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Recommended Citation

Merril Sobie, The Juvenile Offender Act: Effectiveness and Impact on the New York Juvenile Justice System, 26 N.Y.L. Sch. L. Rev. 677 (1981), <http://digitalcommons.pace.edu/lawfaculty/366/>.

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THE JUVENILE OFFENDER ACT: EFFECTIVENESS AND IMPACT ON THE NEW YORK JUVENILE JUSTICE SYSTEM

MERRIL SOBIE*

INTRODUCTION

The Juvenile Offender Act of 1978 incorporates the most radical and perhaps the most controversial amendments to New York's juvenile delinquency statutes in several decades. For the first time since 1909, children accused of committing serious offenses are subject to prosecution in the criminal courts. The gradual decriminalization of delinquency, which began a century and a half ago, has been reversed.

This report analyzes and evaluates the Act and its implementation. The first two sections summarize the historical development of juvenile delinquency legislation and compare present New York provisions to those in other states. Sections III and IV will evaluate the Act's implementation throughout the criminal and juvenile systems. Recommendations to amend the Act in the last section are largely predicated on the experience to date in applying the statute to youths accused of committing juvenile offenses.

I. THE HISTORICAL PERSPECTIVE

The juvenile justice movement dates from the early nineteenth-century development of the prison system as a substitute for physical punishment.¹ Under common law, a child below the age of seven could not be criminally prosecuted, while a youth between the ages of seven and fourteen was presumed to lack criminal capacity,² a presumption only infrequently rebutted. Children above the age of fourteen bore full criminal responsibility,³ although punishment could always be mitigated. Prior to the nineteenth century, criminal punishment was swift and physical in nature, and imprisonment was unknown.⁴

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** Professor Sobie gratefully acknowledges the aid of Lee Elliott in the drafting of this article, as well as the financial aid supplied by the Foundation for Child Development.

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

2. Prevezer, *A Historical Summary of the English Juvenile Court System and an Assessment of Its Features in the Light of American Practice*, 4 WAYNE L. REV. 1, 3 (1957).

3. *Id.*

4. *Id.* at 4.

In the absence of incarceration, the "mixing" of juvenile offenders with adults in common facilities was impossible. Equally, the absence of physical custody precluded the implementation of rehabilitative programs tailored to the young transgressor, the hallmark of the twentieth-century juvenile justice system.⁵

In the early nineteenth century, reforms led to the establishment of the prison system, resulting for the first time, in the incarceration of youths with more hardened adult criminals.⁶ Joint imprisonment created the possibility of separate ameliorative programs. As early as 1819, when sentencing procedures were still in their infancy, an official New York City commission advocated the establishment of separate juvenile facilities while describing the New York penitentiary in vivid terms:

Until recently, boys from 10 to 18 years of age were placed in a large apartment with hoary-headed felons, who had grown grey in vice and deprivation, there to listen to their sarcasms on morality, their jests upon religion, or to oaths, imprecations and blasphemies. At present, the young and adult felons and convicts are in some degree separated, and partial instructions afforded to the former. We are sorry to be informed, by the mayor, that since he has administered our criminal jurisprudence, the unpleasant task has descended on him of sentencing boys from 12 to 15 and 17 years of age several times to the penitentiary . . . [I]f anything can destroy the ingenuousness and rectitude of youth and open a road to ruin, it is the polluting society of those veterans in guilt and wickedness who hold their rein in our prisons of punishment.⁷

Responding in 1824, the legislature enacted the first New York juvenile delinquency statute.⁸ The Act established the "society for the reformation of juvenile delinquents in the city of New York," (Society) an organization devoted to the rehabilitation of delinquents. Criminal courts were allowed to place children below the age of sixteen with the Society in lieu of imprisonment.⁹

5. *Id.* at 6-8.

6. In 1796 the New York Legislature authorized the construction of the state's first prison, a facility which initially housed both adults and children. 1796 N.Y. Laws, ch. 30.

7. THE SECOND ANNUAL REPORT OF THE MANAGERS OF THE SOCIETY FOR THE PREVENTION OF PAUPERISM IN THE CITY OF NEW YORK (1819), *quoted in* P. TAPPAN, JUVENILE DELINQUENCY 391 (1949) [hereinafter cited as TAPPAN].

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

9. 1824 N.Y. Laws, ch. 126. The widely held view that the juvenile justice system commenced in 1902 with the establishment of the Manhattan "children's court" or the 1899

The Society's purpose was rehabilitative. Its statutory grant of custody continued only until boys reached the age of twenty-one and girls reached the age of eighteen. As a result, most juveniles were placed in short-term rehabilitative programs under Society auspices.¹⁰ The long-term incarceration of children became the exception, although still possible under the 1824 Act.

Thus, since 1824, New York has differentiated between the youthful offender and the adult. A majority of children, including those who committed the most violent acts, were henceforth placed in Society facilities.¹¹ The age limit of sixteen was to continue for over one hundred and fifty years, until blurred by the passage of the 1978 Juvenile Offender Act.

The policy of differentiating between the child and the adult criminal was given statewide application in 1840 with the passage of the following statute:

Whenever any person under the age of sixteen years, shall be convicted of any felony or other crime, the court, instead of sentencing such person to imprisonment in a state prison, or county jail may order that he be removed to and confined in the house of refuge, established by the society for the reformation of juvenile delinquents.¹²

The ability of the courts to place children in special facilities was further assisted by the establishment of a juvenile asylum (later known as Children's Village) at Dobbs Ferry in 1851. This facility was specifically geared to the very young and less serious offenders.¹³ The "Western House of Refuge" was established in Rochester to house delinquents from upstate areas.¹⁴

organization of the Cook County Juvenile Court in Chicago is based on the misconception that prior to the establishment of separate juvenile courts, children were held to be criminally responsible and subject to full adult sentencing. See Woods, *New York's Juvenile Offender Law: An Overview and Analysis*, 9 FORDHAM URB. L. J. 1, 4-5 (1980). See also 12 ZERT, EDMONDS, BUTTREY & KAUFMAN, N.Y. CIV. PRAC. § 103 (1981); *In re Gault*, 387 U.S. 1 (1967) "From the juvenile court statute adopted in Illinois in 1899, the system has spread to every State in the Union, the District of Columbia, and Puerto Rico." *Id.*

10. See R. PICKETT, *HOUSE OF REFUGE; ORIGINS OF JUVENILE REFORM 1815-1857*, at 67-85 (1969).

11. TAPPAN, *supra* note 2, at 175. The establishment of the "House of Refuge" has been characterized as "the first great event in child welfare." I. SCHNEIDER, *THE HISTORY OF PUBLIC WELFARE IN NEW YORK, 1609-1860*, at 317 (1938).

12. 1840 N.Y. Laws, ch. 100.

13. TAPPAN, *supra* note 2, at 175. The segregation of the child offender does not mean, however, that he was treated benevolently, at least according to twentieth-century standards. The early houses of refuge or asylums treated children harshly and provided rigorous discipline. See Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1193-95 (1970).

14. 1848 N.Y. Laws, ch. 143. Pursuant to this legislation the courts were apparently required to sentence all delinquents to the house of refuge. *Id.*

In 1875 the legislature also required that a child below the age of sixteen be detained in a facility separate from adult jails, provided such a facility was locally available.¹⁵ The 1875 Act, therefore, represented the first mandatory separation of the juvenile from the adult criminal. Ironically, the pretrial separation of children was to a large extent honored in the breach until recent years.

By the late nineteenth century, a complicated juvenile justice system had evolved as a separate branch of the criminal court system. The possibility of a full criminal sentence remained, but several other available options were widely used. First, a child under the age of fourteen, charged with a felony other than a capital crime, could "in the discretion of the court, be tried as for a misdemeanor, and the court . . . [could] impose the penalty as prescribed by a law in the case of misdemeanors."¹⁶ Second, any child between the ages of twelve and sixteen, who committed a crime, including a capital offense, could be placed with a house of refuge, the state industrial school, or other delinquent program such as Children's Village.¹⁷ On the other hand, a child less than twelve could not be committed to a house of refuge or industrial school,¹⁸ but only to an asylum (*e.g.*, Children's Village) or private program suitable for younger delinquents.¹⁹ In short, children under the age of sixteen were placed in accordance with a sophisticated statutory pattern that was vastly different from the adult sentencing authority.

At the turn of the century, the concept of a separate juvenile court also began to emerge. By then, the routine placement of children in rehabilitative programs and the practice of charging many juvenile offenders with misdemeanors regardless of the actual crime committed inevitably raised questions concerning the continued practice of hearing delinquency cases in courts devoted to adult felony matters.

In 1902, the Manhattan "Children's Court" was established through the amendment of the New York City Charter.²⁰ Al-

15. 1875 N.Y. Laws, ch. 464, § 2.

16. 1896 N.Y. Laws, ch. 553, § 699.

17. *Id.* ch. 546, § 124. *See also id.* ch. 554, § 701.

18. *Id.* ch. 546 § 124.

19. 1897 N.Y. Laws, ch. 428 § 4. There was also a provision that "[n]o child under restraint or conviction, apparently under the age of fourteen years, shall be placed in any prison or place of confinement . . . except in the presence of a proper official," but its application is unclear. *Id.* However, a child who had been placed with a house of refuge or an industrial school could be transferred to the Elmira Reformatory, a prison which housed the older adolescent offenders, after a court hearing, for defying the lawful authority of the institution or who through "gross or habitual misconduct exert[s] [*sic*] a dangerous and pernicious influence over the other delinquents." 1896 N.Y. Laws, ch. 546, § 128.

20. GREATER NEW YORK CITY CHARTER ch. XIX A, tit. I, § 1339 (Thomson 1901).

though designated a "Children's Court," the phrase was misleading. Jurisdiction continued to be vested in the magistrate's court, which was a criminal tribunal. Delinquency cases were merely transferred to a separate part of the court "held by the several magistrates in rotation."²¹ The amendment applied to children "under sixteen years of age"²² and substantive provisions dating from 1824 were applied. In short, the "Children's Court" continued the practices that had developed over the past seventy-five years. The only "reform" was the physical segregation of certain delinquency cases (and other matters involving children) within the adult criminal system. By 1910, all of New York City and several upstate urban centers, including Buffalo, had organized children's court parts.²³

At the end of that decade, the legislature also enacted a series of comprehensive measures governing delinquency. These statutes were of far greater significance than the earlier establishment of the children's court parts. Many of the concepts and procedures that are taken for granted today date back to 1909. For example, the Act stipulated that a "child of more than seven and less than sixteen years of age, who shall commit any act or omission which, if committed by an adult, would be a crime not punishable by death or life imprisonment, shall not be deemed guilty of any crime, but of juvenile delinquency only."²⁴

The 1909 reform act also continued an earlier penal law provision, apparently dating back to the first years of the twentieth century. It stated that "the commission by a child under the age of sixteen years, of a crime, not capital or punishable by life imprisonment, which if committed by an adult would be a felony, renders such child guilty of a misdemeanor only."²⁵ In lieu of imprisonment, the child could be placed with a person or a suitable institution "until majority or for a shorter term."²⁶ However, if commitment was to a state reformatory "the court imposing such sentence shall not fix or limit the duration thereof," apparently creating the first provision permitting placement for an indeterminate period.²⁷

In short, the 1909 reforms fully decriminalized delinquency by converting the former discretionary power of the court into a re-

21. *Id.*

22. *Id.*

23. See 1909 N.Y. Laws, chs. 570, 659.

24. *Id.* ch. 570, § 92. The 1909 Act directed the court to "consider the child not as upon trial for commission of a crime, but as a child in need of care and protection of the state." *Id.* See also *id.* ch. 88, § 2186, as amended by *id.* ch. 478.

25. *Id.* ch. 478, § 2186.

26. N.Y. PENAL LAW § 2194 (McKinney 1909) (amended 1949, 1950, 1956, 1962).

27. *Id.* § 2195.

quirement of individualized and separate treatment based upon the needs of the child. Criminal punishment was precluded. The age limit remained constant at sixteen and, as a practical matter, only the crimes of first- and second-degree murder were excepted.²⁸

The reform act, however, did not alter procedure or significantly affect jurisdiction, though New York City delinquency jurisdiction was transferred from the magistrate's to the Court of Special Sessions, which customarily heard adult misdemeanor cases.²⁹ Outside of New York City, except for those few counties that had organized children's parts,³⁰ the adult criminal courts were charged with the responsibility of applying the new law.

The continuation of adult jurisdiction coupled with the specialized treatment of children was apparently not successful, for in 1922 and 1924 the legislature finally established independent children's courts.³¹ The new courts' organization was remarkably similar to the present family court, although the substantive procedures adopted in 1909 remained unchanged.³² Therefore, until the early 1920's, New York did not have a juvenile court, despite the earlier misleading description of criminal court parts as "children's court." As noted earlier however, the absence of separate courts did not mean that children were treated as criminals. Criminal punishment had been only one option since 1824, and the practice was prohibited by 1909. The special juvenile procedures that had evolved since 1824, however, had been applied by the adult criminal courts. In a sense, the juvenile court was a product of the long

28. *Id.* § 1045. Death was a penalty for first-degree murder or treason against New York State, *id.* § 2382, a crime that could hardly be committed by a child under the age of 16. Life imprisonment could be imposed only for second-degree murder or for a fourth felony conviction. The latter was impossible since a child could not legally commit a felony other than murder. 1909 N.Y. Laws, ch. 478, § 2186. 1909 N.Y. Laws, ch. 478, § 2186.

29. 1909 N.Y. Laws, ch. 470, § 102. There were nevertheless attempts to segregate the children's part; for example, one section provided that "[s]o far as is consistent with proper administration, certain of the probation officers shall be permanently assigned by a majority of the judges to the children's court." *Id.*

30. *Id.* ch. 487.

31. 1922 N.Y. Laws, ch. 547. The 1922 Act applied outside New York City, and the 1924 Act established a separate Children's Court in New York City. 1924 N.Y. Laws, ch. 254. There were, however, provisions for criminal judges to preside in Children's Court in those counties too small to warrant a separate court. 1922 N.Y. Laws, ch. 547, § 4.

32. 1924 N.Y. Laws, ch. 259. For reasons that are not apparent, the New York City Children's Court was short-lived, and in 1933 the New York City Domestic Relations Court was organized. 1933 N.Y. Laws, ch. 482. The Domestic Relations Court remained in existence until it was merged with the present family court. 1962 N.Y. Laws, ch. 689, §§ 41-43. The children's courts throughout the rest of the state, however, continued until the establishment of the family courts. See Besharov, *Practice Commentaries*, in N.Y. FAM. CT. Acr § 112 (McKinney 1975).

history of the separate and relatively lenient treatment of children. Given the fact that children were already treated separately, a logical progression was the establishment of independent children's courts.³³

The substance of the delinquency laws remained virtually unchanged through the decades. From 1824 until the early part of the twentieth century, a child under sixteen could be sentenced criminally or could be placed as a delinquent in lieu of criminal sentencing. Although the criminal option was repealed (except for murder), the delinquency disposition alternative remained relatively constant. Thus, a child could be placed as a delinquent until the age of twenty-one. Although the present eighteen-month placement limit was not prescribed, there were provisions for early release and rehearing.

Since the children's part remained an integral part of the criminal court system, the entire panoply of criminal procedure, including the possibility of jury trial and criminal standards of proof, were fully applicable to delinquency cases.³⁴ Indeed, for many years, the option of delinquency placement in lieu of criminal sentencing did not arise until a conviction had been obtained. Given the criminal milieu and the possibility of criminal sanctions, the application of due process standards was taken for granted. The Children's Court Act, for example, provided for the possibility of a jury trial.³⁵ As late as 1927, the New York Court of Appeals held that criminal procedure standards were required in delinquency actions.³⁶ In 1931, it was held that proof of delinquency must be established beyond a reasonable doubt.³⁷

New York State's strict adherence to criminal due process standards was relaxed during the 1930's, largely as a result of the social work juvenile court model, which had by then been adopted on a national basis. In 1932, a sharply divided New York Court of Appeals held that the constitutional protection against self-incrimination no longer applied to juvenile delinquency actions.³⁸ Citing

33. The progression for separate treatment to separate courts should be contrasted with the currently held perception that separate treatment resulted solely from the establishment of the juvenile courts. See S. DAVIS, RIGHTS OF JUVENILES: THE JUVENILE JUSTICE SYSTEM §§ 1.1-3 (2d ed. 1980) [hereinafter cited as DAVIS].

34. *People v. Fitzgerald*, 244 N.Y. 307, 155 N.E. 584 (1927).

35. "[T]he court may hear and determine such causes in which it has jurisdiction with or without a jury, in the discretion of the court." 1924 N.Y. Laws, ch. 436, § 14. Ironically, the United States Supreme Court, some 50 years later, concluded that a jury trial would, if "superimposed upon the juvenile system," obviate the need for its continued existence. *McKeiver v. Pennsylvania*, 403 U.S. 528, 551 (1971).

36. See *People v. Fitzgerald*, 244 N.Y. 307, 155 N.E. 584 (1927).

37. *In re Madik*, 233 A.D. 12, 251 N.Y.S. 765 (1st Dep't 1931).

38. *People v. Lewis*, 260 N.Y. 171, 183 N.E. 353 (1932).

the distinctions between criminal and delinquency proceedings, the court in *People v. Lewis*, held that the less rigorous civil notice and evidentiary standards were sufficient, including the civil rule that the charges be proven only by a preponderance of the evidence. The court maintained:

The fundamental point is that the proceeding was not a criminal one. The state was not seeking to punish a malefactor. It was seeking to salvage a boy who was in danger of becoming one. . . . Since the proceeding was not a criminal one, there was neither right to nor necessity for the procedural safeguards prescribed by constitution and statute in criminal cases.³⁹

People v. Lewis marked the end of the era in which criminal procedural standards were applied to delinquency cases and the beginning of the more informal "parens patriae" system.⁴⁰

Substantive delinquency law remained largely unchanged from 1922, the year the Children's Court Act was enacted, until 1962, the year of the enactment of the present Family Court Act. The organization of the court remained constant, and the informal standards approved in *Lewis* were applied.

In 1956, the exception for crimes punishable by death or life imprisonment, however, was limited to children more than fifteen years of age.⁴¹ Raising the age of criminal responsibility for murder appears to have been a compromise developed as the result of considerable pressure to eliminate even the limited exception as inconsistent with the strong public policy favoring the separate and more benign treatment of children. In 1946, for example, a district attorney who had prosecuted a fourteen year old for murder commented:

[T]he job of getting the legislature to move in that direction [elimination of the capital offense exception] should

39. *Id.* at 177, 183 N.E. at 355. A strong dissent was written by Judge Crane, who had drafted the earlier *Fitzgerald* decision. *Id.* at 179, 183 N.E. at 356 (Crane, J., dissenting).

40. After an absence of only one generation, however, the 1962 Family Court Act reinstated several due process procedures. 1962 N.Y. Laws, ch. 686. *In re Gault*, 387 U.S. 1 (1967), and subsequent federal and state rulings later completed the circle by applying most of the criminal procedure standards to delinquency actions. In the interim, several new due process criminal standards, such as the exclusionary rule, had been added to criminal procedure. *See, e.g.*, *U.S. v. Wade*, 388 U.S. 218 (1967); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Massiah v. United States*, 377 U.S. 201 (1964); *Wong Sun v. United States*, 371 U.S. 471 (1963); *Mapp v. Ohio*, 367 U.S. 643 (1961). The juvenile got back a good deal more than he had surrendered earlier.

41. 1956 N.Y. Laws, ch. 919.

now be undertaken and assumed, in part at any rate, by those who have been horrified at the sight of the people of the state of New York proceeding against a 14 year old boy in a criminal court.⁴²

The move apparently reflected a growing consensus that the juvenile court system should be strengthened and expanded, as it had been in several other states with higher age limits and greater judicial discretionary authority to protect even the most violent youthful offender.⁴³

In view of this trend, a 1960 statute enacted by the New York State Legislature is surprising, in that it permitted the family court to commit to the Elmira Prison (designated as the correctional facility for adult offenders under the age of 21) fifteen-year-old offenders who were found to have committed first-degree assault, burglary, manslaughter, rape, robbery, sodomy, kidnapping or murder.⁴⁴ The statute can best be described as a close forerunner of the Juvenile Offender Act of 1978. With the significant exception that such cases remained in the juvenile courts, the list of crimes is virtually identical to the Juvenile Offender Law. In approving the legislation, Governor Rockefeller noted that the new statute "will result in separating hardened delinquents from the less serious juvenile offenders without removing the protections for youth afforded by a proceeding conducted in the children's court or domestic relations court."⁴⁵

The present Family Court Act was adopted in 1962. In considering the proposed Act, the legislature maintained exclusive original jurisdiction over crimes committed by youngsters under the age of sixteen, while rejecting proposals to expand delinquency jurisdiction to age eighteen.⁴⁶ The delinquency procedure and disposition provisions of the Children's Court Act remained largely unamended.

During the 1970's increasing juvenile crime and the public perception that the delinquency penalties were overly lenient resulted in increased pressure for tougher punishments. After several

42. N.Y. Times, May 8, 1946, at 29, col. 4, *quoted in* TAPPAN, *supra* note 2, at 174.

43. See notes 55, 70 *infra*.

44. 1960 N.Y. Laws, ch. 882.

45. *Id.* ch. 2051. The 1960 provision was recodified in 1962 and amended to include every Class A and Class B felony. N.Y. FAM. CT. ACT § 758 (McKinney 1975). The amended section remained in effect until it was replaced by the Juvenile Justice Reform Act of 1976, 1976 N.Y. Laws, ch. 878, § 2 (current version at N.Y. FAM. CT. ACT § 254 (McKinney Supp. 1976-1980)).

46. JOINT LEGISLATIVE COMMITTEE ON COURT REORGANIZATION, STATE OF NEW YORK, YOUNG OFFENDERS AND COURT REORGANIZATION 1-3 (1963).

unsuccessful attempts to enact more stringent provisions, the legislature successively adopted the 1976 Juvenile Justice Reform Act⁴⁷ and the 1978 Juvenile Offender Act.⁴⁸

The 1976 Act established a new category of delinquency, the "designated felony,"⁴⁹ which was limited to violent crimes, such as homicide and first-degree robbery. Children above the age of fourteen who were found to have committed designated felonies could be placed for periods of three to five years (as opposed to the "normal" eighteen-month placement) with a minimum period of up to eighteen months in secure confinement.⁵⁰ Prosecution was strengthened by granting the district attorney the optional power of presenting such cases before the family court.⁵¹ Perhaps most significantly, the court was directed to consider "the need for protection of the community," a provision that constitutes a sharp philosophical change from the concept of individual juvenile justice.⁵² The Reform Act remains in effect, and has been expanded to include every juvenile offense as well as nonjuvenile felonies involving repeat offenders.

Although in some ways similar to the 1978 Juvenile Offender Act, the 1976 measure retained and augmented the family court's historic authority in dealing with violent youth. The juvenile procedural safeguards of privacy, confidentiality, and individualized disposition remained. While the available sanctions were strengthened, they remained well below the punitive measures available to a criminal court. Viewed historically, the Act represented a return to the greater authority traditionally vested in the juvenile courts.

The 1976 Act was quickly followed by the 1978 Juvenile Offender Act. The 1978 Act lowered the age of criminal responsibility from sixteen to fourteen for a wide range of crimes, including first- and second-degree robbery and burglary, first-degree assault and first-degree rape, arson and kidnapping. The age of criminal responsibility for murder was reduced to thirteen.⁵³ Age reduction automatically precluded family court jurisdiction and thereby subjected youths to prosecution in the adult criminal courts. Therefore, the substantive body of adult criminal law is now, with several notable exceptions, applied to children below the age of sixteen.

47. 1976 N.Y. Laws, ch. 878.

48. 1978 N.Y. Laws, ch. 478.

49. 1976 N.Y. Laws, ch. 878, § 712(h).

50. N.Y. FAM. CT. ACT § 753-a (McKinney Supp. 1976-1980).

51. *Id.* § 254-a. The county attorney or corporation counsel and the county executive or mayor (of New York City) must agree to district attorney prosecution. *Id.*

52. *Id.* § 711.

53. 1978 N.Y. Laws, ch. 478, § 2.

For the first time since 1824, the discretionary power of the court to waive a criminal penalty regardless of the circumstances of the case has been abolished. A youth arrested for the alleged commission of a juvenile offense is subjected to adult procedures including bail, indictment, and public hearings.⁵⁴ There are, however, provisions for "removal" or transfer to the family court, and the penalties available upon conviction are less than those that may be imposed upon an adult.⁵⁵

The Juvenile Offender Act represents an important historical break in the juvenile court movement or, more broadly, the movement to treat children separately. As noted earlier, the juvenile justice system itself was not, as commonly assumed, born full-blown in the early years of the twentieth century. It was the result of an evolutionary development that began almost simultaneously with the establishment of the prison system. Thus, New York's one hundred and fifty year history of maintaining an age threshold of sixteen for criminal prosecution (except for murder cases) has been terminated by the Juvenile Offender Act.

By applying criminal sanctions, the Juvenile Offender Act adopts an approach which was explicitly rejected as recently as 1960, when the juvenile courts' dispositional powers were strengthened, and again rejected, at least implicitly, in 1976 when the Juvenile Justice Reform Act was enacted. The incarceration of youths in adult prisons (when the "placed" youth reaches the age of eighteen) for criminal activities committed under the age of sixteen, a measure which is permitted without hearing under the Juvenile Offender Act, was attacked successfully at the inception of the prison system in 1824 and gradually abolished by the end of that century. Finally, the assumption that the juvenile or family courts cannot cope with the violent youth, implicit in the Juvenile Offender Act, is historically unfounded. The juvenile courts and juvenile parts of the criminal courts have possessed ample authority to deal with the most violent juvenile offender for well over a century.

The lack of historical precedent does not in itself prove that the Juvenile Offender Act should be repealed or modified. It is, however, an indication of the need for analysis of the Act in light of the collective experience of the past one hundred and fifty years. In addition, the comparative experience of other states should be studied prior to examining New York's experience in implementing the Act's provisions.

54. See N.Y. PENAL LAW § 30.00 (McKinney Supp. 1980).

55. *Id.* § 60.10.

II. A COMPARATIVE ANALYSIS

The New York Juvenile Offender Act includes several provisions never enacted in any other state.⁵⁶ For example, no jurisdiction, other than New York, permits an adult criminal charge to be lodged against a person less than sixteen years of age without at least an initial determination by the juvenile court. For this age group, no other jurisdiction applies adult criminal procedures to the early critical stages of arrest, arraignment, criminal complaint, and bail procedures.⁵⁷ Only New York vests the prosecution with the sole authority, in most cases, of deciding whether a youth should be criminally prosecuted.⁵⁸

Just a handful of states have established an age limitation as low as sixteen for the juvenile court. Most states have provided strong prosecution services to the juvenile courts. Lastly, almost every state provides for the limited transfer of very serious cases involving older youths from the juvenile court to the adult system, a procedure that the New York Juvenile Offender Act reverses.

A. Age Jurisdiction

Approximately two-thirds of the states have established a maximum age limit of eighteen or higher for delinquency.⁵⁹ Approximately ten additional states have established an age limitation of seventeen.⁶⁰ Only Connecticut, North Carolina, Vermont and New York have maintained a jurisdictional age limit of sixteen.⁶¹ New York is, therefore, one of a small number of states that rou-

56. The District of Columbia is perhaps the closest analogy. However, the D.C. equivalent of the Juvenile Offender Act is applicable only to children above the age of 16 (and less than 18) and does not incorporate removal provisions. D.C. CODE ANN. § 2301(3) (1973 & Supp. IV 1977); *United States v. Bland*, 472 F.2d 1329 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 909 (1973). A few states permit the direct filing of adult criminal charges for extremely serious crimes committed by youngsters over the age of 16. *See, e.g.*, MD. CTS. & JUD. PROC. CODE ANN. § 3-804(d)(4) (1980), which grants the criminal courts original jurisdiction when a child over the age of 16 is accused of committing the crime of robbery with a deadly weapon.

57. Transfer powers, which most states apply, are invoked at later stages and usually after juvenile court screening. *See* note 70 *infra*.

58. *See* text accompanying notes 64-77 *infra*.

59. *See* S. FOX, JUVENILE COURTS IN A NUTSHELL 32, Appendix B (2d ed. 1977). A clear majority of states have opted for an 18 year limit, while a few have established jurisdictional limits of 19. Hence, the juvenile courts possess original delinquency jurisdiction for crimes committed by persons under 18 years of age, subject, in most states, to limited powers of transfer to the adult criminal system. *Id.*

60. *See* DAVIS, *supra* note 33, Appendix B.

61. *E.g.*, CONN. GEN. STAT. § 51-301 (Supp. 1980) (originally codified as CONN. GEN. STAT. § 17-53).

tinely subject sixteen- and seventeen-year-old persons to adult criminal prosecution.

It should be noted that arrest rates rise exponentially with age. The number of arrests involving sixteen and seventeen year old persons is substantially greater than arrests involving younger adolescents. If New York were to adopt the national standard of eighteen, the number of youths treated as delinquent (and spared criminal prosecution) would increase greatly. For example, 9,256 delinquency cases were filed in New York City in 1974, while in the same year, Los Angeles, which is less than one-half the size of New York but applies an age limitation of eighteen years, reported 19,059 delinquency cases (for all crimes except traffic offenses).⁶² Philadelphia, a city only a fraction of New York's size, reported 10,664 cases.⁶³ As a consequence of New York's jurisdictional age restriction, this state has historically criminally prosecuted far more children, *i.e.*, persons under the age of eighteen, than any other state. Needless to say, the heavy emphasis on adult criminal prosecution of adolescents pre-dated enactment of the Juvenile Offender Act.

As noted earlier, New York adopted the present age limitation in 1824, at the inception of the movement to treat juvenile offenders separately. The standard has remained constant through several major delinquency law revisions spanning a century and a half. This severe age restriction should nevertheless be considered in evaluating the Juvenile Offender Act. The safeguards that have traditionally and routinely been available to even older youngsters by almost every state except New York, together with transfer provisions designed to protect the community interest, may well represent a viable alternative to the present Act.

B. Prosecution

Historically, juvenile cases have been prosecuted by civil authorities, frequently by a probation department or county attorney.⁶⁴ In the past decade, however, civil officials have largely been supplanted by state criminal prosecutors such as district attorneys.⁶⁵ In effect, there has been a merger of juvenile and adult prosecutors

62. LAW ENFORCEMENT ASSISTANCE ADMINISTRATION NATIONAL CRIME JUSTICE INFORMATION AND STATISTICS SERVICE, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL STATISTICS 574-79 (1976).

63. *Id.* at 579. Pennsylvania also applies a delinquency age limit of 18. 42 PA. CONS. STAT. ANN. § 6302 (Purdon 1981 Pamphlet).

64. Until recently New York was notable for the complete absence of prosecutorial authority. Frequently, the unfortunate result was that the judge turned prosecutor.

65. See RUBIN, JUVENILE JUSTICE; POLICY PRACTICE AND LAW 170-90 (1979).

with criminal officials assuming the responsibility of initiating and conducting juvenile proceedings. Every other major state has granted the criminal prosecutor exclusive powers in the juvenile court.⁶⁶ The era of civil prosecution has ended, replaced by the presumably more effective approach of district or state attorney prosecution.⁶⁷

The constitutional mandate to appoint defense counsel and the increasing legal formalism associated with juvenile delinquency cases have undoubtedly contributed to the prosecutorial trend. The public prosecutor may also be viewed as more effective (if not ruthless) in protecting the public interest. In addition, the very concept of prosecution is alien to and may conflict with the major responsibilities of probation or civil legal authorities.

The factors which have resulted in stronger prosecution have nevertheless not affected juvenile court jurisdiction nationally. The jurisdictional age, transfer provisions,⁶⁸ and dispositional alternatives have been largely unchanged. Juvenile courts have not been restructured. In a sense, the national reaction has been to strengthen juvenile prosecution while retaining the protection and individualized dispositional treatment afforded by the juvenile court.

New York, by way of contrast, has through the Juvenile Offender Act decreased the jurisdiction of the family court, a court that already possessed less jurisdiction than its counterparts in most other states, while not materially strengthening juvenile prosecution. To be sure, in 1976, district attorneys were granted conditional authority to prosecute designated felony cases, a provision that encompasses only the most serious crimes.⁶⁹ However, even in those counties in which the district attorney has elected to prosecute such cases, the primary prosecutor remains civil in the form of the corporation counsel or county attorney.

C. Transfer Provisions

Almost every state grants the juvenile courts exclusive original jurisdiction for cases involving children less than sixteen years of

66. See, e.g., ILL. ANN. STAT. ch. 37, § 701-21 (Smith Hurd 1974); PA. STAT. ANN. tit. 42, § 6336 (Purdon 1979).

67. The only exception other than New York is the District of Columbia, which still relies on corporation counsel prosecution. D.C. CODE ANN. § 2305(a) (1973).

68. A few states have, however, facilitated the transfer of violent cases to the adult criminal courts. See, e.g., MINN. STAT. § 260.15 (1980).

69. N.Y. FAM. CT. ACT § 254-a (McKinney Supp. 1976-1980). District Attorney prosecution is possible only through voluntary agreement between the district attorney and the mayor.

age, but provides for the possible transfer of serious cases to the adult criminal system.⁷⁰ Every case in which a youth is charged with a crime must originate in the juvenile court. After a formal court hearing and subject to defined transfer criteria, the case may be forwarded to an adult criminal court.⁷¹

The specific standards determining transfer vary, although usually several preconditions must be proven. First, the child must be of a minimum "transfer" age, commonly fourteen or fifteen.⁷² Second, the crime alleged must be a felony or, in some states, a violent felony offense.⁷³ Finally, the juvenile court judge must determine, after an evidentiary hearing, that adult criminal sanctions are appropriate.⁷⁴ In most states, it is incumbent upon the prosecutor to request a transfer. Occasionally, the child may have a right to demand that he be heard in a criminal court, thereby obtaining a jury trial and other procedural benefits.

A few states have also enacted mandatory transfer provisions. For example, in Pennsylvania a murder charge must be transferred from the juvenile courts (assuming the child is of the requisite minimum age).⁷⁵ Connecticut mandates transfer when a child of the requisite age is accused of committing a class A or a class B felony and there has been a previous adjudication for a similar crime.⁷⁶ Florida has enacted an unusual provision that requires the prosecutor to request transfer when the child is accused of committing a second "violent" crime against a person.⁷⁷ However, the juvenile court may deny his request.

Although the procedures and standards vary among jurisdictions, the underlying principle encompasses the transfer of very serious cases involving older youths to the adult system.⁷⁸ Significantly, the initial determination is made by the juvenile court

70. Transfer powers generally extend only to the older adolescent, typically 15- and 16-year-old youths. *See, e.g.*, N.J. STAT. ANN. 2A:4-48(a) (West 1978); OHIO REV. CODE ANN. § 2151-36(1) (Page 1978).

71. *See, e.g.*, N.J. STAT. ANN. 2A:4-48 (West 1978); OHIO REV. CODE ANN. § 2151-36 (Page 1978).

72. *E.g.*, N.J. STAT. ANN. 2A:4-48 (West 1978); OHIO REV. CODE ANN. § 2151-26 (Anderson Supp. 1980).

73. *See, e.g.*, N.J. STAT. ANN. 2A:4-48(b) (West 1978); OHIO REV. CODE ANN. § 2151-36(A) (Page 1978).

74. *E.g.*, *Delinquent & Dependent Children*, 27 CAL. JUR. 3d, §§ 67-71 (1976); TEX. FAM. CODE ANN. tit. 3, § 54.02 (Vernon Supp. 1980-1981).

75. PA. STAT. ANN. tit. 42, § 6355 (Purdon 1979).

76. CONN. GEN. STAT. ANN. § 46b-126 (Supp. 1980).

77. FLA. STAT. § 39.09 (1979).

78. It should be noted that, unlike youths governed by the Juvenile Offender Act provisions in most states, a youth transferred to a criminal court faces the possibility of a full adult criminal sanction. *See, e.g.*, N.C. GEN. STAT. § 7A-611 (1979).

judge. The child thereby receives the protection and confidentiality of the juvenile system until the need for adult prosecution is proven. Arrest, detention and preliminary procedures are also consistent with those applied to all juveniles. Even in jurisdictions that provide for limited mandatory transfers, the commencement of the action must be in the juvenile court, thus granting the court and prosecutor the opportunity to determine whether transfer is warranted.⁷⁹ If the case involves overcharging or lacks probable cause, the child remains in the juvenile court, thus precluding possible damage resulting from an adult criminal charge.

New York's provision requiring the initial filing in the adult criminal court followed by possible "removal" or transfer of a case to the family court reverses the practice found in every other state. The Juvenile Offender Act thereby fails to protect those children who are erroneously charged or who will, in any event, be transferred to the family court. Initiating criminal prosecutions, only to have most cases "removed" to the family court is, in many ways, tantamount to closing the barn door after the horse has escaped. Protection and confidential treatment are most needed at the commencement of the action when decisions should be made without public pressure and the rigors of automatic criminal prosecution.⁸⁰

The unique New York delinquency provisions, when combined, have cumulative adverse effects. The severe age restriction, alone, automatically places a greater number of cases in the adult system. The Juvenile Offender Act further increases the volume of adult prosecutions by severely limiting family court jurisdiction. The need for stronger prosecution in the family court has also inhibited the development of an acceptable alternative to criminal prosecution. Lastly, vesting the adult courts with transfer powers, instead of commencing all cases in the juvenile system, has adversely affected the large majority of youths whose cases are ultimately (as in every state) decided by the family court.

It should again be emphasized that, even prior to the enactment of the Juvenile Offender Act, New York possessed perhaps the harshest juvenile laws in the country. As noted by one commentator:

Indeed, looking only at Juvenile Court can provide a misleading picture of what happens to juvenile offenders. For

79. See, e.g., CAL. WELF. & INST. CODE § 707 (West 1981). In Pennsylvania, a murder case which is erroneously commenced in the adult criminal court need not be transferred back to the juvenile court. PA. STAT. ANN. tit. 42, § 6355 (Purdon 1978).

80. Approximately nine out of every ten cases filed under the Juvenile Offender Act are in fact removed to the family court or dismissed. See text accompanying notes 96-99 *infra*.

all its apparent leniency, New York has the toughest juvenile sentencing policy of any state in the union: it incarcerates comparatively few youngsters in juvenile facilities, but it jails large numbers of 16- and 17-year olds. Relative to its total juvenile population, the state's combined jail and detention rate in 1971 was half again as high as California's and four to one and one half times the rate in Illinois, Ohio, and Pennsylvania. Some of the differences undoubtedly reflected the higher rate of robbery by younger offenders in New York than elsewhere; most of it is testimony to the freer use of punishment by the adult system.⁸¹

III. JUVENILE OFFENDER ACT IMPLEMENTATION

This section evaluates the implementation and experience of the Juvenile Offender Act from the effective date, September 1, 1978, through late 1979; including a brief up-date covering the period through February 1980. The analysis will, with minor exceptions, be based on official published reports. It is not my intention to incorporate every published statistic, but rather to present relevant statistical information in a meaningful sequence and to evaluate the Act's effectiveness and impact. Conclusions and recommendations are incorporated in subsequent sections.

The two major available statistical sources are the New York State Division of Criminal Justice Services (DCJS) and the New York City Criminal Justice Agency. A major report published by the Division of Criminal Justice⁸² incorporates statistical information reflecting the Act's implementation during the first year after enactment.⁸³ A second major report incorporating information for a nine-month period (September 1978 through May 1979) has been issued jointly by the New York City Criminal Justice Agency and the Division.⁸⁴ Since only twenty-four juvenile offenders were sentenced in the Supreme Court during the first year and hence included in the Division Report,⁸⁵ this writer has also obtained unoffi-

81. C. SILBERMAN, *CRIMINAL VIOLENCE*, CRIMINAL JUSTICE 354 (1978).

82. N.Y.S. DIVISION OF CRIMINAL JUSTICE SERVICES, *SEMI-ANNUAL VIOLENT FELONY/JUVENILE OFFENSES PROCESSING AND DISPOSITION REPORT*, SEPT. 1, 1978-AUG. 31, 1979 (dated Oct. 1, 1979, released Dec. 1979) [hereinafter cited as DCJS REPORT].

83. The Division report is largely limited to New York City, though it incorporates sketchy information from counties outside of New York City. *Id.* at i-ii.

84. NEW YORK CITY CRIMINAL JUSTICE AGENCY & N.Y.S. DIVISION OF CRIMINAL JUSTICE SERVICES, *JUVENILE OFFENDERS IN NEW YORK CITY: THEIR CHARACTERISTICS AND THE COURSE OF CASE PROCESSING* (Nov. 1979) [hereinafter cited as CJA REPORT]. This report utilizes statistics collected from September 1, 1978 to May 31, 1979. *Id.* at 1.

85. See DCJS REPORT, *supra* note 82, Appendix, Table 72.

cial sentencing information from New York, Bronx and Kings counties covering the period from September through December, 1979, bringing the total to a more statistically meaningful level of seventy-nine.⁸⁶ Queens and Richmond statistics were not available.

A. Arrests

During the first year (September 1978 through August 1979), 1,689 juvenile offender arrests were reported statewide (Table A).⁸⁷ Of the total, 1,455 or eighty-six percent occurred in New

TABLE A
JUVENILE OFFENDERS
STATEWIDE ARRESTS BY CHARGE
SEPTEMBER 1, 1978—AUGUST 31, 1979

	SUBURBAN	UPSTATE	N.Y.C.	STATEWIDE
ROBBERY 1°	43 (36)	40 (35)	654 (45)	737 (44)
ROBBERY 2°	23 (19)	29 (25)	453 (31)	505 (30)
ASSAULT 1°	5 (4)	5 (4)	58 (4)	68 (4)
BURGLARY 1°	6 (5)	1 (1)	20 (1)	27 (2)
BURGLARY 2°	13 (11)	9 (8)	16 (1)	38 (2)
ARSON 1° & 2°	7 (6)	6 (5)	29 (2)	42 (2)
RAPE 1°	14 (12)	10 (9)	89 (6)	113 (7)
SODOMY 1°	2 (2)	7 (6)	34 (2)	43 (3)
KIDNAP 1°		1 (1)	3 (0)	4 (0)
ATT. MUR. 2°	2 (2)	1 (1)	43 (3)	46 (3)
MURDER 2°	3 (3)*	5 (4)	25 (2)	33 (2)
OTHER	2 (2)		4 (0)	6 (0)
UNKNOWN			27 (2)	27 (2)
	120 (100) (7)	114 (100) (7)	1455 (100) (86)	1689 (100) (100)

* Includes one manslaughter 1° arrest.

Note: Numbers in parentheses are percentages.

86. It should also be noted that, although most events, such as removal to the family court, have been subdivided by crime, some have not (*i.e.*, the number of cases that the grand jury refused to indict). Thus, when discussing specific crimes a particular variable may be approximated, based on the reported statistics covering all juvenile offenders (and will be denoted as such). For example, the grand jury failed to indict 12% of the defendants whose cases were presented. The writer has thus assumed that the grand jury failed to indict 12% of presented robbery cases, although the exact figure may be somewhat higher or lower for the specific crime of robbery.

87. See Table A.

York City, while only 234 or fourteen percent occurred throughout the rest of the state.

The relatively small number of arrests outside of New York City is surprising. Approximately forty percent of all juvenile arrests occur outside the city.⁸⁸ Although the percentage of juvenile offenses which by definition involve serious violent crimes, may well be higher in the state's large urban areas, the disparity (forty percent of the total delinquency caseload versus fourteen percent of juvenile offenses) appears to be grossly disproportionate. Absent statistical error, the available data nevertheless indicates that in upstate areas violent juvenile criminal activity is comparatively minimal and, conversely, nonviolent criminal conduct constitutes a substantially higher portion of the caseload.

Of the 1,689 recorded arrests, 1,242 or seventy-four percent were for the crimes of first- and second-degree robbery. Thus robbery accounted for fully three of each four juvenile offender crimes. The next most prevalent crime was rape, accounting for 113 or seven percent of the total. The remaining categories account for only minimal percentages of the caseload, ranging from four percent (assault) to two percent (murder). Therefore the Juvenile Offender Act has been applied predominately to the crime of robbery. Other juvenile offenses included under the Act accounted for only 447 statewide arrests.

The most surprising arrest statistic pertains to burglary.⁸⁹ Under the Act the crimes of first- and, partially, second-degree burglary constitute juvenile offenses.⁹⁰ Yet only sixty-five arrests, four percent of the total, involved the juvenile offense of burglary. In New York City only thirty-six youths (two percent of the city's juvenile offense arrests) were charged with the crime during the entire year.

Burglary, however, is an extremely prevalent offense. During the first nine months of 1979, a period corresponding to the implementation of the Juvenile Offender Act, 2,402 burglary arrests involving fourteen- and fifteen-year-old youths were reported in New York City.⁹¹ On an annual basis the number of burglary

88. See N.Y.S. DIVISION OF CRIMINAL JUSTICE SERVICES, COMPREHENSIVE CRIME CONTROL PLAN, Table VIII, at VII-21 (1979).

89. Burglary basically comprises the act of knowingly entering or remaining unlawfully in a building with the intent of committing a crime therein. See N.Y. PENAL LAW §§ 140.20, .25 (McKinney 1975).

90. The Juvenile Offender Act includes subdivision one of second-degree burglary, *id.* § 140.25, which consists of burglary involving the use or the threat of use of a dangerous instrument, the possession of arms, or burglary which results in any physical injury.

91. New York City Police Department unpublished data collected from January 1, 1979 to September 30, 1979.

arrests involving fourteen- and fifteen-year-old persons was approximately 3,200. Incredibly only thirty-six of 3,200 arrests (one percent) involved first- or second-degree burglary while over 3,100 arrests involved third-degree burglary (ninety-nine percent).⁹² First- and second-degree charges should constitute a far higher percentage.

The most plausible explanation is that the police have virtually ceased charging youths with first- or second-degree burglary, perhaps substituting third-degree burglary, attempted burglary or breaking and entering charges. The fact that burglary is the only nonviolent crime that the legislature included as a juvenile offense may explain this development.

The lack of burglary arrests is a strong indication that the Act is overbroad. As will be shown, the vast majority of the youths accused of committing the less serious juvenile offenses are transferred to the family court. The police may be shortcutting the system to avoid lengthy criminal procedures such as booking and arraignment or may view burglary as an insufficiently serious crime to justify the application of adult criminal procedures. Ironically, if not for the Juvenile Offender Act, a youth could have been charged with the designated felony of burglary and subjected to a restrictive placement. If instead, the youth is charged with a nondesignated felony crime, the charge could, at most, result in an indeterminate eighteen-month placement.

B. Prosecutorial Discretion

The Juvenile Offender Act places the district attorney in an important, indeed almost paramount, position in determining whether or not a child should be prosecuted and in which court (adult or juvenile) the case should be tried and sentenced. Under the terms of the Act, the prosecutor must decide initially whether the child should be released, prosecuted as an adult, or referred or removed to the family court for possible juvenile delinquency action. At later stages, the district attorney may preclude the removal of a case to the family court, even if the court would otherwise be willing to grant a transfer.⁹³

The question of prosecution versus release, the threshold issue facing a prosecutor, might appear to be similar whether the defendant is a child or an adult. However, when dealing with juvenile

92. Burglary also accounted for approximately 2,500 cases, or 18% of all petitions filed in the family court in 1977. OFFICE OF COURT ADMINISTRATION ANNUAL REPORT, Table 80 (1978).

93. See N.Y. CRIM. PROC. LAW § 220.10(5)(g) (McKinney Supp. 1972-1980).

offender cases, the issue is complicated by the possibility of family court action. If, for example, the district attorney concludes that there is insufficient evidence to justify a juvenile offender complaint, the matter may be referred to the corporation counsel to determine whether the evidence substantiates a lesser charge. Even if the evidence suggests that the arrest charge is questionable, the district attorney may prefer to file a juvenile offender complaint and subsequently move for removal to the family court. Unlike a declination to prosecute, a case removed to the family court remains under the control and responsibility of the district attorney, a factor that may weigh heavily in determining the initial charge.

The presence of dual court jurisdiction (criminal court and family court) compounded by dual prosecutorial responsibility (district attorney and corporation counsel) accordingly results in a multitude of possibilities. The district attorney elects the relevant option by deciding whether to charge a juvenile offense and, if so, whether to remove the case to the family court.

Consequently, it is difficult to evaluate the district attorney's position and to identify factors that may contribute to prosecutorial decisions. For example, one factor that may affect the decision of criminal versus family prosecution is the presence of multiple defendants of differing ages. If one defendant is fifteen years of age while a codefendant is sixteen, the district attorney may decide to keep the juvenile case in a criminal court, thereby avoiding the possibility of split prosecution and the certainty of two separate trials in different courts.

The presence of this factor is strongly suggested by the fact that in the Bronx, twenty-one of thirty-four juvenile defendants (sixty-two percent) who were sentenced by the supreme court (September 1978 through December 1979) had one or more adult codefendants. By way of contrast, only twenty percent of all family court juvenile delinquency robbery cases involve an adult codefendant.⁹⁴ There is no plausible reason, other than prosecutorial convenience, to account for the wide disparity. Moreover, the fact that supreme court sentences were comparable to those ordered by the family court⁹⁵ suggests that the administrative convenience of retaining criminal jurisdiction was the paramount factor, rather than the particular facts of each case. In other words, the decision to treat a

94. THE VERA INSTITUTE OF JUSTICE, FAMILY COURT DISPOSITION STUDY 67 (1980). The VERA study found that 20% of all family court robbery cases involved an adult co-defendant and in an additional 33% the presence or absence of an adult co-defendant was not known (the probable range is 25-35%). *Id.* at 354.

95. See text accompanying note 108 *infra*.

child as an adult for criminal purposes may be related to the presence or absence of codefendants rather than the statutorily enumerated criteria such as the seriousness of the offense, the history, character and condition of the youth or, in the case of an armed felony, mitigating circumstance.⁹⁶

The district attorney's discretion permeates subsequent juvenile offender procedures. The prosecutor presents the case before the grand jury, must agree to a possible plea which could result in removal to the family court, and recommends a possible sentence. Each of these events is described in subsequent subsections.

C. Declination of Prosecution

As noted previously, the initial decision, made solely by the district attorney, is whether to decline prosecution, and release the child or refer the case for possible family court action. In the first nine months (September 1978 through May 1979), the district attorneys throughout New York City declined to prosecute seventeen percent of all arrests (193 of 1,124).⁹⁷ However, the declination rate varied widely from county to county. In Staten Island the district attorney declined prosecution in only three percent of the cases, in Queens the rate was seven percent, in Manhattan the rate was twenty-eight percent, Brooklyn registered a twelve percent declination rate, and the Bronx District Attorney declined to prosecute twenty-five percent of all juvenile offender arrests.⁹⁸ Thus, a juvenile arrested in Manhattan is four times as likely to be released or referred to the family court as his counterpart arrested in Queens.

The citywide declination rate also varied substantially by crime. Generally, however, the more serious crimes registered the lowest rate. For example, only four percent of all murder arrests and nine percent of all rape arrests were not prosecuted criminally, while twenty percent of all second-degree robbery arrests were declined.⁹⁹

The district attorneys in most counties thus appear to be using their discretion to decline prosecution depending upon the gravity of the offense. However, the extremely low declination rates in Queens and Staten Island suggest that the district attorneys in those counties are unwilling to evaluate carefully which cases are inappropriate for adult criminal prosecution.

96. See N.Y. CRIM. PROC. LAW § 210.43 (McKinney Supp. 1972-1980).

97. See CJA REPORT, *supra* note 84, at 4.

98. *Id.*

99. *Id.* at 5.

D. Criminal Court Action

Unless declined by the district attorney, every juvenile offender case is filed (in New York City) in the criminal court where the youth is initially arraigned and bail or release status determined. The criminal court may also conduct a hearing to determine whether the case should be dismissed or removed to the family court. If not removed or dismissed, the case proceeds to the grand jury for possible indictment and trial in the supreme court.¹⁰⁰ Table B is a reprint of a report by the Division for Criminal Justice Services, but it incorporates an additional column, added by this author.

As can be seen in Table B, forty-four percent of all cases were removed to the family court at preliminary stages and an additional thirteen percent were dismissed. When declinations of prosecution are added, a total of seventy-seven percent of all cases (950 of 1,240) were removed from the criminal system in the very early stages. In other words, more than three out of four youths who are subjected to adult criminal prosecution never reach the indictment stage.

The removal rate varies considerably from county to county, ranging from twenty-one percent in Queens to forty-eight percent in Brooklyn. (The Staten Island rate, though higher, is derived from a very small statistical base.) In light of the statutory power of the district attorney, it is probable that the disparity in removal rates is caused largely by prosecutorial differences, although judicial philosophies may be a contributing factor.¹⁰¹ Since the ability of the court to remove without the district attorney's consent is very limited, and judges are reluctant to dispose of cases without prosecutorial approval, it appears that to a large extent, the fate of a youth is determined by the policies and attitudes of the local district attorney.

The geographical dichotomy is further compounded by determinations concerning parole or bail. Citywide, forty-five percent of all juvenile offenders were paroled, while bail was set in half the cases and five percent were detained without bail.¹⁰² However,

100. Outside New York City, the case would be filed in local criminal court and, if not dismissed or removed to the family court, would be transferred to the county court. See N.Y. FAM. Cr. Acr § 117 (McKinney Supp. 1976-1980).

101. District attorney policies are concentrated in one individual while the separate philosophies of the large number of judges in each county tend to statistically average out. More importantly, the district attorney must consent to the removal of an armed felony case, and a nonarmed offense cannot be removed after indictment without his approval. N.Y. CRIM. PROC. LAW § 180.75(6) (McKinney Supp. 1972-1980).

102. See CJA REPORT, *supra* note 84, at 11.

TABLE B
JUVENILE OFFENDERS
COURT ACTION BY COUNTY

CASES ORIGINATING SEPTEMBER 1, 1978—AUGUST 31, 1979

	KINGS	BRONX	NEW YORK	QUEENS	RICHMOND	CITYWIDE	PERCENTAGE OF CASES WHICH HAVE BEEN DETERMINED
Declined to Prosecute	78 (14)	71 (23)	64 (20)	37 (15)	1 (3)	251 (17)	(20)
Removed to Family Ct.	263 (48)	129 (43)	79 (25)	54 (21)	17 (52)	542 (37)	(44)
Dismissed	54 (10)	22 (7)	59 (19)	19 (7)	3 (9)	157 (11)	(13)
Subtotal	395 (72)	222 (73)	202 (64)	110 (43)	21 (64)	950 (65)	(77)
Pend. in Crim. Ct.	38 (7)	13 (4)	29 (9)	41 (16)	1 (3)	122 (8)	
Pend. in Grand Jury	12 (2)		8 (3)	8 (3)		28 (2)	
Indicted	96 (18)	67 (22)	53 (17)	63 (25)	11 (33)	290 (20)	(23)
Subtotal	146 (27)	80 (26)	90 (28)	112 (44)	12 (36)	440 (30)	
Unconfirmed arrest reports	6 (1)	1 (0)	25 (8)	32 (13)		64 (4)	
Total	547 (100)	303 (100)	317*(100)	254 (100)	33 (100)	1454 (100)	1240(100)

* One juvenile died before any court action was taken.
 Note: Numbers in parentheses are percentages.

the parole rate varied from thirty-five percent in Queens to fifty-six percent in Manhattan. When coupled with the differing rates of dismissal, only twenty-six percent of those arrested in Manhattan were not released (either through dismissal or parole), while fifty-eight percent were not released in Queens. The citywide average is forty-one percent.¹⁰³ Youths arrested in Queens are far more likely to remain in the adult system and are far more likely to be detained or face the difficult task of raising bail.

Finally, it should be noted that the number of cases removed to the family court also depends, to a large extent, on the particular crime charged. During the first nine months, fifty-nine percent of second-degree robbery cases and seventy percent of burglary cases were removed by the criminal court.¹⁰⁴ During the same period only nine percent of the murder cases were removed. The removal rates are thus consistent with the pattern of screening out most of the less serious offenses through either dismissal or removal to the family court. What remains are cases involving very serious crimes, cases in which a particular district attorney has established a stringent or "tough" policy, and at least to some extent, cases in which it is administratively advantageous for the prosecutor to proceed criminally.

E. Grand Jury Actions

Cases that are not dismissed or removed to the family court are transferred to the supreme court for presentation to the grand jury and possible indictment. The grand jury, after hearing evidence presented by the district attorney, may indict the youth, dismiss the case, or, by finding that a crime of lesser magnitude than a juvenile offense was committed, remove the case to the family court.¹⁰⁵

Experience from September 1, 1978 to May 31, 1979 indicates that seventy-nine percent of juvenile offender cases presented to the grand jury result in indictment, while twenty-one percent are dismissed or removed.¹⁰⁶ However, the probability of indictment varies considerably from county to county. In the Bronx, ninety-six percent of presented cases are indicted, while in Queens, only seventy-five percent of the cases are indicted. Perhaps more important, during the first nine months, grand juries in the Bronx and Manhattan failed to dismiss even a single case while in Queens the grand jury dismissed fourteen percent of all presented cases.¹⁰⁷

103. *Id.*

104. *Id.* at 19.

105. N.Y. CRIM. PROC. LAW § 190.71 (McKinney Supp. 1972-1980).

106. See CJA REPORT, *supra* note 84, at 26.

107. *Id.*

The pattern is one of an inverse correlation between the district attorney dismissal rate (through declination of prosecution) and grand jury dismissals. The Bronx maintained a high declination rate coupled with the lowest grand jury dismissal rate (zero). Queens, which registered a low district attorney dismissal rate experienced the highest grand jury dismissal rate.¹⁰⁸ In effect, Queens' grand juries dismissed those cases that the prosecutor could have dismissed at an earlier stage. The grand jury constituted a "leveling" step in juvenile offense proceedings, although in Queens a disproportionate number of youths charged with the commission of juvenile offenses are indicted despite the relatively large number of grand jury dismissals.¹⁰⁹

F. Supreme Court Proceedings

Approximately one in four juvenile offender cases reaches the supreme court, the adult criminal tribunal responsible for trying and sentencing juvenile offenders. The remainder of the cases have, by the trial stage, already been dismissed or removed to the family court. The supreme court may, nevertheless, dismiss cases or, with the consent of the district attorney, remove additional cases to the family court either before or after a conviction has been obtained.

Table C¹¹⁰ indicates that slightly over one-half of the cases, fifty-four percent, resulted in conviction through trial or plea. The remainder, approximately forty-six percent, were dismissed, acquitted or removed to the family court by the supreme court. Thus, approximately twelve percent (fifty-four percent of twenty-three percent) of all children charged with juvenile offenses are convicted of these offenses. Conversely, by the time the case reaches an adult conviction stage, eighty-eight percent have been screened out for proceedings amounting to less than a juvenile offense (dismissal, acquittal, or removal to the family court).

The "leveling" effect first evinced by the grand jury continued in the supreme court. For example, Table C indicates that the conviction rate was high in Bronx and New York counties, precisely

108. Compare Table B with CJA REPORT, *supra* note 84, at 26.

109. It should be noted that a total of 54 indictments were returned in counties outside of New York City during the first year, compared with 234 arrests. See DCJS REPORT, *supra* note 82, Table 75. The outcome of the remaining cases, including those which may still be pending, has not been reported.

110. See Table C. This is a reprint of the Division of Criminal Justice Services Supreme Court disposition table. Since over one-half of the cases are still pending, an additional column has been added to indicate the disposition percentage of those cases reaching a critical stage.

TABLE C
JUVENILE OFFENDERS
DISPOSITIONS OF INDICTED CASES

SEPTEMBER 1, 1978—AUGUST 31, 1979

	KINGS	BRONX	NEW YORK	QUEENS	RICHMOND	CITYWIDE	PERCENTAGE OF CASES WHICH HAVE BEEN DETERMINED
Guilty By Trial	2 (2)	1 (1)	3 (6)	2 (3)	2 (18)	10 (3)	(8)
Guilty By Admission	14 (15)	22 (33)	9 (17)	10 (16)	3 (27)	58 (20)	(46)
Total Convictions	16 (17)	23 (34)	12 (23)	12 (19)	5 (45)	68 (23)	(54)
Removed from Supreme Ct.	1 (1)	11 (16)	7 (13)	27 (43)		46 (16)	(36)
Acquitted				1 (2)		1 (0)	(1)
Dismissed	4 (4)	1 (1)		6 (10)	1 (9)	12 (4)	(9)
Pend. in Supreme Ct.	75 (78)	32 (48)	34 (64)	17 (27)	5 (45)	163 (56)	
Total Indictments	96 (100)	67 (100)	53 (100)	63 (100)	11 (100)	290 (100)	127 (100)

Note: Numbers in parentheses are percentages.

those counties that screen cases in their early stages. Queens and Brooklyn, which experienced a higher indictment rate, consequently registered a lower conviction rate.

G. Supreme Court Sentencing

As noted previously, only twelve percent of the youths arrested for the commission of a juvenile offense were convicted under the Act, during the first year, that is, twelve percent of all cases reached the sentencing stage. However, a case may also be removed to the family court after conviction. Under the terms of the Act the supreme court justice must remove the case if the conviction, through plea or trial, involves a nonjuvenile offender crime. Even if the conviction is for a juvenile offense, the court, with the consent of the district attorney, may remove the case if the judge deems it inappropriate to apply adult criminal sanctions.¹¹¹

Experience to date indicates that approximately two-thirds of the convicted youths are transferred to family court, forty-six of the sixty-eight cases involving adult convictions were removed during the first year.¹¹² When applied to the number of juvenile offense arrests, only approximately six percent of all juvenile arrests resulted in a sentence by the adult court (one-third of the twelve percent conviction rate), *i.e.*, six of one hundred children arrested under the Act were actually sentenced pursuant to the Act's terms.

The Juvenile Offender Act also grants the supreme court wide latitude in determining an appropriate sentence. If the case is not removed after conviction the court may grant youthful offender status.¹¹³ In the absence of a decision to remove or grant youthful offender status (or if the youth is ineligible for youthful offender treatment) the court determines the length of incarceration based upon the crime of conviction. For example, a youth convicted of a Class C felony may receive a minimum sentence of imprisonment ranging from one to three years. (Class C offenses include second-degree robbery, second-degree burglary, or first-degree assault.) A

111. See CRIM. PROC. LAW § 220.10(5)(g)(iii) (McKinney Supp. 1972-1980); *id.* § 330.25 (McKinney Supp. 1981). If a case is removed after conviction, the removal order is deemed the equivalent of a family court finding and the case is placed on the calendar for a dispositional hearing before a family court judge. Compare *id.* § 220.10 (McKinney Supp. 1972-1980) with *id.* § 330.25 (McKinney Supp. 1981).

112. See DCJS REPORT, *supra* note 82, Table 71.

113. N.Y. PENAL LAW § 60.10 (McKinney Supp. 1980). The Penal Law provision was effective July 5, 1979. Prior to that date, youthful offender status was not available under the Juvenile Offender Act and a youth whose case was not removed to the family court faced a mandatory period of imprisonment. *Id.* § 60.01 (McKinney 1975).

youth convicted of second-degree murder may be sentenced to a maximum of nine years to life imprisonment.¹¹⁴

Sentences imposed by the adult courts range from probation (as part of a youthful offender sentence) to lengthy imprisonment. In fact, a major portion of the small number of youths who are sentenced in the adult system receive probation or short sentences. Surprisingly, a youth sentenced in the adult court may be treated more leniently than in the family court. For example, the family court may order a three-year restrictive placement while the supreme court, in a similar situation, may grant probation. The determining factor appears to be the particular judge rather than the court.

The impact of the Juvenile Offender Act is best measured by the number of sentences in excess of those which could be imposed by the family court (since every juvenile offense is also a designated felony the family court could order a restrictive placement of three or five years).¹¹⁵ The specific sentences must be analyzed to determine the sentencing pattern and, ultimately, the Act's impact on the juvenile justice system.

In view of the paucity of data covering the first year in which the Juvenile Offender Act was effective, when only twenty-five youths were sentenced in New York City,¹¹⁶ information was obtained from New York, Kings and Bronx counties for the period September 1, 1979, to December 31, 1979. When added to the sentences imposed during the first year, as reported by DCJS, a total of seventy-nine youths reached sentence in the supreme court.¹¹⁷ (The first year total included citywide sentences plus the sentences imposed in Manhattan, Brooklyn, and the Bronx from September 1, 1979, through December 31, 1979.) Of these, twenty-two or twenty-eight percent of the total were placed on probation and fifty-seven received terms of imprisonment ranging from indeterminate sentences as youthful offenders to maximum sentences of life imprisonment.

Table D¹¹⁸ incorporates a complete breakdown by offense and sentence. Maximum sentences imposed under the Juvenile Offender Act are often roughly equivalent to a placement under the Family Court Act. A three-year term would be equivalent to a three-year

114. *Id.* § 70.05 (McKinney Supp. 1980).

115. The precise period depends upon the crime of conviction. *See* N.Y. FAM. CT. ACT § 756 (McKinney Supp. 1976-1980).

116. *See* DCJS REPORT, *supra* note 82, Table 72.

117. *See* Table E.

118. *See* Table D.

TABLE D
JUVENILE OFFENDER
MAXIMUM SENTENCES BY OFFENSE (SUPREME COURT)*
SEPTEMBER 1, 1978—DECEMBER 31, 1979**

Offense	Probation	Indefinite	1 yr.	3 yr.	4 yr.	4½ yr.	4¾ yr.	5 yr.	6 yr.	7 yr.	7½ yr.	9 yr.	10 yr.	Life	Totals
Murder 2 (A-1)	—	—	—	—	—	—	—	—	1	—	—	—	—	2	3
Rape 1 (B)	1	3	—	—	—	1	1	—	—	1	—	—	—	—	7
Sodomy 1 (B)	—	1	—	—	—	—	—	—	—	—	—	—	—	—	1
Robbery 1 (B)	10	2	—	3	1	2	1	1	2	2	—	3	1	—	28
Robbery 2 (C)	10	—	1	12	—	—	—	2	1	1	—	—	—	—	27
Burglary 2 (C)	1	—	—	—	—	2	—	—	—	—	—	—	—	—	3
Arson 2 (B)	—	1	—	—	—	—	—	—	—	—	—	—	—	—	1
Manslaughter 1 (B)	—	—	—	—	—	—	—	—	—	—	1	—	1	—	2
Assault 1 (C)	—	—	—	3	—	—	—	—	—	—	—	—	—	—	3
Att. Murder 2 (B)	—	—	—	—	—	—	—	—	—	—	—	1	1	—	2
Att. Rape 1 (C)	—	—	—	—	—	—	—	—	—	1	—	—	—	—	1
Att. Robbery 2 (D)	—	—	—	1	—	—	—	—	—	—	—	—	—	—	1
Totals	22	7	1	19	1	5	2	3	4	5	1	4	3	2	79

* The minimum period of confinement is one-third the maximum period.

** Queens County sentences from 9/1/79—12/31/79 were not available and are hence excluded.

TABLE E

JUVENILE OFFENDER

MAXIMUM SENTENCES (SUPREME COURT): SEPTEMBER 1, 1978 THROUGH DECEMBER 31, 1979

Borough	Proba- tion	Indeter- minate (Y.O.)	1 yr	3 yr	4 yr	4½ yr	4¾ yr	5 yr	6 yr	7 yr	7½ yr	9 yr	10 yr	Life	Totals
Bronx	6	7	—	6	1	3	—	2	2	3	—	3	1	—	34
Brooklyn	11	—	—	9	—	1	—	1	—	1	1	—	1	1	26
Manhattan	4	—	1	2	—	—	2	—	1	1	—	1	1	1	14
Queens*	1	—	—	2	—	1	—	—	1	—	—	—	—	5	5*
Totals	22	7	1	19	1	5	2	3	4	5	1	4	3	2	79

* Queens totals do not include sentences imposed from 9-1-79 to 12-31-79.

MAXIMUM SENTENCES (SUPREME COURT): SEPTEMBER 1, 1979 THROUGH DECEMBER 31, 1979

Borough	Proba- tion	Indeter- minate (Y.O.)	1 yr	3 yr	4 yr	4½ yr	4¾ yr	5 yr	6 yr	7 yr	7½ yr	9 yr	10 yr	Life	Totals
Bronx	6	6	—	—	1	3	—	—	2	2	—	2	1	—	23
Brooklyn	11	—	—	4	—	1	—	1	—	1	1	—	—	1	20
Manhattan	2	—	1	2	—	—	2	—	1	1	—	1	—	1	11
Totals	19	6	1	6	1	4	2	1	3	4	1	3	1	2	54

Note: The minimum period of confinement is one-third the maximum period.

restrictive placement while a five-year term would be roughly equivalent to a five-year restrictive placement.¹¹⁹ A maximum sentence beyond five years has no family court equivalent, *i.e.*, it is beyond the dispositional powers of the family court.

As indicated in Table D,¹²⁰ nineteen youths received sentences in excess of those available to the family court (greater than five years) while thirty youths received maximum sentences of over three years. Approximately twenty-four percent of all youths sentenced in the supreme court received terms in excess of those available to the family court. However, given the large number of removed cases and dismissals, only one and one-half percent of all youths charged with juvenile offenses received sentences in excess of those which would have been available had they been prosecuted initially in the family court. Approximately two and one-half percent of all youths arrested for juvenile offenses received sentences involving imprisonment for longer than the three-year maximum.

It should be noted that under the Juvenile Offender Act youths sentenced in the adult courts are placed with the State Division for Youth, the same agency that receives children found delinquent by the family court.¹²¹ Although the Penal Law¹²² employs the term "imprisonment" while the Family Court Act employs the term "placement," the results are substantially the same.¹²³ In short, most of the children sentenced in the adult felony courts spend the same amount of time in the same place that would have been available had the youth been convicted in the family court.¹²⁴

In the great majority of cases it appears not to matter whether the case is removed, as most are, or remains in the adult system. Prior to the enactment of the Juvenile Offender Act, the New York City Family Court was restrictively placing approximately fourteen percent of all youths arrested for the commission of a designated felony (the equivalent of the present juvenile offense). In other

119. See N.Y. FAM. CT. ACT § 756 (McKinney Supp. 1976-1980).

120. See Table D.

121. Children placed by the supreme court are housed in a secure "Title III" facility, *i.e.*, a secure residential institution. So too, a family court judge may order a "Title III" secure placement in appropriate cases. However, the family court may elect to place a child in a nonsecure facility or group home, dispositions not permitted if the youth is sentenced by the adult felony court. N.Y. EXEC. LAW §§ 510-527 (McKinney Supp. 1979).

122. N.Y. PENAL LAW § 70 (McKinney Supp. 1980).

123. There are differences involving, for example, the granting of home visits. Compare 1978 N.Y. Laws, ch. 510, § 2 with N.Y. PENAL LAW § 70.04 (McKinney 1978).

124. However, a youth incarcerated under the Juvenile Offender Act must spend the entire period of incarceration in a secure facility. 1978 N.Y. Laws, ch. 481, § 515-b(2). The practice of transferring prisoners to a nonsecure facility or half-way house, permitted under family court placements as well as adult sentences, is precluded by the Act. *Id.*

words, the experience prior to enactment of the Juvenile Offender Act was similar to experience under the Act. For the vast majority of children arrested for the commission of a juvenile offense, the result is substantially identical to that which prevailed before 1978. Only approximately two of every hundred youths charged with the commission of a juvenile offense received a greater sentence than was available prior to the Act's passage.

A youth who remains in the supreme court through sentencing, nevertheless suffers the disadvantages of an adult criminal record, adult prosecution and the loss of confidentiality afforded by the family court. Although the juvenile has lost the protections afforded by the family court, the Act's rationale, the imposition of higher sentences, has failed to materialize.

H. Summary

Table F¹²⁵ summarizes the experience to date in determining juvenile offense arrests. Of one hundred arrests, twenty-three resulted in indictment, approximately twelve in criminal convictions (in the adult courts), and approximately six in adult criminal court sentences. Most importantly, an average of only one and one-half percent, or three of every two hundred arrests, resulted in a sentence of greater than five years and only two percent resulted in a sentence greater than three years, *i.e.*, beyond the powers of the family court.

The overall picture is one of screening out of large numbers of children at every stage of the proceedings. Thus, the impact of the Act has been radically narrowed by prosecutorial, judicial and perhaps police discretion. In view of the results, one must question the Act's justification. At the very least, substantial modification is clearly indicated.

I. Statistical Update

In April 1980 the New York State Division of Criminal Justice Services published a Juvenile Offender Act statistical report covering September 1, 1979 to February 29, 1980.¹²⁶ Summarily, there are only two possible significant statistical changes that occurred during the six months not covered in the previous discussion. The total number of arrests declined, and the percentage of indicted cases increased. On a citywide basis, arrests declined from 762

125. See Table F.

126. See N.Y.S. DIVISION OF CRIMINAL JUSTICE SERVICES, JUVENILE OFFENDERS IN NEW YORK STATE, SEPTEMBER 1, 1978-FEBRUARY 29, 1980 (April 30, 1980).

TABLE F
JUVENILE OFFENSES (NEW YORK CITY)

A. <i>Arrested</i>	(1332)	100 %
1. Declined to prosecute	(251)	19 %
2. Removed to Family Court	(542)	41 %
3. Dismissed by Criminal Court	(157)	12 %
4. Transferred to Supreme Court	(382)	28 %
B. <i>Grand Jury</i>	*(354)	28 %
1. Not Indicted	(64)	5 %
2. Indicted	(290)	23 %
C. <i>Supreme Court</i>	*(127)	23 %
1. Removed to Family Court (prior to plea)	(46)	8¼ %
2. Dismissed by Supreme Court	(12)	2¼ %
3. Disposition by Supreme Court		
a. Acquitted	(1)	¼ %
b. Convicted	(68)	12¼ %
(1) Trial (10) 1¾ %		
(2) Plea (58) 10½ %		
D. <i>Sentence</i>	*(49)	12¼ %
1. Removed to Family Court	** (24)	6 %
2. Sentenced by Supreme Court	(25)	6¼ %
a. Probation	(3)	¾ %
b. Incarcerated	(22)	
(1) Consistent with Family Court	(17)	4¼ %
(2) Inconsistent with Family Court	(5)	1¼ %

* Remaining Cases are Pending

** Based upon statistics covering nine months (See CJA study, p. 32) and projected to one year.

Note: *Sentences* by Supreme Court covering a fifteen month period, 9/1/78 - 12/31/79.

- a. Probation (22) 1¾ %
- b. Incarceration (57)
 - (1) Consistent with F. C. (38) 3 %
 - (2) Inconsistent with F. C. (19) 1½ %

(September 1, 1978 to February 28, 1979) to 637 (September 1, 1979 to February 29, 1980), a sixteen percent decrease.¹²⁷ The reduction may be the result of careful case screening, as suggested by the report. The decrease may also be the result of a police reaction against the high rate of later removals to the family court. Why devote the extra resources needed to charge a juvenile offense, including the police time needed to book and arraign a juvenile offender, only to have the case removed? The arrest pattern, however, remained relatively constant. For example, robbery accounted for seventy-six percent of all arrests and burglary accounted for only two percent of juvenile offender charges (fifty-six of two thousand eighty-nine).¹²⁸

On the other hand, the percentage of cases reaching indictment increased. When pending cases are included in the statistical base, the percentage of indicted cases jumped from twenty-three to thirty-three.¹²⁹ However, three percent of the citywide arrests were reported as "unconfirmed arrest reports," *i.e.*, the Division could not ascertain the results of the arrests.¹³⁰ That compares to an almost total absence of unconfirmed reports from previous periods. Since almost all unconfirmed arrest reports probably involved declinations to prosecute or dismissals (it is unlikely that indictments would be "lost," and declinations to prosecute immediately terminate the case), the actual indictment rate was probably twenty-nine percent. Not surprisingly, the percentage of cases removed to the family court declined by a percentage approximately equal to the rise in indictments.

It appears that, by limiting arrests, the percentage of indictments has increased slightly. (Some of the less serious cases, which would have been dismissed or removed, have been screened before a case was initiated.) This occurrence is confirmed by the fact that the number of indictments, as opposed to the percentage, remained almost constant. The system has apparently adjusted to avoid the needless prosecution in the adult criminal courts of those children whose cases will, in any event, be determined in the family court. In conclusion, the Report confirms, for the most part, the evaluations and conclusions based upon earlier statistics.

IV. ANALYSIS BY CRIME

The evaluation of the Juvenile Offender Act has thus far concentrated on longitudinal events such as arrest, removal, indict-

127. *Id.*

128. *Id.* Table 3.

129. *Id.*

130. *Id.*

ment, and disposition. This section analyzes the Act's implementation of arrest by crime. Four separate offenses have been selected for detailed analysis: burglary, second-degree robbery, first-degree robbery, and murder. The four selected crimes account for eighty percent of all juvenile offender arrests in New York City¹³¹ and, in view of the absence of burglary arrests, probably account for an even greater percentage of committed juvenile offenses.¹³²

A. Burglary

Burglary is notable for its absence from the juvenile offender arrest base. Only thirty-six of approximately 3,200 youths arrested for burglary during the year were charged with the juvenile offense of first- or second-degree burglary.¹³³ The Act has simply not been applied to that crime, a phenomenon that conflicts with the Act's legislative intent. In the absence of arrests, every other statistic, such as dismissal, removal, indictment, and sentencing, is meaningless. Burglary exists only as a "paper" juvenile offense. From a prosecutorial or a defense viewpoint, the commission of the crime results in an automatic "removal" to the family court even prior to arrest.

One result of the failure to charge criminally is that a given burglary case can be processed in the family court expeditiously, without the necessity of drafting a criminal charge, scheduling a removal hearing or applying rigorous criminal procedural standards. The accused juvenile confronts only a delinquency charge which precludes either a juvenile offense sentence or a designated felony restrictive placement. The inclusion in the Act of burglary, the only nonviolent juvenile offense, seems no longer logical.

B. Second-Degree Robbery

Second-degree robbery is a serious crime, albeit less severe than first-degree robbery, assault, rape or homicide.¹³⁴ Since 453

131. See DCJS REPORT, *supra* note 82, Table 63.

132. The greatest number of arrests, 76% of the total, involve robbery. *Id.* Burglary has been included because of its prevalence, even though few juveniles are charged with that offense. See text accompanying notes 89-91 *supra*. Murder is included as an example of the most violent and serious crime.

133. DCJS REPORT, *supra* note 82, Table 63. See also text accompanying notes 87-93 *supra*.

134. Second-degree robbery does not include the use of a "deadly weapon" or a "dangerous instrument" or, alternatively, result in "serious physical injury." See N.Y. PENAL LAW § 160.10 (McKinney 1975).

135. See DCJS REPORT, *supra* note 82, Table 63.

youths were charged with the crime¹³⁵ in New York City during the first year one can assume that, unlike burglary charges, the police did not substantially undercharge or refuse to file robbery charges.

Table G¹³⁶ incorporates a comparative analysis for the crimes of murder, first-degree robbery, and second-degree robbery based on the first nine months' experience under the Act (September 1, 1978, through May 31, 1979). Only thirteen percent of all youths arrested for second-degree robbery were indicted, while forty-eight percent were removed to the family court, twenty-one percent were not prosecuted, ten percent were dismissed, and the grand jury refused to indict eight percent. A substantial number of those for whom there was a declination to prosecute or failure to indict were

TABLE G

DISPOSITION OF ARRESTS: SEPTEMBER 1, 1978—MAY 31, 1979

	For All Offenses		Murder 2		Robbery 1		Robbery 2	
A. Arrest	(1069)	100 %	(23)	100 %	(440)	100 %	(367)	100 %
1. Decline to Prosecute	(193)	18 %	(1)	4 %	(65)	15 %	(77)	21 %
2. Remove to Family Court	(431)	41 %	(2)	9 %	(169)	38 %	(177)	48 %
3. Dismiss by Criminal Court	(134)	12 %	(3)	13 %	(66)	15 %	(36)	10 %
4. Transfer to Supreme Court	(305)	24 %	(17)	74 %	(140)	32 %	(77)	21 %
B. Grand Jury	(270*)	29 %	(17)	74 %	(140)	32 %	(77)	21 %
1. Not indict	(57)	6 %	(3)	13 %	(41)	9 %	(31)	8 %
a. Remove to Family Court	(43)		(1)		(7)		(10)	
b. Other (includes dismiss)	(14)		(2)		(34)		(21)	
2. Indict	(213)	23 %	(14)	61 %	(99)	23 %	(46)	13 %
C. Supreme Court	(105*)	23 %	(3*)	61 %	(27*)	23 %	(38*)	13 %
1. Remove to Family Court (Prior to plea)	(6)	1¼ %	(0)		(4)	3½ %	(1)	¼ %
2. Dismiss by Supreme Court	(8)	1¾ %	—**		—**		—**	
3. Disposition	(91)	20 %	(3)	61 %	(23)	19½ %	(37)	12¾ %
a. Acquittal	(0)		Too few sentenced to give reliable statistics.					
b. Conviction								
(1) Trial	(7)							
(2) Plea	(84)							

* Differences accounted for by pending cases and lost records

** Not available by Offense

136. See Table G.

probably refiled in the family court. Close to nine out of ten cases failed to reach the adult felony court.

The precise disposition of those robbery cases that proceeded to sentence in the adult felony court (thirteen percent of the total) is outlined in Table H¹³⁷ (covering the period of September 1, 1979 through December 31, 1979). It should be noted, however, that the sentencing data are based upon convictions and do not reflect those cases that may have involved more serious arrest charges. Nevertheless, only one youth who was convicted of second-degree robbery during that period received a sentence with a maximum term of imprisonment in excess of five years, *i.e.*, a term longer than the family court's statutory authority. By way of contrast, sixty-four percent of the children convicted of second-degree robbery in the adult felony court received a sentence of probation. Thus, lengthy incarceration, a possibility not available in the absence of the Juvenile Offender Act, is almost never used. Adult criminal courts do not treat second-degree juvenile robberies as a crime warranting severe or adult sanctions.

Essentially, burglary cases never even reached the lower criminal court, while most second-degree robbery cases were either screened out before they reached the felony court or, if not, were treated leniently within the adult system. But despite the availability of later lenient treatment there was a loss of confidentiality, the

TABLE H

SUPREME COURT SENTENCES: SEPTEMBER 1, 1978—DECEMBER 31, 1979

Selected Juvenile Offenses
New York, Kings and Bronx Counties

	All J.O. Offenses		Murder 2		Robbery 1		Robbery 2	
Total Sentenced by Supreme Court	(54)	100 %	(3)	100 %	(23)	100 %	(14)	100 %
(a) Probation	(15)	28 %	(0)		(8)	35 %	(9)	64 %
(b) Incarceration	(39)	72 %	(3)	100 %	(15)	65 %	(5)	36 %
(1) Consistent with Family Court	(29)	53½ %	(0)		(8)	35 %	(4)	29 %
(2) Inconsistent with Family Court	(10)	18½ %	(3)	100 %	(7)	30 %	(1)	7 %

137. See Table H.

comparative harshness and difficulties of preliminary adult criminal processing, and the time and financial resources wasted through an adult prosecution destined to be cut short or substituted by a family court proceeding.

Surely, the Act's purpose could not have been the encouragement of preliminary adult criminal prosecution followed by a juvenile delinquency proceeding or an adult disposition identical to that frequently imposed in the family court. But, with second-degree robbery, the system has reacted, when confronted with the dilemma of initiating a juvenile offense proceeding or a nondesignated felony prosecution (by undercharging), by initiating adult charges and subsequently removing the case.

C. First-Degree Robbery

By definition, first-degree robbery is a more violent crime than second-degree robbery or burglary, but less serious than homicide or a felonious sex offense. It is also the most prevalent juvenile crime accounting for almost one-half (forty-five percent) of city-wide juvenile offense arrests.¹³⁸ It is not surprising that first-degree robbery statistics approximate the average for all juvenile offenses. For example, twenty-three percent of the cases result in grand jury indictment, precisely the average percentage for all cases.¹³⁹ The percentages of cases removed to the family court, dismissed or not prosecuted, are also similar to the averages. The sentencing pattern for first-degree robbery parallels the average for all juvenile offenses.¹⁴⁰ Approximately twelve percent of all juvenile offense arrests reach the adult sentencing stage. Of those that are first-degree robbery arrests, approximately two-thirds result in incarceration.¹⁴¹ Eight percent of first-degree robbery arrestees are imprisoned by the adult criminal courts.

In summary, most first-degree robbery cases are dismissed or referred to the family court. However, the adult system retains a significant number and for these, the sentences are frequently substantial. Unlike the case of burglary or second-degree robbery, the Juvenile Offender Act has increased the penalty for first-degree robbery. Viewed from the perspective of results, the possibility of

138. See DCJS REPORT, *supra* note 82, Table 63.

139. See Table G.

140. *Id.*

141. See Tables F & H. Half of the cases are removed to the family court for disposition purposes only and approximately half the cases remaining in the Supreme Court result in incarceration. See Table F.

adult prosecution should remain, although a better system is needed to screen those cases that should not proceed criminally.

D. Murder

Second-degree murder, the last crime selected for analysis, represents the most serious juvenile offense. It is not surprising that sixty-one percent of all arrests resulted in indictment¹⁴² and the criminal courts removed only nine percent to the family court. Murder is the only juvenile offense for which adult prosecution is the rule rather than the exception. It is the only crime for which an arrested youth faces the probability of prosecution and sentencing in adult felony court. As of December 31, 1979, only three second-degree murder convictions had reached the sentencing stage.¹⁴³ All three youths received lengthy sentences: two received a maximum term of life imprisonment.

In summary, the Act's effectiveness, as measured by arrests and disposition data, varies considerably by offense. The general juvenile offense averages, as reported in earlier chapters, including a twenty-three percent indictment rate, a twelve percent conviction rate, and a six percent sentence rate in the adult felony court, apply only to first-degree robbery arrests. The finding that less than two of each hundred youths arrested for the commission of a juvenile offense will be incarcerated for a period of time in excess of that available prior to the enactment of the Juvenile Offender Act masks the wide divergence by crime.

The finding that the Act has been meaningless when applied to burglary (or, based on apparent undercharging, the Act has adversely affected prosecution and conviction) and close to meaningless when applied to second-degree robbery is significant. If the Act were amended to exclude the crimes in question (second-degree robbery, first- and second-degree burglary) the result in effective prosecution and sentencing, would not change. In other words, when viewed by results, it matters not whether those particular crimes are juvenile offenses.

First-degree robbery represents the average juvenile offense. For the approximately two percent of the youths convicted for the crime and sentenced to maximum terms in excess of five years and, perhaps, the approximately three percent sentenced to maximum terms greater than three years, the Act represents a substantial difference. On the other hand, the great majority of first-degree

142. See Table G.

143. See Table H.

robbery cases are removed, dismissed, or result in relatively minor sentences, frequently after intensive adult criminal prosecution. Given these facts, the value of mandated initial adult prosecution is questionable.

Lastly, murder cases represent the other side of the spectrum in prosecution and sentencing effectiveness. Since sixty-one percent of murder arrests have resulted in indictment (most of the remainder are dismissed rather than removed) and since every conviction appears to result in a substantial sentence, the Act's impact has been great. At least from a purely result-oriented viewpoint, the ability to prosecute second-degree murder cases criminally should be continued in some form.

V. CONCLUSIONS AND RECOMMENDATIONS

The Juvenile Offender Act constitutes the most radical change in New York's delinquency laws since the establishment of the Children's Court in 1922, or perhaps the 1909 abolition of criminal penalties.¹⁴⁴ For the first time in seventy years a child may be criminally prosecuted and incarcerated in adult penal institutions for offenses committed prior to attaining the age of sixteen.¹⁴⁵ In fact, by severely limiting the discretion of the courts (as opposed to the prosecutor) to sentence or place children in nonpenal programs, the Act imposes a harsher remedy for some cases than the statutes which were in effect from 1824 until 1909.

New York stands alone in lowering the age of criminal responsibility to thirteen¹⁴⁶ or fourteen years of age.¹⁴⁷ No other state routinely applies criminal procedures to cases involving younger adolescents. Moreover, the Juvenile Offender Act reverses the practice found in every other state of initiating delinquency cases only in the juvenile courts, subject, in many jurisdictions, to criminal court transfer in accordance with statutorily enumerated standards. Historically New York, by maintaining a juvenile court age limitation of sixteen has, unlike most other jurisdictions, applied criminal

144. See notes 20-27 and accompanying text *supra*. The 1962 establishment of the Family Court Act, 1962 N.Y. Laws, ch. 686, the last major amendment prior to 1978, did not materially affect the treatment or confinement of children. See Besharov, *Practice Commentaries*, in N.Y. FAM. CT. ACT art. 1 (McKinney 1975).

145. See N.Y. PENAL LAW § 10.00 (McKinney Supp. 1980).

146. The age of criminal responsibility is 13 for murder. *Id.* § 30.00(2).

147. *Id.* The only exception is murder: several states permit the criminal prosecution of 14- and 15-year-olds accused of murder. See, e.g., GA. CODE ANN. § 26-701 (1976) (Committee Notes); MD. CTS & JUD. PROC. CODE ANN. § 3-804(d)(1)(4) (Supp. 1979). See generally DAVIS, *supra* note 33, §§ 2.2, .10.

sanctions to older children.¹⁴⁸ The Juvenile Offender Act applies equivalent provisions to younger children.

The distinction between originating an action in the juvenile court with possible transfer to the adult criminal court and originating actions in the adult system with possible removal to the juvenile court should be clearly understood. Only the juvenile or family court can protect children from publicity. Criminal procedure is primarily designed to protect society even when the needs of the defendant may outweigh society's need for such protection. Probation case adjustment is precluded and the case is processed in a far more formalistic, adversarial environment. The prosecutor is granted greater authority in determining the outcome of the case. For example, the district attorney must consent to the entering of a plea to a lesser offense. Further, the social services that may be available to the family court cannot be used. For all these reasons, every state except New York has elected to begin delinquency cases only in the juvenile courts regardless of the initial charge.

The fact that only twelve percent of all juvenile offender cases reach the conviction stage in the adult court and half of those are removed to the family court for sentencing is, in itself, a cogent reason to reassess the Act. The inefficiency of successive proceedings in different courts and the possible prejudice to accused children militates in favor of alternative filing or screening mechanisms.¹⁴⁹ When the Act's application to specific crimes, such as burglary or robbery, is evaluated, the need for alternatives is even more manifest.

The Juvenile Offender Act has been in effect for two years, and most of the analysis incorporated in this report is based largely on the first year's experience. Yet a sufficiently strong pattern has emerged to warrant alternatives. The recommendations that follow are based on the Act's practical deficiencies. Whether or not the reader agrees with the law's philosophy and purpose, the Act clearly does not work when applied to several crimes such as burglary and second-degree robbery. On the other hand, it has significantly altered the processing and disposition of the very serious violent crimes, such as homicide. However, for these cases too, modifications seem necessary, considering the very young children involved.

Recommendations are based on the assumption that the Act should be restructured. At a minimum, the Act is overbroad. It fails

148. See text accompanying notes 72-79 *supra*.

149. The inefficiency of prolonged and duplicative proceedings under the Act has been analyzed in a recent report. See Roysher & Edelman, *Treating Juveniles As Adults in New York: What Does It Mean and How Is It Working?* (unpublished report, June 24, 1980).

to serve its intended purpose and severely prejudices those children whose cases are eventually removed to the family court. The specific recommendations are as follows.

A. Every juvenile offender case should be filed initially in the family court.

The practice of filing juvenile offender cases in the adult criminal courts only to have the vast majority removed to the family court is prejudicial to the large majority of arrested youths and wastes scarce resources. It may also encourage overcharging and grants the prosecutor plenary authority to determine the court in which the child will be tried. When coupled with the transfer provisions incorporated in recommendations *D* and *E* below, the proposed procedures will protect those youths, almost ninety percent of the total, whose cases are dismissed or removed, while insuring that the relatively small number of cases that should be criminally prosecuted are transferred to the adult courts for that purpose.

B. The crimes of a) first-degree burglary, b) second-degree burglary and c) second-degree robbery should be eliminated as juvenile offenses, but retained as designated felonies.

The experience to date indicates that burglary is rarely prosecuted as a juvenile offense. Prosecution as a designated felony by family court will involve a possible three-year restrictive placement, a sufficiently severe sanction for a nonviolent offense. In fact, elimination as a juvenile offense would, as previously discussed, increase the possible sanctions.

Second-degree robbery cases are almost always removed to the family court. If not, they are treated leniently by the criminal courts. The crime is simply not viewed as sufficiently serious to warrant adult sanctions. Its continuation as a juvenile offense is not justified.¹⁵⁰

C. The crimes of first-degree rape, first-degree sodomy, first-degree manslaughter, first-degree assault, and first-degree robbery should be class "A" designated felonies.

The above crimes are presently classified as "B" designated felonies.¹⁵¹ If the youth is prosecuted in the family court, the

150. Approximately 90% of second-degree robbery cases fail to reach even the adult felony court. See text accompanying notes 138-44 *supra*.

151. See N.Y. PENAL LAW §§ 125.20 (first-degree manslaughter), 130.35 (first-degree rape), .50 (first-degree sodomy), 160.15 (first-degree robbery) (McKinney 1975).

maximum penalty is therefore a three-year restrictive placement. Under the Juvenile Offender Act the same youth, if prosecuted in the criminal courts, would face a maximum sentence of from ten to fifteen years.

Reclassifying the designated felony equivalents would narrow, though by no means eliminate, the dichotomy between the family court and the criminal courts thus decreasing the tendency to criminally prosecute many youths in the adult system. However, the imposition of a five-year restrictive placement should be purely discretionary and the court should be empowered to place youths restrictively for either three or five years or, for that matter, refrain from ordering any restrictive placement.

D. The small number of juvenile offender cases involving second-degree murder, first-degree manslaughter, first-degree rape, first-degree sodomy and first-degree arson should be transferred to the criminal courts at the request of the district attorney and only upon a finding of probable cause.

This recommendation provides for the transfer of very serious cases to the adult system upon the request of the district attorney. The decision would be a prosecutorial one, and the court would lack the authority to refuse such a request.

This alteration would continue the adult prosecution of almost every case involving the above crimes that are today so prosecuted. However, by initiating the action in the family court, those cases that are presently removed from the criminal courts would be spared such prosecution. For example, approximately forty percent of murder cases filed under the Act fail to reach criminal indictment. These cases would remain in the relatively protective environment of the family court.¹⁵² The additional requirement of a probable cause finding in the family court is meant to preclude, or at least diminish, the possibility of overcharging.

E. Every other juvenile offense case should be transferrable to the adult criminal courts at the discretion of the family court and upon a request by the district attorney.

This proposal is similar to the provisions found in most states. If the prosecutor concludes and convinces the court that a given juvenile offense warrants criminal prosecution, the case is trans-

152. See text accompanying notes 150-56 *supra*. Murder cases are not immune from problems of proof. Also, youth's lack of culpability may result in delinquency rather than criminal prosecution. N.Y. CRIM. PROC. LAW § 310.85(3) (McKinney Supp. 1979).

ferred. The experience of the Juvenile Offender Act to date indicates that such a request will be made in only a small percentage of the cases and will probably be rarely granted. The recommendation will nevertheless continue to permit adult prosecution of those few cases which justify the application of adult penalties.

It should be noted that transfer will not be available for cases involving burglary or second-degree robbery (recommendation B). For the very serious cases, transfer will be mandatory if requested by the district attorney (recommendation D). Lastly, increasing the family court's dispositional powers will further minimize the use of adult prosecution for prosecutorial, judicial or police convenience (recommendation C).

F. The presentment or prosecution of all delinquency cases in the family court should be reviewed.

The present family court Act prosecutorial provisions involving the district attorney, corporation counsel, and county attorneys can best be described as a patchwork of overlapping functions. The national trend in recent years has been to strengthen and unify prosecution. In fact, if New York had provided more effective prosecutorial services, the pressure for Juvenile Offender Act enactment would have been minimized. The entire range of prosecution services in the family court (including those services dealing with persons in need of supervision and child abuse proceedings) should be studied with a view toward unification and increased effectiveness.

These recommendations are intended to establish a better balance between the perceived need to protect the community (by increasing the penalty for the violent juvenile offender) and the need to protect those children who should not be criminally prosecuted in the adult courts. It should be stressed that the disposition or sentence of juvenile offenders will not be materially altered. Except for burglary and second-degree robbery cases (in which maximum penalties are virtually never imposed) the possible maximum penalties would remain the same.

Juvenile offender proceedings would, however, be significantly modified. Instead of all cases starting down the road of adult prosecution only to have almost all diverted, none would automatically start down that road, and only those cases which should be criminally treated would be referred, with appropriate safeguards, to the criminal system. The overwhelming majority of accused juvenile offenders, whose cases are currently diverted from the criminal system, would thereby gain the protection inherent in juvenile courts. The ability to prescribe stringent penalties would

not suffer, but procedures would follow a more logical and equitable progression. The recommendations would also place New York closer to the mainstream of current American juvenile jurisprudence.¹⁵³

The fact that most juvenile offender cases, indeed almost all nonhomicide cases, do not remain before the adult criminal courts (or, at most, result in sentences within the statutory authority of the family court) indicates the good sense of the officials responsible for implementing the Act. There is no reason, however, to continue to hobble the system with inefficient and inequitable procedures. Accordingly, the Act should be substantially modified to protect the vast majority of children who do not require the severity of adult criminal prosecution or punishment.

153. Initiating cases in the family court, with appropriate transfer provisions, would yield additional benefits. The duplication and wastefulness of removing cases would be eliminated. More importantly the time needed to reach disposition in the family court is shorter than the criminal courts. Initiating the action in the family court would expedite the process. It is surely more efficient to maintain actions in one court instead of removing, transferring, or dismissing over 90% of the cases prior to disposition. For most youths, the modifications would also increase the feasibility of assigning a single defense attorney from beginning to end (and a single prosecutor or assistant district attorney).