when crime rates are declining.⁸³ This negative perception of juvenile crime rates was present during the 1980s, a decade that boasted a "get tough on crime" attitude.⁸⁴ While states took a number of different approaches to transfer juveniles into adult courts, New York took a more extreme approach and remains the harshest state for juveniles today.⁸⁵

3. The Law Today

Currently, under the New York Penal Code Article 30.00, "a person less than sixteen years old is not criminally responsible for conduct," subject to enumerated exceptions.⁸⁶ Exceptions to this general rule impose criminal liability for those age thirteen or older for murder in the second degree and felony murder "provided the underlying crime for the murder charge is one for which such person is criminally responsible or for such conduct as a sexually motivated felony."⁸⁷ Exceptions which impose criminal liability

⁸⁰ See John G. Boulahanis & Martha J. Heltsley, *Perceived Fears: The Reporting Patterns of Juvenile Homicide in Chicago Newspapers*, 15 CRIM. JUST. POL'Y REV. 132, 155 (2004); Mike Farrell, *Sixteenth Annual International Law Symposium "Rights of Children in the New Millennium": On the Juvenile Death Penalty*, 21 WHITTIER L. REV. 207, 212 (1999).

⁸¹ See Boulahanis & Heltsley, *supra* note 80, at 155.

⁸² See *id.* at 143.

⁸³ See *id.* at 134 ("A survey accompanying Sprott's study found that almost three-fourths of respondents tended to overestimate the amount of crime, believed homicides involving juvenile offenders had increased (while they had actually decreased), and most viewed the juvenile court as 'too lenient.'").

⁸⁴ Bishop, *supra* note 44, at 84.

⁸⁵ See *id.*

⁸⁶ N.Y. Penal Law § 30.00 (McKinney 2012).

⁸⁷ *Id.*

for those age fourteen or older include: kidnapping, arson, assault, manslaughter, rape, criminal sexual acts, aggravated sexual abuse, burglary, and robbery in the first degree; burglary, arson, and robbery in the second degree; possession of a firearm on school grounds; attempted murder in the second degree; kidnapping in the first degree; and sexually motivated felonies.⁸⁸

Teenagers age sixteen or older, or those whose crimes fall within one of the aforementioned exceptions, are prosecuted as adults in criminal court, but teenagers under sixteen, whose crimes do not fall within the exceptions, are prosecuted as juveniles in Family Court.⁸⁹

III. THE NEED FOR CHANGE

This section will explore why New York needs to change its juvenile transfer laws. Part A will discuss how New York's juvenile transfer laws have failed to meet the goal of decreasing juvenile crime and have actually increased recidivism rates among juvenile offenders. Part B will discuss previous attempts to raise the age of criminal responsibility in New York and posit some factors that may have contributed to its failures, including cost, reluctance to alter the status quo, misconceptions about juvenile crime rates, and the general lack of sympathy for the cause. Part C will demonstrate how the Supreme Court has endorsed advances in juvenile psychology that support increasing the age of criminal liability. Part D will state why the current proposed changes to New York's juvenile transfer laws are insufficient to protect teenagers under the law.

A. New York's Juvenile Transfer Laws Increase Recidivism Rates Among Juvenile Offenders

Though juvenile transfer laws implemented drastic changes within the juvenile justice system, the legislature failed to meet its goal to decrease juvenile crime. While juvenile crime rates have decreased in the past decade, specifically in the past few years, this cannot be rightly attributed to the removal procedures enacted by the legislature.

Juveniles prosecuted as adults in criminal court demonstrated higher recidivism rates than those prosecuted in Family Court.⁹⁰ The Center for

⁸⁸ *Id.*

⁸⁹ *See id.*

⁹⁰ *See, e.g.,* Andrea McGowan et al., *Effects on Violence of Laws and Policies Facilitating the Transfer of Juveniles from the Juvenile Justice System to the Adult Justice System*, 32 AM. J. PREVENTATIVE MED. S7, S14 (2007) (finding, based on empirical evidence, that transferring juveniles

Disease Control created a task force to explore the deterrent value of transfer laws.⁹¹ All studies yielded negative results.⁹² One report compared a group of four hundred juveniles arrested in New York (where the age of criminal liability is sixteen) and New Jersey (where the age of criminal liability is eighteen) and found "transferred juveniles were 39% more likely to be re-arrested on a violent offense than were retained juveniles."⁹³ Another study yielded similar results when it compared more than two thousand juveniles prosecuted during 1992 and 1993 in either New York or New Jersey for aggravated assault, armed robbery, or burglary.⁹⁴ By 1999, the study revealed that "youth prosecuted in the adult courts in New York were 85% more likely to be re-arrested for violent crimes than those prosecuted in the New Jersey juvenile courts, . . . and 44% more likely to be re-arrested for felony property crimes."⁹⁵ Clearly, the New York transfer laws serve little, if any, deterrent value, since recidivism rates are higher for New York juveniles prosecuted as adults, who were re-arrested faster, more frequently, and for more serious offenses, as compared to similarly situated New Jersey juveniles.⁹⁶

B. Previous Attempts at Change and Why These Efforts Failed

While there is no clear reason why New York has failed to reduce the age of criminal liability, a number of interrelated factors may prove informative: cost, reluctance to alter the status quo, misconceptions about juvenile crime rates, and the general lack of sympathy for the cause.⁹⁷

Opponents have objected to amending juvenile transfer laws due to cost.⁹⁸ There is a fear that the already overburdened juvenile justice system cannot adequately fund the influx of sixteen and seventeen-year-old

to adult court and subjecting them to adult sentences results in higher recidivism rates).

⁹¹ Task Force on Cmty Preventative Servs., *Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System*, CENTER FOR DISEASE CONTROL & PREVENTION (Nov. 30, 2007), <http://www.cdc.gov/mmwr/preview/mmwrhtml/rr5609a1.htm>.

⁹² *See id.*

⁹³ *Id.*

⁹⁴ *See* MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice, *The Changing Borders of Juvenile Justice: Transfer of Adolescents to the Adult Criminal Court*, 5 ISSUE BRIEF 1, 1 (2006), available at http://www.adjj.org/downloads/3582issue_brief_5.pdf.

⁹⁵ *Id.*

⁹⁶ *See id.* at 2.

⁹⁷ Similar factors were posited in North Carolina where juveniles were also automatically transferred into adult criminal court at age sixteen. *See* Tamar R. Birckhead, *North Carolina, Juvenile Court Jurisdiction, and the Resistance to Reform*, 86 N.C. L. REV. 101, 121-24 (2008), available at <http://ssrn.com/abstract=1183022>.

⁹⁸ Mosi Secret, *Judge Seeks New System for Juveniles*, N.Y. TIMES, Sept. 21, 2011, at A22; *see* Birckhead, *supra* note 97, 121.

offenders who stand to double the Family Court's caseload if the jurisdictional age limit is raised to eighteen.⁹⁹ This argument, however, is weakened by the findings in Connecticut and North Carolina, where this exact change proved successful.¹⁰⁰ Despite the upfront cost of funding the transfer, over time the predicted drop in recidivism rates by prosecuting juveniles in an appropriate forum actually lowered costs in North Carolina and Connecticut,¹⁰¹ as both states saw decreases in the number of prosecutions.¹⁰²

Another commonly cited issue is the reluctance to change the status quo,¹⁰³ however, this issue alone cannot justify maintaining the jurisdictional age limit at sixteen. While it is difficult to change most laws, this reluctance is outweighed by the overwhelming amount of conclusive scientific studies that present new evidence warranting a change in the status quo. Legislators created the status quo for juvenile justice before researchers could explain the marked differences between adults and juveniles that make the latter inherently less culpable. Given the severe implications for juveniles prosecuted as adults, it would be unjust to allow a reluctance to change the status quo to justify continuing to prosecute juveniles in an inappropriate forum.

Public perception about juvenile crime rates is another reason cited for not amending the juvenile transfer laws;¹⁰⁴ however, this public perception is inaccurate. The statistical data that shows juvenile crime rates are dropping, and reaching historic lows, cannot be disputed, nor can these results be rightly attributed to the transfer laws shown to increase, not decrease, recidivism rates.¹⁰⁵ Though juveniles may be involved in any number of crimes, murder is an illustrative example, given the seriousness of the offense and its prominent status as a cause for public concern. Current juvenile murder arrest rates are decreasing, nearing an all-time low.¹⁰⁶ While rates peaked in 1993 at 14.4 arrests per 100,000 juveniles, in 2008 this rate dropped to just 3.8 arrests per 100,000 juveniles

⁹⁹ Secret, *supra* note 98.

¹⁰⁰ See Birkhead, *supra* note 97, at 118.

¹⁰¹ See *id.* at 154.

¹⁰² See *id.* at 103, 133; Editorial, *Court Reform for Teenage Offenders*, N.Y. TIMES, Oct. 12, 2011, at A22 (describing recent efforts to decrease juvenile recidivism in New York).

¹⁰³ See Birkhead, *supra* note 97, at 121.

¹⁰⁴ See *id.* at 107.

¹⁰⁵ See Task Force on Cmty Preventative Servs., *supra* note 91 (reviewing research on effects of transferring juveniles to adult justice system and finding no evidence of general deterrence).

¹⁰⁶ See Charles Puzanhera & Benjamin Adams, *Juvenile Arrests 2009*, OFF. OF JUV. JUST. & DELINQ. PREVENTION 9 (Dec. 2011), <http://www.ojjdp.gov/pubs/236477.pdf>.

demonstrating a 74% decrease in fifteen years.¹⁰⁷ This demonstrates that the crime wave that prompted the legislature to "get tough on crime" and ensure public safety from juvenile offenders simply no longer exists. The fear of juvenile criminals is fabricated and should not be permitted to keep real juvenile offenders from receiving appropriate treatment in a juvenile court.

Finally, this proposed change has been met with apathy, and at times resistance, because it is simply an unsympathetic cause.¹⁰⁸ While juveniles differ from adults in very real ways that make them less culpable, that does not change the fact that they committed serious crimes against innocent people. Unsympathetic, however, must not be translated into unworthy. The proposed amendments are still necessary and would actually benefit the larger public by reducing recidivism and decreasing crime rates in general.

C. How New Psychology Applies to Juveniles Today

As noted above, scientists' knowledge about the teenage brain has advanced tremendously over the past decade. A juvenile's brain is less developed than an adult's brain, specifically in areas that control logic, reasoning, risk-analysis, and foreseeing consequences. For example, in one study where adult and juvenile participants rated the likelihood of certain risky events occurring and the consequences of risky behaviors such as drinking alcohol, using fireworks, or vandalizing property, juveniles overrated the likelihood of these events occurring but underrated the possibility of negative consequences.¹⁰⁹ While scientific evidence is always under scrutiny in the law due to its ever changing nature, in the past decade the Supreme Court has endorsed these specific psychological advancements in, not one, but three groundbreaking cases.

a. Roper v. Simmons Holds Juveniles Are Different.

In *Roper v. Simmons*,¹¹⁰ the Supreme Court held that the death penalty was a cruel and unusual punishment that violated the Eighth Amendment

¹⁰⁷ Puzanchera, *supra* note 29, at 1.

¹⁰⁸ See Birkhead, *supra* note 97, at 124; Jessica Wilde, *Juvenile Criminals Must be Prosecuted as Adults*, REBEL YELL (Mar. 5, 2009), <http://www.unlvrebelyell.com/2009/03/05/juvenile-criminals-must-be-tried-as-adults/>.

¹⁰⁹ See B.J. Casey et al., *Risk Taking and the Adolescent Brain: Who is at Risk?*, 10 DEVELOPMENTAL SCI. F8, F13 (2007) (finding that, in a study of individuals aged seven to twenty-nine, impulse control continues to develop over the course of adolescence and early adulthood).

¹¹⁰ 543 U.S. 551 (2005).

when applied to juveniles (which the Court defined as those under the age of eighteen) because, simply put, juveniles are different.¹¹¹ The Court articulated three major differences between juveniles and adults to justify its hard line exclusion. First, juveniles demonstrate a lack of maturity and responsibility commonly found in adults.¹¹² Second, juveniles are more susceptible to peer pressure and other outside influences.¹¹³ Third, juveniles exhibit an underdeveloped character that can change over time.¹¹⁴ The Court harped on this point and the rehabilitative potential of juveniles stating,

[t]he reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.¹¹⁵

Clearly, the Supreme Court recognized the principle that juveniles are different.

The Court supported its opinion with the growing national trend to exclude juveniles from the death penalty and the amicus briefs from various psychological associations supporting the proposition that juveniles are different. When looking to national trends, the Court found that a majority of states, thirty out of fifty, prohibit the juvenile death penalty and thus concluded that the majority rule should be extended nationwide.¹¹⁶ The Court also relied on various assertions made in amici briefs by the American Psychological Association (APA) and the American Medical Association (AMA). The APA's brief stressed the transitory nature of juveniles, which experts believe to be so unpredictable that professionals refuse to diagnose those under eighteen with severe disorders, such as personality disorders.¹¹⁷ This ultimately became an important factor for the Court, finding that juveniles who were not in control of their actions and demonstrated a true likelihood of changing their behavior over time could not properly be held criminally responsible in the same manner as an adult.

¹¹¹ *Id.* at 569.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *See id.* at 570.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 564.

¹¹⁷ Brief for the American Psychological Association & Missouri Psychological Association as Amici Curiae Supporting Respondent at 19–20, *Roper v. Simmons*, 543 U.S. 551 (2007) (No. 03-633).

The AMA's brief, while providing more specific explanations about the physical brain development,¹¹⁸ supported the APA's propositions that juveniles make emotional, as opposed to rational, decisions and will likely grow out of their criminal behavior.¹¹⁹

b. *Graham v. Florida* Reaffirms Juveniles Are Different

In *Graham v. Florida*,¹²⁰ the Court reiterated the logic from *Roper* in holding that sentencing a juvenile to life in prison without the possibility of parole for a non-homicide offense also violated the Eighth Amendment.¹²¹ The Court again looked to national trends and the psychological differences between juveniles and adults to conclude that juveniles are different and thus deserve different treatment under the law.¹²² The scientific findings from *Roper* were found to be just as relevant in 2010 when the Court stated the "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds,"¹²³ even citing the APA and AMA briefs for support that "parts of the brain involved in behavior control continue to mature through late adolescence."¹²⁴ The Court noted that juveniles are mentally underdeveloped and, therefore, inherently less culpable than adult criminals.¹²⁵

c. *Miller v. Alabama* Extends the Principle that Juveniles Are Different

In *Miller v. Alabama*,¹²⁶ the Court extended the holding in *Graham* to prohibit mandatory sentences to life without the possibility of parole for

¹¹⁸ See Brief of the American Medical Association et. al. as Amici Curiae Supporting Respondent at 12-20, *Roper v. Simmons*, 543 U.S. 551 (2007) (No. 03-633) (summarizing the structural changes in a juvenile's brain including the dominance of the amygdala, which controls emotional impulsive responses, and the delayed maturation of the pre-frontal cortex, which controls reasoning and weighing risks/rewards in decision-making).

¹¹⁹ See *id.* at 5-8, 22.

¹²⁰ 130 S.Ct. 2011 (2010).

¹²¹ See *id.* at 2034.

¹²² See *id.*; see generally Kristin Rhodes, *The Criminal Prosecution of Juveniles: A Philosophical Reappraisal of Adolescent Agency*, LETHBRIDGE UNDERGRADUATE RES. J. (2008), <http://www.lurj.org/article.php/vol3n2/juveniles.xml>.

¹²³ See *Graham*, 130 S.Ct. at 2026 ("[P]arts of the brain involved in behavior control continue to mature through late adolescence. Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of 'irretrievably depraved character' than are the actions of adults." (quoting *Roper v. Simmons*, 543 U.S. 551, 570 (2007))).

¹²⁴ *Id.* at 2026 (citing Brief for American Medical Association et. al. as Amici Curiae at 16-24, *Graham v. Florida*, 130 S. Ct. 2011 (2010) (No. 08-7412); Brief for American Psychological Association et al. as Amici Curiae at 22-27, *Graham v. Florida*, 130 S. Ct. 2011 (2010) (No. 08-7412)).

¹²⁵ See *id.*

¹²⁶ 132 S. Ct. 2455 (2012).

juveniles for all crimes.¹²⁷ Again, citing the same differences articulated in *Roper* and *Graham*, the Court stated that an individualized determination was required before imposing such a harsh sentence on a juvenile.¹²⁸ The Court compared sentencing a juvenile to life without the possibility of parole to sentencing an adult offender to the death penalty, given the likely duration of the sentence, the juvenile's young age, and the transient nature of a juvenile's character that promoted change.¹²⁹ Inadequate juvenile transfer laws were cited as a contributing source to the impositions of inappropriate sentences. "Because many juvenile systems require that the offender be released at a particular age or after a certain number of years, transfer decisions often present a choice between extremes: light punishment as a child or standard sentencing as an adult."¹³⁰

1. Applying *Roper*, *Graham*, and *Miller* to New York's Juvenile Transfer Laws

Though *Roper*, *Graham*, and *Miller* addressed the Eighth Amendment and dealt with juvenile sentencing post-trial, the same logic can be applied to the decision to prosecute a juvenile as an adult. In each case, the Court made two inquiries: (1) what is the national trend and (2) does science and psychology support the proposition that juveniles are different.

Evaluating the New York jurisdictional age limit under these two inquiries is simple. The national trend is explicitly clear; New York is the only state treating all sixteen-year-olds as adults in criminal proceedings. Though Connecticut and North Carolina only increased their jurisdictional age limits recently,¹³¹ the national trend strongly favors treating children under the age of eighteen as juveniles, and now New York remains the only hold out. Science and psychology also clearly support the proposition that juveniles are different for many of the same reasons endorsed by the Court itself. The most recent studies still indicate that teenagers are inherently less culpable due to their underdeveloped brains and possess a transient character that requires different treatment under the law.

D. Why the Current Proposed Changes Are Inadequate

Under the current New York law, anyone age sixteen or older who

¹²⁷ *Id.* at 2460.

¹²⁸ *See id.* at 2460.

¹²⁹ *See id.* at 2467–69.

¹³⁰ *Id.* at 2474.

¹³¹ *See Sobie, supra* note 3, at 1081.

commits a crime is prosecuted as an adult in criminal court.¹³² In addition, those age fourteen or older will be prosecuted as an adult for kidnapping, arson, assault, manslaughter, rape, a criminal sexual act, aggravated sexual abuse, burglary or robbery in the first degree, or arson or robbery in the second degree.¹³³ Finally, those age thirteen or older are considered adults in criminal court for murder in the second degree and felony murder where the offender would be criminally liable for the underlying felony or if the felony is sexually motivated.¹³⁴

New York is currently reviewing a number of proposed amendments to increase the age of criminal liability to eighteen and expand the number of exceptions placing young offenders in adult criminal court. The first proposed amendment would simply raise the age of criminal liability from sixteen to eighteen.¹³⁵ The next proposed amendment would expand the underlying felonies to support a felony murder charge for fourteen and fifteen-year-old offenders by including not only completed crimes for which the juvenile would be criminally responsible, but also attempts to commit such crimes.¹³⁶ A series of proposed amendments would permit juveniles to be prosecuted as adults for a number of additional crimes.¹³⁷ Proposed amendment 1037 would prosecute thirteen-year-olds as adults for rape, criminal sexual acts, and aggravated sexual abuse in the first degree and fourteen and fifteen-year-olds for aggravated sexual abuse in the second and third degrees.¹³⁸ Proposed amendment 2827 would hold fourteen and fifteen-year-olds liable for criminal possession of a weapon in the third degree, manslaughter in the second degree and an attempt to commit any of the previously enumerated exceptions.¹³⁹ Proposed amendment 4034 would make fourteen and fifteen-year-old offenders liable for strangulation¹⁴⁰ and, under proposed amendment 6466, gang assault in the first degree, aggravated assault upon a police officer or a peace officer, and sexual conduct against a child in the first degree.¹⁴¹

The current proposals will not provide adequate protection for juveniles.

¹³² N.Y. Penal Law § 30.00 (McKinney 2012).

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ See Assemb. 6355, 2011 Leg. 234th Sess. (N.Y. 2011).

¹³⁶ See Assemb. 1037, 2011 Leg. 234th Sess. (N.Y. 2011).

¹³⁷ See *id.*; Assemb. 2827, 2011 Leg. 234th Sess. (N.Y. 2011); Assemb. 4034, 2011 Leg. 234th Sess. (N.Y. 2011); Assemb. 6466, 2011 Leg. 234th Sess. (N.Y. 2011).

¹³⁸ See Assemb. 1037.

¹³⁹ See Assemb. 2827.

¹⁴⁰ See Assemb. 4034.

¹⁴¹ See Assemb. 6466.

The proposed amendments to New York Penal Law Article 30.00 would increase the age of criminal liability to eighteen, but greatly expand the list of crimes that would bring juveniles straight to criminal court.¹⁴² While each crime objectively seems to belong in an adult criminal court, the cognitive limitations of the juvenile offenders who commit these crimes must not be ignored. Clearly, the legislature is taking steps to protect some juveniles by proposing to raise the jurisdictional age limit, but expanding the list of exceptions still poses the same risk of harm to a greater number of underage offenders.

IV. PROPOSAL

This final section presents a proposal for the New York legislature to adopt to ensure that juveniles, particularly those who are sixteen or seventeen years old, are adequately protected under the law. Part A will discuss the proposal and its four critical components. Part B will explain how the proposal can be successfully implemented gradually over a five-year trial period. Part C will apply the proposal to the hypothetical of John and Derek encountered in the introduction.

A. The Proposal

There are four critical components to this proposal. First, the New York legislature should increase the age of criminal liability from sixteen to eighteen and prosecute all persons under the age of eighteen in Family Court. Second, the District Attorney should be able to petition for serious offenses to be removed to criminal court at the Family Court's discretion. Third, the Family Court's sentencing power should be extended, permitting it to sentence according to judicial discretion. Finally, the Family Court's jurisdiction should be extended from twenty-one-year-olds to twenty-five-year-olds.

a. New York Should Increase the Age of Criminal Liability from Sixteen to Eighteen

The New York legislature should increase the age of criminal liability from sixteen to eighteen and prosecute all persons under the age of eighteen in Family Court. As experience and advances in psychological research demonstrate, sixteen and seventeen-year-old brains are

¹⁴² See Assemb. 6355.

underdeveloped and limited in their ability to reason, make decisions, and accurately assess the future consequences of their actions. As a group, juveniles are inherently less culpable and it is improper to evaluate them by the same standards as fully developed adults.

While science indicates the brain is fully developed closer to age twenty-five, delaying criminal liability by nearly a decade goes too far. Eighteen provides a more suitable age to impose criminal liability, as this is the age a juvenile gains many decision-making capabilities, including the right to vote and enlist in the military. Delaying criminal liability to age eighteen is an appropriate compromise between recent psychological findings and political considerations.

b. The District Attorney May Petition the Family Court to Remove Extreme Cases

For particularly heinous offenders or crimes, the District Attorney should retain the power to petition the Family Court for a waiver to prosecute these unique juveniles as adults in criminal court. The Family Court would decide if the case should be removed, considering the nature of the crime, the manner in which the crime was committed, the nature of the offender (as determined from psychological reports, parental reports, school reports, etc.), previous juvenile adjudications, the age of the offender, the age of the victim, and any other extenuating circumstances the court or District Attorney deems appropriate.

This proposal preserves prosecutorial discretion to seek adult punishment and imposes the retributivist features of the adult criminal court, but limits this power with the Family Court judges' expertise in dealing with juvenile offenders. As Family Courts would hear all criminal cases for those under eighteen, its judges would possess a unique perspective in evaluating whether a juvenile should be prosecuted as an adult. Additionally, the Family Court judges would be more insulated from political pressure and public outcry in the wake of violent juvenile crime. This would allow the Family Court to impartially determine if adult prosecution is appropriate for the juvenile without the constraints of political pressure.

c. Family Court Sentences Should be Determined by Guidelines

The New York legislature should expand the sentencing power of the Family Courts to accommodate the more violent crimes the court would be likely to address with sixteen and seventeen-year-old offenders previously

prosecuted in criminal court. Currently, the Family Court may only sentence a juvenile to five years in a secure facility, regardless of the crime committed, and offenders must leave the facilities at age twenty-one. To address this issue, the five-year limit should be eliminated and the Family Court should be permitted to sentence according to judicial discretion (as informed by guidelines modeled after adult criminal sentencing guidelines)¹⁴³ so long as decisions are justified with reasoning in a sealed written opinion.

Merely extending the sentencing power of the court to impose harsher sentences would be insufficient under this proposal that contemplates more serious crimes being prosecuted in Family Court.¹⁴⁴ To adequately address the public's common critique that the Family Court is too lenient on juvenile offenders, a large motivating factor in creating juvenile transfer statutes in the first place, the Family Court must be able to sentence offenders in the same way as a criminal court. This will provide juveniles with a fair adjudication before a court that is familiar with their cognitive limitations, but also satisfy the public's well-founded desire that dangerous offenders be removed from the general population. While the focus of the proceedings should remain rehabilitative, this extension would provide the court with the power to impose harsher sentences for more heinous crimes and alleviate the public critique that juvenile courts are too lenient.

d. Family Court's Jurisdiction Should Extend to Age Twenty-Five

Offenders adjudicated under the Family Court's sentencing power should remain under the treatment of the juvenile system until age twenty-five, when researchers estimate brain development is complete and the offender may properly be evaluated as a culpable adult. Sentences that extend past an offender's twenty-fifth birthday should be reevaluated at that time to determine the best method to fulfill the remaining sentence: probation, a mental health facility, or transfer to an adult prison.¹⁴⁵ There are two

¹⁴³ See, e.g., N.Y. SENTENCING CHARTS, CHART II (2009); U.S. SENTENCING GUIDELINES MANUAL § 5C1.1 (Nov. 2011).

¹⁴⁴ Though under this proposal many of the more serious crimes, such as murder, would be removed to criminal court, other serious offenses, such as burglary, would likely remain in Family Court, creating a genuine need to increase its sentencing power beyond five years. Additionally, some murder cases may remain in Family Court, in which case imposing a five-year sentence presents the same problem faced in the Willie Bosket case.

¹⁴⁵ This reevaluation would not consider the merits of the adjudication or extend the sentence beyond the original sentence prescribed. The reevaluation would assess where the offender should spend the remainder of the sentence consistent with other legal considerations such as due process. Missouri already utilizes an almost identical system where juvenile offenders serve a juvenile sentence in a secure facility until age twenty-one at which point a judge decides whether to release him outright,

reasons for this reevaluation: first, to ensure the offender is receiving adequate treatment that a juvenile facility may not be able to provide, and second, to ensure the safety of other juvenile offenders from the dangers associated with being housed in an adult prison.

Rehabilitation should be the primary goal of these juvenile facilities,¹⁴⁶ and the subsequent standard for either early release or reevaluation at age twenty-five. As the Supreme Court noted on multiple occasions, the character of a juvenile is transient, making him susceptible to change over time.¹⁴⁷ This presents the perfect opportunity for rehabilitative efforts that could correct criminal tendencies and transform the juvenile from a criminal to a productive member of society.

A committee, comprised of mental health professionals, members of the court, and state representatives, would evaluate rehabilitation according to progress in mental health sessions in the facility, good behavior, statements from the offender, and any other factors deemed relevant. If the offender has demonstrated true rehabilitative success, the committee would suggest probation, but if the offender has not demonstrated a successful rehabilitation, the committee would recommend transfer to either an adult prison or a mental health facility. The Family Court would review all committee recommendations and issue a final decision on the record.

B. Implementation

This proposal should be enacted on a five-year trial basis during which time it should not be subject to legislative amendments. This time is necessary to truly test the effectiveness of the system, since these laws are often rashly amended following isolated and sensationalized incidents of juvenile crime to "protect" the public against a perceived threat. A committee of judges, district attorneys, child psychologists, and other similar constituents should be assembled to reevaluate the program annually for the five-year trial and make any necessary changes. The legislature would review the entire system at the end of the trial period and evaluate the merits of the program, deciding to amend it or establish it

place him on probation, or send him to adult prison.

¹⁴⁶ Neither deterrence nor retribution can be a valid goal for the Family Courts or juvenile transfers. Deterrence cannot be a valid goal, since multiple studies have shown juveniles lack the cognitive capacity to foresee future consequences of their actions, a crucial skill to make deterrence effective. Retribution is not an appropriate goal, since neurological studies demonstrate juveniles are inherently less culpable for the crimes they commit due to their underdeveloped brains that present unique challenges to reasoning, decision-making, and impulse control.

¹⁴⁷ See *Roper v. Simmons*, 543 U.S. 551, 570 (2004); see also *Johnson v. Texas*, 509 U.S. 350, 368 (1993).

permanently. This trial period would allow the program to grow with rapid adjustments suggested by informed members of the committee, but also insulate the system from rash legislative actions and public resistance.

A significant concern with this proposal will be funding. Like the recent jurisdictional increase in Connecticut, this financial concern can be addressed through gradual implementation with a one-year age increase of the Family Court's jurisdiction, until it reaches eighteen.¹⁴⁸ In fact, Connecticut and North Carolina have both predicted that prosecuting juveniles in Family Court will save money, as these adjudications cost less than an adult criminal prosecution.¹⁴⁹ Additionally, if funding remains a challenge, funds saved from the adult criminal court system no longer prosecuting these juvenile offenders could be reallocated to the Family Court to offset any upfront costs of the change and the increasing operating cost of these juvenile adjudications. This would alleviate some of the financial stress on the juvenile system and afford juvenile offenders adequate protection under the law.

C. John and Derek's Outcome Under the New Proposal

Applying this proposal to the hypothetical of John and Derek from the introduction yields a very different result. Recall, John and Derek were involved in a physical altercation after a soccer game. Under New York's juvenile transfer law John (sixteen years old) was prosecuted as an adult, which led to serious consequences such as one-year probation and a criminal record, while Derek (thirteen years old) was prosecuted as a juvenile and received community service but no criminal record.

Under this proposal, where the age of criminal liability is increased from sixteen to eighteen, both John and Derek's cases would be adjudicated in Family Court. The boys would likely receive the same charges and punishment for engaging in the same behavior rather than the vastly different punishments imposed by the current law simply due to the boys' respective ages.

Though this hypothetical posed only a minor infraction, if it posed a more serious offense the new proposal would still yield a different result from the current law. Suppose during the altercation Derek fell and hit his head on a rock, resulting in death. While this would increase the severity of the crime, this proposal would still permit the case to be adjudicated in

¹⁴⁸ See Birckhead, *supra* note 97, at 103.

¹⁴⁹ *Id.* at 118.

Family Court, unless the District Attorney successfully petitioned to have the case removed. If the case remained in Family Court, the court would be able to impose an appropriate sentence due to the elimination of the five-year sentence maximum. Additionally, if the sentence required, John could remain under the Family Court's jurisdiction until age twenty-five as opposed to the current age of twenty-one. John's treatment in the juvenile system would provide him a real chance at rehabilitation rather than subjecting him to the harsh realities of being prosecuted as an adult in criminal court.

CONCLUSION

The legislature created and developed the juvenile justice system over the past century to ensure courts adequately addressed the marked differences between juveniles and adults. Moving forward, science and psychology provided proof that this instinct was correct and that the law truly should adhere to the notion that juveniles are different. New York remains the last state to prosecute all juveniles as adults at age sixteen and it is time for the legislature to catch up to the national trend of treating juveniles as juveniles. New York must amend its juvenile transfer laws by increasing the jurisdictional age limit from sixteen to eighteen, prosecuting all offenders under the age of eighteen in the Family Courts, removing only extreme cases upon petition by the District Attorney and approval of the Family Court, increasing the sentencing power of the Family Court to accommodate more violent cases and extending its jurisdiction to age twenty-five. By making these recommended changes New York can return from the bitter to the sweet side of sixteen.

