

Volume 26 | Issue 1

Winter 2023

Reducing Multigenerational Poverty in New York Through Sentencing Reform

Jared Trujillo

New York Civil Liberties Union (ACLU of NY)

Follow this and additional works at: <https://academicworks.cuny.edu/clr>



Part of the [Law Commons](#)

Recommended Citation

Jared Trujillo, Reducing Multigenerational Poverty in New York Through Sentencing Reform, 26 CUNY L. Rev. 225 (2023).

The CUNY Law Review is published by the Office of Library Services at the City University of New York. For more information please contact cunylr@law.cuny.edu.

Reducing Multigenerational Poverty in New York Through Sentencing Reform

Acknowledgements

The author acknowledges and thanks Karen Adelman, Trevor Colliton, Elizabeth Fox, Marcus Hyde, and Glenn Lutzky for their valuable contributions in researching and editing this Article.

REDUCING MULTIGENERATIONAL POVERTY IN NEW YORK THROUGH SENTENCING REFORM

Jared Trujillo[†]

I. INTRODUCTION	226
II. INCARCERATION CAUSES AND EXACERBATES POVERTY.	
POVERTY CAUSES INCARCERATION.	229
A. <i>Dire Impact of Incarceration on the Children of Incarcerated Parents</i>	233
B. <i>Foster Care, Severed Family Bonds, and Youth Homelessness for Children with Incarcerated Parents</i>	235
III. HOW THE STRUCTURE OF NEW YORK’S SENTENCING LAW DRIVES MULTIGENERATIONAL POVERTY.....	236
A. <i>The Impact of New York’s Sentencing Structure on Children and Young People</i>	239
B. <i>Broader Issues Within New York’s Sentencing Paradigm for Adults and Some Children</i>	244
IV. POLICY SOLUTIONS.....	248
A. <i>Abolishing the Juvenile Offender Act</i>	248
B. <i>Youth Justice and Opportunity Act to Alleviate Multi- Generational Poverty</i>	250
C. <i>Eliminate Mandatory Minimum Sentences and Sentencing Restrictions</i>	254
D. <i>Second Look Act</i>	260
E. <i>Earned Time Act</i>	263
V. CONCLUSION	265

[†] Jared M. Trujillo, Esq. (he/him) serves as Senior Policy Counsel at the New York Civil Liberties Union where he focuses on criminal and juvenile legal system issues, including sentencing reform. Prior to this role, he was President of the Association of Legal Aid Attorneys (UAW Local 2325), and a public defender for children and adults in New York City. He is an Adjunct Professor at CUNY School of Law, a board member of the New York State Defenders Association, and a Steering Committee Member of Decrim NY. The author acknowledges and thanks Karen Adelman, Trevor Colliton, Elizabeth Fox, Marcus Hyde, and Glenn Lutzky for their valuable contributions in researching and editing this Article.

I. INTRODUCTION

In New York, as in all states, a fundamental element of the criminal legal system is that even the most minor contact can trap individuals and their families in unrelenting cycles of poverty and reincarceration.¹ Each step of an individual's criminal case perpetuates this reality, from aggressive policing in low-income and racially marginalized communities, to post-release collateral consequences that make finding housing and employment grueling.² This Article focuses on how New York's sentencing structure fuels multigenerational poverty through the imposition of harsh sentences on young people and their families, sanctioned by remnants of so-called "tough-on-crime" era policies such as mandatory minimum sentences, restrictions on release, and a paltry state system for allotting time off sentences for participation in rehabilitative, educational and vocational programming. Sentencing laws are the primary driver of mass incarceration, as they are the most impactful determinant of whether people are sent to prisons, and how long they spend incarcerated. Thus, sentencing reform is crucial in reducing New York's population of generationally impoverished people.

The relationship between incarceration and poverty is circular, cyclical, and symbiotic—poverty is a cause of incarceration and incarceration is a cause of poverty.³ This link between incarceration and poverty contributes to the destabilization of low-income communities.⁴ On average, prior incarceration limits one's income by 52%.⁵

The direct cost of incarceration for family members of incarcerated people can monopolize a substantial portion of a low- or zero-income family's wealth. Court fees and fines cost on average more than \$13,600

¹ See Jaboa Lake, *Criminal Records Create Cycles of Multigenerational Poverty*, CTR. FOR AM. PROGRESS (Apr. 15, 2020), <https://perma.cc/J8Z7-HMPT>; MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 92-94, 138-140 (2010) (explaining how convictions and incarceration affect individuals long after they finish their prison sentences); ERNEST DRUCKER, *A PLAGUE OF PRISONS: THE EPIDEMIOLOGY OF MASS INCARCERATION IN AMERICA* 141 (2011) ("[P]unishment by incarceration operates like a chronic disease to systematically incapacitate individuals, wounding them physically and psychologically while in prison and disabling them for a future of successful participation in American life.").

² ALEXANDER, *supra* note 1, at 92, 139-140; Christian E. Weller et al., *America's Broken Criminal Legal System Contributes to Wealth Inequality*, CTR. FOR AM. PROGRESS (Dec. 13, 2022), <https://perma.cc/26UV-YM9L>.

³ Weller et al., *supra* note 2; see Jalila Jefferson-Bullock, *The Time Is Ripe to Include Considerations of the Effects on Families of Exceedingly Long Sentences*, 83 *UMKC L. REV.* 73, 75, 105 (2014).

⁴ Jefferson-Bullock, *supra* note 3, at 75, 92-94.

⁵ TERRY-ANN CRAIGIE ET AL., *BRENNAN CTR. FOR JUST., CONVICTION, IMPRISONMENT, AND LOST EARNINGS: HOW INVOLVEMENT WITH THE CRIMINAL JUSTICE SYSTEM DEEPENS INEQUALITY* 14-15 (2020), <https://perma.cc/Y7MC-XPGT>.

per year, while the costs of commissary, visits, phone calls, and other expenses related to incarceration can also be debilitating.⁶

Parental incarceration adversely impacts multiple measures of childhood well-being.⁷ As Part II discusses, children suffer financially when a parent is incarcerated, and they also often suffer long-term emotional, physical, psychological, and educational trauma as the result of having an incarcerated parent, which makes them more likely to experience poverty throughout their lives.⁸ Consequently, children of incarcerated parents are six times more likely to be incarcerated during their lives, than children whose parents are not incarcerated.⁹ Experiencing parental incarceration increases the likelihood that a person will live in long-term poverty, as well as, in turn, their own children's likelihood of living in poverty.¹⁰ Not only does mass incarceration devalue entire communities, but it also adversely impacts individual families.¹¹

More than 31,000 people languished in New York prisons in 2021.¹² New York State incarcerates more people on a per capita basis than any other major Western democracy if New York were its own country.¹³ The overwhelming majority of incarcerated people are from low-income households,¹⁴ while Black people “make up only 14 percent

⁶ SANETA DEVUONO-POWELL ET AL., ELLA BAKER CTR. FOR HUM. RTS. ET AL., WHO PAYS?: THE TRUE COST OF INCARCERATION ON FAMILIES 13, 30 (2015), <https://perma.cc/2X4N-7BPE>; Beatrix Lockwood & Nicole Lewis, *The Hidden Cost of Incarceration*, THE MARSHALL PROJECT, (Dec. 17, 2019, 5:00 AM), <https://perma.cc/BZ5X-HTYK>.

⁷ See generally DRUCKER, *supra* note 1, at 144-62 (describing collateral consequences on families and children of incarcerated parents).

⁸ Eric Martin, *Hidden Consequences: The Impact of Incarceration on Dependent Children*, NAT'L INST. OF JUST. J., March 1, 2017, at 3, <https://perma.cc/Y9R5-54PQ>; see Christopher Wildeman & Sara Wakefield, *The Long Arm of the Law: The Concentration of Incarceration in Families in the Era of Mass Incarceration*, 17 J. GENDER RACE & JUST. 367, 371-373 (2014).

⁹ Martin, *supra* note 8, at 2 (reviewing studies finding links between parental incarceration and antisocial behaviors, depression, low educational attainment, economic loss, and housing instability); John Hagan & Ronit Dinovitzer, *Collateral Consequences of Imprisonment for Children, Communities, and Prisoners*, 26 CRIME & JUST. 121, 124 (1999). See generally LAUREN E. GLAZE & LAURA M. MARUSCHAK, BUREAU OF JUST. STAT., OFF OF JUST. PROGRAMS, U.S. DEP'T OF JUST., PARENTS IN PRISON AND THEIR MINOR CHILDREN (2008), <https://perma.cc/4Q4P-8WVD>.

¹⁰ See THE PEW CHARITABLE TRS., COLLATERAL COSTS: INCARCERATION'S EFFECT ON ECONOMIC MOBILITY 8 (2010), <https://perma.cc/RNQ6-8M75>.

¹¹ Wildeman & Wakefield, *supra* note 8, at 371-76; see Jefferson-Bullock, *supra* note 3, at 76, 91.

¹² N.Y. STATE DEP'T OF CORR. & CMTY. SUPERVISION, ADMISSIONS AND RELEASES: CALENDAR YEAR 2021, at 1 (2022), <https://perma.cc/7SHJ-WXEM>.

¹³ Emily Widra & Tiana Herring, *States of Incarceration: The Global Context 2021*, PRISON POL'Y INITIATIVE (Sept. 2021), <https://perma.cc/ZNJ4-UPKT>.

¹⁴ Jennifer Jones Austin, Opinion, *Urban Agenda: End the Poverty to Prison Pipeline*, N.Y. AMSTERDAM NEWS (March 22, 2018), <https://perma.cc/SAE2-2RGN> (“[Eighty percent]

of the state's population but almost half of its prisoners."¹⁵ Members of the LGBTQ+ community also have disproportionately high incarceration rates nationwide.¹⁶ There are currently more than 337,000 New Yorkers in the state who have been incarcerated in their lifetimes.¹⁷ As a result, there are likely millions of children, spouses, and dependent parents with a former or currently incarcerated family member. Thus, addressing inequities within New York's sentencing laws is a critical intervention in addressing poverty within the state.

Importantly, long terms of incarceration have not been shown to deter criminalized behavior.¹⁸ Rather, evidence suggests long sentences destabilize communities, lead to recidivism, and further exacerbate the relationship between incarceration and multigenerational poverty.¹⁹ Moreover, using public funds to provide low-income communities with jobs, quality education, and other resources has been shown to improve public safety.²⁰ New York's sentencing paradigm is not "tough-on-crime;" rather, it is tough on poor people.

of all incarcerated persons in the U.S. hail from low-income communities"); *see also* Jay Holder et al., *Concentrated Incarceration and the Public-Housing-to-Prison Pipeline in New York City Neighborhoods*, 119 PROD. NAT'L ACAD. SCIENCES U.S., Sept. 6 2022, at e2123201119 (stating that incarceration rates per 100,000 people in census tracts with at least one New York City Housing Authority ("NYCHA") public housing development in 2010 was 4.6 times higher than census tracts in New York City without NYCHA developments).

¹⁵ Michael Winerip et al., *The Scourge of Racial Bias in New York State's Prisons*, N.Y. TIMES (Dec. 4, 2016), <https://www.nytimes.com/2016/12/03/nyregion/new-york-state-prisons-inmates-racial-bias.html> (on file with the CUNY Law Review).

¹⁶ *See* Alexi Jones, *Visualizing the Unequal Treatment of LGBTQ People in the Criminal Justice System*, PRISON POL'Y INITIATIVE (Mar. 2, 2021), <https://perma.cc/6443-WSEP>; Daiana Griffith, *LGBTQ Youth Are at Greater Risk of Homelessness and Incarceration*, PRISON POL'Y INITIATIVE (Jan. 22, 2019), <https://perma.cc/U2AT-B8P6>.

¹⁷ AMES C. GRAWERT ET AL., BRENNAN CTR. FOR JUST., *POVERTY AND MASS INCARCERATION IN NEW YORK: AN AGENDA FOR CHANGE 9* (2021), <https://perma.cc/LZT3-B8G6>.

¹⁸ *See* Caitlin J. Taylor, *Ending the Punishment Cycle by Reducing Sentence Length and Reconsidering Evidence-Based Reentry Practices*, 89 TEMP. L. REV. 747, 751-54 (2017); *see also* NAT'L INST. OF JUST., OFF. OF JUST. PROGRAMS, U.S. DEP'T OF JUST., *FIVE THINGS ABOUT DETERRENCE 1* (2016) ("Laws and policies designed to deter crime by focusing mainly on increasing the severity of punishment are ineffective partly because criminals know little about the sanctions for specific crimes. More severe punishments do not 'chasten' individuals convicted of crimes, and prisons may exacerbate recidivism."), <https://perma.cc/U4KP-6R67>.

¹⁹ *See* Taylor, *supra* note 18; NAT'L INST. OF JUST., *supra* note 18; *see also* THE PEW CHARITABLE TRS., *supra* note 10, at 18-22.

²⁰ Hanna Love, THE BROOKING INST., *Want to Reduce Violence? Invest in Place*, (Nov. 16, 2021), <https://perma.cc/279M-QET7>. Decreases in unemployment have been shown to reduce property crime and have some effect on violent crime. In fact, much of the reduction in property crime during the 1990s can be attributed to the declining unemployment rate.

Part II of this Article underscores the link between incarceration, individual poverty, and multigenerational poverty. Part III details how New York's sentencing structure fuels mass incarceration while simultaneously contributing to poverty. Part IV provides policy solutions to reduce multigenerational poverty through sentencing reform. This includes specific bills that have been proposed to the legislature, as well as other policy proposals.

II. INCARCERATION CAUSES AND EXACERBATES POVERTY. POVERTY CAUSES INCARCERATION.

Having low or no income increases the likelihood of being incarcerated, and being incarcerated decreases economic mobility and exacerbates poverty for entire families.²¹ The overwhelming majority of incarcerated people come from resource-starved neighborhoods, where their neighbors also suffer from high levels of incarceration.²² Nationally, even incarceration in a juvenile facility can reduce an individual's

Steven Raphael & Rudolf Winter-Ebmer, *Identifying the Effect of Unemployment on Crime*, 44 J.L. & ECON. 259 (2001). Researchers estimate that increasing student educational attainment, as measured by students remaining in school one year longer, decreases rates of subsequent incarceration for men by 15.5%. Randi Hjalmarsson et. al. *The Effect of Education on Criminal Convictions and Incarceration: Causal Evidence from Micro-Data*, 125 ECON. J. 1290, 1293 (2015). Increased access to publicly-funded medical care has also shown to decrease rates of robbery, aggravated assault, and larceny theft. Hefei Wen et al., *The Effect of Medicaid Expansion on Crime Reduction: Evidence from HIFA-Waiver Expansions*, 154 J. PUB. ECON. Oct. 2017, at 67, 78-79. Increased access to substance abuse treatment facilities in an area reduces both violent and financially motivated crimes, the effects of which are particularly pronounced for relatively serious crimes, including homicides. Samuel R. Bondurant et al., *Substance Abuse Treatment Centers and Local Crime*, J. URB. ECON., March 2018 at 124, 125. Further, one study showed a 51% decrease in arrests for violent crimes for individuals who were given access to emergency cash assistance. Caroline Palmer et al., *Does Emergency Financial Assistance Reduce Crime?*, J. PUB. ECON., Jan. 2019, at 34, 35. Studies have demonstrated that emergency cash assistance reduces rates of domestic violence events in particular. See, e.g., Shalini Roy et. al., *Transfers, Behavior Change Communication, and Intimate Partner Violence: Postprogram Evidence from Rural Bangladesh*. 101 REV. ECON. & STAT. 865 (2019). At the county level, increasing access to affordable housing by building more low-income housing units resulted in significant reductions in robberies and aggravated assaults. Matthew Freedman & Emily G. Owens, *Low-income Housing Development and Crime*, 70 J. URB. ECON., 115, 115. Homicide rates vary widely across countries and states—"[t]here is more than a ten-fold difference in rates between the least and most murderous states . . . [and] . . . [i]ncome inequality is the best predictor of this variability . . . [S]lightly over half of the variability in homicide rates could be predicted from—and hence, perhaps, 'explained' by—income inequality." MARTIN DALY, *KILLING THE COMPETITION: ECONOMIC INEQUALITY AND HOMICIDE*, 23-24 (2016) (emphasis omitted) (footnote omitted).

²¹ See Austin, *supra* note 14; Jefferson-Bullock *supra* note 3, at 75.

²² See Holder et al, *supra* note 14; see Austin, *supra* note 14.

wages by \$5 per hour at age 40.²³ Each year, formerly incarcerated New Yorkers lose \$1.9 billion in wages, while incarceration reduces hourly wages between ten and twenty percent for formerly incarcerated people nationwide.²⁴ Once released, it is difficult for formerly incarcerated people to find employment, with Black and Native formerly incarcerated people having the lowest earnings.²⁵ While incarcerated, workers only earn between 16 cents and 65 cents per hour,²⁶ while the state's minimum wage is \$14.20 per hour.²⁷ Those who are Black or Brown have worse economic outcomes post-incarceration than their white counterparts.²⁸

There is a strong correlation between poverty, and incarceration, with the majority of formerly imprisoned people living in poverty.²⁹ Having a family member currently or formerly incarcerated severely impedes the family's ability to save, build wealth or capital, purchase housing, open businesses, earn a better education, and fully participate

²³ Melanie Taylor, *Adult Earnings of Juvenile Delinquents: The Interaction of Race/Ethnicity, Gender, and Juvenile Justice on Future Earnings*, 13 CJCJ JUST. POL'Y J., Fall 2016, at 5, <https://perma.cc/FM7B-VSJ8>.

²⁴ GRAWERT ET. AL., *supra* note 17, at 5; Bruce Western & Catherine Sirois, *Racialized Re-Entry: Labor Market Inequality After Incarceration*, 97 SOCIAL FORCES 1517, 1518 (June 2019).

²⁵ Leah Wang & Wanda Bertram, *New Data on Formerly Incarcerated People's Employment Reveals Labor Market Injustices*, PRISON POL'Y INITIATIVE (Feb. 8, 2022), <https://perma.cc/8V2T-UMCV>; see E. ANN CARSON ET. AL., BUREAU OF JUST. STAT., OFF OF JUST. PROGRAMS, U.S. DEP'T OF JUST., SPECIAL REPORT: EMPLOYMENT OF PERSONS RELEASED FROM FEDERAL PRISON IN 2010, at 8 (2021), <https://perma.cc/RH27-7TEP>.

²⁶ Twyla Carter et al., Opinion, *Commentary: End New York's Prison Slavery System*, TIMES UNION (Dec. 8, 2022), <https://perma.cc/R6CR-9HFP>; see also Kate Lisa, *Campaign Launched to Raise Pay, Secure Labor Rights for Prisoners*, HUDSONVALLEY360 (Jan. 17, 2022), https://www.hudsonvalley360.com/news/nystate/campaign-launched-to-raise-pay-secure-labor-rights-for-prisoners/article_46dc9d5a-cbfe-5240-abfd-ddf3d0457da8.html (on file with the CUNY Law Review).

²⁷ *New York State's Minimum Wage*, N.Y.GOV, <https://perma.cc/EPJ9-QGGB> (last visited Dec. 8, 2022).

²⁸ See CRAIGIE ET AL., *supra* note 5, at 19 (2020) ("Formerly imprisoned Black and Latino people suffer greater lifetime earnings losses—\$358,900 and \$511,500, respectively — than their white counterparts, whose losses amount to \$267,000.")

²⁹ Bernadette Rabuy & Daniel Kopf, *Prisons of Poverty: Uncovering the Pre-Incarceration Incomes of the Imprisoned*, PRISON POL'Y INITIATIVE (July 9, 2015), <https://perma.cc/P4AH-ZA7F> ("[I]n 2014 dollars, incarcerated people had a median income of \$19,185 prior to their incarceration, which is 41% less than non-incarcerated people of similar ages.") (emphasis omitted). Prior to incarceration, 57% of incarcerated men and 72% of incarcerated women between ages of 27-42 earned less than \$22,500 annual income; see also N.Y. STATE BAR ASS'N SPECIAL COMM. ON COLLATERAL CONSEQUENCES OF CRIM. PROCEEDINGS, "RE-ENTRY AND REINTEGRATION: THE ROAD TO PUBLIC SAFETY": REPORT AND RECOMMENDATIONS OF THE SPECIAL COMMITTEE ON COLLATERAL CONSEQUENCES OF CRIMINAL PROCEEDINGS 219 (2006), <https://perma.cc/J8NA-392K> (noting that over 30% of single adults in New York City's shelters have recently been released from jails).

in the legal economy in other ways to alleviate family poverty.³⁰ These consequences further reduce the current wealth of their families, while also reducing the wealth they can ultimately pass to their heirs.³¹

In addition to reduced wages, formerly incarcerated people are often excluded from the social safety net programs that are intended to alleviate the worst symptoms of poverty.³² They are often excluded from welfare benefits like SNAP,³³ and most felony convictions as well as some misdemeanor convictions include a period of restriction from public housing.³⁴ In New York City, an arrest or criminal charge alone may

³⁰ Weller et al., *supra* note 3 (reporting on rising fines, fees, and other legal debts totaling thousands and tens of thousands of dollars; that many housing and business lenders are allowed to deny applicants based on their criminal records; and that many formerly incarcerated people are ineligible for student financial aid); SANETA DEVUONO-POWELL ET AL., *supra* note 6, at 8-9, 24 (finding that 48% of incarcerated peoples' families had trouble meeting basic housing needs and that only 27% of formerly incarcerated people were able to access any education or job training); Lockwood & Lewis, *supra* note 6 (sharing that many of 200 surveyed family members paid hundreds of dollars monthly for their incarcerated loved one's food, clothes, healthcare, hygiene items, and phone calls).

³¹ See THE PEW CHARITABLE TRS., *supra* note 10, at 16-18, 21 (finding that "in both relative and absolute terms, those who had been convicted of crimes and incarcerated in this time period had much less success in getting ahead," and that parental incarceration's impact on family income and children's educational outcomes had direct negative outcomes on generational economic mobility); Wildeman & Wakefield, *supra* note 8, at 382 (finding that the families of children with incarcerated parents "on average make significantly less money, are significantly more likely to rely on public assistance, and are significantly more likely to live in neighborhoods that are disproportionately Black" than families without an incarcerated parent); Lockwood & Lewis, *supra* note 6 (describing the economic stressors incarceration puts on the family members of incarcerated people).

³² Cameron Kimble & Ames Grawert, *Collateral Consequences and the Enduring Nature of Punishment*, BRENNAN CTR. FOR JUST. (June 21, 2021), <https://perma.cc/32LC-4N5T>.

³³ *Id.*; see Gwen Rubinstein & Debbie Mukamal, *Welfare and Housing—Denial of Benefits to Drug Offenders*, in *Invisible Punishment: The Collateral Consequences of Mass Imprisonment* 37, 37-49 (Marc Mauer & Meda Chesney-Lind eds., 2002). The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 permanently barred individuals convicted in state and federal courts of felony drug possession charges from receiving certain federal benefits. 42 U.S.C. § 608. States can opt out of this ban, however, and many states, including New York, have. CTR. FOR L. & SOC. POL'Y, NO MORE DOUBLE PUNISHMENTS: LIFTING THE BAN ON SNAP AND TANF FOR PEOPLE WITH PRIOR FELONY DRUG CONVICTIONS 6 (2022), <https://perma.cc/AS4S-FRA7>; 21 U.S.C. § 862a. However, as of April 2022, 22 states either fully or partially enforce the ban on receiving Supplemental Nutrition Assistance Program ("SNAP") benefits, and 24 states either fully or partially enforce the ban on receiving Temporary Aid to Needy Families ("TANF") benefits. See CTR. FOR L. & SOC. POL'Y, *supra*.

³⁴ Public Housing Authorities ("PHAs") have, for decades, used their broad discretion to create rules which bar formerly incarcerated persons from being eligible for subsidized housing programs. See Norrinda Brown Hayat, *Housing the Decarcerated: Covid-19, Abolition & the Right to Housing*, 110 CAL. L. REV. 639, 664-74 (2022). Congress first mandated that PHAs include a provision in their lease agreements that would allow them to evict tenants who use drugs or behaved in a manner that threatened the safety of other tenants with

lead to a permanent ban from public housing³⁵ for an individual or their family³⁶ with or without notice to the individuals being banned.³⁷ These exclusions hurt both the formerly incarcerated person and their family.

the passage of the Anti-Drug Abuse Act of 1988, H.R. 5210, 100th Cong. (1988). In 1996, President Clinton called for PHAs to adopt a “one strike and you’re out” policy for “residents who commit crime and peddle drugs.” William Jefferson Clinton, President of the United States, State of the Union Address at the U.S. Capitol (Jan. 23, 1996), <https://perma.cc/S8EK-ZDJK>. In 2002, the U.S. Supreme Court upheld the constitutionality of regulations that allow PHAs to “evict tenants for drug-related activities even if “[the] tenant did not know, could not foresee, or could not control behavior by other occupants.” Dep’t of Hous. & Urb. Dev. v. Rucker, 535 U.S. 125, 129 (2002) (alteration in original) (citation omitted). Today, the Department of Housing and Urban Development (“HUD”) does not mandate that PHAs adopt “One-Strike” policies, but many still do. HUD regulations permit PHAs to screen applicants according to their own policies “for family behavior or suitability for tenancy,” 24 C.F.R. § 982.552(e), and specifically authorizes PHAs to deny or terminate assistance to any “criminal” or “alcohol abuser,” *id.* § 982.553(a). Thus, subsidized tenants who have contacts with the criminal legal system, and even those who have household members or guests who do, whether on or off federally-subsidized property, may be evicted from their housing depending on the local PHAs policies. U.S. Dep’t of Hous. & Urb. Dev, Notice PIH 2015-19, at 2-3 (Nov. 2, 2015) <https://perma.cc/JE2M-HT7E>. Several PHAs now impose lifetime bans for individuals with criminal records. MARIE CLARIE TRAN-LEUNG, SHRIVER CTR., WHEN DISCRETION MEANS DENIAL: A NATIONAL PERSPECTIVE ON CRIMINAL RECORDS: BARRIERS TO FEDERALLY SUBSIDIZED HOUSING, at v, app. I (2015), <https://perma.cc/8AEY-QREH>.

³⁵ Under the New York City Housing Authority’s (“NYCHA”) policies, the Housing Authority can permanently terminate the tenancy of anyone who engages in “non-desirab[le]” conduct or whose family member engages in such conduct.” Maia M. Cole, Note, *Permanently Excluded*, 95 N.Y.U. L. REV. 1062, 1064 (2020) (alteration in original). Such prohibited conduct includes “(i) [a]ny criminal activity that threatens the health, safety, or right to peaceful enjoyment of the Development by other residents or by the Landlord’s employees, or (ii) [a]ny violent or drug-related criminal activity on or off the Leased Premises or the Development, or (iii) [a]ny activity, on or off the Leased Premises or the Development, that results in a felony conviction” N.Y.C. HOUS. AUTH, NYCHA RESIDENT LEASE AGREEMENT § (12)(r)(i)-(iii) (2018), <https://perma.cc/8D3Z-EQ4B>; *see also* NYCHA, MANAGEMENT MANUAL CHAPTER IV, APPENDIX B – TERMINATION OF TENANCY – NON-DESIRABILITY ACTIONS 4-6 (2016), <https://perma.cc/DT7R-XFWR> (listing the different categories of actions constituting “non-desirability”); *see also id.* at 7-8 (noting that the NYCHA Police Department automatically reports all arrests of individuals with NYCHA addresses to NYCHA). NYCHA has used this policy to ban individuals for misdemeanor charges. *See, e.g., In re Matos v. Hernandez*, 79 A.D.3d 466 (N.Y. App. Div. 2010) (overturning NYCHA’s permanent exclusion of a resident convicted of two misdemeanors but who had otherwise never violated NYCHA’s policies or rules); *see also* Manny Fernandez, *Barred from Public Housing, Even to See Family*, N.Y. TIMES (Oct. 1, 2007), <http://www.nytimes.com/2007/10/01/nyregion/01banned.html> (on file with the CUNY Law Review) (discussing NYCHA’s permanent exclusion of a 15-year-old for marijuana possession).

³⁶ NYCHA’s “Permanent Exclusion” policy may result in the eviction of an entire family, or an indefinite ban that bars a family member from living in or even visiting the unit. Permanent Exclusion - Frequently Asked Questions, N.Y.C. HOUS. AUTH., <https://perma.cc/QED6-PEVY> (last visited Dec. 31, 2022).

A. *Dire Impact of Incarceration on the Children of Incarcerated Parents*

Nearly one in 28 children in the United States has an incarcerated parent, including one in nine Black children.³⁸ Notably, in 1985, only one in 125 minor children had an incarcerated parent.³⁹ In fact, 54% of people currently incarcerated in the United States are parents to minor children.⁴⁰ Incarcerated parents are overwhelmingly under 35 years old,⁴¹ and a majority of the children of incarcerated parents are under nine years old.⁴² Parents, spouses, domestic partners, and other family members, in addition to children, are often materially impacted by the incarceration of their relatives, and by the harsh sentencing laws in place in New York.⁴³

Maintaining family bonds while a family member is incarcerated is particularly onerous and expensive. Calling, sending gifts, and providing funds for an incarcerated relative's commissary fund can all be expen-

³⁷ When NYCHA makes a permanent exclusion determination or brings other termination actions, it provides only the tenant of record with notice and the right to a hearing, even when other members of the household, or their guests, are the subject of the permanent exclusion determination or the subject of why a termination proceeding is initiated against the household. See N.Y.C. HOUS. AUTH., MANAGEMENT MANUAL CHAPTER VI: TERMINATION OF TENANCY 10 (2016), <https://perma.cc/2QPY-FNSC> (noting that only tenants of record receive notification letters and sit for interviews when termination actions are initiated); see also MARGARET DIZEREGA, ET. AL., VERA INST. OF JUSTICE, REPORT TO THE NEW YORK CITY HOUSING AUTHORITY ON APPLYING AND LIFTING PERMANENT EXCLUSIONS FOR CRIMINAL CONDUCT 8 (2017), <https://perma.cc/D69C-EUA8> (noting that NYCHA frequently makes permanent exclusion determinations before a criminal court reaches a final verdict or disposition); see also Cole, *supra* note 36, at 1066-67 (2020) (arguing “NYCHA’s permanent exclusion policy deprives authorized residents of a property right without providing constitutionally required procedural due process”); see also Lauren J. Zimmerman, Note, *Exile Without Process: The New York City Housing Authority’s Unconstitutional Trespass Notice Program*, 33 CARDOZO L. REV. 1253, 1267 (2012) (arguing that NYCHA’s permanent exclusion policy and trespass policy, which applies to non-residents as well as residents, violate constitutional due process requirements by depriving residents and non-residents of their “substantive right to freedom of association”).

³⁸ THE PEW CHARITABLE TRS., *supra* note 10, at 4, 19.

³⁹ See *id.* at 18.

⁴⁰ *Id.* at 4.

⁴¹ See GLAZE & MARUSCHAK, *supra* note 9, at 3 tbl. 5.

⁴² See GLAZE & MARUSCHAK, *supra* note 9, at 3 tbl. 3.

⁴³ See SANETA DE VUONO-POWELL ET AL., *supra* note 6, at 9 (finding that phone and visitation costs alone plunged 34% of incarcerated peoples’ families into debt and that half of incarcerated individuals’ family members suffered health harms—often PTSD, nightmares, hopelessness, depression, or anxiety—related to their loved one’s incarceration); Megan Comfort et al., *The Costs of Incarceration for Families of Prisoners*, 98 INT’L REV. RED CROSS 783, 788-95 (2016) (discussing distressed relationships when partners’ time and money constraints encouraged incarcerated males to contact multiple women for emotional and financial support).

sive.⁴⁴ Visitation can take hours, and can result in lost wages, particularly for people incarcerated in upstate New York, with family members in New York City.⁴⁵ Empirical studies demonstrate that maintaining family contact is important for the development of incarcerated people, and that it reduces recidivism.⁴⁶ Ensuring relationships between children and their incarcerated parent(s) can continue can lead poor families to sacrifice necessities or building wealth.

The families of incarcerated people also experience significant financial hardship when the incarcerated family member was a financial contributor prior to their incarceration: “[Seventy-one] percent of incarcerated parents were employed in the month preceding their arrests.”⁴⁷ The majority of parents are employed prior to incarceration, with a majority of fathers contributing financially to their families prior to incarceration.⁴⁸ The loss of a breadwinning co-parent to incarceration often causes non-incarcerated parents anxiety, stress, and financial uncertainty.⁴⁹ Naturally, these stressors impact the quality of relationships non-incarcerated parents have with their children.⁵⁰

⁴⁴ See DE VUONO-POWELL ET AL., *supra* note 6, at 29-30; Lockwood & Lewis, *supra* note 6.

⁴⁵ See Elana Confino-Pinzon, *Locked Up Far Away from Home: The Problem of Distance in New York State Prisons*, BROWN POL. REV. (Mar. 30, 2019), <https://perma.cc/A5DB-GCMQ> (reporting that 58% of people incarcerated in state prisons from New York City are incarcerated at least 200 miles from home). In 2021, New York enacted a law directing its corrections department to place incarcerated parents of minors in the institution or facility closest to their children unless impracticable for the department or if the placement would be unsuitable or inappropriate, not increase contact between the incarcerated parents and children, not be in the best interest of the children, or not be with the incarcerated person’s consent. N.Y. CORRECT. LAW § 72-c(1) (McKinney 2021). The sponsor’s justification included that (1) over 100,000 children in the state had at least one parent in state prison; (2) experts in criminal justice, child development, and child welfare agreed that children nearly always benefit from personal contact and communication with an imprisoned parent; and (3) in-person visits reduce the strain of separation, lower recidivism, and are the foremost factor in reuniting families post-incarceration. Memorandum in Support of Legislation, Assemb. B. A06710A, 2019 Assemb., 2019-2020 Reg. Sess. (N.Y. 2019), <https://perma.cc/4TAU-JZUN>.

⁴⁶ Creasi Finney Hairston, *Family Ties During Imprisonment: Do They Influence Future Criminal Activity?*, FED. PROBATION, Mar. 1988, at 48, 48-49 (1988).

⁴⁷ Jefferson-Bullock, *supra* note 3, at 92.

⁴⁸ *Id.* at 92-93.

⁴⁹ See BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 131-67 (2006); DRUCKER, *supra* note 1, at 141-44; see also Eman Tadros et. al., *Coparenting and Mental Health in Families with Jailed Parents*, INT’L J. ENV’T RSCH. & PUB. HEALTH, Aug. 18, 2021, at 2; Erica Bryant, *More Than 5 Million Children Have Had an Incarcerated Parent*, VERA INST. (Mar. 7, 2021), <https://perma.cc/7YWY-Z8N5>.

⁵⁰ See Tadros et. al., *supra* note 49, at 2-3 (noting the demonstrated negative impact of incarceration on the quality of the incarcerated parent’s relationship with their child, and the subsequent impact on “short- and long-term parent, caregiver, and child well-being outcomes”); Hagan & Dinovitzer, *supra* note 9, at 124-5 (“[O]lder children may have to assume

Significantly, research shows that parental incarceration impacts the educational, emotional, and psychological development of children so adversely that those children will experience an elevated risk of living in long-term poverty.⁵¹ Further, children of incarcerated parents are six times more likely than their peers to be incarcerated in their lives.⁵² These children are also more likely to display antisocial behavior, which can include physical aggression, theft, and other criminalized behaviors.⁵³ Scientists note that the parent's incarceration is directly tied to these behaviors, as it causes frustration and feelings of loss in the child, and destabilizes their family units.⁵⁴ Because these children are overwhelmingly poor, misbehavior is much more likely to be criminalized than transgressions from wealthy children, as they live in neighborhoods and schools that are more policed and are often surrounded by mandated reporters.⁵⁵ Delinquent behaviors from children with incarcerated parents often result in disproportionate suspensions and expulsion from school.⁵⁶ A lack of educational attainment is heavily correlated with poverty later in life.⁵⁷

B. Foster Care, Severed Family Bonds, and Youth Homelessness for Children with Incarcerated Parents

Nearly 10% of children with incarcerated mothers are in the foster care system.⁵⁸ Not all of these children are in the foster care system be-

unexpected role responsibilities, . . . be diverted from school and into early or unplanned labor force participation[,] . . . [or] be pushed toward the underground economy and its criminal activities . . .”).

⁵¹ See Martin, *supra* note 8, at 3 (noting hardships faced by children of incarcerated parents in educational attainment, psychological wellbeing, and economic security); THE PEW CHARITABLE TRS., *supra* note 10, at 21 (noting the negative impact of parental incarceration on the economic mobility of their children, both through reduced family incomes and increased difficulties in obtaining education).

⁵² Martin, *supra* note 8, at 2; Hagan & Dinovitzer, *supra* note 9, at 146-47.

⁵³ Martin, *supra* note 8, at 3.

⁵⁴ *Id.* at 3-4.; see also WESTERN, *supra* note 49.

⁵⁵ Mariame Kaba, *How the School-to-Prison Pipeline Works*, TEEN VOGUE (Oct. 17, 2017), <https://perma.cc/Z7L4-9J3F>; see Mike Hixenbaugh et al., *Mandatory Reporting Was Supposed to Stop Severe Child Abuse. It Punishes Poor Families Instead*, PROPUBLICA (Oct. 10, 2017, 8:00 AM), <https://perma.cc/8WN7-P9A2>.

⁵⁶ Martin, *supra* note 8, at 3.

⁵⁷ THE PEW CHARITABLE TRS., *supra* note 10, at 5; see WESTERN, *supra* note 49, at 15-16 (“High incarceration rates among less educated . . . are unmistakable . . . [S]tate inmates average fewer than eleven years of schooling.”).

⁵⁸ CHRISTOPHER MUMOLA, INCARCERATED PARENTS AND THEIR CHILDREN, U.S. DEP'T OF JUST. 1 (2009) <https://perma.cc/EP38-EB4A>; see Sarah Schirmer et al., THE SENT'G PROJECT, INCARCERATED PARENTS AND THEIR CHILDREN: TRADES 1991-2007, at 5 (2000), <https://perma.cc/QUM6-5T6N>.

cause they have an incarcerated parent, and poverty has a symbiotic and cyclical relationship to placement in the foster care system rivaling the relationship between poverty and incarceration. However, approximately 49% of incarcerated parents did live with their children before incarceration, indicating that incarceration was likely a significant factor in the family separations that occurred.⁵⁹

The foster care to poverty pipeline ensnares far too many young people in numerous ways. Many youth abscond or run away from foster care, particularly LGBTQ+ youth.⁶⁰ This can lead to poverty, homelessness, and engagement with illegal economies that can lead to arrests and incarceration.⁶¹ Young people that “age out” of foster care without the necessary resources are also at heightened risk of homelessness or insecure housing.⁶² Foster care involvement is also a significant indicator that an individual will become involved in the juvenile justice system, which is itself an indicator as to whether one will become involved in the adult system.⁶³ All of these factors, compounded with trauma that children suffer from losing a parent to prison, exacerbate multigenerational poverty.

III. HOW THE STRUCTURE OF NEW YORK’S SENTENCING LAW DRIVES MULTIGENERATIONAL POVERTY

One practice commentary notes that New York’s “sentencing statutes have become a labyrinth not easily traversed by even the most experienced practitioner of the criminal law.”⁶⁴ Similarly, the Chair of the state’s sentencing commission in 2007 noted that the sentencing structure “is an overly complex, Byzantine sentencing structure that is rid-

⁵⁹ GLAZE & MARUSCHAK, *supra* note 9, at 4 fig. 7.

⁶⁰ See Ryan Berg, Opinion, *A Hidden Crisis: The Pipeline from Foster Care to Homelessness for LGBTQ Youth*, IMPRINT (Oct. 14, 2016, 7:25 AM), <https://imprintnews.org/child-welfare-2/hidden-crisis-pipeline-foster-care-homelessness-lgbtq-youth> (on file with the CUNY Law Review).

⁶¹ *Id.*; Griffith, *supra* note 16.

⁶² FED’N OF PROTESTANT WELFARE AGENCIES, KEEPING FOSTER YOUTH OFF THE STREETS: IMPROVING HOUSING OUTCOMES FOR YOUTH THAT AGE OUT OF CARE IN NEW YORK CITY 2-6, 42-43 (2014), <https://perma.cc/8JW2-WYBY>.

⁶³ Rachel Anspach, *The Foster Care to Prison Pipeline: What It Is and How It Works*, TEEN VOGUE (May 25, 2018), <https://perma.cc/AW3F-K5MN> (“According to the latest data, there are 437,500 children in America’s foster care system, who . . . , face a disproportionate risk of being incarcerated.”); N.Y.C. OFF. OF THE MAYOR, CTR. FOR INNOVATION THROUGH DATA INTEL., YOUNG ADULT OUTCOMES OF FOSTER CARE, JUSTICE, AND DUALY INVOLVED YOUTH IN NEW YORK CITY 6 (2015), <https://perma.cc/TKW7-DZJX>; see also GLAZE & MARUSCHAK, *supra* note 9, at 18 tbl. 11.

⁶⁴ William C. Donnino, Practice Commentaries, McKinney’s Cons Laws of N.Y., Book 39, Penal Law § 60.00.

dled with opportunities for injustice and, in some cases, is virtually unintelligible to prosecutors, defense attorneys, defendants and crime victims alike.”⁶⁵ Mandatory sentencing ranges differ based upon numerous factors, including the underlying offense, the age of the convicted individual, whether the underlying offense was a narcotics offense, and the individual’s history of prior convictions.⁶⁶ While some children are sentenced in adult courts, their ranges are sometimes different from the ranges for adults, and children could ultimately serve longer sentences than adults for the same offenses.⁶⁷ However, the uniting factors across New York’s rigid sentencing charts are that they frequently require judges to sentence people to long minimum sentences with little discretion,⁶⁸ and that the length, rigidity, and impersonal nature of those sentences contributes to multigenerational poverty.

New York’s sentencing paradigm has grown increasingly harsh after the civil rights advancements and cultural shifts that occurred in the 1960s.⁶⁹ Legal scholars and historians note that this is when the criminal legal system nationwide shifted its focus from rehabilitation to punishment and retribution.⁷⁰ During this time, as nationwide prison populations swiftly grew so did racial disparities, with Black and Hispanic

⁶⁵ N.Y. STATE COMM’N ON SENT’G REFORM, THE FUTURE OF SENTENCING IN NEW YORK STATE: A PRELIMINARY REPORT FOR REFORM, at v (2007), <https://perma.cc/G7ST-VA5E>.

⁶⁶ N.Y. PENAL LAW §§ 60.00, 70.00 (McKinney 2022). New York Penal Laws § 60.00 and § 70.00 contain New York’s sentencing statutes. With few exceptions, most felony offenses require the court to impose mandatory minimum sentences. *Id.*

⁶⁷ *See* N.Y. PENAL LAW §§ 70.05, 70.02 (McKinney 2022). For instance, pursuant to N.Y. Penal Law § 70.05(2)(d) and § 70.05(3)(c), a child convicted as a juvenile offender for a class C violent felony could be sentenced to an indeterminate term of two and one-third to seven years, whereas pursuant to N.Y. Penal Law § 70.02(3)(b), an adult convicted of a C felony who is not a predicate or persistent felony offender could be sentenced to an indeterminate sentence of three and one-third to fifteen years of imprisonment. In this scenario, the adult could be paroled after serving the minimum of three and one-half years, while the child could be denied parole and serve their full sentence. *See also* N.Y. PENAL LAW § 30.00.

⁶⁸ *See* N.Y. STATE COMM’N ON SENT’G REFORM, *supra* note 65, at 8-9. New York’s penal code contains several sentencing statutes setting mandatory terms of imprisonment and probation. *See, e.g.*, N.Y. PENAL LAW §§ 65.00, 70.00 (McKinney 2022).

⁶⁹ Frank R. Baumgartner et al., *Throwing Away the Key: The Unintended Consequences of the “Tough-On-Crime” Laws*, 19 PERSPECTIVES ON POLS. 1233, 1235 (2021). While crime rates were relatively low in the 1960s, public sentiment was that crime rates were rising due to displays of civil disobedience and at times riots from Black and other severely disenfranchised people. *Id.* Instances of unrest in New York included the New York City School Boycott of 1964, where Black residents pressured New York City to desegregate schools, which many white residents opposed. Yasmeen Khan, *Demand for School Integration Leads to Massive 1964 School Boycott – In New York City*, WNYC, (Feb. 3, 2016), <https://perma.cc/9LKL-A8MN>.

⁷⁰ *See* Loïc Wacquant, *Deadly Symbiosis: When Ghetto and Prison Meet and Mesh*, 3 BERKELEY J. PUNISHMENT & SOC’Y 95, 112 (2001).

people representing increasingly disproportionate shares of prison populations.⁷¹ Before this time, there were only two offenses that carried mandatory minimum sentences, murder and kidnapping.⁷² However, in 1973, New York passed the infamous Rockefeller Drug Laws,⁷³ which introduced harsh mandatory minimum sentences for drug possession and distribution.⁷⁴ The Rockefeller Drug Laws were proudly hailed as the toughest narcotics criminal statutes in the country by the governor.⁷⁵ In 1978, New York's legislature enacted more broad sentencing reforms, which increased mandatory minimum sentences that judges had no discretion but to sentence people to.⁷⁶ That same year, the legislature passed the Crime Package bill, which included the Juvenile Offender Act, which enabled judges to sentence 13 to 15-year-old children to harsh adult sentences, including imprisonment for life.⁷⁷

New York led the national charge in enacting harsh sentencing laws, while simultaneously shrinking its social safety net. This trend continued for more than two decades nationwide.⁷⁸ In the 1990s, with federal incentives, New York passed additional harsh sentencing statutes that increased sentences while divesting from prosocial programs for incarcerated people and their children and families outside of prison walls.⁷⁹ Following the enactment of these statutes, prison and jail censuses swelled. The United States prison population has quadrupled between 1970 and 2014,⁸⁰ with more than 43,000 incarcerated New Yorkers in 2019,⁸¹ and 2.7 million children have an incarcerated parent.⁸²

⁷¹ *Id.* at 96.

⁷² Barry Kamins, *Sentencing Reform: The Next Criminal Justice Battleground*, N.Y. L.J. (Apr. 4, 2022, 12:15PM), at ¶ 2, <https://www.law.com/newyorklawjournal/2022/04/04/sentencing-reform-the-next-criminal-justice-battleground/> (on file with the CUNY Law Review).

⁷³ 1973 N.Y. Laws 1040-65; see William E. Farrell, *Governor Signs His Drug Bills and Assails the Critics Again*, N.Y. TIMES (May 9, 1973), <https://perma.cc/H9QL-X6RC>.

⁷⁴ See JIM PARSONS ET AL., A NATURAL EXPERIMENT IN REFORM: ANALYZING DRUG POLICY CHANGES IN NEW YORK CITY 9, 11 (2015), <https://perma.cc/4KBB-DDDU>.

⁷⁵ James M. Markham & William E. Farrell, *Toughest in the Nation*, N.Y. TIMES (May 13, 1973), <https://perma.cc/3RGJ-23LD>.

⁷⁶ N.Y. STATE COMM'N ON SENT'G REFORM, *supra* note 65, at 8-9.

⁷⁷ John P. Woods, *New York's Juvenile Offender Law: An Overview and Analysis*, 9 FORDHAM URB. L.J. 1, 1-2 (1980).

⁷⁸ THE PEW CHARITABLE TRS., *supra* note 10.

⁷⁹ PAULA M. DITTON & DORIS JAMES, BUREAU OF JUST. STATS., OFF. OF JUST. PROGRAMS, U.S. DEP'T OF JUST., SPECIAL REPORT: TRUTH IN SENTENCING IN STATE PRISONS 3 (1999), <https://perma.cc/T6D8-4GA5>; Lauren-Brooke Eisen, *The 1994 Crime Bill and Beyond: How Federal Funding Shapes the Criminal Justice System*, BRENNAN CTR. FOR JUST. (Sept. 9, 2019), <https://perma.cc/Q6LC-JG4H>.

⁸⁰ LEILA MORSY & RICHARD ROTHSTEIN, ECON. POL'Y INST., MASS INCARCERATION AND CHILDREN'S OUTCOMES 6 fig. 2 (2016), <https://perma.cc/2CB6-GW6X>.

⁸¹ See *U.S. Criminal Justice Data*, THE SENT'G PROJECT, <https://perma.cc/AF4U-YSJR> (last visited Dec. 8, 2022).

A. *The Impact of New York's Sentencing Structure on Children and Young People*

By some metrics, New York has among the harshest criminal sentencing laws in the country for children and young people. Pursuant to New York's juvenile offender statute, children between 13 and 15 years old can be sentenced as adults, under the Penal Law rather than the Family Court Act, for certain offenses.⁸³ Not only does this create a permanent felony conviction for the child, but it allows the court to sentence someone to serve life in prison before they graduate the eighth grade.⁸⁴ Until "Raise the Age"⁸⁵ legislation was passed in 2017, New York was one of only two states that required all 16- and 17-year-old children to be processed in the adult penal system and given adult sentences.⁸⁶ Even since the law was passed, some 16- and 17-year-old children charged with felonies can still be charged in adult court, rather than in Family Court—specialized courts that are required to consider the "best interest" of the child and on rehabilitation.⁸⁷

New York has a "youthful offender" ("YO") sentencing designation available to some people under 19 years old, which restricts maximum sentences to four years for felonies and six months for some misdemeanors,⁸⁸ and gives judges options for noncustodial dispositional alternatives, including unconditional discharge, or discharge conditioned on therapeutic or other treatment programs.⁸⁹ However, New York's youthful offender adjudications are not nearly as generous as similar

⁸² THE PEW CHARITABLE TRS., *supra* note 10, at 4.

⁸³ N.Y. PENAL LAW § 70.05 (McKinney 2022) (establishes sentencing guidelines for those convicted as juvenile offenders); *see also* N.Y. PENAL LAW § 10.00(18)(1)-(2) (McKinney 2022) (listing the offenses for which 13-, 14-, and 15-year-olds can be charged with juvenile offenses).

⁸⁴ *See* N.Y. PENAL LAW § 70.05(2)(a); *see also* N.Y. PENAL LAW § 10.00(18)(1)-(2); *see also* N.Y. STATE UNIFIED CT. SYS., *Crimes Committed by Children Between 7-18* (Dec. 23, 2019), <https://perma.cc/8GZ3-6G7W>.

⁸⁵ Jesse McKinley, 'Raise the Age,' *Now the Law in New York, Is Still a Subject of Debate*, N.Y. TIMES (Apr. 10, 2017), <https://www.nytimes.com/2017/04/10/nyregion/raise-the-age-new-york.html> (on file with the CUNY Law Review).

⁸⁶ Nick Niezdwiadek, *North Carolina 'Raise the Age' Bill Could Leave New York Behind*, POLITICO (Mar. 10, 2017, 5:18 AM), <https://perma.cc/UGS8-YPNY>; *see* YOUTH JUST. RSCH. COLLABORATIVE, *YOUTH REPRESENT, EVALUATING THE IMPLEMENTATION OF RAISE THE AGE IN NEW YORK CITY 1* (2020), <https://perma.cc/VES9-2ZJU>.

⁸⁷ YOUTH JUST. RSCH. COLLABORATIVE, *supra* note 86, at 6; *see* N.Y. FAM CT. ACT § 352.2(2)(a) (McKinney 2022); *see also* *Id.* § 353.2(2)(a) (McKinney 2022).

⁸⁸ N.Y. PENAL LAW § 60.02(1), (2) (McKinney 2022); § 70.00(2)(e) (McKinney 2022).

⁸⁹ N.Y. CRIM. PROC. LAW § 720.10 (McKinney 2022); *see also* N.Y. PENAL LAW § 65.05, .20 (McKinney 2022).

sentencing designations in other jurisdictions.⁹⁰ In New York, judges do not have the option to grant youthful offender designation in some instances: it is only a dispositional alternative for young people under 19 years old,⁹¹ youthful offender adjudications preclude some noncustodial sentencing alternatives for controlled substance offenses,⁹² and judges are only required to substitute a conviction for a youthful offender adjudication when the young person is accused of a misdemeanor and they have no prior convictions or youthful offender adjudications.⁹³ While this Article addresses criminal law as it applies to juveniles, not juvenile delinquency laws pursuant to the Article 3 of the Family Court Act, it is notable that the structure of the Family Court Act also contributes to multigenerational poverty, though it often carries fewer collateral consequences than a criminal conviction.⁹⁴

Perhaps the greatest sin of New York's sentencing structure is that it ignores the fundamental differences between young people and fully developed adults. It has been well established by neuroscientists over the past two decades that young brains do not fully develop until people reach their mid-twenties, particularly in the prefrontal cortex which regulates impulse control.⁹⁵ As a result, young people have a diminished capacity to control their emotions, consider and appreciate short-term and long-term consequences, and resist external pressures, and they are

⁹⁰ For instance, California grants a similar status to young people up to 22 years old, while Vermont grants a similar status to young people over 14 but under 22 years old, and North Dakota grants a similar status to young people under 20 years old. CAL. PENAL CODE § 2905(a) (West 2022); VT. STAT. ANN. tit. 33, § 5280(b) (2022); N.D. CENT. CODE §§ 27-20.4-01(4)(b), -20.2-03 (2021).

⁹¹ N.Y. CRIM. PROC. LAW § 720.10(1), (2) (McKinney 2022).

⁹² N.Y. PENAL LAW § 60.02(2) (McKinney 2022) (“the court must not impose a sentence of conditional discharge or unconditional discharge [non-custodial sentences per N.Y. PENAL LAW § 65.05, .20] if a youthful offender finding was substituted for a conviction of a felony offense in article two-hundred twenty [which contains various offenses related to controlled substances] of this chapter”); see N.Y. PENAL LAW §§ 220.00-78 (McKinney 2022).

⁹³ See N.Y. CRIM. PROC. LAW § 720.20(1)(b).

⁹⁴ Article 3 of the New York Family Court Act governs juvenile delinquency proceedings. See N.Y. FAM. CT. ACT. §§ 301.1-385.2 (McKinney 2022). While juvenile delinquency adjudications are not convictions and they are sealed, a juvenile delinquency record can substantially lower lifetime earnings. See Taylor, *supra* note 23, at 4-5. Poverty is also “one of the most well-documented correlates of juvenile delinquency.” See Roderik Rekker et al., *Moving in and out of Poverty: The Within-Individual Association Between Socioeconomic Status and Juvenile Delinquency*, PLOS ONE, Nov. 17, 2015, at 1; Sue Burrell, *Collateral Consequences of Juvenile Court: Boulders on the Road to Good Outcomes*, in A NEW JUVENILE JUSTICE SYSTEM: TOTAL REFORM FOR A BROKEN SYSTEM 333-45 (Nancy Dowd ed., 2015).

⁹⁵ See Mariam Arain et al., *Maturation of the Adolescent Brain*, 9 NEUROPSYCHIATRIC DISEASE & TREATMENT 449, 451, 453 (2013).

hypersensitive to reward.⁹⁶ Neuroscientists note before maturation of the prefrontal cortex, which happens around age 25, young people are more prone to unlawful behavior, and they are less able to appreciate the long-term consequences of their actions.⁹⁷ Yet, New York's sentencing structure for young people refuses to acknowledge these well-established biological realities. Instead, New York sentencing laws impose potential life sentences on eighth graders, and older teenagers and "emerging adults" are excluded from the state's youthful offender statute.⁹⁸ Further, the vast majority of criminalized young people are Black or Brown, and come from low-income communities. Their behaviors are more likely to be criminalized than their whiter and wealthier counterparts because they live in neighborhoods that have disproportionately more police, mandatory reporters, and other agents of the state, most acutely in New York City.⁹⁹

Enabling courts to bestow children and young people with the scarlet mark of an adult criminal conviction at sentencing is a policy choice from the New York legislature that often damns justice-system-involved young people (who are frequently poor)¹⁰⁰ to adverse economic consequences.¹⁰¹ While juvenile delinquency records are inaccessible to the public,¹⁰² and youthful offender *adjudications* seal,¹⁰³ most criminal *convictions* never seal.¹⁰⁴ As a result, a conviction from when a young

⁹⁶ *Id.* at 453 fig.3.

⁹⁷ See Kathryn Monahan et al., *Juvenile Justice Policy and Practice: A Developmental Perspective*, 44 CRIM. & JUST. 577, 590 (2015).

⁹⁸ *Id.*; N.Y. PENAL LAW § 70.05(2)(a) (McKinney 2022); "Emerging adults" refers to young people between ages 18-25, who have reached legal adulthood, but are developmentally distinct from adolescents and young adults. See Jeffrey J. Arnett, *Emerging Adulthood. A Theory of Development from the Late Teens Through the Twenties*, 55 AM. PSYCH. 469, 475-476 (2000); N.Y. PENAL LAW § 10.00(18)(1)-(2); N.Y. CRIM. PROC. LAW § 720.10(1)-(2).

⁹⁹ FED'N OF PROTESTANT WELFARE AGENCIES, ENDING THE POVERTY TO PRISON PIPELINE 6-8 (2019), <https://perma.cc/FHZ4-QMRE>; Weller, *supra* note 2 ("Households with less wealth are more likely to live in neighborhoods with higher rates of police presence and/or surveillance and are thus more likely than wealthier households to face frequent interactions with the criminal legal system.").

¹⁰⁰ See Rekker et al., *supra* note 94, at 12-13.

¹⁰¹ See Kimble & Grawert, *supra* note 32.

¹⁰² N.Y. FAM. CT. ACT § 380.1(3) (McKinney 2022).

¹⁰³ N.Y. CRIM. PROC. LAW § 720.35(2) (McKinney 2022).

¹⁰⁴ See N.Y. CRIM. PROC. LAW § 160.59 (McKinney 2022). There is a limited sealing provision for criminal convictions. N.Y. CRIM. PROC. LAW § 160.59 (McKinney 2022). However, this relief is restricted to certain offenses, and individuals are limited to sealing two misdemeanors, or one misdemeanor and a felony. Unlike sealing provisions for juvenile delinquency and youthful offender adjudications, sealing is not automatic. *Id.* In the first two years since the sealing provision was enacted, approximately 1,800 people in New York City had their records sealed under the statute, though 600,000 people in New York City were

person was a minor could be used to deny that person access to resources including both private and public housing, legal employment, SNAP and other public welfare programs, childcare, the adjustment of immigration status, education, and other necessities of life, for the span of that person's entire life.¹⁰⁵ Juvenile offender ("JO") convictions and many other sentencing designations that young people receive can even be used as sentence enhancements to increase a sentence they serve later in life.¹⁰⁶ These convictions will impact young people into their adulthood, which could thereby impact their ability to provide in turn for their own children. Moreover, lacking access to these necessities often drives people to engage in criminalized economies, which leads to rearrest, reincarceration, and poverty.¹⁰⁷ Even the stigma alone of having an adult criminal record can lead to higher instances of reincarceration, while sentences focused on rehabilitation, and sentences sparing young people from criminal convictions are clearly shown to reduce the chances that young people are reincarcerated in their lives.¹⁰⁸

The length of sentences New York imposes on young people causes multigenerational poverty in numerous ways. Life sentences and other long sentences deprive family members of the income and other financial contributions that their loved ones would otherwise contribute while the individual is incarcerated.¹⁰⁹ As noted in Part II, on release, those formerly incarcerated can expect to earn 52% less than those who have never been incarcerated, or who were convicted but not incarcerated.¹¹⁰

thought to be eligible. See David Brand, *Two Years on, State Record Sealing Law Has Underwhelming Import in NYC*, QUEENS EAGLE (Nov. 21, 2019), <https://perma.cc/EYL5-36TQ>.

¹⁰⁵ See Brand, *supra* note 104; sources *supra* notes 32-33 and accompanying text.

¹⁰⁶ Juvenile offender convictions are for children who are 13, 14, or 15 years old that are convicted of committing at least one of 15 offenses. Juvenile offender sentences are adult, indeterminate sentences that can lead to lifetime imprisonment. Juvenile offender convictions are distinguishable from juvenile delinquency adjudications and youthful offender adjudications, which are both discussed in this Article. N.Y. PENAL LAW § 10.00(18); see *id.* § 70.05 (McKinney 2022); *id.* § 60.10 *id.* § 70.04, .06, .08, .10. Note that prior convictions can be used to enhance the minimum and maximum sentence a person who is convicted or pleads to a new offense will be required to serve. N.Y. PENAL LAW § 70.04, .06, .08, .10 (McKinney 2022).

¹⁰⁷ Kimble & Grawert, *supra* note 32.

¹⁰⁸ See Samantha Buckingham, *Reducing Incarceration for Youthful Offenders with a Developmental Approach to Sentencing*, 46 LOY. L. REV. 801, 857-59 (2013); see also Hagan & Dinovitzer, *supra* note 9, at 126; see also THE PEW CHARITABLE TRS., *supra* note 10, at 22-23.

¹⁰⁹ See N.Y. PENAL LAW § 60.10-a (McKinney 2019) (listing offenses for which judges can sentence juvenile offenders to terms of imprisonment that could include a life sentence if the person is never granted parole); see THE PEW CHARITABLE TRS., *supra* note 10, at 21.

¹¹⁰ CRAIGIE ET AL., *supra* note 5, at tbl.1

These financial burdens will impact young people as adults, and adversely impact their ability to provide for their own families.

Importantly, incarceration is a violent experience for many people who are incarcerated.¹¹¹ This is particularly true in New York, which currently houses a jail with rates of violence seven to eight times higher than similarly situated jails,¹¹² and prisons with historically high levels of violence.¹¹³ While New York law prevents young people from being incarcerated with adults,¹¹⁴ juvenile detention facilities are associated with sexual victimization from other youth, and facility staff.¹¹⁵ Moreover, when juvenile offenders reach adulthood and are moved to adult prisons, their youth makes them disproportionately more likely to be sexually assaulted.¹¹⁶ These experiences of violence cause many incarcerated and formerly incarcerated people to experience post-traumatic stress disorder, suicidal ideation, and other mental ailments.¹¹⁷ Proponents of New York's shift to harsh youth sentencing laws in the 1970s claimed that it was in response to increased youth engagement in criminalized behaviors.¹¹⁸ Today's proponents of harsher youth sentencing laws echo the same sentiments.¹¹⁹ Yet, there is no evidence that increas-

¹¹¹ Emily Widra, *No Escape: The Trauma of Witnessing Violence in Prison*, PRISON POL'Y INITIATIVE (Dec. 2, 2020), <https://perma.cc/7A2D-H5JK>.

¹¹² Jonah Bromwich & Jan Ransom, *Rikers Still 'Unstable and Unsafe,' Under New Jails Chief, Watchdog Says*, N.Y. TIMES (Mar. 17, 2022), <https://www.nytimes.com/2022/03/16/nyregion/rikers-jail-violence-report.html> (on file with the CUNY Law Review); see Special Report of the Nunez Independent Monitor at 18, *Nunez v. N.Y.C. Dep't of Corr.*, No. 11-cv-05845 (S.D.N.Y. Mar. 16, 2022), ECF No. 438.

¹¹³ See Jean Casella & Katie Rose Quandt, *New York's State Prisons Are Brutal and Deadly. That's Something We Can Change*, GOTHAMIST (Feb. 21, 2019), <https://perma.cc/R6W5-TK99>.

¹¹⁴ See JULIA DAVIS & KATE RUBIN, YOUTH REPRESENT & CHILDREN'S DEF. FUND-N.Y., EXPANDING YOUTH JUSTICE IN NEW YORK 5 (2022), <https://perma.cc/75YB-7S6C>.

¹¹⁵ ERICA L. SMITH & JESSICA STROOP, BUREAU OF JUST. STATS., OFF. OF JUST. PROGRAMS, U.S. DEP'T OF JUST., SEXUAL VICTIMIZATION REPORTED BY YOUTH IN JUVENILE FACILITIES, 2018, at 1 (2019) <https://perma.cc/25ES-RYLS>.

¹¹⁶ Nancy Wolff et al., *Sexual Violence Inside Prisons: Rates of Victimization*, J. URB. HEALTH, Sept. 2006, at 835, 840.

¹¹⁷ Katie Rose Quandt & Alexi Jones, *Research Roundup: Incarceration Can Cause Lasting Damage to Mental Health*, PRISON POL'Y INITIATIVE, (May 13, 2021), <https://perma.cc/DT3B-B5CX>.

¹¹⁸ Woods, *supra* note 77, at 19, 24.

¹¹⁹ See, e.g., OFF. OF THE MAYOR OF N.Y.C., THE BLUEPRINT TO END GUN VIOLENCE 11 (2022), <https://perma.cc/A4WN-QYD2>. For instance, in his "Blueprint to End Gun Violence," New York City Mayor Eric Adams encourages the state government to modify Raise the Age, N.Y. CODE. CRIM. PRO. § 722, legislation so that "[i]f a 16 or 17 year old is arrested on a gun charge, law enforcement should ask the individual where they got the gun. If the individual refuses to disclose that information, prosecutors should have the ability to charge the individual in Criminal Court, rather than Family Court." OFF. OF THE MAYOR OF N.Y.C., *supra*. In effect, Mayor Adams is calling for children alleged to have been carrying firearms

ing incarceration for young people improves community safety, while there is evidence that rehabilitative programming and community investment pay dividends in increasing community safety.¹²⁰ Mandatory minimums for young people only ensure they will suffer in the system. Moreover, overly punitive sentencing structures fuel multigenerational poverty. New York's sentencing laws for young people are not "tough-on-crime." Rather, they reinforce recidivism and multigenerational poverty by erecting impenetrable barricades to rehabilitation and economic security.

B. Broader Issues Within New York's Sentencing Paradigm for Adults and Some Children

Beyond the issues facing young people, New York's sentencing laws impose rigid sentences that cause multigenerational poverty. The most pervasive issue is the wide use of mandatory minimum sentences, which refers to the minimum sentencing range statutes which judges are bound by law to obey when they make sentencing determinations. Mandatory minimum sentences are set by statute,¹²¹ and they do not account for the underlying facts of the case, the accused person's role in the underlying offense, or the rehabilitative needs of the accused.¹²² Once sentenced, there is little recourse to reduce the underlying sentence, as New York does not have a comprehensive resentencing statute.¹²³

For context, New York's sentencing priorities only shifted their focus to retribution and punishment in the past half century.¹²⁴ Before 1967, only two offenses—murder and first degree kidnap—carried

to be charged as adults if they assert their constitutional right to silence pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966). See OFF. OF THE MAYOR OF N.Y.C., *supra*. See generally JOSH ROVNER, THE SENT'G PROJECT, HOW TOUGH ON CRIME BECAME TOUGH ON KIDS: PROSECUTING TEENAGE DRUG CHARGES IN ADULT COURTS 4-8 (2016), <https://perma.cc/TPS6-V3X2>.

¹²⁰ See Thea Sebastian et al., *A New Community Safety Blueprint: How the Federal Government Can Address Violence and Harm Through A Public Health Approach*, BROOKINGS INST. (Sept. 21, 2022), <https://perma.cc/8GWY-W4D9>; Richard E. Reding, *Adult Punishment for Juvenile Offenders: Does It Reduce Crime?* 23-25 (Vill. Univ. Charles Widger Sch. of L., Working Paper, 2006), <https://perma.cc/6BJ3-MUPA>; see also Buckingham, *supra* note 108, at 847.

¹²¹ See N.Y. PENAL LAW § 70.00 (McKinney 2022).

¹²² *Id.*; see Mariam Gaye, *New York Should Abolish Mandatory Minimums*, VERA INST., (Feb. 2022), <https://perma.cc/4ED4-6D3W>; Olivia Ensign & Laura Pitter, *Human Rights Watch Urges Support for NYS Sentencing Reform*, HUM. RTS. WATCH (Apr. 19, 2022 5:00PM), <https://perma.cc/X2S3-HQVJ>.

¹²³ Ensign & Pitter, *supra* note 122; see also Steven Zeidman, *Opinion, No One Can See the Future: New York Needs Second Look Sentencing Before More Lives Are Wasted*, GOTHAM GAZETTE (Dec. 8, 2022), <https://perma.cc/SM4B-TEKP>.

¹²⁴ See N.Y. STATE COMM'N ON SENT'G REFORM, *supra* note 65, at 8.

mandatory minimum sentences.¹²⁵ At the time, New York's sentencing structure was, in theory, focused on rehabilitation. The state employed indeterminate sentences¹²⁶ under the theory that judges would not have complete information about the rehabilitative needs of individuals at sentencing,¹²⁷ so sentencing was purported to enable the state to assess an individual's rehabilitation and need for further incarceration.¹²⁸

Beginning in the early 1970s, New York adopted harsh sentencing structures, and the state set the national appetite for mandatory minimums, longer sentences, and the increased incarceration of impoverished people from Black and Brown communities.¹²⁹ The apex of this harshness was the enactment and enforcement of the Rockefeller Drug Laws in 1973.¹³⁰ These were deemed the harshest drug laws in the country, with penalties that could include life imprisonment even for small amounts of narcotics, even for children.¹³¹ The same year, New York passed a "two-strike" law, which enhanced criminal penalties for those with prior records.¹³² In the 1970s and 1990s, New York passed sentencing laws that increased the length of prison sentences, enforced mandatory minimums, enhanced the power of prosecutors to coerce pleas, reduced opportunities for early release through curtailing the use of parole, and reduced opportunities to earn an education while incarcerated.¹³³

At the same time that New York and other jurisdictions moved toward mass incarceration, the federal and state governments moved to divest money from low-income families and communities.¹³⁴ This peri-

¹²⁵ Kamins, *supra* note 72, at para. 2.

¹²⁶ See N.Y. STATE COMM'N ON SENT'G REFORM, *supra* note 65, at 3-4. Indeterminate sentences refer to sentences with a range. For instance, a minimum of 3.5 years to 7 years. In this instance, a person would be eligible to go before a parole board after 3.5 years. Determinate sentences refer to a set amount of time, for instance, a sentence of 5 years. *Id.*

¹²⁷ See *id.* at 8.

¹²⁸ *Id.* at 4.

¹²⁹ See Brian Mann, *The Drug Laws That Changed How We Punish*, NPR (Feb. 14, 2013 3:04 AM), <https://perma.cc/ZWZ3-JLQK>.

¹³⁰ *Id.*

¹³¹ *Id.*; see also *People v. Thompson*, 83 N.Y.2d 477, 479 (1994) (holding that the trial court was required to sentence a 17-year-old child to a mandatory minimum of 15 years to lifetime imprisonment following her conviction for selling cocaine).

¹³² N.Y. PENAL LAW § 70.04, 70.06 (McKinney 2022); see COMMUNITIES NOT CAGES, A BRIEF HISTORY OF NEW YORK'S SENTENCING LAWS (2021), <https://perma.cc/MQ8P-2VK6>.

¹³³ See N.Y. STATE COMM'N ON SENT'G REFORM, *supra* note 65, at 8; see e.g., 1978 N.Y. Laws ch. 481; 1995 N.Y. Laws ch. 3; 1996 N.Y. Laws ch. 650; 1995 N.Y. Laws ch. 83.

¹³⁴ See Spencer Rich, *Reagan Budget Cuts Seen Harming Poor Children*, WASH. POST, (Feb. 20, 1985), <https://perma.cc/U7W5-XXVN>; Ife Floyd et al., *TANF Policies Reflect Racist Legacy of Cash Assistance: Reimagined Program Should Center Black Mothers* 25-29 (Ctr. on Budget & Pol'y Priorities, Working Paper, 2021), <https://perma.cc/HWY4-8X27>. The Reagan administration emphasized false stereotypes about welfare recipients throughout

od marked the height of the symbiotic and circular relationship between incarceration and poverty. In the 1980s, the federal government slashed funding for housing assistance, healthcare, employment programs for low-income people, financial aid for higher education, and food assistance.¹³⁵ These cuts continued into the 1990s, with the federal government slashing aid for low and zero income families.¹³⁶ The result of these cuts were that more people fell into poverty, and families that were already experiencing poverty fell deeper into poverty,¹³⁷ which in turn exposed more individuals to the likelihood of incarceration. Even as reductions in social welfare spending reached their peak in the mid-1990s, federal and state governments simultaneously poured cash into contracts to build new prisons and jails, which localities often spent already-dwindling resources to become more attractive candidates to win.¹³⁸ The federal government also incentivized states to eliminate education and other rehabilitative programming for incarcerated people, in order to sentence more people to incarceration for longer.¹³⁹

Sentences of incarceration deprive families of breadwinners and cause poor families to divert their resources from escaping poverty to paying for the necessities to survive or supporting loved ones in prison. As noted in Part II, parental incarceration has adverse impacts on children, and causes ailments that make them more susceptible to poverty.¹⁴⁰ The longer the sentence, the deeper the impact, which underscores the connection between New York's sentencing paradigm and multigenerational poverty. Mandatory minimum sentences also give prosecutors tremendous power to coerce individuals to take pleas, or to severely punish individuals who choose to try their cases. The trial pen-

the 1980s to push reforms that limited eligibility while states received waivers permitting them to restrict benefits even further. *Id.* In 1996, the Clinton administration transformed cash assistance for the lowest income families into a block grant system that gave states full control over eligibility, allowing them to shift even more federal resources away from families in poverty. *Id.*

¹³⁵ Floyd et al., *supra* note 134; see also Claire Bond Potter, Opinion, *The Shadow of Ronald Reagan Is Costing Us Dearly*, N.Y. TIMES (Nov. 11, 2021) <https://www.nytimes.com/2021/11/11/opinion/reagan-social-welfare.html> (on file with the CUNY Law Review).

¹³⁶ See Dylan Matthews, "If the Goal Was to Get Rid of Poverty, We Failed": The Legacy of the 1996 Welfare Reform Act, VOX (June 20, 2016, 9:10 AM), <https://perma.cc/2BW9-RA4E>.

¹³⁷ See *id.*; see also Rich, *supra* note 134.

¹³⁸ See Tracy Huling, *Building a Prison Economy in Rural America*, in INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 197, 200-01 (Marc Mauer & Meda Chesney-Lind eds., 2002).

¹³⁹ Wendy Sawyer, *Since You Asked: How Did the 1994 Crime Bill Affect Prison College Programs?*, PRISON POL'Y INITIATIVE (Aug. 22, 2019), <https://perma.cc/DA77-ND8Y>; Ensign & Pitter, *supra* note 123.

¹⁴⁰ See Martin, *supra* note 8, at 2-4; see THE PEW CHARITABLE TRS., *supra* note 10, at 18.

alty, lack of trials in New York, and plea-deal restrictions have enabled prosecutors to force the incarceration of many New Yorkers by making the risk of litigating one's constitutional right to trial too high.¹⁴¹

Importantly, this nexus between harsher sentencing and multigenerational poverty specifically targets poor Black and Brown New Yorkers by design. Before the imposition of mandatory minimums, the purpose of the carceral system was purportedly rehabilitation.¹⁴² However, in the 1960s, despite protests by the majority, Black and Brown New Yorkers won important civil rights victories.¹⁴³ Retrenchment followed; though explicitly racist rhetoric began falling out of favor, conservative politicians successfully stoked white fears about rising crime rates by associating "urban" civil disobedience with criminality and lawlessness.¹⁴⁴ As public appetite for punitive incarceration rose, the so-called tough on crime policies that started in the 1970s gained bipartisan popularity beginning in the 1980s.¹⁴⁵ While sentences grew longer, anti-poverty programs continued to shrink, and urban areas that were overwhelmingly low-income bore the brunt of cuts.¹⁴⁶ Yet, constructing and filling prisons was deemed a crucial economic stimulus for more rural, less poor, whiter communities.¹⁴⁷ In fact, many of these communities competed against one another for the construction of new prisons with

¹⁴¹ See N.Y. STATE ASS'N OF CRIM. DEF. LAWS., *THE NEW YORK STATE TRIAL PENALTY: THE CONSTITUTIONAL RIGHT TO TRIAL IS UNDER ATTACK* 13 (2021), <https://perma.cc/TN93-KP37>. The trial penalty refers to significantly longer sentences prosecutors routinely demand if an accused person does not plead, as compared to sentences prosecutors demand if the accused person pleads. In most felony cases, prosecutors have immense authority in choosing which offense to charge an individual, which impacts the sentence a court is required to impose. In New York, approximately 99% of misdemeanor convictions, and 96% of felony convictions are the result of pleas, not trials. *Id.* at 15.

¹⁴² N.Y. STATE COMM'N ON SENT'G REFORM, *supra* note 65, at 4.

¹⁴³ Olivia B. Waxman, *Nearly Half of New York City's Public-School Students Stayed Home to Protest Segregation in 1964 Boycott. That Fight Is Still Unfinished*, TIME, (September 22, 2020, 2:00 PM), <https://perma.cc/5QUU-BA82>; see Baumgartner, *supra* note 69, at 1235.

¹⁴⁴ ALEXANDER, *supra* note 1, at 44-48.

¹⁴⁵ See Baumgartner, *supra* note 69, at 1235, 1238.

¹⁴⁶ See Sarah Bartlett, *Federal Aid Cutbacks in '80's Hurt New York City*, N.Y. TIMES, (May 26, 1991), <https://www.nytimes.com/1991/05/26/nyregion/federal-aid-cutbacks-in-80-s-hurt-new-york-city.html> (on file with the CUNY Law Review). Reductions in social spending disproportionately impacted Black families not only because Black people in the U.S. experience poverty at higher rates than white people, but also because defunding social welfare programs results in the elimination of public sector jobs with higher rates of Black employment. Sheldon Danziger & Robert Haveman, Institute for Research on Poverty, *The Reagan Administration's Budget Cuts: Their Impact on the Poor*, Focus, Winter 1981-82, at 13, 13-14.

¹⁴⁷ Huling, *supra* note 138, at 199-200.

the implicit intention of diverting public funds and resources from Blacker and Browner urban areas to whiter rural areas.¹⁴⁸

The War on Drugs is perhaps the best example of how New York's sentencing paradigm targeted not just poor people, but specifically poor Black people. The disproportionate impact of the Rockefeller Drug Laws was almost immediate, and by the mid-1980s a majority of those incarcerated for narcotics offenses were Black and Brown.¹⁴⁹ Further, by 1992, the percentage of white people incarcerated for narcotics offenses fell to 5%.¹⁵⁰ The disparate racial impact can be seen in uneven incarceration rates today.¹⁵¹

IV. POLICY SOLUTIONS

A. *Abolishing the Juvenile Offender Act*

Abolishing the Juvenile Offender Act will shield children as young as 13 from being given permanent criminal records that would impede their ability to attain necessities like employment, housing, public benefits, and education.¹⁵² It would also ensure that children are not sentenced to potential life imprisonment for youthful bad acts that occurred before neurological and emotional maturity.¹⁵³ The Juvenile Offender Act was not enacted until 1978, and it was part of broader efforts to shift the criminal legal system from one focused on rehabilitation to one fo-

¹⁴⁸ See *id.* at 201, 210-12. The result of investing in this rural prison economy is that "hundreds of small rural towns and several whole regions have become dependent on an industry that itself is dependent on the continuation of crime-producing conditions." *Id.* at 197. Even where incarcerated people cannot vote, counties where they are incarcerated may receive greater per capita federal funding or increased political representation due to the supposedly higher population. *Id.* at 211-12.

¹⁴⁹ N.Y. C.L. UNION, THE ROCKEFELLER DRUG LAWS: UNJUST, IRRATIONAL, INEFFECTIVE 11-12 (2009), <https://perma.cc/KKW6-CFXL>.

¹⁵⁰ *Id.*

¹⁵¹ See VERA INST. OF JUST., INCARCERATION TRENDS IN NEW YORK (2019), <https://perma.cc/6KJY-FN4S> (highlighting the overrepresentation of Black and Latinx individuals in jails and prisons statewide and nationwide and its link to discriminatory justice policies).

¹⁵² Juvenile Justice Reform Amendment of 1978, 1978 N.Y. Laws chs. 478, 481 (codified as amended in scattered sections of N.Y. CRIM. PROC. LAW (McKinney 2022), N.Y. EXEC. LAW (McKinney 2022), N.Y. FAM. CT. ACT (McKinney 2022), N.Y. PENAL LAW (McKinney 2022)). The law is commonly known as the Juvenile Offender Act of 1978. See Eli Hager, *The Willie Bosket Case: How Children Became Adults in the Eyes of the Law*, MARSHALL PROJECT (Dec. 29, 2014, 7:15 AM), <https://perma.cc/X67X-UPB6>, for a history of the law's enactment.

¹⁵³ See *supra* notes 94-97 and accompanying text. For a discussion of Juvenile Offender Act penalties, see *infra* notes 159-63 and accompanying text.

cused on punishment, where longer sentences and mandatory minimum sentences were prominent features.¹⁵⁴

New York's Juvenile Offender Act was passed, in part, because of the prosecution of Willie Bosket, a 15-year-old Black child from a low-income family who was convicted by a Family Court judge of killing two people.¹⁵⁵ Media coverage relentlessly used this case to sow fears of Black children as dangerous, unruly, and irredeemable.¹⁵⁶ After Willie was sentenced to a minimum of five years in secure detention, then-Governor Hugh Carey immediately called a special legislative session to change the law for young teenagers.¹⁵⁷ The Juvenile Offender Act of 1978,¹⁵⁸ dubiously called the "Willie Bosket Law" at the time, was passed within two weeks, shortly before a contentious Democratic gubernatorial primary.¹⁵⁹ Today, children between 13- and 15-years-olds can be tried as adults for different offenses.¹⁶⁰ The law imposes mandatory minimum indeterminate sentences, and life sentences for some offenses.¹⁶¹ While the law does enable some of these cases to be removed to Family Court,¹⁶² those cases are then classified as "designated felonies,"¹⁶³ which require mandatory minimum sentences when judges order restrictive placement.¹⁶⁴ Governor Carey—who was attacked as being permissive of "crime" before signing this law—claimed that ensuring children who committed certain offenses could be incarcerated for the rest of their lives served as motivation to pass the law.¹⁶⁵ While New York's Juvenile Offender Act was the first law in the country to charge entire categories of children as adults, every other state followed over the next two decades.¹⁶⁶

Importantly, the changes to the law are not consistent with evidence-based solutions to reducing unlawful behavior, improving public safety, or reducing recidivism.¹⁶⁷ Moreover, pro-carceral claims that

¹⁵⁴ Woods, *supra* note 77, at 19.

¹⁵⁵ Hager, *supra* note 152.

¹⁵⁶ *See id.*

¹⁵⁷ *Id.*

¹⁵⁸ 1978 N.Y. Laws ch. 478.

¹⁵⁹ Hager, *supra* note 152.

¹⁶⁰ N.Y. PENAL LAW § 10.00(18)(2) (McKinney 2022).

¹⁶¹ N.Y. PENAL LAW § 70.05 (McKinney 2022).

¹⁶² *See* N.Y. CRIM. PROC. LAW §§ 180.75, 722.22 (McKinney 2022).

¹⁶³ N.Y. FAM CT. ACT § 301.2(8) (McKinney 2022).

¹⁶⁴ The New York Family Court Act requires minimum periods of incarceration when judges sentence children who are found to have committed designated felony acts to restrictive placement. N.Y. FAM. CT. ACT § 353.5(4) (McKinney 2022).

¹⁶⁵ Hager, *supra* note 152.

¹⁶⁶ *Id.*

¹⁶⁷ Buckingham, *supra* note 108, at 829-37.

treating children as adults will improve public safety are dubious, and are not backed by evidence either.¹⁶⁸ Rather, while the Juvenile Offender Act was sold to the public as a “tough-on-crime” policy solution, it was only tough on low-income, predominately Black children. Policies that increase the length of sentences, like the Juvenile Offender Act of 1978, perpetuate multigenerational poverty.¹⁶⁹

Repealing New York’s Juvenile Offender Act will ensure that 13-, 14-, and 15-year-old children’s sentencing dispositions will be decided by Family Court judges. While Family Court is no panacea and aspects of Family Court do perpetuate multigenerational poverty,¹⁷⁰ it is a more appropriate venue for minors than adult criminal court, based upon the psychological and neurological development of young people.¹⁷¹ Additionally, Family Court sentencing dispositions are based partially on the rehabilitation and best interest of the child.¹⁷²

B. Youth Justice and Opportunity Act to Alleviate Multi-Generational Poverty

Youthful offender adjudications are a critical sentencing alternative to criminal convictions in the reform effort to reduce multigenerational poverty because they save young people from the debilitating lifelong impacts of criminal convictions,¹⁷³ and because they often set lower maximum sentences.¹⁷⁴ Pending legislation, the “Youth Justice and Opportunities Act,”¹⁷⁵ (“YJ&O”) would increase the number of young peo-

¹⁶⁸ *Id.*

¹⁶⁹ Marc Mauer, *Long-Term Sentences: Time to Reconsider the Scale of Punishment*, 87 UMKC L. REV. 113, 121-127 (2018).

¹⁷⁰ See Taylor, *supra* note 23, at 5.

¹⁷¹ See generally Buckingham, *supra* note 108, at 846.

¹⁷² N.Y. FAM. CT. Act § 352.2(2) (McKinney 2022).

¹⁷³ See N.Y. CRIM. PROC. LAW § 720.35(2) (McKinney 2022) (“except where specifically required or permitted by statute or upon specific authorization of the court, all official records and papers, whether on file with the court, a police agency, or division of criminal justice services, relating to a case involving a youth who has been adjudicated a youthful offender, are confidential and may not be made available to any person or public or private agency.”). The confidentiality of youthful offender adjudications prevents potential landlords, potential employers, and others from using those records to make adverse employment, and rental decisions against a person with a prior youthful offender adjudication. *Id.*; see THE PEW CHARITABLE TRS., *supra* note 10, at 12; see KIMBLE & GRAWERT, *supra* note 32.

¹⁷⁴ The maximum term of imprisonment for a felony youthful offender adjudication is an indeterminate term of four years. N.Y. PENAL LAW § 60.02(2) (McKinney 2022). See generally N.Y. PENAL LAW Art. 70 (McKinney 2022) (defining minimum and maximum sentences for both adults and juveniles).

¹⁷⁵ See Assemb. B. 3536A, 2021 Assemb., 2021-2022 Reg. Sess. (N.Y. 2021); see S.B. 5749A, 2021S., 2021-2022 Reg. Sess. (N.Y. 2021).

ple between 16 years old and 18 years old who are granted mandatory or discretionary youthful offender sentencing dispositions, create a similar “young adult” status for young people 19-26, remove non-carceral youthful offender sentencing restrictions for narcotic offenses,¹⁷⁶ and create resentencing opportunities for previously ineligible people to receive youthful offender or young adult sentences pursuant to the standards in the YJ&O.¹⁷⁷

Currently, the law only requires judges to substitute convictions for youthful offender sentencing adjudications for young people who do not have another youthful offender adjudication or conviction, whose underlying offense is a misdemeanor,¹⁷⁸ with leave for the District Attorney to object. In instances where youthful offender status is discretionary, the statute only enables judges to consider mitigating circumstances that bear directly on how the underlying offense was committed, and the convicted young person’s relative involvement in the underlying offense when making youthful offender determinations for some felonies.¹⁷⁹ For a young person who is found to have committed higher level felonies—rape in the first degree, a criminal sex act, an armed felony, or aggravated sexual abuse—to be eligible for a youthful offender adjudication the court must determine that there were mitigating circumstances that bear directly on the matter in which the underlying offense was committed, or that the young person’s participation in the underlying offense was relatively minor when they were not the sole participant.¹⁸⁰ Young people convicted of Class A-I or A-II felonies are ineligible for youthful offender consideration.¹⁸¹ Youthful offender status is currently only available to young people between 16 and 18 years old.¹⁸² Further, young people are ineligible for youthful offender status if they have a prior felony conviction, a youthful offender adjudication that was substituted for a felony, or if they have a juvenile delinquency adjudication for a high-

¹⁷⁶ Pursuant to N.Y. Penal Law § 60.02(2) when judges substitute a youthful offender adjudication for a criminal conviction, they are restricted from imposing a youthful offender sentence of conditional discharge or unconditional discharge for N.Y. Penal Law § 220 offenses, which includes offenses related to the use, possession, or distribution of narcotics. N.Y. PENAL LAW § 60.02 (McKinney 2022). The YJ&O gives courts the ability to sentence young persons to conditional discharge or unconditional discharge. Assemb. B. 3536A, 2021 Assemb., 2021-2022 Reg. Sess. (N.Y. 2021); S.B. 5749A, 2021S., 2021-2022 Reg. Sess. (N.Y. 2021).

¹⁷⁷ Assemb. B. 3536A, 2021 Assemb., 2021-2022 Reg. Sess. § 440.49 (N.Y. 2021); S.B. 5749A § 440.49, 2021S., 2021-2022 Reg. Sess. (N.Y. 2021).

¹⁷⁸ N.Y. CRIM. PROC. LAW § 720.20(1)(b) (McKinney 2022).

¹⁷⁹ N.Y. CRIM. PROC. LAW § 720.10(3) (McKinney 2022).

¹⁸⁰ *Id.*

¹⁸¹ *Id.* § 720.10(2)(a).

¹⁸² *Id.* § 720.10(1).

level felony.¹⁸³ Because of these limiting factors, hundreds of young people regularly lose access to youthful offender adjudications and are saddled with criminal records which exacerbate multigenerational poverty.

Alternatively, the YJ&O requires judges to grant youthful offender status to youth for misdemeanors, low-level felonies, and for most narcotics offenses.¹⁸⁴ This means that youth could be granted a youthful offender adjudication more than once. For almost all other felony offenses, there is a rebuttable presumption for the court to grant youthful offender status.¹⁸⁵ If the young person were convicted of rape in the first degree, criminal sexual acts in the first degree, or aggravated sexual abuse, the youth could be granted youthful offender status if the court determines that the interest of justice would be served by granting youthful offender status.¹⁸⁶ In making this determination, the court would consider the facts of the underlying case, the involvement of the young person, and the history and background of the youth, as well as the young person's prospects of rehabilitation.¹⁸⁷ Young people convicted of the highest level felonies, Class A-I and Class A-II felonies, would not be eligible for youthful offender status.¹⁸⁸ Further, judges would not be restricted in sentencing young people convicted of most narcotics offenses, and they could sentence these youth to any noncustodial, rehabilitative sentence.¹⁸⁹ The bill also sets the maximum sentences for youthful offender

¹⁸³ *Id.* § 720.10(2)(b)-(c).

¹⁸⁴ Assemb. B. 3536A, 2021 Assemb., 2021-2022 Reg. Sess. § 3(1)(a) (N.Y. 2021); S.B. 5749A, 2021S., 2021-2022 Reg. Sess. § 3(1)(a) (N.Y. 2021).

¹⁸⁵ Assemb. B. 3536A, 2021 Assemb., 2021-2022 Reg. Sess. § 3(1)(b) (N.Y. 2021); S.B. 5749A, 2021S., 2021-2022 Reg. Sess. § 3(1)(b) (N.Y. 2021).

¹⁸⁶ Assemb. B. 3536A, 2021 Assemb., 2021-2022 Reg. Sess. § 1(3) (N.Y. 2021); S.B. 5749A, 2021S., 2021-2022 Reg. Sess. § 1(3) (N.Y. 2021).

¹⁸⁷ Assemb. B. 3536A, 2021 Assemb., 2021-2022 Reg. Sess. § 1(3) (N.Y. 2021); S.B. 5749A, 2021S., 2021-2022 Reg. Sess. § 1(3) (N.Y. 2021).

¹⁸⁸ Assemb. B. 3536A, 2021 Assemb., 2021-2022 Reg. Sess. § 1(2)(a) (N.Y. 2021); S.B. 5749A, 2021S., 2021-2022 Reg. Sess. § 1(2)(a) (N.Y. 2021).

¹⁸⁹ *See* Assemb. B. 3536A, 2021 Assemb., 2021-2022 Reg. Sess. (N.Y. 2021); S.B. 5749A, 2021S., 2021-2022 Reg. Sess. (N.Y. 2021); Pursuant to N.Y. Penal Law § 60.02 (McKinney 2022), when judges substitute a youthful offender adjudication for a criminal conviction, they are restricted from imposing a youthful offender sentence of conditional discharge or unconditional discharge for New York Penal Law Section 220 offenses, which includes offenses related to the use, possession, or distribution of narcotics. N.Y. PENAL LAW §§ 60.02, 220.00 (McKinney 2022). The YJ&O gives courts the ability to conditionally discharge or unconditionally discharge cases where young people are granted youthful offender or young adult adjudication. Alcohol treatment, substance use treatment, non-residential treatment programs, and youth programs are enumerated rehabilitative programs that courts are empowered to mandate as part of a conditional discharge. N.Y. PENAL LAW § 65.10(2).

adjudications and young adult eligible felonies at an indeterminate sentence of four years and six months for most misdemeanors.¹⁹⁰

Importantly, the YJ&O creates “young adult” status, which is functionally similar to youthful offender status, but would apply to youth under 26.¹⁹¹ As noted above, neurologists have found that young brains are developing until young people reach approximately age 25.¹⁹² As a result, people 25 and under are less able to regulate their behavior, and are more prone to unlawful behavior than they are after full maturation of their prefrontal cortex.¹⁹³ The current law of restricting youthful offender adjudication to youth under 19 has no evidence-supported or scientific basis, and granting youth under 26 the potential of qualifying for young adult status rather than for adult criminal convictions is not only more consistent with neurological development, but will also spare these young adults long carceral sentences and adult criminal convictions that exacerbate multigenerational poverty. It is also consistent with movements in other states to expand access to sentencing alternatives similar to youthful offender adjudications.¹⁹⁴ In several instances, New York State and New York City laws have recognized that 18 is an insufficient marker for adult responsibility. For example, young people up to 21 are eligible to stay in foster care,¹⁹⁵ young people under 22 are restricted from isolated confinement in New York City,¹⁹⁶ and young people under 22 are restricted from solitary confinement in New York State.¹⁹⁷ New

¹⁹⁰ Assemb. B. 3536A, 2021 Assemb., 2021-2022 Reg. Sess. (N.Y. 2021), S.B. 5749A, 2021S., 2021-2022 Reg. Sess. (N.Y. 2021).

¹⁹¹ Under the proposed statute, discretionary and presumptive youthful offender eligibility apply to more offenses than presumptive and discretionary young adult status. However, importantly, both statuses spare young people from the long-term collateral consequences of permanent criminal convictions, and they both set maximum periods of incarceration at four-year indeterminate sentences. Assemb. B. 3536A, 2021 Assemb., 2021-2022 Reg. Sess. (N.Y. 2021); S.B. 5749A, 2021S., 2021-2022 Reg. Sess. (N.Y. 2021).

¹⁹² Arain et al., *supra* note 95, at 453.

¹⁹³ See Monahan et. al., *supra* note 97, at 590.

¹⁹⁴ For instance, California grants a similar status to young people up to 22 years old, CAL. PENAL CODE § 2905 (West), while Vermont grants a similar status to young people between 14 and 22 years of age, VT. STAT. ANN. tit. 33, § 5280(b), and North Dakota grants a similar status to young people under 22 years old, N.D. CENT. CODE § 27-20.4-01, -20.2-03.

¹⁹⁵ N.Y. FAM. CT. ACT § 1055(e) (McKinney 2022).

¹⁹⁶ Rules of the City of New York, tit. 9, ch. 1, § 1-02(b) (effective Jan. 1, 2020); see Michael Winerip & Michael Schwartz, *Rikers to Ban Isolation for Inmates 21 and Younger*, N.Y. TIMES (Jan. 13, 2015) <https://www.nytimes.com/2015/01/14/nyregion/new-york-city-to-end-solitary-confinement-for-inmates-21-and-under-at-rikers.html> (on file with the CUNY Law Review).

¹⁹⁷ N.Y. CORRECT. LAW § 137(vi)(h) (McKinney 2022) (people younger than 22 years old cannot be placed in segregated confinement, except they may be placed in keeplock prior to a disciplinary hearing, for up to 48 hours. These individuals must be given 7 hours of out-of-

York requires some insurers to insure young people up to 29 on their parent's healthcare plan.¹⁹⁸ New York's sentencing paradigm should recognize these realities as well.

Finally, the YJ&O would also help reduce the impact of criminal convictions on older adults who have criminal records from before they were 26, through permitting resentencing.¹⁹⁹ All those over 26 with misdemeanors from when they were under 26 would automatically have their convictions substituted for youthful offender or young adult adjudications.²⁰⁰ Those over 26 with felonies would be able to petition the court to have their convictions substituted for adjudications.²⁰¹ In making these sentencing determinations, judges would be required to consider several factors, including the impact of sealing the conviction on the person's rehabilitation and ability to function in society.²⁰² If granted youthful offender status, older adults would be freed from the stigma and collateral consequences of convictions that exacerbate poverty.

C. *Eliminate Mandatory Minimum Sentences and Sentencing Restrictions*

The Eliminate Mandatory Minimums Act²⁰³ unbinds judges from the confines of mandatory minimum sentences, while also encouraging judges to consider alternatives to custodial incarceration. If passed, this bill would reduce multigenerational poverty by reducing the number of people who are sentenced to incarceration, while also reducing the length of incarceration. While New York's sentencing laws are complex, their unifying theme is that there are numerous ways to exact long, mandatory prison sentences that judges are forced to impose. Many federal judges lament that mandatory minimums cause them to sentence people to longer terms of imprisonment than they otherwise would, even

cell time, per day, and they must be transferred to a residential rehabilitation unit or resident mental health treatment unit "as expeditiously as possible").

¹⁹⁸ *Coverage Expansion Through Age 29*, N.Y. STATE DEP'T OF FIN. SERVS. (last visited Dec. 8, 2022), <https://perma.cc/LQ6R-YC5Z>.

¹⁹⁹ See Assemb. B. 3536A, 2021 Assemb., 2021-2022 Reg. Sess. § 9 (N.Y. 2021); S.B. 5749A, 2021S., 2021-2022 Reg. Sess. § 9 (N.Y. 2021).

²⁰⁰ See Assemb. B. 3536A, 2021 Assemb., 2021-2022 Reg. Sess. § 9 (N.Y. 2021); S.B. 5749A, 2021S., 2021-2022 Reg. Sess. § 9 (N.Y. 2021).

²⁰¹ Assemb. B. 3536A, 2021 Assemb., 2021-2022 Reg. Sess. § 9 (N.Y. 2021); S.B. 5749A, 2021S., 2021-2022 Reg. Sess. § 9 (N.Y. 2021).

²⁰² Assemb. B. 3536A, 2021 Assemb., 2021-2022 Reg. Sess. § 9(3)(a)(i)-(v) (N.Y. 2021); S.B. 5749A, 2021S., 2021-2022 Reg. Sess. § 9(3)(a)(i)-(v) (N.Y. 2021).

²⁰³ See Assemb. B. 9166, 2022 Assemb., 2021-2022 Reg. Sess. (N.Y. 2022); S.B. 7871, 2022S., 2021-2022 Reg. Sess. (N.Y. 2022).

life sentences.²⁰⁴ Many felony convictions require judges to impose a mandatory determinate or indeterminate sentence.²⁰⁵ If an individual has a prior felony conviction, judges are often compelled to incarcerate the person for a longer period of time than if it was the individual's first felony.²⁰⁶ In many instances judges are required to impose longer sentences if individuals have multiple felony convictions, including juvenile offender convictions.²⁰⁷

Consequently, a "life sentence can result from a combination of relatively minor offenses," similar to two-strike and three-strike laws in other jurisdictions.²⁰⁸ Pleas available to accused persons depend upon charges that the government chooses to indict.²⁰⁹ Moreover, in many instances, New York's sentencing statutes require those convicted of multiple offenses to be incarcerated for consecutive sentences rather than concurrent sentences, substantially extending the amount of time they are incarcerated.²¹⁰ While New York's highest court declared the death penalty unconstitutional in 2004,²¹¹ death by incarceration is rampant;

²⁰⁴ See James Cullen, *Sentencing Laws and How They Contribute to Mass Incarceration*, BRENNAN CTR. FOR JUST. (Oct. 5, 2018), <https://perma.cc/VAR8-3S89>. Federal courts employ mandatory minimums, *id.*, which judges have protested for decades. See, e.g. Alan Abrahamson, *Judge Quits S.D. Bench Over Sentencing Rules*, L.A. TIMES (Sep. 27, 1990, 12:00 AM), <https://perma.cc/GRL2-8SXX> (quoting United States District Judge J. Lawrence Irving's explanation for resigning in 1990 that mandatory minimums had "dehumanized the sentencing process . . ."). Federal judges have also spoken out from their benches, issuing decisions that decry harsh sentences imposed by the guidelines, and insisting on using judicial discretion to temper them. See, e.g., *United States v. Nesbeth*, 188 F. Supp. 3d 179 (E.D.N.Y. 2016) (holding that the collateral consequences of a felony drug conviction constituted sufficient punishment and refusing to follow advisory guideline to incarcerate); FAMILIES AGAINST MANDATORY MINIMUMS, MANDATORY SENTENCING WAS ONCE AMERICA'S LAW-AND-ORDER PANACEA. HERE'S WHY IT'S NOT WORKING 5, <https://perma.cc/PM2B-X64K> (reporting on six federal judges that spoke out against mandatory minimums); see also James McKinley, *New York's Chief Judge Leaving a Legacy of Reforms Inspired by Social Justice*, N.Y. TIMES (Dec. 29, 2015), <https://www.nytimes.com/2015/12/30/nyregion/jonathan-lippman-stepping-down-as-chief-judge-of-new-york-court-of-appeals.html> (on file with the CUNY Law Review) ("Judge Lippman lobbied to give judges more control over sentencing . . .").

²⁰⁵ Indeterminate sentences refer to sentences with a range. For instance, a minimum of 3.5 years, to 7 years. In this instance, a person would be eligible to go before a parole board after 3.5 years. Determinate sentences refer to a set amount of time, for instance, a sentence of 5 years. See N.Y. STATE COMMISSION ON SENTENCING REFORM, *supra* note 61, at 3-4.

²⁰⁶ See N.Y. PENAL LAW §§ 60.01, 60.05, 70.04, 70.06, 70.07, 70.08, 70.10 (McKinney 2022).

²⁰⁷ See generally N.Y. PENAL LAW §§ 70.06, 70.07, 70.08, 70.10 (McKinney 2022).

²⁰⁸ See Cullen, *supra* note 204.

²⁰⁹ See N.Y. STATE ASS'N OF CRIM. DEF. LAWS., *supra* note 141, at 32.

²¹⁰ See N.Y. PENAL LAW § 70.25 (McKinney 2022).

²¹¹ See *People v. LaValle*, 3 N.Y.3d 88, 128, 131 (2004) (concluding that the N.Y. Crim. Proc. Law § 400.27(10) deadlock instruction violates state precedent on coercive instructions

nearly one-fifth of New York's prison population is serving a life sentence,²¹² and New York has a higher per capita incarceration rate than every independent democracy.²¹³ Periods of parole²¹⁴ and probation²¹⁵ also have statutory minimums.

Unlike federal sentencing guidelines, which are advisory,²¹⁶ New York's sentencing minimums are compulsory.²¹⁷ Mandatory minimum sentences are rigid. Sentencing judges cannot reduce a sentence based on a person's life circumstances, their relative involvement in an offense, their age past 19, the individual's chances for rehabilitation, whether an alternative to incarceration would be more beneficial to the sentenced person or society, or the impact of incarceration on the individual's spouse, children, grandchildren, dependent parents, or community.²¹⁸ While judges receive pre-sentencing reports which can include extensive information about a person's history, family, background, and mental health, this procedural requirement does not obviate mandatory sentencing minimums—it only enables judges to consider how close to the maximum they will sentence an individual.²¹⁹ In recognition of the legislature's authority to set penological policy, courts have held that judges cannot issue sentences shorter than mandatory minimums.²²⁰ The

and the Due Process Clause of N.Y. Constitution and that the state legislature—not courts—could fix the statute). There remains no corrective legislation. 32A N.Y. JURIS. 2D *Criminal Law: Procedure* § 1528 (2022).

²¹² Sam Mellins, *Thousands of New Yorkers Are in Prison for Life: These D.A. Candidates Want to Change That*, N.Y. FOCUS (Apr. 28, 2021), <https://perma.cc/6A5P-R92W>.

²¹³ Widra & Herring, *supra* note 13.

²¹⁴ See N.Y. PENAL LAW § 70.45 (McKinney 2022).

²¹⁵ See *id.* § 65.00.

²¹⁶ Federal sentencing guidelines are advisory rather than mandatory. See *United States v. Booker*, 543 U.S. 220, 246 (2005); Roger B. Handberg, *Booker: The First 10 Years in Florida*, 91 FLA. B.J. 14, 15 (2017) (describing how the Supreme Court's holding in *Booker* rendered federal sentencing guidelines advisory).

²¹⁷ N.Y. PENAL LAW § 70.00 (McKinney 2022) Courts are bound by New York's sentencing statutes to impose mandatory minimum sentences. They cannot substitute mandatory minimum sentences in the interest of justice. See *People v. Clark*, 176 A.D.2d 1206, 1207 (4th Dep't 1991) (holding that courts lacked jurisdiction to "impose a sentence less than the mandatory statutory minimum").

²¹⁸ See N.Y. PENAL LAW § 70.00 (McKinney 2022).

²¹⁹ N.Y. CRIM. PROC. LAW §§ 390.20, 390.30. (McKinney 2022); N.Y. PENAL LAW § 70.00 (McKinney 2022).

²²⁰ See, e.g., *People v. Thompson*, 84 N.Y.2d 477 (1994). In *Thompson*, New York's Court of Appeals reversed a trial court's sentence of eight years to life imprisonment of a 17-year-old for a felony narcotics offense. 83 N.Y.2d at 485. The trial court had noted that the mandatory minimum sentence for the offense of 15 years to life was excessive. *Id.* at 479. The Court of Appeals discussed the standard used to assess the proportionality of mandatory sentences pursuant to challenges made by way of the Eighth Amendment to the United States Constitution and Section 5 of Article I of the New York State Constitution, *id.* at 479-

Eliminate Mandatory Minimums Act would remove sentencing restrictions that force courts to sentence people to longer sentences than the judges may otherwise deem appropriate.²²¹ The bill would eliminate all of the aforesaid restrictions, including compulsory consecutive sentencing, minimum sentences from most penal law offenses, enhanced sentences for those with multiple convictions, and mandatory periods of parole or probation.²²² Further, the bill would remove plea deal restrictions, which would reduce the power of prosecutors to coerce pleas to higher charges, and sometimes to pleas at all.²²³ Not only would this bill enable people to exercise their constitutionally guaranteed right to a criminal trial without the threat of a prosecutor levying the “trial tax” against them, it would also mean that when there are instances where someone is sentenced, judges would consider multiple factors when determining a sentence.

Importantly, the bill would create a rebuttable presumption against incarceration.²²⁴ In effect, the bill would signal that judges should consider options other than incarceration when determining individual sentences. Before judges could sentence an individual to incarceration, the person would be entitled to a sentencing hearing.²²⁵ At the hearing, judges would hear mitigating factors, and they would also have to consider the actual cost of incarceration.²²⁶

To be sure, judges could continue sentencing individuals to the same periods of incarceration that the current sentencing laws require them to use. Judges could continue to consider an individual’s conviction history, offense, and numerous other factors. However, this bill would also give judges other mitigating factors to consider,²²⁷ and it would not require judges to impose a minimum sentence of incarcera-

81, and held that New York’s mandatory minimum sentence did not constitute cruel and unusual punishment, *id.* at 482.

²²¹ See Assemb. 9166, 2022 Assemb., 2021-2022 Reg. Sess., at 8, l. 42 (N.Y. 2022); see also S.B. 7871, 2022S., 2021-2022 Reg. Sess., at 8, l. 42 (N.Y. 2022); see also Kamins, *supra* note 72.

²²² See Assemb. 9166, 2022 Assemb., 2021-2022 Reg. Sess. § 6 (N.Y. 2022); see also S.B. 7871, 2022S., 2021-2022 Reg. Sess. § 6 (N.Y. 2022).

²²³ See Assemb. 9166, 2022S., 2021-2022 Reg. Sess. § 42 (N.Y. 2022); see also S.B. 7871, 2022S., 2021-2022 Reg. Sess. § 42 (N.Y. 2022).

²²⁴ Assemb. B. 9166, 2022 Assemb., 2021-2022 Reg. Sess. § 2 (N.Y. 2022); S.B. 7871, 2022S., 2021-2022 Reg. Sess. § 2 (N.Y. 2022).

²²⁵ See Assemb. B. 9166, 2022 Assemb., 2021-2022 Reg. Sess., at 2, l. 4 (N.Y. 2022); see also S.B. 7871, 2022S., 2021-2022 Reg. Sess., at 2, l. 4 (N.Y. 2022).

²²⁶ See Assemb. B. 9166, 2022 Assemb., 2021-2022 Reg. Sess., at 2, l. 37, 39 (N.Y. 2022); see also S.B. 7871, 2022S., 2021-2022 Reg. Sess., at 2, l. 37, 39 (N.Y. 2022).

²²⁷ See Assemb. 9166, 2022 Assemb., 2021-2022 Reg. Sess., at 2, l. 28 (N.Y. 2022); see also S.B. 7871, 2022S., 2021-2022 Reg. Sess., at 2, l. 28 (N.Y. 2022).

tion, or incarceration at all.²²⁸ Ideally, the bill would reduce the number of people sentenced to incarceration, while simultaneously reducing the length of sentences for those that are incarcerated. This was what happened after the Rockefeller Drug Law reforms were rolled back in 2004 and 2009—judges sentenced individuals to less harsh sentences because the law did not impose mandatory minimums, and because of evolving understanding of how the drug war wreaked havoc on low-income Black communities.²²⁹

This hypothetical of “Logan” illustrates how the Eliminate Mandatory Minimums Act could be used to give courts more sentencing options. At 19 years old, Logan has no prior felonies. They fight their 19-year-old foster sibling, and the foster sibling sustains a swollen black eye. Logan pleads guilty to Assault in the Second Degree, a Class D violent felony, and the judge is mandated to sentence Logan to at least two years, with a maximum of seven years in prison.²³⁰ At 22 years old, with a felony conviction and resulting difficulty finding a job, Logan steals an Amazon package from the lobby of a residential building, and pleads guilty to Burglary in the Third Degree, a Class D non-violent felony. The judge is obligated to sentence them to a two- to three-and-a-half year indeterminate prison sentence, with a maximum of four years to seven years.²³¹ If Logan were to have been carrying a knife during this burglary, and be convicted of Burglary in the Second Degree, a Class C violent felony, the judge would be required to sentence them to a seven year sentence minimum, with a maximum of 15 years determinate sentence.²³² If, at 29 years old, Logan again takes an Amazon package from the lobby of an apartment building, with no weapons or any other displays of violence, and is convicted of Burglary in the Third Degree, a Class D non-violent felony, a judge would be required to sentence them to a 15- to 25-year prison sentence, and the judge could impose a maximum of lifetime imprisonment.²³³

The Eliminate Mandatory Minimums Act does not *prohibit* a judge from sentencing this individual to these lengthy sentences.²³⁴ However,

²²⁸ See Assemb. 9166, 2022 Assemb., 2021-2022 Reg. Sess. §§ 2, 6 (N.Y. 2022); see also S.B. 7871, 2022S., 2021-2022 Reg. Sess. §§ 2, 6 (N.Y. 2022).

²²⁹ See JIM PARSONS ET AL., VERA INST. OF JUST., END OF AN ERA? THE IMPACT OF DRUG LAW REFORM IN NEW YORK CITY 13, 17, 25 (2015), <https://perma.cc/JZR5-QEGE>.

²³⁰ See N.Y. PENAL LAW § 70.02(3)(c) (McKinney 2022).

²³¹ See N.Y. PENAL LAW § 70.06(3)(d) (McKinney 2022).

²³² See N.Y. PENAL LAW § 70.04(3)(b) (McKinney 2022).

²³³ N.Y. PENAL LAW § 70.10 (McKinney 2022); see also N.Y. PENAL LAW § 70.00(3)(a)(i) (McKinney 2022).

²³⁴ See Assemb. B. 9166, 2022 Assemb., 2021-2022 Reg. Sess. § 5 (N.Y. 2022); see also S.B. 7871, 2022S., 2021-2022 Reg. Sess. § 5 (N.Y. 2022).

the judge would look at mitigating circumstances for this individual. A court could choose not to give 19-year-old foster child Logan a term of incarceration for an offense that the criminal legal system would likely be unaware of, if it were not a fight between young people in foster care, or if Logan were not low-income. For the second or third offense, a court could determine that treatment would best address the underlying reasons for the theft, and could sentence Logan to treatment, or not sentence Logan and allow them to pursue non-carceral, non-compulsory treatment for narcotics, mental illness, or other ailments.²³⁵ If courts were not wedded to statutory mandatory minimums, they could consider numerous sentencing alternatives that do not exacerbate poverty as much as decades-long prison sentences do.

Eliminating mandatory minimum sentences would be particularly powerful for women. As noted in a recent report by The Sentencing Project, “sentencing laws require the same punishment regardless of a defendant’s role in the crime, but women are frequently responsible for a comparatively smaller role in certain violent crime scenarios such as being a getaway driver.”²³⁶ The report goes on to note that criminalized women are sometimes coerced into criminalized behavior by their romantic partners.²³⁷ In other instances, women are criminalized survivors of violence, where they engage in violence against partners or in other unlawful acts to protect themselves or their children, or to prevent further violence from happening to them.²³⁸ In 2019, New York passed the Domestic Violence Survivors Justice Act (“DVSJA”).²³⁹ The DVSJA enables judges to resentence people who suffered sexual, psychological, or physical violence perpetrated by an intimate partner when that violence was a significant contributor to the individual’s conviction,²⁴⁰ and to consider this abuse when sentencing new cases.²⁴¹ While this is a positive development, the DVSJA is not available to many people whose experiences of intimate partner violence contributed to their conviction. This is because it only applies to certain offenses, and it is restrictive.²⁴² Incarceration rates for women are quickly rising, and 86% of women

²³⁵ Assemb. B. 9166, 2022 Assemb., 2021-2022 Reg. Sess. (N.Y. 2022), S.B. 7871, 2022S., 2021-2022 Reg. Sess. (N.Y. 2022).

²³⁶ ASHLEY NELLIS, THE SENT’G PROJECT ET AL., *IN THE EXTREME: WOMEN SERVING LIFE WITHOUT PAROLE AND DEATH SENTENCES IN THE UNITED STATES* 10 (2021), <https://perma.cc/5SAE-FTLF>.

²³⁷ *Id.*

²³⁸ See generally Tamara Kamis & Emma Rose, *The Domestic Violence Survivors Justice Act Gets a Slow Start*, N.Y. FOCUS, (May 7, 2021), <https://perma.cc/Y9YG-HYJQ>.

²³⁹ N.Y. CRIM. PROC. LAW § 440.47 (McKinney 2022)

²⁴⁰ N.Y. CRIM. PROC. LAW § 440.47(2)(c) (McKinney 2022).

²⁴¹ See N.Y. PENAL LAW § 60.12 (McKinney 2022).

²⁴² N.Y. CRIM. PROC. LAW § 440.47(1)(a) (McKinney 2022).

who have spent time in jail are survivors of sexual violence, and 77% of incarcerated women are survivors of intimate partner violence.²⁴³ This is a significant issue, and the Eliminate Mandatory Minimums Act would enable judges to sentence survivors and women to less harsh sentences, or to no custodial prison sentence at all. A majority of incarcerated women are parents, and many of them are caregivers and breadwinners for their families.²⁴⁴ Reducing incarceration rates and lengths for women is imperative to reducing the nexus between New York's sentencing scheme and multigenerational poverty.

Of course, there are numerous other statuses and life experiences that courts could consider in determining sentences if the Eliminate Mandatory Minimums Act were to be law. The realities of young people, elderly people, people with significant disabilities, and other people in vulnerable groups could be used to mitigate sentence length. One's status as an impoverished person could even be used to mitigate against incarceration, or a long period of incarceration. As noted above, poverty causes people to be incarcerated, and incarceration causes poor families to become poorer. Perhaps an important tool to fight poverty by incarceration is to consider poverty when determining sentences of incarceration.

D. *Second Look Act*

While the Eliminate Mandatory Minimums Act could reduce sentences for future targets of the carceral system,²⁴⁵ the Second Look Act would ensure that those who are currently incarcerated on long sentences could petition judges for reduced sentences.²⁴⁶ This bill would ideally reduce the impact of New York's sentencing paradigm on multigenerational poverty by reducing the amount of time people spend incarcerated.²⁴⁷ This would ensure that breadwinners are back in their homes, and that children and romantic partners have the financial, psychological, and emotional support of their incarcerated loved ones who are serving long sentences. Ideally, this bill would lead New York to redirect

²⁴³ Rachel Leah, *86 Percent of Women in Jail Are Sexual-Violence Survivors*, SALON, (Nov. 11, 2017, 4:00 PM), <https://perma.cc/3KQ9-TRFK>.

²⁴⁴ GLAZE & MARUSCHAK, *supra* note 9, at 2-3; Bryant, *supra* note 45.

²⁴⁵ See Assemb. B. 9166, 2022 Assemb., 2021-2022 Reg. Sess. (N.Y. 2022); S.B. 7871, 2022S., 2021-2022 Reg. Sess. (N.Y. 2022).

²⁴⁶ Assemb. B. 8894, 2022 Assemb., 2021-2022 Reg. Sess. (N.Y. 2022); S.B. 7872, 2022S., 2021-2022 Reg. Sess. (N.Y. 2022).

²⁴⁷ Assemb. B. 8894, 2022 Assemb., 2021-2022 Reg. Sess. (N.Y. 2022); S.B. 7872, 2022S., 2021-2022 Reg. Sess. (N.Y. 2022).

money spent on incarceration to aiding communities and the families most likely to be impoverished as a byproduct of mass incarceration.²⁴⁸

Specifically, the Second Look Act²⁴⁹ would enable anyone, sentenced for any offense, to petition for a sentence reduction either after serving ten years of their sentence, or after serving “one-half of the minimum term of an indeterminate sentence where the minimum term exceeds ten years,”²⁵⁰ or after serving “one-half of a determinate sentence where the sentence equals or exceeds ten years.”²⁵¹ Separately, a person could apply for resentencing with the consent of the prosecutor who brought the initial underlying charge against them.²⁵²

In determining whether to reduce an individual’s sentence, courts would be required to consider several factors. Many of these factors directly or indirectly implicate the experiences of poor people that lead them to incarceration or how the individual’s incarceration would impact multigenerational poverty, including the applicant’s history of trauma, abuse or involvement in the child welfare system, and the financial cost of continuing incarceration. The bill specifically directs courts to consider “potential benefits to children and family members of reunification with the applicant.”²⁵³ Other factors would include evidence of rehabilitation; efforts to participate in therapy, vocational opportunities, and education while incarcerated if those opportunities were offered; evidence that the individual’s sentence was enhanced because they exercised their right to a trial; circumstances of the underlying offense; victim impact statements; and other mitigating information produced by the applicant.²⁵⁴

²⁴⁸ See generally Kamins, *supra* note 72.

²⁴⁹ Assemb. B. 8894, 2022 Assemb., 2021-2022 Reg. Sess. (N.Y. 2022); S.B. 7872, 2022S., 2021-2022 Reg. Sess. (N.Y. 2022).

²⁵⁰ Assemb. B. 8894, 2022 Assemb., 2021-2022 Reg. Sess., at 1, l. 4, (N.Y. 2022); S.B. 7872, 2022S., 2021-2022 Reg. Sess., at 1, l. 4, (N.Y. 2022). For instance, if a person were serving an indeterminate sentence of 12 to 25 years, the individual would be eligible to apply for resentencing after serving at least six years of their sentence. See Assemb. B. 8894, 2022 Assemb., 2021-2022 Reg. Sess., at 1, l. 4, (N.Y. 2022); S.B. 7872, 2022S., 2021-2022 Reg. Sess., at 1, l. 4, (N.Y. 2022).

²⁵¹ Assemb. B. 8894, 2022 Assemb., 2021-2022 Reg. Sess., at 1, l. 4 (N.Y. 2022); S.B. 7872, 2022S., 2021-2022 Reg. Sess., at 1, l. 4 (N.Y. 2022). For instance, if a person were sentenced to 15 years, the individual would be eligible to apply for a sentence reduction after serving 7.5 years of their sentence. Assemb. B. 8894, 2022 Assemb., 2021-2022 Reg. Sess., at 1, l. 4, (N.Y. 2022); S.B. 7872, 2022S., 2021-2022 Reg. Sess., at 1, l. 4 (N.Y. 2022).

²⁵² Assemb. B. 8894, 2022 Assemb., 2021-2022 Reg. Sess., at 1, l. 14 (N.Y. 2022); S.B. 7872, 2022S., 2021-2022 Reg. Sess., at 1, l. 14 (N.Y. 2022).

²⁵³ Assemb. B. 8894, 2022 Assemb., 2021-2022 Reg. Sess., at 3, l. 52 (N.Y. 2022); S.B. 7872, 2022S., 2021-2022 Reg. Sess., at 3, l. 52 (N.Y. 2022).

²⁵⁴ Assemb. B. 8894, 2022 Assemb., 2021-2022 Reg. Sess., at 3, l. 44 (N.Y. 2022); S.B. 7872, 2022S., 2021-2022 Reg. Sess., at 3, l. 44 (N.Y. 2022).

The bill also contains a rebuttable presumption for sentence reductions for those that were under 25 at the time the offense was committed, and for those over 55 at the time of their application, as well as a rebuttable presumption that the sentence reduction should result in the person's release.²⁵⁵ As noted in Part II, it is well established that those under 25 have diminished capacity to regulate conduct because their prefrontal cortex is not fully matured.²⁵⁶ As maturation happens, young people are substantially less likely to engage in unlawful conduct, negating the societal public safety benefit of the individual's incarceration, if there ever was a benefit.²⁵⁷ Simply, people tend to be developmentally different after age 25, and the Second Look Act recognizes that maturation is a significant factor as to whether someone's sentence ought to be reduced. Similarly, rates of recidivism for those over age 55 are low.²⁵⁸ Additionally, incarcerated bodies age 10 to 11.5 years faster than the bodies of those outside of prison cages, as the stress, violence, and poor conditions of prison have adverse health consequences.²⁵⁹ Each year imprisoned reduces life expectancy by two years, so imprisoned people are often as unhealthy as others 10-15 years older.²⁶⁰ Thus, a 55-year-old person who has spent a portion of their life incarcerated is physiologically similar to a non-incarcerated person at least a 65 to 70 years old.²⁶¹ As a result, there is a diminished public safety benefit to incarcerating aging people, if there ever is a benefit at all.

Under the proposed law, in making determinations, courts could reduce sentences below current mandatory minimum sentences.²⁶² Additionally, courts could reduce sentences to time-served so that the applicant could be released.²⁶³ However, courts could not resentence incar-

²⁵⁵ Assemb. B. 8894, §§ 1, 3, 28, 2022 Assemb., 2021-2022 Reg. Sess., at 3, l. 38 (N.Y. 2022); S.B. 7872, §§ 1, 3, 28, 2022S., 2021-2022 Reg. Sess., at 3, l. 38 (N.Y. 2022).

²⁵⁶ Arain et al., *supra* note 95, at 451-52.

²⁵⁷ See Monahan et al., *supra* note 97, at 578-90.

²⁵⁸ REBECCA SIBLER ET AL., VERA INST. OF JUST., AGING OUT: USING COMPASSIONATE RELEASE TO ADDRESS THE GROWTH OF AGING AND INFIRM PRISON POPULATIONS 3 (2017), <https://perma.cc/P7X7-KZEY>.

²⁵⁹ R. V. Rickard & Ed Rosenberg, *Aging Inmates: A Convergence of Trends in the American Criminal Justice System*, 13 J. CORR. HEALTH 150, 3 (2007).

²⁶⁰ Amy Fettig, Opinion, *Aging and Dying Behind Prison Walls*, N.Y. DAILY NEWS (May 31, 2021, 5:00 AM), <https://perma.cc/U25B-GFN3>; see also Cynthia Golembeski & Robert Fullilove, *Criminal (In)Justice in the City and Its Associated Health Consequences*, 95 AM. J. OF PUB. HEALTH 1701 (2005). https://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.98.Supplement_1.S185.

²⁶¹ Fettig, *supra* note 260.

²⁶² See Assemb. B. 8894, 2022 Assemb., 2021-2022 Reg. Sess., at 3, l. 14 (N.Y. 2022); S.B. 7872, 2022S., 2021-2022 Reg. Sess., at 3, l. 14 (N.Y. 2022).

²⁶³ See Assemb. B. 8894, 2022 Assemb., 2021-2022 Reg. Sess., at 4, l. 31 (N.Y. 2022); S.B. 7872, 2022S., 2021-2022 Reg. Sess., at 4, l. 31 (N.Y. 2022).

cerated people to longer terms of imprisonment when they applied for resentencing.²⁶⁴ All resentencing decisions would need to be in writing and would be subject to appellate review.²⁶⁵

E. *Earned Time Act*

With rising incarceration rates in the 1990s, New York and the federal government divested from many rehabilitative programs for incarcerated people, particularly education.²⁶⁶ Further, the state restricted the number of people who could earn credits for participation in vocational and educational programming depending on the person's underlying conviction and reduced both the amount of credits people could earn and the opportunities for people to earn them.²⁶⁷

The Earned Time Act would be an important tool to ensure that incarcerated people have access to “earned time credits,” so that they can reduce their sentences while gaining valuable skills that should help ease their reentry once they are released.²⁶⁸ These credits would be available to all incarcerated people, regardless of their underlying offense.²⁶⁹ There are two kinds of “earned time credits” available in New York for incarcerated people to earn to reduce their sentences—merit time credits and good time credits.²⁷⁰ Merit time credits are awarded for participation in prosocial activities such as treatment, rehabilitation, vocational training, and education programs, while good time credits are earned for compliance with prison rules.²⁷¹ If passed, the Earned Time Act would increase the amount of merit time credits that people could earn for determinate sentences from one-seventh of the minimum sentence to one-

²⁶⁴ Assemb. B. 8894, 2022 Assemb., 2021-2022 Reg. Sess., at 3, l. 32 (N.Y. 2022); S.B. 7872, 2022S., 2021-2022 Reg. Sess., at 3, l. 32 (N.Y. 2022).

²⁶⁵ Assemb. B. 8894, 2022 Assemb., 2021-2022 Reg. Sess. §§ 1, 4, 26, 35 (N.Y. 2022); S.B. 7872, 2022S., 2021-2022 Reg. Sess. §§ 1, 4, 26, 35 (N.Y. 2022).

²⁶⁶ See Rachel Silberstein, *Repeal of 1990s Policy Could Transform Prison Education in New York*, TIMES UNION (Aug. 2, 2019, 7:09 AM), <https://perma.cc/Z6ZM-K5D9>; Jenni Gainsborough & Marc MAUER, DIMINISHING RETURNS: CRIME & INCARCERATION IN THE 1990'S, PRISON POL'Y INITIATIVE 26 (2000), <https://perma.cc/7CPZ-HUVH>.

²⁶⁷ See N.Y. STATE COMM'N ON SENTENCING REFORM, *supra* note 65, at 11-12; see Ensign & Pitter, *supra* note 122.

²⁶⁸ Assemb. B. 8462B, 2021 Assemb., 2021-2022 Reg. Sess. (N.Y. 2021); S.B. 7873A, 2022S., 2021-2022 Reg. Sess. (N.Y. 2022); see Dennis Slattery, *Lawmakers, Advocates Aiming to Overhaul New York's Sentencing Laws*, N.Y. DAILY NEWS (Nov. 14, 2021, 11:00 PM), <https://perma.cc/8NEU-M7RK>.

²⁶⁹ Assemb. B. 8462B, 2021 Assemb., 2021-2022 Reg. Sess., at 2, l. 12 (N.Y. 2021); S.B. 7873A, 2022S., 2021-2022 Reg. Sess., at 2, l. 12 (N.Y. 2022).

²⁷⁰ See Kamins, *supra* note 72.

²⁷¹ *Id.*; N.Y. CORRECT. LAW § 803(d)(iv), 803(1)(a)-(c) (McKinney 2022).

quarter of the minimum sentence.²⁷² Meanwhile, good time credit allowances would increase from one-seventh of the maximum sentence to one-half of the maximum determinate sentence, and from one-third of indeterminate sentences to one-half of indeterminate sentences.²⁷³ Additionally, merit-time credits would vest each year, and additional credits could only be withheld or revoked if, at a hearing, the incarcerated person was shown to have violated institutional rules by a preponderance of the evidence.²⁷⁴ This would prevent prison officials from weaponizing earned time—people’s release dates—to coerce or abuse incarcerated people. Further, it would give people certainty, and should be a motivator to comply with institutional directives and to engage in programming. Merit time credits would also be presumptive, meaning that incarcerated people would earn them if their prison does not provide the opportunity to earn these credits.²⁷⁵ This should incentivize prisons to offer vocational, educational, and rehabilitative programming. Further, the bill would expand the types of programs that are eligible to earn credits, enabling creative prison staff to increase offerings.²⁷⁶

While the Earned Time Act would significantly increase the amount of time credits incarcerated people could earn, it would not make New York an outlier. Alabama,²⁷⁷ Nebraska,²⁷⁸ and Oklahoma²⁷⁹ all enable people to earn up to 50% or longer in sentence reductions, and Washington enables some incarcerated people to earn up to 50% sentence reductions.²⁸⁰ Texas enables incarcerated people to earn up to 30 days off their sentences every 30 days that they serve.²⁸¹

The Earned Time Act would help reduce the impact of New York’s sentencing laws on multigenerational poverty by reducing the amount of time people are incarcerated, by reducing the risk of recidivism, and by incentivizing incarcerated people to earn an education and skills that will aid them in their reentry, while also incentivizing prisons to provide

²⁷² Assemb. B. 8462B, 2021 Assemb., 2021-2022 Reg. Sess. § 3 (N.Y. 2021); S.B. 7873A, 2022S., 2021-2022 Reg. Sess. § 3 (N.Y. 2022).

²⁷³ See Assemb. B. 8462B, 2021 Assemb., 2021-2022 Reg. Sess., at 2, l. 43 (N.Y. 2021); S.B. 7873A, 2022S., 2021-2022 Reg. Sess., at 2, l. 43 (N.Y. 2022).

²⁷⁴ See Assemb. B. 8462B, 2021 Assemb., 2021-2022 Reg. Sess., at 2, l. 12 (N.Y. 2021); S.B. 7873A, 2022S., 2021-2022 Reg. Sess., at 2, l. 12 (N.Y. 2022).

²⁷⁵ See Assemb. B. 8462B, 2021 Assemb., 2021-2022 Reg. Sess. §§ 3, 24 (N.Y. 2021); S.B. 7873A, 2022S., 2021-2022 Reg. Sess. §§ 3, 24 (N.Y. 2022).

²⁷⁶ See Assemb. B. 8462B, 2021 Assemb., 2021-2022 Reg. Sess., at 2, l. 51 (N.Y. 2021); S.B. 7873A, 2022S., 2021-2022 Reg. Sess., at 2, l. 51 (N.Y. 2022).

²⁷⁷ ALA. CODE § 14-9-41 (2022).

²⁷⁸ See NEB. REV. STAT. ANN. § 83-1,107(2)(a) (West 2018).

²⁷⁹ See OKLA. STAT. ANN. tit. 57, § 57-138, -138.1 (West 2022).

²⁸⁰ WASH. REV. CODE § 9.94A.729(3)(d) (2022).

²⁸¹ See TEX. GOV. CODE ANN. § 498.002 -.003 (West 2021).

those opportunities. Specifically, this bill would reduce recidivism by enabling incarcerated people to build skills that would help them economically thrive once released, and by reducing their time in prison, which would in turn reduce the amount of trauma they experience.²⁸² Having caregivers and breadwinners back in their communities and with their families is a worthwhile investment for the future wealth of low-income families, and for the emotional and psychological well-being of incarcerated people and their families. Moreover, reducing the length of incarceration has not been shown to adversely impact public safety.²⁸³ Yet, it would free millions in public funds to reinvest in low-income communities.

V. CONCLUSION

For decades, as New York's sentencing structure grew more punitive and the state enacted longer sentences for some categories of offenses,²⁸⁴ the link between sentencing and multigenerational poverty grew more nefarious. Today, nearly five decades after the Rockefeller Drug Laws were passed, the multigenerational impact of those laws is palpable.²⁸⁵ The poorest New York families are poorer, more likely to be incarcerated, and more likely to suffer from traumas that trap them in cycles of poverty, incarceration, and reincarceration. Sentencing is not the only broken piece of New York's criminal legal system. Yet, it is imperative that the New York legislature take proactive steps to reduce the inequities in New York's sentencing structure and thus to reduce its impact in creating multigenerational poverty. New York must repeal the Juvenile Offender Act, and pass the Youth Justice and Opportunity Act, the Eliminate Mandatory Minimums Act, the Second Look Act, and the Earned Time Act.

²⁸² THE PEW CHARITABLE TRS., *supra* note 10, at 25-26.

²⁸³ Mauer, *supra* note 169, at 116.

²⁸⁴ See N.Y. STATE COMM'N ON SENTENCING REFORM, *supra* note 65, at 8-13.

²⁸⁵ See *id.*; see Mauer, *supra* note 169, at 113-14.