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Cover Page Footnote

Former Chief Judge of the State of New York, now Of Counsel Skadden, Arps, Slate, Meagher & Flom in New York City. This essay is adapted from remarks delivered at John Jay College of Criminal Justice in New York City on February 2, 2009, as part of the H.F. Guggenheim Symposium on Crime in America entitled "A New Beginning? Exploring the Criminal Justice Challenge Over the Next Four Years." I am indebted to Greg Berman, Kathleen DeCataldo, and Toni Lang for their assistance in the preparation of this text.

A “NEW BEGINNING” FOR ADOLESCENTS IN OUR CRIMINAL JUSTICE SYSTEM

*Judith S. Kaye**

In the spirit of the day, I begin with “new beginnings.” On a personal level, recently I closed the door on twenty-five years as a judge of New York State’s high court, fifteen of those years as Chief Judge of the State of New York, and commenced Chapter Three of my professional life. But far more significant than my personal situation is our nation’s new beginning, our great President striking a resounding note of hope, a call for individual responsibility as well as collective, societal, responsibility.

For me, a good place to begin is with urgently-needed focus on young adolescents who stand at a precipice, facing imminent descent into lives of crime and misery for themselves and others. It’s their future, ours too.

Actually, it was U.S. Supreme Court Justice Anthony Kennedy who more than five years ago touched off a national conversation about criminal justice challenges in a speech before the American Bar Association (“ABA”).¹ To this day, the ABA continues its intensive study, culminating most recently in recommendations for more nuanced solutions, such as alternatives to incarceration, improvements in parole and probation, and a focus on re-entry issues like housing and employment.²

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1. Anthony M. Kennedy, Assoc. Justice, Supreme Court of the United States, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003), *available at* http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html.

2. AM. BAR ASS’N, JUSTICE KENNEDY COMMISSION REPORTS WITH RECOMMENDATIONS TO THE ABA HOUSE OF DELEGATES (2004), *available at* <http://www.abanet.org/crimjust/kennedy/JusticeKennedyCommissionReportsFinal.pdf>; *see also, e.g.*, Stephen A. Saltzburg, *A Better Way to Sanction Bad Behavior*, 22 CRIM. JUST. 1 (2007), *available at* <http://www.abanet.org/crimjust/cjmag/22-3/chairscounsel.pdf>.

The Grim Statistics

Justice Kennedy's statistics were positively hair-raising, and indeed have worsened in the intervening years. Imagine, an incarceration rate in the United States that is four to seven times higher than other western nations,³ heavily concentrated on twenty- to thirty-year-old racial minorities.⁴ The average annual cost to incarcerate a person in New York today is about three times what we spend educating a child.⁵ Is this really us? Is this America?

Justice Kennedy urged us all to take a hard look beyond the statistics to the human being behind the prison door. And there too we know the grim picture. Our nation's incarcerated adults have the lowest academic skill levels and the highest disability and illiteracy rates.⁶ No surprise. Indeed, we can roll the clock all the way back to birth—what the Children's Defense Fund calls the Cradle to Prison Pipeline.⁷

We know that about half a million people drop out of high school every year,⁸ and that 68% of state prisoners throughout the nation were high-

3. CHRISTOPHER HARTNEY, NAT'L COUNCIL ON CRIME AND DELINQUENCY, U.S. RATES OF INCARCERATION: A GLOBAL PERSPECTIVE 2 (2006), *available at* http://www.nccd-crc.org/nccd/pubs/2006nov_factsheet_incarceration.pdf; *see also* THE PEW CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008, at 3, 5 (2008) [hereinafter ONE IN 100], *available at* <http://www.pewcenteronthestates.org/uploadedFiles/One%20in%20100.pdf> (noting that for the first time, more than one in every 100 adults (1 in 99.1) in the United States is confined in an American jail or prison. The nationwide inmate population at the beginning of 2008 was over 2.3 million people: 1,596,127 in state or federal prison custody and 723,131 in local jails. The total adult inmate population equaled 2,319,258).

4. ONE IN 100, *supra* note 3, at 34.

5. THE PEW CHARITABLE TRUSTS, PUBLIC SAFETY, PUBLIC SPENDING: FORECASTING AMERICA'S PRISON POPULATION 2007–2011, at 19, 33 (2007), *available at* <http://www.pewcenteronthestates.org/uploadedFiles/Public%20Safety%20Public%20Spending.pdf> (finding the national average cost to incarcerate a person during the 2005–06 fiscal year was \$23,876. In New York, like other northeast states, the average was significantly higher, at \$42,202.); U.S. CENSUS BUREAU, PUBLIC EDUCATION FINANCES 2005, at XII (2007), *available at* <http://ftp2.census.gov/govs/school/05f33pub.pdf> (reporting that in 2005, New York spent \$14,119 per student). Although this amount per student is 62% more than the national average of \$8,701, it is significantly less than the cost to incarcerate a person in New York for a year.

6. STEVEN KLEIN ET AL., U.S. DEP'T OF EDUC., CORRECTIONAL EDUCATION: ASSESSING THE STATUS OF PRISON PROGRAMS AND INFORMATION NEEDS 6 (2004), *available at* http://www.mprinc.com/pubs/pdf/corred_report.pdf.

7. *See* CHILDREN'S DEF. FUND, AMERICA'S CRADLE TO PRISON PIPELINE REPORT (2007), *available at* <http://www.childrensdefense.org/child-research-data-publications/data/cradle-prison-pipeline-report-2007-full-highres.html>.

8. CTR. FOR LAW & SOC. POLICY, CLASP FEDERAL POLICY RECOMMENDATIONS FOR 2009 AND BEYOND 8 (2008), *available at* http://www.clasp.org/publications/clasp_fedpolicyrecommendationsfor2009andbeyond.pdf.

school dropouts.⁹ We know that adults who were frequently truant as teenagers tend to have poorer health, lower paying jobs, children with behavioral problems and an increased likelihood of incarceration.¹⁰ We know that approximately half of all inmates (some even the sole custodial parent) have children; we know that a disproportionate percentage of youth who age out of foster care end up incarcerated, or unemployed, homeless.¹¹ And so we come full circle right back to the profile of a majority of our state prisoners.

In 1899, America developed the world's first juvenile court in Chicago. More than a century later, we now lock up more young people than any other nation in the world.¹² Once a leader in juvenile justice, the United States is almost Third World in its punitive approach to youth crime.

Then add these facts to the mix. Homicide rates, a barometer for all violent crime, have recently increased among adolescents, disproportionately among young black men.¹³ Girls today are the fastest growing juvenile justice population, with girls of color, like boys of color, overrepresented throughout the process.¹⁴ And finally, consider the rise in teen pregnancy. The vast majority are unintended pregnancies, and the vast majority of the moms are unwed, they are also more likely to drop out of school and live in poverty, with babies more likely to have health and developmental problems, experience abuse or neglect, and have poor academic outcomes.¹⁵

9. CAROLINE WOLF HARLOW, U.S. DEP'T OF JUSTICE, EDUCATION AND CORRECTIONAL POPULATIONS 1 (2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ecp.pdf>.

10. See e.g., MYRIAM L. BAKER ET AL., U.S. DEP'T OF JUSTICE, TRUANCY REDUCTION: KEEPING STUDENTS IN SCHOOL 1 (2001), available at <http://www.ncjrs.gov/pdffiles1/ojjdp/188947.pdf>.

11. The PEW CHARITABLE TRUSTS, TIME FOR REFORM: AGING OUT AND ON THEIR OWN; MORE TEENS LEAVING FOSTER CARE WITHOUT A PERMANENT FAMILY 1, 19 (2007), available at http://www.jimcaseyyouth.org/docs/ageout_report.pdf.

12. NAT'L JUVENILE JUSTICE NETWORK, JUVENILE JUSTICE TRANSITION PAPER 1 (2008), available at http://pachildrensnews.org/PDFs/NJJN_Transition_Paper.pdf.

13. Erik Eckholm, *Murders by Black Teenagers Rise, Bucking a Trend*, N.Y. TIMES, Dec. 29, 2008, at A12.

14. See, e.g., STEPHANIE R. HAWKINS ET AL., U.S. DEP'T OF JUSTICE, GIRLS STUDY GROUP: UNDERSTANDING AND RESPONDING TO GIRLS' DELINQUENCY; RESILIENT GIRLS—FACTORS THAT PROTECT AGAINST DELINQUENCY 1 (2009); CHRISTY SHARP & JESSICA SIMON, CHILD WELFARE LEAGUE OF AM., GIRLS IN THE JUVENILE JUSTICE SYSTEM 10-11 (2004), available at <http://www.cwla.org/programs/juvenilejustice/jjgirls05.pdf>.

15. See Joyce A. Martin et al., *Births: Final Data for 2006*, NAT'L VITAL STAT. REP., Jan. 7, 2009, at 1, 12, available at http://www.cdc.gov/nchs/data/nvsr/nvsr57/nvsr57_07.pdf (“[T]he overwhelming majority of teenage births have long been nonmarital (rising from two-thirds in 1990 to 84 percent in 2006).”); T.J. Mathews et al., *Infant Mortality Statistics from the 1998 Period Linked Birth/Infant Death Data Set*, NAT'L VITAL STAT. REP., July 20, 2000, at 1, 6; S.J. Ventura et al., *Births to Teenagers in the United States, 1940–2000*, NAT'L VITAL STAT. REP., Sept. 25, 2001, at 1, 4-5, available at <http://www.cdc.gov/nchs/>

Again we come full circle back to the school truants, dropouts and state prisons.¹⁶

So yes, definitely, we have a genuine opportunity for “a new beginning” in meeting criminal justice challenges. There is no question about it. But precisely where does the “new beginning” begin? At birth? Adolescence? Incarceration? It seems to me that at each juncture the only wrong answer is, “don’t bother, we’re doing O.K.”

What is also obvious is that, at every juncture, the solution requires concerted effort across systems. Quality educational opportunities, relationships with caring adults, and community support plainly are among the factors that reduce involvement with the justice system. And when involvement with the justice system occurs, states are finding alternatives that hold people accountable, protect public safety and also cost much less than incarceration. Each of us has a role, and a responsibility, to change the grim statistics.

Justice Kennedy in his remarks to the ABA actually had two themes. His first concern was the inadequacies and injustices of our prison system, his second was the continuing need to teach the principles of freedom to young people, soon to become trustees of our great constitutional heritage and treasured public institutions. Though he established his case beyond all doubt on both scores, his bottom line was not to offer solutions but rather to urge the ABA immediately to begin a wide discussion, and he kindled a flame that fires enthusiasm to this day, with what will surely in the end be tangible outcomes.

Focus on Adolescents

The question I ask myself is: Where in the cycle of distress can we have the greatest impact? Here my thoughts center on adolescents, young teenagers, the people closest to the edge of the cliff, the people closest to their

data/nvsr/nvsr49/nvsr49_10.pdf (“[T]eenage mothers are much less likely than older women to receive timely prenatal care and more likely to begin care in the third trimester or have no care at all. They are also more likely to smoke during pregnancy. . . . [B]abies born to teenagers are more likely to be born preterm (less than 37 completed weeks of gestation) and low birthweight (less than 5 lb 8 oz), and thus are at greater risk of serious and long-term illness, developmental delays, and of dying in the first year of life.”); *see also, e.g.*, S. D. HOFFMAN, NAT’L CAMPAIGN TO PREVENT TEEN PREGNANCY, BY THE NUMBERS: THE PUBLIC COST OF TEEN CHILDBEARING (2006), available at http://www.thenationalcampaign.org/costs/pdf/Science_Says_30.pdf.

16. For a summary of research showing the relationship between high school graduation rates and crime rates, and a relationship between educational attainment and the likelihood of incarceration, see JUVENILE JUSTICE POLICY INST., EDUCATION AND PUBLIC SAFETY (2007), available at http://www.justicepolicy.org/images/upload/07-08_REP_EducationAndPublicSafety_PS-AC.pdf.

first criminal conviction and their first unintended baby, both events with lifetime consequences. These are tough issues, even more so in this tough economy.

I will start with something that was near and dear to my heart as Chief Judge—what has been called problem-solving justice, or restorative, or therapeutic, justice. It begins with a recognition that matters generally reach courts, judges, only after some wrongdoing has been committed. But once courts do become involved, why is it necessary simply to hear a case, impose a sentence that often is “time served,” and then move on to the next case? Put another way, why not use the time and resources of a court intervention positively, constructively, collaboratively with others, in the hope of avoiding what we know may be just one step in a foot-long rap sheet of repetitive, worsening, more threatening criminal conduct?

This is the premise underlying initiatives like drug courts that have spread throughout the nation, building on the critical moment of arrest—“touching bottom” in the words of many offenders I have met—to mandate drug treatment and a host of other measures to repair the harm done, connect the individual to people who can help, and address the underlying causes of the offending behavior. I was so pleased to see in an MTV interview a couple of months ago that then-candidate Barack Obama made that same connection in answer to a question from a caller from Red Hook, about growing up in a climate of hopelessness—Obama described initiatives like drug courts a “smart approach and not just a tough approach.”¹⁷

What caught my eye recently was a report of an inmate on Rikers Island allegedly beaten to death by fellow inmates in the presence of three New York City corrections officers.¹⁸ The victim was just eighteen-years-old, arrested on a parole violation stemming from an earlier burglary. New York, by the way, is one of two states in the entire nation (North Carolina the other) that prosecutes sixteen-year-olds as adults. The article reported that the boy’s mother is thirty-four years old, meaning she was only sixteen years old when she gave birth to him. I have heard Geoff Canada say that you can pretty much predict a child’s future from his zip code.¹⁹

17. *MTV News. Barack Obama Answers Your Questions* (MTV television broadcast Nov. 2, 2008), available at <http://www.mtv.com/news/articles/1598409/20081102/index.jhtml#>.

18. Al Baker, *Indictments Are Expected in Killing of Inmate*, 18, N.Y. TIMES, Jan. 22, 2008, at A30.

19. Canada’s remarks came at a national summit co-sponsored by the Conference of Chief Justices, the Conference of State Court Administrators, the National Center for State Courts, and the New York State Unified Court System. See Geoffrey Canada, Executive Dir., Harlem Children’s Zone, Keynote Address at A Summit on Children: It’s Their Future—Ours Too (Mar. 2007).

The sad truth is that all too many teenagers unwittingly step onto a fast track to nowhere as a single criminal act leads to conviction and incarceration. We know from hard-earned experience that it is difficult to find your way back once you have a criminal record and have spent time behind bars. The prospect of success, always remote for children from the neighborhoods that Geoff Canada is talking about, become even more remote.

None of this is to suggest that we should make excuses for offending behavior. On the contrary, it is crucial that we send a message that crime has consequences and that individuals are responsible for their actions.

But as a nation, we can not afford to send so many thousands of young people on the express lane to prison and oblivion. What we need to do is to design off-ramps. And just one off-ramp is not enough. At every point in the juvenile justice process—from arrest, to adjudication, to sentencing, to reentry—we need to create opportunities for troubled young people to put their lives back on track.

Building Off-Ramps

This will require a fundamental shift in how we view the justice system. We need to turn contacts with the justice system—those moments of crisis—into genuine opportunities for change. Together, we need to create a host of meaningful interventions that will hold young people accountable for their actions while simultaneously offering them the structure and support they need to lead successful, law-abiding lives. For too long, we have been presented with a false choice between accountability and compassion when it comes to adolescents. We can have both. We must have both.

I would like to tell you about one “off-ramp” that I think holds promise: youth court. From my perspective, one of the justice system’s highest priorities when it comes to adolescents should be the concept of early intervention—responding to the first warning signs of trouble in a young person’s life. I wonder about that young man on Rikers Island.

Youth courts are teen-led tribunals where trained young people hear actual low-level criminal cases involving their peers. The animating concept is to turn peer pressure on its head, using pressure as a positive force. In a typical youth court case, a young person apprehended for a minor offense such as shoplifting or vandalism receives a sentence that is both constructive and restorative. Sanctions include restitution, community service, letters of apology, and links to services like tutoring and anger management workshops.

This approach can work. On a trip to Anchorage for the Chief Justices Conference last summer, we were greeted by Mayor (now Senator) Mark Begich, who boasted of their youth courts’ better than 90% success rate, so

the Chief Administrative Judge and I rushed over immediately to see for ourselves. The proceeding we saw, held in an actual courtroom, was downright inspirational. I remember in particular a youth court judge telling the sixteen-year-old before them that day on a car theft, “You can come back to Youth Court in any role but one. You can be judge, or attorney, or bailiff. There’s just one role you can never again play: you can never come back as a defendant. Today you have an arrest record. If you do anything like this again you will have a criminal conviction that will follow you all your life, with every job, school, credit or housing application.” Powerful words. They sure moved me.

That is exactly the kind of message that I hope the teenagers involved with our new Staten Island Youth Court will deliver to their peers.²⁰ The Staten Island Youth Court has three basic components. First, thanks to the support of Staten Island District Attorney Dan Donovan, the Youth Court will offer young people who are referred from criminal court the opportunity, should they successfully complete their sanctions, to avoid a criminal record. Second, it will provide the teenagers who participate as judges, lawyers and jurors with what amounts to an experiential civics class, where they can learn firsthand about how the justice system works. It is a serious program—they have to pass a bar examination to qualify for the court. Finally, we intend for our Youth Court also to include a mentoring program, linking both members and respondents with carefully screened adult volunteers drawn from the ranks of retired judges, the bar, and community organizations. Mentors are extremely important. Studies show that effective mentoring reduces the incidence of delinquency, substance use and academic failure and promotes positive outcomes like improved self-esteem, social skills and career development.²¹

I am excited about this structured, three-pronged approach: avoiding that first criminal conviction, seriously educating teens in our justice system, and providing them with effective mentors.

I recognize that there are many other excellent ongoing efforts to create off-ramps along the way, like the wonderful after-school programs that help young people face the daily challenges of life and avoid dangerous associations, as well as programs building on the fact that fully 75% of the

20. For additional information about the Staten Island Youth Court, see Peter N. Spencer, *Underage Offenders on Staten Island Will Be Judged by Their Peers*, STATEN ISLAND ADVANCE, Jan. 11, 2009, http://www.silive.com/news/index.ssf/2009/01/underage_offenders_will_be_jud.html.

21. See, e.g., JEFFREY A. BUTTS ET AL., THE IMPACT OF TEEN COURT ON YOUNG OFFENDERS (2002), available at <http://www.jbutts.com/pdfs/410457.pdf>; NAT’L ASS’N OF YOUTH COURTS, SUMMARY OF EVALUATIVE LITERATURE FOR YOUTH COURTS, <http://www.youthcourt.net/content/view/37/> (last visit May 26, 2009).

children coming out of our placement facilities are rearrested within three years of their release.²² And if that fact alone were not nightmarish enough, the cost of keeping just one child in placement for a year can reach \$200,000.²³ What a poor return on our investment!

It seems to me that placement, generally, should be reserved for young people who are dangerous.²⁴ How can a system that calls itself the justice system rationalize the removal of a child from home and assignment to a facility, based on the commission of a non-violent misdemeanor? Yet that is precisely the situation for more than half of the children in placement throughout New York State.²⁵ Surely, we can devise better off-ramps for the challenges these children pose.

And what awaits young people when they return home from placement? Families are often overburdened and unable to provide support, reluctant to take them back; services are frequently inaccessible or unaffordable, and there is often little in the way of meaningful supervision and guidance.²⁶

22. BRUCE FREDERICK, FACTORS CONTRIBUTING TO RECIDIVISM AMONG YOUTH PLACED WITH THE NYS DIVISION FOR YOUTH 1 (1999) (providing analysis showing “81 percent of males and 45 percent of females were arrested within 36 months of discharge from DFY custody”).

23. See Press Release, David A. Paterson, Governor, N.Y. State, Governor Paterson Announces Task Force On Transforming New York’s Juvenile Justice System (Sept. 10, 2008), available at http://www.ny.gov/governor/press/press_0910081.html.

24. Research also demonstrates the cost effectiveness of early intervention programs. See, e.g., PETER GREENWOOD ET AL., DIVERTING CHILDREN FROM A LIFE OF CRIME, MEASURING COSTS AND BENEFITS XIV, at 37 (1996) (noting that spending \$1 million on early intervention, e.g., graduation incentives and intense delinquent supervision, can prevent as much as 250 crimes in comparison to preventing only sixty crimes a year by investing the same amount in prisons). For a discussion about the unique needs of girls involved with the juvenile justice system see PHYSICIANS FOR HUMAN RIGHTS, UNIQUE NEEDS OF GIRLS IN THE JUVENILE JUSTICE SYSTEM 1, <http://physiciansforhumanrights.org/juvenile-justice/factsheets/girls.pdf> (last visited Mar. 19, 2009) (showing that girls in the justice system are likely to have been victims themselves: “Up to 92% of incarcerated girls have experienced one or more forms of physical, sexual and emotional abuse before entering the juvenile justice system. More than 45% have been beaten or burned at least once; 40% have been raped; 32% have current or past sexually transmitted diseases; and 32% have chronic health problems. Girls exposed to violence on an ongoing basis are prone to self-abusive behavior, depression, mental illness, drug use and suicide.”); see also Cindy S. Lederman, *Girls in the Juvenile Justice System: What You Should Know*, 19 ABA CHILD L. PRAC. 110 (2000), available at <http://www.abanet.org/child/clp/Juvenile%20Justice/Girls%20in%20the%20Juvenile%20Justice%20System.htm>.

25. VERA INST. OF JUSTICE, WIDENING THE LENS: 2008, at 20-21 (2008), available at http://www.vera.org/publication_pdf/wideningthelens08.pdf.

26. In addition to families, research has shown that there are many factors that influence successful reentry. See, e.g., DANIEL P. MEARS & JEREMY TRAVIS, URB. INST., THE DIMENSIONS, PATHWAYS, AND CONSEQUENCES OF YOUTH REENTRY 10 (2004), available at http://www.urban.org/UploadedPDF/410927_youth_reentry.pdf (“The seven domains along which these challenges occur include: (1) family and living arrangements; (2) peer groups

What is needed is a system in which preparation for reentry begins at the time of placement, like the most appropriate school match, parent training and assistance and other services. We cannot wait for the children to come home to start the process of identification and enrollment. Attention must be paid to insuring that young people comply with the conditions of their release, but they also need to be given a fighting chance to reintegrate into their homes and neighborhoods, to be welcomed back into their schools and, for the older adolescents, to be given vocational training and access to employment so that they can start down the path to self-sufficiency.

As I step away from the bench, I am feeling more than ever what Dr. Martin Luther King called “the fierce urgency of now.”²⁷ Now is the time for all of us who care about justice in this country to roll up our sleeves and get to work. We may be in a moment of crisis, but as the saying goes, a crisis is a terrible thing to waste. We urgently need to change our focus from jails and prisons to treatment, education, job training.

So where is the “new beginning”? The “new beginning” is not a search for new ideas. We do not need new ideas. We know what works, and we sure do know what does not work. The “new beginning” is with each of us—new resolve, new enthusiasm, new dedication to the return of America. It is what President Obama described as “a new era of responsibility, a recognition, on the part of every American, that we have duties to ourselves, our nation, and the world, duties that we do not grudgingly accept but rather seize gladly, firm in the knowledge that there is nothing so satisfying to the spirit, so defining of our character, than giving our all to a difficult task.”²⁸ I hope you will join me in the difficult task of making a difference for adolescents whose lives intersect with the justice system.

and friends; (3) mental, behavioral, and physical health; (4) substance abuse; (5) education and schooling; (6) vocational training and employment; and (7) leisure, recreation, and avocational interests.”).

27. Dr. Martin Luther King, Jr., Speech at the Lincoln Memorial, Washington, D.C. (Aug. 28, 1963), *available at* <http://www.americanrhetoric.com/speeches/mlkihavedream.htm>; Dr. Martin Luther King, Jr., Speech to clergy and laity at Riverside Church, New York, N.Y.: Beyond Vietnam—A Time to Break Silence (Apr. 4, 1967), *available at* <http://www.americanrhetoric.com/speeches/mlkatimetobreaksilence.htm>.

28. President Barack Obama, Inauguration Address (Jan. 20, 2009), *available at* <http://americanrhetoric.com/speeches/barackobama/barackobamainauguraladdress.htm>.