CATCHING UP: HOW THE YOUTH COURT ACT CAN SAVE NEW YORK STATE'S OUTDATED JUVENILE JUSTICE SYSTEM WITH REGARD TO SIXTEEN AND SEVENTEEN-YEAR-OLD OFFENDERS

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INTRODUCTION

Experience, as well as science, has proven that teenagers should not be treated in the same way as adults. Our social customs and law have reiterated and reflected that very idea; teens cannot drink, vote, or sign legal contracts. However, in New York they can still be held to the same level of criminal responsibility as adults.

New York State is one of only two states in the country that classifies sixteen-year-olds as adults in the eyes of the court system,[1] an embarrassing distinction that the Office of Court Administration and the New York State Legislature are eager to change.[2] The Chief Judge of the New York Court of Appeals has introduced a proposal that would create a special court for sixteen and seventeen-year-old nonviolent offenders[3]—in a move that would eventually raise the age of criminal liability in New York to eighteen years old. The proposed measure, the Youth Court Act, essentially blends the essential Due Process protections of the criminal court system with that of the family court system.[4] The proceedings would seamlessly blend the procedural safeguards evident in the criminal system with the rehabilitative elements of family court; with the ultimate goal being a complete shift to family court.[5] In addition to the Court of Appeals, the State Legislature has been working on enacting a bill that would amend the Criminal Procedure Law, the Executive Law, the Family Court Act, and the Penal Law to raise the age of criminal responsibility for certain acts to eighteen.[6] This bill, drafted by the legislature, would go much further and, for various reasons, is not a feasible option.

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[1] Dylan A. Farmer, *Casting off the Curse of God: Litigation Versus Legislation and the Educational Rights of Youth in North Carolina's Adult Criminal Justice System*, 91 N.C. L. REV. ADDENDUM 36, 37 (2012) (North Carolina is the only other state that prosecutes sixteen-year-old offenders as adults.); Mosi Secret, *States Prosecute Fewer Teenagers in Adult Courts*, N.Y. TIMES, Mar. 6, 2011, at A1 (Thirty-seven states, the District of Columbia, and the federal government set the age at eighteen, while eleven states have set the age at seventeen.).

[2] Jeff Storey, *Judges Would Wear Two Hats in Proposed Youth Court*, N.Y. L.J., Mar. 2, 2012, at 1.

[3] *Id.*

[4] *See id.*

[5] *Id.*

[6] S.B. 1409, 236th Leg., Reg. Sess. (N.Y. 2013) (existing in the N.Y. Assembly as A.B. 3668).

The first section of this paper will discuss the evolution of the juvenile justice system in New York. The second section will analyze various reasons for decreasing the criminal responsibility of sixteen and seventeen-year-olds. The third section will examine the proposal set forth by the Court of Appeals, a similar bill currently before the State Legislature, the differences between the two, and the roadblocks that both have faced.

I. EVOLUTION OF THE JUVENILE JUSTICE SYSTEM IN NEW YORK STATE

A. Early Principles

Early American principles for juvenile liability were derived from English Common Law.[7] Under that system, the law drew several bright lines in distinguishing the criminal liability of juveniles. Any child under seven was considered to have no criminal liability and was considered incapable of forming the requisite intent for criminal acts.[8] Children between seven and fourteen were afforded a rebuttable presumption of criminal incapacity that was rather strong at seven, but diminished the closer a child was to fourteen.[9] According to the common law, children over fourteen were considered to have the same criminal capacity as an adult, and were fully accountable for criminal violations.[10] While the common law approach was quite harsh, imposing grave sentences for children as young as twelve years old, and the conviction of one who was eleven years old,[11] the use of a presumption is notable. In the case of a child that was afforded the presumption, the prosecution would bear the burden of showing that the child had the capacity to fully appreciate the wrongfulness of their conduct, and, without this showing, the prosecution would be unable to secure a conviction.[12] It is worth noting that, by use of this presumption, the common law reflected the idea that criminal liability rested on the child's conduct, and not on their numerical age.[13]

In the late nineteenth century, as societal views began to

[7] ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 936 (3rd ed. 1982).
[8] *Id.* at 936 n.1.
[9] *Id.* at 936.
[10] *Id.*
[11] *Id.* at 937.
[12] *Id.* at 938.
[13] *See* PERKINS, *supra* note 7, at 938.

evolve, so too did the law's views towards criminal liability for juveniles.[14] At the outset, New York State led the country towards a system that emphasized rehabilitation for juvenile offenders.[15] The New York House of Refuge was the Nation's first juvenile reformatory.[16] The founders of the reformatory shared a belief that children could be reformed through a system that stressed discipline, education, and hard work.[17] The New York House of Refuge, and the model homes that followed, reflected the increasing conviction that children needed special care and treatment; a feeling that was echoed throughout the course of the nineteenth century and into the twentieth.

"In 1899, the [very] first juvenile court in the U.S. opened in Cook County, Illinois."[18] The basic theory underlying the creation of the Cook County Juvenile Court, "[was] that wayward youth [were] in need of protection and rehabilitation[],"[19] as opposed to the punishment and retribution theory emphasized for adults. Operating under this belief, the creators of juvenile courts imagined a system where hearings would be closed to the public, the juvenile's record would remain confidential, and children would be protected from the harshness and stigma of the criminal justice system.[20]

Throughout the first half of the twentieth century, the *parens patriae* nature of the juvenile justice system prevailed in New York.[21] The State created special "children's courts," and continued to amend the laws in attempts to create the best possible system to deal with the delicate nature of juvenile offenders.[22] However, as will be shown, even as the State progressed, there was still a reluctance to extend the protections to children between sixteen and eighteen years old.

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[14] *See, eg.*, AMERICAN BAR ASSOCIATION, THE HISTORY OF JUVENILE JUSTICE 5, http://www.americanbar.org/content/dam/aba/migrated/publiced/features/DYJpart1.authcheckdam.pdf.

[15] *Id.*

[16] Michael Grossberg, *Changing Conceptions of Child Welfare in the United States, 1820-1935*, *in* A CENTURY OF JUVENILE JUSTICE 3, 15–16 (Margaret K. Rosenheim et al., eds. 2002).

[17] *Id.*

[18] PERKINS, *supra* note 7, at 940; AMERICAN BAR ASSOCIATION, *supra* note 14.

[19] PERKINS, *supra* note 7, at 940.

[20] *See id.* at 941.

[21] Irving Goldsmith, *Legal Evidence in the New York Children's Court*, 3 BROOK. L. REV. 24 (1933).

[22] *Id.*

B. Family Court Act of 1962

With the enactment of the Family Court Act in 1962,[23] New York State took yet another step toward securing rights for juvenile offenders. The Act incorporated several important and unprecedented provisions. Article 7 is the most pertinent to this discussion as it concerned juvenile delinquency:

> The purpose of the article is to provide a due process of law (a) for considering a claim that a person is a juvenile delinquent or a person in need of supervision and (b) for devising an appropriate order of disposition for any person adjudged a juvenile delinquent or in need of supervision.[24]

Juveniles were afforded many, but not all, of the procedural rights that they would be afforded under the adult criminal system and were still protected from the lasting effects of criminal convictions.[25] Even the language used in the Act implies explicit differences between family court proceedings and adjudications, and criminal proceedings.[26]

For all the good done in the Family Court Act, it was still lacking in that its protections only extended to children under sixteen.[27] Legislative history reveals that while many groups supported the act, there was also a strong sentiment that all children under eighteen should fall under the new court's jurisdiction.[28] It seems that many agreed the biggest failure in the Family Court Act was that it set the cut off at age sixteen. Many of those groups made different recommendations for alternatives. The New York City Bar Association's Special Committee on Reorganization of the Courts recommended "that the Family Court should have jurisdiction over minors up to their eighteenth birthday with power to refer to the criminal courts cases involving minors between sixteen and eighteen who are not

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[23] 1962 N.Y. Sess. Laws 2205 (MCKINNEY).

[24] N.Y. Fam. Ct. Act §§ 711, 712 (MCKINNEY 1962) (A juvenile delinquent is a person between the ages of seven and sixteen who does any act which if done by an adult would constitute a crime. A person in need of supervision [PINS] is a male under sixteen or a female under eighteen, "who is a habitual truant . . . and beyond the control of their parent.").

[25] *See, e.g.*, *id.* at §§ 721, 727, 729.

[26] *Id.* at §§ 731, 742.

[27] *Id.* at § 712 (Juvenile delinquent means a person over seven and less than sixteen years of age who does any act which if done by an adult would constitute a crime.).

[28] Various Memoranda, N.Y. Bill Jacket, L. 1962, ch. 686, at 150, 153, 164, 167, 184–85, 201, 203, 284–85, http://jackets.albanylaw.edu/BJ1962CH686.pdf.

amenable to the procedures and techniques of the Family Court."[29] Perhaps the most important of these recommendations, was the one offered by the committee who proposed the bill. The Joint Legislative Committee did not directly disagree with the age limit; however, they did recommend a study be done in order to determine where the cutoff should be set.[30] "[A] judgment about the juvenile delinquency age cannot be properly made without a careful assessment of the practical workings of [various laws] . . . as applied to minors over the age of sixteen."[31]

C. Juvenile Justice Reform

As time passed, the law in New York began to move away from the *parens patriae* system and the idea of rehabilitating children; the rehabilitative purpose instead moved toward one of punishment. The juvenile system began to look more and more like the adult criminal justice system. These changes were in response to the increasing stories of crimes committed by teenagers and the public outcry to punish young offenders more harshly.

The Juvenile Justice Reform Act of 1976 represented the changing ideals and was a significant departure from the original system.[32] The change was evident in section 711, which was amended to add, "[i]n any juvenile delinquency proceeding under this article, the court shall consider the needs and best interest of the respondent as well as the *need for protection of the community*."[33] The first part, concerning the best interests of the respondent, simply reflected a codification of the same sentiments that had existed since the founding of the New York House of Refuge.[34] The last part proved to be more problematic as it represented a clear shift from the rehabilitative theories that had ruled previous laws, to the harsher punitive theory that was gaining support. Long gone were the days when the community

[29] *Id.* at 183–85 (Memorandum of NYCBA. Similar sentiments were echoed by local community organizations, the State Department of Social Welfare, and the National Association of Social Workers.).

[30] N.Y. STATE LEGIS. ANN., at 368 (1962).

[31] *Id.*

[32] *See generally* Juvenile Justice Reform Act, ch. 878 § 711, 1976 N.Y. Sess. Laws at 1755 (West).

[33] *Id.* (emphasis added) (The act exists in current form in Fam. Ct. Act § 301.1.).

[34] *See* PERKINS, *supra* note 7. *See also* Grossberg, *supra* note 16.

believed that all children needed protecting. Now the community was increasingly growing more afraid of the children that they had once sought to protect at all costs.

The juvenile justice system reached a peak two years later, with the amendment of the 1976 act, the Juvenile Justice Reform Amendment of 1978.[35] The amendment was a knee jerk reaction, in an election year, to the gruesome murders committed by a fifteen-year-old boy; since the boy was only fifteen at the time of the murders, he could not be charged in criminal court and could only be confined for a maximum of five years.[36] The amendment solidified New York as a *tough on crime* state, but it also had the adverse effect of stripping away the State's previous status as *parens patriae*. With the introduction of the new, tougher law, New York State took another step in the wrong direction for juvenile justice.

As time has passed, New York has continued to move backwards in this area. The laws have gotten tougher and the punishments more stringent. The State imposes harsher punishments and longer periods of incarceration with little regard for the negative, long-lasting effects that the adult penalties can have on adolescent offenders. Understandably, the State has to make the difficult choice in deciding that a line must be drawn and where that line should be drawn. The problem is that the State has chosen to draw the line at sixteen because of political judgments and social perceptions about teens, not because of any concrete information about sixteen and seventeen-year-old offenders and their predilection towards crime. Other states have taken account of psychological and physiological studies in determining where the age limit should be set.[37] It has

[35] *See generally* Juvenile Justice Reform Amendment, ch. 478, sec. 1, 1978 N.Y. Sess. Laws at 825 (West).

[36] John Elgion, *Two Decades in Solitary*, N.Y. TIMES, Sept. 23, 2008, at B1. *See also* Simon I. Singer et. al., *The Reproduction of Juvenile Justice in Criminal Court: A Case Study of New York's Juvenile Offender Law*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE, 353 (Jeffrey Fagan & Franklin E. Zimring eds., 2000).

[37] *See generally* MACARTHUR FOUNDATION, Info Sheet, *Models for Change: Systems Reform in Juvenile Justice* (Dec. 2008), http://www.macfound.org/media/article_pdfs/INFO-MODELSFORCHANGE.pdf (providing information about a national organization which performed such studies); MACARTHUR FOUNDATION, Info Sheet, *Network on Adolescent Development and Juvenile Justice*, http://www.macfound.org/media/article_pdfs/HCD_NET_DEVELOPMENT_JUVENILE_JUSTICE.PDF. *See also* PUBLIC BROADCASTING SERVICE, *Does Treating Kids Like Adults Make a Difference?*, JUVENILE JUSTICE, http://www.pbs.org/wgbh/pages/frontline/shows/juvenile/stats/kidslikeadults.ht

long since passed the time for New York State to take similar steps and reclaim its position as a leader on juvenile justice and make a change to the current system.

II. WHY SIXTEEN AND SEVENTEEN-YEAR-OLD TEENS DESERVE THE PROTECTION OF THE JUVENILE JUSTICE SYSTEM

A. Children and Teens Are Intrinsically and Scientifically Different from Adults

In 1962, the Joint Legislative Commission (hereinafter JLC) recommended that studies should be conducted to determine whether sixteen was the appropriate age to set the jurisdiction of the family court.[38] At the time, the age limit was seen as a temporary concession until a study could be conducted to conclusively set a more appropriate limit. In those fifty years since the recommendation of the JLC, many studies have been conducted and many of them have come to the same conclusion.

Countless research has shown that when compared to adults, teens and adolescents are significantly different.[39] The studies show that teens are less likely to fully appreciate the consequences of their actions, more likely to act before thinking, easily influenced by peer pressure, and much less likely to understand their legal rights.[40] The current system appears to take this into consideration with teens that are fifteen years old, but chooses to draw a line in the sand for anyone over that age.

Laurence Steinberg and Elizabeth Cauffman evaluate the effects of normative adolescent development in their piece, *A Developmental Perspective on Jurisdictional Boundary*.[41] Examining the period between twelve and seventeen, they

ml (last visited Sept. 30, 2013); Elizabeth S. Scott & Laurence Steinberg, *Adolescent Development and the Regulation of Youth Crime*, 18 POSTSECONDARY EDUC. IN THE U.S. 15, 15, 29 (2008); Sarah Alice Brown, *Juvenile Justice State Legislation 2001-2011* (National Conference of State Legislatures), June 2012 at 3–5, http://www.modelsforchange.net/uploads/cms/documents/ncsl_juvenile_justice_state_legislation_2001-2011.pdf.

[38] N.Y. STATE LEGIS. ANN., at 368 (1962).

[39] *See* Laurence Steinberg, *Juveniles in the Justice System: New Evidence from Research on Adolescent Development*, http://www.familyimpactseminars.org/s_wifis25c01.pdf (last visited Sept. 30, 2013).

[40] *Id.*

[41] Laurence Steinberg & Elizabeth Cauffman, *A Developmental Perspective on Jurisdictional Boundary*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE 379–81, 383 (Jeffrey Fagan & Franklin E. Zimring eds., 2000).

determine that the age range is important for several different reasons. First, is the inherent transitional nature of that time in a young person's life; there are a myriad of changes in physical, intellectual, emotional, and social capabilities.[42]

> There [is] . . . good reason to believe that individuals at the point of entry into adolescence are very different than are individuals who are making the transition out of adolescence. If there is a period in the life span during which one might choose to draw a line between incompetent and competent individuals, this is it.[43]

Second, the authors examine the potential malleability of adolescents in this age range.[44] Experiences with family, friends, and school can have a great influence on how young individuals develop.[45] Finally, there is an examination of the importance of the formative nature of this period in an adolescenct's life.[46] Events and experiences during this time often follow a person into adulthood.[47] The authors caution against developing policies that are based on age alone.[48] The importance of developmental differences, among different age groups, necessitates the use of science in considering policies that would affect adolescents.

In *Roper v. Simmons*,[49] the Supreme Court of the United States also listed three separate, fundamental differences between juveniles under eighteen and adults. First, juveniles display a lack of maturity that can result in impetuous decisions.[50] "In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under [eighteen] years of age from voting, serving on juries, or marrying without parental consent."[51] The second difference goes to the vulnerability and susceptibility of juveniles to negative influences.[52] The third difference is simply a concession to reality; juveniles are not as well developmentally formed as adults and their personality traits are not as fixed, leaving room for growth and change.[53] Citing a substantial amount of scientific and

[42] *Id.* at 383.
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.* at 384.
[47] Steinberg & Cauffman, *supra* note 41, at 384.
[48] *Id.* at 385.
[49] Roper v. Simmons, 543 U.S. 551, 569 (2005).
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.* at 570.

sociological research, the Court held that it was unconstitutional to sentence a person to capital punishment if the crime was committed while under the age of eighteen.[54]

Even though this case deals with the death penalty for juveniles under the age of eighteen, the Court's extensive review of the differences between juveniles and adults is indicative of how they view juveniles and juvenile justice. The Court was willing to take notice of the significant differences between adults and juveniles, and the multitude of scientific evidence in deciding the case.

It is easy to imagine a scenario with two teens committing a misdemeanor offense, where each will be treated differently simply because of an age difference of a matter of months. Under the jurisdiction of the criminal court system, the sixteen-year-old who commits a misdemeanor offense faces a criminal conviction that could result in up to a year in jail. His only savior is a criminal defense attorney, who will hopefully be able to get him Youthful Offender status.[55] If that does not happen, and the case goes to trial, he has to be present and defend himself in a public jury trial. No matter how the case is disposed of, the record of it follows him forever. If instead, the teen is only fifteen years old, suddenly the scenario is much different. The fifteen-year-old would receive the benefit of a closed courtroom, with an army of social workers, and a closed record.

When combined with common sense, endless opinions, and the countless studies on the subject, there can be no viable explanation for the line drawn between fifteen-year-olds and sixteen-year-olds. Compared to adults, fifteen and sixteen-year-olds are functionally equivalent in terms of development and maturity level; so, why does one get the benefit of the family court system while the other is forced to face the formality and severity of the criminal court system? The current system simply ignores the developmental similarities in favor of a bright line rule that is informed by fear, rather than hard evidence. A better system

[54] *Id.* at 570–71.

[55] *See* Singer et al., *supra* note 36, at 364 (It would be unfair to ignore the fact that while New York does have the strictest system for sixteen-year-olds, they do allow for some leniency in the form of the Youthful Offender status. Youths aged sixteen through nineteen are eligible. A sixteen-year-old who is arrested can be given a youthful offender status depending on their crime and the judge's discretion. This procedure helps the defendants because the records are sealed and they can avoid a potentially harsher punishment, however they are still forced to go through the formality and harshness of the Criminal Court system.).

would be one that is informed by the developmental differences between teens and adults, and uses that information in crafting a policy that is better suited to account for those differences.

B. Putting Teens Through the Adult Criminal Justice System Has Lasting, Detrimental Effects and No Determinable Benefit to Society

Teenagers who are put through the adult criminal justice system are at a massive disadvantage. They are more likely to become repeat offenders,[56] receive little to no education while incarcerated,[57] and are placed in harsher conditions that expose them to a wide array of dangers. Additionally, they face many major penalties outside of the court system, as a result of their youthful mistakes, which can result in a significant limit on their future education and employment opportunities.[58]

Parties who advocate harsher penalties for teens often argue that the increased severity will actually go towards reducing crime. In New York State, however, there is evidence to show that putting sixteen-year-olds through the criminal court system actually results in increased recidivism.[59] Comparing those who are prosecuted in juvenile courts versus criminal courts, those teens who go through criminal court are rearrested at much higher rates than their counterparts in juvenile court.[60] The chances of being re-incarcerated are twenty-six percent greater for juveniles who are prosecuted in criminal courts as adults.[61] In addition to being rearrested at higher rates, teens who go through the adult system commit more serious crimes than their family court counterparts.[62]

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[56] THE ACT 4 JUVENILE JUSTICE WORKING GROUP, THE JUVENILE JUSTICE AND DELINQUENCY PREVENTION ACT: A FACT BOOK 15 (2007), http://www.campaignforyouthjustice.org/Downloads/Resources/jjdpafactbook.pdf.

[57] *Id.* at 16.

[58] *See id. See also* Michael A. Corriero, *Advancing Juvenile Justice Reform in New York*, 80 N.Y. ST. B.J. 20, 22 (Jan. 2008).

[59] Eric Pagnanelli, *Children as Adults: The Transfer of Juveniles to Adult Courts and the Potential Impact of Roper v. Simmons*, 44 AM. CRIM. L. REV. 175, 183–84 (2007).

[60] MACARTHUR FOUNDATION, THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE ADULT CRIMINAL COURT 1, http://www.adjj.org/downloads/3582issue_brief_5.pdf.

[61] *Id.* at 2.

[62] Donna Bishop & Charles Frazier, *Consequences of Transfer*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE 237, 237 (Jeffrey Fagan & Franklin Zimring eds., 2000).

When compared to teens who go through the juvenile system, teens who go through the adult criminal system are at great risk of victimization. While incarcerated in adult facilities, they can be routinely subjected to violent assaults and abuse.[63] Juveniles who are forced to go through the criminal system are " . . . more likely to learn social rules and norms that legitimate[] domination, exploitation, and retaliation."[64] Their interactions with actual adult criminals encourage juveniles to act in a way that identifies more closely with those around them.[65] Where the juveniles feel as if they are being treated as criminals, they begin to view the system as antagonistic.[66] That, in turn, begins to reflect on the juvenile's entire way of thinking about the criminal justice system. On the other hand, teens who are prosecuted in the juvenile court system are surrounded by trained professionals, who are able to assist them in cultivating positive views about their own character,[67] as well as shaping their views about the court system and the criminal justice system at large.[68] Additionally, staffs in juvenile facilities are often more invested in helping the youths. They are more concerned about their adjustment, more encouraging, and better at helping teens set and achieve goals.[69]

The proponents of the Juvenile Reform Act, and the harsher laws that have followed, maintain that by imposing these more adult penalties on teens under eighteen, they are protecting the community by getting these juveniles off the streets and into jail.[70] However, at least in the long run, it would seem that the law is having the opposite effect. By putting teens under eighteen through the criminal court system, we actually increase the risk that the community will continue to be harmed. Those teens become more and more like hardened criminals who will go on to repeatedly threaten society in worse ways.[71] If the State were to return to its original tenets of rehabilitation and treatment, then a great number of teens—who are currently being hampered by the criminal system—could actually stand a

[63] *Id.* at 258.
[64] *Id.* at 263.
[65] *See id.* at 263–64.
[66] *See id.* at 263.
[67] *Id.*
[68] *Id.* at 262.
[69] *Id.* at 255.
[70] *See generally* THE ACT 4 JUVENILE JUSTICE, *supra* note 56, at 58.
[71] *Id.* at 55.

chance at being reformed into prosperous members of society.

III. CATCHING UP

A. Youth Court Proposal

In the yearly State of the Judiciary Address for 2012, Chief Judge Jonathan Lippman proposed that the state courts work on rethinking juvenile justice.[72] Referencing the scientific studies and their results concerning sixteen and seventeen-year-old nonviolent offenders, he tasked the Sentencing Commission (hereinafter Commission) with finding a solution.[73] The Commission found that a simple shift, to the already overburdened family court, was not feasible, but that leaving the cases in the criminal court system would not be practical in the face of all that they knew about the effects of the criminal court system on juveniles.[74] As a result of the Commission's findings, Chief Judge Lippman put forward his own proposal to solving the problem.[75] The proposal was put before the New York State Legislature in the form of Senate Bill 7394 (2012),[76] sponsored by Senator Steve Saland, several months after the State of the Judiciary Address.

The bill proposed massive changes to the Criminal Procedure Law, the Penal Law, the Executive Law, and the Judiciary Law.[77] Most importantly, the bill's first section takes notice of the neurological studies establishing that adolescents under eighteen are fundamentally different from adults over eighteen.[78] Additionally, it recognizes the inadequacies of the adult criminal system in effectively handling the cases of sixteen and seventeen-year-olds.[79] The proposed change to the law would blend the alternative rehabilitative options of family court with the procedural safeguards that are necessary in the criminal court system.[80] The bill proposes the Youth Court Act, as a solution to

[72] JONATHAN LIPPMAN, THE STATE OF THE JUDICIARY 2012 3 (Feb. 14, 2012).
[73] *Id.*
[74] *Id.*
[75] *Id.* at 4.
[76] S.B. 7394, 235th Leg., Reg. Sess. (N.Y. 2012) (The bill has been reintroduced in much the same form for the 2013 session as S.B. 4489, sponsored by Sen. Nozzolio.).
[77] *Id.*
[78] *Id.* at § 1.
[79] *Id.*
[80] *Id.*

the problem of balancing community protections and the effects of the criminal court system on juveniles:

> [T]he most effective way of balancing the limits and needs of non-violent 16- and 17-year-old offender with the community needs and relevant penological considerations is to decriminalize their offenses and to establish a specialized forum within the state's superior courts in which those offenses may be addressed.[81]

An entirely new section would be added to the Criminal Procedure law that deals specifically with sixteen and seventeen-year-old offenders.[82] The changes would result in a completely new set of procedures for adjudicating sixteen and seventeen-year-olds.[83] Immediately upon an arrest, police would have to notify a parent or guardian of the arrestee.[84] Once the parents were notified, the arrestee would be released into a guardian's custody and served with a special appearance ticket.[85] The special appearance ticket is defined in the bill as "a written notice issued and subscribed by an officer . . . directing a designated person to appear at the probation service for the county in which the offense or offenses for which the special appearance ticket is issued were allegedly committed."[86] In cases where a parent could not be notified, the police would have to release the adolescent after serving him or her with an appearance ticket, or take the adolescent directly to the youth division of the superior court.[87] In keeping with the original tenets of juvenile courts, the bill also contains provisions that would require the Division of Criminal Justice Services to keep fingerprints that are taken from the youths separate from those taken from adults, and would prohibit the release of those fingerprints to any federal depository.[88]

A new article, Article 722, would be added to the Criminal Procedure Law, which sets out the specific guidelines for proceedings against sixteen and seventeen-year-olds.[89] In cases where sixteen or seventeen-year-olds are arrested and charged

[81] *Id.*
[82] S.B. 7394, 235th Leg., Reg. Sess., at §§ 2, 3, 5 (N.Y. 2012).
[83] *Id.* at § 5.
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] S.B. 7394, 235th Leg., Reg. Sess., at § 7 (N.Y. 2012).
[89] *Id.* at § 8.

with a crime, the first option would be an adjustment,[90] and in considering the adjustment, the probation service is directed to speak to the parents of the arrestee, the complainant/victim, and the arrestee.[91] Once an adjustment is completed, no further action can be taken against an offender under the Act, and the probation service is directed to seal the records and destroy any fingerprints.[92]

If a case could not be adjusted, the next option would be to assign the case to the new Youth Division of the Superior Court,[93] which is the new court that would be used to adjudicate cases where sixteen and seventeen-year-olds are charged with nonviolent offenses.[94] The offenses would be categorized as "youth division offenses" and would include all felonies and misdemeanors, excepting violent felony offenses, committed when the offender was between sixteen and eighteen at the time of the offense.[95]

Judges presiding over the youth division would be mandated to receive training in "specialized areas, including, but not limited to, juvenile justice, adolescent development and effective treatment methods for reducing crime commission by adolescents."[96] Additionally, the division would be granted exclusive jurisdiction over all youth division offenses, and proceedings that relate to juvenile offenders.[97] Even with the criminal procedures guiding the court, if a teen pleads guilty in the youth division, a motion could be made to allow the case to be removed to family court.[98] In ruling on such a motion, the court would have to look to specific factors, such as mitigating circumstances, the seriousness of the crime, the defendant's history and character, and evidence of guilt.[99] Even in cases

[90] *Id.* *See also* MERRIL SOBIE, *Practice Commentaries for N.Y. FAM. CT. ACT §308.1*, MCKINNEY'S CONSOLIDATED LAWS OF NEW YORK ANNOTATED, bk. 29A, at 448 (MCKINNEY 2008) (Although not statutorily defined, "[a]s a matter of practice and custom, . . . adjustment generally means the informal consensual resolution of a case under probation service auspices.").

[91] N.Y. S.B. 7394, at § 8.

[92] *Id.*

[93] *Id.*

[94] S.B. 7394, 235th Leg., Reg. Sess., at §§ 3, 4 (N.Y. 2012).

[95] *Id.* at § 3.

[96] *Id.* at § 8 (A section of the Judiciary Law would also be amended to allow the court to adopt rules in regards to establishing the training program.).

[97] *Id.*

[98] *Id.*

[99] *Id.*

where there is no such motion made, pursuant to section 722.40 of the proposed act, a defendant who is found guilty in the youth division is entitled to a dispositional hearing where the court would determine whether the teen requires supervision, treatment, or confinement.[100] If a teen is found guilty, the relevant sections of the Family Court Act that relate to record sealing and use of records in other courts would apply.[101] In effect, a teen found guilty under the Criminal Procedure Law would then get the benefit of the rehabilitative options present in family court, including the record sealing provisions from the Family Court Act and the alternatives to incarceration.

In addition to the creation of the Youth Court Act, in accordance with the goals of the Chief Judge, the section of the Penal Law relating to infancy is amended.[102] Penal Law section 30.00 would be changed to state that a person under the age of *eighteen* years old would not be criminally responsible for their conduct.[103] The proposed law also adds a new subdivision to section 2 of 30.00, in order to reflect that persons aged sixteen and seventeen can still be held liable for violent felony offenses.[104] Furthermore, complying with the Act, exclusive jurisdiction is vested in the Youth Court for persons who are at least sixteen and under the age of eighteen.[105]

The Act, if passed, was due to take effect on November 1, in the second year following the date on which it became law.[106] Unfortunately, after being referred to the Codes Committee of the New York State Senate,[107] the bill saw no subsequent movement.

However, the bill has been reintroduced with a few changes for the 2013 session.[108] In the new version, where the youth division orders placement of an offender, he or she will be committed to the local facility that he would have been committed to, had he been an adult.[109] Since the determination of placement requires a

[100] S.B. 7394, 235th Leg., Reg. Sess., at § 8 (N.Y. 2012).

[101] *Id.* (Proposed section 722.60 would also mandate that records of proceedings in the youth division would not be open to public inspection.).

[102] *Id.* at § 14.

[103] *Id.* at § 14 (emphasis added).

[104] *Id.*

[105] *Id.*

[106] S.B. 7394, 235th Leg., Reg. Sess., at § 15 (N.Y. 2012).

[107] *Status: S.B. 7934,* N.Y. ST. LEG., http:public.leginfo.state.ny.us/bstfrmef.cgi (last visited Oct. 14, 2014) (showing that the last movement on the bill was May 7, 2012, when it was refereed to codes).

[108] S.B. 4489, 236th Leg., Reg. Sess. (N.Y. 2013).

[109] *Id.* at § 8.

hearing that takes account of all the mitigating circumstances in the case,[110] this change is not unwelcome. While the offender is unfortunately placed in an adult facility, it is only after a judicial hearing that this determination is made. An offender who has been ordered into placement has had the benefit of procedural protections and individualized assessments, and if the court determines that the offender is better off being confined, as opposed to supervision or treatment, then a placement in an adult facility may be the best thing for the offender. This section does an adequate balancing between the needs of the community and the needs of the offender. The other substantial change is the addition of a section that speaks to the creation of a Juvenile Probation Assistance Program,[111] and is further discussed in Part III(C).

In his address, the Chief Judge stated that the long-term goal of the Youth Court Act was to move all cases to the family court.[112] Not to be deterred by the slow pace of the legislature, the court found a way to get the ball rolling immediately with a minimum of disruption and costs to the current system. As part of the initiative, several pilot programs have already been established across the state.[113] The programs have been established in several different courts in Buffalo, Syracuse, New York City, Westchester County, and Nassau County.[114]

The creation of the pilot programs required no change in legislation and was built upon programs that many of the courts already had in place.[115] Many local courts have been operating some version of a youth division for years. As part of the program, judges who preside over these courts are trained in topics including adolescent brain development, trauma, mental health, and education.[116] They also have a wider range of options available to them in regard to dispositions of the cases that they hear. Youths who go through the program can avoid a permanent

[110] *Id.*
[111] *Id.* at § 13.
[112] LIPPMAN, *supra* note 72, at 4.
[113] *See generally Adolescent Diversion Program: The Court System Pilots a New Approach to Young Offenders*, CTR. FOR CT. INNOVATION (Mar. 1, 2012), http://www.courtinnovation.org/research/adolescent-diversion-program-court-system-pilots-new-approach-young-offenders (discussing the overall plan and implementation of the pilot programs).
[114] *Id.*
[115] *Id.*
[116] *Id.*

criminal record, by completing mandated services, like conflict resolution; many of the services are provided through local organizations.[117] These programs give teens an opportunity to avoid the harsh effects of the criminal system while teaching them to be productive members of society. The District Attorney for Manhattan, Cyrus Vance, Jr., has applauded the pilot programs stating:

> Our present system of using adult court for 16- and 17-year-olds too often recycles low-level defendants without appropriate intervention, and has never provided an effective solution to nonviolent teen crime. . . . It's time for New York to recognize the emerging consensus throughout the nation that there is a more effective way for the criminal justice system to treat older teenagers. It will be better for teens, and will keep the streets safer for all of us.[118]

While the pilot programs are a great step in the right direction, they only serve as "testing ground[s]"[119] while the Courts await the passage of legislation that would create the Youth Court Act. The amendments proposed in Senate Bill 4489 could rectify the current system and its deficiencies. It could provide an appropriate venue for sixteen and seventeen-year-old offenders, taking into consideration their relative youth and developmental differences, while adhering to the all too necessary procedural protections. The adoption of this proposal by the State can only result in positive effects and would put New York State back on the right side of the issue.

B. Senate Bill 7020 (2012)

Several months after Chief Judge Lippman's proposal was outlined in the State of the Judiciary, Senator Velmanette Montgomery introduced Senate Bill 7020.[120] On the Sponsor's Memo the purpose is outlined as:

> The bill amends and enacts various provisions of law to raise the age of adult criminal responsibility from sixteen to eighteen so that

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[117] *Id.*

[118] Irene Plagianos, *Youth Court Program Separates Teen Defendants from Adults*, DNAINFO NEW YORK (Oct. 22, 2012), http://www.dnainfo.com/new-york/20121022/midtown/manhattans-youth-court-program-separates-teen-defendants-from-adults (alteration in original).

[119] LIPPMAN, *supra* note 72, at 5.

[120] S.B. 7020, 235th Leg., Reg. Sess. (N.Y. 2012) (the bill has been re-introduced in the 2013 session as S.B. 1409).

> youth who are charged with a crime may be treated in a more age appropriate manner. The changes implemented in the bill reflect the evidence that the current system has not been effective in deterring and preventing future crime, while maintaining a mechanism that youth, on a case by case basis, may be tried in adult criminal court when the circumstances warrant.[121]

According to the purpose, the bill seeks to target the current system's ineffectiveness as far as preventing crime, while ensuring that teens are regarded in a more "appropriate" manner under the law.[122] In a similar vein to Chief Judge Lippman, the bill recognizes the differences between teens and adults, and seeks to address those differences by raising the age of criminal responsibility to eighteen.[123] While the goal is a noble one, the broad reach of the bill would have the effect of frustrating the very system the sponsors want to correct.

The bill would amend multiple sections of the Criminal Procedure Law (hereinafter CPL), the Executive Law, the Family Court Act, and the Penal Law, as well as repeal certain sections of the CPL.[124] Several sections of the CPL would be amended to raise the age at which one is considered an adult from sixteen to eighteen.[125] Unlike the Youth Court Act, the bill makes no distinction between violent crimes and non-violent crimes. The first thing that is amended by the bill is the definition of Juvenile Offender—as defined in the CPL—by simply adding in the ages sixteen and seventeen.[126] Under current law, a juvenile offender under the relevant section is defined as a person fourteen or fifteen years old who is criminally responsible for acts constituting the crimes of murder, kidnapping, arson, and rape, among others.[127] Additionally, the court could order the removal of a juvenile offender to family court without needing the consent of the district attorney.[128] Changes would also be made to raise

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[121] Sponsor's Memorandum in Support, S.B. 7020, 235th Leg., Reg. Sess. (N.Y. 2012).

[122] *Id.*

[123] *Id.*

[124] *See generally* S.B. 7020.

[125] *Id.* at §§ 2–5, 7–11 (The bill also makes sweeping changes to sections relating to offenders under sixteen, that, while not relevant to this discussion, are interesting to note.).

[126] S.B. 7020, 235th Leg., Reg. Sess. at § 1 (N.Y. 2012) (The bill also redefines "juvenile offender" in the Penal Law.).

[127] N.Y. CRIM. PROC. LAW § 1.20 ¶ 42 (MCKINNEY 2013).

[128] S.B. 7020 at § 9. *See* N.Y. CRIM. PROC. LAW § 330.25 ¶ 1–2 (MCKINNEY 2013) (Consistent with current law, the court would still be required to consider

the maximum age for Youthful Offender Status.[129] Changes to the Executive Law would allow detention centers, and other facilities used for housing juveniles, to house all juveniles under eighteen.[130]

The Family Court Act would also be subject to significant and necessary changes. The definition of "juvenile delinquent" is amended to include sixteen and seventeen-year-old offenders.[131] Once again the bill makes no distinction between violent felonious crimes and non-violent crimes, amending the designated felony act definition to include sixteen and seventeen-year-olds. Amendments to relevant sections would authorize the family court to hear cases involving sixteen and seventeen-year-olds, including cases that may be waived down from adult court. Several sections of the Penal Law would also be amended to provide sixteen and seventeen-year-olds with the defense of infancy.

The changes that this bill would seek to enact are much broader than those that the Chief Judge outlined in his State of the State Judiciary. The Youth Court Act would only impact nonviolent offenders; the Senate bill appears to implement this idea and would see it extended to a wide variety of offenses, including violent felony offenses.[132] Additionally, the Senate bill mandates adjudication in family court on the basis of age alone.[133]

Basically all cases involving someone under the age of eighteen could be referred to family court, including violent offenses and minor traffic crimes.[134] Outside of the purpose of the bill, the sponsors do not explain their reasons for the blanket upheaval. Unlike the Youth Court Act, this bill does not balance the best interests of the child with the need for community protection. Whereas the Youth Court Act was created after research on the subject, this bill makes the determination without the use of any evidence, simply basing the change on numerical age.[135] The bill did not see any movement after it was referred to the Codes Committee and died in committee at the end of the 2012

mitigating factors.).

[129] S.B. 7020 at § 11.

[130] *Id.* at § 10.

[131] *Id.* at § 20.

[132] *See generally* S.B. 7020, 235th Leg., Reg. Sess. at § 20 (N.Y. 2012).

[133] *See generally id.* at §§ 1, 20.

[134] *Id.* at § 20.

[135] *See generally* S.B. 7020.

session.[136]

C. Roadblocks

Both the Court's proposal and the Senate bill have faced several roadblocks. There are concerns across the board about the costs of raising the age of criminal liability. In response to the youth court proposal, many counties are worried about the increased costs of additional cases in family court without the promise of additional funding through the State.[137] Even though the direct costs would be offset by the decrease of cases in criminal court, the social services provided through family court require more money.[138]

Different state departments are also nervous about the increased costs. The Departments of Probation, Corrections, and Criminal Justice are just some of the state agencies worried about the increased costs to their budgets.[139] Although these departments could face an increase in workload, those costs would be offset by the reduced need for counsel in cases that would not go to trial.[140] The costs and savings may not occur proportionally in each agency.[141] Some may wind up with more net expenses than others, who may achieve a net savings. More important than these concerns over monetary expenses are the savings that the public will see. A reduction in crime, coupled with protecting adolescents from the criminal system, far outweighs the monetary costs.

The 2013 version of the Youth Court Act may be enough to assuage the fears about the costs of the act. Whereas the 2012 version did little to address the costs, the new version is explicit in creating a program to deal with them efficiently. A new article would be created for the purposes of a "Juvenile Probation

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[136] *See generally id.* (The broad nature of the bill could account for why the bill stalled in committee, however there are no transcripts of committee meetings recorded and therefore no way to be sure. The bill was reintroduced in its current form for the 2013–2014 session and, as of April 20, 2013, has yet to leave the Codes Committee.).

[137] Editorial, *Youth Court in Question*, THE DAILY NEWS ONLINE (June 18, 2012, 12:00pm), http://thedailynewsonline.com/opinion/article_c380db60-b8f7-11e1-82a6-001a4bcf887a.html.

[138] *Id.*

[139] Plagianos, *supra* note 118.

[140] LIPPMAN, *supra* note 72, at 4.

[141] *Id.*

Assistance Program,"[142] a program that would provide an outlet for funding to support the youth court proposal. The article gives the Chief Judge supervisory powers, and gives him the authority to create the necessary rules to effectuate the program.[143] Funds provided as a result of the program would be allocated out towards probation services for teens under eighteen, including educational, vocational, and therapeutic services.[144] Cities and counties could apply for funding and would simply have to prove that they are complying with the rules governing the program and the Youth Court Act.[145] The State Comptroller is given the authority to audit any applicants to ensure that funding is not being misused or misplaced.[146] The section of the Penal Law relating to infancy is also changed to address the issue of cost saving. On December 1st of each year, the Chief Administrator of the Court is directed to consult with the Chair of the Senate Finance Committee, the Chair of the Assembly Ways & Means Committee, and the Director of the Budget and certify with the State Comptroller the increases in local probation costs.[147]

There are also concerns about overburdening the family court system. This concern exemplifies why the Youth Court Act is a better alternative to Senator Montgomery's bill. The Youth Court Act would not raise the age of criminal liability for all offenses, only for certain "youth division offenses."[148] Additionally the measure did not propose, or recommend, immediate mechanisms for removing all sixteen and seventeen-year-old offenders to family court. The youth division of the court would exclusively handle cases involving these teens and would remain part of the criminal court. Senator Montgomery's bill, on the other hand, would indiscriminately send all offenders under the age of eighteen to family court, notwithstanding the seriousness of their offense.[149]

Under Senate bill 7020, there is a great possibility that family courts would be overburdened and would not be able to function properly. An overburdened family court would not be able to give these older adolescents the type of individualized care necessary

[142] S.B. 4489, 236th Leg., Reg. Sess., at § 13 (N.Y. 2013).
[143] *Id.*
[144] *Id.*
[145] *Id.*
[146] *Id.*
[147] *Id.* at § 16.
[148] S.B. 4489, 236th Leg., Reg. Sess., at §§ 1, 3 (N.Y. 2013).
[149] *See* S.B. 7020, 235th Leg., Reg. Sess. at § 20 (N.Y. 2012).

to avoid recidivism. Additionally, an influx of older teens would hamper the court's ability to focus on the adolescents that are currently under the jurisdiction of family court. That is the kind of counterproductive result that the Youth Court Act would like to avoid. By limiting the crimes that are eligible for the youth division, and creating an intermediary court, the proposal would seek to help adolescents by giving them the best opportunity possible.

CONCLUSION

It would be very difficult to undertake the mission of changing the juvenile justice system, without incurring some costs along the way. However, the importance of the dual goals of reducing crime, and shaping wayward adolescents into productive citizens, mandates that it must be done in the best way possible. It comes down to a question of where and how the State wants to incur those costs. The Senate bill has a lofty goal, perhaps too lofty, enacting a sweeping measure that would change fundamental portions of the juvenile justice system, without regard to adolescent development. Some of the most important needs for adolescents are consistency and organization. This bill would have the effect of throwing the system into a state of chaos, where all adolescents would be harmed. The bill would ultimately fail to help older adolescents and in the process would also fail younger ones. A blanket upheaval, without the necessary evaluation, can only do more harm than good.

The Youth Court Act, on the other hand, has taken notice of the costs and has determined the best way to streamline them. Using extensive studies and enlisting the assistance of different groups across the state, Chief Judge Lippman has come up with the best solution to fix a broken system and offset costs. That solution would seek to build on programs that many courts have already implemented, and many communities want, while continuing to search for better solutions. Judges who are specially trained in adolescent development would be able to exercise discretion in an informed manner and would be better equipped to determine the best needs for each case. Additionally the youth court proposal could eventually be a cost saver; there would be significantly less youth charged in criminal court, which

would reduce the burden on prosecutors.[150] Additionally, by creating a pathway for alternative dispositions, there would be a decrease in the number of youth going into adult facilities, reducing costs for those facilities.[151] The youth court proposal would weave together the twin goals of protecting children and protecting the community, in a comprehensive manner that takes into consideration the inherent differences between adults and adolescents.

What makes the Youth Court Act "better" than other alternatives is the use of empirical, physiological, and social science evidence in crafting the law. Fifty years ago, the JLC recommended the use of further studies to determine the proper age for family court protections; and in all that time the State has continued to change the law without the use of any studies. For too long the realm of juvenile justice has been defined by political judgments and sensationalized media stories. Hopefully, the youth court act will be enacted in the near future.

Whenever, and wherever, New York decides to redraw the line, it is imperative that those same empirical studies be utilized. Unless, and until, that happens, teenage offenders, the community, and the State will continue to suffer from a broken system.

[150] LIPPMAN, *supra* note 72, at 4.
[151] *Id.*