

In 2005, the Supreme Court declared what most parents intuitively know: when it comes to culpability, adolescents are not the same as adults. *Roper v. Simmons*, 543 U.S. 551 (2005). Writing for the majority, Justice Kennedy relied on three fundamental differences to distinguish young people from adults in the criminal justice context: (1) a lack of maturity; (2) a higher susceptibility to negative influences; and (3) personality traits that are “more transitory, less fixed.” *Id.* at 569–70. In reaching this conclusion, Justice Kennedy relied on brain science that established that adolescents are not just miniature adults: their inability to conform their behavior to adult standards is not necessarily a moral failing or character flaw, but rather a normal boundary-testing step along the way to developing



courts, where they were far less likely to receive the services they need to become successful adults. More than 2,700 of these children were sent to adult prison or jail, where they were at increased risk of sexual violence, solitary confinement, mental health issues, and suicide.

In response to the calls of juvenile justice advocates to “raise the age” in New York, Chief Judge Lippman spearheaded a reform effort that has been gaining momentum in various corners of the criminal justice system – from criminal justice academics to probation experts and District Attorneys alike – and in

cations of FCA procedures on this older adolescent population, could result in numerous negative outcomes for these youth: a Family Court system that may be appropriate for younger children presents serious due process, governmental intrusion, and proportionality concerns when applied to 16 and 17 year old adolescents. Furthermore, it would be a mistake to eliminate the positive aspects of the adult system as they have developed to apply to adolescents.

Judge Lippman recently proposed a sort of hybrid “Youth Court” for 16 and 17 year olds charged with non-violent,

# Raise the Age

By Susannah Karlsson

individual character. Assigning the full panoply of adult consequences to entirely normal, if unacceptable, adolescent conduct, it follows, is inappropriate and probably counter-productive.

The vast majority of states’ criminal jurisdiction provisions reflect this sensibility and keep children under 18 out of adult court, sparing them the collateral consequences of criminal court contact that would follow them into adulthood. But New York still presumptively holds children as young as 16 criminally responsible for their conduct in the adult courts, and sends them to adult prisons when they are convicted. In 2012, nearly 40,000 16 and 17 year olds were charged in New York’s adult criminal

January, Governor Cuomo announced the creation of a Commission on Youth, Public Safety & Justice that he tasked with developing a plan for raising the age of criminal responsibility in New York by the end of the year.

This shift toward treating teens as teens in the criminal justice system should be applauded. But simply changing the age of criminal court jurisdiction, although a seductively simple answer, masks complexities of consequence for these young people that deserve our consideration.

Removing 16 and 17 year olds from the adult court system or imposing the Family Court Act (“FCA”) wholesale, without carefully considering the ramifi-

low-level offenses that would blend youth-protective elements of the adult criminal court and the FCA system. The proposal would eliminate some of the more substantial government intrusions into the lives of teens mandated by the FCA, including the use of preventive detention and imposition of mandatory pre-adjudicatory services, while providing young defendants with additional protections in police custody, opportunities for pre-court diversion through an “adjustment” process, and dispositional options appropriate to their age and maturity. The proposed Youth Court would implement the Criminal Procedure Law, which provides greater procedural protec-

**Continued on** next page



tions than the FCA does, during the guilt phase. But if a teen is found guilty of a criminal offense, the more protective provisions of the FCA would then apply: no criminal record would result from the adjudication; broad dispositional options driven by the “least restrictive alternative” would be available; and immediate record-sealing provisions would apply to the young people adjudicated in the new court part.

To be sure, this approach indicates a greater appreciation for the elements of the adult court system that have worked well for older teens and reflects an awareness that many provisions of the FCA would be unnecessarily intrusive and disproportionate when applied to this group. But inefficiencies, disproportionalities, and gaps in services remain unaddressed by the proposal.

Specifically, the Youth Court would preserve “adjustment,” an FCA procedure whereby a young arrestee and his parents are directed by the police to meet with a probation officer who decides whether to “adjust” the respondent’s case, thereby holding up prosecution of the open case on the condition that the young person complete activities intended to promote positive youth development. However, the proposal makes no age-appropriate modifications to an adjustment process that delves into the lives of parents at least as much as the children being adjusted and informs its calculations with metrics like current school attendance and parental involve-

ment, which simply aren’t as relevant in assessing the rehabilitative prospects of older youth.

Additionally, while basic criminal procedure law will be carried over from the adult court the proposal doesn’t add necessary youth-protective enhancements to court procedures, such as ensuring the right to counsel at adjustment and guaranteeing a jury trial to anyone seeking to contest the allegations against them, whatever the charge.

Moreover, the proposal does not address whether a full probation report should be required for every Youth Court disposition, regardless of how minor the infraction. The FCA requires that the court order the Department of Probation to make and submit a report containing certain facts about the respondent, including “the history of the juvenile including previous conduct, the family situation, any previous psychological and psychiatric reports, school adjustment, previous social assistance provided by voluntary or public agencies and the response of the juvenile to such assistance” prior to any disposition in the case. See § 351.1. While such intrusions into the intimate lives of very young children’s families may be justified when they commit criminal offenses, delving into the psychological records and family dynamics of a 17 year old caught smoking pot seems less appropriate, overly intrusive, and probably unnecessary.

Critically, the Youth Court proposal also offers no relief for 16 and 17 year olds charged with a violent felony offense, and makes no suggestions concerning teens imprisoned in adult facilities. Young people charged with serious offenses still require procedures consistent with their age and capacity for culpability, and deserve developmentally-appropriate rehabilitative care if imprisoned. While it is true that only a small percentage of these young people are imprisoned, 800 were incarcerated in adult facilities in 2010. During the 24 hours between arrest and arraignment, these adolescents are mingled with adults of all ages who have committed every type of crime. These 24 hours in jail can be deeply traumatizing to a young person. And New York’s prisons are often unsafe for adults, let alone teenagers: the rates of suicide among youth incarcerated in adult facilities are very high, and a shocking number suffer from post-traumatic stress disorder. Serious consideration should be paid to when and under what circumstances incarceration is appropriate for those youth charged with more serious offenses.

In sum, Judge Lippman’s more nuanced proposal is a promising variation on the impulse to “raise the age,” but there is more work to be done to make the criminal justice system functionally proportionate and fair for New York’s youth. ■

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