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## **The Evolution of Youth as an Excuse: Striking a Balance Between the Interest of Public Safety and the Principle that Kids are Kids**

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## The Evolution of Youth as an Excuse: Striking a Balance Between the Interest of Public Safety and the Principle that Kids are Kids

Cover Page Footnote

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**THE EVOLUTION OF YOUTH AS AN EXCUSE: STRIKING A  
BALANCE BETWEEN THE INTEREST OF PUBLIC SAFETY  
AND THE PRINCIPLE THAT KIDS ARE KIDS**

**SUPREME COURT OF NEW YORK  
APPELLATE DIVISION, FIRST DEPARTMENT**

*In re* Jaquan M.<sup>1</sup>  
(decided July 3, 2012)

**I. FACTUAL BACKGROUND**

Jaquan M., a fourteen year old, was tried in a family court juvenile proceeding for the adult crime equivalent of possession of a weapon in the second degree.<sup>2</sup> At approximately 9:30 p.m., police officers patrolling “in a drug-prone location” observed Jaquan walking down the sidewalk with a backpack.<sup>3</sup> He then veered off the sidewalk between two parked cars, and looked both ways up and down the road.<sup>4</sup> Back on the sidewalk, Jaquan looked up and down once again, and paced in a circle.<sup>5</sup> He then made a thirty-second cellphone call, and continued pacing and looking around.<sup>6</sup> While kneeling between the parked cars, Jaquan cautiously removed a white object from his waistband and placed it in the side pocket of his backpack.<sup>7</sup> Despite officers’ admissions that the white object looked nothing like a gun, the officers believed the object could have been a firearm because Jaquan handled the object in such a careful manner and had removed it from “the most common location for carrying a gun.”<sup>8</sup>

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<sup>1</sup> 948 N.Y.S.2d 51 (App. Div. 1st Dep’t 2012).

<sup>2</sup> *Jaquan*, 948 N.Y.S.2d at 52.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Jaquan*, 948 N.Y.S.2d at 52.

<sup>8</sup> *Id.*

Following their observations, one police officer approached Jaquan, noticed his backpack appeared bottom-heavy, identified himself, and told Jaquan to walk with him.<sup>9</sup> Jaquan then indicated he was fourteen years old by stating, “What do you want from me? I am only fourteen [years old].”<sup>10</sup> While the second officer approached, the first officer frisked Jaquan and asked about his comings and goings.<sup>11</sup> Jaquan quickly answered that he was coming from a relative’s house.<sup>12</sup> But, as to where he was going, he pointed out an address written in pen on his arm, and said, “Here.”<sup>13</sup> This address was known to police as being in “a high crime, drug-prone” area.<sup>14</sup>

Officers smelled marihuana, and inquired about the contents of the backpack twice.<sup>15</sup> In both instances, Jaquan countered by stating that nothing was in the backpack.<sup>16</sup> Upon the officers’ inquiry regarding Jaquan’s identification, Jaquan provided only a first name and birthdate, but did not provide any other form of identification.<sup>17</sup> Jaquan then gave police permission to check the contents of his backpack for school papers, as he suggested that he might have some papers bearing his full name.<sup>18</sup> The officers found nothing inside the main compartment, but upon searching the side pocket, they found a heavy white bag.<sup>19</sup> Considering Jaquan to be a flight risk at that point, the officers handcuffed him, opened the white bag to find a loaded handgun and rounds of ammunition, and discovered \$963.00 in cash in Jaquan’s pocket.<sup>20</sup>

Following a fact-finding hearing, the family court judge denied Jaquan’s motion to suppress the gun.<sup>21</sup> The judge concluded that the police were justified in their search of the backpack based on the totality of their observations including: Jaquan’s furtive behavior in a high-crime area at night, inability to supply his full name to the

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 52-53.

<sup>12</sup> *Jaquan*, 948 N.Y.S.2d at 53.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Jaquan*, 948 N.Y.S.2d at 53.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

officers, and his backpack's heavy appearance.<sup>22</sup> As a result of the denied suppression motion, Jaquan admitted to committing the act that would have been a crime of possession of a weapon had he been sixteen years old.<sup>23</sup> Consequently, he was adjudicated a juvenile delinquent and placed on fifteen months of enhanced supervision probation.<sup>24</sup> The family court judge further directed Jaquan "to obey his parents, attend school regularly, refrain from the use of drugs or alcohol, complete 60 hours of community service and [refrain from any] gang affiliation or further difficulties at home or in the community."<sup>25</sup>

On appeal, the Supreme Court of New York, Appellate Division, First Department, relying on *People v. De Bour*,<sup>26</sup> reversed the family court's decision, granted the motion to suppress the weapon, vacated the disposition, and dismissed the case.<sup>27</sup> In *De Bour*, the court categorized four common police actions:<sup>28</sup> (1) the approach in order to request information; (2) the common-law right to inquire; (3) the stop and frisk, or "forcible stop and detention,"<sup>29</sup> and (4) the arrest.<sup>30</sup> In order to justify an approach, police must have "some objective credible reason" for the approach.<sup>31</sup> To take the next step and inquire, police must establish a "founded suspicion that criminal activity is afoot."<sup>32</sup> A forcible stop and detention is legally justified when based on a reasonable suspicion that a crime occurred, is occurring, or is about to occur.<sup>33</sup> Lastly, an arrest must be founded on "probable cause to believe" that a crime was committed.<sup>34</sup> Thus, the justification for a certain level of intrusion by police is directly correlated to the objective credibility of their belief as determined by their observations and knowledge during the situation in question.<sup>35</sup>

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<sup>22</sup> *Jaquan*, 948 N.Y.S.2d at 53.

<sup>23</sup> *Id.*; see also N.Y. FAM. CT. ACT § 301.2(1) (McKinney 2010); N.Y. PENAL LAW § 265.03 (McKinney 2006).

<sup>24</sup> *Jaquan*, 948 N.Y.S.2d at 53.

<sup>25</sup> *Id.* at 53-54.

<sup>26</sup> 352 N.E.2d 562 (N.Y. 1976).

<sup>27</sup> *Jaquan*, 948 N.Y.S.2d at 52, 54.

<sup>28</sup> *Id.* at 54 (citing *De Bour*, 352 N.E.2d at 571-72).

<sup>29</sup> *Id.* (quoting *De Bour*, 352 N.E.2d at 572).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*; *De Bour*, 352 N.E.2d at 571-72.

<sup>32</sup> *Jaquan*, 948 N.Y.S.2d at 54; *De Bour*, 352 N.E.2d at 572.

<sup>33</sup> *Jaquan*, 948 N.Y.S.2d at 54; *De Bour*, 352 N.E.2d at 572.

<sup>34</sup> *Jaquan*, 948 N.Y.S.2d at 54; *De Bour*, 352 N.E.2d at 572.

<sup>35</sup> *De Bour*, 386 N.E.2d at 572.

The court in *Jaquan* concluded that the police were only justified in the first two *De Bour* actions—the approach and inquiry.<sup>36</sup> Based on Jaquan’s apparently surreptitious behavior in a known crime-ridden area at night, the police reasonably formed the requisite founded suspicion that Jaquan “was engaged in criminal activity.”<sup>37</sup> However, as to the search of the backpack beyond the main compartment and Jaquan’s arrest, the police did not possess the requisite reasonable suspicion, or “quantum knowledge sufficient to induce an ordinarily prudent and cautious man under the circumstances to believe that criminal activity is at hand.”<sup>38</sup>

Based on its curious reasonable suspicion analysis, as well as its consent analysis, the majority in *Jaquan* seems to have first concluded that this particular fourteen year old first-time-offender did not deserve a record, and then analyzed the facts to specifically suppress the gun. The majority reasoned that each police observation of Jaquan’s behavior, when analyzed independently from the others, was susceptible to an innocent alternative validation, and therefore the police did not possess the requisite reasonable suspicion.<sup>39</sup> However, in the dissenting opinion, Justice Catterson proposed that the majority incorrectly analyzed each pertinent police observation separately, knocking each down as insufficient by itself to support a reasonable suspicion.<sup>40</sup>

Instead of this piecemeal approach, the majority should have applied a totality of the circumstances analysis and viewed the situation “as a progression of actions, with each circumstance increasing the level of the police officer’s suspicion.”<sup>41</sup> For instance, the majority emphasized the police officers’ concessions that the white “object bore no obvious hallmarks of a [gun].”<sup>42</sup> Relying on *People v. Crawford*<sup>43</sup> and *People v. Fernandez*,<sup>44</sup> the majority reasoned that a simple

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<sup>36</sup> *Jaquan*, 948 N.Y.S.2d at 54.

<sup>37</sup> *Id.*; *see id.* at 54, 55 (denouncing the frisk as unreasonable because the officers admitted the gun looked nothing like a gun and they did not feel their lives were in danger).

<sup>38</sup> *Id.* (quoting *People v. Sobotker*, 373 N.E.2d 1218, 1220 (N.Y. 1978)) (internal quotation marks omitted).

<sup>39</sup> *Jaquan*, 948 N.Y.S.2d at 57 (Catterson, J., dissenting).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* (citing *People v. Rodriguez*, 895 N.Y.S.2d 94, 95 (App. Div. 1st Dep’t 2010) (finding reasonable suspicion where defendant behaved stealthily, in a high crime and drug distribution location and his waistband appeared weighed down)).

<sup>42</sup> *Jaquan*, 948 N.Y.S.2d at 55 (majority opinion).

<sup>43</sup> 931 N.Y.S.2d 313, 315 (App. Div. 1st Dep’t 2011) (finding no reasonable suspicion to seize defendant when he fled police officers with a bulge in his pocket).

action of holding an object near one's waistband, or presence of a bulge in a pocket, without any precise visible factor(s) indicating a gun—such as an outline in the shape of a gun—is not enough to reasonably conclude the suspect is in possession of a gun.<sup>45</sup> Nevertheless, the majority disregarded the valid possibility that other factors gave the officers reason to suspect that Jaquan carried a gun or other dangerous weapon.<sup>46</sup> In fact, Justice Catterson pointed out that the bulge was no longer merely a bulge when the police observed Jaquan pull the white object, which was about the size of a gun, from out of his waistband, handling the object with care.<sup>47</sup> Furthermore, Justice Catterson explained that there “were other ‘indicia of criminality,’ ” that the majority failed to recognize as a possible justification for the police officer’s reasonable suspicion<sup>48</sup> such as, the suspicious nature of the address written on Jaquan’s arm<sup>49</sup> Thus, where in reality, the record reflected that the police made several other legitimate observations that would have led a reasonable person to believe Jaquan was in possession of a gun,<sup>50</sup> the majority seems to have cherry picked certain facts to satisfy their specific sought after end—a clean slate for a fourteen year old boy.

Regarding consent to search Jaquan’s backpack, the Appellate Division concluded that Jaquan did not voluntarily consent to a search of his entire bag.<sup>51</sup> Purportedly, Jaquan possessed a reasonable expectation that the scope of the search would be limited to a

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<sup>44</sup> 928 N.Y.S.2d 293, 294 (App. Div. 1st Dep’t 2011) (concluding no reasonable suspicion to stop and frisk defendant based only on the fact that his hand was near his waistband and defendant was observed in a high crime area) (citing *People v. Sierra*, 638 N.E.2d 955, 956 (N.Y. 1994) (lacking reasonable suspicion to pursue defendant after he grabbed at his waistband and fled)); *see also* *People v. Powell*, 667 N.Y.S.2d 725, 728 (App. Div. 1st Dep’t 1998) (reasoning that defendant’s location in a high crime area as the sole indicia of criminality was not sufficient to rise to the level of reasonable suspicion to justify a stop and frisk).

<sup>45</sup> *Jaquan*, 948 N.Y.S.2d at 54, 55 (“Certainly the dissent would argue that any person on the street, even in a high-crime area, is presumed to be carrying a weapon based only on a drooping pocket or backpack.”).

<sup>46</sup> *Id.* at 56 (Catterson, J., dissenting).

<sup>47</sup> *Id.* at 57 (citing *People v. Alozo*, 580 N.Y.S.2d 298, 298-99 (App. Div. 1st Dep’t 1992)).

<sup>48</sup> *Id.*

<sup>49</sup> *See generally id.* at 52-56 (majority opinion).

<sup>50</sup> *Jaquan*, 948 N.Y.S.2d at 57 (Catterson, J., dissenting).

<sup>51</sup> *Id.* at 56 (majority opinion) (citing *People v. Barreras*, 677 N.Y.S.2d 526, 531 (App. Div. 1st Dep’t 1998) (concluding lack of voluntary consent to a search of the interior of vehicle where it was late at night, inquiries by police were unreasonably accusatory in nature, and the officer did not inform defendant that he could refuse the search request)).

mere search for identification papers.<sup>52</sup> Thus, “[w]hen the officer opened a separate compartment in the backpack that contained no papers, the right to proceed [extinguished].”<sup>53</sup>

However, Justice Catterson rejected this argument—that Jaquan’s invitation to search was limited to the main compartment of his backpack—as unpersuasive.<sup>54</sup> Instead, the dissent reasoned that “[t]he scope of a search is ‘generally defined by its expressed object’ and the ‘reasonable’ expectation of the person consenting to the search.”<sup>55</sup> Furthermore, because school papers with an individual’s name could reasonably be expected to be located in “any pocket of a student’s backpack,” Justice Catterson argued that Jaquan, by inviting the police to look inside for identifying papers, actually consented to the search of his entire backpack.<sup>56</sup>

Another curious aspect of the court’s decision in *Jaquan* was that in determining whether Jaquan voluntarily consented to the backpack search, the court relied primarily on two cases involving vehicle searches, as opposed to baggage searches.<sup>57</sup> The two cases relied on were *People v. Barreras*<sup>58</sup> and *People v. Gomez*.<sup>59</sup> In *Barreras*, the defendant was stopped for allegedly driving through a stop sign without stopping.<sup>60</sup> After police found a gun and drugs in his vehicle,<sup>61</sup> Barreras was ultimately convicted of criminal possession of a weapon, as well as several charges of possession of a controlled substance in varying degrees.<sup>62</sup> After pulling Barreras over, the officer asked for identification papers.<sup>63</sup> While responding to the officer’s questions, Barreras failed to make eye contact with the of-

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<sup>52</sup> *Id.* (citing *People v. Gomez*, 838 N.E.2d 1271, 1273 (N.Y. 2005) (finding lack of consent where the scope of a vehicle search went beyond the reasonable expectation when officers damaged the vehicle by removing attached carpet and used a crow bar to alter sheet metal)).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 58 (Catterson, J., dissenting).

<sup>55</sup> *Jaquan*, 948 N.Y.S.2d at 58 (quoting *Gomez*, 838 N.E.2d at 1273).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 56 (majority opinion).

<sup>58</sup> 677 N.Y.S.2d 526 (App. Div. 1st Dep’t 1998).

<sup>59</sup> 838 N.E.2d 1271 (N.Y. 2005), *remitted to* 808 N.Y.S.2d 626 (App. Div. 1st Dep’t 2005).

<sup>60</sup> *Barreras*, 677 N.Y.S.2d at 528.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 527.

<sup>63</sup> *Id.* at 528.



ficer.<sup>64</sup> Additionally, while Barreras retrieved his license and registration and handed it over to the officer, his hands trembled.<sup>65</sup> The officer also noted that the “defendant’s nervousness was unusual” considering he was able to produce the required paperwork.<sup>66</sup> The officer followed up with more questioning, and asked whether “defendant had ‘a machine gun, or a hand grenade, or a rocket launcher’ in the car.”<sup>67</sup> Barreras replied negatively, but the reply was not the jovial response the officer expected to a relatively outlandish, unfounded question.<sup>68</sup> Consequently, although at that point the officer did not “fear for his life,” the officer’s suspicions that Barreras was in possession of a weapon were further raised.<sup>69</sup> The officer then asked Barreras whether “he would ‘mind’ if the officer looked through the car.”<sup>70</sup> Barreras, while still avoiding eye contact, replied, “Okay.”<sup>71</sup> Then, the officer asked if he could search the entire car, and Barreras responded, “[Y]eah, it’s all right.”<sup>72</sup>

Upon a cursory inspection of the car with a flashlight, the officer saw “nothing that could ‘hurt’ him,” but continued his search by looking in the center console.<sup>73</sup> The officer noticed that the lining of the console was loose and removed it.<sup>74</sup> Underneath the lining, a handgun rested on a large, clear plastic bag filled with smaller baggies of cocaine and marihuana.<sup>75</sup>

At trial, Barreras moved to suppress the handgun and the drugs.<sup>76</sup> The trial court determined “that the totality of the circumstances indicated that ‘[Barreras]’ act of consent [to search his car] was voluntary,” and consequently denied Barreras’ motion to suppress the gun and packages of cocaine and marihuana.<sup>77</sup> However, the Appellate Division, First Department reversed the trial court’s de-

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<sup>64</sup> *Id.*

<sup>65</sup> *Barreras*, 677 N.Y.S.2d at 528.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Barreras*, 677 N.Y.S.2d at 528.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Barreras*, 677 N.Y.S.2d at 528.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 529.

cision and granted the motion to suppress the physical evidence.<sup>78</sup> The court in *Barreras* reasoned that “the request to search cannot be analyzed in a vacuum and the length and circumstances of the continued detention must be considered.”<sup>79</sup> Further, the court explained that, “[f]or a traffic stop to pass constitutional muster, the officer’s action in stopping the vehicle must be justified at its inception and the seizure must be reasonably related in scope, including its length, to the circumstances which justified the detention in the first instance.”<sup>80</sup> Upon learning that Barreras’ papers were in order, the officer no longer had justification to detain Barreras.<sup>81</sup> Without further indication of wrongdoing, the officers were obligated to issue a summons, “and allow [Barreras] to resume his journey.”<sup>82</sup> Thus, the fact that Barreras failed to make eye contact, was extremely nervous, and responded to the officer with innocuous discrepancies, did not provide the officer with “a basis for further suspicion.”<sup>83</sup>

Furthermore, the court in *Barreras* reasoned that the officer’s questioning went beyond simple requests for information and rose to the level of a common-law inquiry—requiring “support[] by a founded suspicion that criminality [was] afoot.”<sup>84</sup> Because the officer was not justified in detaining Barreras, the officer was likewise not justified in seeking consent.<sup>85</sup> Nevertheless, the court observed that even if the officer had justification to request consent to search, Barreras did not consent voluntarily, and thus, the consent was not valid.<sup>86</sup> The court explained that proving voluntariness of consent is a heavy burden for the People to meet.<sup>87</sup> That is, consent is only voluntary if it is an “unequivocal product of an essentially free and unconstrained choice.”<sup>88</sup> Observing the circumstances surrounding the officer’s en-

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<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 530.

<sup>80</sup> *Barreras*, 677 N.Y.S.2d at 530 (quoting *People v. Banks*, 650 N.E.2d 833, 835 (N.Y. 1995) (internal quotation marks omitted)).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* (quoting *People v. Hollman*, 590 N.E.2d 204, 206 (N.Y. 1992) (internal quotation marks omitted)).

<sup>85</sup> *Barreras*, 677 N.Y.S.2d at 530.

<sup>86</sup> *Id.* at 531.

<sup>87</sup> *Id.* at 530.

<sup>88</sup> *Id.* (quoting *People v. Gonzalez*, 347 N.E.2d 575, 580 (N.Y. 1976) (“Consent to search is voluntary when it is a true act of the will, an unequivocal product of an essentially free and unconstrained choice.”)).

counter with Barreras, specifically that it was late at night, the police pointed a flashlight at Barreras, and asked him specific and accusatory questions, the court found that Barreras had not consented voluntarily.<sup>89</sup>

In *Gomez*, although the defendant's consent to search his vehicle was voluntary, the court determined the search exceeded the scope of the consent given.<sup>90</sup> Gomez was pulled over by a police officer because the windows of his car were darkly tinted in violation of New York Vehicle and Traffic Law Section 375.12-a.(b)(2).<sup>91</sup> When the officer approached Gomez's car, he first looked through the tinted passenger window, and then examined the undercarriage of the car, as was his routine as a narcotics investigator.<sup>92</sup> The undercarriage had a fresh undercoat surrounding the gas tank—"a telltale sign[] of [a] secret compartment[]." <sup>93</sup> Gomez also produced a registration card that seemed to have been altered.<sup>94</sup> The tinted windows, the alleged secret compartment, and the tampered registration card led the officer to suspect that Gomez's car had been used for drug transportation.<sup>95</sup> Therefore, the officer asked Gomez whether he had any type of contraband in the car.<sup>96</sup> Gomez replied, "No."<sup>97</sup> Then, the officer requested consent to search the vehicle, which Gomez provided.<sup>98</sup> Upon obtaining consent, the officer ordered Gomez and his passengers out of the car.<sup>99</sup> Immediately, an officer moved back the seat above the suspicious part of the undercarriage, viewed what looked like a

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<sup>89</sup> *Id.* at 531 (citing *Hollman*, 590 N.E.2d at 211) (finding that consent was not voluntary when it "was a product of improper police inquiry"); see also *Gonzalez*, 347 N.E.2d at 580 ("No one circumstance is determinative of the voluntariness of consent. Whether consent has been voluntarily given or is only a yielding to overbearing official pressure must be determined from the circumstances.").

<sup>90</sup> *Gomez*, 838 N.E.2d at 1272.

<sup>91</sup> *Id.*; see N.Y. VEH. & TRAF. LAW § 375.12-a.(b)(2) (McKinney 2012) ("No person shall operate any motor vehicle upon any public highway, road or street: the sidewings or side windows of which on either side forward of or adjacent to the operator's seat are composed of, covered by or treated with any material which has a light transmittance of less than seventy percent.").

<sup>92</sup> *Gomez*, 838 N.E.2d at 1272.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Gomez*, 838 N.E.2d at 1272.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

brand new carpet, and removed the carpet.<sup>100</sup> Under the carpet was a cut in the floor that the officer attempted to open further with his pocket knife.<sup>101</sup> The same officer then retrieved a crow bar, pried open the gas tank, and recovered one and a half pounds of cocaine.<sup>102</sup> Gomez was then arrested and issued a summons for the tinted windows and an expired inspection.<sup>103</sup> Ultimately, Gomez was charged with, among other things, criminal possession of a controlled substance.<sup>104</sup> Subsequently, Gomez claimed lack of voluntary consent to the search, and alternatively that the scope of the search exceeded the scope of consent.<sup>105</sup> The trial court denied the motion on both grounds because Gomez “never expressly limited or revoked his permission” and “in the absence of consent, probable cause existed to justify the search.”<sup>106</sup>

On appeal, the Appellate Division, First Department, affirmed that the consent was voluntary, reasoning that the search “did not exceed the scope of [Gomez’s] consent [when Gomez] ‘fail[ed] to place any limitations on the search, and [failed] to object to the search as it was conducted.’”<sup>107</sup> However, the New York Court of Appeals subsequently reversed, finding that the officer received general consent, but that the search went beyond the scope of the consent given.<sup>108</sup> Relying on a Second Circuit interpretation of consent, the Court of Appeals reiterated that “an individual who consents to a search of his car should reasonably expect that readily-opened containers discovered inside the car will be opened and examined.”<sup>109</sup> Further, the court determined that general consent to search an object, by itself is not sufficient to “justify a search that impairs the structural integrity of a vehicle,” and therefore, the officer should have obtained specific consent to justify the forced opening of the floorboards of the car and

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<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Gomez*, 838 N.E.2d at 1272.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 1272-73.

<sup>106</sup> *Id.* at 1273.

<sup>107</sup> *Gomez*, 838 N.E.2d at 1273 (quoting *People v. Gomez*, 782 N.Y.S.2d 744, 744 (App. Div. 1st Dep’t 2004)).

<sup>108</sup> *Id.* at 1274.

<sup>109</sup> *Id.* at 1273 (quoting *United States v. Snow*, 44 F.3d 133, 136 (2d Cir. 1995) (reasoning that the search did not exceed the scope of consent when the officer opened a duffel bag found in the back seat of a car and another bag under the back seat) (internal quotation marks omitted)).

damaging the gas tank.<sup>110</sup>

Here, as mentioned above, *Jaquan* is distinguishable from *Barreras* and *Gomez* because the object in question in *Jaquan* was a student's backpack, not a vehicle, and the search did not exceed the scope of Jaquan's consent.<sup>111</sup> First, in *Jaquan*, the police did not ask questions, like in *Barreras*, that rose to the level of being accusatory in nature.<sup>112</sup> Nor did the police in *Jaquan* shine flashlights in Jaquan's face or intentionally intimidate him prior to receiving his consent to the requested search.<sup>113</sup> Additionally, as opposed to *Gomez*, where the police damaged the vehicle, in *Jaquan* the backpack was left intact.<sup>114</sup>

Ultimately, whether one agrees with the decision in *Jaquan* or not, Jaquan was granted a clean slate.<sup>115</sup> Perhaps the court was sympathetic towards Jaquan because he was fourteen, just as the United States Supreme Court was sympathetic to the fourteen year olds in *Miller v. Alabama*,<sup>116</sup> which was decided less than a month prior to *Jaquan*.<sup>117</sup> Additionally, although implied here, the disposition in *Jaquan* seems to reflect a growing trend throughout the country, as well as in New York State, recognizing the significant differences between children and adults that affect levels of criminal culpability.<sup>118</sup> Nevertheless, in reversing the disposition, the Appellate Division appeared to have engaged in significant legal gymnastics in order to achieve a certain result.

The overarching issue remains: At what age should a person be considered an adult in the eyes of the law? This case note will ad-

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<sup>110</sup> *Id.* at 1273-74.

<sup>111</sup> *Jaquan*, 948 N.Y.S.2d at 58 (Catterson, J., dissenting).

<sup>112</sup> Compare *Jaquan*, 948 N.Y.S.2d at 53 (asking defendant pedigree information) (majority opinion), with *Barreras*, 677 N.Y.S.2d at 528 (asking whether defendant had illegal contraband in his car).

<sup>113</sup> *Jaquan*, 948 N.Y.S.2d 51; *Barreras*, 677 N.Y.S.2d at 529.

<sup>114</sup> *Jaquan*, 948 N.Y.S.2d at 53; *Gomez*, 838 N.E.2d at 1273-74.

<sup>115</sup> *Jaquan*, 948 N.Y.S.2d at 52.

<sup>116</sup> 132 S. Ct. 2455 (2012) (establishing that mandatory sentences of life without parole constituted cruel and unusual punishment of fourteen year old juveniles).

<sup>117</sup> See Prof. Richard Klein, Presenter, 24th Annual Leon D. Lazer Supreme Court Review at Touro College Jacob D. Fuchsberg Law Center Department of Continuing Legal Education (Oct. 26, 2012) (explaining that the Court granted certiorari to defendants in *Miller* because people tend to be more sympathetic to fourteen year olds as opposed to sixteen or seventeen year olds).

<sup>118</sup> See generally *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (determining that in light of recent proliferation of psychological studies of adolescents, it is no longer constitutional for states to subject juveniles to mandatory life sentences without parole).

dress some procedural differences between juvenile proceedings and adult criminal proceedings, analyze the evolution of federal precedent regarding juvenile culpability, and discuss the proposed litigation in New York State that, if passed will increase the age of culpability in the State.

## II. THE EVOLUTION OF CONSTITUTIONAL RIGHTS OF JUVENILES UNDER FEDERAL LAW

A basic understanding of juvenile treatment under federal law may help to explain the underpinnings of the decision in *Jaquan*. As policy-makers and the judiciary have historically observed, children should not be held to the same standard of culpability as adults.<sup>119</sup> Yet, medicine, science, and legal theories continue to evolve in order to reflect societal norms and other relevant policy concerns. Thus, finding an appropriate balance between these competing interests—seeking to safeguard juveniles’ constitutional protections while holding them to a lesser standard of culpability has proven a difficult task for the legislature, as well as the courts.

### A. The Federal Juvenile Delinquency Act

Following the proliferation of separate juvenile justice systems on the state level, the Federal Juvenile Delinquency Act (“FJDA”) was enacted in 1938.<sup>120</sup> The FJDA was designed to protect youths from the “consequences of a criminal conviction.”<sup>121</sup> It also recognized the possible benefits of rehabilitation and treatment as an alternative to punishment.<sup>122</sup> One provision in the Act permitted federal prosecutors to offer any defendant under the age of eighteen to be prosecuted as a juvenile in a federal district court, contingent upon the juvenile’s acceptance of the special prosecution in writing.<sup>123</sup> However, following several Supreme Court decisions regarding juveniles, discussed in the following sections, the FJDA was amended by the Juvenile Justice and Delinquency Prevention Act of 1974

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<sup>119</sup> Tina Chen, Note, *The Sixth Amendment Right to a Jury Trial: Why is it a Fundamental Right for Adults and Not for Juveniles?*, 28 J. JUV. L. 1, 1 (2007).

<sup>120</sup> *Id.*

<sup>121</sup> *United States v. Torres*, 500 F.2d 944, 948 (2d Cir. 1974).

<sup>122</sup> *Id.*

<sup>123</sup> D. Ross Martin, Note, *Conspiratorial Children? The Intersection of the Federal Juvenile Delinquency Act and Federal Conspiracy Law*, 74 B.U. L. REV. 859, 860-61 (1994).

(“JJDPA”).<sup>124</sup> The JJDPA provided funding to state juvenile justice programs to reduce and prevent juvenile delinquency.<sup>125</sup> It also “re-structured the federal juvenile court system . . . by incorporating provisions borrowed from model acts and state statutory reform,” and altered the FJDA in four major ways.<sup>126</sup> First, the definition of a juvenile under federal law changed from any person under the age of eighteen at the time of indictment, to any person below the age of twenty-one who has committed an offense before reaching the age of eighteen.<sup>127</sup> Second, the JJDPA “required judicial approval before trying any juvenile as an adult.”<sup>128</sup> Third, the offenses for which a juvenile could be prosecuted as an adult were limited.<sup>129</sup> Fourth, the JJDPA permitted federal prosecution of juveniles only in instances where a state refused to prosecute the offense.<sup>130</sup> In 1984, the FJDA was again substantially modified by the Comprehensive Crime Control Act.<sup>131</sup> In what was thought of as an adequate response to violent juvenile conduct, the amendment added provisions that required the transfer of juveniles over sixteen, who were charged with certain violent felonies or serious narcotics offenses, to criminal prosecution in federal district court.<sup>132</sup>

Even before all its modifications, the FJDA was revolutionary in establishing a process through which juvenile crimes could be adjudicated that differed from that of adult criminal proceedings.<sup>133</sup> As opposed to New York State law, which currently has the general age of culpability and subsequent prosecution in adult criminal court set at sixteen,<sup>134</sup> the FJDA originally set the age of culpability at eight-

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<sup>124</sup> *Id.* at 861 n.15 (citing *In re Winship*, 397 U.S. 358 (1970); *In re Gault*, 387 U.S. 1 (1967); *Kent v. United States*, 383 U.S. 541 (1966)); see Williams S. Sessions & Fay M. Bracey, *A Synopsis of the Federal Juvenile Delinquency Act*, 14 ST. MARY’S L.J. 509, 509 (1983) (providing a general historical summary of the FJDA prior to the 1984 amendments).

<sup>125</sup> Justice Ed Kinkeade, *Appellate Juvenile Justice in Texas—It’s a Crime! Or Should Be*, 51 BAYLOR L. REV. 17, 26-27 (1999).

<sup>126</sup> Martin, *supra* note 123, at 861.

<sup>127</sup> *Id.* at 862.

<sup>128</sup> *Id.* at 861.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> Martin, *supra* note 123, at 862.

<sup>132</sup> *Id.* at 861-62, 865-66 (citations omitted).

<sup>133</sup> *Torres*, 500 F.2d at 949.

<sup>134</sup> N.Y. CRIM. PROC. LAW § 1.20.42 (McKinney 2011); N.Y. FAM. CT. ACT § 301.2(1) (McKinney 2010).

een.<sup>135</sup> Furthermore, since the passage of the FJDA, age eighteen has remained the general age of culpability for violations of federal law.<sup>136</sup>

### B. Due Process Rights of Juveniles

Despite its many amendments and attempts to uniformly provide fairness in juvenile proceedings, the FJDA did not encode all due process rights normally afforded adults to juveniles involved in federal adjudication procedures.<sup>137</sup> For example, as discussed later in this section, the Sixth Amendment usually affords adult defendants found in violation of federal law the right to a trial by jury; however, juveniles who are adjudicated in federal district court do not share the same guarantees afforded under this right.<sup>138</sup>

There are two key justifications for the variation of rights afforded to adults and juveniles. The first is that juveniles, whether charged and tried in federal or state court, are “proceeded against by information.”<sup>139</sup> The second rationale is that even where the conduct underlying a charge is criminal in nature, the procedure and resolution of juvenile delinquency proceedings are considered a hybrid of civil and criminal proceedings.<sup>140</sup>

Twenty years after the FJDA, but prior to any of its major amendments, in the *Application of Gault*,<sup>141</sup> the United States Supreme Court recognized that notwithstanding the differences between adult and juvenile adjudication, “[t]he Court has consistently made plain that adequate and timely notice is the fulcrum of due process, whatever the purposes of the proceeding.”<sup>142</sup> The Court explained that while the states have the inherent authority and discretion to implement policy that differs from that which is afforded at the federal level, one’s right to receive notice of the charges raised against him or her is “[s]o fundamental a protection [that it cannot] be spared here nor left to the ‘favor or grace’ of state authorities.”<sup>143</sup> The Court

<sup>135</sup> Kinkeade, *supra* note 125, at 26; Sessions & Bracey, *supra* note 124, at 516.

<sup>136</sup> See 18 U.S.C. § 5031 (2006).

<sup>137</sup> McKiever v. Pennsylvania, 403 U.S. 528, 547 (1971); Chen, *supra* note 119, at 1-2.

<sup>138</sup> McKiever, 403 U.S. at 547; Chen, *supra* note 119, at 1-2.

<sup>139</sup> Torres, 500 F.2d at 945.

<sup>140</sup> McKiever, 403 U.S. 528, 541 (citations omitted).

<sup>141</sup> 387 U.S. 1 (1967).

<sup>142</sup> *Id.* at 73.

<sup>143</sup> *Id.* (quoting Central of Georgia R.R. Co. v. Wright, 207 U.S. 127, 138 (1907)).



explained that in specific situations where a child's liberty is at stake, meaning there is a possibility that he or she "may be committed to a state institution . . . the Due Process Clause has a role to play."<sup>144</sup>

In *Gault*, fifteen-year old Gerald Gault, who was presently on a term of probation, was committed to a juvenile detention center in Arizona for six years after he made a lewd phone call to a woman.<sup>145</sup> An adult, age eighteen years or older, committing the same crime would have received a maximum punishment of "a fine of \$5 or \$50, or imprisonment" of up to two months.<sup>146</sup> At the time Gerald was picked up by an officer for the phone call, his parents were both at work.<sup>147</sup> The police officers failed to inform Mr. and Mrs. Gault that their son had been arrested and "taken to [a] Children's Detention Home."<sup>148</sup> Consequently, when Mrs. Gault arrived home from work, she sent her other son to look for Gerald.<sup>149</sup> The brother somehow learned where Gerald had been taken and arrested, and told his mother.<sup>150</sup> Only upon speaking with the arresting officer by going to the "detention home" did Mrs. Gault find out "why Jerry was there."<sup>151</sup> The officer also informed Mrs. Gault at the Detention Home that Gerald's first hearing would be the next day.<sup>152</sup>

In accordance with the Arizona Juvenile Code at the time, the arresting officer filed a general petition that failed to provide specific facts, but alleged that Gerald was a neglected and delinquent child.<sup>153</sup> Also in accordance with the then-existing Arizona Code, the petition was filed in the court, but never served upon Gerald or his parents.<sup>154</sup> At the initial hearing on June 9, 1964, the Gaults made their appearances.<sup>155</sup> However, the woman who allegedly received the lewd phone calls (the complainant) did not attend that hearing or any subsequent hearings and never spoke with the judge.<sup>156</sup> Furthermore, the

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<sup>144</sup> *Id.* at 13.

<sup>145</sup> *Id.* at 4.

<sup>146</sup> *Gault*, 387 U.S. at 29.

<sup>147</sup> *Id.* at 5.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Gault*, 387 U.S. at 5.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 31-32.

<sup>154</sup> *Id.* at 32.

<sup>155</sup> *Id.*

<sup>156</sup> *Gault*, 387 U.S. at 5, 7.

hearing was neither recorded and transcribed, nor documented in a “memorandum or record [reflecting] the substance of the proceedings.”<sup>157</sup> The judge questioned Gerald about the phone calls and Gerald apparently “admitted [to] making one of the lewd statements.”<sup>158</sup> At the end of the hearing, despite the judge’s adjournment of the proceedings by saying, “he would ‘think about it,’ ” Gerald was returned to the Detention Home instead of to his parents.<sup>159</sup> After being detained for approximately three or four days, Gerald was finally sent home with a handwritten note from the arresting officer informing Mrs. Gault of the date and time of a second delinquency hearing.<sup>160</sup> At this second hearing, the judge adjudicated Gerald a juvenile delinquent and committed him to the State Industrial School until he turned twenty-one.<sup>161</sup>

At the time, Arizona law prevented Gerald from appealing the juvenile court disposition to a higher court.<sup>162</sup> Therefore, the Gaults filed a petition for a writ of habeas corpus with the Supreme Court of Arizona, which was referred to the Superior Court.<sup>163</sup> The Superior Court dismissed the writ.<sup>164</sup> On review, the Arizona Supreme Court affirmed dismissal of the writ.<sup>165</sup>

The Gaults appealed to the United States Supreme Court, arguing that the Juvenile Code of Arizona violated the Due Process Clause of the Fourteenth Amendment because it lacked procedural safeguards and gave “the Juvenile Court virtually unlimited discretion.”<sup>166</sup> The Gaults further argued that the Arizona Code denied juveniles six basic rights: “1. Notice of charges; 2. Rights to counsel; 3. Right to confrontation and cross-examination; 4. Privilege against self-incrimination; 5. Right to a transcript of the proceedings; and 6. Right to appellate review.”<sup>167</sup>

In *Gault*, the United States Supreme Court relied on three of its previous decisions that touched upon constitutional questions of

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<sup>157</sup> *Id.* at 5.

<sup>158</sup> *Id.* at 6.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Gault*, 387 U.S. at 7.

<sup>162</sup> *Id.* at 8.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 9.

<sup>165</sup> *Id.* at 10.

<sup>166</sup> *Gault*, 387 U.S. at 10.

<sup>167</sup> *Id.*

due process as applied to various specific stages of state juvenile proceedings.<sup>168</sup> The three cases included *Haley v. Ohio*,<sup>169</sup> *Gallegos v. Colorado*,<sup>170</sup> and *Kent v. United States*.<sup>171</sup> *Haley* and *Gallegos* both involved the admissibility of confessions by juveniles and determined that the Fourteenth Amendment guaranteed the due process protection against the admissibility of coerced confessions by juveniles.<sup>172</sup>

In *Kent*, a juvenile challenged the constitutionality of a court's failure to provide a hearing to decide whether he should be tried in adult criminal court.<sup>173</sup> The Court in *Kent* "emphasized the necessity that 'the basic requirements of due process and fairness' [b]e satisfied in [hearings determining whether to waive a juvenile to adult criminal court]."<sup>174</sup> Additionally, the Court in *Kent* outlined that the

objectives [of the juvenile court system] are to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt and punishment. The State is *parens patriae* rather than prosecuting attorney and judge. But the admonition to function in a "parental" relationship is not an invitation to procedural arbitrariness.<sup>175</sup>

Relying on the above general principles, observing that all persons, including those under eighteen should enjoy protections guaranteed by the Due Process Clause, the Court in *Gault* determined that juveniles have a right to notice of charges,<sup>176</sup> to counsel,<sup>177</sup> to confrontation and cross-examination of witnesses, and to the privilege against self-incrimination.<sup>178</sup> In fact, the Court, in its analysis of the Arizona Code, lauded the New York Family Court Act as an example of a statute that successfully included procedural due process guarantees to juveniles, such as the right to counsel and protection

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<sup>168</sup> *Id.* at 12-13.

<sup>169</sup> 332 U.S. 596 (1948).

<sup>170</sup> 370 U.S. 49 (1962).

<sup>171</sup> 383 U.S. 541 (1966).

<sup>172</sup> *Gault*, 387 U.S. at 12-13.

<sup>173</sup> *Id.* at 12.

<sup>174</sup> *Id.* at 12 (quoting *Kent*, 383 U.S. at 553).

<sup>175</sup> *Kent*, 383 U.S. at 554-55.

<sup>176</sup> *Gault*, 387 U.S. at 33-34.

<sup>177</sup> *Id.* at 42.

<sup>178</sup> *Id.* at 57.

against self-incrimination.<sup>179</sup> However, the Court also called into question the merits of a separate juvenile justice system—citing statistical studies representing a failure to deter recidivism and rehabilitate juveniles.<sup>180</sup> In turn, the Court explained that should juveniles remain adjudicated separately from adults, a juvenile court’s well intentioned model of *parens patriae* must not overshadow constitutional guarantees, opining that:

Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure . . . The absence of substantive standards has not necessarily meant that children receive careful, compassionate, individualized treatment. The absence of procedural rules based upon constitutional principle has not always produced fair, efficient, and effective procedures. Departures from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness . . . Due process of law is the primary and indispensable foundation of individual freedom . . . [T]he observance of due process standards, intelligently and not ruthlessly administered, will not compel the States to abandon or displace any of the substantive benefits of the juvenile process.<sup>181</sup>

Keeping in mind this underlying concept, the Court in *Gault* established that in order to comply with the Constitution, state law must acknowledge that children, much like adults, have a right to timely notice of charges,<sup>182</sup> a right to counsel,<sup>183</sup> a right to confrontation and cross-examination,<sup>184</sup> and a right to invoke the privilege against self-

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<sup>179</sup> *Id.* at 40-41, 48 (“In New York . . . the recently enacted Family Court Act provides that the juvenile and his parents must be advised at the start of the hearing of his right to remain silent . . . police must [also] attempt to communicate with . . . parents before questioning [a juvenile], and that absent ‘special circumstances’ a confession may not be obtained from a child prior to notifying his parents or relatives and releasing the child either to them or to the Family Court.”).

<sup>180</sup> *Id.* at 21-22.

<sup>181</sup> *Gault*, 387 U.S. at 18-21.

<sup>182</sup> *Id.* at 33-34.

<sup>183</sup> *Id.* at 41.

<sup>184</sup> *Id.* at 57.

incrimination.<sup>185</sup> Furthermore, although the Court did not touch upon other rights such as appellate review, it reversed the Supreme Court of Arizona and remanded Gerald Gault's case for further proceedings in juvenile court consistent with *Gault*.<sup>186</sup> Thus, the Court in *Gault* recognized that safeguarding children's due process rights would actually aid children, rejecting the notion that affording those rights could negatively affect the questionable benefits provided by the juvenile court *parens patriae* approach.<sup>187</sup>

### C. Right to Trial by Jury

In the wake of *Gault*, courts became more accepting of the benefits of affording limited due process rights to children, while also becoming more cognizant of the potential for success in state juvenile justice systems.<sup>188</sup> Furthermore, following *Gault*, the Supreme Court affirmed other fundamental rights of juveniles, such as the right to the standard of proof of delinquency beyond a reasonable doubt.<sup>189</sup> However, in *McKiever v. Pennsylvania*,<sup>190</sup> the Court determined that the fundamental right to trial by jury in state court afforded to adults was not necessarily fundamental to children in state juvenile courts because entitling children to a jury trial could infringe upon the unique, rehabilitative goals of those courts.<sup>191</sup> Refraining from conclusively labeling juvenile court proceedings as either "criminal" or "civil," the Court reasoned . . . [would] remake the juvenile proceeding into a fully adversary process and . . . put an effective end to . . . the idealistic prospect of an intimate, informal protective proceeding."<sup>192</sup> Relying on statistical studies, the Court assessed the "juvenile con-

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<sup>185</sup> *Id.* at 55; *see Gault*, 387 U.S. at 47 (observing that the Fifth Amendment, by its express language is an "unequivocal protection [] without exception", the Court commented that "[i]t would indeed be surprising if the privilege against self-incrimination were available to hardened criminals but not to children").

<sup>186</sup> *Id.* at 59.

<sup>187</sup> *Id.* at 21.

<sup>188</sup> *See, e.g., McKiever*, 403 U.S. 528 (1971); *In re Winship*, 397 U.S. at 366; *United States v. Torres*, 500 F.2d 944 (1974).

<sup>189</sup> *Winship*, 397 U.S. at 368.

<sup>190</sup> 403 U.S. 528 (1971).

<sup>191</sup> *McKiever*, 403 U.S. at 540 (indicating that the "addition of the trial by jury 'might well destroy the traditional character of juvenile proceedings.'" (quoting *In re Terry*, 265 A.2d 350, 355 (Pa. 1970))).

<sup>192</sup> *Id.* at 541, 545.

cept” as a “disappointment[] of grave dimensions” because it failed to deliver on its promised rehabilitative goals.<sup>193</sup> Additionally, the Court recognized that a separate juvenile system fails because its success “depends on the availability of resources, on the interest and commitment of the public, on willingness to learn, and on understanding as to cause and effect and cure.”<sup>194</sup> Nevertheless, the Court reasoned that in the unique field of creating a special court to rehabilitate children and prevent recidivism, experimentation is the key to success, and “imposing the jury trial” would impede upon that experimentation.<sup>195</sup> In declining to declare a fundamental right to a jury trial for juveniles, the Court left room for the States to decide whether to embrace such a right.<sup>196</sup> Ultimately, however, the Court cautioned against applying all criminal procedures to juvenile court proceedings, explaining that “[i]f the formalities of the criminal adjudicative process are to be superimposed upon the juvenile court system, there is little need for its separate existence. Perhaps that ultimate disillusionment will come one day, but for the moment we are disinclined to give impetus to it.”<sup>197</sup>

In *United States v. Torres*,<sup>198</sup> the United States Court of Appeals for the Second Circuit applied the precedent established in *McKiever*, concluding that juveniles were not entitled to a jury trial even where prosecuted under the FJDA.<sup>199</sup> Torres, a sixteen year old, was charged with creating an unauthorized photographic negative of a One Dollar Bill.<sup>200</sup> On appeal, Torres argued that sections 5031 through 5037 of the FJDA violated the right to trial by jury under the Sixth Amendment to the United States Constitution.<sup>201</sup> Torres argued that the Act was unconstitutional because it forced a juvenile to make the choice between being tried as a juvenile and waiving the right to a jury trial, or being tried as an adult with the right to a jury trial.<sup>202</sup> Nevertheless, relying on *McKeiver*, the Court of Appeals upheld the FJDA as constitutional, observing in part that a juvenile proceeding

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<sup>193</sup> *Id.* at 547.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *McKiever*, 403 U.S. at 547.

<sup>197</sup> *Id.* at 551.

<sup>198</sup> 500 F.2d 944 (1974).

<sup>199</sup> *Torres*, 500 F.2d at 949.

<sup>200</sup> *Id.* at 945.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 946.

does not fall within the scope of the criminal prosecution proceedings that are protected by the Sixth Amendment.<sup>203</sup> In its reasoning, the court reiterated the principals of *McKiever*, recognizing the need for the progress of juvenile courts as well as the FJDA's commendable objectives to rehabilitate and "protect the wayward youth from stigma and other consequences of a criminal conviction."<sup>204</sup> In fact, articulating that affording the right to trial by jury to children could possibly deter from the Act's commendable objectives, the Second Circuit explained:

[T]he Juvenile court system providing intimate, informal, protective and paternalistic procedure for the juvenile accused of wrongdoing, with rehabilitation rather than punishment as its goal, still ha[s] promise. To impose on that system trial by jury as a matter of right would be a regressive and undesirable step. It would undermine the Juvenile Court's ability to carry out its praiseworthy functions and goals and "would tend once again to place the juvenile squarely in the routine of the criminal process."<sup>205</sup>

Ultimately, the Court of Appeals extended *McKiever*, upheld the FJDA, and concluded that the Sixth Amendment did not, for the purposes of jury trial, extend to juvenile proceedings in federal court.<sup>206</sup>

#### D. Juvenile Culpability and Punishment

In *Thompson v. Oklahoma*,<sup>207</sup> a fifteen year old convicted of first-degree murder was sentenced to death.<sup>208</sup> Determining that it was cruel and unusual to sentence anyone under the age of sixteen to death, the United States Supreme Court reversed the sentence because it violated the Eighth Amendment.<sup>209</sup> The Court considered the fact that all states allowed for juvenile court jurisdiction over juveniles up to sixteen years of age, and cited several consistent legal lim-

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<sup>203</sup> *Id.* at 949.

<sup>204</sup> *Torres*, 500 F.2d at 948.

<sup>205</sup> *Id.* at 947 (quoting *McKiever*, 403 U.S. at 547).

<sup>206</sup> *Id.* at 948.

<sup>207</sup> 487 U.S. 815 (1988).

<sup>208</sup> *Thompson*, 487 U.S. at 818, 819.

<sup>209</sup> *Id.* at 838.

its that divided children and adults.<sup>210</sup> Further, the Court acknowledged “that the normal fifteen year old is just not prepared to assume the full responsibilities of an adult.”<sup>211</sup> In reaching its decision, the Court also recognized that under the Constitution “punishment should be directly related to the personal culpability of the criminal defendant.”<sup>212</sup> The Court described youth as “a time and condition of life” resulting in minors possessing a lessened capacity for perspective and good judgment.<sup>213</sup> Thus, despite youths’ ability to cause irreparable harm, the Court acknowledged that younger people, “have less capacity to control their conduct” and conceive of long-term consequences.<sup>214</sup>

Most adults, having been teenagers before, understand the seemingly obvious, yet, important character differences between children and adults that the Court in *Thompson* emphasized and used to justify juveniles’ limited capacity for criminal responsibility. However, in what almost seems like an excuse for inexcusable individual behavior, the Court unloaded the culpability of youths onto society as a whole.<sup>215</sup> The Court reasoned that criminal acts by juveniles “represent a failure of family, school, and the social system, which share responsibility for the development of America’s youth.”<sup>216</sup>

Approximately fifteen years following *Thompson*, a divided Court raised similar Eighth and Fourteenth Amendment issues regarding the death penalty and juveniles in *Roper v. Simmons*.<sup>217</sup> Upon careful consideration for the concerns in this context, the Court raised the constitutional age limit of capital punishment from sixteen to eighteen years old.<sup>218</sup> This time, the Court likened the condition of adolescence to that of mental retardation because of their shared abil-

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<sup>210</sup> *Id.* at 824-25 (pointing to legal lines drawn between children and adults because a certain level of responsibility is needed to participate in regulated activities, such as voting, gambling, serving on a jury, marrying without parental consent, and purchasing alcohol and tobacco products).

<sup>211</sup> *Id.* at 825.

<sup>212</sup> *Id.* at 834 (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (internal quotation marks omitted)).

<sup>213</sup> *Thompson*, 487 U.S. at 834 (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982) (internal quotation marks omitted)).

<sup>214</sup> *Id.* (quoting *Eddings*, 455 U.S. at 115 n.11) (internal quotation marks omitted)).

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> 543 U.S. 551 (2005).

<sup>218</sup> *Id.* at 575.



ity to lessen legal standards of criminal culpability.<sup>219</sup> Notably, the Court recognized the arbitrariness of setting the age at eighteen and further explained why juveniles should not be considered as culpable as adults.<sup>220</sup> First, juveniles lack maturity which can lead to reckless behavior and ill-considered actions.<sup>221</sup> Second, “juveniles are more vulnerable or susceptible to negative influences and outside pressures including peer pressure,”<sup>222</sup> and therefore, have less ability to “extricate themselves from . . . criminogenic setting[s].”<sup>223</sup> Third, as opposed to adults, juveniles have yet to fully develop a fixed character.<sup>224</sup> Consequently, there is a general belief that juveniles may still be reformed, despite committing a heinous crime.<sup>225</sup>

More recently, in *Graham v. Florida*,<sup>226</sup> the Court expanded the application of the *Roper* and *Thompson* concepts of juveniles’ rehabilitative nature.<sup>227</sup> In *Graham*, the Court concluded that the Eighth Amendment protects juveniles, convicted of all crimes except murder, from being sentenced to life without parole (“LWOP”).<sup>228</sup> Given the age of a juvenile, life spent in prison is much longer on average compared to that of an adult, and therefore, cruel and unusual.<sup>229</sup> In its decision, the Court outlined why sentencing a juvenile to LWOP, other than with a conviction of homicide, lacks sufficient penological justification.<sup>230</sup> First, retribution does not justify LWOP because juveniles are no longer considered as culpable as adults and LWOP is the highest punishment a juvenile can constitutionally receive.<sup>231</sup> Second, LWOP is not justified as a deterrent for juvenile

<sup>219</sup> *Id.* at 563 (“Mental retardation . . . diminishes personal culpability even if the offender can distinguish right from wrong.” (citing *Atkins v. Virginia*, 536 U.S. 304, 318 (2002))).

<sup>220</sup> *Id.* at 574 (“The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is . . . the age at which the line for death eligibility ought to rest.”).

<sup>221</sup> *Id.* at 569.

<sup>222</sup> *Roper*, 543 U.S. at 569 (citing *Eddings*, 455 U.S. at 115).

<sup>223</sup> *Id.* (internal quotation marks and citations omitted).

<sup>224</sup> *Id.* 543 U.S. at 570.

<sup>225</sup> *Id.* (observing “[t]he reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character”).

<sup>226</sup> 130 S. Ct. 2011 (2010).

<sup>227</sup> *Graham*, 130 S. Ct. at 2029-30, 2038.

<sup>228</sup> *Id.* at 2034.

<sup>229</sup> *Id.* at 2028.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.* (stating that “[t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender” (quoting *Tison v. Ari-*

crime because “[juveniles] are less likely to take a possible punishment into consideration when making decisions,” especially when the punishment is rare.<sup>232</sup> Third, although recognized as a prevention of recidivism, as well as a promotion of public safety, incapacitation of juveniles for life categorically denies their previously recognized malleable, rehabilitative nature.<sup>233</sup> Lastly, LWOP does not justify the goal of rehabilitation through imprisonment because

[t]he penalty forswears altogether the rehabilitative ideal. By denying the defendant the right to reenter the community, the State makes an irrevocable judgment about that person’s value and place in society. This judgment is not appropriate in light of a juvenile nonhomicide offender’s capacity for change and limited moral culpability.<sup>234</sup>

Most recently, the Court in *Miller v. Alabama*<sup>235</sup> again recognized the condition of youth as a limitation on culpability.<sup>236</sup> In *Miller*, two fourteen year old defendants from different states were granted certiorari and challenged their respective state’s mandatory LWOP sentences.<sup>237</sup> Both teenagers were tried as adults and convicted of murder.<sup>238</sup> Reiterating the justifications set forth by the Court in both *Roper* and *Graham*, the Court confirmed “what ‘any parent knows’ ” and what social and scientific studies have demonstrated—that juveniles are less blameworthy because they are reckless and impulsive, have an increased vulnerability to their environment, and are inherently less fixed in character than the average adult.<sup>239</sup> Thus, the Court in *Miller* concluded that imposing a mandatory sentence of LWOP on juveniles as a less culpable class is violative of the Eighth

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zona, 481 U.S. 137, 149 (1987) (internal quotation marks omitted)).

<sup>232</sup> *Graham*, 130 S. Ct. at 2028-29.

<sup>233</sup> *See id.* at 2029; *see also* *Workman v. Commonwealth*, 429 S.W.2d 374, 378 (Ky. 1968) (declaring a belief “that incorrigibility is inconsistent with youth [and] it is impossible to make a judgment that a fourteen year old youth, no matter how bad, will remain incorrigible for the rest of his life”).

<sup>234</sup> *Graham*, 130 S. Ct. at 2029-30 (reasoning that LWOP defendants are not provided with vocational or other services that are rehabilitative in nature, to which juveniles are the most receptive).

<sup>235</sup> 132 S. Ct. 2455 (2012).

<sup>236</sup> *Miller*, 132 S. Ct. at 2463-64.

<sup>237</sup> *Id.* at 2460.

<sup>238</sup> *Id.*

<sup>239</sup> *Id.* at 2464 (quoting *Roper*, 543 U.S. at 569).

Amendment because no matter the crime, the severity of the penalty will always be disproportionate.<sup>240</sup>

Although Miller and Jackson were both fourteen years old and had similar convictions, sentences, and upbringings,<sup>241</sup> each teenager's level of involvement in his respective crime was diametric.<sup>242</sup> Jackson, from Arkansas, was charged in 1999 with capital felony murder and aggravated robbery, and sentenced to LWOP.<sup>243</sup> The Court noted that it was questionable whether Jackson played an active role in the robbery, or simply became caught up in circumstances beyond his control.<sup>244</sup> While Jackson walked to the video store with two other boys, he learned that one boy had a shot-gun under his coat.<sup>245</sup> Upon arrival at the store, Jackson waited outside while the other boys entered.<sup>246</sup> Jackson then entered the store and witnessed the boy with the shotgun demanding money from the clerk.<sup>247</sup> The parties at trial disputed whether Jackson "told his friends, 'I thought you all was playing' " or warned the clerk by stating, "[W]e ain't playin'." <sup>248</sup>

Unfortunately for Jackson, under Arkansas law prosecutors are given discretion to charge juveniles as adults for certain violent crimes, and this particular prosecutor exercised that discretion.<sup>249</sup> Before his conviction, Jackson made a motion to transfer his case to juvenile court.<sup>250</sup> However, the Court denied Jackson's motion in light of Jackson's arrest history for shoplifting and car theft, the results of a psychiatric examination, and the "alleged facts of [Jackson's] crime."<sup>251</sup>

Miller, from Alabama, grew up with a drug-addict mother, and attempted suicide at age six.<sup>252</sup> One evening in 2003, Miller smoked marihuana and played drinking games with his friend, Smith,

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<sup>240</sup> *Id.* at 2469.

<sup>241</sup> *Miller*, 132 S. Ct. at 2462.

<sup>242</sup> *Id.* at 2468-69.

<sup>243</sup> *Id.* at 2461.

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *Miller*, 132 S. Ct. at 2461.

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> *Miller*, 132 S. Ct. at 2461.

<sup>252</sup> *Id.* at 2462.

and Miller's mother's drug dealer, Cannon.<sup>253</sup> Later, when Cannon passed out, Miller stole his wallet.<sup>254</sup> Upon catching Miller, Cannon grabbed Miller.<sup>255</sup> Then, Miller seized a baseball bat and beat Cannon continuously.<sup>256</sup> Before Miller delivered the last blow to incapacitate Cannon, he put a sheet over Cannon's face and said, "I am God, I've come to take your life."<sup>257</sup> Then, along with Smith, Miller attempted to cover up the evidence by starting a fire.<sup>258</sup> Cannon ultimately died from the injuries caused by the bat and smoke inhalation.<sup>259</sup>

Alabama juvenile law differs slightly from Arkansas law.<sup>260</sup> Arkansas law gave deference to the prosecution to charge Jackson as an adult subject to the juvenile's petition for a transfer to juvenile court,<sup>261</sup> whereas Alabama law required that Miller automatically be adjudicated as a juvenile.<sup>262</sup> Furthermore, in Alabama, when certain crimes are alleged to have occurred, the District Attorney may seek a removal from juvenile court to criminal court.<sup>263</sup> In light of Miller's apparent "mental maturity" and prior juvenile offenses of truancy and criminal mischief, as well as the violent "nature of the [alleged] crime," the Alabama Court of Criminal Appeals affirmed the removal.<sup>264</sup>

In overturning both Miller and Jackson's sentences, and concluding that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders," the Court expanded the precedent set by *Roper* and *Graham*, heavily relying on scientific studies.<sup>265</sup> The Court did make clear, however, that in *Miller* it was "not categorically barr[ing] a

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<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> *Miller*, 132 S. Ct. at 2462.

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> *Miller*, 132 S. Ct. at 2461.

<sup>262</sup> *Id.* at 2462.

<sup>263</sup> *Id.*

<sup>264</sup> *Id.* at 2463.

<sup>265</sup> *Id.* at 2469; *see Miller*, 132 S. Ct. at 2464-65 (stating that previous scientific "findings—of transient rashness, proclivity for risk, and inability to assess consequences—both lessened a child's 'moral culpability' and enhanced the prospect that, as the years go by and neurological development occurs, his deficiencies will be reformed").

penalty for a class of offender's . . . [i]nstead, [the Court's ruling] mandate[d] only that a sentence follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty.”<sup>266</sup>

### III. JUVENILE TREATMENT IN NEW YORK STATE

Federal precedent regarding juveniles reveals how science and statistics have influenced the United States Supreme Court decisional law, especially when the science confirms our own common intuition.<sup>267</sup> Over the past fifty years courts have gone from one extreme to another in the treatment of juveniles. Before *Gault*, a young child could be detained without due process because he made a lewd phone call.<sup>268</sup> On the other side of the spectrum, presently, children are definitively recognized as less culpable and the law has come to their aid by giving them, in some ways, more rights than adults.<sup>269</sup> Over the years, similar policy concerns that have influenced the federal courts have also influenced New York State in its process and procedure used to adjudicate juveniles. Specifically, in light of *Miller*, the New York State Legislature has sought to raise the age of culpability by either providing the family court with automatic jurisdiction over juvenile delinquency proceedings for sixteen and seventeen year old, non-violent offenders, or by creating special “youth divisions” for their prosecution.<sup>270</sup>

#### A. Evolution of Family Courts and Current Designations Under the Family Court Act

In conjunction with the Penal Law, Article 3 of the Family Court Act regulates juvenile delinquency proceedings and dispositions.<sup>271</sup> The New York State Family Court Act (“Family Court

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<sup>266</sup> *Id.* at 2471.

<sup>267</sup> See generally *Gault*, 387 U.S. 1 (relying on statistics of recidivism to question the merits of a separate juvenile court system); *Miller*, 132 S. Ct. 2455 (citing several scientific psychological and brain science studies relied on in *Roper* and *Graham*).

<sup>268</sup> See generally *Gault*, 387 U.S. 1.

<sup>269</sup> See generally *Miller*, 132 S. Ct. 2455; *Graham*, 130 S. Ct. 2011; *Roper*, 543 U.S. 551.

<sup>270</sup> See S.B. 7394, 2012 Leg., 235th Sess. (N.Y. 2012) available at <http://open.nysenate.gov/legislation/bill/S7394-2011>; S.B. 7020, 2012 Leg., 235th Sess. (N.Y. 2012) available at <http://open.nysenate.gov/legislation/bill/S7020-2011>.

<sup>271</sup> N.Y. FAM. CT. ACT, Art. 3 (McKinney 2012).

Act”) was enacted in 1962.<sup>272</sup> Almost a century and a half prior to its enactment, various programs in New York State were developed to handle youths in a more rehabilitative fashion, and therefore, differently than their adult counterparts.<sup>273</sup> One of the first efforts to separate juvenile offenders from adult criminals included the creation of the New York House of Refuge, which was authorized to receive juveniles upon their judicial commitment.<sup>274</sup> Several decades later, the New York State Legislature enacted the “Disorderly Child” Act.<sup>275</sup> That Act defined disorderly children as people “under the age of sixteen . . . deserting their homes without good and sufficient cause, or keeping company with dissolute or vicious persons against the lawful command of their [parent] . . . or other persons standing in the place of a parent.”<sup>276</sup> As the nineteenth century came to a close, state child welfare agencies surged in urban New York areas, identifying a greater need for specialized courts to handle familial issues, including child prosecutions.<sup>277</sup> Thus, branches of criminal courts, called Children’s Courts Parts, began to spring up in Manhattan and the Bronx.<sup>278</sup> By the 1920s, the Children’s Court Act authorized the creation of similar courts in other counties across New York State to specifically handle cases dealing with juvenile delinquency and child neglect.<sup>279</sup> Eventually, in 1962, the Family Court Act created a uniform court system, granting jurisdiction to family courts to handle cases involving “every symptom of familial dysfunction,” including, but not limited to child neglect, juvenile delinquency, intra-family violence, and paternity suits.<sup>280</sup> The Act “establish[ed] procedures in accordance with due process of law,” seeking to balance “the needs and best interests of [juveniles with] the need for protection of the

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<sup>272</sup> Merrill Sobie, *No Longer A ‘Judicial Stepchild’*, N.Y.L.J. (Oct. 12, 2012), <http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202574588751&slreturn=20130308234848>.

<sup>273</sup> Rose M. Charles & Jennifer V. Zuccarelli, Note, *Serving No “Purpose”*: *The Double-Edged Sword of New York’s Juvenile Offender Law*, 12 ST. JOHN’S J. OF LEGAL COMMENTARY 721, 726-27 (1997) (providing an in depth history of juvenile treatment in the court system in New York).

<sup>274</sup> Merrill Sobie, Practice Commentary, N.Y. FAM. CT. ACT. § 111 (McKinney 2012).

<sup>275</sup> *Id.*

<sup>276</sup> *Id.*

<sup>277</sup> *Id.*

<sup>278</sup> *Id.*

<sup>279</sup> Sobie, *supra* note 274.

<sup>280</sup> *Id.*

community.”<sup>281</sup>

Under the Family Court Act, if it is proven that a person under sixteen committed an act, which if committed by an adult would be considered a non-violent crime, he or she is automatically adjudicated as a juvenile delinquent and afforded certain protections within the Family Court system.<sup>282</sup> These protections include a lack of mandatory sentences, an option of complete disposition of a case upon probation, or a sealed record.<sup>283</sup>

Currently in New York State, a juvenile is defined as a person between the ages of seven and under the age of sixteen and over whom the family court has jurisdiction.<sup>284</sup> Unlike in the criminal justice system in which adults are tried, the family courts hold fact-finding hearings instead of trials and dispositional hearings instead of sentencing hearings.<sup>285</sup> Furthermore, instead of a determination of guilt or innocence, a juvenile is adjudged a juvenile delinquent and put under supervision, treatment, or confinement by the court.<sup>286</sup>

Youths in New York, ages sixteen and up to nineteen years old, are considered as criminally culpable as adults as demonstrated by their automatic arraignment and adjudication in criminal court.<sup>287</sup> However, depending on consideration of certain pertinent factors such as a lack of prior convictions or arrests, a positive reputation in the community, and a demonstrated respect for the law and society,<sup>288</sup> upon petition, those young defendants may be adjudged a youthful offender.<sup>289</sup> Consequently, a youthful offender receives a more lenient sentence, and the possibility of a sealed record, regardless of the crime.<sup>290</sup>

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<sup>281</sup> N.Y. FAM. CT. ACT § 301.1 (McKinney 2012).

<sup>282</sup> N.Y. FAM. CT. ACT § 375.1 (McKinney 2010).

<sup>283</sup> *Id.* (stating that if the juvenile proceeding is terminated in favor of the juvenile, all records relating to the prosecution, arrest, and probation will be sealed).

<sup>284</sup> N.Y. FAM. CT. ACT § 301.2 (McKinney 2010).

<sup>285</sup> *Id.*

<sup>286</sup> *Id.*

<sup>287</sup> N.Y. CRIM. PROC. LAW § 720.10 (McKinney 2012).

<sup>288</sup> *People v. Cruickshank*, 484 N.Y.S.2d 328, 333-34 (3d Dep’t 1985) (stating that “factors to be considered include the gravity of the crime, mitigating circumstances, prior criminal record, prior acts of violence . . . level of cooperation with authorities, defendant’s attitude toward society and respect for the law, and the prospects for rehabilitation and hope for a future constructive life”).

<sup>289</sup> N.Y. CRIM. PROC. LAW § 720.20 (McKinney 2012).

<sup>290</sup> William C. Donnino, Practice Commentary, N.Y. PENAL LAW § 60.02 (McKinney 2012).

## B. Juvenile Offender Status

Originally, the Family Court Act authorized jurisdiction over all children, fifteen years of age and younger, who had been charged with an adult equivalent crime.<sup>291</sup> However, in 1978, the passage of the Juvenile Offender Act (“JOA”) removed family court jurisdiction over thirteen through fifteen year olds, charged with certain violent crimes, labeled them “juvenile offenders,” and subjected them to prosecution and sentencing under the Penal Law as adults.<sup>292</sup>

The JOA was a knee-jerk legislative response to an infamous case involving a fifteen year old defendant, Willie Bosket.<sup>293</sup> Bosket was adjudicated in family court, because of his youthful status, and was sentenced to only five years in prison for committing a double-homicide.<sup>294</sup> Inferring that some children were beyond repair, and thus, deserving of adult-like punishment for adult crimes, the JOA carved out certain exceptions to the prosecution of juveniles under the age of sixteen.<sup>295</sup> These enumerated exceptions, or designated felony acts, are the most violent, malicious acts, such as, murder, rape, sexual abuse, arson, kidnapping, and robbery in the first degree.<sup>296</sup> As a result, in “a reversal of 150 years of American legal history,” the JOA allowed for child violent offenders, otherwise categorized as juveniles, to suffer the consequences of criminal prosecution.<sup>297</sup>

A little over a decade after the JOA became law, the Court of Appeals of New York decided *People v. Roe*.<sup>298</sup> The facts before the Court and resolution of the case in *Roe* illustrate the unintended consequences resulting from a law enacted in the wake of fear and con-

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<sup>291</sup> Sobie, *supra* note 274.

<sup>292</sup> *Id.*

<sup>293</sup> See *People v. Roe*, 542 N.E.2d 610, 620 (N.Y. 1989); see also, Travis Johnson, *All Children Are Created Equal Too: The Disparate Treatment of Youth Rights in America*, 15 CUNY L. REV. 173, 182 (2011) (providing some insight into Willie Bosket’s upbringing and treatment within the courts); David S. Tanenhaus & Steven A. Drizin, “Owing to the Extreme Youth of the Accused”: *The Changing Legal Response to Juvenile Homicide*, 92 CRIM. L. & CRIMINOLOGY 641, 668 (2002) (explaining the political climate encompassing Willie Bosket’s case including the fact that Governor Hugh Carey signed the JOA into law two days following Bosket’s sentencing).

<sup>294</sup> Tanenhaus & Drizin, *supra* note 293, at 668.

<sup>295</sup> *Roe*, 542 N.E.2d at 620.

<sup>296</sup> N.Y. FAM. CT. ACT § 301.2 (McKinney 2010).

<sup>297</sup> Johnson, *supra* note 293.

<sup>298</sup> 542 N.E.2d 610 (N.Y. 1989).



troversy.<sup>299</sup> Just six months short of his sixteenth birthday, Steven Roe was convicted of second degree murder, specifically depraved indifference murder under Penal Law Section 125.25 (2).<sup>300</sup> One idle summer afternoon, Roe and two of his friends decided to play a game of “Polish Roulette” with a 12-gauge shotgun.<sup>301</sup> Roe incorrectly believed the first two chambers in his gun held “dummy” ammunition, where in fact they held live ammunition.<sup>302</sup> Consequently, Roe accidentally shot and killed his best friend’s thirteen year old brother.<sup>303</sup> Thus, a senseless game amongst adolescent young boys quickly morphed into an irreversible murder.<sup>304</sup>

On appeal, the only issue in *Roe* was whether there was sufficient evidence to establish Roe’s guilt for depraved indifference murder.<sup>305</sup> Upholding Roe’s conviction, the court explained the *mens rea* analysis of depraved indifference, as being “an objective assessment of the degree of risk presented by defendant’s reckless conduct.”<sup>306</sup> Instead of assessing the facts as revealing an impressionable, young defendant, unfamiliar with guns, the court characterized Roe as a calculated criminal who should have known better than to participate in “a macabre game of chance where the victim’s fate—life or death—may be decreed by the flip of a coin or a roll of a die.”<sup>307</sup> More notably, the court reasoned that the conviction fit the crime, despite the boys young age, and immediate remorse, opining that “[t]he sheer enormity of the act—putting another’s life at such grave peril in this fashion—is not diminished because the sponsor of the game is a youth of 15.”<sup>308</sup>

In an ardent dissent, Judge Bellacosa criticized the JOA and its effect as categorizing an obviously remorseful, yet reckless juvenile with cold-blooded, intentional, premeditated killers.<sup>309</sup> Judge Bellacosa explained:

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<sup>299</sup> *Roe*, 542 N.E.2d at 620 (Bellacosa, J., dissenting).

<sup>300</sup> *Id.* at 610 (majority opinion).

<sup>301</sup> *Id.* at 616-17 (Bellacosa, J., dissenting).

<sup>302</sup> *Id.* at 610 (majority opinion).

<sup>303</sup> *Id.* at 616 (Bellacosa, J., dissenting).

<sup>304</sup> *Roe*, 542 N.E.2d at 616.

<sup>305</sup> *Id.* at 610-11 (majority opinion).

<sup>306</sup> *Id.* at 611 (quoting *People v. Register*, 457 N.E.2d 704, 707 (N.Y. 1983), *overruled by* *People v. Feingold*, 852 N.E.2d 1163 (2006) (internal quotation marks omitted)).

<sup>307</sup> *Id.* at 614.

<sup>308</sup> *Id.*

<sup>309</sup> *Roe*, 542 N.E.2d at 615 (Bellacosa, J., dissenting).

From common-law times to modern penal code days, the tragic incident at the heart of this case has qualified as the paradigmatic manslaughter with recklessness as the culpable mental state or *mens rea*. Indeed, until recently, persons under 16 years of age in this State were legal infants incapable of being convicted of *any* crime as an adult, no less of the prime, most heinous crime punishable under our law—murder. This case represents an enormous penological regression by combining the juvenile offender *exception* with the depraved indifference homicide *exception* and giving birth to this routinized homogenous murder category.<sup>310</sup>

In addition to criticizing the JOA as regressive, Judge Bellacosa critiqued the statutory scheme as improperly subjecting juveniles like Roe to “a kind of double bind—creating an opposite anomaly from that which precipitated the juvenile offender legislation—the escape of then-juvenile delinquent Willie Bosket from the clutches of the adult criminal law.”<sup>311</sup> Additionally, in effect, Judge Bellacosa echoed federal precedent, such as *Thompson* (decided only a few months prior) by positing that charging, trying, convicting, and punishing a fifteen year old so that he may “live the rest of his life with the scarlet condemnation of ‘depraved murderer’ ”<sup>312</sup> distorted the principle of proportionality.<sup>313</sup> Further, Judge Bellacosa concluded his dissent with a harsh reminder of the consequences of adjudicating juveniles as adults under the rigidity provided by statutes, explaining that “[i]n the eyes of the law all the slayers are now made alike, when the perpetrators themselves know and our best instincts and intelligence tell us, too, that they are very different. Justice is disfigured by the punishment of offenders so homogeneously and, yet, so disproportionately.”<sup>314</sup>

### C. Proposed Legislation

Despite the criticisms of the JOA even soon after its enact-

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<sup>310</sup> *Id.*

<sup>311</sup> *Id.* at 620.

<sup>312</sup> *Id.* at 617.

<sup>313</sup> *Id.* at 620.

<sup>314</sup> *Roe*, 542 N.E.2d at 620.

ment, it remains in effect today. Moreover, New York State courts remain the only state courts that automatically adjudicate all youthful offenders in adult criminal court.<sup>315</sup> Although taking variant approaches, every other state employs an effective transfer procedure for even the most violent youths that is used to evaluate whether the particular youth, the circumstances underlying the offense, and the nature and severity of the charges imposed, justify adjudication in criminal court.<sup>316</sup> Furthermore, notwithstanding the nature of the offense, New York State treats every sixteen year old juvenile alike, “adher[ing] to the early twentieth century age limitation” as a magical number to hold juveniles accountable for their criminal culpability, subjecting them to the same or similar punishment that would otherwise be imposed upon an adult offender.<sup>317</sup>

Despite the influential role that political standpoints tend to have on state legislatures, New York State remains tough on youths, arresting approximately 50,000 youths between sixteen and seventeen years old each year.<sup>318</sup> Moreover, New York State and North Carolina are the only states that presently recognize age sixteen as the appropriate age to subject a juvenile to the jurisdiction of the criminal courts.<sup>319</sup> However, in light of recent United States Supreme Court decisions, recognizing the significant differences that exist between the culpability of adult and juvenile offenders, the New York State Legislature has proposed new policies that would raise the age of culpability to seventeen years old, thereby providing either the family court or a specialized youth court with jurisdiction over certain proceedings for sixteen and seventeen year olds.<sup>320</sup>

In early January of 2012, two bills concerning the appropriate age for criminal culpability came before the New York State Senate.<sup>321</sup> One bill, better known as the Assembly Leadership Bill, if passed, would effectively increase the maximum age of family court jurisdiction over juveniles from fifteen years old to seventeen years

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<sup>315</sup> Merrill Sobie, *Raising the Age: New York's Archaic Age of Criminal Responsibility*, N.Y.L.J., Sept. 4, 2012, at 4.

<sup>316</sup> *Id.*

<sup>317</sup> *Id.*

<sup>318</sup> N.Y.S.B. 7394 (2012).

<sup>319</sup> Sobie, *supra* note 315; see also The Schuyler Center for Analysis and Advocacy, Schuyler Center Source, *Raise the Juvenile Jurisdictional Age: An Update*, available at [http://www.scaany.org/resources/documents/scs\\_issue12\\_raiseage\\_update\\_000.pdf](http://www.scaany.org/resources/documents/scs_issue12_raiseage_update_000.pdf).

<sup>320</sup> See generally N.Y.S.B. 7394; N.Y.S.B. 7020.

<sup>321</sup> The Schuyler Center for Analysis and Advocacy, *supra* note 319.

old and simultaneously raise the present age of criminal responsibility recognized under the corresponding Penal Law.<sup>322</sup> Additionally, the bill would repeal the JOA—meaning that thirteen through fifteen year olds accused of violent crimes would have an automatic right to a hearing in family court in order for the court to carefully decide whether to transfer and prosecute the juvenile in criminal court.<sup>323</sup> Finally, the bill proposes that the maximum age at which a juvenile may be considered for youthful offender status be raised from eighteen to nineteen.<sup>324</sup>

The second bill, the Sentencing Commission Bill, which was proposed by Chief Judge Lippman, portrays a hybrid approach, specifically accounting for the logistics that will come into play if the New York State Legislature raises the age of criminal culpability so as to funnel sixteen and seventeen year old juveniles through the court system.<sup>325</sup> This bill would create “youth parts” within the Supreme Court.<sup>326</sup> In effect, these specialized parts, rather than family courts, would have jurisdiction over cases involving sixteen and seventeen year old offenders.<sup>327</sup> Among the benefits behind the establishment of the youth parts is that the judges that would preside in these courts would have specialized training in psychology, and thus, would be apt to decide these cases and evaluate appropriate punishment in light of the behavioral and emotional changes that juveniles undergo in the course of their adolescence.<sup>328</sup> The ultimate goal of this bill is to establish an appropriate forum that balances the existing family court rehabilitation-focused approach and the culpability-focused approach underlying criminal court procedural law.<sup>329</sup>

Although these bills propose a policy and procedure for juvenile adjudication in harmony with that employed in the vast majority of states, the potential enactment of the bills has stirred up a controversial debate. For instance, opponents of the bill have argued that the family court system is already overburdened, and thus, without adequate judicial resources to carry out the plans intended.<sup>330</sup> Specif-

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<sup>322</sup> Sobie, *supra* note 315.

<sup>323</sup> *Id.*

<sup>324</sup> N.Y.S.B. 7020 (2012).

<sup>325</sup> Sobie, *supra* note 315.

<sup>326</sup> *Id.*

<sup>327</sup> *Id.*

<sup>328</sup> N.Y.S.B. 7394 (2012).

<sup>329</sup> *Id.*; Sobie, *supra* note 315.

<sup>330</sup> Sobie, *supra* note 315.

ically, budgetary concerns are real because the family court system currently has a \$162 million budget,<sup>331</sup> which is bound to balloon as a result of funneling an increased number of youths through its courtrooms.

Notwithstanding the result of these two bills, the roots of the Family Court Act should not be forgotten. The Family Court Act revolutionized juvenile adjudication, extending important due process rights to all juveniles.<sup>332</sup> Since the United States Supreme Court's acknowledgment that courts may not deprive juveniles of their due process protection, the family court system further evolved so as to uphold additional procedural rights and dispose of cases in a manner that allows for rehabilitation—recognizing that children are just children and should not be subjected to the same standard as mature and developed adults.<sup>333</sup>

The passage of either of the pending bills would serve to recognize that “New York’s children, including those that commit youthful mistakes, are no different than their counterparts in the rest of the country.”<sup>334</sup> All sixteen and seventeen year olds, deserve both equal protection under the law, and the same or substantially similar opportunities for rehabilitation, as their younger teenage counterparts. In support of the family court system in general, and succinctly stated by Chief Judge Lippman, “[w]e cannot afford to falter. If we miss opportunities to give children the support they need to grow into productive adults . . . then we will feel the social consequences for decades to come.”<sup>335</sup>

### III. CONCLUSION

If either bill is enacted in New York State, it is likely that courts will be less inclined to perform legal gymnastics simply to clear a teenager’s record, but rather, will defer to the family court’s findings. Nevertheless, the facts and resolution of *Jaquan* illustrate that a fine line exists between providing youths with due process and rendering proper punishment. In light of the recognition of the “benefits” of a family court disposition over a criminal record, it seems as

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<sup>331</sup> Chief Judge Lippman, *Family Court 50 Years Later*, N.Y.L.J. (Sept. 24, 2012).

<sup>332</sup> *See Gault*, 387 U.S. at 48.

<sup>333</sup> Lippman, *supra* note 331.

<sup>334</sup> Sobie, *supra* note 315.

<sup>335</sup> Lippman, *supra* note 331.

though the First Department did young Jaquan a disservice when it ruled to suppress the gun and reverse the disposition. Jaquan, like other impressionable, vulnerable, and reckless teenagers, got caught up as the delivery boy in an illegal business transaction. We can only guess whether and what personal circumstances might have caused him to get involved in such a dangerous and destructive undertaking. However, neither personal circumstances nor Jaquan's youthful status should negate the fact that he was caught red-handed with a gun in his backpack and nearly one-thousand dollars in cash in his pocket. It is more than plausible that this was not the first time that Jaquan had engaged in questionable activity, as he was street smart enough to refuse to give his last name to the police officers or carry any type of identification.

Yet, notwithstanding his actions and culpability, the family court gave Jaquan a fifteen-month probation period, directing Jaquan to perform community service and attend school on a regular basis during this time. Arguably, a probation officer might have had the capacity to see that Jaquan stay out of trouble and perhaps be rehabilitated. However, the First Department, in its ruling, absolved Jaquan of responsibility for carrying a handgun. What lessons did Jaquan learn from his exposure to the court system? Ultimately, without any mechanism for deterrence or rehabilitation, Jaquan may continue along his troubled path, leaving open the possibility that he will likely find himself back in court at a future date.

The question remains unresolved—at what point does a youthful indiscretion rise to the level of an intentional criminal act? Presently, the answer turns mainly upon the age of the actor. As a society, we are inclined to see the good in people and recognize, like Chief Judge Lippman, that children especially deserve second chances. Nevertheless, the legislature and courts must strike the balance between their recognition of the inchoate nature of juveniles and their responsibility to protect the citizenry.

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