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THE NEW YORK JUVENILE JUSTICE REFORM ACT OF 1976:
RESTRICTIVE PLACEMENT—AN ANSWER TO THE
PROBLEM OF THE SERIOUSLY VIOLENT YOUTH?

Society has grappled with the question of its problem children for most of its history,¹ and public concern over juvenile crime is a perennially recurrent theme.² Recently, however, a new, more fearful note has emerged. Where it once meant property offenses like vandalism and car theft, "juvenile delinquency" more and more conjures up images of serious personal violence.³ The mass media carries the message of a newer, tougher juvenile, more dangerous, and committing more violent crimes, than ever before. For example, the New York Times reports that in New York City in 1975, 54 youths under sixteen were arrested for murder, 5,276 for robbery, 1,230 for felonious assault, 125 for rape, 125 for sodomy;⁴ and that 83% of all those arrested in Nassau County in 1973-74 for major crimes were youths.⁵ Seemingly indifferent and remorseless fourteen and fifteen year-olds prey on the elderly⁶ and murder passers-by⁷ and each other⁸ with callous casualness in between brief visits to the Family Court.⁹ The courts and treatment centers are portrayed as incapable of handling effectively the most dangerous offenders.¹⁰ Similar, if more restrained, reports appear in professional publications.¹¹ The net result is a public perception of a vast increase in violent juvenile crime and of almost total failure of the present techniques for dealing with the threat.¹²

Whether this is an accurate perception is the subject of debate. In a recent article,¹³ one authority cited arrest figures to show that the actual incidence of

¹. A Seventeenth Century guide to British Justices of the Peace advised that "[a]n infant of eight yeares of age, or above, may commit homicide, and shall be hanged for it . . . ." W. Sanders, Juvenile Offenders for a Thousand Years 11 (1970). In the Nineteenth Century, despite numerous attempts at ameliorative treatment not unlike those engendered by modern philosophy, [see id. at 113-66] British children were transported to Australia or confined in rotting prison ships. Id. at 69-70.

². One commentator writing in the mid-50's noted that every ten years we have hysteria about juvenile delinquents. Sharp, Jails or Detention Homes for Children?, in Youth and Crime 182 (F. Cohen ed. 1957).


⁴. Id., col. 2.

⁵. N.Y. Times, Jan. 11, 1976, Long Island §, at 1 (L.I. ed.).

⁶. N.Y. Times, April 11, 1976, at 1, col. 1.

⁷. N.Y. Times, June 21, 1976, at 1, col. 5.


¹⁰. N.Y. Times, March 2, 1976, at 1, col. 7.

¹¹. See notes 13 & 14 infra and accompanying text.

¹². Family Court Judge Simeon Golar expressed these views in an open letter to the mayor, resigning his post. N.Y. Times, May 6, 1976, at 37, col. 5.


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serious violent crime among the under-sixteen age group was relatively insignificant. A subsequent article by another authority on the New York situation cited the serious effect of youthful violence on the most frequent victims—the poor, the elderly, the working-class urban-dweller—to refute claims that the problem was exaggerated. But however accurate or inaccurate, the public perception of a threat to its safety is a reality, already translated into pressure for change in the way the law treats serious juvenile offenders. Today's public is demanding protection of the community from its violent children.

The New York Legislature, in an attempt to deal more effectively with the juvenile who commits a serious violent offense without surrendering him to the adult criminal system, has enacted the New York Juvenile Justice Reform Act of 1976. This Note will examine the Act in an attempt to evaluate whether these goals are likely to be effectuated.

DEVELOPMENT AND BACKGROUND OF THE JUVENILE JUSTICE SYSTEM

Although differences exist among the various state schemes, the underlying theory and basic elements are universal enough to justify reference to a single Juvenile Justice System in this country—a system whose hallmarks are the separate treatment of juveniles and adult offenders, a focus on the offender rather than the offense, and an emphasis on rehabilitation rather than punishment. This system came into being in the latter part of the last century as a result of a wave of social reform that swept the nation, and in reaction to the harshness of the then current laws that treated adult criminals and

16. This is in sharp contrast to eighty years ago, when the public's perception of inequities in the way the law dealt with troubled and troublesome children brought about drastic changes for the protection of the child. See text accompanying notes 21-25 infra.
17. In its report, the legislative committee that investigated the operation of the juvenile justice system in New York stated: "The concept of a separate juvenile justice system remains valid. The adult criminal justice system is totally unprepared and ill-equipped to contend with the special problems posed by juvenile offenders. However, it is clear that major changes are needed. . . . The most obvious need for change is in the treatment of serious, violent offenders." N.Y. State Assembly Standing Comm. on Child Care, 199th Sess., Juvenile Crime 2 (1976) [hereinafter cited as Gottfried Report].
delinquent children alike. The reformers hoped "that the child who has begun to go wrong, who is incorrigible, who has broken a law . . . [will] be taken in hand by the state, not as an enemy but as a protector, as the ultimate guardian . . . ." Thus the state became the benevolent parent providing for the needs of its children, a concept that guided the formulation of the first juvenile court system in Chicago in 1899 and of those that quickly followed across the country.

Although it was originally believed that the special nature of the juvenile process required the suspension of constitutional safeguards in order to be most beneficial to the child, this proved in practice to be a major flaw. It left the juvenile vulnerable to arbitrary treatment often far harsher than that dealt out to adults, without the adult's ready recourse to redress through appeal, while failing to provide the rehabilitation and protection for which his constitutional rights were presumably exchanged. As a result of a series of successful challenges to this practice in recent years, the juvenile offender

22. Id. at 6-10; Mack, The Juvenile Court, 23 Harv. L. Rev. 104, 106 (1909). There is, however, some evidence that children were not, in fact, treated so harshly as the laws decreed: the very inflexibility of the rules led juries to acquit and judges to dismiss in cases where children would otherwise suffer adult penalties. Sanders, Some Early Beginnings of the Children's Court Movement in England, in Faust, supra note 19, at 42. A fairly complex system of alternative measures grew up to avoid the strictures of the adult rules. Mennel, Origins of the Juvenile Court, 18 Crime & Delinquency 68, 78 (1972).
24. Johnson, supra note 19, at 3.
25. Id. at 3-5.
26. F. Faust & P. Brantingham, The Era of the 'Socialized' Juvenile Court—1899 to 1967, in Faust, supra note 19, at 146. "To save a child from becoming a criminal, or from continuing in a career of crime, to end in mature years in public punishment and disgrace, the legislature surely may provide for the salvation of such a child . . . by bringing it into one of the courts of the state without any process at all . . . ." Commonwealth v. Fisher, 213 Pa. 48, 53, 62 A. 198, 200 (1905).
"It would be carrying the protection of 'inalienable rights,' guaranteed by the Constitution, a long ways to say that that guaranty extends to a free and unlimited exercise of the whims, caprices, or proclivities of . . . a child . . . for idleness, ignorance, crime, indigence, or any kindred dispositions or inclinations." Ex parte Sharp, 15 Idaho 120, 129-30, 96 P. 563, 565 (1908).
27. M. Paulsen, Children's Court: Gateway or Last Resort?, in Paulsen, supra note 21, at 108-09. See generally In re Gault, 387 U.S. 1 (1967).
28. For example, Gerald Gault was sentenced to six years for what would have earned an adult a fine of five to fifty dollars or two months in prison. In re Gault, 387 U.S. 1, 7-9 (1967).
29. The Arizona law which controlled the Gault case did not permit appeal in juvenile cases. Id. at 8. In other cases, the paucity of appeals may be due to the parents' acceptance of the court's order through indifference, despair, or lack of advice of counsel. Dembitz, Ferment and Experiment in New York: Juvenile Cases in the New Family Court, 48 Cornell L.Q. 499, 503-04 & n.21. (1963) [hereinafter cited as Dembitz-Cornell].
31. The sequence of cases from Kent v. United States, 383 U.S. 541 (1966), to In re Gault, 387 U.S. 1 (1967), to In re Winship, 397 U.S. 358 (1970), has been dealt with at great length in the standard treatments of the juvenile system. See, e.g., Faust, supra note 19, at 356-420.
now enjoys most of the procedural protections of an adult accused of a crime.\textsuperscript{32} In New York, the juvenile being processed through the separate juvenile system was entitled to procedural due process at the adjudicatory phase even before the Supreme Court required it.\textsuperscript{33}

**The New York Juvenile Justice System**

The New York juvenile justice system, as embodied in the Family Court Act (FCA) passed in 1962,\textsuperscript{34} might be more accurately termed a family justice system, since juveniles under sixteen are handled exclusively by the Family Court, even when accused of criminal offenses.\textsuperscript{35} The original intent was to focus on individual and family needs rather than on traditional legal culpability, and to that end a single court was created to have jurisdiction over the many, varied situations of family relationships that traditionally were spread over a number of civil and criminal courts—paternity actions, intra-family disputes, and juvenile cases. With a viewpoint that was as much social as legal, the Family Court tried to resolve the problems of the whole person by viewing him in the context of his social setting and relationships rather than as an individual to be punished for a specific offense.\textsuperscript{36}

The system presently operates as follows. When a juvenile offender (in New York, a person between seven and sixteen charged with an offense that if committed by an adult would be a crime)\textsuperscript{37} is arrested, the case goes to the Intake Bureau of the Probation Department. A majority of the cases are "adjusted" here, \textit{i.e.,} charges are dropped, the child is referred to a community program or residential facility, or placed on probation.\textsuperscript{38} If not "adjusted," a petition is filed against the child (the respondent). This decision is usually made by a court officer but an insistent complainant can have a petition filed where Intake has recommended otherwise.\textsuperscript{39} Pending adjudication, which occurs in the fact-finding hearing, the child can be placed in detention or released. There

\textsuperscript{32} I.e., the right to sufficient written notice of charges, to counsel, to the privilege against self-incrimination and to the confrontation of witnesses but not to a jury trial. McKeiver \textsuperscript{v. Pennsylvania}, 403 U.S. 528 (1971). However, in other areas, such as school locker searches, juveniles still are not afforded full due process protection. For a thorough discussion of this area, see Note, Public School Searches and Seizures, 45 Fordham L. Rev. 202 (1976).

\textsuperscript{33} The drafters of the Family Court Act of 1962 expressed a determination "to provide...due process of law...[and] affirms the traditional role of the courts in reviewing under the constitution the application of the law..." Report of the Joint Legislative Committee on Court Reorganization, the Family Court Act, N.Y. Session Laws 3437 (McKinney 1962). The Supreme Court favorably cited the New York statute several times in its opinion in \textit{In re Gault}, 387 U.S. 1, 40, 48, 55 n.96, 57 (1967).

\textsuperscript{34} N.Y. Family Ct. Act (McKinney 1975) [hereinafter cited as FCA].

\textsuperscript{35} The Family Court has exclusive jurisdiction over juveniles. FCA § 713. Persons under 16 are not criminally responsible for their conduct. N.Y. Penal Law § 30.00 (McKinney 1975).

\textsuperscript{36} Dembitz-Cornell, supra note 29, at 500-01.

\textsuperscript{37} FCA § 712(a), as amended, the Act § 3.

\textsuperscript{38} FCA § 734(a)(ii); Dembitz-Cornell, supra note 29, at 514.

\textsuperscript{39} FCA § 734(b).
are, however, detailed criteria for detention\(^{40}\) which tend to encourage release in most situations.\(^{41}\)

The fact-finding hearing is held before a Family Court judge to determine "whether the respondent did the act or acts alleged in the petition . . . .\(^{42}\) This hearing, comparable to the trial of an adult offender, is ringed about with all the procedural protections except a jury trial.\(^{43}\) The county attorney acts as "counsel for the petitioner," since this is considered a civil matter.\(^{44}\)

If the child is adjudicated a juvenile delinquent, \(i.e.,\) found to have committed the acts alleged in the petition,\(^{45}\) a separate dispositional hearing is held "to determine whether the respondent requires supervision, treatment or confinement."\(^{46}\) The child, his law guardian, and the Probation Department participate, but usually not counsel for the petitioner. To aid him in his decision, the judge will have the background reports and recommendations of the Probation Department.\(^{47}\) Any evidence relevant to the issue of a child's welfare is admissible because it is felt that the judge should know as much as possible about the child and those factors in his background that led to his

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40. On taking a child into custody, a police officer has a choice of releasing the child, taking him to Family Court or to a detention facility but, "[i]n the absence of special circumstances," he is directed to release the child. FCA § 724(c). Before a petition is filed, a child taken into custody on a charge of juvenile delinquency should be released from detention facilities unless there are "special circumstances requiring his detention." FCA § 727(b). After a hearing and before the filing of a petition the judge shall order the release of the child "unless there is a substantial probability that he will not appear in court on the return date or unless there is a serious risk that he may before [that date] do an act which if committed by an adult would be a crime." FCA § 728(b)(iii). After the filing of a petition and prior to an order of disposition, the child shall be released unless there is a substantial probability that he will not appear or a serious risk that before the return date he would do an act which, if committed by an adult, would be a crime. FCA § 739.

41. The drafters of the FCA indicated that they intended to "avoid as much as possible any deprivation of liberty without a judicial order," Committee Comments to FCA § 727 (McKinney 1975) and "any routine detention of a child." Committee Comments to FCA § 739 (McKinney 1975).

42. FCA § 742.

43. "[A]t the commencement of any hearing under this article, the respondent . . . . shall be advised of [his] right to remain silent and of his right to be represented by counsel chosen by him or his parent . . . or by a law guardian assigned by the court . . . ." FCA § 741.


44. Report of the Joint Legislative Committee on Court Reorganization, The Family Court Act, in N.Y. Session Laws §§ 3433-34 (McKinney 1962); D. Besharov, Practice Commentary to N.Y. Family Court Act § 711 at 549 (McKinney 1975) [hereinafter cited as Practice Commentary].

45. "If the allegations . . . . are established . . . . the court shall enter an order finding that the respondent is a juvenile delinquent . . . ." FCA § 752.

46. FCA § 743.

47. Even though not required by law, such reports are standard court procedure. D. Besharov, Juvenile Justice Advocacy 393 (1974).
offense, including information that may help or hinder treatment. Since such open-ended standards allow for the possibility that inaccurate or biased information will be included, the respondent has the right to challenge the reports and to produce counter evidence at the dispositional hearing.

There are several options open to the judge. The child can be put on probation or given suspended judgment, with various conditions. Further, the offender can be placed in foster care with the Division for Youth, the Social Services Department, or a local agency. Such a "placement" is for eighteen months, extendable year-by-year until the child reaches the age of eighteen (twenty-one with the child's consent), but he can be released or discharged at any time at the discretion of the Division for Youth. The child can also be transferred to the Department of Mental Hygiene if it should be found that he has a mental illness "likely to result in serious harm to himself or others." He can be "committed" instead of "placed" for up to three years, with no provision for extending the commitment and release possible at any time.

The only special provision in the present law for particularly violent juveniles is applicable only to those who, while fifteen, commit what would be a class A or B felony. These juveniles can be committed for three years to an adult correctional facility.

**The System in Operation**

In *In re Gault*, Justice Fortas warned against assuming "any necessarily close correspondence [of the ideal] to the realities of court and institutional

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48. The standard of evidence set by § 745(a) is "material and relevant," unlike that set for the fact-finding hearing as "competent, material and relevant." FCA § 744(a) (emphasis added). In practice a wide range of sources is used. Davis, supra note 19, at 150.


51. The conditions are to be set by the court from the list of permissible terms and conditions defined by the Rules of the Family Court. They include such terms as: obeying all lawful commands of parents; attending school or a job regularly; and keeping away from bad company. N.Y. Court Rules § 2506.6 (McKinney 1975).

52. FCA § 756(a).

53. FCA § 756(b), (c).


55. FCA § 760(a).

56. FCA § 758. Although no explicit distinction is made in the FCA between "placement" and "commitment," the general practice of reserving the latter for the more serious offenses, and the terminology of § 758, emphasizing commitment to "an institution suitable for the commitment of a delinquent child," a reference lacking in § 756(a), tends to indicate that commitment is to be used for the more difficult cases.

57. FCA § 758(b), repealed by the Act § 18. Class A felonies include first and second degree murder, first degree kidnapping and first degree arson. N.Y. Penal Law §§ 125.25, .27, 135.25, 150.20. Class B felonies are first degree manslaughter, rape, sodomy, burglary, criminal mischief, second degree kidnapping, and arson. N.Y. Penal Law §§ 125.20, 130.35, .50, 135.20, 140.30, 145.12, 150.15 (McKinney 1975). Males can be committed to Elmira Reception Center and females to Westfield State Farm. Notes to Decisions, Practice Commentary, supra note 44, at 662-63.

58. 387 U.S. 1 (1967).
The weaknesses of the New York system in operation are a case in point. Legislative investigators found it ineffective and chaotic throughout, plagued by uncoordinated and ill-informed decision-making from Intake through Release. They reported that "[y]ouths arrested may be sent home, with probation and the court unaware of the existence or seriousness of other pending charges." In many cases, the various witnesses and officers who had dealt with a child involved in a serious offense had never communicated with each other. Excessive delays and adjournments discouraged all but the most persistent complainants and witnesses. Frequently, a decision was made without a lawyer in the court to represent the community's interest. Massive cuts in funds, understaffing, and numbing caseloads in Probation resulted in inadequate investigations and perfunctory reports to the court. The judge who decided on the disposition was often not the judge who presided at any other hearing in the case.

Juvenile delinquency cases are heard along with other family cases, so the court "never gets a chance to focus on the problem of juvenile crime on a coherent basis." No one agency has ultimate responsibility for coordinating available programs and for concentrating these resources on the most serious problems. As a result, vital decisions were being made without adequate information about the child, his offense, or available dispositions. Hence "many serious or repeat offenders [were] not [being] identified or treated as such."

Further, once a disposition has been made by the court, it is subject to change at the total discretion of the Division for Youth. Release procedures in the Division were found to be chaotic. Juveniles were frequently released only because the space was needed for new arrivals, or because they were so violent they became a serious disruption to the facility, and so were released into the streets.

In many cases, investigation and other evaluative reports were not transmitted to the agency for several months after the youth himself had arrived. This made it virtually impossible for the agency to construct a meaningful rehabilita-

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60. Gottfried Report, supra note 17, at 5.
61. Id. at 6.
62. Id. at 5; N.Y. Times, April 11, 1976, at 42, col. 6.
63. Gottfried Report, supra note 17, at 5.
65. Gottfried Report, supra note 17, at 5.
66. Id. at 6. This result, ironically, is an outgrowth of the attempt to deal more effectively with these problems by bringing them together in one court. See text accompanying note 36 supra.
68. Id. at 5.
70. Gottfried Report, supra note 17, at 7; Dembitz-N.Y.L.J., supra note 14, at 2, col. 3.
A Synopsis of the New Act

Designated by its sponsors in the State Legislature as "[a]n act to amend the family court act, the executive law, the education law, and the mental hygiene law, and repealing certain provisions thereof, in relation to juvenile justice reform," the Juvenile Justice Reform Act of 1976 deals almost exclusively with the delinquent juvenile, making only a passing reference to the juvenile in need of supervision. It is principally concerned with creating a new method of dealing with the seriously violent juvenile, and most of its provisions are directly aimed at that end.

Section 2 amends the purpose of the Family Court Act (FCA) to require that in any proceeding, the court shall consider the need for protection of the community as well as the needs and best interests of the child.

Section 3 collects the definitions of the FCA in one section, and adds four new terms. "Designated felony act" (DFA) is defined as an act committed by a 14 or 15 year-old which, if done by an adult, would be (i) first degree murder; second degree murder; first degree kidnapping; first degree arson; or (ii) first degree assault; first degree manslaughter; first degree rape; first degree sodomy; second degree kidnapping "where the abduction involved the use or threat of use of deadly physical force"; second degree arson; first degree robbery; or (iii) an attempt to commit murder in the first or second degree; or kidnapping in the first degree. "Designated class A felony act" is defined as a designated felony act included in (i) of the above definition. "Secure..."
facility" is one which is characterized by "physically restricting construction, hardware and procedures, and is designated as a secure facility by the division for youth." 81 "Restrictive placement" is a placement pursuant to the provisions of the new section 753-a. 82

Section 4 amends section 731 of the FCA to require that "designated felony act petition" shall be prominently marked on all such petitions, and shall not be stricken unless the allegations are withdrawn or dismissed. 83

Section 6 amends section 734(a)(ii) of the FCA to provide that there can be no adjustment at Intake of a designated felony act petition without the written approval of a judge of the court (rather than the local probation director). 84

Section 9 creates two new sections of the FCA to replace those repealed by sections 786 and 8. 87 New section 742 provides that the judge who presides at the beginning of the fact-finding hearing shall continue to preside through the end of the proceedings, unless circumstances prevent it. 88 The second of these new sections, FCA section 743, mandates that counsel for the petitioner receive written prior notice of all dispositional hearings and the opportunity to participate therein, including the right "to present evidence of available resources and to be heard regarding the availability and advisability of each disposition provided for by law." 89

Section 10 repeals section 746 of the FCA, which is related to the sequence of the hearings and the availability of probation reports. 90

Section 11 amends section 748 of the FCA by requiring that the reasons for any adjournment of the fact-finding hearing in a DFA case shall be stated on the record. 91 Section 12 amends section 749 by barring the court from ordering an adjournment in contemplation of dismissal, and by limiting other adjournments to one, of up to thirty days, if the respondent is detained. 92

Section 13 creates a new section 750 of the FCA, dealing in detail with the content and availability of probation reports. 93 Section 750(1) provides that the reports shall be confidential and disclosed only according to law. Further, the reports shall not be furnished to the court before the completion of the fact-finding hearing and the entering of a finding that the respondent is a

81. The Act § 3, adding FCA § 712(j).
82. The Act § 3, adding FCA § 712(k).
83. The Act § 4, adding FCA § 731(2).
84. The Act § 6, amending FCA § 734(a)(ii).
85. The Act § 9, adding FCA §§ 742-43.
86. The Act § 7, repealing FCA § 742. § 3 of the Act defines the fact-finding hearing. This has been moved to FCA § 712(f) by § 3 of the Act.
87. § 8 of the Act repealed FCA § 743, defining the dispositional hearing. This has been moved to FCA § 712(g) by § 3 of the Act.
88. The Act § 9, adding FCA § 742.
89. The Act § 9, adding FCA § 743.
90. FCA § 746 has been substantially replaced by new FCA § 750(1), which was created by § 13 of the Act.
91. The Act § 11, amending FCA § 748.
92. The Act § 12, amending FCA §§ 749(d)(i), (ii).
93. The Act § 13, adding FCA § 750.
juvenile delinquent, and shall be used only at a dispositional hearing.\textsuperscript{94} New section 750(2) allows the reports to be made available to the respondent and his counsel and to counsel for the petitioner.\textsuperscript{95} Except in a DFA case, the court may except some parts from disclosure, but this must be noted on the record, along with reasons, and may be challenged.\textsuperscript{96}

The new section deals with cases where the juvenile has been found to have committed a DFA.\textsuperscript{97} It requires a probation investigation and diagnostic assessment that must include the history of the juvenile and his family, including past psychological and psychiatric reports, school adjustment, and any assistance provided by public or private agencies. An in-depth study of his mental and emotional status, including the nature and intensity of his impulses and controls, and of situational factors that may have contributed to his actions, must also be made.\textsuperscript{98} Expert opinion on the risk presented to himself and others shall be included where feasible.\textsuperscript{99} Section 750(4) provides that these reports are to be available to the court, counsel for respondent, and counsel for petitioner no less than five court days prior to the dispositional hearing. "The respective attorneys . . . have the right to examine the makers of all such [reports] . . . [and] to an adjournment for a reasonable time in order to produce additional evidence . . . ."\textsuperscript{100}

Section 14 amends section 752 by requiring that the order finding the juvenile a delinquent shall state the facts upon which the finding is based and that section of the penal law under which the act or acts would have been a crime.\textsuperscript{101} Further, "[i]f the [juvenile] is found to have committed a designated felony act, the order shall so state."\textsuperscript{102}

Section 16 renumbers section 753-a\textsuperscript{103} of the FCA and creates a new 753-a, the heart of the Act, that provides for the mandated minimum restrictive placement of those juveniles who have committed the serious and violent offenses listed in section 3.\textsuperscript{104}

\textit{Section 753-a}

Once it is determined that the juvenile has committed the DFA, the judge must decide, based upon a preponderance of the evidence,\textsuperscript{105} whether or not a restrictive placement is required. That decision must be grounded on the

\textsuperscript{94} The Act § 13, adding FCA § 750(1).
\textsuperscript{95} The Act § 13, adding FCA § 750(2).
\textsuperscript{96} Id.
\textsuperscript{97} The Act § 13, adding FCA § 750(3).
\textsuperscript{98} Id.
\textsuperscript{99} Id.
\textsuperscript{100} The Act § 13, adding FCA § 750(4).
\textsuperscript{101} The Act § 14, amending FCA § 752.
\textsuperscript{102} Id.
\textsuperscript{103} The Act § 16 renumbers FCA § 753-a to FCA § 753-b.
\textsuperscript{104} The Act § 3; see text accompanying notes 79-80 supra.
\textsuperscript{105} This standard remains true for the dispositional hearing. The Gault court indicated that the requirements of due process it was imposing on the adjudicatory phase did not necessarily apply to the dispositional phase as well. In re Gault, 387 U.S. 1, 13 (1967).
following criteria: "(a) the needs and best interests of the respondent; (b) the record and background of the respondent . . . ; (c) the nature and circumstances of the offense . . . ; and (d) the need for protection of the community." The judge must make specific written findings as to each of these elements within twenty days of the close of the dispositional hearing. Should he find that no restrictive placement is necessary, the entire range of dispositions provided for in sections 753(a)-(d) of the FCA is available. Should he find that a restrictive placement is required, the provisions of sections 753-a(3) and (4) go into effect. Section 753-a(3) mandates that when a restrictive placement is required for one who has committed a class A DFA, he shall be placed with the Division for Youth for an initial period of five years, the first year to be spent in a secure facility and the second in a residential facility. He may not be released or transferred during this two-year period. No motion for a new hearing or to stay the execution of, arrest, set aside, modify, or vacate the order of disposition may be made or granted pursuant to part six of the FCA Article 7 for the first year, except as provided for in section 440.10 of the Criminal Procedure Law. The juvenile may not be released after the initial two-year period without written approval of the director or deputy director of the Division for Youth. He may not be discharged from the Division's custody except by court order, which cannot be sought for three years. He "shall be subject to intensive supervision whenever not in a secure or residential facility," written reports shall be made to the court by the Division for Youth every six months, and, after a hearing, the placement may be extended, year by year until the respondent's twenty-first birthday.

Where the DFA was not a class A offense, the restrictive placement shall be for three years, the first six to twelve months in a residential facility. The other terms are substantially the same as for a class A DFA. Thus the juvenile may not be released or transferred during the initial period; no motion pursuant to part six may be made, heard, or granted during the first six months of

106. The Act § 16, adding FCA § 753-a(2).
107. The Act § 16, adding FCA § 753-a(1).
108. Id. For those dispositions, see text accompanying notes 51-56 supra.
109. The Act § 16, adding FCA § 753-a(1).
110. The Act § 16, adding FCA § 753-a(3)(a).
111. The Act § 16, adding FCA § 753-a(3)(b). § 440.10 of the Criminal Procedure Law permits the judgment to be vacated when it was illegally or unfairly obtained, or where new evidence not previously discoverable has come to light. N.Y. Crim. Pro. Law (McKinney 1975).
112. The Act § 16, adding FCA § 753-a(3)(c)(i).
113. The Act § 16, adding FCA § 753-a(3)(c)(ii). FCA § 764 permits a parent or guardian to petition the court for an order terminating placement or commitment upon a showing that they have made application to the agency holding the child and have been denied. § 20 of the Act adds to these provisions a line excluding DFA cases. The Act § 20, amending FCA §§ 764(a), (b).
114. The Act § 16, adding FCA § 753-a(3)(c)(ii).
116. The Act § 16, adding FCA § 753-a(4)(a).
117. FCA §§ 761 et seq. See notes 111 & 113 supra and accompanying text.
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placement; he may not be released without written approval; he will be subject to intensive supervision whenever not in a residential facility; written reports will be made every six months; and the placement may be extended until age twenty-one.\textsuperscript{118}

In both DFA and class A DFA situations, the court may make an order under section 760,\textsuperscript{119} dealing with respondents who are mentally ill and likely to do serious harm to themselves or others. The juvenile may be transferred to the temporary custody of the Department of Mental Hygiene for care and treatment while continuing to be under the restrictive placement of the Division for Youth.\textsuperscript{120}

Section 22 of the Act amends section 254 of the FCA to provide that, where a DFA has been alleged, the district attorney and the county attorney may enter into an agreement for the temporary assignment of assistant district attorneys to the county attorney or corporation counsel for the purpose of presenting the juvenile delinquency petition.\textsuperscript{121}

Section 27 amends Executive Law section 523 to bar release from the Division for Youth except as pursuant to section 753-a of the FCA.\textsuperscript{122}

Other sections of the Act provide for transfer "forthwith" of the court order, of probation reports and "all other relevant evaluative records" to the institution or agency in which a child is placed or committed;\textsuperscript{123} for the development of standards\textsuperscript{124} and regulations\textsuperscript{125} for restrictive placement facilities; and for cooperation among the Division for Youth, the Department of Education, the Department of Mental Hygiene, and the Division of Probation to implement the terms of the Act.\textsuperscript{126}

\textit{Impact on the Current System}

Essentially, the major changes wrought by the Act will be the possibility of substituting a criminal prosecutor for the county attorney as counsel for the petitioner; the detailed record-keeping at each stage of the proceeding; the curtailment of the wide discretion now enjoyed by the Probation and Division

\textsuperscript{118} The Act § 16, adding FCA § 753-a(4)(c).
\textsuperscript{119} FCA § 760.
\textsuperscript{120} The Act § 19, adding FCA § 760(2).
\textsuperscript{121} FCA § 254 has up to now reflected the view that prosecutors had no place in Family Court. Practice Commentary, supra note 44, at 185.
\textsuperscript{123} The Act § 21, adding FCA § 782-a. The Act § 26, amending N.Y. Exec. Law § 519(2) (McKinney 1972) provides that copies of all probation reports and other relevant records be delivered with the child or earlier to a person authorized by the Division for Youth to receive the child. Originally, the law required only notification of the Division, and the delivery with the child of the court order of adjudication and disposition. N.Y. Exec. Law § 519(2) (McKinney 1972).
\textsuperscript{124} The Act § 24, adding N.Y. Exec. Law § 515.
\textsuperscript{125} The Act § 25, amending N.Y. Exec. Law § 516 (McKinney 1972).
\textsuperscript{126} The Act § 29, adding N.Y. Educ. Law § 112; the Act § 30, amending N.Y. Mental Hygiene Law § 7.05 (McKinney 1976). The heads of these departments are directed to prepare a plan for presentation to the governor and the legislature before January 1, 1977. The Act § 31.
for Youth personnel over the processing and disposition of juveniles accused of serious violent crimes; and the imposition of continuity in judicial supervision.127

Currently, many of the personnel involved in these processes, and the techniques they use, are social-service, case-method oriented.128 As a result they tend to focus primarily on the treatment needs of the child rather than on punishment or the community's interest in protection. The altered purpose of the law, which for the first time explicitly directs the consideration of the safety of the community in any delinquency proceeding, will lend support to those who favor severe treatment of serious offenders. Thus juveniles will probably be treated more stringently.129

**Intake**

The requirement that each case involving a DFA be prominently marked, and that every subsequent action be committed to the record along with the reasons for it,130 virtually guarantees that the serious juvenile offender will not slip unnoticed and unchallenged through the system. It should also promote long and careful deliberation by intake and probation personnel because the crucial decisions they make will now be on the record and, therefore, subject to more detailed scrutiny by the court.

The near absolute discretion of Intake as to whether to file a petition will no longer exist. Before "adjusting" a DFA case, the written approval of a judge of the court must be obtained.131 This automatically sets apart the more serious cases, and further reduces the possibility that a violent offender will be overlooked because of a heavy work load or an understaffed bureau.

**Adjudication**

Once the petition is filed, it must be prominently marked as a "designated felony act petition."132 This will force attention to the nature of the offense at every subsequent step. The natural tendency to view the juvenile offender sympathetically as a misguided child will be balanced with the constant reminder that he is charged with such crimes as murder, rape, or arson.

The assignment of one judge to remain with a case through disposition, where possible,133 is a major shift from current practice, in which different judges may preside at each stage.134 The limit on adjournment of fact-finding hearings135 should mean quicker, more efficient processing of a case, improv-

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127. See notes 58-71 supra and accompanying text.
128. For a discussion of the usual social-service background of most personnel in the juvenile justice system, see Johnson, supra note 19, at 56-57.
129. For a discussion of the possible effect of a child-oriented focus on decision-making, see Dembitz-N.Y.L.J., supra note 14, at 2, col. 3.
130. See text accompanying notes 83, 91, 96 supra.
131. See text accompanying note 84 supra.
132. See text accompanying note 83 supra.
133. See text accompanying note 88 supra.
134. See text accompanying note 65 supra.
ing the likelihood that all pertinent data and personnel will be available to aid in more effective decisions. Where the district attorney becomes involved in a DFA case, the result should be more effective prosecution, given his proficiency with criminal cases. The district attorney's presence should also serve to emphasize the serious nature of the offense. Taken as a whole, the Act's provisions make only minor changes in the fact-finding process, but the overall effect may be harder on the juvenile.136 His needs will be balanced by the community's need to be protected from him, and, in the less one-sided hearing,137 his advocates will have to offer more justification than formerly for exoneration.

Disposition

Most of the Act's changes concern the dispositional hearing, the pre-disposition reports, and the actual dispositions available.

Currently, the court's use of probation reports and assessments is fairly common, but nothing in the law requires them.138 When the FCA was passed, there was still some controversy over how much of the information in the reports should be made available to the respondent. Drafters of the FCA were influenced by concern that a child could be damaged by knowledge of the contents of psychological or other reports, and that relatives, teachers, neighbors, and other sources of information might be reluctant to be quoted if they knew the subject had access to the reports.139 To prevent the reports from becoming either a danger to the child or a meaningless superficiality, they left it up to the court's discretion to decide—if such reports are used—how much should be disclosed.140 The Act expands this by providing that if reports are made to the court, they shall be disclosed to the respondent.141 If the court wishes to keep some parts confidential, this fact must be disclosed and explained.142 If the respondent receives the reports, they must be made available to counsel for the petitioner,143 an aspect unmentioned in the FCA heretofore. The new law still does not require the use of such reports in ordinary delinquency cases.144 Since the same practical factors (lack of time, money and personnel) that now inhibit the universal use of such reports145 will still exist, the frequency of use in non-DFA cases may or may not be affected by the increased importance given them in DFA cases, where their use has been made mandatory. In the latter situations, the Act, for the first time, not only requires

135. See text accompanying note 92 supra.
136. For evidence that delay in the past has been to the benefit of the juvenile, see D. Besharov, Juvenile Justice Advocacy § 3.4.2 at 59 (1974).
137. See text accompanying notes 61-63 supra.
138. See note 47 supra.
139. Dembitz-Cornell, supra note 29, at 516-17.
140. FCA § 746(b), repealed by the Act § 10.
141. The Act § 13, adding FCA § 750(2).
142. Id.
143. Id.
144. The Act § 13, adding §§ 750(1), (2).
145. See text accompanying note 64 supra.
the use of these tools, but also specifies what they must contain. Moreover, it recommends that expert opinion be obtained as to the risk posed by the juvenile, and mandates that all reports, and their makers, be available to both respondent and petitioner. This should result in more detailed investigations and more thoughtful assessments, but will be subject to the same limitations as currently apply unless additional funds and facilities are supplied in order to provide for the quality of work that the law seems to require.

A significant addition of the Act is the provision for input from counsel for the petitioner by providing him with written notices of all dispositional hearings and the opportunity to participate. He will now have the same information as the judge and the right to present rebuttal evidence and offer reappraisals of the availability and effectiveness of suggested dispositions where necessary. The inclusion of projections as to the risk involved in any disposition will offer opportunity to argue the safety of the community as a compelling factor in any decision on requiring a restrictive placement.

This decision is the last major point of judicial discretion, since once it is decided that such a placement is necessary, the actual disposition is mandated; but the traditional flexibility and individualization of the juvenile justice approach can still be maintained up to that point.

Sentencing has usually been individualized to the juvenile and his needs, regardless of the offense. Although the new law is aimed at limiting that discretion where a serious violent offense is involved, the judge may still decide that in a particular case restrictive placement is not required. Although there are criteria for this decision written into the law, how much weight is given to each will still be a matter of judicial discretion, allowing the judge to decide against restrictive placement where circumstances have persuaded him that lesser dispositions would be more appropriate. The requirement of detailed written justifications for every element of the decision may make for more cautious decisions but should not overly inhibit judicial freedom to choose the most effective disposition for the particular child.

Once restrictive placement is decreed, the broad control of the Division for Youth over the actual implementation of any disposition is at an end. Currently, despite the terms set by the Family Court, the Division can release or transfer a juvenile from a secure or non-secure facility at any time without

146. See note 98 supra and accompanying text.
147. The Act § 13, adding FCA § 750(3).
148. See note 100 supra and accompanying text.
149. See text accompanying note 64 supra.
150. See text accompanying notes 95 & 100 supra.
152. The Act § 16, adding FCA § 753-a(1).
153. See text accompanying note 106 supra.
154. The Act § 16, adding FCA § 753-a(1).
having to consult or notify the court, or justify the action by showing that the juvenile has been rehabilitated or the purpose of the disposition has been achieved.\textsuperscript{155} This unreviewable discretion has been replaced with judicial control of the terms, the setting, and the conditions of confinement. The court must also be kept informed at regular intervals of the juvenile’s progress and must be involved in subsequent decisions to extend placement, discharge from custody, or transfer to or from the Department of Mental Hygiene.\textsuperscript{156} At the very least this should bring about more carefully considered decisions whether to release the violent juvenile into society. Whether these measures will succeed in reducing violence and protecting society is another matter.

One of the oft-cited flaws in the current system is its inability to filter out the minor offender from the serious criminal, and give the latter the special handling his problems and offenses require.\textsuperscript{157} The currently available dispositions offer little in the way of meaningful treatment for the offender or effective protection for the community.\textsuperscript{158} Despite its reliance on the principle that juveniles are incapable of criminal responsibility, and therefore all offenses are really only the single one of “juvenile delinquency,”\textsuperscript{159} the law has recognized that more “adult” crimes require special treatment. Thus, under the old law, juveniles could be sentenced to prison for serious crimes.\textsuperscript{160} However, in the entire state in 1973-74, only ten juveniles were so sentenced.\textsuperscript{161} This may reflect a reluctance to sentence children to adult criminal company,\textsuperscript{162} or may indicate problems with enforcing an adult sentence arrived at without a jury trial.\textsuperscript{163} It certainly does not reflect the true incidence of serious crime among juveniles.\textsuperscript{164}

The restrictive placement provisions of new section 753-a would seem to impose at least a comparable length of confinement while avoiding those factors that inhibited sentencing under the current section 758(b). Whether the

\begin{itemize}
  \item \textsuperscript{155} Dembitz-N.Y.L.J., supra note 14, at 2, col. 1.
  \item \textsuperscript{156} See notes 113-18 supra and accompanying text.
  \item \textsuperscript{157} Gottfried Report, supra note 17, at 5-6.
  \item \textsuperscript{158} See, e.g., Joint Report, supra note 64, at 22-24; Gottfried Report, supra note 17, at 5; Guggenheim, supra note 13, at 4, col. 3; N.Y. Times, April 11, 1976, at 42, col. 3.
  \item \textsuperscript{159} See text accompanying notes 37-39 supra; A. Hechtman, Practice Commentary to N.Y. Penal Law § 30.00 (McKinney 1975).
  \item \textsuperscript{160} See note 51 supra.
  \item \textsuperscript{161} Guggenheim, supra note 13, at 4, col. 4, n.9.
  \item \textsuperscript{162} One of the overriding concerns of all juvenile reformers has been the mixing of young offenders with older “hardened” criminals. See text accompanying notes 20-25 supra. Today this is reflected in the provisions of the Federal Juvenile Justice and Delinquency Prevention Act of 1974, 18 U.S.C. § 5039 (Supp. V 1975), for the segregation of serious criminal offense delinquents from adult offenders.
  \item \textsuperscript{163} Courts have been reluctant to enforce dispositions under the current provisions of FCA § 758(b) that would commit a youth to the adult Department of Corrections when the adjudication was made by a judge alone. Rice v. Cory, 73 Misc. 2d 813, 342 N.Y.S.2d 510 (Sup. Ct. 1973); In re S., 77 Misc. 2d 194, 352 N.Y.S.2d 808 (Fam. Ct. 1974); contra, In re Garrett, 74 Misc. 2d 961, 346 N.Y.S.2d 651 (Fam. Ct. 1973).
  \item \textsuperscript{164} See text accompanying notes 4-5 supra.
\end{itemize}
mandated minimum is sufficient is another issue. Advocates of an alternative proposal argued for adult treatment of juveniles, based on the adult nature of the offense, and the presumably greater penalties available in the adult criminal code.

This is done in many other states either by excluding certain offenses from juvenile court jurisdiction, or by allowing the court to waive its jurisdiction in certain circumstances. Transferring such cases to adult courts, whether it be done through exclusion or waiver, reflects a realization that chronological age alone is no standard for measurement of the degree of danger represented by certain offenders. One commentator has seen in this practice a basic mistrust of the juvenile court's ability to handle serious young offenders and a lack of commitment to the primacy of rehabilitation over punishment, at least in regard to serious criminal offenders.

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165 Hecht Bill, N.Y.A. 10340-A (1976). The bill's principal sponsor was Assemblyman Burton G. Hecht.

166. For the views of Assemblyman Hecht, State Senators Donald M. Halperin and Ralph J. Marino, see Treaster, Juvenile Criminals an Increasing Problem, N.Y. Times, May 25, 1976, at 22, col. 3. For an argument that adult treatment will not result in longer sentences for juveniles, see Guggenheim, supra note 13, at 4, col. 2. For an example of a situation where the Family Court dealt more severely with a 14 year-old mugger than the adult court did with his 16 year-old partner-in-crime, see N.Y. Times, April 11, 1976, at 42, cols. 6-8.


169. The waiver of jurisdiction has serious implications for the juvenile. In the juvenile court, he is shielded from publicity, rarely jailed with adults, may be confined only to age 21, and does not lose his civil rights. Thus, the Supreme Court has ruled that he is entitled to a waiver hearing. Kent v. United States, 383 U.S. 541, 556-57 (1966). While the Kent court suggested extensive criteria for deciding to waive jurisdiction, id. at 566-67, in general practice, most courts seem to rely on the seriousness of the offense and the past history of the juvenile. Davis, supra note 19, at 114. Although New York does not use waiver, these criteria and the type of decisions called for—I.e., is the offender amenable to treatment or rehabilitation as a juvenile or does his nature and the nature of his offense require more severe methods—are not unlike those called for in new FCA § 753-a.

In most states, the maximum jurisdictional age is 18 or higher, Davis, supra note 19, at 8, and the transfer procedure presumably reflects the belief that older youths who commit serious crimes are not appropriate candidates for juvenile treatment. Id. at 106. New York, with its uniquely low age limit, Guggenheim, supra note 12, at 4, col. 1, accomplishes much the same result by the Youthful Offender Law, whereby a youth over 16 is tried in adult court but, if granted Youthful Offender status, receives many of the benefits of juvenile treatment. N.Y. Crim. Pro. Law §§ 720 et seq. (McKinney 1971), as amended, (McKinney Supp. 1975).

170. E.g., the view of State Senator Ralph J. Marino that "the determination of maturity should be based on the seriousness of the crime and not an artificial chronological age. A kid who commits rape is not a child," in Treaster, Juvenile Criminals an Increasing Problem, N.Y. Times, May 25, 1976, at 22, col. 3-4.

171. Davis, supra note 19, at 33-34.
Referring juveniles to adult courts results in confining juveniles to adult correctional facilities, a practice which is in general disfavor. It has been recognized that placing "children with . . . sophisticated adult offenders, and the delinquent status which comes from familiarity with jail and adult criminals tends to strengthen delinquent values and attitudes and thus increase the likelihood of repeated delinquent offenses by the juveniles when released."\textsuperscript{172} One authority on juvenile crime has expressed the view that a term in adult prison would return to the streets an angrier, more hostile youth who would pose an even greater threat to the community than before incarceration.\textsuperscript{173}

New York, through the Act, has adopted a compromise. Although the Family Court retains exclusive jurisdiction over those under sixteen, the mandated minimum sentences do reflect the influence of proponents of longer sentences and terms more directly related to the magnitude of the offense\textsuperscript{174} and the concern of many juvenile authorities that confinement be of sufficient length to allow efforts at rehabilitation a chance to work.\textsuperscript{175}

In any case, the length of sentence may not be of as much importance as its certainty. Unrealistically high sentences in past laws have often resulted in "nullification" when courts refused to impose them.\textsuperscript{176} When an offender can judge that the risk of any real penalty is slight, the deterrent effect of high "paper" penalties is lost.\textsuperscript{177} Thus, the relatively short sentences of restrictive placement—if imposed with consistency, and if applied with the full panoply of rehabilitative techniques and the corrective measures that the Act directs the Division for Youth and the State Departments of Education and Mental Hygiene to employ\textsuperscript{178}—may prove effective against the violent juvenile.

**CONCLUSION**

In passing this Act, the New York State legislature has acted under the combined influence of great public pressure for protection from increasingly violent youths, and the overwhelming evidence that the present system is serving neither the youth nor the community. Demands for reform from advocates of the mishandled youth have had to be reconciled with the legitimate demands of a frightened public. It is noteworthy that even those most committed to the cause of youth recognized the need for more effective

\textsuperscript{172} P. Hahn, The Juvenile Offender and the Law 343 (1971).

\textsuperscript{173} N.Y. Times, April 30, 1976, at B5, col. 1.

\textsuperscript{174} See note 166 supra.

\textsuperscript{175} Dembitz-N.Y.L.J., supra note 14, at 2; Joint Report, supra note 64, at 15-16. Other authorities concur on the length of sentence prescribed. In its projected "blue print for reform" of the juvenile justice system the Juvenile Justice Standards Project will recommend that dispositions be made according to the gravity of the offense and the age and prior record of the individual, rather than solely on the "needs" of the child; and that fixed terms of no more than two years be set for juveniles. Kaufman, Of Juvenile Justice and Injustice, 62 A.B.A.J. 730, 732-33 (1976).

\textsuperscript{176} The Twentieth Century Fund Task Force on Criminal Sentencing, Fair and Certain Punishment 15-18 (1976).

\textsuperscript{177} Id.

\textsuperscript{178} For an analysis of the support services needed in the view of one group that studied the system, see Joint Report, supra note 64, at 22-24.
measures of dealing with the violent youth. There still exists, however, a fundamental divergence in viewpoint over the prime purpose of a juvenile system. Is it to help and treat unfortunate youth, or is it to punish young criminals? Thus one can speculate on whether this Act is a mere first step toward increasingly harsher treatment of increasingly more vicious juvenile criminals or a sop thrown by the “bleeding-hearts” to the “hard-liners” in hopes of holding off further encroachment on the “socialized” ideal of the juvenile system. The answers to these questions are difficult to determine since the Act seems in large measure to be a compromise of these conflicting views. There is a sense of reluctant acquiescence to be detected in the support given the Act by some juveniles advocates, a feeling that if something must be lost to the more militant view, this is the least noxious alternative. Conversely, the advocates of sterner measures seem to be taking a “wait and see” attitude before pressing for further revision of the penalty provisions.

Viewed from the outside perspective of a potential crime victim, the penalties of a two or three year “restrictive placement” will seem woefully inadequate measured against the offenses of murder, rape, manslaughter, and kidnapping. But viewed against the reality of the current operation, as revealed by the legislative investigation and the experience of those working in the juvenile system, the structure and controls imposed by the Act have the potential for major, meaningful improvements. The combination of those controls and a mandatory penalty, even of relatively brief duration, should bring about substantial improvements in the problem of the seriously violent juvenile. Whether the Act can achieve its goal of satisfying the need for stronger penalties without sacrificing the special nature of juvenile treatment, however, will depend on how quickly it makes an observable impact on the juvenile crime picture.

Margaret Holihan

179. Id. at 2-5.
180. N.Y. Times, June 26, 1976, at 48, cols. 5-8; interview with Andrew Schoenbeck, legislative aide to Assemblyman Burton G. Hecht, June 29, 1976.
182. Dembitz-N.Y.L.J., supra note 14, at 2; Guggenheim, supra note 13, at 4, cols. 2-5.