Citizens' Committee for Children's 2012 Justine Wise Polier Symposium
Rethinking Juvenile Justice
Chief Judge Jonathan Lippman
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I am delighted to be here and to share with all of you, who are so knowledgeable and so committed to the welfare of our children, what I consider to be positive new developments in juvenile justice in New York State. Thank you to the Citizens' Committee for Children. The work you do is vital to promoting the health, safety, education, and stability of the children of this city.

We are coming up on the 50th anniversary of the Family Court Act of 1962, a watershed moment in our courts' history. It marked the foundation of our Family Court and helped to shape our justice system's response to children. Now is a natural time, 50 years later, to reflect on what works and what doesn't work, and, in particular, it is time to re-consider how we respond to young people aged 16 and 17, accused of wrongdoing, who come into our courts with their very lives and futures at stake.

To insist that our system respond in a more meaningful way to young people in crisis is to honor the spirit of Justine Wise Polier, for whom today's symposium is named. Judge Polier devoted her life to protecting the most vulnerable among us, particularly children. As you know, Justine Wise Polier became a judge of the Domestic Relations Court in 1935. She was – at only 32 years old – the first woman judge to rise above the position of magistrate in New York State. Legend has it that she resisted at first when Mayor Fiorello LaGuardia, then her boss, offered to make her a judge. She suspected he was only trying to "kick her upstairs" and relieve himself of her outspoken criticisms. But

once she visited the court, she found herself “absolutely fascinated” and changed her mind. She was a judge for nearly four decades.

Judge Polier never let her position on the Family Court bench quiet her activist voice. Her extensive extracurricular activities led her to say that she “lived two lives – [she] worked during the day at [her] job, and then pitched into the things that seemed most important at night.” She worked tirelessly in the service of justice and to ameliorate human suffering. Judge Polier once said: “I don’t believe we can have justice without caring or caring without justice.” Those words have a continuing and powerful meaning today, as we re-examine juvenile justice in New York to ensure that we are treating our young people in a way that is both just and caring.

Every year, about 45,000 to 50,000 youths aged 16 and 17 are arrested in New York and prosecuted as adults in our criminal courts, overwhelmingly for minor crimes. In 37 other states and the District of Columbia, the age of criminal responsibility starts at 18. Eleven states have set the age at 17. New York and North Carolina, alone in the nation, continue to prosecute16-year olds as adult criminals. And, based on recent developments in the North Carolina legislature, New York may very soon have the dubious distinction of standing alone on this issue.

Before going on, 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 prosecute the most violent juveniles as adults. In New York, the age of criminal responsibility for all murder cases starts at 13, and at 14 for major felonies. You know the history: These ages were lowered three decades ago after a 15-year old named Willie Bosket shot and killed two people on the subway in 1978. Let me be clear about one thing.

Those juveniles who commit these types of serious offenses can and should be prosecuted in the criminal courts.

But as to how we prosecute the vast majority of young people who do not commit those serious crimes, the question must be asked: 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 16 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 higher age. Despite the intense debate, age 16 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 though there was, the study's authors recommended: further study. The effort petered out. The issue was never revisited, and the "temporary fix" of 16, which even in 1962 was already out of step with most of the country, has now lasted half a century without meaningful reconsideration.

Fifty years later, we know based on scientific research that adolescents, even older adolescents, are different from adults. In particular, their brains are not fully matured, and 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. 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 18. Two 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."

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 leave you shaking your head and pulling out your hair. But as a state, what do we want for our 16 and 17-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 16 and 17 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.

Put simply, the adult criminal justice system is not designed to address the special problems and needs of 16 and 17-year-olds. When we judge and punish these young people as adults, we miss the opportunity to help them turn their lives around. There are plenty of research studies out there confirming that older adolescents who are tried and sentenced in criminal courts have higher recidivism rates, re-offend sooner, and go on to commit violent crimes and felony property crimes at a higher rate than those youths who go through the family court system.

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. Justine Wise Polier, in her 1941 book "Everyone's Children, Nobody's Child," put her finger so perfectly on the range of circumstances that can bring a child to the point of wrongdoing. For example, she says: "Stealing is used to describe the child who yields to a sudden impulse to take something long coveted and also the child who has a deep-seated urge to appropriate every manner of thing regardless of whether or not it has any significance for him, the child rejected by parents whom he unconsciously seeks to test or

punish by stealing, the unpopular, insecure child who takes things through which he may curry favor with playmates, and the child driven to prove his 'toughness' in an effort to gain approval from other children." Though she was speaking of children younger than 16, Polier's words that emphasize understanding root causes, or as Judge Polier puts it, seeing "the child as a whole," apply equally to children aged 16 and 17.

With all this in mind, last fall I asked our Sentencing Commission, co-chaired by New York County District Attorney Cyrus R. Vance, Jr. and Judge Barry Kamins, Administrative Judge of the New York City Criminal Court and for Criminal Matters in the Second Judicial District, to work through the complex issues involved and recommend a better approach through legislative change.

Initially, it appeared that best solution would be to give the Family Court jurisdiction over these cases right away. 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 obvious financial concerns. Abruptly shifting many thousands of cases a year to Family Court would place a heavy burden on the infrastructure and staffing of the court and the entire juvenile justice system. We would likely need additional judges, certainly many 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 raised genuine concerns about extending the reach of Family Court. We know that conditions in state-operated juvenile facilities are deplorable. Governors Cuomo, Paterson and other public officials have criticized them for harming children, wasting money and ultimately endangering public safety. If the alternative to prosecuting 16-and 17 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, 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.

Ultimately, the Sentencing Commission concluded that it would be costly and impractical to simply and immediately move to the already overburdened Family Court the tens of thousands of cases each year in which 16- and 17-year-olds are charged with criminal conduct. Yet they also found that leaving these cases in the adult criminal courts would be counter-productive and unacceptable.

Informed by the Commission's invaluable input, I announced last Tuesday at my State of the Judiciary address in Albany that I am proposing a legislative solution to this dilemma. Later this month, we will be sending to the Legislature a proposed "Youth Court Act." This Act would establish a new "Youth Court" to adjudicate cases in which 16- and 17-year-olds are charged with non-violent criminal conduct.

How will this new Youth Court operate? First, it will be a part of superior court, which translates to Supreme Court within New York City and County Court outside New York City. It will combine the best features of the Family Court and of the criminal courts, with the kinds of alternative options, or off ramps, that are available in Family Court. There will be an adjustment process, where a young person can be placed under probation supervision in lieu of a court proceeding. If a case is not adjusted, it would be assigned to the Youth Court. Judges presiding in the Youth Court will be specially-trained on subjects including legal issues and procedure, the dynamics of adolescent behavior, current research into adolescent psycho-social and brain development, and available services and referral options. They will both understand the legal and psychosocial issues involving troubled adolescents and will be familiar with the broad range of age-appropriate

services and interventions designed specifically to meet the needs and risks posed by these young people. The judges in the Youth Court would handle the cases essentially in accordance with the existing Criminal Procedure Law protections, which in many regards have more to offer for adolescents, bail, speedy trial requirements, and the like. If the cases ended with an adjudication of guilt, Family Court protocols would then apply. The adjudication would not be deemed a criminal conviction resulting in a criminal record. The broader dispositional options available in Family Court and the principle of "least restrictive alternative available" would govern. Court record sealing provisions would be modeled on the Family Court Act. Most importantly, enhanced services and alternative-to-incarceration community programs would be available as part of the case disposition.

Although ultimately Family Court is the best fit for these cases — and we will continue to work toward the long-term goal of placing them under the Family Court's jurisdiction — the plan I have outlined offers a practical approach that will immediately address the problems of the current system, which treats 16- and 17-year-olds charged with criminal conduct as adults. The plan can also be implemented with a minimum of disruption and in a cost-effective way, not just for the courts but for prosecutors, defense organizations, police, and our hard-pressed counties and local government agencies. While costs may shift slightly overall, the plan's cost-effectiveness stems from the increase in adjustments and fewer cases entering the system, coupled with a decreased reliance on expensive incarcerations that, in many instances, serve no useful purpose for adolescents accused of low-level offenses. Although probation departments might see some additional workload due to an increase in "adjusted" cases, this would be offset by

savings from the reduced need to appoint counsel in those cases, which would not proceed to court.

To demonstrate that this approach makes sense and is a vast improvement over the existing system, we have established pilot adolescent diversion courts across the state. The nine pilot courts began operating last month in criminal courts in Buffalo, Syracuse, Nassau County, Westchester County and the five boroughs of New York City and are off to a great start. These courts handle 16- and 17-year-old defendants who would benefit from a criminal justice response that includes age-appropriate services, interventions, and penalties. Each one is the product of close collaboration with prosecutors, defense attorneys, probation officials, departments of education, service providers, and law enforcement agencies, under the leadership of Judge Judy Harris Kluger, Chief of Policy and Planning and with valuable assistance from the Center for Court Innovation. These courts take into account the age and circumstances of the defendants and emphasize accountability, treatment, and supervision in crafting outcomes. Each jurisdiction was able to formulate a model that was responsive to local needs and resources. Under the pilots, participating judges have access to new sentencing options, including short-term social service interventions and community service. Community service assignments focus on conduct associated with youthful transgressions – think of graffiti, fare evasion, and trespass. Defendants may be sentenced to sessions on conflict resolution, civic responsibility, and vocational and educational goal setting. Generally speaking, interventions in the adolescent diversion courts aim to build concrete life skills and promote personal accountability. And they are age-appropriate and designed to address the particular emotional and developmental needs of adolescents. Defendants are monitored

to ensure they are compliant, and if they are not, they are returned to court for further action. Wherever possible, a brief assessment is conducted prior to sentencing to ensure the most appropriate interventions.

The court system and the New York Foundling provided a comprehensive training program for the judges in the pilot courts, a training program that can serve as a model for Youth Court training programs under the new legislative plan. Although the pilot courts do not have the full benefit of the broad range of options offered under our proposed legislation, they serve as a valuable testing ground for a more holistic approach to 16- and 17-year-olds charged with criminal conduct.

This approach 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 growing 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 am grateful for the work of all involved in this effort, and in particular the work of the Hon. Michael A. Corriero, Executive Director and Founder of the New York Center for Juvenile Justice, and Richard M. Aborn, President of the Citizens Crime Commission, for their invaluable assistance to the Sentencing Commission. I believe that the legislation, which we will be submitting immanently, is a first major step toward juvenile justice reform. We will be working with the Governor's office, the Senate and the Assembly to achieve action in this legislative session. We have waited a half a

century to again make New York a leader in this area that is so critical to our future. We can afford to wait no longer.

The new Youth Court is no idle daydream. Indeed, we've 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 for adults. 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. While national prison populations have exploded, New York houses 12,000 fewer inmates today than it did in 1999. At the same time, the rate of violent crime in this state, even with some recent upticks, has been reduced to levels not seen since John F. Kennedy was president. We can do the same in the juvenile justice arena. Treating 16- and 17-year-olds charged with low level offenses as adults does not serve the public safety or improve the quality of life in our communities. Kids in trouble need a helping hand, and the last thing in the world they need is to be treated in a punitive way that turns them toward a lifetime of crime that will take away their lives and their futures.

New York has a proud history of being at the cutting edge when it comes to juvenile justice reform. In the 1800s, New York became the first state to construct special facilities that enabled children to be removed from adult penitentiaries. As is so often the case, New York set the bar back then, and other states followed. 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.