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Stephen A. Newman

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STEPHEN A. NEWMAN

## Foreword: The Past, Present, and Future of Juvenile Justice Reform in New York State

ABOUT THE AUTHOR: Stephen A. Newman is Professor of Law at New York Law School. The author thanks research assistant Slavena Konstantinova and librarian Joseph Molinari for their invaluable assistance.

## THE PAST, PRESENT, AND FUTURE OF JUVENILE JUSTICE REFORM IN NEW YORK STATE

The juvenile justice system in New York State is in crisis. The system deals with youth between ages seven and fifteen who commit crimes. Teenagers age sixteen and over are treated as adults,<sup>1</sup> as are some thirteen- and fourteen-year-olds accused of certain felonies.<sup>2</sup> In the last few years, news reports, studies, and investigations have exposed a system that is cruel, costly, and counterproductive. Here are some of the key events:

- The U.S. Department of Justice (DOJ) investigated four New York juvenile detention facilities and issued a report in August 2009 finding that juveniles held in confinement were regularly being abused, severely injured, and deprived of constitutional rights.<sup>3</sup> The State recently reached a settlement with the DOJ to forestall further legal action.<sup>4</sup>
- The Legal Aid Society of New York filed a class action lawsuit against New York State (*G.B. v. Carrión*<sup>5</sup>) over intolerable conditions in juvenile institutions, including several institutions that were not covered by the DOJ investigation.<sup>6</sup>
- A thirty-two member Task Force on Transforming Juvenile Justice, appointed by Governor David Paterson (the “Governor’s Task Force”), issued a report in December 2009 detailing widespread problems in the juvenile system and proposing twenty recommendations for reform. The Governor’s Task Force dealt only with post-adjudication issues and worked through two subcommittees, one titled “Redefining Residential Care” and

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1. See N.Y. FAM. CT. ACT § 301.2(1) (McKinney 2010).

2. See *infra* notes 50–54 and accompanying text.

3. CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE LANSING RESIDENTIAL CENTER, LOUIS GOSSET, JR. RESIDENTIAL CENTER, TRYON RESIDENTIAL CENTER, AND TRYON GIRLS CENTER, (2009) [hereinafter DEP’T OF JUSTICE INVESTIGATION].

4. See Press Release, U.S. Dep’t of Justice, Justice Department Announces a Comprehensive Agreement with New York to Remedy Violations and Ensure Constitutional Rights at Four Juvenile Justice Facilities (July 14, 2010), <http://www.justice.gov/opa/pr/2010/July/10-crt-811.html>. The DOJ complaint, filed in federal district court in New York, is available online. *Id.*

5. No. 09-civ-10582 (S.D.N.Y. Jan. 19, 2012) (order denying preliminary injunction).

6. See Nicholas Confessore, *Treatment of Youths in New York Prisons Spurs Suit*, N.Y. TIMES, Dec. 30, 2009, at A23. The complaint in the case accuses the Office of Children and Family Services (OCFS) of using techniques of physical restraint that “expose children to the risks of difficulty breathing, cardiac and respiratory arrest, back, arm and neck injuries, abrasions, bruises, strained muscles and other musculoskeletal injuries, and head injuries.” Complaint, at 12, *G.B. v. Carrión*, No. 09-10582 (S.D.N.Y. filed Dec. 30, 2009), available at <http://www.legal-aid.org/media/125217/09cv10582paccomplaint.pdf>. It also states “OCFS staff use physical force disproportionately against children with mental illness.” Complaint at 17. G.B., one of the named plaintiffs, allegedly had a history of mental disorders. In five separate incidents, OCFS guards threw him to the ground; bent his left arm, which was broken, behind his back; hit him in the face; banged his head of the floor; and put him in a choke hold for not picking up a piece of paper he had dropped on the floor. Complaint at 28–29.

the other “Re-entry and Alternatives to Placement.” The Task Force confirmed that abuse of juvenile inmates by staff was not limited to the four centers identified in the DOJ report, but a problem throughout the system. The report’s recommendations include a call for greater use of alternatives to incarceration, provision of basic social and mental health services, better preparation of youth for re-entry into the community, improved staff training for rehabilitation of youthful offenders, and reduction of the disproportionate representation of minority youth in institutional placements.<sup>7</sup> The report praised the Office of Children and Family Services (OCFS) for its recent efforts to reduce the population of its youth prisons and to reduce the use of unnecessary and excessive force against inmates, but said there was still much work to be done.<sup>8</sup>

- A Human Rights Watch and American Civil Liberties Union (ACLU) inquiry in 2006 reported the excessive use of force in the state’s juvenile institutions for girls. The report detailed the overuse of physical restraint, resulting in broken bones, “rug burns” from being pushed face-first with arms held back into the floor, and other injuries inflicted by staff members who were inadequately trained and poorly supervised. Problems of sexual abuse and harassment were also described.<sup>9</sup>
- Gladys Carrión, commissioner of OCFS—the agency that runs the state’s juvenile institutions—has accepted the criticisms of her agency and has vigorously pursued reforms in the system.<sup>10</sup>

On April 29, 2011, a symposium on Juvenile Justice Reform in New York was hosted by the Diane Abbey Law Center for Children and Families at New York Law School.<sup>11</sup> Panelists looked at the various efforts for reform in all aspects of New York’s juvenile justice system: from the first contact with police, through the adjudication process, to sentencing and detention practices.<sup>12</sup> Many agreed with the

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7. GOVERNOR DAVID PATERSON’S TASK FORCE ON TRANSFORMING JUVENILE JUSTICE, CHARTING A NEW COURSE: A BLUEPRINT FOR TRANSFORMING JUVENILE JUSTICE IN NEW YORK STATE 12–13 (2009) [hereinafter TASK FORCE], <http://www.vera.org/download?file=2944/Charting-a-new-course-A-blueprint-for-transforming-jvenile-justice-in-New-York-State.pdf>.

8. *Id.* at 17.

9. AM. CIVIL LIBERTIES UNION & HUMAN RIGHTS WATCH, CUSTODY AND CONTROL: CONDITIONS OF CONFINEMENT IN NEW YORK’S JUVENILE PRISONS FOR GIRLS 3–7 (2006), <http://www.aclu.org/files/pdfs/racialjustice/custodycontrol20060925.pdf>.

10. *See infra* text accompanying notes 131–32.

11. Symposium, *Juvenile Justice Reform in New York*, 56 N.Y.L. SCH. L. REV. 1263 (2011–12).

12. For articles addressing different aspects of juvenile justice reform in New York as part of this symposium see Michael A. Corriero, *Judging Children as Children: Reclaiming New York’s Progressive Tradition*, 56

assessment of former Chief Judge Judith Kaye that the momentum for reform in New York is at a high point.<sup>13</sup> Despite this momentum, changing a longstanding, complex system with many actors and multiple power centers is no easy task.

Will the reform movement achieve its goals? Part I of this article discusses the last major changes in the system, spurred by both the 1967 Supreme Court decision in *In re Gault* and a deep-seated fear of juvenile crime in the last decades of the twentieth century.<sup>14</sup> Part II examines the present crisis and analyzes the elements favoring reform, including the crucial role of the *New York Times*, and the obstacles to reform, including the unpredictability of the state's political leadership, opposing legislative forces, and uncertainty regarding budget battles over funding for significant reforms of the juvenile justice system in New York.

## I. GAULT AND THE CHANGES THAT FOLLOWED IN NEW YORK

Many years ago, the nation's juvenile justice systems were reformed by order of the U.S. Supreme Court. A fifteen-year-old boy named Gerald Gault was charged with making a lewd phone call to a neighbor, Mrs. Cook.<sup>15</sup> Under loose procedures in force in the state of Arizona, the boy was arrested on June 8, 1964, with no notice to his parents and no formal written charges. His mother discovered from a friend that her son had been taken into custody. A court hearing was held the very next day. As later described by the Supreme Court,

[o]n June 9, Gerald, his mother, his older brother, and Probation Officers Flagg and Henderson appeared before the Juvenile Judge in chambers. Gerald's father was not there. He was at work out of the city. Mrs. Cook, the complainant, was not there. No one was sworn at this hearing. No transcript

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N.Y.L. SCH. L. REV. 1413 (2011-12) (Executive Director and Founder of the New York Center for Juvenile Justice, formerly served as a judge in the New York State courts for twenty-eight years); Nancy L. Fishman, *Reducing Juvenile Detention: Notes from an Experiment on Staten Island*, 56 N.Y.L. SCH. L. REV. 1475 (2011-12) (Project Director for Youth Justice Programs at the Center for Court Innovation); Udi Ofer, *Criminalizing the Classroom: The Rise of Aggressive Policing and Zero Tolerance Discipline in New York City Public Schools*, 56 N.Y.L. SCH. L. REV. 1373 (2011-12) (Professor and Advocacy Director at the New York Civil Liberties Union); Gabrielle Prisco, *When the Cure Makes You Ill: Seven Core Principles to Change the Course of Youth Justice*, 56 N.Y.L. SCH. L. REV. 1433 (2011-12) (Director of the Juvenile Justice Project); and Brett G. Stoudt, Michelle Fine & Madeline Fox, *Growing up Policed in the Age of Aggressive Policing Policies*, 56 N.Y.L. SCH. L. REV. 1331 (2011-12) (Professor, and Coordinator, Polling for Health, Education and Justice Project, respectively). The issue also features essays based on remarks given by the Hon. Judith S. Kaye, former Chief Judge of the New York Court of Appeals, delivered on August 27, 2010 at the City Law Breakfast Series, *Juvenile Justice Reform: Now Is the Moment*, 56 N.Y.L. SCH. L. REV. 1299 (2011-12), and Jeremy Travis, President of John Jay College of Criminal Justice, delivered on April 29, 2011 at the New York Law School Juvenile Justice Symposium, *Reflections on Juvenile Justice Reform in New York*, 56 N.Y.L. SCH. L. REV. 1317 (2011-12).

13. See Kaye, *supra* note 12.

14. 387 U.S. 1 (1967).

15. *Id.* at 4-5, 7.

or recording was made. No memorandum or record of the substance of the proceedings was prepared.<sup>16</sup>

Gerald answered some questions posed by the judge. A week later, the hearing resumed, still in the absence of a complaining witness, and the judge found Gerald to be a delinquent and ordered him sent to a juvenile detention institution for the rest of his minority, i.e., until he reached age twenty-one. As the boy was fifteen, this meant a sentence of six years. If someone over eighteen years of age had committed the same offense, the maximum sentence in the state would have been a fine or two months imprisonment.<sup>17</sup>

Not surprisingly, state law allowed juveniles no right to appeal. A habeas corpus petition ultimately brought the matter before the Supreme Court. Justice Fortas, after reviewing the slipshod manner in which the proceedings were conducted, condemned the state's undue haste, lack of notice of the charges against Gerald, lack of time for the defense to prepare and investigate, lack of sworn testimony, failure to produce the complaining witness for questioning, failure to recognize a right against self-incrimination, and lack of legal counsel for Gerald. Writing for the Court, Fortas was moved to acidly remark, "Under our Constitution, the condition of being a boy does not justify a kangaroo court."<sup>18</sup> The Court ruled that the proceedings unconstitutionally deprived juveniles of the right to notice of the charges, to confront and cross-examine witnesses, to avoid self-incrimination, and to counsel. The fact that the proceedings were labeled "civil" by the state did not blind the Court to the serious deprivation of liberty, which activated the traditional constitutional protections for those accused of crimes.<sup>19</sup> The long era of casual juvenile court adjudication was over.

New York had for many years applied criminal court procedures in juvenile cases, partly because the original children's court was an offshoot of the criminal court. In a 1927 case, *People v. Fitzgerald*, the New York Court of Appeals rejected the arguments of the District Attorney that the rules of evidence and the state criminal code governing proof of crimes should not apply in juvenile delinquency cases.<sup>20</sup> The court saw no difference between charging a boy with "delinquency" arising from a burglary and charging an adult with the "crime" of burglary since both the boy and the adult were subject to loss of their liberty upon a finding that they committed the wrongful act.<sup>21</sup>

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16. *Id.* at 5.

17. *Id.* at 29.

18. *Id.* at 28.

19. *See id.* at 17.

20. 244 N.Y. 307 (1927). This was followed up in 1931 by an Appellate Division case holding the proof beyond a reasonable doubt standard must be applied in juvenile cases. *In re Madik*, 251 N.Y.S. 765 (3d Dep't 1931), a position rejected by the Court of Appeals in *In re Samuel W.*, 24 N.Y.2d 196 (1969), *rev'd sub nom. In re Winship*, 397 U.S. 358 (1970) discussed *infra* p. 1269.

21. *Fitzgerald* 244 N.Y. at 315.

But the court took a sharp turn in 1932, in *People v. Lewis*, in which a fifteen-year-old boy was accused of breaking into a Grand Union grocery and stealing twelve dollars.<sup>22</sup> The boy was not warned against self-incrimination and admitted his guilt to the judge. In considering whether the boy was entitled to the constitutional privilege against self-incrimination, the Court of Appeals adopted the ideas of juvenile court reformers like Julian Mack, who early in the twentieth century wrote a much-quoted article in the *Harvard Law Review* setting forth the view that

[t]he problem for determination by the judge is not, Has this boy or girl committed a specific wrong, but What is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career.<sup>23</sup>

The court held that the case was not a criminal matter, but rather provided an opportunity to aid, encourage, and guide a child. Under these circumstances, the court reasoned that procedural safeguards afforded by the Constitution to those accused of criminal behavior were not required.<sup>24</sup>

Judge Crane, dissenting in *Lewis*, was remarkably prescient in an opinion that anticipated the *Gault* decision that was to come thirty-five years later:

The motives behind all our reform movements are probably commendable and beyond criticism. Some are ever on the lookout to improve civic conditions and the morals of the individual by the force of law, and yet, we must be careful that in these endeavors to correct others, we do not exceed well-recognized principles of municipal government. Absolute power in the hands of a careful and just man may be a benefit, but most of our Constitutions have been adopted out of experience, with human nature as it is, and is apt to be in the future. We must minimize the chance of abuse and place limitations even upon those who have the best of purposes and the most benevolent dispositions. To send a young man to prison for a crime is a serious matter for him and his family. To take a young lad, filled with the wild dreams of childhood, from his parents and his home and incarcerate him in a public institution until he is twenty-one years of age, is equally as serious, and the consequences are not lessened by the emollient term, 'juvenile delinquency.'<sup>25</sup>

Though Judge Crane's position was ultimately vindicated in *Gault*, New York's high court at first resisted the new juvenile justice regime *Gault* established. That resistance surfaced in *In re Samuel W.*, a case decided only two years after *Gault*. A twelve-year-old was accused of stealing \$112 from a woman's purse.<sup>26</sup> New York law required a showing of guilt by only a preponderance of the evidence. The New York Court of Appeals adamantly rejected the claim that, after *Gault*, the criminal law's standard of "proof beyond a reasonable doubt" was required. The majority held that proceedings against

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22. 260 N.Y. 171 (1932).

23. Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 119–20 (1909).

24. *Lewis* 260 N.Y. at 177.

25. *Id.* at 181–82 (Crane, J., dissenting).

26. 24 N.Y.2d 196 (1969), *rev'd sub nom. In re Winship*, 397 U.S. 358 (1970).



juveniles under sixteen years of age were civil in nature, not adversarial, and thus should be informal and paternalistic. The Court of Appeals stubbornly evaded the basic fact, central to the *Gault* holding, that the accused boy could be confined in a state institution and deprived of his liberty for up to six years and was therefore entitled to essential rights the Constitution grants to any criminally accused person. Judge Bergan, writing for the majority, sought refuge in the origins of the state juvenile court system, the 1922 Children's Court Act, and its worthy intentions:

[T]he proceedings were not designed to be punitive but were for the protection and training of a child found in difficulty; and would be administered by humane and parentally minded Judges whose end was not to punish, but to save the child.

....

The Judge, acting as a mature and well-balanced parent, tries to find the answer to the child's trouble; and only if all else fails and there is no other recourse, does he commit the child to any institution, and even then he tries to find the one best suited to the child's needs and having the fewest punitive policies.<sup>27</sup>

Too broad an interpretation of *Gault*, Judge Bergan continued, would lead the juvenile legal process to be ruined by the criminal law's "technicalities" (otherwise known as constitutional rights). Judge Bergan saw the *Gault* case as one of those "hard constitutional cases" that "impaled" the juvenile justice system on its "sharp points."<sup>28</sup> He saw no reason to apply the criminal law's standard of proof beyond a reasonable doubt to a "noncriminal status determination" of delinquency.<sup>29</sup> In dissent, Chief Judge Fuld contended the reasonable doubt standard was a vital component to the fact-finding process in all criminal prosecutions and *Gault's* logic therefore mandated its adoption in juvenile delinquency cases.<sup>30</sup>

The case, under the name *In re Winship*, went on to the U.S. Supreme Court, which rebuked the Bergan majority and explicitly endorsed Fuld's view of the indispensability of the higher standard of proof in juvenile adjudications.<sup>31</sup> In blunt, unflattering terms, the high court concluded, "We do not find convincing the contrary arguments of the New York Court of Appeals. *Gault* rendered untenable much of the reasoning relied upon by that court."<sup>32</sup> Each argument of Bergan's majority opinion was recited and found wanting. Fundamental fairness and the basic societal value of not convicting the innocent required the use of the highest standard of proof.<sup>33</sup>

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27. *Id.* at 197–98.

28. *Id.* at 200. Resistance to *Gault* appeared in other ways throughout the nation. See GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 314–16 (2d ed. 2008).

29. *In Re Samuel W.*, 23 N.Y.2d at 203.

30. *See id.* at 203–04 (Fuld, C.J., dissenting).

31. 397 U.S. 358 (1970).

32. *Id.* at 365.

33. *Id.* at 363–64. In 1982, the New York legislature amended the Family Court Act to require proof beyond a reasonable doubt in juvenile delinquency cases. N.Y. FAM. CT. ACT § 342.2 (McKinney 2011).

*Winship* was followed by a mix of cases that ricocheted between a concern for juveniles' constitutional rights and a desire both to protect public safety and to leave room for experimentation. In 1971, in *McKeiver v. Pennsylvania*, Chief Justice Warren Burger concluded that juveniles need not be accorded the right to a jury trial.<sup>34</sup> Jury trials, he wrote, could result in a fully adversarial process that "will put an effective end to what has been the idealistic prospect of an intimate, informal protective proceeding."<sup>35</sup> In *Breed v. Jones*, the Court ruled that double jeopardy protection for juveniles was constitutionally required.<sup>36</sup> The next Chief Justice, William Rehnquist, writing for the Court in *Schall v. Martin*, found no constitutional problem with a New York statute allowing pretrial detention of juveniles deemed a serious risk for committing a crime before trial.<sup>37</sup> While noting the juvenile's interest in freedom before conviction, Rehnquist observed that "juveniles, unlike adults, are always in some form of custody,"<sup>38</sup> as if parental custody bore some similarity to the accommodations provided by the state juvenile detention center.

Despite the revolutionary nature of *Gault*, it is important to note its limits. First, *Gault* did nothing to promote the rehabilitative goals of the juvenile justice system; its concern was with proper procedure in the fact-finding phase of juvenile adjudications. Second, it did not deal with the duration and conditions of incarceration of youth. Despite the outrage over the six-year sentence imposed on Gerald Gault for making a lewd phone call (if indeed he did make such a call), the Court had nothing to say about the issue of unfair sentencing of young people to imprisonment in detention facilities for petty and nonviolent offenses, nor did *Gault* address the need for states to provide sensible alternatives to incarceration. Finally, the decision also contributed little to the important question of police-youth interactions at school and on the street.

The *Gault* court's attention to adjudication rights has been a mixed blessing. The decision has been criticized for failing to see the negative effects of copying the adult criminal justice system.<sup>39</sup> Formal criminal process often means proceedings conducted in a legal language that is unintelligible to the defendant, who may not understand the proceedings, much less meaningfully participate, in the process.<sup>40</sup> Due process procedures often result in brief court appearances, rushed meetings with assigned counsel, and plea-bargaining that disposes of cases quickly, if not always justly. Juveniles do not always trust appointed counsel and may not form productive attorney-client relationships that would aid their own defense. Rules of evidence and

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The legislature previously had required proof beyond a reasonable doubt in "persons in need of supervision" cases, but was amended in 1976. N.Y. FAM. CT. ACT § 744(b) (McKinney 2011).

34. 403 U.S. 528 (1971).

35. *Id.* at 545.

36. 421 U.S. 519 (1975).

37. 467 U.S. 253 (1984).

38. *Id.* at 265.

39. See Emily Buss, *The Missed Opportunity in Gault*, 70 U. CHI. L. REV. 39 (2003).

40. See *id.* at 39.

adversarial questioning techniques prevent victims from confronting youthful offenders directly and offenders from learning from such encounters.<sup>41</sup> *Gault* may in fact inhibit experiments with more informal processes that aim to educate and rehabilitate youth who can be reached in untraditional environments.<sup>42</sup> Techniques of “restorative justice” may not always resemble courtroom practices, but may involve and educate the offending youth more than the formal processes of the law.

#### *A. New York’s Reform Efforts After Gault*

“Reform,” of course, means different things at different times. In 1982, responding to the need to reconfigure the juvenile justice process after *Gault*, the New York state legislature enacted a set of changes to the Family Court Act.<sup>43</sup> The New York Court of Appeals referred to the reform package as a “sweeping overhaul” designed “to reflect the significant changes in the legal rights of juveniles that had occurred since the late 1960’s and to standardize practice throughout the State.”<sup>44</sup>

Establishing procedural regularity, however, only put the final touches to the reforms initiated by *Gault*. For New York, and most of the nation, the major changes that recast the legal rules governing juveniles in the 1970s, 1980s, and 1990s were aimed in a very different direction. Simply put, there was a determined effort to treat juveniles more severely. Most states expanded the grounds for steering juvenile cases to adult criminal court, with New York leading the way.<sup>45</sup> The impetus was a powerful fear of juvenile crime, acknowledged by the New York Court of Appeals in 1976 when it observed that, although young people in trouble were often victims of neglect, juveniles are also

the perpetrators—of homicides, robberies, burglaries and rapes which threaten to make the modern city an imprisoning fortress for the old, the weak and the timid. Probable cause was found here, for instance, to conclude that this youth had engaged in a mugging which led to the death by strangulation of a pedestrian on the streets of New York.<sup>46</sup>

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41. In juvenile cases, the victim does not get to engage in direct conversation with the juvenile offender in order to tell the youth about the emotional impact of the crime and how it affected the victim’s life. In the courtroom, the lawyers speak for the parties, ask questions, and controls the entire course of communication.

42. See Buss, *supra* note 39, at 39; Fishman, *supra* note 12.

43. The changes appear throughout Article 3 of the New York Family Court Act. N.Y. FAM. CT. ACT. art. 3 (McKinney 2001). Some procedures in Article 3 may be quite strictly interpreted against the State. For example, in *In re Kevin M.*, a detained juvenile’s right to a probable cause hearing no more than four days after arrest was interpreted to disallow scheduling the hearing on a Monday when the fourth day fell on a Saturday. The court reasoned that the State must be constrained to limit juveniles’ exposure to excess pre-petition detention. 925 N.Y.S.2d. 194 (2d Dep’t. 2011).

44. *In re Frank C.*, 70 N.Y.2d 408, 413 (1987).

45. See Mosi Secret, *States Prosecute Fewer Teenagers in Adult Courts*, N.Y. TIMES, Mar. 6, 2011, at A1. The expansion was accomplished “either by lowering the age of criminal responsibility or increasing the number of offenses for which juveniles could be prosecuted as adults, with most of the changes happening in the 1990s.” *Id.*

46. *People ex rel. Wayburn v. Schupf*, 39 N.Y.2d 682, 690–91 (1976) (upholding a law permitting pre-trial detention of youths who might commit crimes before cases can be heard). At the century’s end, in *In re*

The epidemic in the use of drugs and the public response that followed resulted in the infamous 1973 Rockefeller Drug Laws, the harshest laws in the nation aimed at combating the drug trade through lengthy, mandatory sentences for the sale and possession of even small quantities of illegal substances.<sup>47</sup> Soon state prisons were filled with low-level drug addicts and sellers serving long sentences, while a crack cocaine epidemic roared on. Decades later, another New York governor, David Paterson, summed up the law's ineffectiveness by saying, "I can't think of a criminal justice strategy that has been more unsuccessful than the Rockefeller Drug Laws."<sup>48</sup> Unfortunately, the laws stayed on the books for decades.<sup>49</sup>

Legislators are sensitive to public attitudes about juvenile crime, and a single horrific incident can ignite efforts to crack down on all juveniles. In 1978, New Yorkers were frightened and angered over the murder of two people on the subway by a youth named Willie Bosket, a fifteen-year-old who, because of his age, was sentenced to only five years in jail.<sup>50</sup> Public outrage over the short sentence prompted the state legislature to enact the Juvenile Offender Act of 1978 (the "JO Law"), which lowered the age at which many juveniles could be tried as adults. For homicide, the age went down to thirteen and for other selected felonies (assault, arson, burglary, robbery, kidnapping, and rape) to fourteen.<sup>51</sup> The general age for adult criminal responsibility stayed at the already low age of sixteen, where it was set in 1909<sup>52</sup> and where it remains today.<sup>53</sup> Looking across the country, thirty-eight states have set the age of adult responsibility at eighteen, nine states at seventeen, one state at seventeen for felonies and eighteen for misdemeanors, and only two states, North Carolina and New York, fix it at age sixteen.<sup>54</sup>

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*Raymond G.*, the court was voicing concern about a "perceived epidemic of violent criminal conduct by juveniles." 93 N.Y.2d 531, 534 (1999).

47. Madison Gray, *A Brief History of New York's Rockefeller Drug Laws*, TIME (Apr. 2, 2009), <http://www.time.com/time/nation/article/0,8599,1888864,00.html>. The law included "mandatory minimum sentences of 15 years to life for possession of four ounces of narcotics—about the same as a sentence for second-degree murder." *Id.* See generally, Act of May 8, 1973, chs. 276, 277, 278, 676, 1051, 1973 N.Y. Laws 371 (current version at N.Y. PENAL LAW § 220 (McKinney 2009)).
48. Gray, *supra* note 47.
49. *Id.* (describing a minor amendment in 1979 to reduce marijuana possession sanctions and a significant reform in 2004 intended to relax the laws' harsh sentencing guidelines).
50. John Eligon, *Two Decades in Solitary*, N.Y. TIMES, Sept. 23, 2008, at B1. After his release, Bosket committed an assault and received a lengthy prison sentence; the *Times* reported that he was put in solitary confinement for two decades. *Id.*
51. See 1978 N.Y. Laws, ch. 431 § 28 (current version at PENAL § 30.00(2)).
52. See Merril Sobie, *Juvenile Delinquency Proceedings*, 10 N.Y. PRAC., NEW YORK FAMILY COURT PRACTICE § 11:1.
53. See N.Y. FAM. CT. ACT § 301.2(1) (McKinney 2010); PENAL § 30.00(2). Advocates like Judge Michael Corriero, a participant in the April 29, 2011 *Juvenile Justice Reform in New York* symposium, have been seeking to raise the age to seventeen or eighteen. *Supra* note 11; Michael Corriero, *Judging Children as Children: Reclaiming New York's Progressive Tradition*, 56 N.Y.L. SCH. L. REV. 1413, 1424 (2011–12); see also Andrew Schepard, *Raising New York's Age of Criminal Responsibility for Juveniles*, 245 N.Y. L.J. 3 (2011).
54. Merril Sobie, SUPPLEMENTARY PRACTICE COMMENTARIES TO N.Y. FAM. CT. ACT § 301.2 (McKinney 2011).

The JO Law “has been characterized as the most punitive delinquency law in the nation.”<sup>55</sup> The law’s proponents sought to deter serious juvenile crime by increasing punishments and directing serious youth crime to the adult criminal system.<sup>56</sup> Professor Andrew Schepard has summarized the difference it makes when young offenders are deemed adults, stating, “These youth face trial as adults in criminal rather than family court, sentencing emphasizing punishment rather than rehabilitation, confinement in adult jails with other adult criminal offenders, and the enduring stigma and collateral consequences of an adult criminal record.”<sup>57</sup> Some of these juveniles may be waived to family court, but the process must start in adult criminal court and waiver subsequently approved by a judge.<sup>58</sup>

The effects of the law on crime rates were disappointing. A study reported that the evidence indicated no effect on homicides or assault, rape or arson, and a possible, but doubtful, effect on robbery. “Overall, the analysis most strongly supports the conclusion that the JO Law did not affect juvenile crime.”<sup>59</sup> Of course the law had other goals, namely the incapacitation of perpetrators and retribution for their crimes. But simply getting tough on crime did not seem to turn the problem of serious juvenile crime around. Many experts have since found that mixing juveniles and adults in the correctional system increases juvenile recidivism and transforms juvenile offenders into career criminals.<sup>60</sup>

As the turn of the century approached, a report on juvenile justice observed:

During the past 20 years, a nationwide trend to get tough on crime has resulted in a much harsher approach to meting out justice for children and adolescents who break the law. Virtually every state has expanded the charges for which juvenile offenders can be tried as adults, lowered the age at which it can be done, and increased the severity of punishment for juveniles convicted of a crime.<sup>61</sup>

In New York, public attitudes about crime and youth were profoundly affected by a particularly horrific crime that occurred in 1989. A young woman, jogging one day in Central Park, was viciously attacked, beaten with a pipe, raped, and left for dead.<sup>62</sup> A group of boys, mostly fourteen- and fifteen-year-olds, African American and

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55. Simon I. Singer & David McDowall, *Criminalizing Delinquency: The Deterrent Effects of the New York Juvenile Offender Law*, 22 LAW & SOC’Y REV. 521, 522 (1988).

56. *See id.*

57. *See* Schepard, *supra* note 53.

58. *Id.*; *see also* *In re Raymond G.*, 93 N.Y.2d 531 (1999).

59. Singer & McDowall, *supra* note 55, at 531.

60. Mark Soler et al., Symposium, *Juvenile Justice: Lessons for a New Era*, 16 GEO. J. ON POVERTY L. & POL’Y 483, 498–99 (2009).

61. JOHN D. & CATHERINE T. MACARTHUR FOUNDATION, YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE, EXECUTIVE SUMMARY 1 (Thomas Grisso & Robert G. Schwartz eds., 2000), <http://www.mac-adoldev-juvjustice.org/youthnews4.pdf>.

62. David E. Pitt, *Jogger’s Attackers Terrorized at Least 9 in 2 Hours*, N.Y. TIMES, Apr. 22, 1989, at 11. The jogger later disclosed her identity and wrote of her experience. *See* TRISHA MEILI, I AM THE CENTRAL PARK JOGGER: A STORY OF HOPE AND POSSIBILITY (2003).

## THE PAST, PRESENT, AND FUTURE OF JUVENILE JUSTICE REFORM IN NEW YORK STATE

Latino, were arrested, charged with the crime, and convicted after the police had obtained confessions from them. Anyone living in New York City at the time may recall the extraordinary level of fear and outrage generated by this crime. A commentator looking back on the event recalled:

At the time of the trial they were vilified by the media, which depicted them as inchoate, predatory animals. It didn't matter that there was no physical evidence—not a drop of blood or a speck of mud—linking them to the bludgeoned rape victim. Four of the defendants had confessed. That their confessions were wildly inconsistent and inaccurate didn't sway the court. . . . “Lock them up!” the media ranted. “Execute them!” people demanded. Donald Trump took out full-page newspaper ads advocating reinstatement of the death penalty.<sup>63</sup>

The term “wilding” was supposedly used by one of the initial suspects and caught the media's attention as a way to describe the barbarism of the group.<sup>64</sup> The youths disavowed their confessions, went to trial, and were found guilty. It was not until many years later, after the five boys spent between seven and thirteen years in prison, that DNA evidence and a confession by a serial rapist showed the crime had been not been committed by *any* of the convicted teenagers.<sup>65</sup>

Finally, in 1999, just before the new millennium, one of the worst crimes in U.S. history occurred. Two boys took a slew of guns to their high school in Littleton, Colorado and indiscriminately murdered twelve fellow students and a teacher, and then took their own lives.<sup>66</sup> The name Columbine would be forever associated with the two young killers whose crime outraged and traumatized the nation. It was not a good time to advocate for juvenile justice reform.

## II. THE CURRENT CRISIS AND BEYOND

Currently, a reform effort in juvenile justice is well underway. The crisis that has given impetus to the renewed movement in New York stems from problems far different than those that concerned the Supreme Court in *Gault*. Investigations have exposed defects in a sprawling system that extends far beyond the courtroom. A primary focus of the investigations has been on post-adjudication treatment of delinquent youth in detention facilities scattered throughout New York State. Some of these places have been the scene of unconscionable physical abuse of juvenile inmates, resulting in injuries that include broken bones, broken teeth, and, in a few cases, death.<sup>67</sup> These events have been exposed in investigations and reports from

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63. Glyn Vincent, *Central Park Jogger Case: Forgotten Victims*, HUFFINGTON POST (June 24, 2009, 2:00 PM), [http://www.huffingtonpost.com/glyn-vincent/central-park-joggeronly-a\\_b\\_217948.html](http://www.huffingtonpost.com/glyn-vincent/central-park-joggeronly-a_b_217948.html).

64. Rober F. Worth, *A Crime Revisited: Wilding; a Word that Seared a City's Imagination*, N.Y. TIMES, Dec. 6, 2002, at B4.

65. See Maggie Nelson, *The Central Park Jogger Case Revisited*, N.Y. TIMES, June 19, 2011, at BR23.

66. Jennifer Senior, *The End of the Trench Coat Mafia*, N.Y. TIMES, Apr. 19, 2009, at BR13 (noting that the two killers had bombs which, had they exploded, would have killed 500 people).

67. See TASK FORCE, *supra* note 7.

both official sources and private organizations.<sup>68</sup> These facilities, often located hundreds of miles from the homes and families of detainees, have operated with insufficient resources to address the needs of their young populations. In addition to closing the worst of these facilities and improving the rest, the state needs to divert youth from high-cost residential facilities to lower cost alternative programs that monitor and educate them, help them overcome drug addiction and mental health problems, direct them to productive pursuits, and keep them out of trouble.

Is reform likely to succeed in New York? Significant reform of any public system requires: (1) a major effort directed to sounding the alarm—that is, letting the public know that something is seriously wrong with the system’s present functioning; and (2) a determined effort to develop solutions and alternatives, guided by advocates with the expertise to know what needs to be done and endorsed by political leaders with the power to see that the necessary reforms are ultimately adopted.

But these actions, though necessary, are not always sufficient. A public-sphere reform effort, by its nature, faces formidable and inevitable obstacles: the inertia that leads things to stay as they are unless a countervailing force arises; the tendency of bureaucratic culture to resist change and continue to habitually and dogmatically do whatever they have been doing; the active opposition from those involved in the current system who benefit from the status quo and will fight any changes that might disadvantage them; the monetary costs of change, especially in a time of budget shortfalls; and the difficulty of securing and maintaining the support of political leaders and of the general public over the time span needed to effect reform.

#### *A. Sounding the Alarm: The Pivotal Role of the New York Times*

In the modern age, no one doubts the important role of the media in effecting social change. News articles that expose unseemly practices, coupled with editorials that influence public opinion and prod public officials to act, are common features of successful reform campaigns.<sup>69</sup>

In the current effort to reform juvenile justice in New York, the *New York Times* (the “*Times*”) has played a central role in sounding the alarm by drawing public attention, through news articles and editorials, to problems within the system. The problems exposed have been dramatic. The *Times* reported on the November 2006 death of a fifteen-year-old boy, Darryl Thompson, who died in custody when he was physically restrained by two guards at the Tryon Boys Residential Center in Johnstown, New York.<sup>70</sup> The same *Times* story also noted the earlier investigation

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68. See *supra* text accompanying notes 3–10.

69. This is most clearly evident in the major domestic upheaval of the twentieth century: the civil rights movement. For an excellent account of the crucial role of the press, see GENE ROBERTS & HANK KLIBANOFF, *THE RACE BEAT: THE PRESS, THE CIVIL RIGHTS STRUGGLE, AND THE AWAKENING OF A NATION* (2007).

70. Cassi Feldman, *State Facilities’ Use of Force is Scrutinized After a Death*, N.Y. TIMES, Mar. 4, 2007, at §1. A case against the two guards was presented to a local grand jury, which refused to issue an indictment. See Rick Carlin, *Ex-Tryon Aide Had Record of Abuse*, TIMES UNION (Albany), Aug. 17, 2010, at A3. For

and report by Human Rights Watch and the ACLU, which detailed the violent mistreatment of girls at two other state juvenile detention facilities.<sup>71</sup> The story noted allegations of sexual abuse as well as the use of excessive physical force against female inmates by staff officers. Although many inmates were from New York City, the facilities were located in upstate areas, far from the girls' homes.

Use of excessive force by guards was the subject of many *Times* articles in 2009 and 2010, several written by one reporter, Nicholas Confessore, who developed critical expertise about the juvenile detention system. Confessore wrote in August 2009 of the "broken bones, shattered teeth, concussions and dozens of other serious injuries over a period of less than two years" suffered by young detainees.<sup>72</sup> These startling accusations were made by DOJ investigators who had examined conditions at four state detention centers. The article quoted the investigators' finding that "[a]nything from sneaking an extra cookie to initiating a fistfight may result in a full prone restraint with handcuffs,"<sup>73</sup> highlighting in dramatic fashion the indiscriminate and routine use of force in detention centers.

Another hard-hitting story by Confessore, in December 2009, began, "New York's system of juvenile prisons is broken, with young people battling mental illness or addiction held alongside violent offenders in abysmal facilities where they receive little counseling, can be physically abused and rarely get even a basic education."<sup>74</sup> The reporter quoted from a draft report (labeled "confidential," but given to the *Times* in advance) by the Governor's Task Force, the blue-ribbon panel appointed by David Paterson to advise him on reform of the state's juvenile justice system. The task force concluded that the problems of excessive force detailed by the DOJ extended well beyond the four institutions that were the subject of the federal investigation.<sup>75</sup>

This lengthy *Times* story—over 1200 words—also stressed the high cost of incarceration (roughly \$210,000 per inmate per year), the high recidivism rate (seventy-five percent re-arrested within three years of their release), the limited resources available to cope with the widespread addiction and mental health problems of the prison population, the confinement of many juveniles who had committed only minor crimes, and the fact that inmates were drawn disproportionately from black and Latino communities. Although most of the detained youth were from New York City, the prisons were nearly all upstate and virtually inaccessible to their families.<sup>76</sup>

This story also reported that Commissioner Carrión had advised family court judges to try, whenever possible, to avoid placing juveniles in the state's detention

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a collection of news articles on the matter see COALITION AGAINST INSTITUTIONALIZED CHILD ABUSE, *Archived News*, [http://www.caica.org/CAICA\\_NEWS\\_CURRENT.htm](http://www.caica.org/CAICA_NEWS_CURRENT.htm) (last visited Feb. 15, 2012).

71. Feldman, *supra* note 70. For the report issued by Human Rights Watch and the ACLU, see AM. CIVIL LIBERTIES UNION & HUMAN RIGHTS WATCH, *supra* note 9.

72. Nicholas Confessore, *4 Youth Prisons in New York Used Excessive Force*, N.Y. TIMES, Aug. 25, 2009, at A1.

73. *Id.* (quoting DEP'T OF JUSTICE INVESTIGATION, *supra* note 3).

74. Nicholas Confessore, *New York Finds Extreme Crisis in Youth Prisons*, N.Y. TIMES, Dec.14, 2009, at A1.

75. *Id.*; see also TASK FORCE, *supra* note 7.

76. *Id.*



facilities, admitting that they were inferior to alternative programs for most delinquents. Finally, the article covered the opposition of prison employees to reform, an important theme in later stories on the politics of reform; workers claimed Ms. Carrión's effort to restrain the use of force by guards had contributed to more injuries suffered by the guards.

Within three weeks, another article by Confessore appeared, announcing the filing of a lawsuit by The Legal Aid Society alleging the use of excessive force by prison staff against particular juveniles and further claiming the absence of adequate treatment for inmates' mental illnesses.<sup>77</sup> Confessore took the opportunity to remind his readers of the two "withering reports" on the juvenile prison system (by the DOJ and the Governor's Task Force), and noted that the State, in negotiating with the federal government to avoid a federal takeover of the prisons, was attempting to address the additional problems of "inadequate psychological and drug abuse counseling, and substandard education."<sup>78</sup> He also wrote that Commissioner Carrión had instituted new rules on the use of force in 2007 and had encountered opposition from the union representing the prison staff, a point Confessore had made in a preceding article.<sup>79</sup>

Two more articles appeared the next month. A *Times* report on the merger of two New York City departments, the New York City Department of Juvenile Justice (DJJ) and the New York City Administration for Children's Services (ACS), appeared on January 21, 2010.<sup>80</sup> The goal of the merger was to increase the use of alternatives to incarceration, employing the resources of ACS to provide in-home programs for young offenders, including restrictions on behavior, curfews, education, and help for parents in improving parenting skills. The article mentioned the "notorious" state juvenile prisons, described as "broken, ineffective and dangerous" by the Governor's Task Force, and reiterated their expense (given there as \$215,000 per youth annually).<sup>81</sup> Jeremy Travis, chair of the task force, was quoted as saying: "Our No. 1 recommendation was that the state system of juvenile justice be downsized" and "community-based strategies" be employed instead.<sup>82</sup>

On January 27, 2010, Confessore was again at work, reporting on the decision of a state supreme court judge who had ordered prison guards to stop shackling all young prisoners when transporting them to court appearances.<sup>83</sup> The specific case involved a fourteen-year-old youth who was taken 200 miles from an upstate jail to a Manhattan courthouse. The boy had been in shackles (described as having his

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77. See Confessore, *supra* note 6; Complaint at 1, G.B. v Carrión, 09 Civ 10582 (S.D.N.Y. filed Dec. 30, 2009).

78. Confessore, *supra* note 6.

79. *Id.*

80. Julie Bosman, *City Signals Intent to Put Fewer Teenagers in Jail*, N.Y. TIMES, Jan. 21, 2010, at A31.

81. *Id.*

82. *Id.*

83. Nicholas Confessore, *Judge Bars Youth Prisons from Routine Shackling*, N.Y. TIMES, Jan. 27, 2010, at A21.

“hands and feet handcuffed, with a belly chain linked to the handcuffs”) for about fifteen hours on a single day.<sup>84</sup> State policy called for restraints for young prisoners who were nonviolent, even for those who were in non-secure facilities for offenses “like truancy, graffiti or petty theft.” The judge found the policy on shackling a violation of state law, which permitted restraints only for dangerous prisoners who could not be controlled otherwise. The Legal Aid Society staff attorney, Nancy Rosenbloom, was quoted as condemning the “culture of abusive practices” that “does not recognize that these are children who are in the care of the state.”<sup>85</sup> Once again, Confessore reiterated the system’s problems with this reminder: “It is the latest controversy for a system that has been widely faulted for doing what critics say is an abysmal job of meeting the needs of juvenile offenders.”<sup>86</sup>

OCFS revised its shackling policy the next week, as reported by a new Confessore piece.<sup>87</sup> In a memorandum issued by Deputy Commissioner Joyce Burrell, the new policy barred the combination of handcuffs, foot cuffs, and waist belts for any transported prisoners. Full shackles were permitted only in highly secure facilities, to be used when a youth was deemed dangerous. The article again spotlighted the conflict between the agency and its workers union, which complained that worker safety was jeopardized by the agency’s new rule.<sup>88</sup>

Another article followed a week later, on yet another aspect of the systemic problem. Reporter Julie Bosman wrote of the woeful lack of mental health personnel in juvenile facilities, in an article dramatically headlined “For 800 Youths Jailed by State, Not One Full-Time Psychiatrist.”<sup>89</sup> The article explained that only seventeen part-time psychiatrists were available throughout the juvenile prison system, supplemented by “several dozen psychologists who visit them for consultations, and staff members at the jails who run group therapy sessions despite often having no qualifications beyond a high school degree.”<sup>90</sup> Some juveniles were assigned multiple and varying diagnoses of mental disorders and received questionable treatment. The article reminded readers of the DOJ report and its condemnation of “four notorious state juvenile prisons.”<sup>91</sup>

Confessore returned to the beat with “A Glimpse Inside a Troubled Youth Prison,” an account of the sometimes-miserable experience of a young man confined at the state’s Highland Residential Center.<sup>92</sup> The facility itself is described as “a drab collection of run-down cottages . . . part of a state juvenile prison system under fire for

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84. *Id.*

85. *Id.*

86. *Id.*

87. Nicholas Confessore, *Officials Bar Shackling of Juvenile Offenders*, N.Y. TIMES, Feb. 4, 2010, at A28.

88. *See id.*

89. Julie Bosman, *For 800 Youths Jailed by State, Not One Full-Time Psychiatrist*, N.Y. TIMES, Feb. 11, 2010, at A1.

90. *Id.*

91. *Id.*

92. Nicholas Confessore, *A Glimpse Inside a Troubled Youth Prison*, N.Y. TIMES, Feb. 14, 2010, at MB1.

its abysmal and sometimes dangerous conditions.”<sup>93</sup> The featured youth had emotional problems, but “[n]o one seemed to care whether he took his pills, so he didn’t.”<sup>94</sup> One therapist he saw soon left the job, another saw him for a short time but also vanished. The boy was wary of group therapy where, he said, “you don’t want to show no weakness.”<sup>95</sup> Others at Highland, as described by Confessore, included a suicidal inmate who was never treated and another who, though moderately mentally retarded, was repeatedly physically restrained, “including one episode in which a worker banged his head against the floor.”<sup>96</sup> Commissioner Carrión is quoted as saying she thought the experience of youth like the one featured in the piece “makes my case for transformation of the juvenile justice system. He makes my case for why we need change.”<sup>97</sup>

The summer of 2010 brought two new Confessore articles. The first described a proposal by then-Governor Paterson to reduce the population of juvenile detention sites by barring judges from sending low-level offenders to juvenile detention.<sup>98</sup> The article reviewed the past history of these facilities, repeating the findings by the DOJ of “broken bones and shattered teeth” resulting from staff members’ use of excessive force and the findings of the Governor’s Task Force that the system was “broken almost beyond repair,” and burdened by “abysmal facilities,” “little counseling or schooling,” and “physical abuse.”<sup>99</sup>

The second article covered the newly signed settlement between the DOJ and New York, in which the State agreed to sharply restrict the use of force by guards and substantially expand the availability of mental health personnel for juvenile detention facilities.<sup>100</sup> The article repeated the charges of brutality by guards (“broken bones, shattered teeth, concussions and dozens of other serious injuries in a period of less than two years”) and recalled the 2006 death of a teen at the Tryon center.<sup>101</sup> It also mentioned the recommendations of the Governor’s Task Force. Commissioner Carrión was quoted as approving the changes required by the agreement and indicated her intent to extend the agreement’s terms on the use of forcible restraints, originally applicable to only four prisons, to all of the other prisons under her jurisdiction.

Taken together, the entire set of news articles in the *Times* painted a vivid picture of a dysfunctional juvenile detention system. Reporters repeatedly described detention conditions as “abysmal” and the official investigation reports as “withering,” while supplying hard facts to back up these characterizations. The articles portrayed

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93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. See Nicholas Confessore, *Paterson Bill Would Begin Overhaul of Youth Prisons*, N.Y. TIMES, June 2, 2010, at A28.

99. *Id.*

100. Nicholas Confessore, *Federal Oversight for Troubled N.Y. Youth Prisons*, N.Y. TIMES, July 15, 2010, at A1.

101. *Id.*

Commissioner Carrión as an honest public official trying to reform the system under her administration. Meanwhile, prison employee unions seemed to always be in a defensive struggle to justify the behavior of their members.

Supplementing the *Times* news coverage was a series of emphatic, pro-reform editorials pressing the “powers-that-be” to act boldly to change the system. A May 23, 2008 editorial called on Congress to compel the states, through conditions on federal funding, to end the practice of sending juveniles under eighteen years of age to adult prisons.<sup>102</sup> The young inmates were “at greater risk of being raped, battered or pushed to suicide,” as well as of becoming “damaged people who are much more likely to commit crimes and return to prison.”<sup>103</sup> Seven weeks later, the newspaper urged much less reliance on incarceration and greater employment of community-based treatments for juvenile offenders.<sup>104</sup> Too many young offenders who do not pose a threat to the community, the *Times* stated, are sent to distant residential facilities in upstate New York, far from their homes. Reliance on community-based programs would increase public safety because those programs produced much lower recidivism rates. And the greater use of community programs, with their emphasis on counseling both youth and their families, would lower costs significantly, as detention costs the state approximately \$200,000 per year per child, and community programs cost \$20,000 per year per child. The *Times* added sharp criticism of labor unions and legislators who sought to prevent the closure of upstate facilities in order to keep local jobs.<sup>105</sup>

Another editorial commentary, entitled “Rikers Horror Story,” appeared on January 29, 2009.<sup>106</sup> It noted the indictment of three officers in the death of an inmate at Rikers Island youth prison. The indictment charged that the guards had “used violent inmates to ride herd over others, sanctioned assaults on inmates and decided when, where and how they would take place.”<sup>107</sup> The guards protected the gang of enforcers. The editors called for a change in the culture at Rikers: “clearly, the city needs to do a much better job of training and supervising corrections officers there.”<sup>108</sup>

A December 17, 2009 editorial urged Congress to make rules discouraging states from confining youth in adult jails (except for “truly heinous criminals”).<sup>109</sup> The editors repeated their earlier conviction that confining youth in such settings, including those merely awaiting trial, “places them at risk of being raped or battered and increases the chance they will end up as career criminals.”<sup>110</sup> The editorial

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102. Editorial, *Children in Adult Jails*, N.Y. TIMES, May 23, 2008, at A24.

103. *Id.*

104. Editorial, *Help Closer to Home*, N.Y. TIMES, July 11, 2008, at A16.

105. *Id.*

106. Editorial, *Rikers Horror Story*, Jan. 29, 2009, at A26.

107. *Id.*

108. *Id.*

109. Editorial, *De-Criminalizing Children*, N.Y. TIMES, Dec. 17, 2009, at A46.

110. *Id.*

recalled that progress in juvenile rehabilitation had flagged since the 1990s, when “unfounded fears of an adolescent crime wave reached hysterical levels.”<sup>111</sup>

A January 2010 editorial summed up all the objections to the juvenile prison system and told the governor and legislators to “pay attention.”<sup>112</sup> In strong terms, the editors condemned the institutions’ “terrible job of rehabilitation,” their “disastrous and inhumane” environments, and their use of force “often for minor offenses such as laughing too loudly or refusing to get dressed.”<sup>113</sup> The repeated criticisms contained in the “damning reports” from the DOJ, the Governor’s Task Force, and The Legal Aid Society lawsuit justified strong measures, including shutting down select prisons. The editors praised the “reform-minded” Commissioner Carrión and expressed contempt for the “fierce and predictably self-interested resistance from the unions representing workers in juvenile prisons and their allies in Albany.”<sup>114</sup> Its exasperated conclusion was that “the Legislature will finally have to put the needs of the state’s children ahead of the politically powerful unions and upstate lawmakers who want to preserve jobs—and the disastrous status quo—at all costs.”<sup>115</sup>

In June 2010, the *Times* supported reform proposals to “fix this broken system.”<sup>116</sup> Governor Paterson’s reform ideas could “improve the quality of the leadership and care in the state’s often dangerous and inhumane juvenile facilities.”<sup>117</sup> The editorial declared that the “argument for closing down the worst facilities and treating low-risk children in their home communities is irrefutable.”<sup>118</sup> Juveniles who had committed “minor, nonviolent offenses” did not belong in places rife with abuse and short on help. It commended Commissioner Carrión for closing down a dozen centers and saving \$30 million in the process, and lamented the fact that only \$5 million of this sum went into community-based efforts (the rest went into the state’s general coffers). It noted the \$200,000 cost per child per year of confinement dwarfed the cost of non-institutional care. State employee unions were singled out as the selfish enemies of reform; the *Times* told state legislators to “stand up to unions that are more interested in preserving jobs than in doing what is best for children.”<sup>119</sup>

Money was the subject of an October 2010 editorial that decried the wasteful spending on New York juvenile detention facilities, which was costing New York taxpayers \$170 million a year.<sup>120</sup> The editors highlighted the fact that the state was

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111. *Id.*

112. See Editorial, *Juvenile Injustice*, N.Y. TIMES, Jan. 6, 2010, at A22.

113. *Id.*

114. *Id.*

115. *Id.*

116. Editorial, *Real Justice for Juveniles*, N.Y. TIMES, June 10, 2010, at A30.

117. *Id.*

118. *Id.*

119. *Id.*

120. See Editorial, *Two Words: Wasteful and Ineffective*, N.Y. TIMES, Oct. 10, 2010, at A22; see also N.Y. CORRECT. LAW § 79-a(3)(iii) (McKinney 2011).

paying over “2,000 employees to oversee fewer than 700 children.”<sup>121</sup> Detention was criticized as ineffective as well—with a recidivism rate of approximately eighty percent for young men, who “end up committing more crimes within a few years of their release.”<sup>122</sup> The editors repeated their desire to see the State “close down as many of these facilities as possible, preserving only the few necessary to hold genuinely dangerous young offenders.”<sup>123</sup> Instead, they suggested, send low-risk youth to community programs “that do a much better job of rehabilitation and are far less expensive to manage.”<sup>124</sup> They cited figures similar, but not identical, to the ones quoted in the past—local programs that cost “as little as \$15,000 a year, compared with the estimated \$220,000 to house a child in a state facility.”<sup>125</sup> The *Times*, once again, encouraged the governor to “stand up to the labor unions” opposing closures; praised Commissioner Carrión for closing a dozen centers in three years; and criticized the legislature for enacting the 2006 law requiring a full year’s notice to workers before closing an unneeded facility.

Anticipating the arrival of newly elected Governor Andrew Cuomo, the *Times* in December 2010 reiterated its belief that more “ruinously expensive, and half-empty juvenile detention facilities must be closed.”<sup>126</sup> Recounting facts and figures on the lessening population of incarcerated youth—“drop[ping] from more than 2,300 a decade ago to about 650 today”—the editors called the waste of funds spent on paying 1560 staffers “indefensible at a time when the state is cutting education and medical care for the indigent.”<sup>127</sup> The editors, again, cited the effectiveness and cost savings of using community-based programs, chided Governor Paterson for not closing more facilities, and told Governor-Elect Cuomo to “take on the state’s powerful unions” as he pledged to do during his gubernatorial campaign.<sup>128</sup> “Shut those doors,” the editorial’s headline demanded.

All of these forceful editorials certainly strengthened the hand of reform advocates, bringing the problems of juvenile justice to the forefront and raising the stakes for public officials who have the power to act and feel the eyes of the nation’s most important newspaper scrutinizing them. Nevertheless, for these blunt and blistering editorials to have a real impact, a set of reform-minded individuals must be in place who are willing to take up the call and who are capable of providing both political leadership and policymaking expertise.

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121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. Editorial, *Shut Those Doors*, N.Y. TIMES, Dec. 12, 2010, at A24.

127. *Id.*

128. *Id.*

*B. The Reform Vanguard: The Key Individuals in the Reform Movement*

Like a play, a reform movement must have a compelling cast of characters who can move the action along to a satisfactory conclusion. In New York, the characters in the reform movement include public officials and private sector organizations that need to work together. Some of the key players in the state are highlighted below:

1. *Gladys Carrión*

Perhaps the most central figure in the reform movement in New York State is Gladys Carrión, appointed as commissioner of OCFS by Governor Eliot Spitzer in January 2007. This post puts her in charge of the state's institutions for confinement of delinquents.<sup>129</sup> Carrión has earned a reputation as a blunt-speaking, determined administrator who is committed to changing the way the state's juvenile facilities are operated. Indeed, her most notable initiative was that of closing down over a dozen facilities, including the notorious Tryon Boys facility that was the scene of a teenage resident's death in 2006 and the subject of scathing criticism by the DOJ.<sup>130</sup> Carrión agrees that her agency's facilities provide a "toxic environment" for youth.<sup>131</sup> From 2006 to 2010, Carrión cut the number of incarcerated youth from 1500 to 755.<sup>132</sup> She has had cameras installed to document and deter mistreatment, promulgated rules that limit staff use of physical restraint and require the reporting of all such incidents, and shifted resources to local programs that emphasize rehabilitation and counseling.<sup>133</sup> Judith Kaye, the former Chief Judge of New York, calls Carrión's efforts "heroic."<sup>134</sup>

Carrión has used the criticism leveled at the juvenile prison system to fuel her efforts. Rather than reacting defensively or issuing "no comment" responses to public criticism, she welcomes even harsh scrutiny for its use by her "as a lever": "If it takes this report [referring to the sharply critical Governor's Task Force report] to push through change, then good."<sup>135</sup>

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129. See About the Commissioner Gladys Carrión, Esq., NEW YORK STATE OFFICE OF CHILDREN & FAMILY SERVICES, <http://ocfs.ny.gov/main/about/commissioner.asp> (last visited Jan. 23, 2012).

130. For an overview of life at the Tryon center, see Jennifer Gonnerman, *The Lost Boys of Tryon*, N.Y. MAG., Jan. 24, 2010, <http://nymag.com/news/features/63239/>. Tryon's boys center was closed in January 2011. Michael Anich, *Tryon Half-closed; Other Half Waits*, THE LEADER-HERALD, Feb. 9, 2011, <http://www.leaderherald.com/page/content.detail/id/534735/Tryon-half-closed-other-half-waits.html?nav=5011>.

131. Elizabeth Dwoskin, *Shutting Upstate Jails for City Kids Has Made a Fiery Bronx Bureaucrat Host of Enemies*, THE VILLAGE VOICE (Aug. 4, 2010), <http://www.villagevoice.com/2010-08-04/news/gladys-carrión-upstate-jails-for-city-kids-bronx/>.

132. Elizabeth Dwoskin, *Kids in Detention: Four State Employees to Watch Them?*, THE VILLAGE VOICE (May 20, 2010, 11:59 PM), [http://blogs.villagevoice.com/runninscared/2010/05/kids\\_in\\_detenti.php](http://blogs.villagevoice.com/runninscared/2010/05/kids_in_detenti.php).

133. Nicholas Confessore, *Official in Charge of State's Youth Prisons Welcomes a Critical Report*, N.Y. TIMES, Dec. 16, 2009, at A36.

134. See Kaye, *supra* note 12.

135. Confessore, *supra* note 133.

Her battles with employee unions are titanic. Each side publicly attacks the other. Carrión blames the unions and civil service rules for protecting abusive guards and making it nearly impossible to eliminate the use of excessive force by staff.<sup>136</sup> Meanwhile, union leaders charge that she understates the dangers faced by workers dealing with inmates who are difficult to control. One incident that union leaders cite as an example, and which workers recall well, is the following assault at the Tryon facility:

Tryon's most infamous resident-on-staff assault took place inside the mental-health unit in the summer of 2008, when a 60-year-old YDA [Youth Division Aide] named Charles Loftly was on duty. A teenager tricked Loftly into opening the door to his room, grabbed a piece of wood from his desk, and cracked him on the back of the head. Five weeks later, Loftly had a stroke and slipped into a coma. He died shortly after. According to the coroner, his death had nothing to do with the attack. Within the walls of Tryon, however, everyone blames the job.<sup>137</sup>

But the independent investigations of Tryon and other youth institutions in the system reported widespread abuse by staffers. When union leaders claimed that worker injuries were increasing, Ms. Carrión expressed her belief that some staffers were inciting inmates in order to boost the number of alleged staff injuries.<sup>138</sup>

As Tryon's population wound down prior to its closure, the union managed to preserve staff jobs at the facility. When the number of boys in residence shrunk down to four, the staff numbered 129, thanks to a law that required the state to notify workers a full year in advance of a facility's closing.<sup>139</sup> Some workers even collected extra pay for overtime. "This is called a union problem," said the commissioner at a public event in midtown Manhattan.<sup>140</sup> The New York State Public Employees Federation had sought the one-year notice law and succeeded in passing the legislation in 2006.<sup>141</sup> A union leader defended the staffing levels at Tryon and faulted the commissioner, stating, "It's strange that you have the commissioner of an agency who has made it her mission to shut her own agency down."<sup>142</sup>

State legislators, friendly to the unions (which contribute to the politicians' campaigns) are also quick to attack Carrión; one state senator, Catharine Young, has

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136. *Id.*

137. Gonnerman, *supra* note 130, at 9.

138. Dwoskin, *supra* note 132; Dwoskin, *supra* note 131 (reporting that Carrión stated that video evidence and research prove this occurs).

139. Dwoskin, *supra* note 132. The notice period was changed to two months in 2011. *See* N.Y. EXEC. LAW § 501.15 (McKinney 2011); Joel Stashenko, *Cuomo Wins Battle to Close Some Troubled Youth Facilities*, 245 N.Y.L.J. 1, (2011).

140. Dwoskin, *supra* note 132.

141. Russ Buettner, *Bloomberg Makes a Proposal on Youth Prisons*, N.Y. TIMES, Dec. 21, 2010, at A26.

142. Dwoskin, *supra* note 132.



organized a “Senate Republican Task Force on Juvenile Justice Reform” to coordinate the anti-Carrión efforts.<sup>143</sup>

## 2. *Andrew Cuomo*

To reform a statewide system, the support of the governor is crucial. The state’s present governor, Andrew Cuomo, signaled his support of the effort to improve the juvenile justice system in his first State of the State address. Cuomo included the following passage in his speech:

For those of us who are old enough to remember Willowbrook [a notorious state residence for the mentally retarded, closed because of its inhumane conditions<sup>144</sup>], it brings back very bad memories. When we think about our current juvenile justice facilities, I believe there are echoes of what we dealt with in Willowbrook. You have juvenile justice facilities today where we have young people who are incarcerated in these state programs who are receiving . . . treatment that has already been proven to be ineffective; recidivism rates in the 90 percentile. The cost to the taxpayer is exorbitant. For one child, over \$200,000 per year. The reason we continue to keep these children in these programs that aren’t serving them but are bilking the taxpayers is that we don’t want to lose the state jobs that we would lose if we closed the facilities. I understand, I understand, the importance of keeping jobs. I understand the importance of keeping jobs especially in upstate New York. I also understand that that does not justify the burden on the taxpayer and the violation of civil rights of the young person who is in a program that they don’t need where they’re not being treated hundreds of miles from their home just to save state jobs. An incarceration program is not an employment program. If people need jobs, let’s get people jobs. Don’t put other people in prison to give some people jobs. Don’t put other people in juvenile justice facilities to give some people jobs. That’s not what this state is all about and that has to end this session.<sup>145</sup>

The newly elected governor followed this speech with a press release that said he promised to

undertake an immediate reorganization of the state’s youth detention facilities with the goal of consolidation, while providing current staff the priority for relocation to other facilities, retraining, and/or reemployment opportunities. To avoid keeping facilities open that have few or no children, he proposed a repeal of the requirement mandating a 12-month notice requirement to close facilities.<sup>146</sup>

Eventually, the governor got the closure notice rule reduced to two months.<sup>147</sup>

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143. Dwoskin, *supra* note 131.

144. *See State and Families Reach Final Accord Over Willowbrook*, N.Y. TIMES, Mar. 3, 1987, at B3.

145. Governor Andrew M. Cuomo, N.Y. State of the State Address (Jan. 5, 2011), <http://www.governor.ny.gov/sl2/stateofthestate2011transcript>.

146. Press Release, Governor Andrew M. Cuomo, Governor Cuomo Delivers State of the State Message in Poughkeepsie (Jan. 20, 2011), *available at* <http://www.governor.ny.gov/press/012011messagepoughkeepsie>.

147. Stashenko, *supra* note 139.

### 3. *Michael Bloomberg*

New York City Mayor Michael Bloomberg has also weighed in on reform efforts, supporting the shift from incarceration to rehabilitation programs. Early in 2010, he merged the New York City DJJ and ACS, which is the city's child welfare arm that responds to child abuse and neglect problems and supervises foster care placements, among other child welfare duties. There is much important common ground between the agencies; many delinquents are abused or neglected children, and many have been in the foster care system.<sup>148</sup> The merger encourages the development of more juvenile services that are oriented toward providing intensive supervision and help to both the target children and families who need to learn more about effective parenting. ACS had already begun a "Juvenile Justice Initiative" in 2007 that created programs, in cooperation with nonprofit groups, that provide community-based social service alternatives to juvenile incarceration. This city effort anticipated the Governor's Task Force recommendation that fewer juvenile detention centers be operated by the state and that non-dangerous youth who commit minor crimes be assigned to rehabilitative programs rather than jail. One of ACS's early moves in 2011 was to close down the Bridges Juvenile Center in the Bronx, a center with an abusive reputation, formerly known as Spofford.<sup>149</sup>

At the end of 2010, Mayor Bloomberg pursued greater authority for the city over juvenile detention. He announced his intention to ask the state to give local governments control over youth services, including detention facilities. He argued this would keep the juveniles closer to home, reduce the high recidivism rates for those currently being sent to distant upstate jails, and save the local government substantial payments required for sending youth into the state system. According to the state's contribution formula, New York City had to pay \$62 million to the state for incarcerating a daily average of 569 offenders in a recent year.<sup>150</sup> These payments have increased over time despite the fact that the number of offenders has fallen, in part because the state has kept open near-empty facilities and charged the city a share of the costs to staff them. The city has responded with a lawsuit to stop the state from imposing costs stemming from underused and mismanaged facilities.<sup>151</sup>

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148. See Bosman, *supra* note 80. A journalist visiting the Tryon facility for boys reported:

The rap sheets of the boys at Tryon don't begin to tell the story of how deeply rooted their problems are. Many were in foster care before coming here, and almost every kid has endured some form of abuse. An employee talks about a boy who was sexually abused starting at age 6 by multiple female members of his family. And then there was the kid who was tossed into a Dumpster at age 2. Almost every resident here has a diagnosis, if not four or five: ADD, ADHD, bipolar illness, depression, PTSD, schizophrenia. "Who do we incarcerate in the state of New York? Kids with serious mental-health disorders," Carrión says. "I feel like I'm running a psychiatric hospital."

Gonnerman, *supra* note 130.

149. Jeff Storey, *New York City Closes Juvenile Detention Facility*, 245 N.Y. L.J. 1 (2011). The juvenile population confined in ACS facilities declined by thirty-one percent since 2006. *Id.*

150. Buettner, *supra* note 141.

151. *Id.*

#### 4. Vincent Schiraldi

One of the newest arrivals to New York's reform movement is the New York City Commissioner of Probation, Vincent Schiraldi, who took over the leadership of the department in early 2010. In Washington, D.C. he directed the Department of Youth Rehabilitation Services, where his reforms, according to the *Washington Post*, were "dramatic." The *Post* editorial page commended him for creating "unique education and rehabilitation programs" and "turning lives around through positive youth development"; his reforms reduced the recidivism rate and turned the city away from "warehousing juveniles in unspeakable conditions."<sup>152</sup>

In New York, Schiraldi has argued for increasing spending on rehabilitative efforts and expanding community-based alternatives to confinement. He has praised Commissioner Carrión's efforts to close the worst juvenile facilities and deplored the waste of resources in the system.<sup>153</sup> He promises to operate the department using "evidence-based best practices" and "risk assessment tools" to promote better outcomes.<sup>154</sup> He brings years of expertise and a sense of mission to the Probation Department and to the state reform movement generally.

#### 5. Jonathan Lippman

On Law Day 2010, the Chief Judge of the State of New York, Jonathan Lippman, chose to address the need for improving the state's juvenile justice system because "New York is failing to live up to its proud history of leadership in juvenile justice reform."<sup>155</sup> He cited the "widespread violence and abuse" in some facilities, the high recidivism rates of those in custody, the great expense incurred by the state, the lack of mental health professionals assigned to juvenile facilities, and the incarceration of many petty offenders who do not belong in state juvenile prisons and are turned into serial offenders by the system. Stating that "New York needs to fundamentally re-think how its justice system responds to troubled young people," the chief judge argued for greater alternatives to incarceration and increased funding for local probation departments charged with supervising juveniles and aiding family court judges in carrying out their sentencing responsibilities.<sup>156</sup>

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152. Editorial, *A D.C. Reformer Departs; Vincent Schiraldi Changed How Troubled Youth are Treated*, WASH. POST, Dec. 4, 2009, at A26.

153. Vincent Schiraldi & John Mattingly, *Transforming Juvenile Justice*, 244 N.Y. L.J. 6 (2010).

154. N.Y.C. DEP'T OF PROB., STRATEGIC PLAN 2011: THE NYC MODEL OF PROBATION (2011).

155. Jonathan Lippman, *Law in the 21st Century: Enduring Traditions, Emerging Challenges; Reforms Proposed for Juvenile Justice*, 83 N.Y. L.J. 11 (2010).

156. *Id.* Family court judges deciding delinquency cases would welcome additional disposition options, according to the administrative judge for the NYC family Court, Edwina Richardson-Mendelson. Bosman, *supra* note 80. One family court judge sent a violent teen to juvenile prison but ordered him not to be confined in the four centers criticized by the DOJ, though her authority to do so is doubtful. Jeff Storey, *In Sentencings, Judge Says Youths Should Not Go to Troubled Facilities*, 36 N.Y. L.J. 1 (2010). Judge Lippman followed up his Law Day remarks with a proposal to establish special youth courts for non-violent sixteen- and seventeen-year-old offenders, who are now prosecuted as adults. The youth courts would combine rehabilitative features of the family court with the formal due process procedures of

6. *Non-profit groups*

New York has a rich array of non-profit organizations seeking reform of the juvenile justice system. The following are some of the most influential advocacy groups:

- The respected Vera Institute of Justice played a critical, if unheralded, role in performing the staff work for the Governor's Task Force report.<sup>157</sup>
- The Legal Aid Society defends juveniles in family court and has brought a federal class action suit, *G.B. v. Carrión*, arguing that juvenile facilities deprive inmates of needed mental health care and use excessive force against them, in violation of their constitutional rights.<sup>158</sup>
- The Center for Court Innovation operates youth courts in which young offenders who have committed low-level infractions (e.g., marijuana possession, vandalism, shoplifting) are tried by their teenage peers upon referral from courts, probation officers, and police. The project has the support of bar leaders, including the New York State Bar Association and New York's former Chief Judge Judith Kaye.<sup>159</sup>
- The Correctional Association of New York monitors prison conditions and has recently been involved in the effort to ensure that offenders serve sentences in facilities close to their neighborhoods, enabling them to maintain ties to their families.<sup>160</sup>
- The New York Center for Juvenile Justice, founded by its executive director, former state court judge Michael Corriero, has advocated that sixteen- and seventeen-year-olds be removed from the state's criminal justice system and included in the juvenile system.<sup>161</sup>

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Criminal Court. John Caher, *Youth Court, DNA Top Lippman's Agenda*, N.Y. L.J., Feb. 15, 2012, <http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202542248341&slreturn=1>.

157. See VERA INSTITUTE OF JUSTICE, <http://www.vera.org> (last visited Jan. 24, 2012); see also Diane Abbey Law Center for Children & Families, N.Y. L. SCH., [http://www.nyls.edu/centers/projects/diane\\_abbey\\_law\\_center\\_for\\_children\\_and\\_families](http://www.nyls.edu/centers/projects/diane_abbey_law_center_for_children_and_families) (last visited Jan. 24, 2012).

158. Confessore, *supra* note 6.

159. Tim Stelloh, *Ensuring Petty Crimes Don't Lead to Big Ones*, N.Y. TIMES, Sept. 22, 2010, at A22; see Kaye, *supra* note 12.

160. Danny Hakim & Thomas Kaplan, *As Republicans Resist Closing Prisons, Cuomo Is Said to Scale Back Plan*, N.Y. TIMES, Jan. 29, 2011, at A19 (quoting the group's executive director Robert Gangi).

161. See Corriero, *supra* note 12; see also History, N.Y. CTR. FOR JUVENILE JUSTICE, <http://www.nycjj.org/history> (last visited Jan. 22, 2012).

- The New York Civil Liberties Union has been active in monitoring the role of the police department in the city's school system.<sup>162</sup> Many young people first enter the juvenile justice system through encounters with police assigned to their schools.

### *C. Factors Favoring Reform*

Background factors in society can contribute, albeit indirectly, to an environment that favors reform. Three factors worth noting are: (1) scientific advances in understanding both emotional maturation and physical development of the brain during adolescence; (2) decisions of the U.S. Supreme Court since 2005 dealing with adolescence; and (3) the lack of media focus on juvenile crime.

#### *1. Scientific Research*

Recent scientific research on human development has contributed insights into the emotional, social, and cognitive maturation of adolescents. The American Medical Association and the American Academy of Child and Adolescent Psychiatry filed an amicus brief in *Graham v. Florida*, a U.S. Supreme Court case considering the constitutionality of life without parole sentences for juveniles convicted of non-homicide offenses.<sup>163</sup> The brief summarized recent developments in brain science in this way:

Scientists have found that adolescents as a group, even at later stages of adolescence, are more likely than adults to engage in risky, impulsive, and sensation-seeking behavior. This is, in part, because they overvalue short-term benefits and rewards, are less capable of controlling their impulses, and are more easily distracted from their goals. Adolescents are also more emotionally volatile and susceptible to stress and peer influences. In short, the average adolescent cannot be expected to act with the same control or foresight as a mature adult.

Behavioral scientists have observed these differences for some time, but only recently have studies provided an understanding of the biological underpinnings for why adolescents act the way they do. For example, brain imaging studies reveal that adolescents generally exhibit more neural activity than adults or children in areas of the brain that promote risky and reward-based behavior. These studies also demonstrate that the brain continues to mature, both structurally and functionally, throughout adolescence in regions of the brain responsible for controlling thoughts, actions, and emotions.<sup>164</sup>

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162. The NYCLU website describes various programs in which the organization is engaged and reports it has issued concerning the schools and the police. See *School to Prison Pipeline: Fact Sheet*, N.Y. CIVIL LIBERTIES UNION, [http://www.nyclu.org/schooltoprison#\\_ftnref2](http://www.nyclu.org/schooltoprison#_ftnref2) (last visited Mar. 29, 2012).

163. Brief for the Am. Med. Ass'n & Am. Acad. of Child & Adolescent Psychiatrics as Amici Curiae Supporting neither party, *Graham v. Florida*, 130 S. Ct. 2011 (2010) (No. 08-7412), 2009 WL 2247127.

164. *Id.* at 2–3.

The brief went on to describe scientific findings derived in significant part from new, advanced brain imaging techniques that “are a quantum leap beyond previous mechanisms for assessing brain development.”<sup>165</sup> These studies show the slow maturing of the pre-frontal cortex, which controls higher cognitive functioning, and the developmental imbalances in areas of the juvenile brain that stimulate risk-taking behaviors and impulsiveness. Interestingly, the brief did not support the juvenile in the case before the Court, but merely requested that the justices take the scientific evidence into account in reaching its decision.<sup>166</sup> A similar brief, filed by several mental health organizations, was more direct in urging the Court to find for the juvenile petitioner and overturn his sentence of life without parole because “condemning an immature, vulnerable, and not-yet-fully formed adolescent to die in prison is a constitutionally disproportionate punishment.”<sup>167</sup>

The *Graham* majority did overturn the sentence, with a passing nod to the scientific community: “As petitioner’s *amici* point out, developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence.”<sup>168</sup> The evidence from science was deemed more cumulative than conclusive. Instead of relying on the scientific evidence, the Court noted that common observation and experience supported the notion that adolescents act immaturely and impulsively, engage in risky behavior, respond to peer pressure, and often fail to make careful judgments about the consequences of their acts.

## 2. U.S. Supreme Court Cases

Several U.S. Supreme Court decisions since 2005 have helped shape the societal perspective on juvenile crime. In 2005, in *Roper v. Simmons*, the Court prohibited as unconstitutional the imposition of the death penalty for juveniles under age eighteen.<sup>169</sup> In the course of its opinion, the majority stated that youth should be treated differently than adults in determinations of punishment under the criminal justice system. The attributes of youth—immaturity, impulsiveness, susceptibility to peer pressure, and still-developing character formation<sup>170</sup>—led the Court to conclude that the most extreme penalty for a crime should not apply to juveniles.

The Court extended its ruling in 2010, in *Graham v. Florida*, when it held that a sentence of life in prison without parole for non-homicide crimes committed by

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<sup>165</sup>. *Id.* at 13–14.

<sup>166</sup>. *Id.* at 31–32.

<sup>167</sup>. Brief for the Am. Psychol. Ass’n, et al. as Amici Curiae Supporting Petitioners, *Graham v. Florida* (2009) (Nos. 08-7412, 08-7621), 2009 WL 2236778.

<sup>168</sup>. *Graham v. Florida*, 130 S. Ct. 2011 (2010) (citing Brief for Am. Med. Ass’n, *supra* note 163 at 16–24; Brief for Am. Psychol. Ass’n et al., *supra* note 167, at 22–27).

<sup>169</sup>. 543 U.S. 551 (2005).

<sup>170</sup>. *Id.* at 569–70.

juveniles violated the constitutional ban on cruel and unusual punishment.<sup>171</sup> Justice Anthony M. Kennedy wrote the majority opinion, explaining, “The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. It does forbid States from making the judgment at the outset that those offenders never will be fit to reenter society.”<sup>172</sup> The Court, while recognizing that society could demand retribution for crimes committed by a juvenile, was not willing to give up on the possibility of a young person being rehabilitated.

An interesting feature of the litigation was the submission of an amicus brief on behalf of seven prominent citizens, including a former U.S. senator, all of whom had committed serious offenses in their youth. They urged the Court to consider their rehabilitation and subsequent contributions to society.<sup>173</sup> Further support for the Court’s view came from a *Washington Post* editorial praising *Graham* (and suggesting the Court go further by requiring the consideration of parole for juveniles who commit murder).<sup>174</sup>

In 2011, the Court had another chance to reiterate the view that a young person’s age and capacities should be taken into account when he or she stands accused of criminal behavior. The case, *J.D.B. v. North Carolina*, involved a thirteen-year-old middle school student who was taken for police questioning to a room in the school.<sup>175</sup> The Court, considering whether the boy was “in custody” for purposes of receiving *Miranda* warnings, held that judges and police must consider the age of the juvenile in making the “in custody” analysis. Justice Sotomayor’s majority opinion drew upon “commonsense” propositions, e.g., that children are immature and “possess only an incomplete ability to understand the world around them.”<sup>176</sup> She further reasoned that “children cannot be viewed simply as miniature adults.”<sup>177</sup>

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171. 130 S. Ct. 2011 (2010).

172. *Id.* at 2030.

173. See generally Brief of Former Juvenile Offenders Charles S. Dutton et al. as Amici Curiae in Support of Petitioners, *Graham v. Florida*, 130 S. Ct. 2011 (Nos. 08-7412, 08-7621), 2009 WL 2219302.

174. Editorial, *Too Young for Life Without Parole*, WASH. POST, May 18, 2010, at A18. The editorial stated that the majority sensibly drew a bright line: No one convicted of committing a crime other than homicide before the age of 18 may be locked away forever without at some point being given the chance of making a case for release. That point may not come until the offender has spent 10, 20 or even 30 years behind bars. And there is no guarantee that such a plea would prevail. We believe the same opportunity-without-guarantee should exist even for those who commit homicide as juveniles, but the Supreme Court did not venture that far Monday.

*Id.*

175. 131 S. Ct. 2394, 2399 (2011).

176. *Id.* at 2403.

177. *Id.* at 2404. The opinion begins with the “commonsense reality” that “children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave.” *Id.* at 2398–99.

Although these opinions do not bear directly on the juvenile justice reforms under consideration in New York, they may serve to influence the way in which participants in public discussion think about young offenders. Harsh rhetoric from the Court about juvenile crime might have made proposed changes in New York seem “soft on crime”; instead, the Court’s measured observations about the rehabilitative potential of youth support reformers’ efforts to work with offenders to turn their lives around.

### 3. *Media Focus on Reform and off Crime*

The media brought public attention in New York to the grave deficiencies in the juvenile justice system. Perhaps equally important is what the media did *not* shine its spotlight on—juvenile crime—despite the fact that there is never a shortage of possible stories about juvenile criminal activity. After all, in 2010, 45,873 young people between the ages of sixteen and eighteen were arrested in New York, some of whom were doubtless charged with serious crimes.<sup>178</sup> But the major fact to be highlighted about juvenile crime is its sharp decline nationwide:

In 2008, the year of the most recent national estimate from the Justice Department, law enforcement agencies made about 2.1 million arrests of teenagers younger than 18, and most of those cases involved 16- and 17-year-olds. The data also showed a drastic decrease in arrest levels since the mid-1990s: there were an estimated 2.9 million such arrests in 1996, when the population of those under 18 was smaller than it is today.<sup>179</sup>

While crimes by youth garner less attention, crimes *against* children have attracted wide media coverage. Recently, the most intense media attention focused on the case against Casey Anthony, a mother charged with the murder of her two-year-old daughter Caylee. The lengthy case “transfixed America for three years”<sup>180</sup> and ended in the summer of 2011 when a Florida jury found Ms. Anthony not guilty of murder and convicted her only of providing false information to the police. In a case closer to home, the murder of an eight-year-old boy in Brooklyn drew enormous attention during July 2011.<sup>181</sup>

With the juvenile crime rate falling and the media occupied with other matters, such as crimes that create sympathy for victimized children, there is some political space for those seeking to humanize the juvenile justice system. Reformers must hope this favorable media environment continues.

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178. Secret, *supra* note 45, at 2.

179. *Id.*

180. Lizette Alvarez, *Florida Mother Is Found Not Guilty of Murder*, N.Y. TIMES, July 5, 2011, at A1. A Google search on July 31, 2011 for “casey anthony trial” yielded 34,900,000 results.

181. Anahad O’Connor & Juliet Linderman, *Thousands Mourn Boy Killed in Brooklyn*, N.Y. TIMES, July 13, 2011.



*D. Obstacles to Reform*

With the stars seemingly well aligned for reform, what could go wrong? Plenty, of course. The following section will detail some reasons why it would be unwise to rest easy that reforms will take place, notwithstanding how needed and beneficial the changes might be.

*1. Budgets*

First, consider the issue of money. Any change, even one that may pay big dividends, requires some investment in a new set of arrangements. Unfortunately, today's sizeable budget deficits make new investments much less likely. Furthermore, state budgets reflect not only monetary allotments, but also power allocations. The constant battles in New York—between upstate and downstate interests, city and state control, conservatives and liberals, and the state senate and the state assembly—ensure that no road to reform in the state will ever be smooth.

Some of the conflicts over money have been adverted to previously. There are substantial savings to be had in the shift from incarceration, which is extremely expensive, to other alternatives. But the savings achieved thus far by closing detention centers are not largely directed to funding alternatives; they instead go into the state's general fund.<sup>182</sup> The state has a multi-billion dollar deficit to deal with and new programs, no matter how promising, are thrown into the fight over how state moneys are to be allocated. Meanwhile, some beneficial funding may be offset by cuts to other worthwhile programs. New York City Commissioners Schiraldi (Department of Probation) and John Mattingly (ACS) remind us that,

Governor Paterson's administration proposed spending \$18 million to address the Justice Department's criticisms, such as the lack of mental health services in state facilities. But at the same time, it proposed cutting \$16 million from alternative local programs that were keeping low-risk youth in their home communities. This robs an effective Peter to pay for a destructive Paul.<sup>183</sup>

And even when funds are made available, there is competition between communities; smaller municipalities may worry that money will be siphoned off by New York City, to the disadvantage of their own locales.<sup>184</sup>

Certain reforms, like the proposals to lift the age of criminal responsibility to the age of eighteen, require a particular expansion of personnel. If sixteen- and seventeen-year-olds are to be included in the juvenile delinquency regime, their cases must be tried in family court, an already very busy place, and prosecuted by the city's Law Department. New judges must be added, as well as new prosecutors and perhaps new

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182. New York City Commissioners Schiraldi (Probation) and Mattingly (ACS) have urged the state to continue facilities closings and to "reallocate savings to local government," which they acknowledged "will take no small amount of political courage." See Schiraldi & Mattingly, *supra* note 153, at 6.

183. *Id.*

184. See Buettner, *supra* note 141.

courtrooms. The legislature is not always receptive to the judiciary's call for more funds, as demonstrated by the lengthy battle over salary raises for state judges.<sup>185</sup>

Money is needed by probation departments seeking to expand non-prison alternatives for juveniles. The state's Chief Judge has argued that the judiciary should control probation funding and services.<sup>186</sup> Unfortunately, all reform ideas that raise questions of control raise conflicts over authority, the ever-present political "turf wars." Currently, the New York City Probation Department wants to change the allocation of authority between the city and the state in the area of juvenile dispositions. Commissioner Schiraldi, writing with Commissioner Mattingly, urged the State to empower local governments "to take care of their own young people in their own communities, when appropriate."<sup>187</sup> In the meantime, over the last two decades the state's share in funding local probation departments has fallen from forty-seven percent to eighteen percent.<sup>188</sup>

Major budget problems plaguing all levels of government can undermine efforts to provide the tools and personnel needed for youth rehabilitation. Refusals to fund new ideas and innovations can stifle experimentation. Cuts to programs that promote literacy, education, adult mentoring, help for runaway youth, and a host of other projects will hinder reform efforts to help young people avoid involvement with the juvenile justice system, as well as damage efforts to put those in the system on paths away from crime.

## 2. *Political Leadership*

With political leaders—even those professing a desire for reform—there is always the possibility that they will be distracted, lose interest, or otherwise cool to the reform project. The juvenile justice system is filled disproportionately with minority youth,<sup>189</sup> who lack political power and have never been a popular segment of society. Governors have multiple agendas, need to deal with shifting alliances on a number of public issues, and may be swayed to deal away juvenile justice reform opportunities in order to pursue other goals deemed more worthy, more politically advantageous, or more attainable. For example, Governor Cuomo decided to invest his political capital in pushing a same-sex marriage bill through the legislature, requiring Republican votes in the state senate. Who knows what he may have promised in return. If (and this is mere speculation) he agreed to put his effort to get rid of overstaffed, underused juvenile jails on the back burner because they are located in Republican districts that need jobs, the juvenile reform effort would have lost out to another worthy objective. Similarly, Republican cooperation on budget issues may be

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185. William Glaberson, *Caution Urged on Raises for State Judges*, N.Y. TIMES, July 21, 2011, at A22.

186. Lippman, *supra* note 155, at 11.

187. Schiraldi & Mattingly, *supra* note 153.

188. GOVERNOR DAVID PATTERSON'S TASK FORCE ON THE FUTURE OF PROBATION IN NEW YORK STATE: PHASE II, REPORT TO THE CHIEF JUDGE 5 (2008).

189. TASK FORCE, *supra* note 7, at 27–28 (reporting that almost "85 percent . . . of the young people entering OCFS custody in 2007 were either African American (59.4 percent) or Latino (24.8 percent)").

needed in the future and therefore may become the subject of hard political bargaining. It is noteworthy that within a few weeks of his taking office, Governor Cuomo appeared to sharply curtail his prison closing plans, in the face of “stiff resistance” from Senate Republicans, who were concerned about the loss of hundreds of state jobs held by their constituents.<sup>190</sup> Regardless, facilities have been closed and the governor has won a reduction, but not the elimination, of the time required to notify prison employees of a closure, from one year to two months.<sup>191</sup>

### 3. *Public Opinion*

Opinion leaders like the *New York Times* have been advocating reform in editorials and describing the intolerable conditions in juvenile prisons in news columns, helping to create a favorable climate for reform.<sup>192</sup> The sharp drop in juvenile crime throughout the nation has also allowed a window to open for reforms that were impossible in the fear-ridden 1990s.<sup>193</sup>

But public opinion can be fickle, and it can turn on unexpected events. A terrible crime committed by a youth or a gang, for example, can stir public outrage and make politicians leap to the microphones demanding severe “law and order” policies. It has happened in the past, such as when fifteen-year-old murderer Willie Bosket burst on the scene thirty years ago.<sup>194</sup> Even academics caught the fever when juvenile crime was high, with one Princeton professor predicting that “super-predators”—a term coined to describe amoral, violent teens—would be roaming the streets of America in force by the year 2010.<sup>195</sup>

Reform advocates must guard against public rejection of their efforts in the wake of possible notorious juvenile crimes. They may do this by making it clear that proposed changes to the juvenile justice system are not designed to protect the worst teen offenders from prosecution and just punishment. The public wants teens who commit violent crimes to be held accountable and, frankly, wants retribution, which is a

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190. Danny Hakim & Thomas Kaplan, *supra* note 160.

191. *See* Stashenko, *supra* note 139.

192. *See supra* text accompanying notes 72–168. National magazines have also carried stories favorable to reform. *See, e.g.,* Ken Stier, *Why Reforming the Juvenile Justice System is So Hard*, *TIME*, Sept. 16, 2009; Maia Szalavitz, *Why Juvenile Detention Makes Teens Worse*, *TIME* (Aug. 7, 2009), <http://www.time.com/time/health/article/0,8599,1914837,00.html>.

193. *See* Mark Soler et al., *Juvenile Justice: Lessons for a New Era*, 16 *GEO. J. ON POVERTY L. & POL'Y* 483, 486 (2009).

194. *See supra* text accompanying note 50. As a teenager, Willie Bosket was convicted of murdering two New Yorkers on the subway. He led a life of crime and became known as the most incorrigible offender in the New York state prison system. Fox Butterfield, *Jailed 'Monster' Gets More Prison Time for Stabbing a Guard*, *N.Y. TIMES*, Apr. 20, 1989, at B3.

195. Soler et al., *supra* note 193 (quoting John D. DiIulio of Princeton, and noting that similar dire, but wrong, predictions were made by James Q. Wilson of Harvard and James Allen Fox of Northeastern University).

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legitimate and longstanding goal of the criminal law.<sup>196</sup> Reformers need to reassure the citizenry that they also share a feeling of revulsion at the worst youth crimes, and that whatever changes they suggest in the system, the worst offenses will still be punished and the public will be kept safe from the most violent offenders.<sup>197</sup> Reformers often succeed when they show flexibility. Therefore, they should let the public know that the system can deal with both the worst and the less serious crimes committed by youth. Indeed, even a rehabilitative approach can be “sold” as one that promotes public safety by lowering recidivism rates and avoids transforming juveniles into career criminals.

### III. CONCLUSION

New York is attempting to reform its juvenile justice system in many ways, from closing down detention centers that have been condemned as abusive and inhumane, to building up community-based programs to rehabilitate offenders and drive down recidivism rates. A good deal has been accomplished thus far, largely due to a combination of factors that have favored reform efforts. A critical role has been played by the *New York Times* in informing the public of systemic abuses and in publishing a series of stinging editorials that demand action from public officials. A set of reform-minded commissioners and political leaders are now in place. A reduction in levels of juvenile crime has created an opportunity for reforms to take hold. The road to further change seems open. Nevertheless, full reform of complex and entrenched statewide bureaucratic systems takes time. Obstacles—in the form of limited budgets, political opposition, and shifting public opinion—may yet cause the reform effort to lose momentum. The battles ahead will determine the shape of juvenile justice in New York for years to come.

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196. The Supreme Court in *Graham v. Florida* acknowledged that retribution is a legitimate reason to punish juveniles, stating that “the heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender.” 130 S. Ct. 2011, 2028 (2010) (quoting *Tison v. Arizona*, 481 U.S. 137, 149 (1987)).

197. New York City officials did this when announcing the effort to provide alternatives to imprisonment, reassuring the public that any juveniles considered a threat to public safety will continue to be incarcerated. Julie Bosman, *Seeking to Send Fewer Youths to Jail, City Shifts Strategy on Delinquency*, N.Y. TIMES, Jan. 21, 2010, at A31.



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