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## Criminal Justice Reform Is Not for the Short-Winded: How the Judiciary's Proactive Pursuit of Justice Helped Achieve "Raise the Age" Reform in New York

Jonathan Lippman

*The Honorable Jonathan Lippman, former Chief Judge of New York and Chief Judge of the New York Court of Appeals, is Of Counsel in the New York office of Latham & Watkins LLP and a member of the firm's Litigation & Trial Department*

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# **CRIMINAL JUSTICE REFORM IS NOT FOR THE SHORT-WINDED: HOW THE JUDICIARY'S PROACTIVE PURSUIT OF JUSTICE HELPED ACHIEVE "RAISE THE AGE" REFORM IN NEW YORK**

*Jonathan Lippman\**

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\* The Honorable Jonathan Lippman, former Chief Judge of New York and Chief Judge of the New York Court of Appeals, is Of Counsel in the New York office of Latham & Watkins LLP and a member of the firm's Litigation & Trial Department. The author wishes to express his appreciation and gratitude to Lemay Diaz for his assistance in researching and drafting this article.

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## INTRODUCTION

This past April of 2017, after years of debate, the New York State Legislature passed a comprehensive reform bill raising the age of criminal responsibility from sixteen to eighteen.<sup>1</sup> New York became the forty-ninth state to raise the age of criminal responsibility above the age of sixteen.<sup>2</sup> When Governor Andrew Cuomo signed the bill into law, New York finally fulfilled a more than fifty-year-old promise made by the State Legislature in 1962.<sup>3</sup> At that time, a divided Legislature decided to keep the age of criminal responsibility at sixteen, but promised that this was “tentative” and subject to change upon the completion of a study of the impact of the new court and related laws.<sup>4</sup> Although the study was completed, no bill was ever introduced and the “tentative” decision remained for the next five decades.

The battle to raise the age in New York was a long and arduous one, filled with many obstacles and lessons. To paraphrase Justice Vanderbilt’s famous aphorism, criminal justice reform is not a sport

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1. S.B. 2009C, 239th Leg., Budget Bill, Part WWW § 1 (N.Y. 2017); *see also* Press Release, Andrew M. Cuomo, Governor of New York, Governor Cuomo Signs Legislation Raising the Age of Criminal Responsibility to 18-years-old in New York (Apr. 10, 2017), <https://www.governor.ny.gov/news/governor-cuomo-signs-legislation-raising-age-criminal-responsibility-18-years-old-new-york> [<https://perma.cc/L47W-6X3L>].

2. New York joined forty-one other states that had already set the age of criminal responsibility at eighteen and an additional seven states that had set the age at seventeen. *See* JOSH ROVNER, THE SENTENCING PROJECT, HOW TOUGH ON CRIME BECAME TOUGH ON KIDS: PROSECUTING TEENAGE DRUG CHARGES IN ADULT COURTS 4 (2016), <http://www.sentencingproject.org/wp-content/uploads/2016/12/How-Tough-on-Crime-Became-Tough-on-Kids.pdf> [<https://perma.cc/4U5B-EELK>]. On June 19, 2017, North Carolina followed New York and became the last state to raise the age. Anne Blythe, *NC Becomes Last State to ‘Raise the Age’ of Teens in Court*, NEWS & OBSERVER (June 20, 2017, 5:27 PM), <http://www.newsobserver.com/news/politics-government/article157219234.html> [<https://perma.cc/5LK6-T33Y>].

3. Merril Sobie, *Pity the Child: The Age of Delinquency in New York*, 30 PACE L. REV. 1061, 1072–73 (2010).

4. *Id.*

for the short-winded,<sup>5</sup> and neither was the fight to keep sixteen- and seventeen-year-old children out of the adult criminal justice system.

Notably, the push that finally achieved reform this past April was ignited by what many would consider to be an unexpected source—the State Judiciary. This advocacy would seem to be at odds with Chief Justice Roberts's judicial philosophy. During his confirmation hearing in 2005, he described the job of a judge as being akin to an umpire who must only "call balls and strikes and not [ ] pitch or bat."<sup>6</sup> There is much wisdom to Chief Justice Roberts's analogy. Judges should not be "judicial activists" and should not arrive at legal conclusions based on their personal agendas or biases. In other words, judges should not be divorced from the rules of the game—rules that are framed by the legislative and constitutional constraints of our tri-partite system of government.

But that does not mean that state judiciaries, particularly Chief Justices<sup>7</sup>—the stewards of the justice system in their respective states—should simply sit idly, treating citizens as faceless numbers on the crowded court docket. At a time when many Americans lack confidence in the criminal justice system<sup>8</sup> and access to justice is unfortunately largely driven by wealth,<sup>9</sup> state judiciaries should be

5. ARTHUR T. VANDERBILT, INTRODUCTION TO MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION, at xix (1949) ("Judicial reform is no sport of the short-winded or for lawyers who are afraid of temporary defeat. Rather must we recall the sound advice given by General Jan Smuts to the students at Oxford: 'When enlisted in a good cause, never surrender, for you can never tell what morning reinforcements in flashing armours will come marching over the hilltop.'").

6. *Roberts: 'My Job is to Call Balls and Strikes and Not to Pitch or Bat'*, CNN (Sept. 12, 2005, 4:58 PM), <http://www.cnn.com/2005/POLITICS/09/12/roberts.statement/> [<https://perma.cc/6NEN-HRNL>].

7. The term "Chief Justice" is used in most states to describe the highest-ranking judge in the state's court of last resort. However, New York, Maryland, and the District of Columbia use the term "Chief Judge." For simplicity, this Essay will use the term "Chief Justices" to refer to both Chief Justices and Chief Judges when referring to the heads of the judicial branches in a general way.

8. See Jim Norman, *Americans' Confidence in Institutions Stays Low*, GALLUP NEWS (June 13, 2015), [http://www.gallup.com/poll/192581/americans-confidence-institutions-stays-low.aspx?g\\_source=Politics&g\\_medium=newsfeed&g\\_campaign=tiles](http://www.gallup.com/poll/192581/americans-confidence-institutions-stays-low.aspx?g_source=Politics&g_medium=newsfeed&g_campaign=tiles) [<https://perma.cc/V2L3-RSBW>] (finding that only twenty-three percent of Americans have either "a great deal" or "quite a lot" of confidence in the criminal justice system); see also HARVARD INST. OF POLITICS, EXECUTIVE SUMMARY SURVEY OF YOUNG AMERICANS' ATTITUDES TOWARD POLITICS AND PUBLIC SERVICE 10 (2016), [http://iop.harvard.edu/sites/default/files/content/160425\\_Harvard%20IOP%20Spring%20Report\\_update.pdf](http://iop.harvard.edu/sites/default/files/content/160425_Harvard%20IOP%20Spring%20Report_update.pdf) [<https://perma.cc/65AJ-S6A3>] (finding that nearly half of young Americans lack confidence in the justice system, while forty percent only have "some" confidence).

9. TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL SERVS. IN N.Y., REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 1 (2010), <https://www.nycourts.gov/>

proactive in the pursuit of equal justice. In the complex world of today, the modern Judiciary must ensure that justice is really and truly being done. Namely, state judiciaries can and should raise awareness when the system fails and propose solutions. Who better to spot such problems than the state's top jurists who have the expertise and experience to best appraise the weaknesses of the judicial system? As such, the judicial branch has a prominent part to play in promoting reforms that are essential to its constitutional mission and to the administration of justice. Such reforms will ultimately enable judges to better serve the public and the society in which we live. The courts are the emergency room for society's ailments and must be a part of the solution to the problems of today.<sup>10</sup>

The push to raise the age of criminal responsibility in New York provides a compelling case study for why the Judiciary can and should be the laboratory of criminal justice reform in order to effectuate its constitutional mandate to achieve justice. This piece seeks to highlight the unique pulpit that judicial leaders hold and how judges can use their position to positively affect public policy discussions and reform. Through the lens of my own experience as New York's Chief Judge, this Essay will provide an account of the long battle to raise the age of criminal responsibility in New York, from its inception to law.

Part I provides a general background of the age of juvenile criminal responsibility in New York discussing the 1962 "tentative" decision to keep sixteen as the cut-off age for criminal responsibility. It also discusses the implications of this decision—in particular, how New York began to lag behind as other states embraced raising the age of criminal responsibility in response to a rapidly evolving body of science recommending such a change. Part II discusses the heavy price that New York paid as a result of this "tentative" decision by highlighting how the law disproportionately affected juveniles of color, how it did not make our cities safer, and how it was economically wasteful. Part III discusses the push to raise the age of

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accesstojusticecommission/pdf/CLS-TaskForceREPORT.pdf [<https://perma.cc/P6EV-ATLT>] (finding that each year more than 2.3 million litigants came into New York courts without legal representation because they were unable to afford a lawyer or obtain free assistance).

10. William Glaberson, *The Recession Begins Flooding Into the Courts*, N.Y. TIMES (Dec. 27, 2009), <http://www.nytimes.com/2009/12/28/nyregion/28caseload.html> [<https://nyti.ms/2zueL4k>] ("We are the emergency room for society."); Casey Seiler, *Lippman's Final Gavel*, TIMES UNION (Nov. 21, 2015, 6:49 PM), <http://www.timesunion.com/tuplus-local/article/Lippman-s-final-gavel-6649096.php> [<https://perma.cc/N8BY-KMKQ>].

criminal responsibility in New York from my perspective as Chief Judge, by highlighting how the Judiciary’s proactive pursuit of justice helped make this reform a reality.

## I. BACKGROUND OF JUVENILE CRIMINAL RESPONSIBILITY IN NEW YORK

New York has a proud history of being at the cutting edge when it comes to juvenile justice reform, championing a system that emphasized rehabilitation for juvenile offenders.<sup>11</sup> However, the New York Legislature’s failure to revisit its 1962 tentative decision to not raise the age of criminal responsibility marked the beginning of a shift in the law towards a more punitive system. The tentative decision became permanent law with the passage of time. Meanwhile, much of the nation reformed on the basis of a rapidly evolving body of science showing that the criminal justice system should not treat juveniles as adults. As a result, New York remained marred by its failure to raise the age of criminal responsibility for the next fifty years.

### A. Family Court Act of 1962 and the Broken Promise

Prior to the current raise-the-age law, the Family Court Act of 1962<sup>12</sup> (the “1962 Act”) was one of the last progressive juvenile criminal justice reforms undertaken by the New York State Legislature. A year earlier, the 1961 Constitutional Convention established the Family Court.<sup>13</sup> The Convention extensively discussed whether to raise the age of criminal responsibility to eighteen.<sup>14</sup> Unable to reach a consensus, the Convention ultimately invited change via legislative act, rather than the cumbersome constitutional amendment process.<sup>15</sup>

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11. For a comprehensive history of New York’s juvenile criminal justice system prior to the 1962 Act, see Julianne T. Scarpino, *A Progressive State of Mind: New York’s Opportunity to Reclaim Justice for Its Juveniles*, 23 J.L. & POL’Y 845, 851–54 (2015). For instance, in the 1800s New York spearheaded juvenile reform towards a system that emphasized rehabilitation, becoming the first state to construct special facilities that enabled children to be removed from adult penitentiaries. Sobie, *supra* note 3, at 1062. This progress continued in the early 1900s, as New York County created a specialized juvenile court in 1902 and the State Legislature decriminalized most juvenile offenses in 1909 and created the New York State Children’s Court in 1922. See Scarpino, *supra* at 853.

12. 1962 N.Y. Sess. Laws 3043 (McKinney) (codified as N.Y. FAM. CT. ACT).

13. Sobie, *supra* note 3, at 1071.

14. *Id.*

15. *Id.* at 1072.

The 1962 Act incorporated several unprecedented provisions, which were a great step toward securing rights for New York's juvenile offenders at the time. Of note, Article 7 of the 1962 Act provided that juvenile delinquents would be tried in Family Court, not in the adult criminal systems.<sup>16</sup> Importantly, the 1962 Act granted these juveniles most of the procedural rights afforded under the adult criminal system.<sup>17</sup>

However, for all its good, Section 712 of the 1962 Act defined Juvenile Delinquents—those entitled to the protections of the law—as persons “over seven and less than sixteen years of age . . . ”<sup>18</sup> This decision was contrary to the legislative history, which demonstrated widespread support for extending the Family Court’s jurisdiction to all children under the age of eighteen.<sup>19</sup> Yet, by maintaining the ceiling of the Family Court’s juvenile jurisdiction at fifteen, the 1962 Act ensured that thousands of sixteen- and seventeen-year-old nonviolent juvenile offenders would be processed through the adult criminal justice system, a system that was, at best, ill-prepared to provide for their developmental needs.<sup>20</sup>

The legislative history indicates that various advocacy groups and stakeholders offered different recommendations as to how sixteen- and seventeen-year-olds should be treated under the law.<sup>21</sup> Nevertheless, the Family Court ceiling was maintained due to the “tough-on-crime” versus “soft-on-crime” debate within the political branches.<sup>22</sup> Like the Constitutional Convention before it, the Joint Legislative Committee deferred a decision on raising the age in order to pass the 1962 Act.<sup>23</sup> They agreed to maintain age sixteen as the cut-off point, but they noted that this decision was “*tentative* and

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16. N.Y. FAM. CT. ACT §§ 712-13 (McKinney 2017).

17. *Id.* at §§ 721, 727, 729.

18. *Id.* at § 712.

19. Jellisa Joseph, Note, *Catching Up: How the Youth Court Act Can Save New York State’s Outdated Juvenile Justice System with Regard to Sixteen and Seventeen-Year-Old Offenders*, 7 ALB. GOV’T L. REV. 219, 223 (2014).

20. See generally BARRY HOLMAN & JASON ZIEDENBERG, JUSTICE POLICY INST., THE DANGERS OF DETENTION: THE IMPACT OF INCARCERATING YOUTH IN DETENTION AND OTHER SECURE FACILITIES (2006), [http://www.justicepolicy.org/images/upload/06-11\\_rep\\_dangersofdetention\\_jj.pdf](http://www.justicepolicy.org/images/upload/06-11_rep_dangersofdetention_jj.pdf) [https://perma.cc/X5NL-SMPU]; COUNCIL OF JUVENILE CORR. ADM’RS, POSITION STATEMENT: WAIVER AND TRANSFER OF YOUTHS TO ADULT SYSTEMS (2009), [http://www.campaignforyouthjustice.org/documents/CJCA%20Waiver%20and%20Transfer%20\(2009\).pdf](http://www.campaignforyouthjustice.org/documents/CJCA%20Waiver%20and%20Transfer%20(2009).pdf) [https://perma.cc/9P2N-W8GC].

21. See Joseph, *supra* note 19, at 223.

22. *Id.* at 225.

23. Sobie, *supra* note 3, at 1072.

subject to change" upon further study of the impact of the new court and related laws.<sup>24</sup> The Joint Legislative Committee further ordered that this study be completed and new legislation be submitted by the 1963 legislative term.<sup>25</sup>

The study was indeed completed in time, but the Joint Legislative Committee failed to reach a firm decision on whether to raise the age of criminal responsibility. As a result, no legislation was proposed. Rather, the final paragraph of the 1963 report states that "the Legislature is under a constitutional mandate to examine again the question of whether the juvenile delinquency age should be changed or other arrangements made for dealing with young offenders."<sup>26</sup> However, the legislative history inexplicably ends there, with no evidence of further attempts by the Legislature to re-examine the age of juvenile delinquency.<sup>27</sup>

Subsequently, the legislative climate in New York began to shift away from the rehabilitative theory that had led to the enactment of the 1962 Act—the main focus became punishment.<sup>28</sup> A few, high-profile and gruesome crimes committed by juveniles in the early 1970s<sup>29</sup> caused public outcry and provided tough-on-crime advocates with the necessary ammunition to not only halt, but reverse much of the progress New York had accomplished.<sup>30</sup> First, the Juvenile

24. *Id.* (quoting N.Y. JOINT LEGISLATIVE COMM. ON COURT REORGANIZATION, THE FAMILY COURT ACT REPORT 110 (1962) (emphasis added)).

25. *Id.*

26. *Id.*

27. Sobie, *supra* note 3, at 1073.

28. Jan Hoffman, *Quirks in Juvenile Offender Law Stir Calls for Change*, N.Y. TIMES (July 12, 1994), <http://www.nytimes.com/1994/07/12/nyregion/quirks-in-juvenile-offender-law-stir-calls-for-change.html> [https://nyti.ms/2iMVGay].

29. See Simon I. Singe et al., *The Reproduction of Juvenile Justice in Criminal Court: A Case Study of New York's Juvenile Offender Law*, in THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT 353, 353 (Jeffrey Fagan & Franklin E. Zimring eds., 2000); John Elgion, *Two Decades in Solitary*, N.Y. TIMES (Sept. 22, 2008), <http://www.nytimes.com/2008/09/23/nyregion/23inmate.html?mcubz=0> [https://nyti.ms/2puc4xG].

30. By the early 1970s, the media and politicians warned of a youth generation of "superpredators." See ASHLEY CANNON ET AL., CITIZENS CRIME COMM'N OF N.Y.C., GUIDE TO JUVENILE JUSTICE IN NEW YORK CITY 9 (2010), <http://www.nycrimecommission.org/pdfs/GuideToJuvenileJusticeInNYC.pdf> [https://perma.cc/NXH4-EELV] ("[t]his punitive turn in juvenile justice was exacerbated by research that emerged during this time painting juveniles as 'superpredators'"); see also Barry C. Feld, *Legislative Exclusion of Offenses from Juvenile Court Jurisdiction: A History and Critique*, in THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT, *supra* note 29, at 83, 86; Mosi Secret, *States Prosecute Fewer Teenagers in Adult Courts*, N.Y. TIMES (Mar. 5, 2011), <http://www.nytimes.com/2011/03/06/nyregion/>

Justice Reform Act of 1976 amended the 1962 Act by requiring that judges consider “the need for protection of the community.”<sup>31</sup> This language evidenced a shift from the rehabilitative theories towards harsher punitive theories.<sup>32</sup>

Second, two years later in an impulsive reaction to several high-profile murders committed by fifteen-year-old Willie Bosket, the Legislature enacted the Juvenile Offender Act of 1978.<sup>33</sup> The Juvenile Offender Act lowered the age of criminal responsibility for serious crimes and moved prosecution of these cases to adult criminal court.<sup>34</sup> With it, New York’s status as a tough-on-crime state was solidified. The “tentative” 1962 decision had now become permanent, and children between sixteen and eighteen years of age would be subject to the wrath of a much harsher adult criminal judicial system for the next fifty years.

### B. New York Lags Behind the Evolving Science and Law

For the next five decades New York remained attached to the tough-on-juvenile-offenders paradigm, despite the rapidly evolving science and legal theories that were espoused by many other states in the country. Particularly, in the past twenty-five years the view on adolescent criminal responsibility has evolved significantly.

Numerous neurological and psychological studies have conclusively shown that the adolescent brain is in development and not fully formed until an individual reaches his or her early twenties.<sup>35</sup> As a result, juveniles are impulsive and prone to peer pressure, and therefore lack the ability to understand the full consequences of their

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06juvenile.html [<https://nyti.ms/2zu9CsU>] (“New York led the charge to crack down on juvenile crime after a 15-year-old named Willie Bosket shot and killed two people in the New York City subway in 1978.”).

31. 1976 N.Y. Sess. Laws 878 § 2 (McKinney) (codified as amended at N.Y. FAM CT. ACT § 301.1 (McKinney 2017)); *see also* John P. Woods, *New York’s Juvenile Offender Law: An Overview and Analysis*, 9 FORDHAM URB. L.J. 1, 16 (1980).

32. Woods, *supra* note 31, at 16.

33. 1978 N.Y. Sess. Laws 512 (McKinney); *see also* CANNON ET AL., *supra* note 30, at 8.

34. Merril Sobie, *The Juvenile Offender Act: Effectiveness and Impact on the New York Juvenile Justice System*, 26 N.Y.L. SCH. L. REV. 677, 686 (1981).

35. Laurence Steinberg et al., U.S. Dep’t of Justice, Office of Juvenile Justice & Delinquency Prevention, *Psychosocial Maturity and Desistance From Crime in a Sample of Serious Juvenile Offenders*, JUV. JUST. BULL., Mar. 2015, at 7–8, <https://www.ojjdp.gov/pubs/248391.pdf> [<https://perma.cc/2MDX-B6BK>].

behavior.<sup>36</sup> Thus, juveniles are less morally culpable than adults who are fully aware and in control of their actions.<sup>37</sup>

Moreover, because the adolescent brain is still developing, the juvenile's character, personality, and behavior are highly malleable.<sup>38</sup> Studies show that juvenile offenders respond well to intervention and are likely to grow out of their delinquent behavior by their mid-twenties.<sup>39</sup>

Not surprisingly, the legal consensus in much of the country also began to move with this evolving body of science. In 2005, the United States Supreme Court first espoused the theory that adolescents have diminished culpability in the landmark case of *Roper v. Simmons*.<sup>40</sup> The Court held that juveniles under the age of eighteen could not be capitally punished because they are inherently different and less culpable than adults.<sup>41</sup> In reaching this decision, the Court extensively cited to the evolving science and highlighted three separate, fundamental differences between juveniles and adults.<sup>42</sup> First, juveniles' immaturity due to their still developing brains gives rise to rash decisions made in the heat of the moment.<sup>43</sup> Second, juveniles are highly vulnerable and susceptible to negative influences and peer pressure.<sup>44</sup> Third, a juvenile's character and traits are not

36. See MACARTHUR FOUND. RESEARCH NETWORK ON ADOLESCENT DEV. & JUVENILE JUSTICE, ISSUE BRIEF NO. 3, LESS GUILTY BY REASON OF ADOLESCENCE 1, 3 (2006), [http://www.adjj.org/downloads/6093issue\\_brief\\_3.pdf](http://www.adjj.org/downloads/6093issue_brief_3.pdf) [<https://perma.cc/SFS4-G9UA>]; Elizabeth Cauffman & Laurence Steinberg, (*Im*maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable than Adults, 18 BEHAV. SCI. & L. 741, 748–49, 754 tbl.4 (2000).

37. See MACARTHUR FOUND. RESEARCH NETWORK ON ADOLESCENT DEV. & JUVENILE JUSTICE, *supra* note 36, at 1, 3.

38. ELIZABETH S. SCOTT & LAURENCE STEINBERG, RETHINKING JUVENILE JUSTICE 52 (2008) ("[C]oherent integration of the various retained elements of identity into a developed 'self' does not occur until late adolescence or early adulthood. Empirical research indicates that the final stages of this process often occur during the college years."); Laurence Steinberg & Robert G. Schwartz, *Developmental Psychology Goes to Court, in YOUTH ON TRIAL* 9, 27 (Thomas Grisso & Robert G. Schwartz eds., 2000) ("[M]ost identity development takes place during the late teens and early twenties.").

39. See Steinberg et al., *supra* note 35, at 6; Terrie E. Moffitt, *Adolescent-Limited and Life-Course Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 PSYCHOL. REV. 674, 685–86 (1993).

40. 543 U.S. 551 (2005).

41. *Id.* at 567–68.

42. *Id.* at 569–70.

43. See *id.* at 569 ("In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent.").

44. *Id.*

well formed or fixed, which leaves substantial room for growth and change with maturity.<sup>45</sup> Because of these factors, the Court noted, juveniles are inherently less morally culpable than adults, and thus, must be treated differently.<sup>46</sup> In a series of subsequent decisions, the Court expanded the reasoning in *Roper* to prohibit life without parole for the majority of juvenile offenders.<sup>47</sup>

By 2007, New York and North Carolina remained the only two states in the nation that automatically prosecuted sixteen-year-olds as adults.<sup>48</sup> Most other states reformed and raised the age of criminality to seventeen or eighteen.<sup>49</sup> Even traditionally tough-on-crime states like Texas and Louisiana had raised the age of criminal responsibility.<sup>50</sup>

## II. NEW YORKERS PAID A HEAVY PRICE FOR THE TENTATIVE DECISION

For more than fifty years, New York's sixteen- and seventeen-year-olds faced the consequences of the Legislature's failure to follow through with its constitutional mandate. As a result, New Yorkers paid a terrible price. Particularly, the law disproportionately affected juveniles of color, who were far more likely than their white peers to be arrested and sentenced to time in adult facilities. Yet, the evidence clearly showed that the practice of treating these youths as adults failed to reduce future criminal activity and made New York's communities less safe. Additionally, this archaic practice was simply

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45. *Id.* at 570.

46. *Id.* ("From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.").

47. *Montgomery v. Louisiana*, 136 S. Ct. 718, 719 (2016); *Miller v. Alabama*, 132 S. Ct. 2455, 2455 (2012); *Graham v. Florida*, 130 S. Ct. 2011, 2011 (2010); *see also* Alice Reichman Hoesterey, *Confusion in Montgomery's Wake: State Responses, the Mandates of Montgomery, and Why a Complete Categorical Ban on Life Without Parole for Juveniles Is the Only Constitutional Option*, 45 FORDHAM URB. L.J. 149, 157–61 (2017).

48. *Get the Facts*, RAISE THE AGE NY, <http://raisetheageny.com/get-the-facts> [<https://perma.cc/7K7S-FC6H>]; *see also* Sobie, *supra* note 3, at 1061. Indeed, New York was already behind the curve when the 1962 Act was enacted, since twenty states had already raised the age to eighteen and the majority of the remaining states had raised it to seventeen. *Id.* at 1064, 1071.

49. By 2007, forty-one states and the District of Columbia had set the age of criminal responsibility at eighteen, while seven states had set it at seventeen. *See Rovner*, *supra* note 2, at 4 (noting that forty-one states, the District of Columbia, and the federal government have set the maximum age for juvenile court jurisdiction at seventeen years, while seven states have set the maximum age at sixteen years).

50. *Id.* at 8.

economically wasteful and a terrible investment for New York's taxpayers.

#### **A. Juveniles of Color Bear the Brunt of the Consequences**

Prosecuting juveniles as adults harmed a large segment of the population, producing disastrous results for the affected juveniles—the majority of which were children of color—and for society as a whole.<sup>51</sup> For example, from 2012 to 2016, New York arrested between 24,000 and 38,000 sixteen- and seventeen-year-old juveniles each year.<sup>52</sup> The great majority of arrests were for nonviolent misdemeanors.<sup>53</sup> These children were held in adult facilities and their cases were processed through an adult criminal system focused on punishment and not on rehabilitation.<sup>54</sup> Including juveniles who were behind bars pretrial or presentencing because they could not make bail, there were approximately 800 sixteen- and seventeen-year-olds in adult facilities statewide on any given day.<sup>55</sup>

Moreover, the impact was disproportionate along racial lines with children of color, particularly black and Hispanic children, feeling the brunt of this broken system. It is well documented that juveniles of color are disproportionately affected by the criminal justice system,<sup>56</sup>

51. See, e.g., *Get the Facts*, *supra* note 48.

52. See N.Y. State Div. of Criminal Justice Servs., *Arrests Among 16–17 Year Olds: New York State* (Feb. 17, 2017), <http://www.criminaljustice.ny.gov/crimnet/ojsa/youth-arrests/nys.pdf> [<https://perma.cc/6BUU-JKUZ>]. Some reports found that the number of affected juveniles was much higher, estimating that New York State arrested and prosecuted between 40,000 to 50,000 sixteen- and seventeen-year-olds annually. WARREN A. REICH ET AL., CTR. FOR COURT INNOVATION, THE CRIMINAL JUSTICE RESPONSE TO 16- AND 17-YEAR-OLD DEFENDANTS IN NEW YORK 2 (2014), [http://www.courtinnovation.org/sites/default/files/documents/ADP%20Y2%20Report%20\\_%20Final.pdf](http://www.courtinnovation.org/sites/default/files/documents/ADP%20Y2%20Report%20_%20Final.pdf) [<https://perma.cc/EN3S-CGDZ>].

53. See N.Y. State Div. of Criminal Justice Servs., *supra* note 52. During the same time period, approximately 4700 annual sentences involving adult jail or prison were handed down to youth who committed their crimes at ages sixteen or seventeen. COMM'N ON YOUTH, PUB. SAFETY & JUSTICE, FINAL REPORT OF THE GOVERNOR'S COMMISSION ON YOUTH, PUBLIC SAFETY AND JUSTICE 78 (2015) [hereinafter GOV.'S COMM'N RECOMMENDATIONS], [http://www.njjn.org/uploads/digital-library/ReportofCommissiononYouthPublicSafetyandJustice\\_0%20\(1\).pdf](http://www.njjn.org/uploads/digital-library/ReportofCommissiononYouthPublicSafetyandJustice_0%20(1).pdf) [<https://perma.cc/ND2C-DX85>]. During the same period, between 2400 and 3700 juveniles were sentenced to time in adult facilities. *Id.*

54. Mark Hay, *Why Is New York Still Prosecuting 16-Year-Olds As Adults?*, GOTHAMIST (Nov. 3, 2016, 1:00 PM), [http://gothamist.com/2016/11/03/new\\_york\\_raise\\_the\\_age.php](http://gothamist.com/2016/11/03/new_york_raise_the_age.php) [<https://perma.cc/JF76-25GV>].

55. *Id.*

56. Mark Soler & Lisa M. Garry, U.S. Dep't of Justice, Office of Juvenile Justice & Delinquency Prevention, *Reducing Disproportionate Minority Contact: Preparation at the Local Level*, DISPROPORTIONATE MINORITY CONTACT BULL.,

and predictably, this was no different in New York. While black and Hispanic youths make up just 33% of the sixteen- and seventeen-year-old youth population statewide, they constituted 72% of all juvenile arrests and 77% of all felony arrests.<sup>57</sup> Additionally, black and Hispanic youths made up a staggering 82% of the juveniles sentenced to incarceration in adult facilities.<sup>58</sup> In short, New York's archaic law not only had a substantial negative impact of the youth population, but it disproportionately criminalized the most vulnerable communities of the State.

### B. Adult Jails and Prisons Were Breeding Grounds for Abuse and Future Criminality

In addition to disproportionately affecting children of color, the 1962 "tentative" decision did not accomplish its goal of preventing recidivism. Rather than rehabilitating these youths, the system placed them in adult facilities that were breeding grounds for abuse and future criminality. In effect, New York was destroying communities and training future hardened criminals.

First, juveniles placed in adult facilities are subject to high levels of abuse and physical violence.<sup>59</sup> They are twice as likely to suffer physical and emotional abuse at the hands of both inmates and officers, and are fifty percent more likely to be attacked with weapons than juveniles placed in youth facilities.<sup>60</sup> Juveniles in adult facilities

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Sept. 2009, at 1, <https://www.ncjrs.gov/pdffiles1/ojjdp/218861.pdf> [<https://perma.cc/YY3M-62U6>]. Nationwide, "[a]s of 2013, black juveniles were more than four times as likely to be committed as white juveniles" while "Hispanic juveniles were 61 percent more likely" to be committed than white juveniles. JOSH ROVNER, THE SENTENCING PROJECT, RACIAL DISPARITIES IN YOUTH COMMITMENTS AND ARRESTS 1 (2016), <http://www.sentencingproject.org/wp-content/uploads/2016/04/Racial-Disparities-in-Youth-Commitments-and-Arrests.pdf> [<https://perma.cc/75AU-86RE>]. African American youths were 129% more likely to be arrested than white youths. *Id.* at 8.

57. GOV.'S COMM'N RECOMMENDATIONS, *supra* note 53, at 40 (citing Div. of Criminal Justice Servs., *Computerized Criminal History* (Albany: Div. of Criminal Justice Servs., 2014)).

58. GOV.'S COMM'N RECOMMENDATIONS, *supra* note 53, at 78.

59. See, e.g., Tamar Birckhead, *Op-Ed: The Solitary Confinement of Youth*, JUV. JUST. INFO. EXCHANGE (Sept. 23, 2014), <http://jjie.org/2014/09/23/op-ed-the-solitary-confinement-of-youth/> [<https://perma.cc/H5AM-4F33>] (providing the personal account of Ismael Nazario, who at age seventeen was incarcerated at Rikers where "he was attacked by four inmates who demanded his phone privileges and commissary food and required him to ask their permission before sitting in a chair or using the bathroom").

60. RICHARD A. MENDEL, AM. YOUTH POLICY FORUM, LESS HYPE, MORE HELP: REDUCING JUVENILE CRIME, WHAT WORKS—AND WHAT DOESN'T 1, 41 (2000), <http://www.aypf.org/publications/mendel/MendelRep.pdf> [<https://perma.cc/3AEL-6MXJ>]; see also NAT'L JUVENILE JUSTICE & DELINQUENCY PREVENTION COAL., THE

also face the highest risk of sexual assault of all inmate populations.<sup>61</sup> A 2005 federal study found that despite making up just one percent of the entire jail population, juveniles under the age of eighteen constituted twenty-one percent of all sexual violence victims.<sup>62</sup> Indeed, in drafting the Prison Rape Elimination Act, Congress concluded that juveniles under the age of eighteen are “[f]ive times more likely to be sexually assaulted in adult rather than juvenile facilities—often within the first 48 hours of incarceration.”<sup>63</sup> And these figures are likely much higher since incidents of sexual assaults on youths in adult facilities are often underreported.<sup>64</sup>

Additionally, juveniles incarcerated in adult facilities suffer the psychological scars and trauma of being thrown into the harsh reality of adult prison life. The practice of placing juveniles in solitary confinement often has terrible psychological results.<sup>65</sup> For example, juveniles in adult facilities have substantially higher rates of suicide; juveniles held in adult jails are five times more likely than the general youth population to commit suicide and eight times more likely than their counterparts who are confined in juvenile facilities.<sup>66</sup> According to the Bureau of Justice Statistics, suicide constitutes an outstanding

JUVENILE JUSTICE AND DELINQUENCY PREVENTION ACT: A FACT BOOK 60 (2007), <http://www.campaignforyouthjustice.org/Downloads/Resources/jjdpafactbook.pdf> [<https://perma.cc/3GKN-6TGD>].

61. NAT'L PRISON RAPE ELIMINATION COMM'N, NATIONAL PRISON RAPE ELIMINATION COMMISSION REPORT 18 (2009), <https://www.ncjrs.gov/pdffiles1/226680.pdf> [<https://perma.cc/LWG8-YWEU>] (finding that juveniles are “[m]ore than any other group of incarcerated persons . . . at the highest risk for sexual abuse”); *see also* Prison Rape Elimination Act of 2003, 34 U.S.C.A. § 30301 (West 2017) (originally codified at 42 U.S.C. § 15601 (2012)).

62. CAMPAIGN FOR YOUTH JUSTICE, JAILING JUVENILES: THE DANGERS OF INCARCERATING YOUTH IN ADULT JAILS IN AMERICA 4 (2007), [http://www.campaignforyouthjustice.org/Downloads/NationalReportsArticles/CFYJ-Jailing\\_Juveniles\\_Report\\_2007-11-15.pdf](http://www.campaignforyouthjustice.org/Downloads/NationalReportsArticles/CFYJ-Jailing_Juveniles_Report_2007-11-15.pdf) [<https://perma.cc/BHE8-7TS7>].

63. 34 U.S.C.A. § 30301(4) (West 2017) (originally codified at 42 U.S.C. § 15601(4) (2012)).

64. *See* Alice Ristrop, *Sexual Punishments*, 15 COLUM. J. OF GENDER & L. 139, 149 (2006).

65. CAMPAIGN FOR YOUTH JUSTICE, *supra* note 62, at 4 (“Even limited exposure to such an environment can cause anxiety, paranoia, exacerbate existing mental disorders, and increase risk of suicide.”).

66. JAMES AUSTIN ET AL., U.S. DEP'T JUSTICE, BUREAU OF JUSTICE ASSISTANCE, JUVENILES IN ADULT PRISONS AND JAILS: A NATIONAL ASSESSMENT 7–8 (2000), <https://www.ncjrs.gov/pdffiles1/bja/182503.pdf> [<https://perma.cc/CF8G-ZF2S>]; CAMPAIGN FOR YOUTH JUSTICE, KEY FACTS: YOUTH IN THE JUSTICE SYSTEM 3 (2012), <https://www.campaignforyouthjustice.org/documents/KeyYouthCrimeFacts.pdf> [<https://perma.cc/8XER-XBW2>] (“[Y]outh housed in adult jails are 36 times more likely to commit suicide than are youth housed in juvenile detention facilities.”).

seventy-one percent of all deaths of youths under the age of eighteen in adult facilities.<sup>67</sup> These figures demonstrate that horrifying stories like that of Kalif Brower, who committed suicide after spending more than 1000 days at Rikers—800 of which were in solitary confinement—without ever being found guilty, were not all that uncommon.<sup>68</sup>

Second, multiple studies show that placing juvenile offenders in adult facilities does not reduce, but rather increases, the likelihood of future criminal activity. Juveniles who go through the adult criminal justice system are thirty-four percent more likely to be rearrested for violent and other crimes as compared to juveniles who go through the youth justice system.<sup>69</sup> Further, youths exposed to adult facilities who reoffend are eighty percent more likely to commit more serious crimes.<sup>70</sup> Thus, by placing children in adult facilities New York all but ensured that they would not only reoffend, but would become more violent.

Third, juvenile offenders processed through New York's adult criminal justice system were unable to participate in an array of social service programming available solely pursuant to the 1962 Act.<sup>71</sup> Adult facilities are not equipped to provide juveniles with the necessary services they need that would nurture them and enable

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67. MARGARET E. NOONAN, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, MORTALITY IN LOCAL JAILS AND STATE PRISONS, 2000–2010 – STATISTICAL TABLES, at 12 tbl.10 (2012), <https://www.bjs.gov/content/pub/pdf/mljsp0010st.pdf> [https://perma.cc/Z3X6-PAQV].

68. See Daffodil J. Altan & Trey Bundy, *For Teens at Rikers Island, Solitary Confinement Pushes Mental Limits*, REVEAL (Mar. 4, 2014), <https://www.revealnews.org/article-legacy/for-teens-at-rikers-island-solitary-confinement-pushes-mental-limits/> [https://perma.cc/XY5T-XV8N].

69. CTR. FOR DISEASE CONTROL & PREVENTION, EFFECTS ON VIOLENCE OF LAWS AND POLICIES FACILITATING THE TRANSFER OF YOUTH FROM THE JUVENILE TO THE ADULT JUSTICE SYSTEM: A REPORT ON RECOMMENDATIONS OF THE TASK FORCE ON COMMUNITY PREVENTIVE SERVICES 9 (2007), <http://www.cdc.gov/mmwr/preview/mmwrhtml/rr5609a1.htm> [https://perma.cc/ZJR5-9QAM]; see also Anna Aizer & Joseph J. Doyle, Jr., *Juvenile Incarceration, Human Capital and Future Crime: Evidence from Randomly-Assigned Judges* 22–23 (Nat'l Bureau of Econ. Research, Working Paper No. 19102, 2013), <http://www.nber.org/papers/w19102.pdf> [https://perma.cc/J4P7-G743] (finding that “incarceration as a juvenile increases the probability of recidivism as an adult by 22-26-percentage points” and “that the recidivism is for types of crime that are both serious and costly”).

70. NAT'L CAMPAIGN TO REFORM STATE JUVENILE JUSTICE SYS., THE FOURTH WAVE: JUVENILE JUSTICE REFORMS FOR THE TWENTY-FIRST CENTURY 20 (2013), <http://raisetheageny.com/wp-content/uploads/2011/08/The-Fourth-Wave.pdf> [https://perma.cc/CZ4C-DDBG].

71. See Michael A. Corriero, *Judging Children as Children: Reclaiming New York's Progressive Tradition*, 56 N.Y.L. SCH. L. REV. 1413, 1415 (2012).

them to develop into responsible adults.<sup>72</sup> Adult facilities are rarely equipped to provide juveniles with appropriate education, job training, and both health and mental health treatment opportunities that many so desperately need.<sup>73</sup> Juveniles confined in adult facilities, particularly those in pretrial detention, face a high risk of falling behind in their education, which can cause long-term negative consequences.<sup>74</sup> Additionally, juveniles' developmental stage and malleability make them especially susceptible to criminal socialization while incarcerated with adults.<sup>75</sup> Simply put, prison life denies juveniles access to positive models for building an identity and honing productive life skills that would otherwise help them mature into productive members of society.<sup>76</sup> Instead, their malleable minds were being placed directly in contact with experienced and hardened criminals, forcing them to adapt or risk abuse and even death.<sup>77</sup>

Moreover, even when youth avoided exposure to adult facilities, those who were tried as adults—the majority of which were children of color—faced a host of life-long collateral consequences. A

72. See COUNCIL OF JUVENILE CORR. ADM'RS, *supra* note 20.

73. See CAROLINE WOLF HARLOW, DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, EDUCATION AND CORRECTIONAL POPULATIONS (2003), <https://www.bjs.gov/content/pub/pdf/ecp.pdf> [<https://perma.cc/62PL-9DMQ>] (finding that forty percent of adult facilities lack education services and only seven percent provide services specifically directed at preparing and training young inmates for a job); see also AUSTIN ET AL., *supra* note 66, at 66–67 (finding that adult facilities often fail to provide juveniles even with basic services, including prison-survival skills and counseling); CAMPAIGN FOR YOUTH JUSTICE, *supra* note 62, at 6–7.

74. See CAMPAIGN FOR YOUTH JUSTICE, *supra* note 62, at 7. Particularly, delays can affect the juvenile's ability to graduate from high school or obtain a GED, which leads to further roadblocks to obtain vocational skills or access to college education. *Id.*

75. *Id.* at 7–8; Donna Bishop & Charles Frazier, *Consequences of Transfer*, in THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT, *supra* note 29, at 227, 257–58.

76. Bishop & Frazier, *supra* note 75, at 258 (noting that juveniles in adult facilities spend a considerable amount of time with experienced adult offenders who may pass along their expertise, cementing the juvenile's future criminality).

77. See *In New York, Support Grows for Keeping Teens out of Adult Prisons*, N.P.R. (Mar. 22, 2015, 5:53 PM), <http://www.npr.org/2015/03/22/394655132/in-new-york-support-grows-for-keeping-teens-out-of-adult-prisons> [<https://perma.cc/9A2D-6LYR>] (Anjelique Waddington, who at the age of seventeen spent a year and a half in an adult facility, stated in an interview: "I had to become violent, I had to become evil, . . . I had to become an inmate."). Adult facilities, such as Rikers Island, are dangerous places even for adult inmates, thus making the risks to these youth all the more palpable. See generally INDEP. COMM'N ON N.Y.C. CRIMINAL JUSTICE & INCARCERATION REFORM, A MORE JUST NEW YORK CITY (2017), <https://static1.squarespace.com/static/577d72ee2e69cfa9dd2b7a5e/t/58f67e6846c3c424ad706463/1492549229112/Lippman+Commission+FINAL+4.18.17+Singles.pdf> [<https://perma.cc/47BK-J6A8>].

criminal record imposes “a lifetime of barriers to obtaining the most basic rights such as employment, public housing and higher education, things that are essential for future success.”<sup>78</sup> For instance, according to the National Inventory of Collateral Consequences of Conviction, in New York, a person could face over 1300 different negative collateral consequences as a result of conviction under the adult criminal justice system, including for a misdemeanor.<sup>79</sup> Potential ill effects of exposing juveniles to this system include laws limiting a juvenile’s ability to obtain certain jobs, receive student loans and grants, and have access to certain kinds of housing and other government benefits.<sup>80</sup> In addition to these consequences, the societal stigma of having a criminal conviction undoubtedly restricts the juvenile’s future employment opportunities in the private sector.<sup>81</sup> As a former juvenile offender stated in an interview, “[h]aving a permanent adult record for a mistake I made as a teenager . . . will always impact my ability to fully participate in the world.”<sup>82</sup>

In effect, by throwing these impressionable children into adult facilities that lacked even the most basic educational opportunities, New York was destroying the lives of tens of thousands of children.

### C. A Poor Investment for Taxpayers

Not only was the New York system of incarcerating juveniles in adult facilities morally reprehensible and ineffective in preventing crime, it was also economically wasteful. The cost of confining sixteen- and seventeen-year-olds in New York can reach over \$200,000 per youth annually.<sup>83</sup> Indeed, a December 2016 study by the Independent Democratic Conference (“IDC”), outlined the

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78. Alec Hamilton, New Sch. Ctr. for N.Y.C. Affairs, *Re-order in the Court?*, CHILD WELFARE WATCH, Winter 2012/2013, at 20, <https://static1.squarespace.com/static/53ee4f0be4b015b9c3690d84/t/54138bc4e4b00c34af599db/1410567108474/CCW-vol22-digital-2a.pdf> [https://perma.cc/U47L-G4D4].

79. *The National Inventory of Collateral Consequences of Conviction—New York*, JUSTICE CTR.: COUNCIL OF STATE GOV'TS, [https://niccc.csgjusticecenter.org/map\\_text/](https://niccc.csgjusticecenter.org/map_text/) (follow “New York” hyperlink) (last visited Nov. 5, 2017) (results on file with the *Fordham Urban Law Journal*).

80. *Id.*; see also Richard E. Redding, U.S. Dep’t of Justice, Office of Juvenile Justice & Delinquency Prevention, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?*, JUV. JUST. BULL., June 2010, at 7, <https://www.ncjrs.gov/pdffiles1/ojjdp/220595.pdf> [https://perma.cc/Y4KE-7E2Z].

81. See Corriero, *supra* note 71, at 1420–21.

82. Dartunorro Clark, *Advocates Urge Age Change*, TIMES UNION (Apr. 28, 2015, 8:51 PM), <http://www.timesunion.com/news/article/Advocates-urge-age-change-6230010.php> [https://perma.cc/S43F-NRQ2].

83. Gov’s COMM’N RECOMMENDATIONS, *supra* note 53, at 39.

significant savings that the State could achieve by raising the age of criminal responsibility to eighteen.<sup>84</sup> These included a reduction of up to \$117.11 million in annual criminal justice costs,<sup>85</sup> \$528,500 in annual avoided costs related to the victims of crimes due to reduced recidivism rates,<sup>86</sup> and \$21.1 million annually for avoiding sexual assault victimization costs.<sup>87</sup>

But the cost of incarcerating children ran far beyond that of overburdening adult facilities. By stamping these children with a criminal record, the State was ensuring that they would face life-long difficulties obtaining gainful employment, further hurting the state financially.<sup>88</sup> First, as one study by Child Welfare Watch found, trying sixteen- and seventeen-year-old nonviolent offenders as adults in criminal court damaged the earning potential of nearly 1000 juvenile New Yorkers each year.<sup>89</sup> The total cumulative cost for these New Yorkers was estimated at between \$50 million and \$60 million in lost income over the course of their lives.<sup>90</sup> Second, the diminished earning potential also meant that the State was ultimately footing the bill at the other side of the road through safety net programs.<sup>91</sup> In short, the State was wasting millions of dollars on a system that made the State less safe, less productive, and more dependent on already strained social programs.

84. See generally INDEP. DEMOCRATIC CONFERENCE, THE PRICE OF JUVENILE JUSTICE: WHY RAISING THE AGE MAKES CENTS FOR NEW YORK (2016), [https://www.nysenate.gov/sites/default/files/idc\\_price\\_of\\_juvenile\\_justice\\_full\\_report.pdf](https://www.nysenate.gov/sites/default/files/idc_price_of_juvenile_justice_full_report.pdf) [<https://perma.cc/LAS5-K4LD>].

85. *Id.* at 3 tbl.1.

86. *Id.* at 4 tbl.2.

87. *Id.* at 6 tbl.3.

88. Michael A. Corriero, *Advancing Juvenile Justice Reform in New York*, 80 N.Y. ST. B.J. 20, 22 (2008).

89. New Sch. Ctr. for N.Y.C. Affairs, *The High Cost of Convicting Teens as Adults*, CHILD WELFARE WATCH, Winter 2012/2013, at 23, <https://static1.squarespace.com/static/53ee4f0be4b015b9c3690d84/t/54138bc4e4b00c34/afd599db/1410567108474/CCW-vol22-digital-2a.pdf> [<https://perma.cc/7ZFR-D6B3>].

90. *Id.* The IDC's study estimated that each affected youth would see additional earnings of \$9360 per year, a total of \$10.22 million annually for the State. See INDEP. DEMOCRATIC CONFERENCE, *supra* note 84, at 8. In turn, the diminished earning potential also meant that the State was losing an estimated \$0.6 million in annual tax revenue per affected youth. *Id.* at 12. That is about \$29.57 annually in total lost taxes. *Id.*

91. See INDEP. DEMOCRATIC CONFERENCE, *supra* note 84, at 12 (noting that raising the age of criminal responsibility could save the States an estimated \$3.46 million annually in public assistance and healthcare programs costs).

### III. THE JUDICIARY'S PUSH TO RAISE THE AGE IN NEW YORK

This Part will provide an in-depth personal account of the push to raise the age of criminal responsibility in New York from its inception to the passage of the bill this past April. Section III.A discusses the unique position the State Judiciary has within our tripartite system of government and how I was able to use my distinct pulpit as Chief Judge to bring the raise-the-age issue to the spotlight. Section III.B then discusses how the Judiciary proactively laid the foundation for reform by acting as a laboratory of innovative ideas and implementing immediate administrative fixes within existing constitutional and statutory constraints. Section III.C explains the Judiciary's proposed Youth Court Act bill and how the Judiciary took a leadership role in an attempt to broker a deal to get the legislation passed. Section III.D then briefly touches upon the difficulties the Judiciary encountered as it tried to get the Youth Court Act passed by the Legislature. Section III.E analyzes the recommendations made by Governor Cuomo's Commission and the initial push back the Governor's proposed bill received. Finally, Section III.F examines the final push during the 2017 legislative session and the bill that passed, highlighting how the Judiciary's influence helped to achieve this much-needed reform.

#### A. The Judiciary as the Laboratory for Reform: Bringing the Issue to the Spotlight

By design, much like Article III courts, New York's Judiciary stands as the only branch of the State's government that is relatively independent from the ever-changing pressures of politics. While the legislative and the executive branches must play to the demands of their constituents, the Judiciary is generally free from such pressures. Chief Justices are in a unique position to put forward bold reform proposals, as well as put administrative fixes into place within existing statutory constraints, without fear of running for election or reelection. Chief Justices have a rare opportunity: a pulpit from which to have an impact on the society they serve, on the justice system, and on individuals.<sup>92</sup>

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92. Christine Streich, *Jonathan Lippman: New York's 'Pro-Activist' Judge*, JUV. JUST. INFO. EXCHANGE (July 30, 2014), <http://jje.org/2014/07/30/jonathan-lippman-new-yorks-pro-activist-judge/> [https://perma.cc/D7TB-MP2T].

The Judiciary can and should be the laboratory of criminal justice reform.<sup>93</sup> That is not to say that judges should strive to fit the stereotype of activist judges who think they make rather than apply the law. Judges should work within the legislative and constitutional constraints created by democratically elected officials.<sup>94</sup> But, the Judiciary has a prominent part to play in promoting reforms that are essential to its constitutional mission and to the administration of justice—reforms that ultimately enable judges to better serve the public. As such, the Judiciary should be proactive in the pursuit of justice, particularly when the political branches fail to act despite clear evidence that the system is broken.<sup>95</sup>

During my time as the Chief Judge of New York, I tried to transform the Judiciary into a proactive force in the State government, often taking the lead in tackling issues such as criminal justice reform, juvenile justice, and equal access to courts.<sup>96</sup> For

93. Chief Judge Jonathan Lippman, Remarks at the Charles Evans Hughes Lecture (Nov. 30, 2015), [https://www.nycla.org/siteFiles/Publications/Publications1775\\_0.pdf](https://www.nycla.org/siteFiles/Publications/Publications1775_0.pdf) [<https://perma.cc/A4LD-MYD6>].

94. See Jonathan Lippman, *A Proactive Judicial Branch: Confronting the Crisis of the Unrepresented*, 2011 CARDozo L. REV. DE NOVO 1, 5 (Feb. 2, 2011), [http://www.cardozolawreview.com/content/denovo/LIPPMAN\\_2011\\_1.pdf](http://www.cardozolawreview.com/content/denovo/LIPPMAN_2011_1.pdf) [<https://perma.cc/ZT7D-26FF>] (“Please understand that when I speak of the judiciary being proactive here, I do so *not* in the context of adjudication. Judges and courts in their legal opinions should not be advancing their personal social or political agendas at the expense of the constitution or the laws enacted by our democratically elected representatives.” (emphasis in original)).

95. *Moving Mountains: A Conversation with New York State Chief Judge Jonathan Lippman*, CTR. FOR COURT INNOVATION (Jan. 23, 2015), [http://www.courtinnovation.org/sites/default/files/documents/Lippman\\_FINAL.pdf](http://www.courtinnovation.org/sites/default/files/documents/Lippman_FINAL.pdf) [<https://perma.cc/83EJ-3L68>]; see also Liz Farmer, *Jonathan Lippman: A Crusader for the Poor and Drug-Addicted*, GOVERNING (Sept. 2014), <http://www.governing.com/topics/public-justice-safety/gov-jonathan-lippman-new-york-judge.html> [<https://perma.cc/W7P4-AHUP>] (“His approach to an institution bound by precedent is that the judiciary should go beyond simply deciding cases fairly. It should be an incubator for ideas that make the system function better for everyone using it. And it should work to make courts open and navigable for citizens of every income level.”).

96. See, e.g., Jonathan Lippman, *New York's Pro Bono Requirement: The Whys and Hows of Building a Culture of Service in Future Lawyers*, in NATIONAL CENTER FOR STATE COURTS: TRENDS IN STATE COURTS 2013, at 2 (2013), <http://www.ncsc.org/~/media/Microsites/Files/Future%20Trends%202013/06202013-New-Yorks-Pro-Bono-Requirement-Building-a-Culture-of-Service-in-Future-Lawyers.ashx> [<https://perma.cc/AD2L-56WP>] (“Rather than wring our hands, wait for help to come, and hope that things get better, New York's judiciary has confronted this crisis head on.”); Lippman, *supra* note 94, at 5; Chief Judge Jonathan Lippman, Speech Before the Citizens Crime Commission, at 3–4 (Mar. 16, 2010), <http://www.nycrimecommission.org/pdfs/lippman100316.pdf> [<https://perma.cc/WL2U-RHYJ>]; Chief Judge Jonathan Lippman, Speech Before the Citizens Crime Commission 1 (Sept. 21, 2011) [hereinafter Lippman, 2011 Speech Before the CCC],

example, in 2009 I established the Justice Task Force—one of the first permanent task forces to address wrongful convictions in the United States that made recommendations which have generated important reforms in New York.<sup>97</sup> In 2010, the Judiciary proposed legislation that would grant it oversight of juvenile probation.<sup>98</sup> That year the Judiciary led the charge to confront the crisis of access to justice in New York by establishing the Task Force to Expand Access to Civil Legal Services.<sup>99</sup> The taskforce aimed to ensure that low-income New Yorkers had equal access to legal representation in civil matters.<sup>100</sup> In October 2010, I established the New York State Permanent Commission on Sentencing (“Sentencing

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<http://www.nycrimecommission.org/pdfs/Lippman110921.pdf> [<https://perma.cc/R3MY-Z8TX>].

97. N.Y. STATE JUSTICE TASK FORCE, <http://www.nyjusticetaskforce.com/> [<https://perma.cc/23QZ-EBD5>]. Among the reforms achieved thanks to the Justice Task Force are the expansion of the DNA Databank and greater access to post-conviction DNA testing by criminal defendants, as well as the implementation of electronic-recording of custodial interrogations and procedural safeguards for lineups and photo identification. Chief Judge Janet DiFiore, State of Our Judiciary 2017, at 13 (Feb. 22, 2017), [https://www.nycourts.gov/Admin/stateofjudiciary/17\\_SOJ-Speech.pdf](https://www.nycourts.gov/Admin/stateofjudiciary/17_SOJ-Speech.pdf) [<https://perma.cc/XNM5-NMF>].

98. S.B. S7426A, 233rd Leg., Reg. Sess. (N.Y. 2010); A.B. A10793A, 233rd Leg., Reg. Sess. (N.Y. 2010); Chief Judge Jonathan Lippman, State of the Judiciary 2011: Pursuing Justice, at 12 (Feb. 15, 2011) [hereinafter Lippman, State of the Judiciary 2011], <http://www.courts.state.ny.us/admin/stateofjudiciary/SOJ-2011.pdf> [<https://perma.cc/9K7V-Y4GR>].

99. Press Release, N.Y. Courts, Task Force to Support Chief Judge’s Efforts to Ensure Adequate Legal Representation in Civil Proceedings Involving Fundamental Human Needs (June 9, 2010), [https://www.nycourts.gov/press/pr2010\\_09.shtml](https://www.nycourts.gov/press/pr2010_09.shtml) [<https://perma.cc/3CH7-78YT>].

100. Jonathan Lippman, *Brennan Lecture: The Judiciary as the Leader of the Access-to-Justice Revolution*, 89 N.Y.U. L. REV. 1569, 1572–73 (2014). The Task Force to Expand Access became recognized as a national model and the implementation of its recommendations helped to significantly reduce the number of unrepresented civil litigants in New York courts. See Press Release, N.Y. Courts, Chief Judge Announces Creation of Permanent Commission on Access to Justice, at 1–2 (July 22, 2015), [https://www.nycourts.gov/PRESS/PDFs/PR15\\_07.pdf](https://www.nycourts.gov/PRESS/PDFs/PR15_07.pdf) [<https://perma.cc/MM9A-G3LZ>]. The Legislature recognized the Judiciary’s efforts, issuing a joint resolution requesting that New York’s Chief Judge report annually to the governor and the Legislature on the work of the task force, and later granting funding to implement necessary civil legal services programs. Leg. Res. J6368, Leg. Sess. (N.Y. June 29, 2010), <https://www.nysenate.gov/legislation/resolutions/2009/j6368> [<https://perma.cc/UR9S-D25J>]. In 2015, the Judiciary established the Permanent Commission on Access to Justice, which would continue the Task Force’s mission to remove barriers to justice for New Yorkers. See PERMANENT COMM’N ON ACCESS TO JUSTICE, <https://www.nycourts.gov/accesstojusticecommission/> [<https://perma.cc/5ZQW-BM8M>].

Commission”).<sup>101</sup> The Sentencing Commission is charged with evaluating “sentencing laws and practices and recommending reforms that will improve the quality and effectiveness of statewide sentencing policy.”<sup>102</sup>

By 2011 it was clear that the science, the economics, and common sense all pointed to the need for reform and to raise the age of juvenile criminality in New York.<sup>103</sup> It was evident that the adult criminal justice system was not designed to, and was unable to, address the needs of sixteen- and seventeen-year-old juvenile offenders.<sup>104</sup> The New York criminal justice system was not only hurting these children, but their communities and the State as a whole.

Yet, public discussion about the proper age of criminal responsibility in New York was largely, and incomprehensibly, nonexistent. A number of individuals in the academic community attempted to bring the issue into focus. For instance, Professor Merrill Sobie, the Chair of the New York State Bar Association’s Committee on Children and the Law, published an article in 2010 urging reform of New York’s age of criminal responsibility.<sup>105</sup> Inexplicably, such efforts went largely unnoticed and ignored by the political branches and public officials.

When, in 2010, New York State arrested more than 37,000 sixteen- and seventeen-year-olds mostly for misdemeanor and nonviolent felony charges, we could not afford to wait for the political branches any longer—justice required the Judiciary to act.<sup>106</sup> Sensing the opportunity to start a robust conversation and finally achieve reform, I delivered a speech before the Citizens Crime Commission on September 21, 2011.<sup>107</sup> The focus of the speech was to start a dialogue by providing some concrete ideas on how New York could reform the juvenile justice system and finally raise the age of criminal

101. Press Release, N.Y. Courts, Chief Judge Announces Creation of Permanent Sentencing Commission for New York State (Oct. 13, 2010), [http://nycourts.gov/press/pr2010\\_11.shtml](http://nycourts.gov/press/pr2010_11.shtml) [https://perma.cc/Z8X4-MYCN].

102. *About Us*, N.Y. STATE PERMANENT COMM’N ON SENTENCING, <http://nycourts.gov/ip/sentencing/index.shtml> [https://perma.cc/A5KU-X7Y7]. The Commission also serves in an advisory capacity to the Chief Judge. *Id.*

103. See generally Lippman, State of the Judiciary 2011, *supra* note 98, at 12–13.

104. Chief Judge Jonathan Lippman, State of the Judiciary 2012: Balancing the Scales of Justice, at 3 (Feb. 14, 2012) [hereinafter Lippman, State of the Judiciary 2012], <https://www.nycourts.gov/Admin/stateofjudiciary/SOJ-2012.pdf> [https://perma.cc/ZHU6-EK59].

105. See generally Sobie, *supra* note 3.

106. Hamilton, *supra* note 78, at 20.

107. Lippman, 2011 Speech Before the CCC, *supra* note 96.

responsibility. The speech emphasized the need for an approach that was based on the child's best interest, and with the goal of rehabilitating these children rather than punishing them for their immaturity.<sup>108</sup>

The speech had its intended effect, bringing the issue to the forefront<sup>109</sup> and revitalizing community groups that for years had been fighting for the reform.<sup>110</sup> Soon after, the New York City Council's Committee of Juvenile Justice ("NYCCCJJ") adopted a resolution in support of the Chief Judge's call to raise the age of criminal responsibility.<sup>111</sup> At the Council hearing, a wide range of advocacy groups and stakeholders expressed their support for raising the age.<sup>112</sup>

With the public discourse now centered on raising the age, the Judiciary began to work on getting the necessary support to achieve reform.

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108. *Id.*

109. Denise M. Champane, *Lippman: Raise Age of Criminal Responsibility*, DAILY REC. (Sept. 23, 2011), <http://nydailyrecord.com/2011/09/23/lippman-raise-age-of-criminal-responsibility> [https://perma.cc/Y6D7-SR95]; Susannah Karlsson, *Raise the Age*, 26 ATTICUS 11, 11 (2014), [http://bds.org/wp-content/uploads/NYSACDL\\_Atticus\\_Spring\\_Karlsson\\_Excerpt.pdf](http://bds.org/wp-content/uploads/NYSACDL_Atticus_Spring_Karlsson_Excerpt.pdf) [https://perma.cc/N4JX-NBHY] ("Chief Judge Lippman spearheaded a reform effort that has been gaining momentum in various corners of the criminal justice system.").

110. Mosi Secret, *New York Judge Seeks New System for Juveniles*, N.Y. TIMES (Sept. 20, 2011), <http://www.nytimes.com/2011/09/21/nyregion/new-yorks-chief-judge-seeks-new-system-for-juvenile-defendants.html> [https://nyti.ms/2jLqTZB]; see, e.g., SCHUYLER CTR. FOR ANALYSIS & ADVOCACY, RAISING THE JURISDICTIONAL AGE FOR JUVENILE JUSTICE: MOMENTUM FOR CHANGE GROWS (2011), [http://www.scaany.org/resources/documents/scs\\_issues8\\_raisingtheage.pdf](http://www.scaany.org/resources/documents/scs_issues8_raisingtheage.pdf) [https://perma.cc/9CRK-P9X6]; John Caher, *Lippman Urges Increased Age for Adult Prosecution of Teens*, N.Y.L.J. (Sept. 22, 2011), <https://www.law.com/newyorklawjournal/almID/1202515857837/?slreturn=20171003082836> [https://perma.cc/BQ9R-FJLC].

111. N.Y.C. Council Res. 1067-2011, Leg. Sess. 2805 (N.Y. 2011) ("Resolution supporting New York State Chief Judge Jonathan Lippman's call on the New York State Legislature to pass and the Governor to sign legislation raising the age of criminal responsibility for nonviolent offenses to eighteen and permit the cases of sixteen and seventeen year-olds charged with such offenses to be adjudicated in the Family Court rather than the adult criminal justice system.").

112. See Various Memoranda in Support of Resolution 1067, *Hearing on Res. No. 1067-2011 Before the Comm. on Juvenile Justice*, 2012 N.Y.C. Council, Leg. Sess. 2805 (N.Y. 2011), <http://legistar.council.nyc.gov/View.ashx?M=F&ID=1605037&GUID=9AEDCB1A-E8BF-4F1B-80FC-E7CC6ADF525C> [https://perma.cc/K8VK-ZWPM]; see also *Hearing on Res. No. 1067-2011 Before the Comm. on Juvenile Justice*, 2012 N.Y.C. Council, Leg. Sess. 2805, at 34 (N.Y. 2011) (testimony of Hon. Jonathan Lippman, C.J., NYS Unified Court Sys.), <http://legistar.council.nyc.gov/View.ashx?M=F&ID=1630082&GUID=EB3819A8-A302-4DFD-901B-0A097C7B4E30> [https://perma.cc/STD9-Y67F].

### B. Laying the Foundation to Achieve Reform

Public policy reform requires planning, negotiation, and most of all, a groundswell of support from advocacy groups, both sides of the political spectrum, and members of the affected communities. While the speech before the Citizen Crime Commission was meant to begin the conversation, words are meaningless without a concrete plan to back them.

Using its uniquely independent place in our government, the Judiciary immediately began to implement immediate fixes within the existing statutory framework.<sup>113</sup> The plan was to consolidate support and obtain concrete data showing that reform was necessary and achievable. I requested that the Sentencing Commission, then co-chaired by District Attorney Cyrus R. Vance and Judge Barry Kamins, combine its expertise and resources with that of retired Judge Michael Corriero, the Executive Director and founder of the New York Center for Juvenile Justice ("NYCJJ"). Together, they would study the age of criminal responsibility issue and draft a bill that the Judiciary could introduce during the 2012 legislative session.<sup>114</sup>

In the meantime, the Judiciary introduced the Adolescent Diversion Program, which established pilot criminal court parts dedicated to handling sixteen- and seventeen-year-old offenders.<sup>115</sup> Similar programs had proved to be highly successful with children

113. The New York Constitution vests the Chief Judge with the authority to administer the Unified Court System with the assistance of the Administrative Board of the Courts. N.Y. CONST. art. VI, § 28 ("The chief judge . . . shall establish standards and administrative policies for general application throughout the state . . ."). Thus, through its administrative arm, the New York Judiciary has constitutional and statutory authority to take appropriate actions to the extent permitted by law, including the creation of new court parts, the transfer of certain offenses from one court to another, and the establishment of commissions to study certain legal issues. *See id.*; N.Y. JUD. LAW § 211 (McKinney 2017); *see also* People v. Correa, 933 N.E.2d 705, 713 (N.Y. 2010) (upholding the Judiciary's authority to create Integrated Domestic Violence parts and to transfer the prosecution of certain misdemeanors from criminal court to supreme court); Corkum v. Bartlett, 386 N.E.2d 1066, 1068 (N.Y. 1979) ("In short, the Chief Judge's administrative powers are complete, and the Chief Administrator may employ them fully when and while and to the extent that they have been delegated to him.").

114. Lippman, 2011 Speech Before the CCC, *supra* note 96, at 11.

115. *See* N.Y. COMP. CODES R. & REGS. tit. 22, § 49.1; Lippman, 2011 Speech Before the CCC, *supra* note 96, at 12; *see also* CTR. FOR COURT INNOVATION, ADOLESCENT DIVERSION PROGRAM: THE COURT SYSTEM PILOTS A NEW APPROACH TO YOUNG OFFENDERS (Mar. 2, 2012) [hereinafter ADOLESCENT DIVERSION PROGRAM], <http://www.courtinnovation.org/research/adolescent-diversion-program-court-system-pilots-new-approach-young-offenders> [<https://perma.cc/7YVE-MAXL>] (discussing the overall plan and implementation of the pilot parts program).

under the age of sixteen,<sup>116</sup> and this program's application to sixteen- and seventeen-year-olds would provide invaluable data in the effort to raise the age of criminal responsibility in New York. Thus, the pilot parts would serve as a case study to show that a more holistic approach worked and could be implemented relatively seamlessly.<sup>117</sup> In turn, this success would create the urgency needed to drive the legislative branch into action and pass meaningful reform.<sup>118</sup>

The pilot parts were placed under the direction of Judge Judy Harris Kluger, the Chief of Policy and Planning for New York State, in consultation with the Center for Court Innovation, the research and development arm of the New York State court system.<sup>119</sup> As Judge Kluger later explained, "the goal [was] to encourage non-criminal dispositions so adolescents aren't saddled with permanent criminal records."<sup>120</sup> Under the pilot parts, cases involving nonviolent offenses were steered to specially trained criminal court judges.<sup>121</sup> These judges understood the legal and psychosocial issues adolescents faced and were familiar with the broad range of age-appropriate services and interventions designed specifically to meet the needs of these juveniles.<sup>122</sup>

The Adolescent Diversion Program proved to be a resounding success, providing substantial data to support reform efforts. In the first six months of the program, between January and June 2012, the pilot parts enrolled 1,302 juveniles and showed that "diversion did not jeopardize public safety and, in fact, produces a lower re-arrest rate for new felonies."<sup>123</sup> By April 2013, the parts had adjudicated over 3,000 cases in nine counties.<sup>124</sup> Research by the Center for Court Innovation showed that the program was achieving its goal.<sup>125</sup> For

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116. ADOLESCENT DIVERSION PROGRAM, *supra* note 115.

117. *See generally* Hearing on Res. No. 1067-2011 Before the Comm. on Juvenile Justice, *supra* note 112; *see also* Lippman, State of the Judiciary 2012, *supra* note 104, at 5.

118. ADOLESCENT DIVERSION PROGRAM, *supra* note 115.

119. Lippman, 2011 Speech Before the CCC, *supra* note 96, at 12.

120. ADOLESCENT DIVERSION PROGRAM, *supra* note 115.

121. *See id.*

122. *See id.*; Lippman, 2011 Speech Before the CCC, *supra* note 96, at 12.

123. MICHAEL REMPEL ET AL., CTR. FOR COURT INNOVATION, ADOLESCENT DIVERSION PROGRAM: A FIRST YEAR EVALUATION OF ALTERNATIVES TO CONVENTIONAL CASE PROCESSING FOR DEFENDANTS AGES 16 AND 17 IN NEW YORK, at vi (2013), [http://www.courtinnovation.org/sites/default/files/documents/ADP\\_Report\\_Final.pdf](http://www.courtinnovation.org/sites/default/files/documents/ADP_Report_Final.pdf) [<https://perma.cc/TN5U-6J5P>].

124. Jonathan Lippman, *In Search of Meaningful Systemic Justice for Adolescents in New York*, 35 CARDOZO L. REV. 1021, 1027 (2014).

125. *Id.*

example, most cases were resolved without jail time or criminal records, while the youths who went through the program were significantly less likely to be rearrested.<sup>126</sup>

For all its success, however, existing statutory constraints limited the pilot parts’ effectiveness. The pilot parts’ judges’ hands were tied by the existing sentencing options, which often required prison time and did not permit age appropriate alternatives, such as adjustment.<sup>127</sup> There was a clear need to decriminalize certain offenses for these youths and broaden sentencing options for judges, neither of which was possible without legislation. With the State Legislature mute, it was up to the Judiciary to put a concrete plan on the table that could achieve these goals.

### C. The Youth Court Act is Born

The Sentencing Commission worked tirelessly to investigate how to best achieve meaningful reform and raise the age of criminal responsibility in New York.<sup>128</sup> It met with numerous stakeholders and interested parties, including Family Court judges, experts, representatives of various levels of government, and representatives of other states.<sup>129</sup>

The Sentencing Commission released a report on February 10, 2012.<sup>130</sup> It found that a simple shift of the tens of thousands of annual cases to the already overburdened Family Court was costly and unfeasible at this juncture.<sup>131</sup> Particularly, the Family Court was unable to properly absorb such a significant number of cases and it lacked the procedural protections available in criminal court such as jury trial and access to bail.<sup>132</sup> At the same time, given the mountain of evidence showing the detrimental effects the criminal court system has on children and their communities, leaving the cases in the criminal court system would not be practical.<sup>133</sup> As a result, the

126. *Id.*

127. *Id.*

128. BARRY KAMINS & CYRUS VANCE, N.Y. STATE SENTENCING COMM’N, RAISING THE AGE OF CRIMINAL RESPONSIBILITY (2012), <http://www.courts.state.ny.us/IP/sentencing/Raising%20the%20Age%20of%20Criminal%20Responsibility%20Report.pdf> [<https://perma.cc/5JFN-W29L>].

129. See *id.* at 1–2 (listing stakeholders and experts consulted).

130. *Id.* at cover page.

131. *Id.* at 3; Lippman, State of the Judiciary 2012, *supra* note 104, at 3.

132. KAMINS & VANCE, *supra* note 128, at 3.

133. Lippman, State of the Judiciary 2012, *supra* note 104, at 3.

Commission recommended a hybrid system that combined the best of the criminal and family court systems.<sup>134</sup>

Relying on the Sentencing Commission's invaluable research and recommendations, I announced the proposed Youth Court Act during the 2012 State of the Judiciary address.<sup>135</sup> The proposed Act, which closely followed the recommendations laid out by the Sentencing Commission, was later put before the New York State Legislature in a bill sponsored by Senator Steve Saland.<sup>136</sup>

### *1. A Bold, Yet Sensible, Proposal to Achieve Reform*

The Youth Court Act provided a sensible model to achieve meaningful reform that balanced community protections and mitigated the effects of the criminal court system on juveniles, while limiting the possible disruption reform could have on the existing system.<sup>137</sup> It would take the best of both worlds by blending the alternative rehabilitative options of Family Court with the procedural safeguards of the criminal court system.<sup>138</sup> The bill would amend Penal Law section 30.00 to state that a person under the age of eighteen years would not be criminally responsible for his or her conduct.<sup>139</sup> Significantly, the Youth Court Act put the emphasis on rehabilitation for adolescent offenders, rather than punishment and incarceration.<sup>140</sup>

The bill was bold, proposing substantial changes to the Criminal Procedure Law, the Penal Law, the Executive Law, and the Judiciary Law.<sup>141</sup> Yet it was also balanced, in an effort to reach across the political spectrum and achieve the desired reform.<sup>142</sup> The bill added an entirely new section to the Criminal Procedure Law that

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134. KAMINS & VANCE, *supra* note 128, at 4.

135. Lippman, State of the Judiciary 2012, *supra* note 104, at 4.

136. S.B. 7394, 235th Leg., Reg. Sess. (N.Y. 2012).

137. *Id.* at § 1 ("[T]he most effective way of balancing the limits and needs of non-violent 16- and 17-year-old offenders with community needs and relevant penological considerations is to decriminalize their offenses and to establish a specialized forum within the state's superior courts in which those offenses may be addressed[.]").

138. Lippman, State of the Judiciary 2012, *supra* note 104, at 4.

139. S.B. 7394, 235th Leg., Reg. Sess., § 14 (N.Y. 2012). The bill further added a new subsection 2-A, reflecting that sixteen- and seventeen-year-olds who commit violent felonies could still be held criminally responsible. *Id.*

140. Lippman, State of the Judiciary 2012, *supra* note 104, at 5.

141. See generally S.B. 7394, 235th Leg., Reg. Sess. (N.Y. 2012).

142. Lippman, State of the Judiciary 2012, *supra* note 104, at 5 (noting the pilot programs were the result of collaboration with diverse groups of individuals, including "prosecutors, defense attorneys, probation officials, service providers, and law enforcement agencies").

specifically focused on protecting sixteen- and seventeen-year-old juvenile offenders from the moment of arrest throughout their interaction with the judicial system.<sup>143</sup> This protection was particularly important given the significant disparate impact the then-existing law had on juveniles of color.

This proposed system also required police officers to notify the juvenile's parents immediately upon arrest.<sup>144</sup> Following this notice, the juvenile would then be released into the custody of their guardian and served with a special appearance ticket.<sup>145</sup> In cases where the guardian could not be notified, the police officers would have to release the juvenile upon serving him or her with a ticket, or the officer would have to take the youth straight to the new youth division of the superior court.<sup>146</sup> Juveniles would not be placed in jail, which would protect these children from exposure to the adult jail system.<sup>147</sup> Additionally, the bill required the Division of Criminal Justice Services to keep the juvenile's fingerprints separate from those taken from adults and prohibited the release of those fingerprints to any federal depository.<sup>148</sup> This would ensure the juvenile would not have a criminal record, avoiding the great host of negative collateral consequences that for so long had marred New York's youths.

Once the juvenile returned to court, the bill set out specific guidelines for proceedings against sixteen- and seventeen-year-olds by adding a new article: Article 722.<sup>149</sup> Under Article 722, adjustment<sup>150</sup>—and not jail time—would be the first option when a

143. S.B. 7394, 235th Leg., Reg. Sess. §§ 2, 3, 5 (N.Y. 2012).

144. *Id.* at § 5.

145. *Id.* (defining the special appearance ticket as “a written notice issued and subscribed by an officer . . . directing a designated person to appear at the probation service for the county in which the offense or offenses for which the special appearance ticket is issued were allegedly committed”).

146. *Id.* (using the statutory definition of superior court, which includes the supreme court or county court). The youth division would be a new court modeled after the Adolescent Diversion Program pilot parts specializing in cases involving sixteen- and seventeen-year-olds charged with nonviolent offense. *Id.* at § 3. It would be granted exclusive jurisdiction over all youth division offenses and proceedings related to juvenile offenders. *Id.* at § 8. All nonviolent offenses, including felonies and misdemeanors, committed when the offender was between sixteen- and seventeen-years of age, would be categorized as “youth division offenses.” *Id.* at § 3.

147. *Id.* at § 5.

148. *Id.* at § 7.

149. *Id.* at § 8.

150. Adjustment is not statutorily defined, but “[a]s a matter of practice and custom, . . . adjustment generally means the informal consensual resolution of a case under probation service auspices. The resolution may range from a warning

juvenile was charged with a crime.<sup>151</sup> Upon achieving adjustment, no further action could be taken against the juvenile.<sup>152</sup> The bill required that all relevant law enforcement agencies seal the records of arrest and destroy the youth's fingerprints.<sup>153</sup> If a case could not be adjusted,<sup>154</sup> the case would be assigned to the new youth division of the superior court.<sup>155</sup> These Youth Courts would be largely modeled after the Adolescent Diversion Program pilot parts. In order to further protect youth offenders, the bill required judges presiding over these cases to receive training in "specialized areas, including, but not limited to, juvenile justice, adolescent development and effective treatment methods for reducing crime commission by adolescents."<sup>156</sup>

Lastly, juveniles found guilty (whether through plea or otherwise) in the youth division would then be entitled to removal to Family Court, or to a hearing where the court would determine if the juvenile required supervision, treatment, or confinement.<sup>157</sup> In effect, juvenile delinquents would get all the benefits of the rehabilitative options available in Family Court, including the 1962 Act's record-sealing provisions and alternatives to incarceration.<sup>158</sup> This would ensure that these youths have access to the individualized services they required.

## *2. Building a Base of Support*

The Youth Court Act bill itself was crafted in a conscious effort to draw a consensus. Once again, the Judiciary provided the leadership needed to bring together all the competing groups and broker a deal to get the legislation passed.

The Judiciary worked closely with the Governor's office, the Chairs of the Codes Committees, Senator Stephen M. Saland and

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concerning the implications of future conduct to multiple counseling sessions or a referral to a community agency." MERRIL SOBIE & GARY SOLOMON, NEW YORK FAMILY COURT PRACTICE § 10:13 (2d ed. 2017).

151. S.B. 7394, 235th Leg., Reg. Sess. § 8 (N.Y. 2012). Article 722 further stated that in considering the adjustment, probation services had to speak with the juvenile's parents, the victim, and the arrestee. *Id.*

152. *Id.*

153. *Id.*

154. For instance, if the arrested youth fails to comply with the conditions imposed by Probations. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

Assemblyman Joseph R. Lentol, and the other members of the Legislature.<sup>159</sup> We also engaged with the community, consistently bringing the issue to the forefront to educate members of the community and gain their support.<sup>160</sup> Lastly, we sought and gained support from stakeholders and advocacy groups including the Citizen Crime Commission,<sup>161</sup> the NYCCCJJ,<sup>162</sup> and many others.<sup>163</sup>

At the same time, advocacy groups, reinvigorated by the new attention to the issue, began to consistently lead grassroots efforts. For instance, the NYCJJ held multiple raise-the-age forums across New York State, often featuring retired Judge Michael Corriero.<sup>164</sup> Similarly, the Correctional Association spearheaded a raise-the-age campaign that engaged in grassroots community organizing with families, community members, and faith based leaders.<sup>165</sup> And in July

159. Lippman, State of the Judiciary 2012, *supra* note 104, at 5.

160. *Lippman Urges NY to Raise the Age*, JAY HERITAGE CTR. (Oct. 29, 2014), <http://jayheritagecenter.org/2014/10/29/stand-against-racism-raise-the-age-hon-jonathan-lippman-2014/> [<https://perma.cc/C3QQ-TV2F>]; Flier, YWCA, Save the Date: YWCA Presents its Fall Symposium on "Raise the Age" (Oct. 28, 2014), <http://www.wca4kids.org/wp-content/uploads/Judge-Lippman-Breakfast.pdf> [<https://perma.cc/T766-7EHC>]; Lippman, *supra* note 124, at 1021–22; Chief Judge Jonathan Lippman, State of the Judiciary 2013: "Let Justice Be Done", at 9–11 (Feb. 5, 2013) [hereinafter Lippman, State of the Judiciary 2013], <https://www.nycourts.gov/ctapps/news/SOJ-2013.pdf> [<https://perma.cc/AVF8-BDQC>].

161. See Press Release, N.Y. Crime Comm'n, Crime Commission Backs Chief Judge Lippman's Call to Raise the Age of Criminal Responsibility (Feb. 5, 2013), <http://www.nycrimecommission.org/pdfs/Release-Lippman-Raise-The-Age-2013.pdf> [<https://perma.cc/STF2-KHPR>]; Press Release, N.Y. Crime Comm'n, Crime Commission Statement on Judge Lippman's State of the Judiciary Applauds Youth Court Proposal for Juvenile Justice Reform (Feb. 14, 2012), <http://www.nycrimecommission.org/pdfs/Release-Lippman-Raise-The-Age-2012.pdf> [<https://perma.cc/ATA8-9FF7>].

162. N.Y.C. Council Res. 1067-2011, Leg. Sess. 2805 (N.Y. 2011).

163. See, e.g., Various Memoranda in Support of Resolution 1067, *supra* note 112.

164. See, e.g., Yuval Sheer, *Cardozo Law School to Host Raise the Age Symposium*, N.Y. CTR. FOR JUV. JUST. (Apr. 8, 2013), <http://www.nycjj.org/cardozo-law-school-to-host-raise-the-age-symposium/> [<https://perma.cc/P4RG-TYSK>]; Yuval Sheer, *Queens Community Members Discuss Raising the Age of Criminal Responsibility*, N.Y. CTR. FOR JUV. JUST. (May 28, 2013), <http://www.nycjj.org/queens-community-members-discuss-raising-the-age-of-criminal-responsibility> [<https://perma.cc/QN6S-GMTY>]. Judge Corriero was an avid ally throughout the process, and he had a pivotal role in preparing the Sentencing Commission's report and then drafting the proposed Youth Court Act bill.

165. MATTHEW A. GOODMAN, N.Y. JUVENILE JUSTICE INITIATIVE, HOW LONG IS TEMPORARY? NEW YORK'S MOVEMENT TO RAISE THE AGE 10 (2013), <https://nyjji.files.wordpress.com/2012/03/nyjji-raise-the-age-brief.pdf> [<https://perma.cc/V8Z8-CVRU>]. The Corrections Association had a number of grassroots initiatives. See Anita Gates, *Correctional Association Now a Producer of a Lament Against the Police*, N.Y. TIMES (Feb. 15, 2013), [http://www.nytimes.com/2013/02/15/theater/reviews/lyrics-from-lockdown-at-national-black-theater.html?ref=todayspaper&\\_r=0](http://www.nytimes.com/2013/02/15/theater/reviews/lyrics-from-lockdown-at-national-black-theater.html?ref=todayspaper&_r=0)

2013 several advocacy groups came together to launch “Raise the Age NY,” a grassroots campaign set on increasing public awareness of the need to raise the age of criminal responsibility in New York State.<sup>166</sup>

With each passing day momentum was building, increasing the pressure on the political branches to act.

#### D. Difficulties Encountered

Despite the growing momentum toward common-sense reform, the push to raise the age of criminal responsibility in New York hit several road blocks.

Some groups raised valid concerns about the cost and implementation of such sweeping reform. Several counties, the Office of Probation and Correctional Alternatives, and the New York State Department of Corrections and Community Supervision raised concerns about the increased workload and cost of additional cases in Family Court without additional funding from the State.<sup>167</sup> Stephen Acquario, the executive director of the New York Association of Counties, stated that while he agreed with the merits of the reform he worried that counties would be left with increased costs and no assistance from the State government.<sup>168</sup> To address these concerns, we submitted a revised version of the bill in 2013 with the bipartisan support of Senator Michael F. Nozzolio and Assemblyman Joseph Lentol.<sup>169</sup> The revised bill would ensure that county probation

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[<https://nyti.ms/2k5Jcqp>] (co-produced a Broadway show); Press Release, Corr. Ass'n of N.Y., Join Us for Lyrics from Lockdown & the Raise the Age Community Conversation Series (Jan 13, 2013), <http://www.correctionalassociation.org/news/join-us-for-lyrics-from-lockdown-the-raise-the-age-community-conversation-series> [<https://perma.cc/W6D9-P22X>] (co-produced a community conversation series); Video, Corr. Ass'n of N.Y., *Call Governor Cuomo and Ask Him to Keep the “Raise the Age” Bill in the NYS Budget: #RaisetheAgeNY*, YOUTUBE (Mar. 23, 2016), <https://www.youtube.com/watch?v=0Gj0hXGuqHs> (last visited Nov. 6, 2017) (2016 raise the age video campaign).

166. *About Us*, RAISE THE AGE NY, <http://raisetheageny.com/about-us> [<https://perma.cc/3H2N-HG46>].

167. See Maggie Lee, *New York to Try Again to ‘Raise the Age’*, JUV. JUST. INFO. EXCHANGE (Oct. 7, 2012), <http://jjie.org/2012/10/07/york-try-again-raise-age/> [<https://perma.cc/WYC9-YQXA>]; Irene Plagianos, *Youth Court Program Separates Teen Defendants from Adults*, DNA INFO (Oct. 22, 2012), <https://www.dnainfo.com/new-york/20121022/midtown/manhattans-youth-court-program-separates-teen-defendants-from-adults> [<https://perma.cc/2ECC-YFG>].

168. Lee, *supra* note 167 (noting that “we have very serious concerns about implementation of this change in public policy” and stating that the money “has to come from the state”).

169. See generally S.B. 4489, 236th Leg., Reg. Sess. (N.Y. 2013).

departments would be reimbursed, relieving local governments of any fiscal burden.<sup>170</sup>

In addition, the political branches again became enthralled by the tough-on-crime versus soft-on-crime false dichotomy.<sup>171</sup> Much like they had done in the 1970s with the claims of "superpredator" youths,<sup>172</sup> tough on crime legislators seized on overly hyped violent trends, such as the "knockout game" in 2013, to argue against reform.<sup>173</sup> As Senator Nozzolio told the New York Times, "[t]here is a great deal of concern about moving away from a zero tolerance for violence no matter who exerts that violence. The victim is still victimized and the damage is still extreme in many cases."<sup>174</sup>

At the same time, some advocacy groups were not satisfied with the proposed Youth Court Act, alleging that it did not go far enough.<sup>175</sup> For instance, Laurine Parise, Director of Youth Represent, stated that "[i]f [the bill] doesn't include people accused of violent felonies it may fall short of the intended goals."<sup>176</sup>

While the intentions of advocacy groups like Youth Represent are noble, the only way to achieve meaningful legislative reform in a timely manner was by obtaining broad consensus and support from

170. See Lippman, State of the Judiciary 2013, *supra* note 160, at 10.

171. Too often the political branches become blinded in partisan politics and forget that if we truly want justice and safe communities we should not be tough-on-crime versus soft-on-crime, but rather, we should be smart on crime.

172. See *supra* note 30 and accompanying text.

173. Adam Taylor, *The 'Knockout Game' Is Terrible but Almost Certainly Overhyped*, BUS. INSIDER (Nov. 25, 2013, 4:30 PM), <http://www.businessinsider.com/the-knockout-game-is-terrible-but-almost-certainly-overhyped-2013-11> [<https://perma.cc/KZD6-76WQ>]; Rob Watson, *Youth Crime Not an Issue for Politics*, BUFFALO NEWS (Feb. 29, 2014), <http://buffalonews.com/2014/02/19/youth-crime-not-an-issue-for-politics/> [<https://perma.cc/RUN6-5VQE>]; Morgan Winsor, *Teen 'Knockout' Game Assault Spreading*, FOX 8 CLEV. (Nov. 22, 2013, 8:10 PM), <http://fox8.com/2013/11/22/teen-knockout-game-assaults-spreading/> [<https://perma.cc/LFQ2-87XM>].

174. Mona El-Naggar, *Renewed Push to Raise Age of Being Tried as Adult*, N.Y. TIMES (July 11, 2013), <http://www.nytimes.com/2013/07/12/nyregion/renewed-push-to-raise-age-of-being-tried-as-adult.html> [<https://nyti.ms/2iHHVJX>].

175. See GOODMAN, *supra* note 165, at 4–5; *Action in the Legislature on Raise the Age*, NEW SCH. CTR. FOR N.Y.C. AFFAIRS: CHILD WELFARE WATCH (May 23, 2012), <http://www.centernyc.org/child-welfare-nyc/2012/05/youth-court-legislation> [<https://perma.cc/DA2W-7YS5>].

176. *Action in the Legislature on Raise the Age*, *supra* note 175; see also Alec Hamilton, New Sch. Ctr. for N.Y.C. Affairs, *Left Out by Reform*, CHILD WELFARE WATCH, Winter 2012/2013, at 20, <https://static1.squarespace.com/static/53ee4f0be4b015b9c3690d84/t/54138bc4e4b00c34afd599db/1410567108474/CCW-vol22-digital-2a.pdf> [<https://perma.cc/U47L-G4D4>] (noting that while Justine Olderman, managing attorney at the Bronx Defenders, supported many aspects of the proposed act, she was concerned that the law did not go far enough); Karlsson, *supra* note 109, at 12.

competing groups. As David Bookstaver, spokesperson for the Officer of Court Administration, stated in an interview at the time, “the most effective way to garner support is to develop a bill that is likely to succeed. Right now we think the best way to do that is to address the issue of nonviolent offenses.”<sup>177</sup> Indeed, Child Welfare Watch noted that “[t]he bill that is widely considered to have a chance of passing will be based on 2012 legislation submitted at the request of Chief Judge Jonathan Lippman.”<sup>178</sup> And as explained in 2013 by Judge Corriero of the NYCJJ, the raise-the-age movement still had “many stakeholders to persuade if any legislative change is to be made, including district attorneys, legislators, unions, civil servants, prosecutors and New York’s vast media network.”<sup>179</sup> In short, achieving real reform requires compromise.

As a result of these pressures, the Youth Court Act ultimately stalled in Committee and never passed.<sup>180</sup> However, the Judiciary had accomplished a large portion of what it had set out to do. By proactively seeking justice and playing a leadership role, the Judiciary started a lively conversation leading to the proposal of several competing raise-the-age bills<sup>181</sup> and brought advocacy groups, stakeholders, and legislators from both sides of the political spectrum to the negotiating table. More importantly, the proposed Youth

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177. *Action in the Legislature on Raise the Age*, *supra* note 175.

178. New Sch. Ctr. for N.Y.C. Affairs, *Recommendations and Solutions*, CHILD WELFARE WATCH, Winter 2012/2013, at 4; <https://static1.squarespace.com/static/53ee4f0be4b015b9c3690d84/t/54138bc4e4b00c34af599db/1410567108474/CCW-vol22-digital-2a.pdf> [<https://perma.cc/U47L-G4D4>]; see also Alec Hamilton, New Sch. Ctr. for N.Y.C. Affairs, *New York Law, Teens and the Courts*, CHILD WELFARE WATCH, Winter 2012/2013, at 24, <https://static1.squarespace.com/static/53ee4f0be4b015b9c3690d84/t/54138bc4e4b00c34af599db/1410567108474/CCW-vol22-digital-2a.pdf> [<https://perma.cc/U47L-G4D4>] (“The legislation that has the best chance of winning sufficient support in the state Assembly and Senate, and of being signed by Governor Andrew Cuomo, will most likely be based on a bill submitted at the request of Chief Judge Jonathan Lippman. The bill applies only to young people charged with nonviolent crimes.”); Wilder Fleming, *Impasse on Justice Reform for Young Defendants*, N.Y. WORLD (Dec. 9, 2013), <https://web.archive.org/web/20131209202152/http://www.thenewyorkworld.com/2013/12/09/justice-reform/> [<https://perma.cc/Z8RA-J8MF>] (“A bipartisan swath of legislators see Lippman’s bill as a realistic first step, given the tough-on-crime philosophy generally held by Senate Republicans.”).

179. GOODMAN, *supra* note 165, at 6.

180. See S.B. 4489A, 236th Leg., Reg. Sess. (N.Y. 2013); S.B. 7394, 235th Leg., Reg. Sess. (N.Y. 2012).

181. See S.B. 4157, 238th Leg., Reg. Sess. (N.Y. 2017); S.B. 1019, 236th Leg., Reg. Sess. (N.Y. 2015); A.B. 2774, 238th Leg., Reg. Sess. (N.Y. 2015); S.B. 1409, 234th Leg., Reg. Sess. (N.Y. 2013); A.B. 3668A, 236th Leg., Reg. Sess. (N.Y. 2013); S.B. 7020, 233th Leg., Reg. Sess. (N.Y. 2012); A.B. 9424, 235th Leg., Reg. Sess. (N.Y. 2012).

Court Act would ultimately serve as the bipartisan template of the bill that Governor Cuomo signed into law in April 2017, finally achieving reform.<sup>182</sup>

#### E. Reaping What You Sow: The Momentum Builds and Cuomo Acts

The Judiciary's leadership, combined with a growing chorus of support from advocacy groups and the community, finally achieved political success in January 2014. During the State of the State speech, Governor Cuomo publicly threw his support behind the raise-the-age movement noting that "[o]ur juvenile justice laws are outdated.... It's not right, it's not fair – we must raise the age."<sup>183</sup> He proposed that the State should "form a commission on youth public safety and justice" and finally raise the age of criminal responsibility.<sup>184</sup>

In April of that year, Governor Cuomo signed Executive Order 131 establishing the Commission on Youth, Public Safety, and Justice (the "Governor's Commission").<sup>185</sup> He tasked the Governor's Commission with providing recommendations pertaining to youth in New York the justice system by December 31, 2014.<sup>186</sup> Among its duties, the Governor's Commission was tasked with "develop[ing] a plan, structure, process and timeline to raise the age of juvenile jurisdiction."<sup>187</sup> The Governor's Commission was also tasked with identifying any needed revisions to existing law, policies, programs, and practices in order to achieve reform.<sup>188</sup>

After months of research, the Governor's Commission released a comprehensive and extremely detailed 163-page report on January 19, 2015.<sup>189</sup> The report recommended that New York raise the age of criminal responsibility to eighteen.<sup>190</sup> The Judiciary's influence was

182. See discussion *infra* Section III.F.

183. Governor Andrew M. Cuomo, 2014 State of the State Address (Jan. 9, 2014), <https://www.governor.ny.gov/news/transcript-governor-cuomos-2014-state-state-address> [https://perma.cc/4CHP-LZNM].

184. *Id.*

185. N.Y. COMP. CODES R. & REGS. tit. 9, § 8.131 (2015).

186. *Id.* at § 8.131(A)(1), (A)(7).

187. *Id.* at § 8.131(B)(1)(a).

188. *Id.* at § 8.131(B)(1)(b).

189. See David Seifman, *Juvi-justice Panel Wants Criminal Responsibility Age Raised to 18*, N.Y. POST (Jan. 20, 2015), <http://nypost.com/2015/01/20/juvi-justice-panel-wants-criminal-responsibility-age-raised-to-18/> [https://perma.cc/92MM-P7XU]; see also Gov.'s COMM'N RECOMMENDATIONS, *supra* note 53, at 33.

190. Gov.'s COMM'N RECOMMENDATIONS, *supra* note 53, at 150.

visible throughout the report prepared by the Governor's Commission. The Governor's Commission relied on the Sentencing Commission's 2012 report as a blueprint for its research before building and expanding upon the Sentencing Commission's findings.<sup>191</sup> Indeed, many of its thirty-eight procedural and legislative recommendations<sup>192</sup> mirrored or improved upon what the Judiciary had proposed in the Sentencing Commission's 2012 report.

For instance, as I had recommended in 2011, the Governor's Commission's report recommends expanding Family Court's jurisdiction to sixteen- and seventeen-year-olds charged with nonviolent felonies, disorderly conduct violations, misdemeanors, and harassment crimes.<sup>193</sup> The criminal court system would retain original jurisdiction over all violent felonies,<sup>194</sup> but new youth parts—largely modeled after the pilot parts that the Judiciary had championed in 2012—would be created within the criminal court system to adjudicate these cases.<sup>195</sup> Here too, the fruits of the Judiciary's leadership role in proactively seeking justice were visible.

But for all its merits, the Governor's Commission's report was far too detailed and one-sided, losing sight of the reality that legislation requires winning the support of opponents. The Governor's Commission's proposed reforms were arguably the most progressive in the nation, vastly expanding the Family Court's jurisdiction to a larger age cohort and list of offenses.<sup>196</sup> When Governor Cuomo

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191. *Id.* at 55. This same report led to the proposed Youth Court Act in 2012. See *supra* Section III.C.

192. Gov.'s COMM'N RECOMMENDATIONS, *supra* note 53, at 150–53. In addition, the Report provided a detailed overview of the history of juvenile reform in New York and existing practices at the time, the evolving science and detrimental effects of confining juveniles in adult facilities, and the projected impact on case processing if the State were to raise the age of criminal responsibility. *Id.* at 3–9, 17–27, 55–77.

193. *Id.* at 151.

194. Under the Governor's Commission's plan, the criminal courts would retain original jurisdiction over "current Juvenile Offender crimes, as well as all violent felony offenses; all homicide offenses; Class A felonies; sexually motivated felonies; crimes of terrorism; felony vehicular assaults; aggravated criminal contempt; and conspiracy to commit any of these offenses and tampering with a witness related to any of these offenses." *Id.*

195. *Id.*

196. *Id.* at 150–53. For instance, the report recommended extending Youthful Offender status to the age of twenty-one, *id.* at 152, as well as permitted juveniles to remain in juvenile facilities until the same age. *Id.* at 151. These unprecedented provisions went far beyond what the Judiciary's Youth Court Act had proposed. It also went far beyond what many tough on crime legislators were willing to accept, as evidenced by the next two years of political deadlock. See *infra* notes 204–08 and accompanying text. Ultimately, as discussed below, the Governor had to

proposed a bill that closely followed the report's expansive reforms,<sup>197</sup> it was hardly surprising that it immediately faced substantial opposition and criticism from both sides of the political aisle.<sup>198</sup>

Several senators were "concerned that teens that commit serious crimes would be diverted away from prison; that the governor's plan to shift sixteen- and seventeen-year-olds to Family Court would overburden the already taxed system; and that not enough thought has been put into changing the entire process."<sup>199</sup> Some tough-on-crime legislators even went as far as calling it "the Gang Recruitment Act."<sup>200</sup> They claimed that raising the age would give juvenile offenders a "pass" and would incentivize gangs to use juveniles for drug and gun sales and to commit other crimes without the fear of being held accountable.<sup>201</sup> Additionally, the State's District Attorney Association urged the Governor to rethink the reform arguing that the proposed legislation was "frightening" because it would permit adjudication of violent criminal offenses in Family Court.<sup>202</sup>

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compromise, and as a result, the raise-the-age bill signed in April of 2017 did not include many of these recommendations. *See infra* Section III.F.

197. *See generally* S.B. 2006B, 236th Leg., Budget B. (N.Y. 2015); A.B. 3006, 238th Leg., Budget B. (N.Y. 2015). *See also* Press Release, Andrew M. Cuomo, Governor of N.Y., Governor Cuomo Calls on Legislature to Raise the Age of Criminal Responsibility This Session (May 28, 2015), <https://www.governor.ny.gov/news/governor-cuomo-calls-legislature-raise-age-criminal-responsibility-session> [<https://perma.cc/L8ZD-PAVE>]; Leticia Miranda, *New York Still Charges Teenagers as Adults. Will Cuomo's Bill Change That?*, PROPUBLICA (Mar. 26, 2015, 10:32 AM), <https://www.propublica.org/article/new-york-still-charges-teenagers-as-adults.-will-cuomos-bill-change-that> [<https://perma.cc/RN3C-LAET>].

198. Miranda, *supra* note 197 (noting that the bill faced "plenty" of opposition "from both sides of the aisle").

199. David H. King, *Cuomo's Executive Action on 'Raise the Age' Prompts Questions*, GOTHAM GAZETTE (July 8, 2015), <http://www.gothamgazette.com/government/5797-cuomos-executive-action-on-raise-the-age-prompts-questions> [<https://perma.cc/K2K6-VTHP>]. The District Attorneys Association of the State of New York also opposed the Governor's bill arguing that "some of the most dangerous, violent and sociopathic criminals are under the age of 18." Brendan J. Lyons, *DAs Question Juvenile Reform Act*, TIMES UNION (Mar. 25, 2015, 7:18 AM), <http://www.timesunion.com/news/article/DAs-question-juvenile-reform-act-6156717.php> [<https://perma.cc/33FB-TRZ9>].

200. *See* Matthew Hamilton, *Assembly Passes Raise the Age as Budget Negotiations Continue*, TIMES UNION (Feb. 14, 2017, 11:48 PM), <http://www.timesunion.com/local/article/Assembly-passes-Raise-the-Age-as-budget-10932412.php> [<https://perma.cc/XX57-Z3CC>].

201. *Id.; see also 'Raise the Age' Already Gaining Steam in 2017 Session*, RAISE THE AGE NY (Jan. 4, 2017), <http://raisetheageny.com/newitem/raise-age-already-gaining-steam-2017-session> [<https://perma.cc/W5SY-XFBK>]

202. Lyons, *supra* note 199.

Concurrently, advocates were worried that the bill was “too long, too complicated and too nuanced to be rushed through in the compressed political process that is represented by budget negotiations.”<sup>203</sup> Ironically, even the Governor stated that raising the age was “not likely to be done in the budget” as it was too complex.<sup>204</sup>

Over the next two years the New York State Legislature became entrenched in a bitter battle largely divided along the usual soft-on-crime versus tough-on-crime lines.<sup>205</sup> By the end of the 2015 session, a gridlocked Legislature failed to move the raise-the-age bill forward.<sup>206</sup> The Governor was forced to take executive action to separate juveniles from adult facilities.<sup>207</sup> The bill was reintroduced as part of the 2016 budget proposal,<sup>208</sup> but again the Legislature failed

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203. See N.Y. State Defenders Ass’n, Inc., Memorandum in Opposition of the Executive Proposal to Raise the Age of Criminal Responsibility (Mar. 17, 2015), [https://www.propublica.org/documents/item/1690564-nysda\\_memoinoppositions2006\\_a3006](https://www.propublica.org/documents/item/1690564-nysda_memoinoppositions2006_a3006) [https://perma.cc/NXT8-MT6P]; see also Miranda, *supra* note 197 (noting that the bill also faced criticism from advocates because it created stricter sentencing schemes).

204. David H. King, *Democrats Frustrated by Governor Backing Off Party’s Issues*, GOTHAM GAZETTE (Mar. 26, 2015), <http://www.gothamgazette.com/government/5654-democrats-frustrated-by-governor-backing-off-partys-issues> [https://perma.cc/LT4G-Z2BP]; see also Lyons, *supra* note 199.

205. See Dartunorro Clark, *Hurdles For Juvenile Justice Plan: GOP Objects to Raising the Age of Teens Sent to Adult Prison*, TIMES UNION (Feb. 13, 2015, 11:08 PM), <http://www.timesunion.com/tuplus-local/article/Hurdles-for-juvenile-justice-plan-6080818.php> [https://perma.cc/JWU2-KXDS] (“If someone commits a violent crime, they don’t deserve to go to a juvenile detention center, they should go to jail.”); Deanna Gondek, *“Raise the Age” Bill Left Out of Budget, But Advocates Remain Determined*, LEGIS. GAZETTE (Apr. 8, 2016), <http://legislativegazette.com/raise-the-age-bill-left-out-of-budget-but-advocates-remain-determined/> [https://perma.cc/4DQ8-H6H4]; David H. King, *Criminal Justice Reform Again Given Little Attention in Budget Negotiations*, GOTHAM GAZETTE (Mar. 30, 2016), <http://www.gothamgazette.com/index.php/government/6249-criminal-justice-reform-again-given-little-attention-in-budget-negotiations> [https://perma.cc/Q4AN-53JN].

206. Thomas Kaplan, *Cuomo Gets Timely New York Budget but Pays Price*, N.Y. TIMES (Mar. 30, 2015), <https://www.nytimes.com/2015/03/31/nyregion/cuomo-gets-timely-new-york-budget-but-pays-price.html> [https://nyti.ms/2ySfKw4].

207. See 38 N.Y. Reg. 127 (Jan. 6, 2016), <https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO150.pdf> [https://perma.cc/H99Y-SJNK] (directing the Department of Corrections and Community Supervision, in collaboration with the Office of Children and Family Services, to implement a plan to remove minors from adult prisons in the state).

208. See Anne-Lise Vray, *New York Governor Includes “Raise the Age” Proposal in His “State of the State” Budget Announcement*, CAMPAIGN FOR YOUTH JUST. BLOG (Jan. 15, 2016), <http://cfyj.org/news/blog/item/new-york-governor-includes-raise-the-age-proposal-in-his-state-of-the-state-budget-announcement> [https://perma.cc/U5QS-HM5F].

to include it in the budget deal, and a comparable Senate bill did not go past the Codes Committee.<sup>209</sup>

#### F. New York Raises the Age

By the 2017 legislative session there was strong support to raise the age of criminal responsibility.<sup>210</sup> Yet, the State Senate remained gridlocked and largely divided along partisan lines, again threatening to derail the push to raise the age in New York.<sup>211</sup>

The Independent Democratic Conference, a group of New York State senators elected as Democrats but who generally vote along independent lines, took on the raise-the-age issue.<sup>212</sup> The IDC began to wedge itself between the more progressive Democrats and the tough-on-crime Republican senators.<sup>213</sup> In an effort to end the impasse and finally pass the much-needed reform, the IDC supported a hybrid raise-the-age proposal.<sup>214</sup> The hope was that this

209. See Gondek, *supra* note 205.

210. See Kenneth Lovett, *Most New Yorkers Support Millionaires’ Tax, ‘Raise the Age,’ Free College Tuition*, N.Y. DAILY NEWS (Mar. 30, 2017, 8:06 AM), <http://www.nydailynews.com/new-york/new-yorkers-support-millionaires-tax-raise-age-article-1.3013589> [https://perma.cc/BK6X-LB2G].

211. Press Release, Daniel L. Squadron, N.Y. State Sen., Squadron Responds to Reports That Senate Majority May Nix Raise the Age from Budget Negotiations (Mar. 31, 2017) [hereinafter Squadron, Press Release], <https://www.nysenate.gov/newsroom/articles/daniel-l-squadron/squadron-responds-reports-sen-majority-may-nix-raise-age-budget> [https://perma.cc/WC9T-WG5K].

212. Press Release, Indep. Democratic Conference, Changing New York Agenda (Jan. 4, 2017) [hereinafter IDC, Changing New York Agenda], [https://www.nysenate.gov/sites/default/files/changing\\_new\\_york\\_agenda\\_0.pdf](https://www.nysenate.gov/sites/default/files/changing_new_york_agenda_0.pdf) [https://perma.cc/S27W-35K9]; Press Release, Diane J. Savino, N.Y. State Sen., IDC Releases Its ‘Changing New York Agenda’ (Jan. 5, 2017) [hereinafter Savino, Press Release], <https://www.nysenate.gov/newsroom/press-releases/diane-j-savino/idc-releases-its-changing-new-york-agenda> [https://perma.cc/T7TR-CZAK]. To help this push, the IDC released a report outlining the significant savings that the State could achieve by raising the age of criminal responsibility to eighteen. See generally INDEP. DEMOCRATIC CONFERENCE, *supra* note 84.

213. Nick Reisman, *IDC Pushes Raise the Age*, N.Y. ST. POL. BLOG (Dec. 30, 2016, 6:30 AM), <http://www.nystateofpolitics.com/2016/12/idc-pushes-raise-the-age/> [https://perma.cc/C3MG-J9CG]. The IDC released a report showing how the State could save a substantial amount of money by protecting these children. *Id.* The IDC made Raise the Age a centerpiece of its “Changing New York Agenda” for 2017. Savino, Press Release, *supra* note 212; see also IDC, Changing New York Agenda, *supra* note 212.

214. See generally INDEP. DEMOCRATIC CONFERENCE, *supra* note 84. On February 21, 2017, Senator Jeff Klein, the leader of the IDC, invited me to participate in a roundtable event in Westchester to make one last push to reach across the political aisle and get Republican support for raising the age. Press Release, Jeffrey D. Klein, N.Y. State Sen., Senators Carlucci & Klein Host Raise the Age Round Table with Chief Judge Lippman & Advocates (Feb. 21, 2017), <https://www.nysenate.gov/>

compromise would finally bring opponents of the raise-the-age bill into the fold. These efforts paid off on April 9, 2017, when after several delays caused by intense negotiation,<sup>215</sup> the New York Legislature passed the State's Budget and with it the raise-the-age bill.<sup>216</sup>

What had started as a speech by the head of the Judiciary had snowballed into a movement that achieved meaningful reform. The Judiciary's proactive pursuit of justice not only sparked the torch of reform, but helped to drive the public discourse to the finish line. By acting as a laboratory for criminal justice reform and by proposing innovative ideas, the Judiciary pushed the political branches to come to the negotiating table and act. Indeed, although the proposed Youth Court Act ultimately did not pass, it shaped the conversation by serving as a bipartisan model to drive reform through.<sup>217</sup>

The new law borrows substantially from the Judiciary's proposed Youth Court Act, creating a hybrid system that attempts to bring together the best of the Family Court and criminal court systems. Like the Youth Court Act had proposed, the new law amended Penal Law section 30.00 to state that a person under the age of eighteen years who commits a nonviolent offense is not criminally responsible

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newsroom/press-releases/jeffrey-d-klein/senators-carlucci-klein-host-raise-age-round-table-chief [<https://perma.cc/R9LZ-8THS>]; Nick Reisman, *IDC Continues Raise the Age Push with Lippman*, N.Y. ST. POL. BLOG (Feb. 21, 2017, 2:52 PM), <http://www.nystateofpolitics.com/2017/02/idc-continues-raise-the-age-push-with-lippman/> [<https://perma.cc/W9DW-H5LK>].

215. See, e.g., Plagianos, *supra* note 167. At one point during negotiations, the Senate Majority considered nixing the Raise the Age legislation again in order to pass the budget bill. See Squadron, Press Release, *supra* note 211; *Brooklyn Lawmakers on the Move: Squadron & Dilan on 'Raise the Age' and other Justice Reform Bills*, KING'S CTY. POL. (Apr. 3, 2017), <http://www.kingscountypolitics.com/brooklyn-lawamkers-move-april-3-2017/> [<https://perma.cc/85MA-Y58M>].

216. Nicole Brown, *New York Budget: Senate Approves Raise the Age, Path to Free College Tuition, More*, AM N.Y. (Apr. 10, 2017), <http://www.amny.com/news/politics/new-york-budget-senate-approves-raise-the-age-path-to-free-college-tuition-more-1.13412287> [<https://perma.cc/K4M4-HWTF>]; Press Release, Jeffrey D. Klein, N.Y. State Sen., Advocates Praise Independent Democratic Conference on Passage of Raise the Age (Apr. 9, 2017), <https://www.nysenate.gov/newsroom/press-releases/jeffrey-d-klein/advocates-praise-independent-democratic-conference-passage> [<https://perma.cc/7T6B-KBTJ>].

217. See, e.g., *Public Hearings on Raising the Age of Criminal Responsibility Before the S. Comm. on Children & Families and the S. Standing Comm. on Crime Victims, Crime & Correction*, 2017 Leg., 238th Sess., at 8–9 (N.Y. 2017), <http://bds.org/wp-content/uploads/2017.02.06-BDS-state-senate-testimony-on-raise-the-age.pdf> [<https://perma.cc/8BEX-DM2B>] (testimony of Lisa Schreibersdorf, Exec. Dir., Brooklyn Defenders Services) (encouraging the Legislature to rely on the Youth Court Act bill as “a bipartisan model for such legislation that could serve as an important starting point for a more nuanced raise the age conversation”).

for their conduct.<sup>218</sup> Further, just as the Youth Court Act proposed, the new law requires parental notification when a juvenile is arrested<sup>219</sup> and requires that the questioning of youths takes place in age-appropriate settings, with parental involvement, and for developmentally appropriate lengths of time.<sup>220</sup>

Similarly, the new Youth Parts in the criminal court system are largely modeled after the pilot parts the Judiciary championed in 2012.<sup>221</sup> Youths whose cases are tried in the Youth Part will be referred to as "Adolescent Offenders."<sup>222</sup> While adult sentencing applies to these cases, the sentencing judge is required to consider the youth's age when making a sentencing determination.<sup>223</sup>

In some respects, the new law goes further than the proposed Youth Court Act. For instance, reminiscent of my original vision outlined during my 2011 speech,<sup>224</sup> the great majority of cases will be tried before the Family Court, either originating there<sup>225</sup> or being transferred from the newly formed Youth Part.<sup>226</sup> These cases will be processed pursuant to existing juvenile delinquency laws, which provide the opportunity for adjustment and do not create a permanent criminal record.<sup>227</sup>

218. Compare S.B. 2009C, 239th Leg., Budget Bill, at Part WWW § 56 (N.Y. 2017), with S.B. 7394, 235th Leg., Reg. Sess., at § 14 (N.Y. 2012). The new law will take effect over the next two years, raising the age of accountability for sixteen-year-olds effective October 1, 2018, and for seventeen-year-olds effective October 1, 2019. S.B. 2009C, 239th Leg., Budget B., at Part WWW § 56 (N.Y. 2017). Additionally, the new law also prohibits any youths under eighteen from being held at Rikers Island by October 2018. *Id.* at § 36-a.

219. S.B. 2009C, 239th Leg., Budget B., at Part WWW §§ 20, 23, 24 (N.Y. 2017).

220. *Id.*

221. *Id.* at § 1-a. Instead of specially trained judges, family court judges will preside over these new youth parts. *Id.* However, just as in the proposed youth division these judges will receive specialized training related to the needs of youth offenders. Compare *id.*, with S.B. 7394, 235th Leg., Reg. Sess., at §§ 3, 4 (N.Y. 2012).

222. S.B. 2009C, 239th Leg., Reg. Sess., at Part WWW § 1 (N.Y. 2017).

223. *Id.* at § 41.

224. Lippman, 2011 Speech Before the CCC, *supra* note 96, at 3.

225. All misdemeanor cases will originate in the family court pursuant to the 1962 Act. S.B. 2009C, 239th Leg., Budget B., at Part WWW § 1-a (N.Y. 2017).

226. *Id.* All felonies will start in the Youth Part. All nonviolent felonies will be transferred to Family Court unless the District Attorney files a motion showing "extraordinary circumstances." *Id.* Similarly, almost all violent felonies can be transferred to family court unless the District Attorney files such a motion. *Id.* However, "extraordinary circumstances" is undefined, potentially opening the door for an overly broad interpretation that could force many youths to stay in criminal court. Additionally, violent felonies where the accused displayed a deadly weapon, caused significant physical injury, or engaged in unlawful sexual conduct can only be removed with the District Attorney's consent. *Id.*

227. *Id.* at § 48.

In short, by acting as an incubator for reform, the Judiciary not only pushed the political branches to act, but provided a clear blueprint that ultimately achieved desperately needed reform.<sup>228</sup>

### CONCLUSION

The push to raise the age of criminal responsibility in New York provides many valuable lessons on how to achieve criminal justice reform, including the important role that state judicial leaders can and should play. It showcases how a Judiciary that proactively seeks justice can ignite the fires of reform and achieve necessary and meaningful change by driving the political branches to action.<sup>229</sup>

The 1962 “tentative” decision to maintain the age of criminal responsibility at sixteen had been a stain on a State that prides itself on being in the cutting edge of criminal justice reform.<sup>230</sup> After lying

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228. This does not suggest that New York should stop pushing for more progressive reforms. While the passage of the raise-the-age law was a great victory, the pursuit of juvenile justice reform never rests; it is an ongoing process. After all, justice system reform is not a sport for the short-winded. There is room for improvement, which might be achieved by shortening or eliminating the ten-year wait time for sealing records of juveniles convicted in the Youth Parts, since criminal records can have a dramatic impact on a youth’s ability to reintegrate into society. *See infra* notes 78–82 and accompanying text. Compare S.B. 2009C, 239th Leg., Reg. Sess., at Part WWW § 48 (N.Y. 2017), with S.B. 7394, 235th Leg., Reg. Sess., at § 8 (N.Y. 2012). Additionally, further reforms should be made to prioritize alternatives to incarceration for juveniles convicted in the Youth Parts, which under the new law could potentially include nonviolent offenders if there is a showing of “extraordinary circumstances,” an undefined term. Other reforms should also emphasize expanded access to age-appropriate community services and trainings focused on providing troubled youths with the tools necessary to shape themselves into productive members of our society. The Judiciary should certainly continue to play a pivotal role by incubating innovative ideas that can help achieve these goals.

229. Recently, North Carolina also applied this lesson successfully when, after years of gridlock, it finally achieved raise the age reform. Chief Justice Mark Martin, the Chief Justice of North Carolina’s court system, made raise the age his “top legislative priority” and convened a commission to study, among other things, the age of criminal responsibility in North Carolina. Laura Leslie, ‘*Raise the Age*’ Push Gathers Steam, WRAL.COM (May 11, 2017), <http://www.wral.com/-raise-the-age-push-gathers-steam-16695953/> [https://perma.cc/V3FM-78PC]. The commission’s report made several proposals and recommendations, which became the foundation for House Bill 280, the bill that ultimately helped North Carolina achieve reform. Melisa Boughton, *Lawmakers Announce Agreement to ‘Raise the Age’ in Final Budget Beginning Dec. 2019*, NC POL’Y WATCH BLOG (June 19, 2017), <http://pulse.ncpolicywatch.org/2017/06/19/lawmakers-announce-agreement-raise-age-final-budget-beginning-december-2019/#sthash.lSs1WOnz.dpbs> [https://perma.cc/5UN2-472K]; N.C. COMM’N ON THE ADMIN. OF LAW & JUSTICE, FINAL REPORT, at app. A, 1–4 (2017), [https://nccalj.org/wp-content/uploads/2017/pdf/nccalj\\_final\\_report.pdf](https://nccalj.org/wp-content/uploads/2017/pdf/nccalj_final_report.pdf) [https://perma.cc/P2V6-BBY9].

230. *See supra* Parts I, II.

dormant for more than forty years, the New York Judiciary’s leadership reignited the issue in 2011, starting a much needed public policy debate.<sup>231</sup> The Judiciary’s influence was felt at every step of the way through the subsequent six years that culminated with the current raise-the-age reform that Governor Cuomo championed.<sup>232</sup> By implementing an administrative fix in the form of the Adolescent Diversion Program, and establishing the Sentencing Commission, the New York Judiciary provided the leadership needed to show that reform was not only necessary, but feasible.<sup>233</sup> By proposing bold and fresh reform ideas in the provisions of the proposed Youth Court Act, the Judiciary provided the template for comprehensive bipartisan reform.<sup>234</sup>

Yet, at the same time, a look at the campaign to raise the age of criminal responsibility in New York also shows that by proactively seeking justice, the judicial leaders of our state did not become activist judges. Rather, the Judiciary provided our democratically elected officials with clear evidence that the existing system was unfair, and with a template to achieve essential reforms so that every day judges can, as Chief Justice Roberts viewed it, “call balls and strikes” and achieve justice.

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231. *See supra* Section III.A.

232. *See supra* Section III.E.

233. *See supra* Sections III.A, III.B.

234. *See supra* Section III.C.