



Staff Memorandum

EXECUTIVE COMMITTEE Agenda Item #6

REQUESTED ACTION: Approval of a resolution from the Committee on Children and the Law with respect to the juvenile delinquency age.

In 2008, the Executive Committee approved a report and resolution from the Committee on Children and the Law requesting that the Legislature and Governor appoint a commission or task force to consider whether the age of juvenile delinquency should be raised to eighteen. The committee has updated its 2008 report and resolution, noting that the Chief Judge has recommended that the age be raised, and now calls for the enactment of legislation to raise the jurisdictional age to eighteen. Attached is the committee's updated report, a revised resolution, and the original report and resolution from 2008.

The report will be presented at the November 4 meeting by committee member Kathleen R. DeCataldo.

New York State Bar Association

Children and the Law Committee

Report

On October 31, 2008, the Executive Committee approved the attached resolution requesting that the Legislature and Governor establish a commission or task force to consider and recommend whether the general juvenile delinquency age should be raised to age eighteen. As noted in the attached original Committee memorandum, the resolution reflected the fact that the overwhelming majority of states preclude the criminal prosecution of most children under the age of eighteen; only two states, New York and North Carolina, prosecute all children above the age of sixteen as adults (a bill to raise the age to eighteen is pending before the North Carolina Legislature). The resolution also reflected the fact that research into brain development and decision-making capacity has conclusively shown that all adolescents below age eighteen have diminished judgmental capabilities, and that New York's decision in 1962 to retain the lower jurisdictional threshold was deemed to be "tentative" by the relevant Constitutional Convention.

Three years have elapsed since the Executive Committee adopted the resolution. During that time considerable momentum to raise the age has been achieved. Recently, the Chief Judge has recommended that the general jurisdictional age be increased, and his position has been endorsed by the NYSBA President. The Chief Judge requested the Permanent Sentencing Commission, chaired by Justice Barry Kamins and District Attorney Cyrus Vance, to draft the necessary legislation. Former Justice Michael Corriero is serving as a special adviser to the Sentencing Commission. The Citizens Crime Commission and a Committee consisting of the relevant "stakeholders" also been active in this endeavor.

The Children and the Law Committee believes that the NYSBA should amend the earlier resolution to reflect these developments. The amended resolution hence recommends that the Executive Committee request that the Legislature and Governor enact and approve legislation raising the general jurisdictional age to eighteen. New York, like every other state, would continue to prosecute in criminal court older adolescents who commit serious violent felonies. A procedural mechanism to determine Criminal Court versus Family Court proceedings should be part of the overall endeavor. We also note that the resolution and the 2007 memorandum recognize that the financial and administrative impact on the judiciary and state and local executive agencies must be considered; an implementation timetable and funding structure is needed before any enacted change could be fully effective.

Dated: October 25, 2011

NEW YORK STATE BAR ASSOCIATION
RESOLUTION ADOPTED BY EXECUTIVE COMMITTEE
OCTOBER 31, 2008

WHEREAS, in the overwhelming majority of states most children cannot be charged criminally as adults until they attain age eighteen; and

WHEREAS, New York is one of only two states in which children who are age sixteen and over cannot be prosecuted as juvenile delinquents, and must consequently be prosecuted criminally as adults; and

WHEREAS, the New York Family Court Act's establishment of age sixteen as the threshold of adult criminal jurisdiction was deemed to be "tentative" by the relevant Constitutional Convention Commission and subject to change; and

WHEREAS, research has proven conclusively that children under the age of eighteen have significantly diminished judgmental capabilities; and

WHEREAS, children in New York sixteen years and over could benefit greatly from programs and services available only for children found to be delinquent in Family Court and hence not convicted in a criminal court;

ACCORDINGLY, the New York State Bar Association requests that the New York State Legislature and the Governor of the State of New York establish and fund a commission or task force to consider and recommend whether the general juvenile delinquency jurisdictional age should be raised to age eighteen, and that the commission or task force report their findings and recommendations to the Governor and the Legislature on a timely basis.

MEMORANDUM

To: NYSBA Committee on Children and the Law

From: Merrill Sobie

Date: December 18, 2007

Subject: New York's Juvenile Delinquency Jurisdictional Age Limitation

As we all know, New York's JD jurisdictional age limitation is 16, i.e., Family Court jurisdiction terminates at 16. The precise age limitation dates from 1824, when New York enacted the first American criminal law which differentiated children from adults. The limitation is statutory, and not constitutional (the surprising reason will be explained later in this memo). Hence New York could raise (or lower) the jurisdictional age legislatively.

Nationally, the picture is vastly different. The "national" norm is age eighteen. Thirty-eight states and the District of Columbia have established 18 as the jurisdictional "divide" between juvenile court and criminal court. An additional ten maintain an age limitation of 17, Only New York and North Carolina maintain an age 16 ceiling.

This year Connecticut, which like New York had established a jurisdictional age limitation of 16, raised the age to 18 (Connecticut's motivation will be discussed later). Interestingly, the Rhode Island legislature almost simultaneously reduced the jurisdictional age in that state from 18 to 17, but, following a public outcry, repealed the reduction several months later. Illinois, which has an age 17 limitation, is on the verge of raising the juvenile court age for misdemeanors to 18 (both houses of the Illinois legislature have passed slightly different bills, which presumably will be aligned shortly).

Two additional states, Wisconsin and New Hampshire, are considering raising the age limitation in those states from 17 to 18. There is a growing national consensus to join the large majority of "age 18" states.

New York's History

In 1824 New York established the House of Refuge for children; children under the age of 16 who were convicted of a crime in criminal court (there was as yet no notion of a separate juvenile court) could, at the discretion of the judge, be placed with the House of Refuge in lieu of imprisonment. In 1846 placement in a House of Refuge was mandated (by then a second "House" had been established upstate): ". . . the courts of criminal jurisdiction of the several counties . . . shall sentence to said house of refuge every male under the age of eighteen, and every female under the age of seventeen years, who shall be convicted before such court of any felony" (L. 1846, c. 134, §16; yes, New York raised the age limitation in 1846).

In the early twentieth century, New York established separate children's court parts to hear and determine criminal charges involving children under the age of 16 (see L. 1902, c. 590). By 1909 the term "juvenile delinquent" had been substituted for "conviction". The 1909 statute, codified as FCA Section 301.2(1), is in effect today (except for JO's), almost one century later:

A child of more than seven and less than sixteen years of age, who shall commit any act or omission which, if committed by an adult, would be a crime not punishable by death or life imprisonment, shall not be deemed guilty of any crime, but of juvenile delinquency only. [L, 1909, c. 4781].

The 1909 statute was of course continued in the 1922 Children's Court Act, the Family Court Act's direct predecessor.

This brings us to the 1962 Family Court Act. At the 1961 Constitutional

Convention, which established Family Court, the issue of New York's low age threshold was debated. Finding an absence of a strong consensus, the convention deferred a decision. The Constitution itself is therefore intentionally flexible, incorporating the following non-age specific provision:

The family court shall have jurisdiction over the following actions and proceedings which shall be originated in such family court in the manner provided by law: (1) the protection, treatment, correction and commitment of those minors who are in need of the exercise of the authority of the court because of circumstances of neglect, delinquency or dependency, as legislature may determine . . . [Art. 6, §13(b)].

In furtherance, the official legislative committee comment to the original Family Court Act Section states as follows:

This section follows existing law in limiting juvenile delinquency to persons under sixteen years of age. This decision is tentative and subject to change upon completion of a study of the Youthful Offender Act and the Wayward Minor Law and observation of the functioning of the new court with the program of law guardians established under Article 1. The Joint Legislative Committee on Court Reorganization plans to complete the study and submit legislation in 1963. [State of New York, Joint Legislative Committee on Court Reorganization, The Family Court Act, 1962, p. 1109; *emphasis added*].

The Joint Legislative Committee indeed completed a lengthy study in 1963. Its published report, however, came to no firm decision, concluding with the comment:

"The committee now looks forward to the advice and recommendations of others at public hearings and conferences (and through written communications)." At that point the legislative history ends. he promise to submit legislation in 1963 **was** apparently unfulfilled, or at least I have been unable to find any subsequent material. The "tentative" 1962 decision has remained in effect for 45 years.

The National Progression

The "national" jurisdictional age limitation was initially set at age 16 (as in New

York). Illinois, the first state to establish an independent juvenile court, enacted the following provision in 1899: "no child under 16 years of age shall be considered or treated as a criminal." The provision was widely replicated as each state quickly jumped on the juvenile court "band wagon". (I have researched 6 or 7 states -each established age 16 as the limitation).

After one generation, most states raised the jurisdictional age restriction. The juvenile court was deemed to be successful; it's benefits worthy of expansion. Whatever the exact sequence, by 1935 or 1940 virtually every state had raised the jurisdictional age limit. For unknown reasons (at least to me), New York, Connecticut, and North Carolina) failed to participate. The situation remained static for approximately 70 years, until Connecticut's and (presumably) Illinois' enactment of a higher age.

It should be emphasized that the national norm of 18 is not an absolute. Every state excludes very serious violent crimes committed by older adolescents. At the time most states expanded jurisdiction, almost every state simultaneously enacted "transfer" provisions, whereby a case could be transferred from juvenile court to criminal court; the level of crime charged and the age at which a child could be transferred varied, and still varies, but the principle is identical. New York, which opted out of the national movement to a higher limitation, is virtually the only state which lacks a transfer provision; since we maintained the lower age limitation, the question of transfer never arose.

Today, several states have enacted measures to augment transfer. One mechanism is "direct file", which is similar to New York's Juvenile Offender Act. Another option is "mandatory transfer", whereby the juvenile court must transfer to the criminal court a

major violent felony case when the prosecutor so requests (a mandatory transfer provision, which essentially leaves the decision to the prosecutor, is included in the Connecticut Act).

Why Connecticut?

The Connecticut decision was based primarily on the fact that the overwhelming percentage of crimes committed by persons less than 18 years of age are of a minor nature.. In Connecticut, in New York, and in every jurisdiction, the large majority of crimes youngsters commit are the relatively non-serious property offenses (e.g., larceny, auto theft, vandalizing) or misdemeanor assault. Once the sponsors excluded the opposite end of the spectrum, i.e. the violent felonies, there was little perceived justification to continue criminal jurisdiction. The relevant Joint Legislative Committee report explained the decision in the following words:

Each year, 10,000 Connecticut children can be expected to go through the adult judicial system. About two of them will have killed someone. We believe it is better to design a system for the 10,000 than for the two. There will still be provision to move violent youths to the adult system - we are not talking about giving anyone a pass for serious crimes. The vast majority of minors, however, could be better held accountable in the juvenile system, where rehabilitative services have been proven to put kids back on track, rather than the adult system, an ideal environment to create career criminals. The experience of other states proves this.
[source: H. Ted Rubin, Juvenile or Adult Jurisdiction? Age Changes -the States, Juvenile Justice Update, October/November 2007).

The Connecticut sponsors also cited studies showing that children who are incarcerated in jails and prisons are more likely to re-offend and commit more serious crimes than children placed in juvenile facilities, and recent studies concluding that the areas of the human brain which control judgment and rationale decision-making do not fully mature until post age eighteen. The Connecticut executive and the judiciary

supported the change; the police and prosecutors were opposed (at least initially). A public effort, with the slogan "Raise the Age", was organized to rally support.

Why New York?

That's an easy one. New York is clearly the odd state out. We are also probably the only state to have established age 16 as a "tentative" decision with a commitment to submit further legislation.

New York is also virtually the only state to maintain the ancient historical system of local justice courts, staffed by part-time and non-lawyer judges. Almost every criminal case originates in the local court (the only exception is when indictment precedes arrest), and misdemeanors never leave the local court. Just how a local nonlawyer judge evaluates the needs of a 16 or 17 year old juvenile escapes me. Do we really want a 16 year old who cannot resist shoplifting prosecuted as an adult and convicted in the local criminal court? And do we want to be the only exception (with North Carolina) to the national rule?

The Logistics

The logistics of raising the age limitation are formidable. To raise just a few questions, who would prosecute (County Attorney or DA)? Where would a 16 or 17 year old be detained (the state has few secure juvenile facilities)? Would the Family Court bench be augmented? Where would 16 and 17 year olds be placed, when placement is necessary (OCFS would have to develop new programs and expand the training school network)?

From a fiscal perspective, raising the age would benefit county and local government, but necessitate significant increased state expenditures. Family Court

would obviously expand at state cost, OCFS facilities and programs would supplant jails and defense costs would be transferred from the counties (18-B) to the state (law guardians/attorneys for the child). Obviously we are a long way from outlining the administrative and fiscal details.

The First Step

The first step for the Committee is, as always, a committee resolution. Then, hopefully, the Executive Committee and House of Delegates will approve a resolution requesting legislation. Perhaps we should recommend the formation of a legislative commission to study the issue and draft relevant legislation incorporating a higher age limitation (with appropriate exclusions based on the seriousness of the crime charged).

NEW YORK STATE BAR ASSOCIATION
Committee on Children and the Law
Proposed Resolution
October 24, 2011

WHEREAS, there is an overwhelming national consensus recognizing that children should not, except in extraordinary circumstances, be charged criminally as adults until they attain the age of eighteen; and

WHEREAS, New York is now one of only two states in which children who are age sixteen and over are criminally prosecuted as adults; and

WHEREAS, the New York Family Court Act's establishment of age sixteen as the threshold of adult criminal jurisdiction was deemed to be "tentative" by the relevant Constitutional Convention Commission almost 50 years ago; and

WHEREAS, research has shown that the adolescent brain is not as fully developed as the adult brain; limiting youths' critical decision-making, reasoning, impulse control, ability to resist peer pressure and understanding of risk; and

WHEREAS, the U.S. Supreme Court, based in part on the foregoing adolescent brain research, has determined that the penalties accorded juveniles who commit serious crimes should be take into account their youth and ability to be rehabilitated; and

WHEREAS, children in New York age sixteen years and over could benefit greatly from the different treatment of young offenders upon which the Family Court is premised - as responsible but less blameworthy by reason of their age and to provide rehabilitation and age-appropriate services - and from the programs and services available only for children found to be delinquent in Family Court and not convicted in a criminal court; and

WHEREAS, the administrative and financial impact of raising the age of juvenile court jurisdiction on the unified court system, state and local law enforcement, probation, parole, and social services agencies; detention and placement facilities; prosecution and defense services providers; and other affected agencies, including a timetable for implementation and an appropriate funding structure should be ascertained and considered;

ACCORDINGLY, the New York State Bar Association requests that the New York State Legislature pass and the Governor of the State of New York sign legislation raising the age of criminal responsibility and general juvenile delinquency jurisdictional age to eighteen.

