BRINGING THE BEST OF BOTH WORLDS: RECOMMENDATIONS FOR CRIMINAL JUSTICE REFORM FOR OLDER ADOLESCENTS

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INTRODUCTION

In *Roper v. Simmons*, the Supreme Court of the United States held that it is unconstitutional to impose capital punishment for crimes committed while under the age of eighteen.[1] In so doing, the Court acknowledged the emerging consensus that it can be "cruel and unusual" to punish sixteen- and seventeen-year-olds as adults. Writing for the majority, Justice Kennedy discussed the "[t]hree general differences between juveniles under 18 and adults": (1) a lack of maturity; (2) a higher susceptibility to negative influences; and (3) personality traits that are "more transitory, less fixed."[2] In distinguishing the adolescent from the adult offender, Justice Kennedy relied on research by, among others, the renowned neuropsychologist Laurence Steinberg.[3] Professor Steinberg explains the differences in the ways adolescents and adults approach risk-taking as follows:

> In sum, risk taking declines between adolescence and adulthood for two, and perhaps, three reasons. First, the maturation of the cognitive control system, as evidenced by structural and functional changes in the prefrontal cortex, strengthens individuals' abilities to engage in longer-term planning and inhibit impulsive behavior. Second, the maturation of connections across cortical areas and between cortical and subcortical regions facilitates the coordination of cognition and affect, which permits individuals to better modulate socially and emotionally aroused inclinations with deliberative reasoning and, conversely, to modulate excessively deliberative decision-making with social and emotional information. Finally, there may be developmental changes in patterns of neurotransmission after adolescence that change reward salience and reward-seeking, but this is a topic that requires further behavioral and neurobiological research before saying anything definitive.[4]

Professor Steinberg has done extensive research on the adolescent brain. His work establishes what teachers and parents already know—adolescents are not young adults. Their inability to conform their behavior to adult standards is not necessarily a moral failing, but rather a normal developmental step along the way to developing character.[5]

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1 Roper v. Simmons, 543 U.S. 551 (2005). *Roper*, a 5-4 decision, overturned *Stanford v. Kentucky*, 492 U.S. 361 (1989), which had upheld capital punishment for persons sixteen years old or above.

2 *Roper*, 543 U.S. at 569–70.

3 *See id.* at 569–73.

4 Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 DEVELOPMENTAL REV. 78, 99 (2008).

5 *Id.* at 99–100.

Because of their undeveloped mental and emotional capacity, it is simply unjust and inappropriate to try sixteen- and seventeen-year-old adolescents in the adult criminal justice system. Consonant with this reasoning, thirty-seven states now preclude trying persons under the age of eighteen as adults. Eleven states treat seventeen-year-olds as adults, although many of these states are currently reforming their policies to become more in line with the majority of states.[6]

At present, only two states remain that treat sixteen-year-olds as adults: North Carolina[7] and New York.[8] In response to the calls of juvenile justice advocates, New York's Chief Judge has spearheaded a reform effort that would remove New York from this list.[9]

This reform effort is to be applauded. However, simply changing the age of criminal responsibility, although a seemingly simple answer, may not be the wisest solution. Removing sixteen- and seventeen-year-olds from the adult court system by imposing the Family Court Act (FCA) without considering the ramifications of FCA procedures on this older adolescent population could result in numerous negative outcomes for these youth. As will be explained in detail below, the procedures in the Family Court system may be appropriate for younger children but present serious due process, governmental intrusion, and proportionality concerns when applied to older adolescents. Additionally, it would be a mistake to eliminate the positive aspects of the adult system as they have developed to apply to adolescents.

This Article will analyze aspects of New York's adult and juvenile criminal justice laws and discuss policies that should be considered in any new legislation. The benefits and disadvantages of the existing juvenile court will be discussed, as well as the positive and negative aspects of the adult system as it is currently applied to adolescents. The potential negative implications of applying the Family Court Act to

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6 NEELUM ARYA, CAMPAIGN FOR YOUTH JUSTICE, STATE TRENDS: LEGISLATIVE VICTORIES FROM 2005 TO 2010: REMOVING YOUTH FROM THE ADULT CRIMINAL JUSTICE SYSTEM 31 (2011), *available at* http://www.campaignforyouthjustice.org/documents/CFYJ_State_Trends_Report.pdf.

7 *Raise the Age: Keep Children Out of the Adult System*, ACTION FOR CHILD. N.C., http://www.ncchild.org/issue/safety/main-area-of-work/raise-age-keep-children-out-adult-system (last visited Dec. 2, 2013).

8 As Michelle Haddad has noted, "[a]s far away as New York is from the rest of the nation [in its treatment of young defendants], the United States as a whole is even further away from international norms." Michelle Haddad, Note, *Catching Up: The Need for New York State to Amend Its Juvenile Offender Law to Reflect Psychiatric, Constitutional and Normative National Trends Over the Last Three Decades*, 7 CARDOZO PUB. L. POL'Y & ETHICS J. 455, 488 (2009); *see also id.* at 488–90 (discussing the International Convention on the Rights of the Child, which has been ratified by every nation except the United States and Somalia).

9 *See* Jonathan Lippman, Chief Judge of the State of N.Y., Speech at the Citizens Crime Commission of New York City (Sept. 21, 2011), *available at* http://www.nycrimecommission.org/pdfs/Lippman110921.pdf.

sixteen- and seventeen-year-old adolescents will be discussed in detail. The Article will also discuss the appropriate level of state intrusion into the lives of adolescents and analyze the purpose of punishment, including its proportionate relationship to the crime committed. The potential constitutional issues implicated in applying procedures designed for children to young adults will be examined as well. Ultimately, the analysis will suggest that there should be a specialized adolescent court for sixteen- and seventeen-year-old defendants housed in the adult court system. This would be a hybrid court, drawing on the most just and appropriate aspects of each of the juvenile and adult systems.

I. A COMPARISON BETWEEN THE FAMILY COURT SYSTEM AND THE ADULT COURT SYSTEM

A. *The Family Court System*

Pursuant to New York State's FCA,[10] defendants under the age of sixteen are, for the most part, prosecuted in Family Court.[11] There are many aspects of the FCA that are quite beneficial for youth under the age of sixteen.

One of the most advantageous procedures is the process of "adjustment," in which children fifteen years and under benefit from statutorily-mandated diversion under the supervision of the Department of Probation. Under the FCA, a young arrestee and his or her parents are directed by the police to meet with a specialized probation officer who decides whether to "adjust" the respondent's case.[12] If the case is selected for adjustment, the young person's case is held open without a referral to the prosecutor's office, on the condition

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10 For a history of the creation of New York's family court system and the Family Court Act, see Alison Marie Grinnell, Note & Comment, *Searching for a Solution: The Future of New York's Juvenile Offender Law*, 16 N.Y.L. SCH. J. HUM. RTS. 635, 637–49 (2000).

11 Certain cases are allowed to proceed in adult court for people as young as thirteen. *See* N.Y. PENAL LAW § 10.00(18) (McKinney 2013). The Juvenile Offender law provides for dual jurisdiction over homicides and other extremely serious crimes. *See* N.Y. CRIM. PROC. LAW § 180.75 (McKinney 2013).

12 While the Department of Probation has discretion about which cases to adjust, it is statutorily mandated that the Department of Probation conduct an adjustment process in all cases. N.Y. FAM. CT. ACT § 307.1 (McKinney 2013). In determining whether adjustment is appropriate, the Family Court Act mandates that the Department of Probation consider a number of factors *outside* of the gravity of the offense, including whether the young person at issue is likely to commit another offense during the adjustment process. Though the factors leading to the conclusion that a young person is likely to commit a new offense during the adjustment process are not enumerated, the Act explicitly provides that prior arrests may be considered.

that the young person complete activities intended to promote positive youth development.[13] Recent figures show that 38%, or more, of young people referred to the Department of Probation are, in fact, adjusted.[14] There is clearly a significant advantage to the adjustment process, which is not available in the adult system.

If the matter is not adjusted, it is referred to a special juvenile prosecutor who is tasked with prosecuting the case in a manner consistent with youth development principles.[15] This standard for prosecution is another benefit of the FCA. The prosecutorial function is implemented through the use of a mandatory investigation by the probation department into the academic, emotional, social, and familial background of the young person which is presented to the court.[16] That information is used by the prosecutor, and eventually by the court, to fashion an appropriate punishment (or remedy) for the child.

Sentencing under the FCA is strictly in the domain of the judge. Section 352.2 of the FCA requires a Family Court judge to sentence the offender to "the least restrictive available alternative enumerated . . . which is consistent with the needs and best interests of the respondent and the need for protection of the community."[17] This type of sentencing scheme makes sense for children who are not necessarily capable of making informed decisions in their own best interests. It also provides a wider range of options for the court.[18]

Another important aspect of the Family Court Act is the expedited timeline designed to take into account the shorter attention span of young people, and their rapid developmental changes.[19]

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13 FAM. CT. § 308.1; N.Y. COMP. CODES R. & REGS. tit. 9, § 356.6 (2013).

14 Alec Hamilton, *Case Closed: Thousands More Teens Are Now Diverted from Juvenile Court*," CHILD WELFARE WATCH BLOG (Dec. 12, 2012), http://blogs.newschool.edu/child-welfare-nyc/2012/12/case-closed-thousands-more-teens-are-now-diverted-from-juvenile-court.

15 In New York City, prosecutions in Family Court are handled by the New York City Law Department's Corporation Counsel.

16 Note, however, that if a case is disposed of by way of an "adjournment in contemplation of dismissal" (ACD) as provided for under Family Court Act § 315.3, there is a strong argument that the Act does not require a probation investigation and report before disposal of the case. There is a lack of appellate case law on this issue and as a result it is common practice in some counties to "ACD" the case without a probation report, while in other counties the judges will require a report as a matter of policy. *See* Sobie, Practice Commentary, FAM. CT. § 315.3 ("Since an ACD is not a dispositional alternative described in Section 352.2, a probation investigation and report is apparently not required . . . . it is a common practice in some counties (although other Family Court judges will not as a matter of policy order an ACD without a probation report). . . .").

17 FAM. CT. § 352.2.

18 This procedure eliminates plea bargaining as it is practiced in adult criminal court.

19 If a Family Court respondent remains in the community during the process, his case must go to trial within sixty days of a first appearance. If the respondent is detained during the proceeding, Family Court Act § 340.1 requires that a fact-finding hearing take place within three to fourteen days of the initial appearance, depending upon the severity of the alleged offense. FAM. CT. § 340.1. Cases of detained young offenders in Family Court must proceed to

Perhaps the most enlightened part of the FCA is the sealing provisions designed to protect the young person from public scrutiny. The "criminal defendant" in adult court is now termed a "juvenile delinquent" or "respondent" in Family Court, and all proceedings are sealed from the beginning; even appellate cases are denoted solely with the first name and first initial of the alleged delinquent's name.

Young people prosecuted under the FCA are detained (pending trial) and incarcerated (after sentencing) in separate facilities meant to focus on child development. These facilities, which often look more like group homes than jails, provide extensive educational and health services, and a number of enrichment services. They also have low resident-to-staff ratios. Young people under the age of sixteen detained at time of arrest are also held in specialized juvenile areas within police precincts and kept separate from the adult population.

When compared to the treatment of their slightly older counterparts in the adult system, this may be the starkest advantage to the Family Court system in New York State. Currently, sixteen- and seventeen-year-olds are detained within the general holding areas of police precincts and pre-trial detention jails. During the twenty-four hours between arrest and arraignment, sixteen- and seventeen-year-olds are mingled with adults of all ages who have committed every type of crime. These twenty-four hours can be deeply traumatizing to a young person.

B. *The Adult Criminal Court System*

Human decency points to the injustice of subjecting adolescents to the full punishments of the adult system, including the lingering criminal record that will haunt the future adult. However, as the youngest and most vulnerable population in adult court, there is no doubt that adolescents receive some advantages in that system. Despite some of the serious concerns regarding diversion and incarceration, for the most part sixteen- and seventeen-year-olds receive quite a bit of deference in the adult system, especially when it comes to misdemeanor offenses. Most prosecutors, judges, defense attorneys, probation officers, and others in the criminal justice system recognize that an adolescent is capable of youthful acts that are not necessarily indicative of a criminal proclivity. And in the real world of adult criminal court, well upwards of 90% of cases are resolved by plea bargain, where a shared perception of

disposition within ten days of a finding of guilt; cases of released young offenders must proceed to disposition within fifty days. *Id.* § 350.1(1).

the "worth" of a case becomes its outcome.[20] In the formularized world of plea bargaining, particularly in the large volume of New York City, the fact of youth, the number of prior arrests (usually none for a sixteen-year-old), and the nature of the crime are the most significant factors in making the bargain.

Although plea bargaining is often seen as the bane of the adult criminal justice system, for most defendants the process is one that gives them and their advocate some measure of control over the resolution of the matter. Defense attorneys can evaluate the strength of the evidence, the background of their client, and collateral consequences, and advise clients about their choices. The possibility of plea-bargaining can be highly beneficial to the adolescent because it allows a great deal of flexibility to fashion a plan for the case. The ability to actively negotiate in the adult system brings the teenager and his family clarity, proportionality, and the opportunity to say no if they and their attorney do not feel that the plea arrangement is fair. Teens in adult court observe adults engaging in a reasoned, structured decision-making process during plea-bargaining and keeping commitments when judges honor plea bargains when youth do their part. Furthermore, if a plea bargain is deemed appropriate, prior to receiving services, the adolescent is required to admit guilt as part of the deal.[21] This procedure is positive, in that admitting culpability for the crime is an important step on the way to accepting responsibility, the very quality that our system needs to be focused on when it comes to adolescents.

The impact of the robust interactions that take place during the plea bargaining process for adolescents charged with misdemeanor cases (at least in Brooklyn where I have practiced for thirty years), is positive in most cases. It is the rarest of situations where an appropriate resolution of a misdemeanor case cannot be arrived at extremely early in the case, often times at the criminal court arraignment.

In adult court, New York law provides for "Youthful Offender" status for adolescents until their nineteenth birthday; this is mandatory for misdemeanors and discretionary for felony cases.[22] This status allows significant flexibility in the sentencing options available to courts and, if granted, results in sealing of the court record (albeit after the fact, unlike Family Court). Youthful Offender status avoids most collateral consequences as well, most significantly draconian immigration penalties like deportation.[23]

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20 Erica Goode, *Strong Hand for Judges in the 'Bazaar' of Plea Bargains*, N.Y. TIMES, Mar. 23, 2012, at A12 (94% of state cases and 96% of federal cases result in plea bargains).

21 N.Y FAM. CT. ACT § 315.3 (McKinney 2013).

22 *See* CRIM. PROC. §§ 720.10, 720.20. Youthful Offender treatment in adult court is unique to New York.

23 Wallace v. Gonzales, 463 F.3d 135, 138 (2d Cir. 2006) (those with youthful offender

Finally, there are many alternatives to incarceration programs that are specific to the needs of adolescents in adult court.[24] While the adult system may not exactly fit adolescents due to their differing needs and culpability, it would be unfair to say that there are no accommodations for the youngest people charged with crimes. In most counties, there are diversion programs, some that require as little as one day of services and some that provide rich and useful programming that teaches accountability and community identification.[25]

II. WHEN APPLIED TO SIXTEEN- AND SEVENTEEN-YEAR-OLD ADOLESCENTS, THE FAMILY COURT SYSTEM HAS SIGNIFICANT DISADVANTAGES

A. *Lack of Proportionality in Government Intrusion*

An issue that has not been discussed much in the advocacy community is the validity of extensive government intrusion into the family and personal lives of people who are accused of minor crimes. In adult court, it is usually not required that every detail about a person's life be exposed to the judge unless the defendant has committed a serious offense.[26] As an example of a situation most adults have encountered, it is common knowledge that a traffic infraction is greeted with a fine, whether you are homeless or a millionaire. If a citizen appeared in traffic court, and the Department of Probation started asking questions about his work or home life, most would be shocked and offended. This is because a high level of government intrusion would be seen as unacceptable and disproportionate for someone who

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status cannot be barred from certain relief or penalized, but underlying behavior can be considered when they apply for adjustment of status, *e.g.*, for citizenship while a green card holder).

24 In New York City those programs include CASES, Esperanza, several programs hosted by the Center for Community Alternatives, and Exalt.

25 *See* YOUNG NEW YORKERS, http://www.youngnewyorkers.org (last visited Nov. 8, 2013).

26 Family Court Act § 351.1 requires that the court order the Department of Probation to make 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 a Family Court case. FAM. CT. § 351.1. Criminal Procedure Law § 390.20 only requires that the court order a pre-sentence investigation prior to sentencing an adult on a felony matter, or when a sentence of probation or more than 180 days is imposed. CRIM. PROC. § 390.20. A review of §§ 350.6 and 350.7 of the Complication of Codes, Rules & Regulations of the State of New York reveals that the process of preparation of a pre-sentence report in "adult court," is less intrusive, requiring a background collected solely from an interview with the defendant and a statement of criminal responsibility. N.Y. COMP. CODES R. & REGS. tit. 9, §§ 350.6–350.7.

merely drove over the speed limit. If we imagine that most misdemeanor cases are slightly more serious than traffic infractions—shoplifting, bar fights, or entering the subway without paying the fare, for example—most of us would agree that the appropriate punishment could be determined on the facts of the alleged conduct. We would probably agree that looking at prior similar incidences would be appropriate as well, if they existed, as is done in traffic court. However, most Americans would think it inappropriate for a case manager to come to your job and ask your colleagues about your work habits if, for example, you were accused of possessing marijuana. Yet this is exactly what happens in Family Court. A child may commit a relatively innocuous act, even a relatively common act, like sneaking onto a bus or subway, and that will result in his whole life becoming open for examination by the Department of Probation, prosecutor, judge, and court staff.[27]

The true question is: at what age, and at what degree of severity, is it no longer appropriate for a person to have to open his or her life simply because of a criminal transgression? Should a seventeen-year-old's parents be required to open their private lives to the court if their child trespassed? Shoplifted? Stole a car? Had a fight after school?

From a societal point of view, there should be some sort of common-sense continuum where the age of the transgressor and the seriousness of the crime combine to point to an appropriate level of scrutiny into the offender's life. I would argue that sixteen or seventeen years old—ages at which society grants numerous privileges, such as driver's licenses and the right to be employed—are critical points along that continuum. It does not seem appropriate to subject older teens and their families to the type of scrutiny that takes place in Family Court.

A deeply disturbing aspect of the free-flowing information prevalent in Family Court is the fact that what is gleaned through that inquiry is used to fashion a "treatment plan" for the child. If the child fails at the plan, (or sometimes the plan fails the child), the child is punished for that *failure* and not necessarily for the *act* he or she committed. For example, a young person in Family Court may be charged with a misdemeanor assault for fighting at school. After reviewing all the information, the judge may order the child to go to school, keep a curfew, and seek certain services. If the child is unable (or even unwilling) to follow through with all of the services, he or she may end up in jail. The range of services is also not dependent on the nature of the crime, but on the perceived needs of the adolescent. So both the

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[27] See the comparison of probation reports listed *supra* note 26. Also note that in any case in which a youth charged with delinquency is placed in long-term detention, a mental health report is also ordered. FAM. CT. § 351.1.

extent of the criminal justice obligation and the penalty for failing to keep to the sentence imposed by the court can be, and often are, blown out of proportion to the act committed by the child in the first place.

In any new statute, it is important to remember that if older adolescents are subjected to this level of scrutiny, more conditions will be placed on them, and the risk of violating those conditions will increase. At the same time, the impact the family can have on the young person's compliance decreases. Even the best parents with significant resources find their adolescents, going through a normal rebellious and risk-taking time of their life during the ages of sixteen and seventeen. Yet, a move towards application of the FCA to older adolescents broadens the likelihood of older youth being punished for non-compliance in a manner grossly disproportionate to the original crime. Through this sort of "net-widening," applying the juvenile justice system to older adolescents would trip up young people who are still learning to think in a fully consequential way and who are engaging in developmentally-common testing behaviors, possibly resulting in higher levels of incarceration and greater unfairness to this group of young people. This certainly defeats the purpose of reform and exacerbates one of the worst aspects of the juvenile justice system.[28]

B. *Increased Likelihood of Pre-Trial Detention in Family Court Versus Adult Court*

In the adult system, the Criminal Procedure Law allows for pre-adjudicatory detention only when a defendant cannot post bail. The standard for the judge's ability to set bail in New York is the likelihood that the accused will return to court.[29] Under the FCA, a judge is empowered to consider both the likelihood that a youth will return to court and the chances that he or she will commit a new offense if released. The "prediction" about whether the youth is likely to re-offend includes a risk assessment analysis that works against older children in Family Court, as age is itself one of the factors alleged to make re-arrest more likely. In Family Court, youth deemed unsuitable for release are detained without bail until resolution of the case.[30]

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28 *See* Mark Ezell, *Juvenile Arbitration: Net Widening and Other Unintended Consequences*, 26 J. RES. CRIME & DELINQ. 358, 375–76 (1989) (examining how a juvenile court diversionary program resulted in, inter alia, more juveniles being supervised by the court).

29 New York Criminal Procedure Law § 510.30(2)(a) states that the court should consider what is necessary to secure the "principle's" attendance in court during an arraignment in criminal court. CRIM. PROC. § 510.30(2)(a).

30 The Family Court Act's authorization of preventive detention in § 520.5(3)(a) allows the Family Court to consider both whether or not a youth will return to court *and* whether there is a serious risk that she will commit another crime before the return date. FAM. CT. § 520.5(3)(a).

It is submitted that the standards for and the extent of pre-trial detention in Family Court is one of the disgraces of that system. Many young people spend weeks or months in placement facilities prior to an adjudication as to their guilt or innocence. Of all the procedures in Family Court that should not be adopted for older adolescents, those relating to pretrial detention are at the top of the list.

C. *Increased Sentences for Cases in Family Court Versus Adult Court*

Despite the fact that adolescents tried in adult court are older and are presumed to be more responsible for their crimes, and despite the fact that Family Court respondents can be sentenced to no more than eighteen months of incarceration,[31] on the whole sixteen- and seventeen-year-old defendants in adult court face less severe punishment than younger adolescents prosecuted in Family Court.

In 2010, 60% of sixteen- and seventeen-year-olds prosecuted pursuant to the Criminal Procedure Law in New York State were neither convicted nor adjudicated.[32] An additional 22% of the cases of sixteen- and seventeen-year-olds were disposed of by admission to a non-criminal infraction.[33] Six percent of sixteen- and seventeen-year-olds arrested in 2010 were sentenced to probation, and 11% were sentenced to some form of incarceration.[34] In comparison, among youth adjudicated pursuant to the FCA in 2012, 29% were sentenced to a period of probation, and 12% of upstate residents and 14% of New York City residents were incarcerated at sentencing.[35]

In Family Court, in sharp contrast to adult court, more than half the cases go to trial due to the fact that agreements to resolve the case are not handled the same way.[36] In Family Court, the juvenile can plead guilty to the crime (or a reduced version of the crime), but that does not

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31 FAM. CT. § 353.3(5). The Office of Children and Families can, and frequently does, release young persons sentenced to placement in its facilities during a placement sentence with supervision. *See id.* It can also petition the Court for one-year extensions of placement every year until the respondent's eighteenth birthday. *See id.*

32 This statistic is calculated based on data provided by the New York State Division of Criminal Justice Services. Included in this number are youth whose cases were adjourned in contemplation of dismissal (and later dismissed), those whose cases were withdrawn by the prosecution, and those who were found not guilty.

33 This statistic is drawn from 2010 numbers provided by the New York State Division of Criminal Justice Services.

34 These statistics were similarly drawn from the New York State Division of Criminal Justice Services numbers. Note that incarceration includes both jail and prison time. Some youth were sentenced to time served.

35 Statistics come from Office of Children and Family Services and NYC Family Court data.

36 See various reports of the New York Office of Court Administration at www.nycourts.gov.

guarantee any particular sentence. Under the FCA, the Family Court Judge has the sole discretion to determine the appropriate sentence.[37] Because of that fact, and the large range of outcomes for any case in Family Court, plea arrangements are notoriously unpredictable, the opposite of what occurs in adult courts. In fact, almost half of the cases in Family Court go to trial, compared to more than 90% of cases in adult court resolved by plea bargain, largely because the risk of what could happen with an "open" plea is not worth taking for many young respondents.[38]

There are wide-ranging opinions about the general process of plea bargaining. However, the systems that have grown around the practice work very well for most sixteen- and seventeen-year-olds. Judges and prosecutors in the adult system are familiar with the range of adult criminal acts—from minor transgressions to serious felony crimes—and are able to gauge the level of punishment or rehabilitation that best suits the crime. Moreover, although adolescents in adult court are punished for failing to comply with conditions that are imposed on them, such as drug treatment or community service, those conditions are often less onerous than those imposed in Family Court, particularly in misdemeanor cases.

A comparison of the outcomes of youth arrests prosecuted pursuant to the FCA and the Criminal Procedure Law reveals a dramatic difference in sentencing philosophy. These statistics illustrate that those charged with petty crimes in Family Court are far more likely to be incarcerated than the slightly older youth charged with similar offenses in adult court. Nearly 9% of young people prosecuted for a misdemeanor in Family Court were incarcerated after sentencing; by contrast, less than 4% of those prosecuted for misdemeanor offenses were incarcerated when prosecuted in the adult system.[39] Stated differently, a young person charged with a misdemeanor is over two times as likely to end up incarcerated if his or her case is brought in Family Court.[40]

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37 N.Y. FAM. CT. ACT § 352.2 (McKinney 2013).

38 Based on the author's observations in practice.

39 These statistics were calculated using the New York State Office of Children and Family Services's 2010 Youth in Care Report, N.Y. STATE OFFICE OF CHILDREN & FAMILY SERVS., 2010 ANNUAL REPORT: YOUTH PLACED IN OCFS CUSTODY (2010), *available at* http://ocfs.ny.gov/main/reports/asr10.pdf [hereinafter 2010 ANNUAL REPORT], the New York City Office of the Criminal Justice Coordinator's Criminal Justice Indicator Report, JOHN FEINBLATT, N.Y.C. OFFICE OF THE CRIMINAL JUSTICE COORDINATOR, CRIMINAL JUSTICE INDICATOR REPORT (Jan. 2013), *available at* http://www.nyc.gov/html/om/pdf/2013/criminal_justice_indicator_report_0113.pdf, and statistics provided to the author from the Division of Criminal Justice Services.

40 These statistics, in fact, underestimate the comparative degree of disaggregation of severity of crime and punishment in the Family Court because a smaller proportion of the cases adjudicated by the court are misdemeanors. A review of the sources listed *supra*, note 32,

The discrepancy in sentencing between Family Court and adult court is counterintuitive, particularly since the young people prosecuted in Family Court are younger—sometimes significantly so—than those prosecuted in adult court. Moreover, as explained above, the FCA appears to contemplate a punitive regime intended to be less, not more, harsh than its adult court counterpart.

This obviously raises the question: why are juveniles prosecuted in Family Court serving longer sentences than older adolescents sentenced in adult court? There are several key reasons for this phenomenon. One is the prevalence and nature of plea bargaining in New York. In adult court, especially in New York City, plea bargain agreements consist of both the conviction and the sentence. At the point of agreement, all three parties—the judge, district attorney, and the defendant (through his attorney)—agree on the punishment. This is not like Family Court, where open plea bargains are the norm. In an open plea, the defendant admits culpability for the crime or a lesser crime (with the consent of the prosecutor), and the judge then sentences the defendant within a pre-agreed range or, in many cases, within the full range of the crime admitted. This wide discretion is one of the reasons more fifteen-year-olds wind up in jail than sixteen-year-olds charged with similar offenses.[41] There is plenty of research to show that not only are outcomes that rely on such broad judicial discretion harsher and less consistent, but they also have a stark racially disparate impact.[42]

Another reason for harsher outcomes in Family Court is the higher degree of intrusion into the lives of adolescents in that court. This is because any skeleton in a person's closet is likely to be discovered by the Family Court and minor family issues can color the judge's opinions about the offender. For example, a young person's mother may complain to the Department of Probation that he is not doing his homework. In adult court, no such information would be before the judge.

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reveals that because many misdemeanors are adjusted, a little more than 50% of the cases adjudicated before the Family Court are misdemeanors while approximately 75% of cases appearing before the Criminal Court are misdemeanors.

41 As described in note 26, *supra*, a judge in Family Court only makes a decision as to disposition after receiving reports from probation and, in some cases, the mental health clinic. The judge, alone, makes that determination. This is not so in criminal court. Our experience is that many judges, upon learning about a variety of experiences in a young person's life beyond the alleged crime, see reasons to remove a young person from his home—sometimes as a means of protecting the child from poor parenting or dangerous neighborhoods—and on other occasions, to gain control over a young person's poor school attendance or curfew compliance.

42 *See, e.g.*, Raymond Paternoster, *Racial Disparity Under the Federal Sentencing Guidelines Pre- and Post*-Booker, 10 CRIMINOLOGY & PUB. POL'Y 1063 (2011) (presenting various research about racial disparity in application of federal sentencing guidelines as federal judges were afforded more and less discretion by the Supreme Court and the Sentencing Commission).

Greater information gathering by the Family Court contributes to increased penalties in other ways as well. Where there is extensive personal information about the young person, it is natural for judges to want to provide services if they believe that the youngster is in need. And when that happens, the consequence of non-compliance is going to be punishment, often incarceration. In these cases punishment can be harsher than expected—judges often feel they gave a young person an opportunity to succeed and may treat the failure to comply with services quite harshly. Although it is considered better judicial practice to use a series of graduated sanctions for non-compliance with services, this is still not required, thus a small measure of non-compliance can result in the hammer of incarceration.[43]

Another reason for higher incarceration rates is the prevalence and standard for pre-trial detention under the FCA. Throughout all systems, the fact of pre-trial detention alone increases the chances of a post-conviction incarceratory sentence.[44] Thus, the greater likelihood of pre-trial detention in Family Court is a significant contributing factor to the greater incidence of incarceration.

Will older youth face greater incarceration rates if they are subject to the FCA, with its lack of plea bargaining, its higher pre-trial detention rate, its intrusive procedures, and its wide-ranging judicial discretion? Will the FCA's requirement that young people and their families disclose all their personal information force more young people into well-intentioned programs and result in greater punishments? It certainly seems likely. After all, when a fourteen-year-old does not follow through on the court's requirements, some of the fault may lie in the parents, the schools, or other institutions responsible for the well-being of children. But when a seventeen-year-old refuses to comply with a court's order to attend school, it will more likely be seen as the willful act of a responsible near-adult. Services for older adolescents are also harder to come by—older adolescents garner less sympathy and present greater challenges to both court staff and their attorneys when engaged in experimentation with drugs or risky behavior. It is difficult for judges and court staff to understand the degree to which defiant behavior is driven by brain development rather than willfulness.[45] This brings us full circle as to why adolescents should have their own court that understands the fundamental reality of adolescence—both the limits, such as impaired consequential thinking and impulse control, as well as the opportunities, such as significant capacity to change and learn.

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43 *See* 2010 ANNUAL REPORT, *supra* note 39.

44 Marian R. Williams, *The Effect of Pretrial Detention on Imprisonment Decisions*, 28 CRIM. JUST. REV. 299 (2003).

45 *See* Steinberg, *supra* note 4.

D. *Racial Disparities*

There are significant racial disparities in the prevalence of incarceration and other harsh sentences in Family Court cases.[46] In fact, the juvenile justice system is rife with racial disparities. At every juncture, from the decision to arrest, and followed by adjustment, prosecution, diversion, and sentencing, discretionary decision-making results in a large percentage of black and Latino children on the harsher side of that decision.[47] Relative rate of placement for black youth in New York City involved in the Family Court system is 1.7 times that of their white counterparts, and Latino youth are 1.6 times more likely to be placed in a long-term detention facility than white youth.[48]

There are many reasons why this is the case, but we should not discount the obvious one—racism. Racism can, and does, impact outcomes in criminal and juvenile cases in New York and more broadly, in the United States. Racism is not always overt, though. It can be subtle, displaying itself in attitudes and expectations rather than hatred. In any new system, it is our obligation to reduce and limit the impact of subtle and overt racism.

What we do know is that if we give discretion to decision-makers, there has to be checks and balances in place to reduce the impact of systemic racism on those decisions. For example, if the eligibility for diversion is based solely on the type of crime and the person's record, this becomes an objective standard that is likely to reduce racial disparities in diversion eligibility. To the contrary, if we include things like "doing well in school" or "not being at risk for re-arrest" as criteria, the application of these subjective measures will take place at a higher rate of racial disparity.

Any new system must apply objective criteria along with limited sanctions for most cases. These standards will reduce the likelihood of incarceration and other harsh sentences that, in the long run, create more problems than they solve.

It is for these reasons that the wide discretion, limited to one decision-maker, has no place in the sentencing of older adolescents. It

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46 *See* VERA INST. OF JUSTICE, A REPORT OF THE NEW YORK CITY WORKING GROUP ON REDUCING DISPROPORTIONATE MINORITY CONTACT IN THE JUVENILE JUSTICE SYSTEM (Apr. 20, 2012), *available at* http://www.nysjjag.org/documents/nyc-dmc-final-report-4-12.pdf (demonstrating significant racial disparities throughout the juvenile justice system in New York City); *see also Disproportionate Minority Contact*, N.Y. STATE JUV. JUST. ADVISORY GROUP, http://www.nysjjag.org/our-work/disproportionate-minority-contact.html (last visited Nov. 8, 2013) (identifying significant racial disparities throughout New York State's juvenile justice system).

47 N.Y. STATE JUV. JUST. ADVISORY GROUP, *supra* note 46.

48 VERA INST. OF JUSTICE, *supra* note 46.

certainly does not make sense to expand a sentencing scheme that is already questionable or widen the net of young people of color for whom wrong assumptions and inappropriate expectations can lead to disenfranchisement, jails, and prisons.

E. *Constitutional Protections*

As a criminal defense attorney, many of the procedures in Family Court trouble me deeply. Take, for example, the process of adjustment, in which the accused and his parent attend an interview with a government official where they are required to divulge personal information related to the offense, yet they do not receive *Miranda* warnings. To be fair, the official cannot use anything stated by the child or family at a trial, but the information can and will be used against them in every other aspect of the case. If there is a new court to better address the complexity of older adolescents that includes adjustment, there should be a right to an attorney at the time of the adjustment interview. That attorney should have an opportunity to investigate the case and the young person's background in a confidential manner protected by the attorney-client privilege. The attorney would advise the client and his parents about the benefits of the adjustment interview and help circumscribe the appropriate information to share with the Department of Probation.

There is also the matter of the right to a jury trial. This constitutional right is fundamental; it is the primary method by which judges are divested of the ultimate decision-making authority. Yet in Family Court, it is only the judge who has control over the fact-finding and sentencing, and he knows everything about the child's life prior to making any of these decisions. The right to a jury trial (and the rules of evidence) keeps the system honest. That is the purpose of the jury system.[49] It takes the decision-making away from the individual insiders in the system who may have lost perspective or have a personal or political motive in determining the guilt or innocence of the accused. It is a procedure that should be made available to anyone facing an accusation, especially young people, where the possibility of early incarceration could dramatically impact and alter their future life course and their attitudes about American society.

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49 *See In re* L.M., 186 P.3d 164 (Kan. 2008) (in which the Kansas Supreme Court found that "juveniles" have a constitutional right to a jury trial pursuant to the state and federal constitutions as a means of ensuring due process); Tamar R. Birckhead, *Toward a Theory of Procedural Justice for Juveniles*, 57 BUFF. L. REV. 1447 (2009) (discussing the ways in which the institution of jury trials for those charged with juvenile delinquency would promote a perception among impacted adolescents that the system is fair).

III. FAMILY COURT ACT PROCEDURES ARE POTENTIALLY UNCONSTITUTIONAL AS APPLIED TO SIXTEEN- AND SEVENTEEN-YEAR-OLDS

Family Court procedures that may be appropriate for younger children do not clearly withstand constitutional scrutiny as applied to older adolescents. In the wake of the FCA's implementation, both the Supreme Court of the United States and the New York Court of Appeals have considered whether the FCA's comparatively expansive intrusion into the lives of defendants under sixteen withstands constitutional scrutiny.[50] While both courts have upheld the FCA, the constitutionality of the Act's intrusive procedures as applied to older adolescents is far from certain.

In *People ex rel. Wayburn v. Shupf*, the New York Court of Appeals considered whether the FCA's pretrial detention on the basis of the likelihood of re-offense ran afoul of either the Due Process or Equal Protection clauses.[51] Because a judge could detain a young person on the grounds that there was a perceived serious risk of re-arrest under the FCA and could not do so when considering the pre-trial detention of an adult under the Criminal Procedure Law, the Court of Appeals determined that the FCA's pre-trial detention procedures must serve a compelling state interest. The court ruled that the scheme was appropriate "only if no less restrictive means are available to satisfy that compelling State interest."[52]

The *Wayburn* court identified two compelling state interests in differentiating between youths charged as juvenile delinquents and adults charged with crime: an interest in prospectively protecting the community from perpetration of serious crimes and an interest in protecting and sheltering children "who in consequence of grave antisocial behavior are demonstrably in need of special treatment and care."[53] Describing the greater interest in prospectively protecting the community, the court noted:

> Our society recognizes that juveniles in general are in the earlier stages of their emotional growth, that their intellectual development is incomplete, that they have had only limited practical experience, and that their value systems have not yet been clearly identified or firmly adopted. In consequence of what might be characterized as this immaturity, juveniles are not held to the same standard of

50 *See* Schall v. Martin, 467 U.S. 253 (1984); People *ex rel.* Wayburn v. Schupf, 350 N.E.2d 906 (N.Y. 1976).

51 *Wayburn*, 350 N.E.2d 906.

52 *Id.* at 908.

53 *Id.*

> individual responsibility for their conduct as are adult members of our society. That this is so is made manifest by the establishment and continuation of youthful offender procedures and juvenile delinquency proceedings . . . . For the same reasons that our society does not hold juveniles to an adult standard of responsibility for their conduct, our society may also conclude that there is a greater likelihood that a juvenile charged with delinquency, if released, will commit another criminal act than that an adult charged with crime will do so. To the extent that self-restraint may be expected to constrain adults, it may not be expected to operate with equal force as to juveniles. Because of the possibility of juvenile delinquency treatment . . . , there will not be the deterrent for the juvenile which confronts the adult. Perhaps more significant is the fact that in consequence of lack of experience and comprehension the juvenile does not view the commission of what are criminal acts in the same perspective as an adult. . . . All of these commonly acknowledged factors make the commission of criminal conduct on the part of juveniles in general more likely than in the case of adults.[54]

Thus, argued the court, without pre-trial detention, "there is a high likelihood that the juvenile will fall into further criminal activity if he is returned to the same environment and setting in which his present alleged misconduct occurred. The same factors dictate the desirability of protecting the juvenile from his own folly."[55] The court proceeded to conclude that the procedure did, in fact, meet the requirements of strict scrutiny.

Eight years after *Wayburn*, the Supreme Court, in *Schall v. Martin*, took up the question of whether New York's Family Court pretrial detention system violated the Due Process Clause.[56] Reversing the Second Circuit, the majority, relying upon the same *parens patriae* interest articulated in *Wayburn*, held that New York's practice of protective pretrial detention for juveniles was constitutional.[57] The Court considered whether New York's practice constituted an unwarranted infringement upon the due process rights of juvenile offenders and held that young persons have a less substantial interest in freedom from government intrusion than do adults:

> The juvenile's countervailing interest in freedom from institutional restraints, even for the brief time involved here, is undoubtedly substantial as well. But that interest must be qualified by the recognition that juveniles, unlike adults, are always in some form of custody. Children, by definition, are not assumed to have the

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54 *Id.* at 908–09.

55 *Id.* at 909.

56 Schall v. Martin, 467 U.S. 253 (1984).

57 *Id.* at 256–57.

> capacity to take care of themselves. They are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as parens patriae. In this respect, the juvenile's liberty interest may, in appropriate circumstances, be subordinated to the State's "parens patriae interest in preserving and promoting the welfare of the child."[58]

The *Schall* Court held that the government's means of protecting its interests were not unduly restrictive; pre-adjudicative detention was not necessarily designed for the purpose of punishment but could be read as incident to the legitimate governmental purpose of exercising the state's interest in protecting children from their own misconduct.[59] It noted that the conditions of confinement prevented exposure to "adult criminals," and that the place of confinement for those juveniles in non-secure detention constituted "a sort of 'halfway house,' without locks, bars, or security officers where the child receives schooling and counseling and has access to recreational facilities."[60] According to the Court, even the more restrictive secure detention is "consistent with the regulatory and *parens patriae* objectives relied upon by the State" because the young inmates are separated by age, size, and behavior; are permitted to wear street clothes; participate in educational, recreational, and counseling sessions; and are punished for misbehavior by confinement to their rooms.[61]

Writing for the dissent, Justice Marshall (joined by Justices Brennan and Stevens) argued that pretrial detention of juveniles violated the Due Process Clause.[62] In his dissent, Justice Marshall highlighted a problem with the preventive detention statute that, in fact, infects the entirety of Article III of New York's FCA:

> The provision applies to all juveniles, regardless of their prior records or the severity of the offenses of which they are accused. The provision is not limited to the prevention of dangerous crimes; a prediction that a juvenile if released may commit a minor misdemeanor is sufficient to justify his detention.[63]

Thus, in considering whether the application of FCA procedures to the cases of sixteen- and seventeen-year-olds provides due process of

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58 *Id.* at 265 (citations omitted) (quoting Santosky v. Kramer, 455 U.S. 745, 766 (1982)).

59 *Id.* at 271 (quoting Bell v. Wolfish, 441 U.S. 520, 538 (1979)).

60 *Id.* at 270–71 (quoting Testimony of Mr. Kelly, Deputy Commissioner of Operations, New York City Department of Juvenile Justice).

61 *Id.* at 271 (citing Testimony of Mr. Kelly).

62 *Id.* at 302 (Marshall, J., dissenting).

63 *Id.* at 283 (majority opinion). Indeed, in a footnote, Justice Marshall discusses "Tyrone Parson, aged 15," who, after being "arrested for enticing others to play three-card monte," was "detained for five days under § 320.5(3)(b) [of the New York Family Court Act]." *Id.* at 295 n.21.

law, the key question is whether the state has the same compelling interests—prospectively protecting the community from unmeasured acts and protecting these more mature youth from themselves. In turn, the answer to this question depends upon whether older adolescents have the same challenges with decision-making and impulse control as their younger counterparts. Given what social science literature tells us about adolescent behavior and human development, these older adolescents do not demonstrate the same need to be protected against themselves as their younger counterparts. In fact, they do have a developing capacity for consequential thinking and a greater ability to care for themselves.[64] Additionally, many sixteen- and seventeen-year-olds are, appropriately, under less control by their parents by this stage in adolescence (one of the deciding factors of the *Schall* Court), rendering the legitimate government interest, as enumerated by the Court, likely to be insufficient to warrant pre-trial detention for this group of older adolescents.

When dealing with a pre-adolescent, it clearly makes sense for the Family Court to question the parents about the child's home life and, when parents are not in a position to take proper care of the child, to consider placing him in a group home. But the rationality of the system is far less clear when applied to a sixteen- or seventeen-year-old. First, the minor "crimes" of a seventeen-year-old are not as much of a warning sign as the same act would be for a ten- or eleven-year-old. It is normal adolescent behavior to take chances, brazenly jump over a turnstile to see if one can get away with it, try alcohol and marijuana, and do any number of other risky things.[65] It would be obvious that a nine-year-old who is smoking marijuana is probably facing serious issues at home and may be in need of help and intervention. But if a seventeen-year-old is smoking marijuana, the same warning bells do not go off—after all, half of seventeen- and eighteen-year-olds have tried marijuana and there are major cultural shifts that have led to the current national discussion about legalization.[66] Given what is known about adolescent development, common risk-taking behaviors, and the waning control parents have over older adolescents, the state interests articulated in *Wayburn* and *Schall* do not apply to sixteen- and seventeen-year-olds. Therefore, government intrusions common under Family Court procedures could very well violate the due process of this

64 Steinberg, *supra* note 4.

65 *See* Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 176 (1997).

66 *See Youth Online: High School Youth Risk Behavior Survey 2011: Ever Used Marijuana One or More Times*, CENTER FOR DISEASE CONTROL, http://apps.nccd.cdc.gov/youthonline/App (last visited Dec. 28, 2013) (follow "Alcohol and Other Drug Use" hyperlink; then follow "Ever used marijuana one or more times" hyperlink; then select "Grade, Include Only: 12th").

older adolescent population.

IV. RECOMMENDATIONS

A. *A Hybrid System Combining the Best of the Family and Adult Court Systems Is the Best Solution for Sixteen- and Seventeen-Year-Old Adolescents*

On September 21, 2011, the Honorable Judge Lippman, Chief Judge of the State of New York, gave a speech to the Citizens Crime Commission. Noting that "the adult criminal justice system is not designed to address the special problems and needs of 16 and 17-year-olds," Judge Lippman charged the N.Y. State Permanent Commission on Sentencing, headed by Judge Barry Kamins[67] and New York County District Attorney Cyrus Vance, to make recommendations for the reform of New York State's treatment of sixteen- and seventeen-year-olds as adults.[68]

The Commission's report, dated February 14, 2012, recommended the establishment of youth parts in the New York adult court, designed to handle the cases of sixteen- and seventeen-year-olds charged with non-violent felonies, misdemeanors, and violations.[69] Pursuant to the Commission's recommendations, these parts were to "take into account the age and circumstances of the defendants and emphasize accountability, treatment, and supervision in crafting outcomes."[70] The Commission also recommended that the cases of sixteen- and seventeen-year-olds be reviewed by the Department of Probation for possible adjustment.[71] In essence, the Commission recommended a hybrid court be created that incorporates features of the family and adult courts.

Since the Commission's recommendations, the Office of Court Administration has piloted nine specialized youth parts throughout New York State to serve sixteen- and seventeen-year-old defendants.[72] In addition, the Department of Probation has begun to house youth probation units within the communities most impacted by youth crime,

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67 Judge Kamins is the Administrative Judge of the New York City Criminal Court and for Criminal Matters in the Second Judicial District.

68 *See* Lippman, *supra* note 9.

69 *See* JONATHAN LIPPMAN, THE STATE OF THE JUDICIARY 2012: BALANCING THE SCALES OF JUSTICE 4 (Feb. 14, 2012), *available at* http://www.nycourts.gov/admin/stateofjudiciary/SOJ-2012.pdf.

70 *Id.* at 5.

71 *Id.* at 4.

72 *Id.* at 5.

entitled the "Neighborhood Opportunity Network."[73] However, adjustment of sixteen- and seventeen-year-olds has not begun because there is no statutory authority for this process.[74] At the moment, the youth parts operate like specialized courts within the adult system, as there has been no legislative action "raising the age" that would allow these young people to utilize Family Court remedies.

The Commission's recommendations are well thought-out. Much of the structure of the adult system is suitable for adolescents but should be modified to include greater sentencing flexibility, comprehensive sealing, and legally mandated physical separation in police precincts, pre-trial and post-sentence jails and prisons, as well as appropriate re-entry services. The adjustment procedure would also be a good tool in a newly-designed hybrid court for adolescents.

From the perspective of someone who has worked with hundreds of young people and in an office with a specialized adolescent representation unit, I do not believe we should eliminate those procedures in adult court that work well. In a new hybrid court, information should only be given on consent of the defendant after consultation with his attorney. A plan for services should be designed and evaluated by the defendant's counsel or an expert of the defendant's choosing to assure it is an appropriate plan for that defendant. If it appears to be a good option, then agreement among the judge, the prosecutor, and the defense attorney regarding the scope of services, the outcome of the case if the defendant complies, and the maximum penalty if the adolescent fails to meet the requirements of the service plan should all be determined at the point of the defendant's admission.

Judge Lippman's proposal eliminates some of the more substantial government intrusions into the lives of teens, including the use of preventive detention and imposition of mandatory pre-adjudicatory services, while providing young defendants with additional protections while in police custody, opportunities for pre-court diversion, and dispositional options appropriate to their age and maturity.[75] However, many of the above-discussed problems with the use of the FCA as a dispositional structure remain. It is suggested that the following procedures be evaluated by the Commission: (1) whether there should be a full probation report for every disposition, regardless of the severity of the crime; (2) the standard for adjustment to better suit the age of the

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73 *See NYC Department of Probation: Neighborhood Opportunity Network (NeON)*, NYC.GOV, http://www.nyc.gov/html/prob/html/neon/neon.shtml (last visited Oct. 13, 2013).

74 Legislation granting this authority is pending.

75 *See* Lippman, *supra* note 9.

respondents;[76] and (3) adding the right to counsel at adjustment and guaranteeing a jury trial for anyone who seeks to litigate the allegations.

B. *Additional Areas for Exploration and Improvement in Systemic Responses to Young People Charged with an Offense*

Legislators may want to consider increasing the age of youthful offender status to include youth up to twenty-one years of age,[77] and explore increasing the jurisdiction of the new court to include all high school age teens—fifteen to eighteen years old. There should also be some form of retroactive sealing so that adults who are still being penalized by an old arrest can have relief from the ongoing employment and other consequences of their conviction.

Beyond the modifications for sixteen- and seventeen-year-olds charged with misdemeanors and nonviolent felonies, the legislature should consider how to make the system fairer for two groups of individuals for which the Lippman proposal provides no remedy: sixteen- and seventeen-year-old youth charged with a violent felony offense and young individuals imprisoned in adult facilities. Young people charged with serious offenses still require developmentally appropriate care. While it is true that only a small percentage of these young people are imprisoned, eight hundred were sentenced to incarceration in adult facilities in 2010.[78] These young people are housed in environments that are often unsafe for adults, let alone teenagers. As described at length in a range of national literature, the rate of suicide among youth incarcerated in adult facilities is very high, as is the likelihood of serious long term negative ramifications such as post-traumatic stress disorder.[79]

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76 Section 205.22(c) of the Uniform Rules for the New York State Trial Courts outlines the factors to be considered in an adjustment, including the likelihood of re-offense during the adjustment period, the probability that the respondent's conduct will endanger others, the age of the potential respondent, and whether the young person would be removed from his home during the process. N.Y. CT. R. § 205.22(c) (McKinney 2013). All of these factors require a different calculus when talking about older youth. Additionally, the probation department is allowed to consider whether the child is likely to meet with the probation officer. *Id.* Traditionally, this calculation is made by looking at school attendance records and parent involvement, factors that may be less meaningful with older youth.

77 As described above, youthful offender status, codified in § 720 of the New York Criminal Procedure Law, allows for sealing of criminal offenses committed by youth under the age of nineteen who are tried in adult courts. N.Y. CRIM. PROC. LAW §§ 720.10–720.15 (McKinney 2013). It also reduces the severity of sentencing options. CRIM. PROC. §§ 720.10, 60.02.

78 These statistics were drawn from New York State Division of Criminal Justice Services statistics provided to the author in 2013.

79 The Department of Justice is implementing the Prison Rape Elimination Act of 2003 which is intended to reduce the impact of this problem.

CONCLUSION

It is clear that older teens are not adults, but neither are they children. Research by social scientists has given us a more specific understanding of the stages of brain development, making this the right time to carefully analyze the manner in which adolescents are prosecuted in New York. It is important to inculcate into this discussion society's values regarding responsibility and the freedom from government intrusion in the family's right to raise their children. Any reform must also recognize the enormous potential for growth and change, and the seeds of the future adult in each young person accused of a criminal act. Additionally, with today's easy access to criminal record information, we must move away from causing criminal records that can never be removed and seriously consider a retroactive provision to help adults who had a youthful indiscretion in their distant past. The impacts of criminal convictions are wide-ranging as collateral consequences—limited employment opportunities and educational bars are significant and long-lasting.

The Chief Judge's initiative is a welcome opportunity to focus attention on this issue. It is a call to practitioners, policy makers, and youth advocates to evaluate the best aspects of both the family and adult court systems and develop a hybrid that allows New York to take advantage of the best of each court as well as the experience of other states and the latest scientific information.