IN SEARCH OF MEANINGFUL SYSTEMIC JUSTICE FOR ADOLESCENTS IN NEW YORK

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I am delighted to be here to speak with you about juvenile justice reform in New York. I want to thank the *Cardozo Law Review*, the Jacob Burns Ethics Center, and Cardozo's terrific Dean, my friend Matthew Diller, for hosting this program and for having me here today. I also want to thank Michael Corriero, founder of the New York Center for Juvenile Justice, one of the sponsors for today's event. Judge Corriero, whom you will be hearing from later today, has touched the lives of so many young people both on the bench and through his innovative and creative approaches to reforming New York's justice system.

At the outset, let me be very direct. Given our present juvenile justice laws, we all have much work to do before we can deliver justice to adolescents in New York that is fair, effective, and rational. The interactions of young people with law enforcement and the courts should be, and is, a matter of the greatest concern to all of us. This topic is basic to the well-being of our society and our children, and I do not just mean hot-button issues that are very relevant to young men and women, such as stop and frisk, sex trafficking, or in-school police arrests. In a much more basic and fundamental sense, our system of juvenile justice in New York is broken and must be changed.

And that is why I have submitted a bill to the New York State legislature that would effectively raise the age of criminal responsibility for non-violent crimes to eighteen years of age. The bill seeks to secure better outcomes in the justice system for youth aged sixteen or seventeen who are accused of non-violent crimes by removing them from the traditional adult criminal justice system. At the same time, it emphasizes treatment, rehabilitation, and effective reintegration. The bill is the culmination of much thought, debate, and research. It benefits from the views of those within the court system and from the wider

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community. And it responds to mounting evidence that adolescent brain development is very different from that of adults.[1]

Every year, about 45,000 to 50,000 youths aged sixteen and seventeen are arrested in New York and prosecuted as adults in our criminal courts, overwhelmingly for minor crimes. In thirty-seven other states and the District of Columbia, the age of criminal responsibility starts at eighteen. Eleven states have set the age at seventeen. New York and North Carolina alone in the nation continue to prosecute sixteen-year-olds as adult criminals.

As someone who has spent over forty years in the justice system, I just cannot fathom how that can possibly be. It really says something when avowedly tough-on-crime states like Texas, Georgia, and Mississippi, to name just a few, have all seen the wisdom of prosecuting troubled young people as juveniles, while New York continues to expose teenagers to an adult criminal justice system that so often serves as a breeding ground for career criminals.

I want to clarify that my focus here today is on the less serious crimes committed by adolescents. As you know, New York and every other state already prosecutes the most violent juveniles as adults. In New York, the age of criminal responsibility for all murder cases starts at thirteen, and at fourteen for major felonies. While I personally believe that, overwhelmingly, those juveniles who commit these types of serious offenses can and should be prosecuted in the criminal courts, one could reasonably argue about how to draw the line on when and where juveniles should be treated as adults for violent criminal conduct. But that is not the issue of the day, and not what I am talking about. Rather, the question to be asked for the vast majority of young people who do not commit those kinds of serious crimes is simple: How is it that New York, which has always been the progressive leader in the country, finds itself so out of step with national norms?

The history of juvenile justice in New York is a complicated one, full of false steps, missed opportunities, and paths not taken. Indeed, the current age of criminal responsibility is a perfect example of this. When the current Family Court Act became law in 1962, the Legislature could not agree on the age of criminal responsibility. The age of criminal responsibility had been sixteen for decades during the era of the Children's Courts. And yet, by 1962, most other states had raised the jurisdictional age, and there was strong advocacy in New York for a

[1] Since this speech was delivered, the 2013 legislative session ended without passage of the bill. Significantly, however, the New York State Association of Counties, which represents local governments that will be impacted by the reforms contained in the bill, has recently reversed its position on the legislation and now supports it. The Office of Court Administration will seek to have the bill reintroduced in the 2014 legislative session with the goal of passage in the coming year.

higher age. Despite the intense debate, age sixteen was chosen as a temporary measure for the Family Court Act until public hearings could be held and additional research could be presented. The official legislative committee comment called the decision "tentative and subject to change." The Legislature anticipated that there would be further study of the issue. And there was. But the study's authors regrettably recommended still *further study*. The effort petered out and the issue was never revisited. And the "temporary fix" of sixteen has now lasted half a century without meaningful reconsideration.

More than fifty years later, we know based on advances in scientific research that adolescents, even older adolescents, are different from adults. In particular, their brains are not fully matured. This limits their ability to make reasoned judgments and engage in the kind of thinking that weighs risks and consequences. Teenagers have difficulty with impulse control and with resisting outside influences and peer pressure. They lack the capacity to fully appreciate the future consequences of their actions. At the same time, the systems in the brain that control emotions are highly activated, leading some to describe the teenage brain as "all drive and no brakes." In addition to being more immature, the teenage brain is also more "plastic," meaning that it is more malleable and capable of change.

The United States Supreme Court has recognized the validity of the science of adolescent brain development in concluding that different penalties are appropriate for juveniles who commit serious crimes. In 2005, in *Roper v. Simmons*, the Court outlawed the death penalty for crimes committed by persons under eighteen. Three years ago, in *Graham v. Florida*, the Court outlawed life without parole for juveniles in non-homicide cases. The Court made clear in *Roper* that young offenders are not to be absolved of responsibility or punishment for their actions, but rather that they need to be treated differently from older criminals because their transgressions are not as "morally reprehensible as that of an adult." Then, just last year, the court went further in *Miller v. Alabama*, holding that mandatory sentences of life without parole are unconstitutional for juvenile offenders in all cases, including homicides. The Supreme Court recognized adolescents' capacity for change as well as their susceptibility to outside pressures, limited control over their own environment, immature brain development, impulsivity, and underdeveloped sense of responsibility.

If you are the parent of a teenager, or remember those years, you know that these are not revolutionary concepts. Teenagers do stupid, impulsive, irrational things that frustrate and anger adults. But as a state, what do we want for our sixteen- and seventeen-year-olds who get arrested for minor drug offenses, shoplifting, vandalism, trespassing, fare-beating, or the like? Do we really want these teenagers to be

processed in an adult criminal justice system focused on punishment and incarceration, where rehabilitative options are limited, where they may be jailed, where they may be victimized, and where they may be burdened with a criminal record that bars them from future employment and educational opportunities?

Or do we as a state want these young people to go through a court system that is equipped to intervene meaningfully in their lives, before their troubles escalate into more serious criminality, and without exposing them to a criminal record? A system that is focused on rehabilitation and getting children back on the right track, that offers supervision, mental health treatment, remedial education, and other services and programs; a system where judges are obligated by law to act in the "best interests" of the children who come before them, a mandate that does not exist in criminal court.

In our society, we do not allow sixteen- and seventeen-year-olds to vote or drink or serve in the military because we know full well that they lack the necessary maturity and judgment. Why then do we treat them as adults when it comes to crime? Why, when our goal is to achieve better outcomes that change juvenile behavior and protect public safety? It makes no sense.

Prosecuting teenagers as adults also ignores the underlying issues that may give rise to misconduct and that can be addressed to put these teenagers on the path to a law abiding life. Juveniles may be unable, as the Supreme Court put it in *Miller v. Alabama*, "to extricate themselves from horrific, crime-producing settings." They may be struggling with mental illness or trauma. They may be motivated by a range of circumstances and difficulties, and we must look to the root causes of a child's conduct and see the child as a whole in some kind of context that might explain their behavior.

Put simply, the adult criminal justice system is not designed to address the special problems and needs of sixteen- and seventeen-year-olds. When we judge and punish these young people as adults, we miss the opportunity to help them turn their lives around and improve their chances of growing into productive, law-abiding adults. Today, we also have the benefit of studies confirming that older adolescents who are tried and sentenced in criminal courts are more likely to re-offend and to re-offend sooner, and they go on to commit violent crimes and serious property crimes at a far higher rate than those young people who go through the family court system. We simply do not succeed in enhancing public safety by prosecuting and punishing sixteen- and seventeen-year-olds as adults. They are left with a dimmer future, a future where they carry with them the stigma of a criminal record that will stand in the way of opportunities for education, employment, and housing throughout their lives. Instead, we could be providing them

with the services they need, like mental health or drug treatment, to get their lives back on track and reduce the likelihood of future crime.

With all this in mind, I asked the court system's Sentencing Commission to work through the complex issues involved and recommend to me a better approach through legislative change.

Initially, it appeared that best solution would be to immediately give the Family Court jurisdiction over these cases. The whole guiding philosophy of Family Court is to focus on the problems that are specific to children and young people. Each case is considered within the context of the family, and with the goal of promoting rehabilitation whenever possible. There would be practical and legal benefits to Family Court as well: Teenagers in Family Court are technically charged with delinquency and not crimes. The implications of this subtle change in vocabulary are far-reaching. First and foremost, those charged with delinquency do not receive criminal records. This means they can honestly state on applications for employment and financial aid and housing that they have never had a criminal conviction. This so often can be the difference between a gainfully employed productive citizen and an unemployed, welfare-dependent person who gets caught in the revolving door of the criminal justice system.

In Family Court, as you know, there are off-ramps at nearly every stage of the process, from arrest to adjudication to sentencing. In fact, many juvenile cases never even make it to court but are instead "adjusted" by probation. Under the Family Court Act, probation departments across the state have the discretion to divert a case for up to 120 days. If the young person complies with whatever conditions probation imposes, which could include curfews, letters of apology, and links to services, then the case is closed and sealed and no further action is taken.

At the same time, there are real problems in shifting to Family Court all of the cases involving sixteen- and seventeen-year-olds. First, there are obvious financial concerns. Abruptly transferring many thousands of cases a year to Family Court would place a heavy burden on the infrastructure and staffing of that court and the entire juvenile justice system. We would likely need many more additional judges, certainly more community service options, and a more robust juvenile probation system. Even considering the savings to the criminal court system, there could be significant additional costs, particularly in the current economic climate.

Some advocates for children and defense organizations also have raised genuine concerns about extending the reach of Family Court. We know that conditions in state-operated juvenile facilities are deplorable. Governor Cuomo and other public officials have criticized them for harming children, wasting money, and, ultimately, endangering public

safety. If the alternative to prosecuting sixteen- and seventeen-year-olds in criminal court would be to have Family Court judges send young people to these failed youth prisons, then we would be doing little or nothing to advance public policy in this critical area. Rather, I believe we must find ways in which the court system can intervene meaningfully in the lives of troubled young people before minor problems escalate into major problems and without subjecting them to a criminal record—but not necessarily by depositing these cases into an already overburdened, under-resourced Family Court.

Ultimately, the Sentencing Commission concluded that it would be costly and impractical to simply and immediately move to Family Court the tens of thousands of cases each year in which sixteen- and seventeen-year-olds are charged with criminal conduct. Yet they also found that leaving these cases in the adult criminal courts, without legislative reform, would be counter-productive and unacceptable.

The conclusion I came to is that the solution is to bring together the best features of the Family Court and criminal court without a wholesale transfer of jurisdiction. The legislation that I proposed last spring would establish a new "Youth Division" in our state's superior courts to adjudicate cases in which sixteen- and seventeen-year-olds are charged with non-violent criminal conduct. The proposed Youth Division mirrors the Family Court at the outset and again at the conclusion of the case. When a case first arises, it can be "adjusted," or placed under the supervision of the local probation department in lieu of proceeding through the court. During that time, if appropriate, needed services and programs will be provided. If the case is not adjusted and proceeds in the Youth Division, it will resemble a traditional criminal court case, with all the protections that offers to adolescents, including bail, grand juries, speedy trial requirements, and discovery rules. If a case proceeds in the Youth Division and ends with an adjudication of guilt, Family Court procedures then apply once again. The adjudication will not be deemed a criminal conviction resulting in a criminal record. Court record sealing provisions will be like those in the Family Court Act. Most importantly, enhanced services and alternative-to-incarceration community programs will be available as part of the case disposition, including psychiatric care; drug or alcohol treatment; individual, group or family therapy; crisis or trauma services; educational assistance; anger management; or whatever else may be warranted in a particular case. Judges in the Youth Division will receive training in the legal and psychosocial issues involving troubled adolescents, including brain development, trauma, substance abuse, mental health, and education. They will be familiar with the broad range of age-appropriate services and interventions designed specifically to meet the needs and risks posed by this population. The proposed Youth

Division can provide the tailored, age-appropriate approach that New York needs to prevent recidivism and effectively deliver justice to this critical age group.

The 2012 legislative session ended before this legislation was enacted. Nevertheless, within the limits of current law, we have been testing the principles embodied in the legislation with encouraging results. Adolescent Diversion Pilot Parts, established in nine jurisdictions, have already adjudicated over three thousand cases. These pilot parts better enable judges to address defendants' underlying problems while still holding them accountable for their actions. They have shown us precisely why this approach is the right one. Preliminary research by the Center for Court Innovation indicates that the Adolescent Diversion program is achieving its goals. The pilot program has resolved the overwhelming majority of cases without imposing jail time or criminal records. Most importantly, young people coming through these pilot programs were significantly less likely than comparison groups to be re-arrested for felonies. By addressing the defendants' underlying problems while still holding them accountable for their actions, this approach is achieving results without having a negative impact on public safety or imposing life-long stigma on our youth.

We have learned two valuable lessons from these parts over the past year. First, they are not a substitute for legislation. Without legislation that decriminalizes certain offenses committed by sixteen- and seventeen-year-olds and broadens sentencing options, judges are limited as to what types of dispositions and sentences they can impose. Moreover, adjustment—resolving the charges before they become a pending court case, such a critical tool for keeping adolescents accused of minor offenses out of the criminal justice system—is not available without legislation. Second, and most importantly, we have learned that adjudicating adolescents in a way that utilizes age-appropriate services, interventions, and penalties works—for our young people, for our families, and for the people of our state.

Accordingly, I have re-submitted the Judiciary's legislation, but with important changes that take into account the serious fiscal challenges currently facing state and local governments and alleviate the potential financial impact of the proposed Youth Division. Our proposal will require the court system to reimburse local probation departments for their costs in adjusting these cases, thereby relieving local government of any new fiscal burden. In addition, at the present time, sixteen- and seventeen-year-olds who are now incarcerated, either pre-trial or post-conviction, are housed in adult facilities, but separate from adult offenders. By maintaining the current statutory arrangement rather than proposing that these sixteen- and seventeen-year-olds be

housed in extremely expensive juvenile facilities that we know have their own risks, the legislation will relieve local governments of any new detention costs. At the same time, we will work with localities to develop better ways to handle detained youths. In that regard, we will continue our discussions with Mayor Bloomberg's Office about the best way to house sixteen- and seventeen-year-olds in the City of New York.

I am truly heartened by the success of our pilot parts to date and I look forward to working with the Legislature and the Governor and many others, including Judge Corriero, to build upon these successes, to enact meaningful legislation in the 2013 legislative session, and to usher in fundamental reform to the juvenile justice system. The approach I have laid out today puts first and foremost an emphasis on rehabilitation for adolescents, rather than incarceration. The present punitive approach turns children into hardened criminals and must be changed if we are to ensure a meaningful future for kids who find themselves in the throes of the justice system. Our children deserve nothing less, and there is across the political spectrum a strong consensus that now is the time to rethink juvenile justice in our state, to improve the lives of adolescents who deserve a chance to be useful members of our society. I believe the plan I have proposed bridges the gap that exists between the views of prosecutors, defense attorneys, advocacy groups, psychiatric and social service experts, academics, and juvenile justice reformers. Between those who want some change but are leery of upending the present system overnight and those who want immediate draconian reform. The bill that I propose is politically doable and is good public policy that recognizes the latest scientific advances and best practices in juvenile justice reform.

We have waited a half a century to again make New York a leader in this area that is so critical to our future. The new Youth Division is no idle daydream. Indeed, we have been employing many of the ideas that I have outlined here—a problem-solving approach, special subject matter training for judges, and an emphasis on alternatives to incarceration—in our drug courts, mental health courts, and community courts. And the data is unequivocal: these programs have helped to reduce recidivism and incarceration. Indeed, New York is one of just a handful of states in the country to consistently accomplish both goals.

We can do the same in the juvenile justice arena. Treating sixteen- and seventeen-year-olds charged with non-violent offenses as adults does not serve the public safety or improve the quality of life in our communities. Kids in trouble need to be held accountable. But they also need a helping hand, and the last thing in the world they need is to be treated in a way that turns them toward a lifetime of crime that will take away their lives and their futures, destroying them before they even have a chance to be a part of the American Dream.

New York has a proud history of being at the cutting edge when it comes to criminal justice issues. Now it is time for us to once again embrace our great history and take our place at the national forefront of juvenile justice reform. We can afford to wait no longer. The time for change is now because the very future of our children and our state is at stake. Nothing could be more important! Thank you.