

Cheryl L. Kates Esq.

**Criminalization of Violent Juvenile Offenders:**  
Issues They Face Within the Administration of Justice

**CRIMINALIZATION OF VIOLENT JUVENILE OFFENDERS:**

Issues They Face within the Administration of Justice.

**ABSTRACT**

The criminalization and incarceration of juvenile offenders for violent crimes and their transfer into the adult prison population has created distinct issues for criminal justice administrators and agencies entrusted to administer their punishment and evaluate their suitability for re-entry into society. Can we treat juvenile offenders under the same guidelines as adult offenders and still maintain a fair, just, and equal system of justice? Or do issues such as the development of physical and mental characteristics distinguish the juvenile offenders from adult offenders evaluating criminal culpability? When evaluating juvenile offenders for their suitability for re-entry into society should they be held to the same standards of adult offenders?

## **ISSUE STATEMENT**

The criminalization and incarceration of violent juvenile offenders as adults and their transfer into the adult prison population has created distinct issues for criminal justice administrators and agencies entrusted to administer their punishment and evaluate their suitability for re-entry into society.

## **INTRODUCTION**

In 2004, 2.1 million people were incarcerated in the United States (Mauer, 2004). Between the years of 1984-1992, violent crime rose an astonishing 40% (King, Mauer & Young, 2004). These trends contributed to the nations get tough on crime agenda. Unfortunately, a large portion of the increased violent crime rates between the years 1984-1994 was attributable to juveniles (Ruth & Reitz, 2003). The country as a whole has shifted in its trends of incarceration, and now tend to invoke serious punishments for those convicted of violent crimes, even if they were juveniles (Macallair, 2008). This is a result of the rise of conservative political policies and the belief deterrence is accomplished through harsh sentencing (Macallair, 2008).

Sentencing laws in New York State were revised in 1978, eliminating the defense of infancy for individuals charged with violent crimes who were 13 years of age and above (NYS Board of Parole, 1981). The original intent of juvenile courts was to establish a separate system allowing judges to address the needs of each juvenile before it (Ruth & Reitz, 2003). The idea was to allow the system to try to rehabilitate juveniles, correcting the family problems that may have contributed to the situation and salvage them before they become adult offenders (Ruth & Reitz, 2003).

At least 40 states passed laws between the years of 1992-1995, making it easier to try juveniles as adults (King, Mauer & Young, 2004). Juveniles began to be sentenced in criminal courts as opposed to family courts along with adult offenders.

A juvenile offender as defined by Black's Law Dictionary is: "a juvenile who has committed a crime and is tried as an adult rather than as a juvenile" (Black's Law Dictionary, 1996). In NYS, juveniles convicted of A-1 felony, Murder in the second degree receive a sentence with a minimum of between 5 and 9 years if they were 13, 14, or 15 at the age of commission (Hayes, 2007). The maximum sentence would be life (Hayes, 2007). Children convicted of Murder in the second degree who are over the age of 15 receive a sentence with the minimum between 15-25 years the maximum of life (NYS Board of Parole, 1981).

Children who are sentenced in this manner are remanded to the NYS Division of Youth (NYS Board of Parole, 1981). The Division of Youth in their discretion transfers children in their care over to the NYS Department of Corrections when they are between the ages of 16-21(NYS Board of Parole, 1981). All must be transferred by age 21( NYS Board of Parole, 1981).

In 1977, parole was separated form the Department of Corrections becoming a separate entity (NYS Bar Association, Professor Gentry, 2007). At this time parole established a set of guidelines that were intended to guide parole commissioners when evaluating an individual for parole release (NYS Bar Association, Professor Gentry, 2007). In 1985, the guidelines were revised indicating the purpose for the guidelines was to ensure consistency, and predictability (NYS Bar Association, Professor Gentry, 2007).

The NYS Board of Parole is entrusted with evaluating all inmates applying for discretionary release after serving their minimum sentence (NYS Board of Parole, 1981). These decisions are governed by NYS Executive Law 259 (i) (NYS Board of Parole, 1981).

NYS Executive Law 259 (i) (c) (4) requires the NYS Board of Parole to use separate criteria for juvenile offenders (NYS Board of Parole, 1981). This criteria uses a different point system to evaluate the minimum guidelines for offenders which is used as a discretionary indication of the suitable amount of time for imprisonment for offenders based on certain factors (NYS Board of Parole, 1981).

In NYS, the issue that has been presenting, once juveniles are being transferred into the adult correctional setting they are being lost in the system. Former parole commissioner Vernon Manley indicated, parole boards are treating juveniles just like they were adults (NYS Bar Association, Manley, 2007). Manley remarked despite the fact he distributed articles showing the difference in brain development his colleagues continued they continued to hold juveniles to the same standard as that of an adult offender (NYS Bar Association, Manley, 2007). This policy results in lengthy incarceration for juveniles with violent crimes.

This issue is not receiving much attention as in NYS the juvenile offenders represent a small proportion of offenders incarcerated in the NYS Department of Corrections. Currently of the 63,304 inmates in NYS prisons in 2007, only 236 of them were juvenile offenders. An additional, 932 were adjudicated youthful offenders (Bernstein, 2007).

The issues presented spans between juveniles being sentenced as adults and how they are treated once they enter the correctional system with adults. This issue is of importance as juveniles have distinct issues surrounding their criminality. These issues have to be recognized when administrating criminal justice. Juveniles as a class differ from adult offenders. Treating them the same as adult offenders and extending their punishment beyond what was intended is a problem the system currently faces with Parole Boards once juvenile offenders are transferred into the adult prison population.

Scientific evidence proves that juveniles mind development is different than an adult offender. Criminal Justice professionals must weigh in this factor when evaluating juvenile offenders and their readiness for release to maintain a fair justice system.

**LITERATURE REVIEW**  
**SUBTOPIC ONE: HISTORY OF JUVENILE OFFENDER SENTENCING,**  
**THEORIES OF PUNISHMENT.**

Classical criminal justice theorists rely on the theory wherein humans are rational beings who possess free will and choice (Onwudiwe, 2004). Therefore, they must be held accountable for their actions (Onwudiwe, 2004). Relying on the classical approach, Onwudiwe points out the focus of criminal justice should be deterrence, incapacitation, and retribution (Onwudiwe, 2004).

Positive theorists focus more on rehabilitation and treatment believing delinquency in children is not a result of totally their own actions, but biological and cultural factors playing a significant role (Onwudiwe, 2004).

NYS prior to 1978, prosecuted juveniles in family court (Carrierio & Hamanjian, 2008). In 1978, the Juvenile Offender Law was passed allowing children aged 13 and up to be prosecuted in the adult courts when accused of committing Murder (Carrierio &

Hamanjian, 2008). Additional crimes for 14 year olds were allowed to be prosecuted in adult courts such as Robbery, and Assault (Carrierio & Hamanjian, 2008). Based on this system, the excuse of infancy was erased and the children are now faced with the stigma of a criminal record and incarceration similar to that imposed upon adults (Carrierio & Hamanjian, 2008).

Sentencing in New York further changed with the enactment of the Sentencing Reform Act of 1995 requiring certain sentences for repeat offenders and violent offenders, eliminating some aspects of parole, and toughening release procedures for violent felons (NYS Sentencing Commission, 2007). Nationally federal grant money was offered to states that increased the incarceration rates of violent felons (NYS Sentencing Commission, 2007). NYS collected almost 53 million dollars under the truth in sentencing grants being offered (NYS Sentencing Commission, 2007). The atmosphere then and continuing now is that violent felony offenders must be punished harshly. It does not seem to matter whether they are adult or juvenile offenders.

The philosophies of punishment indicate what the aim of the particular sentence should be (Reichel, 2001). Deterrence is the thought wherein a particular punishment will deter the criminal from committing further crimes and will deter others from committing crimes (Reichel, 2001). Incapacitation is the philosophy in that by incarcerating someone they cannot commit more crimes (Reichel, 2001). Rehabilitation is the philosophy in which an offender is provided programming to better themselves and prepare for re-entry to society as a law abiding citizen (Reichel, 2001). Retribution is the philosophy wherein the offender is punished for committing the crime (Reichel, 2001).

## **SUBTOPIC TWO: JUVENILE OFFENDERS VS. ADULT OFFENDERS: SOCIAL FACTORS, CRIMINAL CULPABILITY & DEVELOPMENT**

### **SOCIAL FACTORS**

In trying to analyze the increased trend in juvenile violence, scientists are beginning to conclude violent tendencies begin in the brain (Wiley, 2008) Criminologists have begun to try to identify the roots of juvenile delinquency. A fundamental issue being examined is the dysfunctional family (Onwudiwe, 2004). Examination has focused on societal problems such as teen pregnancies, single-parent households, drop out rates, poverty, substance abuse, physical and sexual abuse as predictors of delinquency later in life (Onwudiwe, 2004).

Statistics indicates: a child is abused every 36 seconds; (Edelman, 2008, p.32). Children that live in homes with incomes of less than \$15,000 are more than 22 times as likely to be neglected (Edelman, 2008, p. 32). Every minute a child is born to a teen mother (Edelman, 2008, p.32).

Children born into poverty are being deprived of basic needs; good food, shelter, and stability (Canada, 2008). Risk factors for children in poverty include being exposed to failing neighborhoods, deficient public schools, increased exposure to gangs and criminality right outside their doors (Canada, 2008).

Absent parents, or positive role models could contribute to the problem. 1.5 million children have a parent in prison (Mauer, 2004). African-American males currently have a risk that 1 in 3 will spend time in prison during their lifetime (Mauer,



2004). Children with an incarcerated parent have a risk factor of being 6-9 times more likely than children without an incarcerated parent to serve time in prison (Canada, 2008)

Some research indicates that victims of violence as youth have a tendency to become repeat offenders in the criminal justice system, are arrested at earlier ages, and are more likely to engage in crimes of violence (Fagan, 2005). Fagan reports in the analysis, there was a highly significant relationship between physical abuse and involvement in crime (Fagan, 2005, p.283).

### **CRIMINAL CULPABILITY AND DEVELOPMENT**

Recent developments in legal and psychological theory indicate an adolescent mind is not developed to have the same criminal culpability of that of an adult. Dr. Ruben Gar, a neuropsychologist and the director of the Brain Behavior Lab at the University of Pennsylvania indicated:

“The evidence is strong the brain does not cease to mature until the early 20’s in the relevant parties of the brain that govern impulsivity, judgment, planning for the future, foresight of consequences and other characteristics that make people morally culpable” (ABA, 2004).

Other researchers have found through the study of MRI studies of an adolescent brain, the frontal lobe, the part of the brain that controls aggression, long-range planning, mental flexibility, abstract thinking and moral judgment is not developed fully in those in adolescence. There is a late phase of development of myelin formation indicating there is a neural basis for assuming teens are less blameworthy than adults for criminal acts (ABA, 2004, Brower, 2004).

These theories are filtering into the legal analysis of whether an adolescent is morally culpable for criminal acts. In analyzing whether a mentally retarded person should be executed, the Supreme Court recognized there was a different level of

culpability due to the lack of development in the brain, Atkins v. Virginia, 536 U.S. 304 (2002).

Further arguments also state that adolescents do not have the same level of moral culpability, Roper v. Simmons , 543 U.S. 557 (2005). Evidence submitted by various sources indicated the above research. The court held American society viewed juveniles as categorically less culpable than the average criminal. They provided three reasons: 1. The lack of maturity and an underdeveloped sense of responsibility were found in youth more often than adults and were more understandably among the young; 2. Juveniles were more vulnerable or susceptible to negative and outside pressures including peer pressure and 3. The character of a juvenile was not as well formed as that of an adult, Roper id.

Riley indicates brain development begins within the womb (Wiley, 2008). Prenatal exposure to toxins such as exposure to alcohol, drugs and or nicotine may have an adverse affect on the child's brain development (Wiley, 2008). Experiences once born that include abuse, neglect, domestic violence etc., affect both the structural development and chemistry development in the brain of children (Wiley, 2008). Wiley notes that children exposed to these types of environments often develop post traumatic stress disorder (Wiley, 2008). This syndrome is often mistaken for other issues such as attention deficit, learning disabilities or other psychological diagnosis given to children (Wiley, 2008).

An additional study examines the association of head injury to violent offending in youth, surprisingly drawing an association with injuries to the frontal lobe being associated with future aggressive and violent behavior (Kenny, & Learnings, 2007). It

should be noted that physical abuse can be attributed to 95% of the head injuries suffered by children (Kenny, & Learnings, 2007).

Modecki, indicates juveniles lack judgmental maturity to make decisions in the same manner as adults (Modecki, 2008). Age brained maturity does not occur completely until an individual has reached their mid-twenties (Modecki, 2008). This research focused on the pre-frontal lobe area of the brain (Modecki, 2008). During the development of the frontal lobe, adolescents use the basal ganglia as an alternative for decision making (Modecki, 2008). Adolescent decision making made in a different area of the brain is influenced by societal and environmental factors (Modecki, 2008). Adult decisions affected by the same differ in that their decisions are thought to be of their own choices (Modecki, 2008). Researchers have indicated three factors that occur in adolescent decision making that does not occur in the decision making of adults: the ability to act independent and be self-sufficient, the ability to evaluate a situation before acting, and the ability to consider different view points when making decisions (Modecki, 2008, p.3).

Adolescents tend to be more effected by peers influence, seeking of sensations, and future time perspective (Modecki, 2008). This research indicates that a lower level of culpability should be present when looking at juveniles in that their brains are less developed than their adult offender counterparts (Modecki, 2008).

## **JUVENILE DEVELOPMENT PERTAINING TO ADJUDICATION**

This decision making process weighs in not only in the adolescents ability to be held fully accountable for their crime but in their decision making processes during their prosecution. Children tend to follow their parent's advice during the course of a criminal prosecution (Young, 2004). They look to their parents for guidance and may ignore advice given by an attorney if their parents disagrees (Young, 2004). Children do not fully understand the consequences of their acts (Young, 2004).

Due process requirements require criminal defendants are competent to stand trial with the ability to assist counsel, to understand the nature of the proceeding, and to make decisions regarding the proceedings (Grisso, Steinberg, Woolard, Cauffman, Scott, Graham, Lexcen, Repucci, & Schwartz, ). As indicated above, with the lack of developmental brain activity an adolescent is at a disadvantage when compared to an adult offender to stand trial. They often enter into plea bargains which must be made knowingly, intelligently, and willingly. These pled out sentences often incorporate a maximum sentence of life. Adolescents tend to often also make poor decisions when confronted with police investigating their crimes wanting to cooperate with authorities often giving confessions before consulting with attorneys and or parents (Grisso, Steinberg, Woolard, Cauffman, Scott, Graham, Lexcen, Repucci, & Schwartz, ).

**SUBTOPIC THREE: RELEASE GUIDELINES, TRANSFER TO ADULT FACILITIES, RE-ENTRY**

As indicated in NYS children sentenced for violent crimes are housed at the NYS Division of Youth (NYS Board of Parole, 1981). They are transferred to adult prisons when they are between the ages of 16-21 (NYS Board of Parole, 1981). Once an inmate serves their minimum sentence, they are eligible to be considered for parole release (NYS Board of Parole, 1981).

In NYS as indicated NYS Executive Law outlines the procedures for parole release consideration. NYS Executive Law states:

NYS Executive Law § 259 (i) (2) (c) (a)

“Discretionary release on parole shall not be granted, merely as a reward for good conduct or efficient performance of duties while confined but after considering if there is a reasonable probability that, if such inmate is released, he will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society and will not so deprecate the seriousness of his crime as to undermine respect for the law.” The Parole Board shall consider:

- (I) The institutional record including program goals and accomplishments, academic achievements, vocational, educational, training or work assignments, therapy and interpersonal relationships with staff and inmates;
- (II) Performance, if any, as a participant in a temporary release program;
- (III) Release plans including community resources, employment, education and training and support services available to the inmate;
- (IV) Any deportation order issued by the federal government against the inmate while in the custody of the Department of Correctional Services and any recommendation regarding the deportation made by the Commissioner of the Department of Correctional services pursuant to Section One Hundred Forty-Seven of the Correction Law;
- (V) Any statement made to the Board by the crime victim or the victim’s representative, where the crime victim is deceased or is mentally or physically incapacitated. The Board shall provide toll-free telephone access for crime victims. In the case of an oral statement made in accordance with subdivision one of Section 440.50 of the Criminal Procedure Law, the Parole Board member shall present a written report of the statement to the crime victim’s closest surviving relative, the committee or guardian of such person, or the legal representative of any such person. Such statement submitted by the victim or victim’s representative may include information concerning, threatening or intimidating conduct towards the victim, the victim’s representative, or the victim’s family, made by the person sentenced and occurring after the sentencing. Such information may include, but

not be limited to, the threatening or intimidating conduct of any other person who or which is directed by the person sentenced.” NYS Executive Law § 259 (i) (2) (c) (a)

The Board must also consider:

“(1) Seriousness of the offense with due consideration to the type of sentence, length of sentence, and recommendations of the sentencing court, the district attorney, the attorney for the inmate, the pre-sentence report as well as any other mitigating factors and activities following arrest and prior to confinement.

(2) Criminal history, including nature and pattern of offenses, adjustments to previous probation and parole and the adjustment to confinement”. NYS Executive Law § 259 (i) (1) (a)

The NYS Board of Parole has adopted separate guidelines for Juvenile Offenders which also must be considered. Guidelines are calculated to give the Commissioners a discretionary figure established in months in which they can judge a certain crime and a suggested punishment for that crime based on months incarcerated. The Juvenile

Guidelines are:

Juvenile Offender Guidelines:

A “Juvenile Offender is:

2. A person 14 or 15 years old who is criminally responsible for acts constituting the following crimes:

(a) Murder in the second degree”. (NYS Board of Parole, 2005).

“Separate Juvenile Offender Parole Release Decision Making Guidelines are used by the Board to assist the release decision”. (NYS Board of Parole, 2005).

Guideline Information:

“Offense score: The offense consists of three items; a. felony class of the conviction, b. weapon possession, c. forcible contact. A score is calculated on each of these items, and then the score is added together to get a total offense score. The higher the score the more serious the offense rating”. (NYS Board of Parole, 1981).

“In the calculation of the release guideline range the highest felony class of conviction regardless of who imposed the minimum would be used”. (NYS Board of Parole, 1981).

B. “Weapon Possession-This item concerns whether or not a weapon was used in the offense as described in the pre-sentence report”. (NYS Board of Parole, 1981).

C. "Forcible Contact-The purpose of this item is to indicate the amount of force used in the offense or the extent of the physical injury sustained by the victim". (NYS Board of Parole, 1981).

"Total Offense Score-Add up the points assigned for the three offense related items and record the score." (NYS Board of Parole, 1981).

"Prior Criminal History-The prior criminal history score consists of three items:  
a. number of JO adjudications within the last three years, b. number of prior JO adjudications for violent a, b, and c felonies within the last three years, and c. youth's status when the current offense was committed".(NYS Board of Parole, 1981).

"Advisory Juvenile Offender Guideline Matrix-Offense severity score of 8-9 and Youth's prior record score of 0 = 36-60 months. Offense severity score of 8-9 and youth's prior record score of 1-2 moderate = 48-72 months. Offense severity score of 8-9 and youth's prior record of 3 or more serious= 60-108 months". (NYS Board of Parole, 1982).

The focus of Aaron Kupchik's article was to analyze data received from inmates examining correctional experiences (Kupchik, 2007). The study encompassed gathering data from inmates from 5 different correctional facilities in a Northeastern state (Kupchik, 2007). The study mixed inmates who were incarcerated in adult and juvenile facilities (Kupchik, 2007).

In comparison, Kupchik found the juvenile facilities placed a larger focus on treatment, counseling, education and mentoring than the adult facilities (Kupchik, 2007) Kupchik came to this conclusion by analyzing the policies of such institutions (Kupchik, 2007).

The conditions of the juvenile facilities seemed to also be more mindful of safety having a lower inmate to staff ratio (Kupchik, 2007). The ironic thing was despite these factors the inmates placed at adult facilities reported they had better access to programming than their juvenile counterparts (Kupchik, 2007).

It has been indicated that younger inmates often cause increased security risks and create more disturbances and or violent conduct than their adult counterparts (Kupchik, 2007). Housing youth in adult prisons also creates the additional problems of security for adult prisons to protect the youth's vulnerable state (Kupchik, 2007).

Myers points out that sending youth to adult facilities may be counterproductive to rehabilitating them (Myers, 2005) He contends the youth may be further corrupted through interactions with more experienced criminals (Myers, 2005). Meyers indicates transferring youth to adult facilities is bad practice in that the adult facilities are unprepared to deal with their special needs(Myers, 2005) Myers indicates adolescents are at different stages than adults mentally, physically and emotionally ( Myers, 2005) Myers points out adult facilities are plagued with issues of overcrowding, and limited programming opportunities (Myers, 2005). His views are contrary to those of Kupchik's. Carrierio & Hamanjian point out incarcerating youth along with adults may have an adverse affect on deterring crime and may in fact increase it (Carrierio & Hamanjian, 2008). A youth being placed in adult correctional facilities is bad business in that children are still developing and transitioning from adolescence into adulthood (Carrierio & Hamanjian, 2008). Placing them in a violent, prison culture will affect their further development as adults (Macallair, 2008).

In NYS it has been recognized that there is a problem in evaluating juveniles for parole release after they have been transferred to adult correctional facilities. First and foremost, the change in political culture has definitely affected the release rates of violent felons into society (Macallair, 2008).



In NYS, the issue that has been presenting, once juveniles are being transferred into the adult correctional setting they are being lost in the system. Former parole commissioner Vernon Manley indicated, parole boards are treating juveniles just like they were adults (NYS Bar Association, Manley, 2007). Manley remarked despite the fact he distributed articles showing the difference in brain development his colleagues continued they continued to hold juveniles to the same standard as that of an adult offender (NYS Bar Association, Manley, 2007). This policy results in lengthy incarceration for juveniles with violent crimes.

This issue is not receiving much attention as in NYS the juvenile offenders represent a small proportion of offenders incarcerated in the NYS Department of Corrections. Currently of the 63,304 inmates in NYS prisons in 2007, only 236 of them were juvenile offenders. An additional, 932 were adjudicated youthful offenders (Bernstein, 2007).

### **CONCLUSION**

The incarceration of violent juvenile offenders has created very important issues for criminal justice adjudicators in relation to their readiness for re-entry to society and they way they are judged for parole release. When considering the factor listed in NYS Executive Law, adjudicators must be mindful of the differences in brain development and the special circumstances presented with incarcerating juveniles. To hold the juveniles to the same level of culpability and understanding as adult offenders is a miscarriage of justice.

Kupchik in his study has failed to look at whether the difference he noted between interviewing the youth in juvenile facilities and comparing them to the youth in adult facilities was due to their perspective brain development when they reached an older age. To evaluate the effectiveness of correctional facilities, when not being mindful of this scientific issue, is creating a bias in his work ignoring developmental features of the studies participants. The youth housed in the adult facility were older than those in the juvenile facility. They could be at a later stage of development wherein they appreciate the programs more than their younger counterparts as indicated in the work of Modecki. (Modecki, 2008).

Another factor that could play into things is the length of time the youth have been incarcerated, the conditions of their confinement, whether they have served their minimum sentence and have been denied parole, the outside support they have from family and friends etc. The study has left too many unanswered variables to be deemed an accurate analysis and conclusion.

As pointed out by Carrierio & Hamanjan, juvenile and adult facilities vary by their individual cultures (Carrierio & Hamanjan, 2008). The adult prison having many more issues for the youth to deal with when housed there such as their vulnerability, being placed with older, career criminals, gang exposure, increased violence and the change of the goals of the facility (Carrierio & Hamanjan, 2008). Adult prisons tend to have a primary goal of safety and security while the juvenile facilities were more individualistic and programmatic catering to the individual offender (Myers, 2005). All of these factors should be weighed in to have a more detailed background study.

An additional problem that seems to be manifested by the literature, is the failure of the criminal justice adjudicators to distinguish the distinct issues presented with juvenile offenders. Once the children are transferred into adult facilities, they are being blended in with adult offenders. The problem is they are maturing and evaluators are overlooking the fact that now an adult sits before them seeking release. The fact that they were juveniles at the time of the commission of their crime is being mistakenly overlooked. This is a very unfair process in that the aim of the criminal justice system by creating a separate offense entitled juvenile offender demonstrates the intention these youth should be treated differently than their adult offender counterparts.

The reason for this distinction is clearly pointed out by the literature. Modecki clearly demonstrates the scientific research shows there is a scientific explanation that proves an adolescents mind is not fully developed (Modecki, 2008). Being that the decision making portions of the brain are not in complete development criminal justice adjudicators should be mindful of this phenomenon. Parole Commissioner Manley points out they are not. He indicated, parole boards are treating juveniles just like they were adults (NYS Bar Association, Manley, 2007). Manley remarked despite the fact he distributed articles showing the difference in brain development his colleagues continued they continued to hold juveniles to the same standard as that of an adult offender (NYS Bar Association, Manley, 2007). This policy results in lengthy incarceration for juveniles with violent crimes.

As indicated above the Parole Board when evaluating an inmate for parole release must consider the following factors:

NYS Executive Law § 259 (i) (2) (c) (a) states:

“Discretionary release on parole shall not be granted, merely as a reward for good conduct or efficient performance of duties while confined but after considering if there is a reasonable probability that, if such inmate is released, he will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society and will not so deprecate the seriousness of his crime as to undermine respect for the law.”

The Parole Board shall consider:

- (I) The institutional record including program goals and accomplishments, academic achievements, vocational, educational, training or work assignments, therapy and interpersonal relationships with staff and inmates;
- (II) Performance, if any, as a participant in a temporary release program;
- (III) Release plans including community resources, employment, education and training and support services available to the inmate;
- (IV) Any deportation order issued by the federal government against the inmate while in the custody of the Department of Correctional Services and any recommendation regarding the deportation made by the Commissioner of the Department of Correctional services pursuant to Section One Hundred Forty-Seven of the Correction Law;
- (V) Any statement made to the Board by the crime victim or the victim’s representative, where the crime victim is deceased or is mentally or physically incapacitated. The Board shall provide toll-free telephone access for crime victims. In the case of an oral statement made in accordance with subdivision one of Section 440.50 of the Criminal Procedure Law, the Parole Board member shall present a written report of the statement to the crime victim’s closest surviving relative, the committee or guardian of such person, or the legal representative of any such person. Such statement submitted by the victim or victim’s representative may include information concerning, threatening or intimidating conduct towards the victim, the victim’s representative, or the victim’s family, made by the person sentenced and occurring after the sentencing. Such information may include, but not be limited to, the threatening or intimidating conduct of any other person who or which is directed by the person sentenced.” NYS Executive Law § 259 (i) (2) (c) (a)

The Board must also consider:

- “(1) Seriousness of the offense with due consideration to the type of sentence, length of sentence, and recommendations of the sentencing court, the district attorney, the attorney for the inmate, the pre-sentence report as well as any other mitigating factors and activities following arrest and prior to confinement.
- (2) Criminal history, including nature and pattern of offenses, adjustments to previous probation and parole and the adjustment to confinement”. NYS Executive Law § 259 (i) (1) (a)

First and foremost, a juvenile offender does also carry the maximum sentence of life. Despite the juvenile guidelines, the Parole Board has discretion so they can extend the incarceration of these individuals beyond what the suggested juvenile guidelines indicate is an appropriate punishment. In theory, at least in NYS it has been my experience as a practitioner they are holding these juvenile offenders much beyond the 9 year maximum for their minimum sentences. These individuals because they are convicted of A-1 violent felonies are serving sentences equivalent to adult offenders reaching 25 and 30 years of incarceration, totally ignoring the fact these people were juvenile offenders.

It is noted that 57% of the 63,304 inmates who make up the NYS prison population are violent felony offenders (Bernstein, 2007) Of that number, only 236 of them were juvenile offenders(Bernstein, 2007) An additional, 932 were adjudicated youthful offenders (Bernstein, 2007). In 2005, only 3% of A-1 felons were released. (Caher, 2006). There is no indication of how many of those individuals were juvenile offenders.

The issue of parole denials for violent felons in NYS became so bad that a class action lawsuit was filed, Graziano v. Pataki 7:06-cv-00480, on behalf of A-1 felons being denied parole solely based on the nature of the crime (Kates, 2007) As mentioned above, parole releases for violent felons dropped to almost non-existent at 3% in 2005, according to John Caher, formerly of the NYLJ (Caher, 2006). Repeated denials were experienced by violent felony offenders, plea-bargained persistent felons and youthful offenders. The

common place of these defendants is their sentences are all indeterminate; 2-life, 5-life or 25-life allowing for Parole Board discretion (Kates, 2007)

In looking at the findings in the literature, one huge problem presents. The Parole Board can deny an inmate parole based on the serious nature of the crime. It is imperative that the scientific evidence is weighed when evaluating this factor. Secondly, adjudication of juveniles is usually done by imposing a plea bargain. This factor presents an additional issue that is also demonstrated by the literature.

This decision making process weighs in not only in the adolescents ability to be held fully accountable for their crime but in their decision making processes during their prosecution. Children tend to follow their parent's advice during the course of a criminal prosecution (Young, 2004). They look to their parents for guidance and may ignore advice given by an attorney if their parents disagrees (Young, 2004). Children do not fully understand the consequences of their acts (Young, 2004).

Due process requirements require criminal defendants are competent to stand trial with the ability to assist counsel, to understand the nature of the proceeding, and to make decisions regarding the proceedings (Grisso, Steinberg, Woolard, Cauffman, Scott, Graham, Lexcen, Repucci, & Schwartz, 2003). As indicated above, with the lack of developmental brain activity an adolescent is at a disadvantage when compared to an adult offender to stand trial. They often enter into plea bargains which must be made knowingly, intelligently, and willingly. These pled out sentences often incorporate a maximum sentence of life. Adolescents tend to often also make poor decisions when confronted with police investigating their crimes wanting to cooperate with authorities

often giving confessions before consulting with attorneys and or parents (Grisso, Steinberg, Woolard, Cauffman, Scott, Graham, Lexcen, Repucci, & Schwartz, 2003).

When questioned about the policy of the Parole Board in plea-bargained offenses, Head counsel Terrence Tracy responded October 19, 2007:

“As that there is no statutory authority or settled case law that requires the Parole Board to consider an inmate’s plea minutes when assessing the appropriateness of his or her discretionary release, there is no basis for a change in the Division’s current policy”

The discretion afforded to the NYS Board of Parole is resulting in wide fundamental violations of incarcerated people’s constitutional and statutory rights. The above statements are in themselves in violation of the constitutional rights a defendant relinquishes to enter a plea bargain. These statements show proof the Parole Board has developed into a re-sentencing authority which is volatile to the statutory criteria in which they should be operating. This is two fold for juvenile offenders.

Specifically, the NYS Parole Board abides by conflicting policies regarding juvenile offenders, plea-bargained offenders and adult offenders convicted by trial (Kates, 2007) They treat all of these people the same despite legislation mandating otherwise (Kates 2007). The penal laws and criminal procedure laws are in direct conflict with NYS Executive Law § 259 (i) governing discretionary parole release (Kates, 2007).

In general in the statute, there is no distinction directly in the section of the Executive Law indicating the Board should treat these three types of offenders differently, specifically in the criteria used to evaluate parole decisions (Kates 2007). However, with further legal analysis there is support herein these offenders should be treated differently and they were intended to be treated differently when sentenced in the criminal courts (Kates, 2007).

Specifically, it should be noted that both of these offenders are offenders that have waived fundamental constitutional rights to enter a plea of guilty saving the prosecution of their burden to convict them beyond a reasonable doubt in exchange for a lighter sentence (Kates, 2007). It should be further noted, when criminal defendants enter a plea bargain, the sentencing phase of such is a two-part process; the plea allocation and the sentencing (Kates, 2007) In a plea case, the recommendations of the district attorney, defense attorney, and sentencing judge are usually found in the plea allocation. This allocation also contains the actual plea bargain which becomes the foundation for the plea-bargained defendant's conviction (Kates 2007).

The NYS Board of Parole's policy in regards to plea bargains is that they do not feel they should have to review plea allocations as part of what is defined as an inmate's sentencing minutes (Kates, 2007). Counsel to the NYS Division of Parole, Terrence X. Tracy has unequivocally stated in correspondence dated October 19, 2007:

"There is no statutory authority or settled case law that requires the Parole Board to consider an inmate's plea minutes when assessing the appropriateness of his or her discretionary release, there is no basis for a change in the Division's current policy"(Kates, 2007).

The current policy is unconstitutional (Kates, 2007). NYS Executive Law § 259 (i) is unconstitutional (Kates, 2007). The NYS Parole Board is functioning outside of its statutory authority becoming a re-sentencing body directly in conflict of the separation of powers clause establishing the judiciary duties and legislative duties (Kates, 2007). The current policy ignores the purposes for the criminal justice system in establishing plea-bargained and youthful offender statuses (Kates, 2007). The current system treats all offenders the same under NYS Executive Law ignoring the separation that was intended by the underlying criminal justice system (Kates, 2007). This constitutes a system that is



unfair, illegal and a violation of defendant's due process and other constitutional rights (Kates, 2007).

The inherent secondary problem presented is that due to the great discretion of the Parole Board criminal defendants cannot receive judicial relief in reviewing these unconstitutional decisions (Kates, 2007). It is well-governed precedent that the NYS Parole Board's decisions are discretionary and, if made in accordance with statutory requirements, are not subject to judicial review. Matter of Sweeper v. State of New York Exec. Dep't. Bd. Of Parole, 233 A.D. 2d 647, 648 (3d Dept. 1996); Matter of Zane v. Travis, 231 A.D. 2d 848 (4<sup>th</sup> Dept. 1996); Matter of Secilmic v. Keane, 225 A.D. 2d 628, 628-9 (2d Dept. 1996). Absent a convincing demonstration that the Parole Board failed to consider the applicable statutory outlined criteria, it must be presumed that the Parole Board fulfilled its duty. Matter of McKee v. New York State Bd. Of Parole, 157 A.D. 2d 944, 945 (3d Dept. 1990). To warrant judicial intervention, the petitioner must show that the Parole Board's decision amounted to "irrationality bordering on impropriety." Matter of Russo v. New York State Bd. Of Parole, 50 N.Y. 2d 69 (1980). It is also established that a prisoner's right to liberty was extinguished with his conviction and sentencing and therefore, a petitioner has no constitutional guarantee to parole, Russo, (id). Citing; Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 7(1979).

As indicated, the analysis of the literature clearly indicates there is a policy problem within the adjudication of juvenile offenders. Their distinct characteristics as outlined above clearly mandate policy revisions should be made consistent with the law.

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