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Note: Constitutional Chellanges to New York's Youthful Offender Statute

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CONSTITUTIONAL CHALLENGES TO NEW YORK'S YOUTHFUL OFFENDER STATUTE

I. Introduction

New York's Youthful Offender Statute[1] has been described as "humane and progressive legislation intended for the benefit of a youth who makes his first mistake and that he should not be branded as a criminal therefor . . . ."[2]

In keeping with this philosophy, the statute provides a system whereby a youth (*i.e.*, an individual between the ages of sixteen and eighteen) can avoid the serious consequences which result from being convicted of a crime.[3] Upon determination that youthful offender status should be granted, the conviction is vacated and replaced with a youthful offender finding.[4]

Prior to 1975, those youths indicted for crimes punishable by death or life imprisonment (a class A felony), or previously convicted of any felony, were excluded automatically from youthful offender consideration.[5] In 1973 a revision of the state's drug laws had divided class A felonies into three sections (A-I, A-II and A-III) and provided a minimum sentencing term for each subdivision.[6] The 1975 amendment to the youthful offender statute recognized this change in felony classifications. Under the new provisions, those youths indicted for class A-I and A-II felonies continued to be excluded from youthful offender treatment, while those indicted for A-III felonies became eligible for such treatment.[7]

Recently in *People v. Drummond*,[8] the New York Court of Appeals held that the pre-1975 statute violated the due process clause because it tied eligibility to the seriousness of the crime charged in

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1. N.Y. CRIM. PROC. LAW §§ 720.10-.35 (McKinney 1971), *as amended*, (McKinney Supp. 1976).

2. People v. Plath, 71 N.Y.S.2d 667, 668 (Bronx County Ct. 1947).

3. *See* People v. Shannon, 1 App. Div. 2d 226, 231, 149 N.Y.S.2d 550, 555 (2d Dep't), *aff'd mem.*, 2 N.Y.2d 792, 139 N.E.2d 430, 158 N.Y.S.2d 334 (1956).

4. N.Y. CRIM. PROC. LAW § 720.20(3) (McKinney 1971), *as amended*, (McKinney Supp. 1976).

5. *Id.* § 720.10 (McKinney 1971), *as amended*, (McKinney Supp. 1976).

6. *See* N.Y. PENAL LAW § 55.05(1); § 70.00(3)(a) (McKinney 1975).

7. N.Y. CRIM. PROC. LAW § 720.10 (McKinney Supp. 1976).

8. 40 N.Y.2d 990, 359 N.E.2d 663, 391 N.Y.S.2d 67 (1976), *rev'g in part per curiam* People v. Santiago, 51 App. Div. 2d 1, 379 N.Y.S.2d 843 (2d Dep't 1975).

the indictment rather than the crime for which the defendant was convicted. The eligibility criteria of the pre-1975 statute have also been challenged on equal protection grounds[9] in that one defendant may be granted youthful offender consideration while another is denied it, even though the defendants are ultimately convicted of the same crime.

The 1975 amendment has done little to quiet these constitutional challenges since it continues to base eligibility on the crime charged in the indictment. This Note will examine the youthful offender statute and its 1975 amendment in light of *Drummond* and the conflicting lower court decisions.

II. The Development of the Youthful Offender Statute

Under New York's Code of Criminal Procedure (CCP), the forerunner of the Criminal Procedure Law (CPL), all youths between the ages of sixteen and eighteen who had been indicted for a crime not punishable by death or life imprisonment were eligible for youthful offender status if they had not previously been convicted of a felony.[10] The court subjected these eligible youths to a complex investigative process that determined whether youthful offender treatment was warranted.[11] This took place at the beginning of the criminal action prior to any trial or conviction.[12]

The CPL replaced this cumbersome process with a streamlined procedure that begins upon the conviction of the eligible youth.[13] At

9. *See, e.g.*, People v. Brian R., 78 Misc. 2d 616, 356 N.Y.S.2d 1006 (Sup. Ct. 1974), *aff'd mem.*, 47 App. Div. 2d 599, 365 N.Y.S.2d 998 (1st Dep't 1975).

10. 1956 N.Y. Laws ch. 841 § 2, *amending* 1944 N.Y. Laws ch. 632 § 2.

11. The process included: (1) a recommendation that the youth be investigated, made by either the grand jury, the district attorney, or the court; (2) the approval or disapproval of the recommendation by the court, plus an order to commence the investigation upon approval; (3) the investigation, usually conducted by a probation agency; (4) the final determination by the court to grant or withhold youthful offender treatment. 1944 N.Y. Laws ch. 632 § 2.

12. Since the determination was made so early in the criminal process, the indictment was looked to in order to find what crime the defendant had "committed".

13. *See* N.Y. CRIM. PROC. LAW § 720 note at 314-17 (McKinney 1971). Judge Denzer noted:

> Expecially [sic] wasteful was the requirement making an *investigation* of the defendant a condition precedent in every case to the granting of such treatment. In the New York City Criminal Court in particular, those investigations (by probation officers) proved prolific, time consuming, unpopular all around and expensive. And in all those cases which did not result in convictions—a very substantial percentage of the total—the investigations amounted, of course, to exercises in futility.

that time, a pre-sentence investigation of the defendant is conducted and the decision as to youthful offender treatment is made according to the following provisions. If the conviction is obtained in a local criminal court[14] (*i.e.*, the lower criminal courts of the state, including the New York City Criminal Court, and other city, town and village courts), and the defendant has not previously been convicted of a crime or adjudicated a youthful offender, the treatment is mandatory.[15] On the other hand, if the conviction is had in a superior court[16] (*i.e.*, the supreme court or a county court), youthful offender treatment may be granted at the discretion of the court.[17] The CPL, however, did not change the CCP's eligibility criteria, providing that every youth would be eligible for youthful offender status "unless he (a) is indicted for a class A felony, or (b) has previously been convicted of a felony."[18]

Since "a youthful offender adjudication is not a judgment of conviction for a crime,"[19] the statute provides for private proceedings[20] and confidentiality of official records.[21] Youthful offender status affords the offender many advantages: (1) denomination as a youthful offender, rather than as a criminal; (2) retention of qualification for possible public employment or service in public office; (3) retention of all rights and privileges possessed by the noncriminal; (4) continued eligibility to seek and receive a license granted by public authority; (5) absence of a conviction record so that it will not be considered in possible future multiple offender situations; and (6)

Id. at 315-16; *See also* R. PITLER, NEW YORK CRIMINAL PRACTICE UNDER THE CPL § 7.41 (1972).

14. *See* N.Y. CRIM. PROC. LAW § 10.10(3) (McKinney 1971). Sections 10.10-.30 of the Criminal Procedure Law contain the names and jurisdictions of the New York criminal courts.

15. N.Y. CRIM. PROC. LAW §§ 720.20(1)(a)-(b) (McKinney 1971), *as amended*, (McKinney Supp. 1976). This mandatory youthful offender treatment has been provided in order to reconcile the statute with Supreme Court decisions mandating jury trials where a sentence longer than six months is possible upon conviction. *See* N.Y. CRIM. PROC. LAW § 720.25 note at 322-24 (McKinney 1971). Other changes in the sentencing structure were made to correct apparent abuses of reformatory type sentences. *See* N.Y. CRIM. PROC. LAW § 720.20 note at 134 (McKinney Supp. 1976).

16. *See* N.Y. CRIM. PROC. LAW § 10.10(2) (McKinney 1971).

17. N.Y. CRIM. PROC. LAW §§ 720.20(1)(a) - (b) (McKinney 1971), *as amended*, (McKinney Supp. 1976).

18. *Id.* § 720.10(2) (McKinney 1971), *as amended*, (McKinney Supp. 1976).

19. *Id.* § 720.35(1) (McKinney 1971).

20. *Id.* § 720.15(2) (McKinney 1971).

21. *Id.* § 720.35(2) (McKinney 1971), *as amended*, (McKinney Supp. 1976).

protection of the youth from public exposure due to the private nature of the proceedings.[22] The statute, basing eligiblity on the indictment, denies these advantages to many youths and requires them to be treated as adults.

III. Constitutional Challenges to the Pre-1975 Statute

New York State has generally led other jurisdictions in protecting the constitutional rights of juveniles (*i.e.*, individuals from seven to fifteen years of age).[23] Article 711 of the Family Court Act, which guarantees "due process of law" to juvenile delinquents and persons in need of supervision[24] was enacted five years before the Supreme Court held in *In re Gault*[25] that juveniles accused of a crime were entitled to certain constitutional safeguards guaranteed by the due process clause of the fourteenth amendment.[26] In recent years, however, the New York Youthful Offender Statute, which applies to children no longer eligible for juvenile treatment, has been challenged as being violative of the offenders' right to both equal protection and due process because of its restrictive criteria in granting eligibility for youthful offender treatment.[27]

Both the Supreme Court and state courts have employed two tests[28] in dealing with statutes challenged under the equal protection clause. The nature of the statute and the classification it creates are factors that determine which test is to be used. The first test is the rational basis test,[29] which only requires that a state show

22. People v. Towler, 30 App. Div. 2d 876, 293 N.Y.S.2d 7, 9 (2d Dep't 1968); R. PITLER, NEW YORK CRIMINAL PRACTICE UNDER THE CPL § 7.32 (1972). Many times, however, the proceedings remain open to the public despite the statute. *See* Levine, *The Youthful Offender Under the New York Criminal Procedure Law*, 36 ALBANY L. REV. 241, 255 (1972).

23. N.Y. FAM. CT. ACT § 712(a) (McKinney 1975).

24. *Id.* § 711 (McKinney 1975), *as amended*, (McKinney Supp. 1976).

25. 387 U.S. 1 (1967).

26. *Id.* 12-31; *See also* N.Y. FAM. CT. ACT § 711 note at 548-550 (McKinney 1975); 1 L. PAPERNO AND A. GOLDSTEIN, CRIMINAL PROCEDURE IN NEW YORK § 314 (rev'd ed. 1971).

Nor are juveniles the only class that has benefited from this concern in New York in providing due process safeguards. In 1975 an amendment to the corrections law required that prisoners who were denied parole be notified in writing of the reasons for such denial. N.Y. CORREC. LAW § 214 (McKinney Supp. 1976), *noted in* Lewin, *Criminal Procedure*, 27 SYRACUSE L. REV. 69, 136 (1976).

27. *See* text accompanying note 18 *supra*.

28. *See* Note, *The New Equal Protection—Substantive Due Process Resurrected Under A New Name?*, 3 FORDHAM URBAN L.J. 311, 315 (1975).

29. Dandridge v. Williams, 397 U.S. 471, 485 (1970).

a "fair and substantial relationship" between the purported object of the statute and the questioned classifications made by the legislation. This is the test traditionally utilized in examining challenged statutes.[30] However, if the statute affects a fundamental right,[31] or is based on a "suspect" classification,[32] a stricter test is employed; the state is required to show that a "compelling state interest" is being advanced.[33]

Where the individual's right to life, liberty or property is involved, due process requires that a "reasonable connection" be shown between the statute and the welfare and safety of the public.[34] In cases of fundamental rights, however, the courts once again require that regulation limiting these rights may be justified only by a "compelling state interest."[35]

Constitutional challenges to the youthful offender statute have been raised in several New York cases, with differing results. *People v. Brian R.*[36] considered the pre-1975 youthful offender eligibility provision. Justice Leon Polsky found it constitutionally impermissable to use the level of crime charged in the indictment as the basis for determining youthful offender eligibility.[37] The court noted that

30. Note, *supra* note 28, at 313-14.

31. *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330 (1972); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942).

32. *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944) (classification by race).

33. *Id.*; Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

34. People v. Santiago, 51 App. Div. 2d 1, 9, 379 N.Y.S.2d 843, 853 (2d Dep't 1975); People v. Gillson, 109 N.Y. 389, 401, 17 N.E. 343, 347 (1888). *See also* Truax v. Corrigan, 257 U.S. 312, 332 (1921).

35. People v. Santiago, 51 App. Div. 2d 1, 10, 379 N.Y.S.2d 843, 853 (2d Dep't 1975)(citations omitted). *See* Roe v. Wade, 410 U.S. 113, 155 (1973); Kramer v. Union Free School Dist., 395 U.S. 621, 627 (1969).

36. 78 Misc. 2d 616, 356 N.Y.S.2d 1006 (Sup. Ct. 1974), *aff'd mem.*, 47 App. Div. 2d 599, 365 N.Y.S.2d 998 (1st Dep't 1975). *See also* People v. Charles S., 79 Misc. 2d 1058, 361 N.Y.S.2d 848 (Sup. Ct. 1974). Here, an eighteen year old defendant was indicted for a class A felony arising out of a sale of drugs. The state contended that only a defendant who has been *convicted* of less than a class A felony has standing to challenge the eligibility provision's unconstitutionality. Justice Polsky, the same judge who wrote the opinion in *Brian R.*, rejected this contention and held that this argument ignores the due process challenge that the legislature is without the power to withhold youthful offender treatment based on the offense charged. The court also noted that to say that a person ultimately convicted of a class A felony is without standing to challenge assumes that the statute denies youthful offender treatment to those *convicted* rather than indicted for class A felonies, a situation which was not presented by the statute as written. *Id.* at 1059-60, 361 N.Y.S.2d at 849-50.

37. 78 Misc. 2d at 619, 356 N.Y.S.2d at 1010.

the purpose of an indictment was to notify the defendant and establish jurisdiction over him. The opinion conceded that in some cases the level of the offense charged could give rise to ancillary consequences, such as the availability of the jury trial, but concluded that in no case was it permissible for these consequences to have effect beyond the final judgment of the court.[38] Justice Polsky decided that basing youthful offender eligibility on untested allegations violated due process and gave "independent existence" to the indictment. In effect, the accusations in the indictment, rather than the determination of guilt, controlled the defendant's treatment *after* conviction.[39] In rejecting this basis the court noted "[u]ltimately . . . the penalties prescribed for particular offenses must depend upon the crime of which the defendant is convicted, not the offense with which he was originally charged."[40]

The court also found the eligibility criteria defective on equal protection grounds.[41] It could not conceive of a rational basis for treating youths convicted of the same crime differently, simply because one might be indicted for a class A felony and the other for a lesser offense. Justice Polsky branded the statutory classification "utterly capricious and irrational."[42] For the first time, the eligibility excepting provision of the youthful offender statute, which had remained basically unchanged since its inception in 1943,[43] was found to be unconstitutional.

These same issues were also considered in *People v. Goodwin.*[44] The trial court had denied defendant's motion for youthful offender treatment because he was indicted for murder, a class A felony.[45]

38. *Id.* at 618, 356 N.Y.S.2d at 1008-09. Justice Polsky further noted that in New York, every count in the indictment includes every possible lesser offense, and that a motion to dismiss because of insufficient evidence before the grand jury must be denied if there is "sufficient evidence to sustain a lesser included offense even though the evidence might be insufficient to sustain the actual offense charged." *Id.* at 619, 356 N.Y.S.2d at 1009. The court concluded from this procedure that even at this early stage in the criminal process, an indictment charging a class A felony can be upheld though there is only sufficient evidence to support a lesser crime. *Id.* at 619, 356 N.Y.S.2d at 1009-10.

39. *Id.*, 356 N.Y.S.2d at 1010.

40. *Id.*

41. *Id.* at 619-20, 356 N.Y.S.2d at 1010.

42. *Id.* at 620, 356 N.Y.S.2d at 1010.

43. 1943 N.Y. Laws ch. 549 § 1 (reenacted in a separate title by 1944 N.Y. Laws ch. 632 § 2). *See* text accompanying note 10 *supra.*

44. 49 App. Div. 2d 53, 378 N.Y.S.2d 82 (3d Dep't 1975).

45. *Id.* at 54, 378 N.Y.S.2d at 83-84.

Ultimately, defendant was convicted of criminally negligent homicide, a class E felony. The appellate division upheld the statute against due process and equal protection challenges. Finding the eligibility provision valid, the third department noted that the statutes of other jurisdictions making similar distinctions[46] "have previously been found to be immune from constitutional attack on . . . [due process and equal protection] grounds, particularly in view of the strong presumption of validity which attaches to legislative classifications."[47]

Defendant argued that the statute's prohibition against youthful offender treatment should be applied only in cases of class A felony convictions rather than indictments.[48] The court pointed out that this argument conceded the rationality of withholding the procedure from certain defined classes (*i.e.*, those *convicted* of class A felonies), and of denying it to those previously convicted of felonies.[49] The court found that the provision basing eligibility on the indictment carried out the similar legislative interest of limiting the availability of the procedure in a rational manner.[50]

In his dissenting opinion,[51] Justice Louis Greenblott contended that the eligibility provision violated the equal protection clause. In an argument similar to Justice Polsky's in *Brian R.*,[52] Justice Greenblott could find "no rational basis for an inequality of treatment amongst youths who have been convicted of the same offense merely because one of them had originally been charged with a higher crime."[53] He found further support for his argument in the newly enacted CPL.[54] Under the CPL procedure, the youthful offender

46. *See, e.g.*, D.C. Code Encyl. § 16-2301(3)(A) (West Supp. 1970), *amending* D.C. Code Encyl. § 16-2301 (West 1966).

47. 49 App. Div. 2d at 55, 378 N.Y.S.2d at 84, *citing* United States v. Bland, 472 F.2d 1329 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 909 (1973); *see* Long v. Robinson, 316 F. Supp. 22 (D. Md. 1970), *aff'd*, 436 F.2d 1116 (1971).

48. 49 App. Div. 2d at 54, 378 N.Y.S.2d at 84.

49. *See* text accompanying note 18 *supra*.

50. 49 App. Div. 2d at 55, 378 N.Y.S.2d at 85. The court noted that the eligibility provision also indirectly serves the public's right to be informed of serious crimes which have been committed, since without youthful offender status, the proceedings remain open to public scrutiny. *Id.*, 378 N.Y.S.2d at 85.

51. 49 App. Div. 2d at 55-58, 378 N.Y.S.2d at 85-87.

52. *See* text accompanying notes 36-42 *supra*.

53. 49 App. Div. 2d at 57, 378 N.Y.S.2d at 86.

54. *See* text accompanying notes 10-18 *supra*.

determination is made after conviction. Thus, Justice Greenblott concluded that no rational basis exists for denying the treatment because of the offense charged in the indictment.[55]

The most recent case dealing with the constitutionality of the former statute is *People v. Drummond.*[56] In a brief per curiam opinion the court of appeals declared "limitations in CPL 720.10 conditioning eligibility for youthful offender treatment on the highest count of the indictment . . . unconstitutional."[57] The court refused to make an equal protection analysis, but found that the statute violated due process.[58] In doing so, it reversed the appellate division's decision in *People v. Santiago*[59] and specifically adopted the "applicable" portions of Justice Samuel Rabin's dissenting opinion.[60] Justice Rabin had contended that an indictment should not

55. 49 App. Div. 2d at 57, 378 N.Y.S.2d at 87.

56. 40 N.Y.2d 990, 359 N.E.2d 663, 391 N.Y.S.2d 67 (1976), *rev'g in part per curiam* People v. Santiago, 51 App. Div. 2d 1, 379 N.Y.S.2d 843 (2d Dep't 1975).

57. 40 N.Y.2d at 992, 359 N.E.2d at 664, 391 N.Y.S.2d at 68.

58. *Id.*

59. 51 App. Div. 2d 1, 379 N.Y.S.2d 843 (2d Dep't 1975). The *Santiago* decision resolved a split that existed among the lower courts in the second department. In People v. Estrada, 80 Misc. 2d 608, 364 N.Y.S.2d 332 (Sup. Ct. 1975) defendant was indicted for a class A-II and A-III felony for the sale of drugs and was convicted at trial. In rejecting defendant's due process and equal protection arguments, the court pointed to the statutes of other jurisdictions which use the crime charged as the standard of eligibility 18 U.S.C. §§ 5031-37 (1970), *as amended*, (Supp. V, 1975); D.C. Code Encyl. § 16-2301(3)(A) (West Supp. 1970); MD. CTS. & JUD. PROC. CODE ANN. § 3-804 (Supp. 1976)). The court further noted that legislative enactments are presumed to be valid, until their invalidity is shown beyond a reasonable doubt and the legislature is presumed to have investigated a matter and found facts necessary to support the questioned legislation. *Id.* at 610, 364 N.Y.S.2d at 234-35. In People v. Ruben S., 81 Misc. 2d 305, 365 N.Y.S.2d 426 (Sup. Ct. 1975), defendant was indicted for the criminal sale of a controlled substance (cocaine), a class A-III felony. The court reviewed the history of the 1973 narcotics law which made the sale or possession of all controlled substances a class A felony: "The history of the youthful offender law indicates that that statute was not originally intended to deal with drug-related crimes and is now inflexible in connection with what might be considered a minor crime." *Id.* at 308, 365 N.Y.S.2d at 429. The court then refused to follow the holding in *People v. Estrada* and cited approvingly to the *Brian R.* case. *See* text accompanying notes 36-42 *supra*. The court also noted that the Federal Delinquency Act (18 U.S.C. §§ 5031-42) had been replaced by the Juvenile Justice and Delinquency Prevention Act of 1974 (18 U.S.C. § 5031) which eliminated any classification that forbade eligibility on the basis of the crime charged. *Id.* at 311, 365 N.Y.S.2d at 431-32. The court then concluded: "Buttressed by logic, motivated by justice and persuaded by appellate authority, this court can reach but one conclusion—that is, to remove the constitutional infirmity of CPL 720.10 that would deny to this defendant the opportunity to have him considered a youthful offender." *Id.* at 313, 365 N.Y.S.2d at 433.

60. 51 App. Div. 2d at 14-16, 379 N.Y.S.2d at 857-59.

be relied on in fixing the treatment of a youth following conviction, since its function is exhausted when the trial is complete.[61] He could find "no reasonable justification or necessity" for basing eligibility on the crime charged. "By according a decisive role in the determination of which youths are eligible for youthful offender treatment to nothing more substantial than a written statement of unproven allegations . . . the statute offends reasonable notions of fairness."[62]

61. *Id.* at 15, 379 N.Y.S.2d at 858.

62. *Id.* Justice Rabin stated further that an indictment "should play *no part* in determining the type of postconviction treatment accorded to youngsters otherwise eligible for youthful offender consideration . . . ." *Id.* (emphasis added). However, in People v. Drayton, 47 App. Div. 2d 952, 367 N.Y.S.2d 506 (2d Dep't 1975), *aff'd*, 39 N.Y.2d 580, 350 N.E.2d 377, 385 N.Y.S.2d 1 (1976), the court of appeals held that it was proper for the judge to take into account the charge in the indictment in the exercise of his discretion as to whether youthful offender treatment should be granted to a particular youth. The defendant was indicted on a felony charge, but was allowed to plead guilty to a misdemeanor. Under the provisions of section 720.20 of the Criminal Procedure Law, an otherwise eligible youth who is charged with a *misdemeanor* and convicted in a local criminal court is automatically granted youthful offender status, provided that he has not been previously convicted of a crime or adjudged a youthful offender. *See* N.Y. CRIM. PROC. LAW § 720.20(1)(a) (McKinney 1971), *as amended*, (McKinney Supp. 1976). Since superior courts in New York have exclusive jurisdiction over felonies, the defendant was tried in supreme court and denied the automatic granting of youthful offender treatment. Furthermore, that court, after receiving an unfavorable probation report, exercised its discretion and refused to grant the defendant youthful offender status. Defendant alleged that this denied him equal protection in that the determination to automatically grant youthful offender treatment should not depend on what court he is tried in, especially since the crime to which he pleaded guilty was a misdemeanor, and triable in a local criminal court. 39 N.Y.2d at 583, 350 N.E.2d at 378, 385 N.Y.S.2d at 2. The court of appeals found a rational basis for treating differently one indicted for a misdemeanor and one indicted for a felony. The legislature made a valid determination, said the court, in cases where youths are indicted for felonies that "youthful offender status should be conferred only in the court's discretion upon due consideration of the youth's background and prior history of involvement with the law." 39 N.Y.2d at 585, 350 N.E.2d at 380, 385 N.Y.S.2d at 4.

The district court disagreed, however, granted a writ of habeas corpus and found that the provisions of section 720.20(1) of the CPL violated the equal protection clause. 423 F. Supp. 786 (E.D.N.Y. 1976). The court rejected the rational bases suggested by the state (*i.e.*, greater seriousness of charges brought in supreme court, availability of jury trial in supreme court, and judicial economy or efficiency), in explaining the differences in treatment for potential youthful offenders in supreme court and in criminal court. The district court then ordered that defendant's adult conviction be vacated and replaced by a youthful offender finding. *Id.* at 792-93.

In a related case, United States *ex rel.* Frasier v. Casscles, 531 F.2d 645 (2d Cir. 1976), defendant, sentenced as a second felony offender, applied for a writ of habeas corpus to set aside his previous conviction because of the unconstitutionality of the New York youthful offender statute. Defendant had been charged with several crimes of less than a class A level, but was allowed to plead guilty to one class D felony, and his motion to be accorded youthful offender treatment was denied. *Id.* at 645-46. The court, in interpreting section 913-g of the

The appellate division majority opinion had upheld the statute on both due process and equal protection grounds.[63] Justice James Hopkins concluded that the traditional due process test normally required only a "reasonable connection between the statute and the promotion of the safety and welfare of the community."[64] Finding no suspect classifications or fundamental interests involved,[65] the court also decided that the statute must satisfy the rational basis rather than the stricter "compelling state interest" test.[66] Noting the presence of many necessary and discretionary choices inherent in the criminal process,[67] the majority reasoned that the statute satisfied an administrative purpose by fixing an objective standard. The court concluded that "[t]he finding of the Grand Jury that sufficient evidence existed to justify the return of an indictment . . . of a class A felony provided a clear and permissible expression of the goal of the Legislature to deny to youths charged with those crimes the benefits of youthful offender process . . . ."[68]

In *Drummond,* the court of appeals resolved the conflict over the validity of the eligibility provisions of the former youthful offender

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old CCP said that the "court, could in its discretion, deny youthful offender treatment and the nature of the crime charged could be considered as a determining factor." *Id.* at 647 (citations omitted). The court compared the grant or denial of youthful offender status to sentencing where courts have wide discretion. *Id.* The *Drayton* and *Frasier* cases can be distinguished from others under consideration because here the defendant was given the benefit of the court's discretion which validly took into account the charge in the indictment as one factor in determining eligibility. Section 720.10(2) of the CPL, though, allows no discretion by the court and denies eligibility solely on the basis of a class A felony indictment.

63. 51 App. Div. 2d at 14, 379 N.Y.S.2d at 857.

64. *Id.* at 9, 379 N.Y.S.2d at 852.

65. The court noted: "[W]e view the claim of lack of substantive due process as subsumed under the more critical claim of the breach of equal protection of the laws." *Id.* at 10, 379 N.Y.S.2d at 853.

66. The court said: "Clearly, the statute does not . . . touch a suspect classification based on race, religion or national origin. Nor do we think that it falls within . . . interests of fundamental importance, though this construction presents a closer issue. Differences in treatment of criminal offenders have been considered not to affect an interest of fundamental concern. . . ." *Id.* at 11, 379 N.Y.S.2d at 854, *citing* Marshall v. United States, 414 U.S. 417 (1974); McGinnis v. Royster, 410 U.S. 263 (1973); United States *ex rel.* McGill v. Schubin, 475 F.2d 1257 (2d Cir. 1973).

67. For example, the prosecutor decides who to charge and at what level, the grand jury decides to vote an indictment or not and the petit jury returns a guilty or not guilty verdict for the crime charged or for a lesser one. 51 App. Div. 2d at 12-13, 379 N.Y.S.2d at 855-56.

68. *Id.* at 14, 379 N.Y.S.2d at 856.

statute. The majority opinions in *Goodwin*[69] and *Santiago*[70] had relied heavily on the presumption of validity which attaches to a classification reviewed under the traditional rational basis test. But the courts in *Drummond* and in *Brian R.*[71] could not conceive of an adequate reason why eligibility for youthful offender treatment should rest on the charge in the indictment.[72]

IV. The 1975 Amendment

The 1975 amendment to the youthful offender statute resulted from the 1973 narcotics law changes, which Governor Rockefeller requested to combat the widespread sale of dangerous drugs.[73] That legislation divided class A felonies into three classes (A-I, A-II and A-III) and made the sale or possession of controlled substances a class A felony, in order to preclude the offender from eligibility for youthful offender status.[74] Thus, a wide range of drug related offenses were included in the class A felony system, along with the more traditional serious violent crimes, all of which precluded the individual from youthful offender treatment.[75]

Soon after this law was passed, the first constitutional attacks on the pre-1975 youthful offender statute were launched.[76] Many courts were disturbed by the realization that youths indicted for relatively minor crimes (*e.g.*, the sale of a minimal amount of cocaine) would be branded as criminals for their entire lives.[77] As a direct reaction to this situation, the 1975 amendment to the youthful offender eligibility provision was passed.[78] It represented a compromise between

69. 49 App. Div. 2d at 55, 378 N.Y.S.2d at 84.

70. 51 App. Div. 2d at 9, 379 N.Y.S.2d at 852-53.

71. *See* text accompanying notes 36-42 *supra*.

72. *See* 40 N.Y.2d at 992, 359 N.E.2d at 664, 391 N.Y.S.2d at 67; 78 Misc. 2d at 619, 356 N.Y.S.2d at 1010.

73. *See* Messages of the Governor, N.Y. Sess. Laws 2317-19 (McKinney 1973).

74. *Id.* at 2319; N.Y. PENAL LAW § 220 (McKinney Supp. 1976).

75. *See* People v. Ruben S., 81 Misc. 2d 305, 308, 365 N.Y.S.2d 426, 429 (Sup. Ct. 1975).

76. *See, e.g.*, People v. Brian R., 78 Misc. 2d 616, 356 N.Y.S.2d 1006 (Sup. Ct. 1974), *aff'd mem.*, 47 App. Div. 2d 599, 365 N.Y.S.2d 998 (1st Dep't 1975). One court noted: "Unquestionably, the effect of the stringent narcotics laws has induced the assault upon the constitutionality of the statute." People v. Santiago, 51 App. Div. 2d 1, 6, 379 N.Y.S.2d 843, 849-50 (2d Dep't 1975).

77. *See, e.g.*, People v. Ruben S., 81 Misc. 2d 305, 308, 365 N.Y.S.2d 426, 429 (Sup. Ct. 1975).

78. A memorandum accompanying the new amendment provides:

Class A-III felonies were inserted into the penal law during the 1973 legislative session

allowing youthful offender eligibility to all class A felons, and denying it in all cases of sale and possession of certain amounts of controlled substances. The new amendment provides: "'Eligible youth' means a youth who is eligible to be found a youthful offender. Every youth is so eligible unless he (a) is indicted for a class A-I or class A-II felony, or (b) has previously been convicted and sentenced for a felony.[79]Those indicted for class A-III felonies and those previously convicted as felons, who were subsequently *sentenced* as youthful offenders, are now eligible for youthful offender consideration.

In 1976 this new amendment was also declared unconstitutional by the supreme court, Kings County, in *People v. Evelyn R.*[80] Defendant, indicted on a drug related class A-I felony, was allowed to plead guilty to a class A-III felony. Justice Jacob Lutsky granted youthful offender status in spite of the statute and declared that this new legislative act only compounded the unconstitutionality of the former statute.[81] The court could find no rational basis for selecting only class A-III felons as suitable for special consideration. Justice Lutsky noted that the legislative memorandum[82] accompanying the 1975 bill made no mention of minimum sentences, the distinguishing feature among classes of A felonies. On this basis he concluded that all youths faced with a maximum mandatory life sentence (*i.e.*, all youths charged with class A felonies) should be accorded the same consideration as youthful offenders.[83] Furthermore, to base eligibility upon the indictment negates the presumption of innocence to which the defendant is entitled. Such a procedure is inherently suspect.[84] Finally, the court echoed the sentiments of *Brian R.*[85] and *Drummond*[86] in commenting, "[s]ince when does a mere

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as a response to the appeal for tough drug laws. As such, they penalized the youthful seller or possessor of narcotics and other drugs with mandatory life sentences. *Courts* should be given the *discretion* to allow youthful offender treatment for those individuals which presently exist for those who are *accused* of more serious crimes.

Quoted in People v. Evelyn R., 85 Misc. 2d 872, 878, 379 N.Y.S.2d 1000, 1006 (Sup. Ct. 1976). It seems clear that the Legislature had in mind situations such as the one in People v. Ruben S., 81 Misc. 2d 305, 365 N.Y.S.2d 426 (Sup. Ct. 1975).

79. N.Y. CRIM. PROC. LAW § 720.10(2) (McKinney Supp. 1976).
80. 85 Misc. 2d 872, 379 N.Y.S.2d 1000 (Sup. Ct. 1976).
81. *Id.* at 880, 379 N.Y.S.2d at 1008.
82. *See* note 78 *supra*.
83. 85 Misc. 2d at 876-79, 379 N.Y.S.2d at 1006-07.
84. 85 Misc. 2d at 876-77, 379 N.Y.S.2d at 1005.
85. *See* text accompanying notes 36-42 *supra*.
86. *See* text accompanying notes 56-60 *supra*.

indictment preclude a defendant from being able to shed the stigma of being labled a 'criminal'?. . . This court declares the answer to be *never*."[87]

The court of appeals decision in *Drummond* has invalidated the exclusion criteria of the former youthful offender statute. This decision signals the end of the use of the indictment as the sole basis for withholding youthful offender eligibility under the 1975 amendment[88] and calls for the eventual affirmation of the *Evelyn R.* ruling. While it is constitutionally permissible to use the indictment *as a factor* in determining the court in which the defendant will be tried and in determining whether youthful offender consideration should be granted,[89] it is clearly unfair to deny such treatment *solely* on the basis of the accusatory instrument.

V. The Law of Other Jurisdictions

Several New York courts have pointed to the statutes of other jurisdictions[90] in attempting to uphold the constitutionality of the youthful offender eligibility criteria. These "similar statutes making like distinctions"[91] generally set up a procedure whereby youths charged with certain serious crimes are treated as adults rather than tried in a separate juvenile court system.

In *United States v. Bland*,[92] the United States Court of Appeals for the District of Columbia upheld provisions of the District of Columbia Code against due process and equal protection challenges. The District of Columbia Code grants the family court jurisdiction over any "child" alleged to have committed delinquent acts. A "child" is anyone under the age of eighteen who has not been charged with certain crimes by the United States Attorney. If the person is over eighteen years of age, or over sixteen and charged with

87. 85 Misc. 2d at 883, 379 N.Y.S.2d at 1011.

88. *See* text accompanying note 79 *supra*.

89. *See* note 62 *supra*.

90. *See, e.g.*, People v. Estrada, 80 Misc. 2d 608, 611-13, 364 N.Y.S.2d 332, 336-38 (Sup. Ct. 1975); People v. Goodwin, 49 App. Div. 2d 53, 54-55, 378 N.Y.S.2d 82, 84 (3d Dep't 1975).

91. People v. Goodwin, 49 App. Div. 2d at 54, 378 N.Y.S.2d at 84.

92. 472 F.2d 1329 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 909 (1973). Though the opinion of the federal court is not binding on the local District of Columbia court, the District of Columbia Court of Appeals, in Pendergast v. United States, 332 A.2d 919, 923 (D.C. 1975), adopted the ruling in *Bland* as the correct law.

one or more of the listed felonies, he is prosecuted in the adult court system.[93]

In *United States v. Bland* a sixteen year old defendant had been arrested and indicted as an adult. The district court dismissed the indictment saying that due process required a hearing to determine whether the youth was beyond the help of the juvenile system before he could be tried as an adult.[94] In reversing the district court the court of appeals examined the legislative history of the statute and decided that Congress had established sufficient facts to make such a classification.[95] The court also relied on the "long and widely accepted concept of prosecutorial discretion"[96] in bringing an indictment, and said that such a concept is not usually reviewable by the courts. Finally, the court rejected defendant's contention that the action of the United States Attorney in bringing the indictment denied the presumption of innocence since, "[i]t in no manner relieves the Government of its obligation to prove appellee's guilt beyond a reasonable doubt."[97] A strong dissent was filed by Judge Skelly Wright,[98] deploring the "out of sight-out of mind" attitude which the majority seemed to be taking by placing juvenile offenders in adult prisons "with hardened criminals."[99] Judge Wright doubted that such an attitude was in the best interest of the juvenile or society.[100]

In *Johnson v. State,*[101] the Supreme Court of Florida found that

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93. 16 D.C. Code § 2301(3)(A) (1973) provides:

The term "child" means an individual who is under 18 years of age, except that the term "child" does not include an individual who is sixteen years of age or older and -

(A) charged by the United States Attorney with (i) murder, forcible rape, burglary in the first degree, robbery while armed, or assault with intent to commit any such offense, or (ii) an offense listed in clause (i) and any other offense properly joinable with such offense;

(B) charged with an offense referred to in sub paragraph (A)(i) and convicted by plea or verdict of a lesser included offense . . . .

94. 472 F.2d at 1333.

95. *Id.* at 1331-34.

96. *Id.* at 1335.

97. *Id.* at 1338. Another factor which prompted the court to uphold the statute was the absence of any initial jurisdiction in the juvenile court over the defendant due to the unique wording of the provision. *See* note 93 *supra.*

98. 472 F.2d at 1338-50.

99. *Id.* at 1349.

100. *Id.* at 1349-50.

101. 314 So. 2d 573 (Fla. 1975).

no constitutional rights were impaired by a statute which provided that any "child" indicted by a grand jury for a crime punishable by death or life imprisonment be subjected to the jurisdiction of the adult court.[102] Defendant, fifteen years of age, was indicted for grand larceny and robbery, each of which carried a maximum potential sentence of life imprisonment. He contended that some children charged with such crimes are indicted and handled as adults, while others are not indicted and thus are treated as juveniles.[103] The court found that such a provision was "within the scope of legislative authority allowed under . . . the Florida Constitution."[104] The court also rejected defendant's due process claim by finding that every child tried under the Florida statute is guaranteed the same substantive and procedural rights as one tried in the usual manner. In addition, it concluded that the absolute discretion of the state attorney in choosing to prosecute is "inherent in our system of criminal justice," and does not result in a violation of equal protection.[105]

Finally, in *Myers v. District Court for the Fourth Judicial District,*[106] the Supreme Court of Colorado declared constitutional a statute which allowed the district attorney to file a felony information against a juvenile in adult court if the juvenile had been previously adjudicated a delinquent within the preceding two years due to the commission of certain acts.[107] Again, the court relied heavily on the "broad discretion granted to the district attorney" in rejecting defendants' due process and equal protection claims.[108]

A comparison between the New York youthful offender eligibility provision and the statutes of the District of Columbia, Florida and Colorado shows many similarities. Initially, the juveniles under these statutes are comparable to the "eligible youth" of the youthful

102. FLA. STAT. ANN. § 39.02(5)(c) (West 1974) provides in part:
A child of any age charged with a violation of Florida law punishable by death or by life imprisonment shall be subject to the jurisdiction of the court . . . unless and until an indictment on such charge is returned by the grand jury in which event and at which time the court shall be divested of jurisdiction under the statute and the . . . child shall be handled in every respect as if he were an adult.

103. 314 So. 2d at 574-75.

104. *Id.* at 577.

105. *Id.*

106. 184 Colo. 81, 518 P.2d 836 (1974).

107. COLO. REV. STAT. § 19-1-103(9)(b)(II) (1974). The provisions are set out at 184 Colo. at 83 n.1, 518 P.2d at 837 n.1.

108. 184 Colo. at 85-86, 518 P.2d at 838-39.

offender act,[109] since anyone charged with certain crimes is automatically excluded from the benefits of either the juvenile system or the youthful offender procedure. More importantly, it is the charge contained in the indictment which determines how a defendant will be treated. The New York statute has been criticized for handling individuals convicted of similar crimes differently.[110] A similar opportunity for different treatment exists in other jurisdictions. For example, a youth indicted in the District of Columbia for an offense not enumerated in the District of Columbia Code would be a "child" subject to the special rights and immunities of a juvenile.[111] However, another youth, indicted for a serious crime under the prosecutorial discretion of the United States Attorney would automatically be treated as an adult, despite the possibility that he will be convicted of a lesser crime than charged in the indictment.

The consequences of being denied juvenile jurisdiction in the District of Columbia Code are actually greater than in New York. The commitment of the "child" under the juvenile act in the District of Columbia can only last until the age of majority is reached, whereas commitment in the adult criminal system could last significantly longer.[112] In New York both the youthful offender and the ineligible youth are treated in the adult criminal court. Thus, the differences in length of commitment are not that great.[113]

What then is the basis for the differing conclusions reached by the New York Court of Appeals and the courts of the other jurisdictions? One possible distinction is that the juvenile statutes in other jurisdictions do nothing more than determine the jurisdiction of the court (juvenile or adult) based on the nature of the crime charged.[114] Because such a vital determination must be made early in the judicial process, the seriousness of the crime contained in the indict-

109. *See* text accompanying note 79 *supra.*

110. *See* People v. Goodwin, 49 App. Div. 2d 53, 57, 378 N.Y.S.2d 82, 87 (3d Dep't 1975) (Greenblott, J., dissenting).

111. United States v. Bland, 472 F.2d 1329, 1339-40 (D.C. Cir. 1972) (Wright, J., dissenting).

112. D.C. Code Encyl. § 16-2322(f) (West Supp. 1970). *See* United States v. Bland, 472 F.2d at 1337.

113. *See* Levine, *The Youthful Offender Under the New York Criminal Procedure Law*, 36 ALBANY L. REV. 241, 255 (1972).

114. *See* People v. Goodwin, 49 App. Div. 2d 53, 57, 378 N.Y.S.2d 82, 87 (3d Dep't 1975)(Greenblott, J., dissenting).

ment is of great value in deciding which court will hear the case. But this rationale is not applicable to New York. Children under sixteen may be tried only in juvenile court,[115] and children over sixteen are handled in adult court.[116] Thus, youthful offender proceedings are heard in the adult court system, and the determination as to youthful offender status is not made until after conviction.[117]

VI. Conclusion

In light of the court of appeals decision in *Drummond,* the 1975 amendment to the youthful offender statute appears to be in jeopardy. An application of the court's reasoning forces the conclusion that the court of appeals will find the new statute constitutionally lacking. Although the new amendment relaxes the automatic exclusion provision of the old statute, it continues to base eligibility solely on the indictment. Such use of the indictment will probably be rejected as a denial of due process.

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115. *See* N.Y. FAM. Ct. Act § 712 (McKinney 1975), *as amended,* (McKinney Supp. 1976). *See also* Note, *Sending The Accused Juvenile To Adult Criminal Court: A Due Process Analysis,* 42 BROOKLYN L. REV. 309 n.3 (1975).

116. *See* N.Y. FAM. CT. ACT § 712 note at 557 (McKinney 1975).

117. *See* N.Y. CRIM. PROC. LAW §§ 720.10-.35 (McKinney 1971), *as amended,* (McKinney Supp. 1976).